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September 13, 2013

VIA COURIER

ACCEPTED/FILED

SEP 13 2013

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Dear Ms. Dortch:

Enclosed for filing on behalf of Navajo Pillars Telecommunications, Inc., is the Petition of Navajo Pillars Telecommunications, Inc. for designation as an Eligible Telecommunications Carrier and related waivers. This package contains an original and one copy of both a confidential version and a public, redacted version of the Petition.

Respectfully submitted,



Jennifer A. Hollrah

Enclosures

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SEP 13 2013

Federal Communications Commission
Office of the Secretary

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Navajo Pillars Telecommunications, Inc.)	
)	
Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix- Glossary of the Commission's Rules)	CC Docket No. 96-45
)	
Petition for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Telecommunications Act of 1996)	WC Docket 09-197
)	
Related Waivers of Parts 36, 51, 54, and 69 of the Commission's Rules)	
)	
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 Inter-carrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45

**PETITION OF NAVAJO PILLARS TELECOMMUNICATIONS, INC. FOR
DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER AND
RELATED WAIVERS**

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September 13, 2013

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TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY.....	iii
I. INTRODUCTION	2
II. THE PROPOSED STUDY AREA	7
III. STANDARD FOR WAIVER.....	8
IV. THE COMMISSION SHOULD WAIVE ITS STUDY AREA FREEZE.....	12
A. The State Commission Having Regulatory Authority Over The Transferred Exchanges Does Not Object To The Transfer.....	13
B. The Transfer Must Be In The Public Interest.....	16
V. THE COMMISSION SHOULD GRANT THE PETITION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER	18
A. Navajo Pillars Telco is Not Subject to State Commission Jurisdiction, and Therefore the Commission Has Jurisdiction Over This Petition	18
B. Navajo Pillars Telco Satisfies All of the Statutory and Regulatory Prerequisites for Designation as an Eligible Telecommunications Carrier.....	23
1. Navajo Pillars Telco Will Be a Common Carrier.....	23
2. Navajo Pillars Telco Will Offer the Services Supported by the Federal Universal Service Support Mechanisms	24
a. Voice-grade access to the public switched telephone network	24
b. Minutes of use for local service	24
c. Access to emergency services.....	25
d. Toll limitation services to qualifying low-income consumers	25
3. Navajo Pillars Telco Will Offer Supported Services Through its Own Facilities	26
4. Navajo Pillars will Advertise its Universal Service Offering	26
5. Navajo Pillars Telco Meets the Additional Requirements for Designation as an ETC Under Section 54.202 of the Commission's Rules, as Applicable.....	27
a. Navajo Pillars Telco certifies that it will comply with all relevant service requirements	27
b. Navajo Pillars Telco's five year service improvement plan.....	27
c. Navajo Pillars Telco will remain functional in emergency situations	28
d. Navajo Pillars Telco is committed to meeting consumer protection and service quality standards.....	29
C. Navajo Pillars Telco's Proposed Service Area.....	30
D. Grant of this Application Will Serve the Public Interest.....	30
1. Introducing Telecommunications Services to the Region.....	31
2. Advantages of the Particular Service Offering	31

3.	Introduction of Affordable Voice Telephony and Broadband Services	32
E.	Anti-Drug Abuse Certification.....	33
VI.	THE COMMISSION SHOULD FIND THAT SECTION 54.305 OF ITS RULES DOES NOT APPLY BECAUSE NAVAJO PILLARS TELCO IS NOT ACQUIRING AN EXCHANGE FROM FRONTIER.....	33
VII.	THE COMMISSION SHOULD WAIVE SECTIONS 36.611 AND 36.612 OF IT'S RULES TO ENABLE NAVAJO PILLARS TELCO TO RECEIVE USF SUPPORT IMMEDIATELY	34
VIII.	THE COMMISSION SHOULD WAIVE SECTION 54.903(a)(3) OF ITS RULES FOR ICLS	37
IX.	THE COMMISSION SHOULD WAIVE SECTIONS 69.2(hh) OF ITS RULES TO ALLOW NAVAJO PILLARS TELCO TO PARTICIPATE IN NECA POOLS AND TARIFFS.	38
X.	THE COMMISSION SHOULD GRANT A FIVE-YEAR WAIVER OF SECTION 51.909 OF THE COMMISSION'S RULES ESTABLISHING THE TRANSITION TO BILL-AND-KEEP	39
XI.	THE COMMISSION SHOULD GRANT A WAIVER OF THE CAPEX AND OPEX LIMITS.....	42
A.	The Network Will Not Be Constructed Without A Waiver of the CapEx and OpEx Limits.....	42
B.	The Commission's Objectives Will Be Strengthened, Not Undermined, by Grant of the Waiver.....	43
C.	Financial Data and Other Information	44
1.	Density Characteristics	44
2.	Alternative Providers	46
3.	Corporate Operations	46
4.	End User Rate Plans.....	46
5.	List of Services Other Than Voice Services Provided Over USF Supported Plant.....	46
6.	Customers Served	46
7.	Procedures for Allocating Shared or Common Costs Between Regulated and Nonregulated Services or Operations	47
8.	Audited Financial Statements	47
9.	Information Regarding Outstanding Loans	47
10.	Five-Year Pro Forma Financial Analysis	47
11.	Identification of the Specific Facilities That Will Be Taken Out of Service.....	47
XII.	THE COMMISSION SHOULD GRANT ANY ADDITIONAL WAIVERS NECESSARY TO EFFECTUATE THE IMMEDIATE PROVISION OF BASIC AND ADVANCED TELECOMMUNICATIONS SERVICES TO THE NAVAJO PEOPLE IN THE PROPOSED SERVICE AREA	47
XIII.	CONCLUSION.....	48

EXECUTIVE SUMMARY

There are no telecommunications services presently available in the Smoke Signal and Blue Gap Chapter House regions of the Navajo Nation. This Petition seeks to change that.

Specifically, this Petition requests designation of Navajo Pillars Telecommunications, Inc. (“Navajo Pillars Telco”) as an eligible telecommunications carrier (“ETC”) and waivers of related rules regarding universal service support and intercarrier compensation revenue. ETC designation and grant of these waivers is necessary for Navajo Pillars Telco obtain a loan from the Rural Utilities Service (“RUS”). This loan will allow Navajo Pillars Telco to deploy modern wireline telecommunications infrastructure in one of the poorest and most underserved regions of the Navajo Nation. Alternatively, without the ETC designation and requested waivers, RUS has informed the company that it cannot issue a loan because Navajo Pillars Telco will be unable to provide adequate financial assurances demonstrating an ability to repay its loan.

Navajo Pillars Telco was established in 2011 for the purpose of providing basic and advanced telecommunications services to the Navajo people. The area within which Navajo Pillars Telco plans to provide telecommunications service is located exclusively within the Navajo Nation lands and is completely unserved. The company is wholly-owned by a member of the Navajo Nation and is in the process of obtaining a certificate of convenience and necessity from the Navajo Nation Telecommunication Regulatory Commission to offer telecommunications services as a common carrier.

Navajo Pillars Telco is committed to increasing significantly the quality of basic and advanced services provided to the Navajo Nation and the telephone penetration rate in its service area, and ensuring that such services are provided at affordable rates. At present, none of the households in the proposed service area have wireline telephone service. As demonstrated herein, this lack of service has contributed to almost unimaginable hardships for the area’s residents.

Navajo Pillars Telco plans to construct a fiber backbone network on an IP-platform, over which the company will provide basic and advanced telecommunications services throughout the proposed service area. The network will connect to the neighboring networks of Frontier and Hopi Telecommunications, Inc. and provide 1 gigabit bandwidth to Navajo Pillars Telco’s central office. The entire service area is located in a valley at altitudes between 6,100 to 6,700 feet, and surrounded by mesas (high plateaus) at approximately 7,200 feet above sea level. This significantly prohibits the availability of satellite or microwave backhaul capabilities. Consequently, Navajo Pillars Telco’s fiber backbone is designed to extend to across the proposed service area. The extension of the fiber backbone is more costly than a satellite or microwave backhaul, but necessary due to the geography of the proposed service area.

Specifically, Navajo Pillars Telco requests a waiver of the definition of “study area” to remove the proposed study area from the Arizona study area of Frontier Corporation (“Frontier”). The proposed study area is unserved presently by Frontier. Moreover, Navajo Pillars Telco does not expect Frontier to object to this study area waiver request.

In addition, Navajo Pillars Telco seeks ETC for the new cost-based study area. ETC designation will allow Navajo Pillars Telco to receive vital universal service support, without which Navajo Pillars Telco would be unable to repay its RUS loan. Navajo Pillars Telco also seeks a finding that Section 54.305 of the Commission's rules, which provides that a carrier acquiring exchanges from an unaffiliated carriers shall receive the same levels of high-cost support for which the exchanges were eligible prior to transfer – does not apply to the instant transaction because Navajo Pillars Telco is not purchasing an “exchange.”

Navajo Pillars next requests certain waiver of the Commission's timing and certification requirements to avoid any unnecessary and unwarranted delays in the receipt of this critical universal service funding. Specifically, Navajo Pillars Telco seeks a waiver of Section 36.611 and 36.612 of the Commission's historical cost rules to allow Navajo Pillars Telco to begin receiving immediately high-cost loop support based upon Navajo Pillars Telco's costs for the initial interim period. Navajo Pillars also seeks waiver of Section 54.903(a)(3) of the Commission's rules, to allow the company to become eligible to receive interstate common line support immediately, and a waiver of the definition of “telephone company” in Section 69.2(hh), to allow Navajo Pillars Telco to become a member of the National Exchange Carrier Association (“NECA”) and immediately participate in NECA pools and tariffs. Absent these waivers, Navajo Pillars would be denied universal service and intercarrier compensation revenues in the short term, a result that would seriously harm Navajo Pillars Telco's ability to repay its RUS loan during its initial years of operations while also limiting the company's ability to extend reasonably-priced telecommunications services to residential customers in this high-cost, low-income service area.

Finally, Navajo Pillars requests waivers of two actions taken in the Commission's *USF/ICC Transformation Order and FNPRM*: the transition to bill-and-keep set forth in Section 51.909 in the Commission's rules and the limit on capital and operating expenses (“CapEx and OpEx Limits”). The FCC's bill-and-keep rules do not appear to provide any means for new carriers to derive intercarrier compensation (“ICC”) revenues during the transition. The requested waiver will correct this, enabling Navajo Pillars Telco to receive ICC revenues that will help ensure the company meets its RUS loan repayment obligations during its first five years of operations. Similarly, it is not possible to quantify at this time what the CapEx and OpEx Limits will be for a new rate-of-return carrier, such as Navajo Pillars Telco. Moreover, the CapEx and OpEx limits will change over time, adding significant risk for new carriers, such as Navajo Pillars Telco, whose revenues are already subject to uncertainty based on their uncertain line counts. This uncertainty makes it impossible for Navajo Pillars Telco to provide RUS with adequate assurance that it will be able to meet its loan repayment obligations.

The requested waivers in this Petition serve the public interest and are consistent with the Commission's efforts to secure for consumers living on tribal lands the same opportunities to take advantage of telecommunications capabilities that other Americans have. They should be granted expeditiously.

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**PETITION OF NAVAJO PILLARS TELECOMMUNICATIONS, INC. FOR
DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER AND
RELATED WAIVERS**

Navajo Pillars Telecommunications, Inc. (“Navajo Pillars Telco”), a Native-owned corporation,¹ hereby requests, pursuant to Section 1.3 of the rules of the Federal

¹ See Exhibit R: Navajo Nation Certificate of Navajo or Indian Owned Business; *see also* Exhibit J: Certificate of Indian Blood.

Communications Commission (“FCC” or “Commission”), a waiver of the definition of “Study Area” contained in Part 36, Appendix-Glossary of the Commission’s rules to modify the current study area of Frontier Communications Corporation (“Frontier”) to effectuate the creation of a new study area on certain lands located entirely within the borders of the Navajo Nation. In addition, Navajo Pillars Telco seeks eligible telecommunications carrier (“ETC”) designation within the proposed new study area. Finally, Navajo Pillars Telco seeks related waivers of Parts 36, 51, 54, and 69 of the Commission’s rules.

The proposed new study area, while presently encompassed by Frontier’s study area, is presently completely unserved. Commission grant of the ETC designation and the requested waivers is critical for Navajo Pillars Telco to secure a loan from the United States Department of Agriculture’s Rural Utilities Service (“RUS”) for the purposes of deploying telecommunications infrastructure and commencing service. Without ETC designation and the requested waivers, Navajo Pillars Telco will not have sufficient revenues to demonstrate its ability to repay the RUS loan for which it is applying. Accordingly, Navajo Pillars Telco requests expedited grant of this Petition.

I. INTRODUCTION

Navajo Pillars Telco was established in 2011 for the purpose of providing basic and advanced telecommunications services to the Navajo people. The area within which Navajo Pillars Telco plans to provide telecommunications service is located exclusively within the Navajo Nation lands and is completely unserved.² The proposed service area covers approximately 239 square miles and falls completely within the current study area of Navajo

² Maps depicting Navajo Pillars Telco’s proposed service area are attached hereto as Exhibit A.

Communications Company, Inc., a subsidiary of Frontier.³ While Frontier is not a signatory to this Petition, Navajo Pillars Telco does not expect Frontier to oppose this petition.

The Commission has recognized that “communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population.”⁴

According to the most recently available data, less than 70 percent of households located on Tribal lands have basic telephone service,⁵ compared to a national average of approximately 98 percent.⁶ The disparity with respect to broadband is even more dramatic. As of 2010, “the percentage of unserved Americans living on Tribal lands in rural areas is more than eight times the national average.”⁷

The Navajo Nation, in many ways, is the poster child for the digital divide that separates Tribal and non-Tribal America. The Navajo Nation has the largest Native population of all reservations,⁸ and access to telecommunications services on the reservation is extremely limited.

³ The study area code is 454449.

⁴ *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*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 at ¶479 (2011) (“*USF/ICC Transformation Order and FNPRM*”); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

⁵ See *Telephone Subscribership on American Indian Reservations and Off-Reservation Trust Lands*, Federal Communications Commission (May 2003).

⁶ See January 2006 GAO Report, *Telecommunications, Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, available at <http://www.gao.gov/new.items/d06189.pdf> (last visited Jan. 4, 2013).

⁷ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended*, Report, 27 FCC Rcd 10342 (2012).

⁸ TINA NORRIS ET AL., *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, 2010 CENSUS BRIEFS*, U.S. CENSUS BUREAU, C2010BR-10, 14 (Jan. 2012) (“The Navajo Nation

A recent study by the Government Accountability Office found that Navajo Nation's telephone subscribership was the lowest among the 25 most populous Tribal lands.⁹ Wireline telecommunications services have never been provided in the area Navajo Pillars Telco plans to serve.

Navajo Pillars Telco was created to change the status quo. Navajo Pillars Telco plans to construct a fiber backbone network on an IP-platform, over which the company will provide basic and advanced telecommunications services throughout the proposed service area. The network will connect to the neighboring networks of Frontier and Hopi Telecommunications, Inc. and provide 1 gigabit bandwidth to Navajo Pillars Telco's central office.¹⁰

The project will be a game changer for the region. The network will provide residents with unprecedented access to services and technologies necessary to end the economic isolation and despair that plagues this region. Students attending the area's K-12 school will have access to online and digital resources that are presently unimaginable. Workers will be presented with employment opportunities that hold the possibility of ending the vicious cycle of poverty that has plagued the region for generations. And perhaps most importantly, all residents finally will have access to emergency services and telehealth resources.

As with most networks providing services to high cost areas, support from the Universal Service Fund ("USF") is crucial to the success of the project. In particular, support from the USF High-Cost program has enabled numerous tribes to launch successful telecommunications

had the largest American Indian and Alaska Native population of all the American Indian reservations").

⁹ U.S. Government Accountability Office, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, GAO-06-513T, at 5 (2006) (stating that telephone subscribership for the Navajo Nation is 38 percent).

¹⁰ A map depicting the planned fiber deployment in the proposed service area is attached hereto in Exhibit A.

companies which provide Tribal residents with all of the benefits offered through increased connectivity. Navajo Pillars Telco hopes to duplicate these successes within its proposed service area in the Navajo Nation.

Navajo Pillars Telco also realizes that the Commission is in the midst of a multi-year process to incentivize carriers to operate more efficiently. With this in mind, Navajo Pillars Telco has designed numerous efficiencies into its proposed network. Thus, this Petition requests waivers of only those rules that absolutely must be waived for the company to obtain a loan from the RUS and remain financially solvent during its initial years of operation. In other words, waivers of these rules are necessary for the company to demonstrate to RUS that the company will have sufficient funds to construct and maintain the network and make loan repayments to the RUS. Without these waivers, the company has been informed by RUS that it will not receive a loan.

Accordingly, Navajo Pillars Telco seeks the following:

- 1) A waiver of the definition of “study area,” contained in the Appendix-Glossary of Part 36 of the Commission’s rules, to remove the subject territory from Frontier’s Arizona study area and to permit Navajo Pillars Telco to establish a new cost-based study area corresponding to the subject territory;
- 2) Designation of Navajo Pillars Telco as an ETC for the new cost-based study area;
- 3) A finding that Section 54.305 of the Commission’s rules does not apply to this transaction;
- 4) Waiver of Sections 36.611 and 36.612 of the Commission’s historical cost rules to allow Navajo Pillars Telco immediate access to high-cost loop support (“HCLS”) based on Navajo Pillars Telco’s current data for an interim period;

- 5) Waiver of Section 54.903(a)(3) of the Commission's rules to allow Navajo Pillars Telco to be eligible to receive interstate common line support ("ICLS") immediately;
- 6) Waiver of the definition of "telephone company" in Section 69.2(hh) to allow Navajo Pillars Telco to become a member of NECA and immediately participate in NECA pools and tariffs;
- 7) A five-year waiver of the cap on interstate originating and terminating rates and intrastate terminating rates and the transition path for interstate and intrastate terminating rates as set forth in Section 51.909 in the Commission's rules; and
- 8) A five-year waiver of the rule limiting reimbursable capital and operating expenses for High Cost Loop Support.¹¹

Granting this Petition will further the Commission's goal of universal service by assisting a carrier attempting to serve a high-cost, rural area. As the universal service statute mandates, "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular and high-cost areas, should have access to telecommunications and information services... at rates that are reasonably comparable to rates charged for similar services in urban areas."¹² In light of the historic lack of service and impoverished conditions in the territory Navajo Pillars Telco plans to serve, it is difficult to fathom a more compelling case for Commission action.

In the event any additional waivers are necessary to expedite Navajo Pillars Telco's receipt of USF support and participation in NECA pools and tariffs, Navajo Pillars Telco requests that such waivers be considered and granted on the Commission's own motion.

¹¹ *USF/ICC Transformation Order and NPRM* at ¶220.

¹² 47 U.S.C. § 254(b)(3).

II. THE PROPOSED STUDY AREA

The proposed service area is located in northeast Arizona on the Navajo Nation reservation in Navajo and Apache counties.¹³ Nearly the entire proposed service area lies in a valley at altitudes between 6,100 to 6,700 feet and is surrounded by mesas (high plateaus) at approximately 7,200 feet above sea level. The proposed service area is rural in the extreme.

The area is very remote with a very low population density. Navajo Pillars Telco plans to deploy two exchanges, one of which will serve the area formerly known as the Smoke Signal Chapter House region¹⁴ and the other of which will service the Blue Gap Chapter House region. The Blue Gap exchange area will be approximately 173 square miles and the Smoke Signal area will be approximately 66 square miles. The population within this area is only 2,282.¹⁵ The proposed service area also is remote and isolated. The single largest cluster of homes is the 30 residences and the adult recreation center located in Smoke Signal. In addition there are clusters of 5-10 homes throughout the service territory, although in some areas there are single homes located more than 1 mile from the proposed fiber backbone. There is only one store within the area that sells food and gasoline, and the nearest town of significant size, Chinle, Arizona, is

¹³ Maps depicting Navajo Pillars Telco's proposed service area is attached hereto as Exhibit A.

¹⁴ The Smoke Signal Chapter House region was incorporated into the Low Mountain Chapter House region in 2011. *See Exhibit Q: Letter from Former Navajo Nation Delegate Sampson Begay.* Navajo Pillars Telco proposes to serve the regional formerly known as the Smoke Signal Chapter House region, and no other sections of the Low Mountain Chapter House at this time.

¹⁵ *See Exhibit O: Chapter House Profiles* (stating that the population of the Smoke Signal Chapter House is 1,104); *see also American Fact Finder, U.S. Census Bureau, Tachee Chapter, 2010 Census Summary File, available at:* https://docs.google.com/folder/d/0B9Ys0__F67YfV2xGeHF5MTZRWU0/edit?usp=sharing#docId=0B9Ys0__F67YfV2xGeHF5MTZRWU0 (stating that the population of the Tachee-Blue Gap Chapter House is 1,178).

more than 35 miles east of the service area's eastern edge. Within five years of receiving RUS funding, Navajo Pillars Telco estimates that it will serve approximately 908 total subscribers.

III. STANDARD FOR WAIVER

This Petition seeks numerous waivers of the Commission's rules. Under Section 1.3 of the Commission's rules, "any provision of the Commission's rules may be waived by the Commission . . . or on petition if good cause therefore is shown."¹⁶ The Commission has interpreted this rule to permit waivers where "particular facts would make strict compliance inconsistent with the public interest."¹⁷ As interpreted by the courts, this requires a petition to demonstrate that "special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest."¹⁸ As demonstrated herein, the special circumstances in the instant Petition warrant a waiver of the Commission's rules.

Navajo Pillars Telco's waiver requests serve the public interest and are consistent with the Commission's efforts "to promote telecommunications deployment and subscribership on Tribal lands."¹⁹ The Commission recognizes that:

As our society increasingly relies on telecommunications technology for employment and access to public services, such telecommunications services have become a practical necessity. The absence of telecommunications services within a home places its occupants at a disadvantage when seeking to contact, or be contacted by, employers and potential employers. The inability to contact police, fire departments, and medical service providers in an emergency situation may have, and in some areas routinely does have, life-threatening consequences. In geographically remote areas, access to

¹⁶ 47 C.F.R. § 1.3.

¹⁷ *Matter of Policies and Role Concerning Operator Services Access and Pay Telephone Compensation*, 7 FCC Rcd 4355, 4364 n. 118 (1992).

¹⁸ *ALLTEL Corporation Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control*, Memorandum Opinion and Order, 14 FCC 14191, 14201 (1991) (quoting *Northwest Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)) ("ALLTEL"). See also *Wait Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

¹⁹ *Lifeline and Link Up Reform and Modernization, et al.*, 27 FCC Rcd 6656, ¶ 160 (2012).

telecommunications services also may provide a source of access to more advanced services.²⁰

The instant situation is no different. The proposed service area is entirely unserved and is home to an economically-depressed, undereducated population. These factors, combined with numerous geographic and cultural barriers, have resulted in little justification for the deployment and maintenance of telecommunications infrastructure.

The proposed service area is completely unserved by both wireline and wireless providers.²¹ One reason for this is the high-cost of providing service in the area. As previously addressed in Section II, the proposed service area is remote and isolated with a low population density. Moreover, the proposed service area lacks many of the infrastructure normalities (i.e., roads, bridges, electricity, etc.) that are used during the deployment and maintenance of telecommunications infrastructure, and even lacks some basic human necessities, such as access to water.

Compounding these difficulties are cultural barriers between the residents of the area and non-Tribal, traditional carriers. For example, few traditional, non-Tribal carriers are aware of the importance of Navajo Chapter Houses as a means of dispersing information and obtaining community input on telecommunications services. In addition, difficulties obtaining business certificates, rights-of-way for construction, and certificates of convenience and necessity for

²⁰ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, ¶3 (2000) (“*Twelfth Report and Order*”).

²¹ To demonstrate the lack of mobile service in the proposed service area, the company hired a consultant to conduct a drive test of the roads within the Blue Gap and Smoke Signal Chapter Houses. The test measured mobile coverage between 824 MHz to 1680 MHz. The results of this test, which are included in Exhibit B, demonstrate that the proposed service area is unserved by wireless carriers.

operations also often serve as barriers to the deployment of communications infrastructure on Tribal lands.

In addition, there has not been a sufficient business justification for traditional, non-Tribal carriers to buildout service to the proposed service area. Residents have little ability to afford high-priced telecommunications services. Unemployment on the Navajo Nation is 47%, and 37% of the Nation's residents live below the poverty line.²² Moreover, the high school graduation rate is less than 50%, giving little indication that economic conditions will improve in the near future.²³

Upon grant of the requested waivers, Navajo Pillars Telco will deploy telecommunications infrastructure to serve the Navajo people living in this area. Using modern facilities and technologies, Navajo Pillars Telco will provide affordable services that will rival services offered in metropolitan areas. The Commission's grant of the requested waivers will allow Navajo Pillars Telco to provide, for the first time ever, basic and advanced telecommunications services to residents in the proposed service area, while maintaining reasonable rates. Moreover, the network will be constructed in an efficient manner with an eye towards expanding capacity for growth in demand.

The proposed network also will provide economic and educational opportunities to area residents. In addition, these services will increase access to vital health care and emergency

²² Letter from Frederick H. White, Acting Executive Director of the Navajo Nation's Division of Natural Resources to Hyla Hurst, Office of Natural Resources Revenue, United States Department of the Interior, July 20, 2011, *available at*: http://www.onrr.gov/Laws_R_D/PubComm/PDFDocs/AA00/AA00%20Navajo%20Nation%20Comments.PDF

²³ Demographic Analysis of the Navajo Nation using 2010 Census and 2010 American Community Survey Estimates, Arizona Rural Policy Institute, 57, *available at*: <http://azcia.gov/Documents/Links/DemoProfiles/Navajo%20Nation.pdf> (finding that almost 35% of Navajo Nation residents 25 and over do not have a high school degree).

services that are limited significantly by the present lack of connectivity in the region. To ensure that low income households realize the benefits of the new service offering, the company will aggressively market Lifeline and Link-Up service above and beyond what is required by the Commission's rules.

Navajo Pillars Telco, a company owned by a member of the Navajo Nation, will also address cultural barriers that have deterred incumbent carriers in the past. The company has garnered significant support from the Blue Gap and Low Mountain Chapter Houses that fall within its proposed service area,²⁴ and the company plans to work with these Chapter Houses once it commences operations to ensure that the needs of the community are being met. Moreover, as part of its due diligence before embarking on this project, Navajo Pillars Telco commissioned a study of the area's residents to ensure that it tailors its service offerings to the needs and desires of the local population. With respect to Tribal approvals, Navajo Pillars Telco already has obtained a Certificate of Authority from the Navajo Nation Business Regulatory Department to transact business within the reservation²⁵ and is in the process of obtaining a certificate of convenience and necessity to offer telecommunications services as a common carrier.²⁶

Finally, the Commission's responsibilities under the Federal Trust Doctrine further support grant of the requested waivers. In affirming its role within the Federal Trust Doctrine, the Commission recognized its "own general trust relationship with, and responsibility to,

²⁴ See Exhibit C: Chapter House Resolutions.

²⁵ Exhibit D: Navajo Nation Business Regulatory Department Certificate of Authority.

²⁶ Exhibit E: Petition for Contingent Certificate of Public Convenience and Necessity from the Navajo Nation Telecommunications Regulatory Commission (exhibits omitted).

federally-recognized Indian Tribes.”²⁷ The Commission also recognized “the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.”²⁸ In the instant situation, the Navajo Nation clearly supports the provision of service in the proposed study area by Navajo Pillars Telco. Demonstrations of support received by Navajo Pillars Telco include resolutions of support from the two Chapter Houses the carrier will serve,²⁹ resolutions of support from neighboring Chapter Houses,³⁰ and a letter of support from a large number of delegates to the Navajo Nation Tribal Council.³¹ Accordingly, by granting the requested waivers to a Tribally-supported and Native- owned company, the Commission would be enabling the Tribe to set its “own communications priorities and goals” for the welfare of the Navajo Nation’s members.³² Moreover, granting the requested waivers would be consistent with the Commission’s trust relationship with, and responsibility to, the Navajo Nation by providing the necessary resources to allow for “adequate access to telecommunications service” on the Navajo Nation.³³

IV. THE COMMISSION SHOULD WAIVE ITS STUDY AREA FREEZE

Navajo Pillars Telco seeks a waiver of the Commission’s “study area freeze.” Part 36 of the Commission’s rules “freezes” the definition of “study area” to the boundaries that existed on

²⁷ *Statement of Policy Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4081 (2000) (“Tribal Policy Statement”).

²⁸ *Id.*

²⁹ Exhibit C: Chapter House Resolutions

³⁰ *Id.*

³¹ Exhibit F: Letter of Support from Tribal Council Delegates to Navajo Nation Tribal Council.

³² *Id.*

³³ Tribal Policy Statement

November 15, 1984.³⁴ “The Commission took this action to prevent incumbent local exchange carriers (“LECs”) from establishing separate study areas made up only of high-cost exchanges to maximize their receipt of high-cost universal service support.”³⁵ Consequently, the Commission has found that, as is the case here, “a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within [an] existing study area[.]”³⁶ The Commission did not intend, however, for the “study area freeze” to discourage carriers from expanding services to cover high cost areas.³⁷

In the *USF/ICC Transformation Order and FNPRM*, the Commission determined that study area waivers will be granted when “(1) the state commission having regulatory authority over the transferred exchanges does not object to the transfer and (2) the transfer must be in the public interest.”³⁸ These two requirements are addressed in turn.

A. The State Commission Having Regulatory Authority Over The Transferred Exchanges Does Not Object To The Transfer

In accordance with Section 54.207(d) of the FCC’s rules and FCC precedent, Navajo Pillars Telco respectfully requests that the Commission petition the Arizona Corporation

³⁴ See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (“*Part 67 Order*”). See also 47 C.F.R. Part 36, App.

³⁵ *USF/ICC Transformation Order and FNPRM* at ¶ 260.

³⁶ *M&L Enterprises, Inc., d/b/a Skyline Telephone Company Petition for Waiver of Sections 36.611, 36.612 and 69.2 (hh) of the Commission’s Rules*, Order, 19 FCC Rcd 6761, ¶ 13 (WCB 2004) (“*Skyline*”) (granting a study area waiver whereby Skyline Telephone Company created a new study area from within an unserved area of Verizon’s existing study area).

³⁷ *Matter of MTS and WATS Market Structure, Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket Nos. 78-22 and 80-286, 49 Fed. Reg. 48325, 48337 ¶ 65 (Dec. 12, 1984).

³⁸ *USF/ICC Transformation Order and FNPRM* at ¶ 265.

Commission (“ACC”) to satisfy the requirement that “the state commission having regulatory authority over the transferred exchanges does not object to the transfer.”³⁹

Navajo Pillars Telco, which as discussed herein is not subject to the authority of the ACC,⁴⁰ does not recognize the regulatory authority of any state commission over the “transferred exchange.”⁴¹ For this reason, it would not be appropriate for Navajo Pillars Telco to petition the ACC for a determination on the proposed study area waiver and consequent study area redefinition. However, it is well within the bounds of the Commission’s authority to petition the ACC on this matter.

Specifically, creating a new study area for Navajo Pillars Telco requires both a waiver of the Commission’s study area freeze and the redefinition of the study area of Frontier, a rural telephone company.⁴² The Commission previously has noted that it must seek the assent of the appropriate state commission before redefining the service area of a rural telephone company.⁴³ Moreover, Section 54.207(d) of the Commission’s rules provides that:

[t]he Commission may, on its own motion, initiate a proceeding to consider a definition of a service served by a rural telephone company that is different from that company’s

³⁹ *Id.* at ¶ 260.

⁴⁰ *See supra* Section III.A.

⁴¹ Although there has been no sale or transfer of facilities here because the proposed study area is completely unserved, the Commission still refers to proposed new study areas carved out from existing study areas as a “transferred exchange.” *See Skyline* at ¶ 10-17 (finding that even when there is no sale or transfer of facilities in the transactions that modify the study areas in question, a study area waiver is required nonetheless where a company was seeking to create a new study area from within one or more existing study areas).

⁴² *See* “High Cost Support With Capped CETC Support Projected by State by Study Area – 1Q2012.xls,” USAC, available at: <http://usac.org/about/tools/fcc/filings/2012/q1.aspx> (identifying the instant study area as a rural study area).

⁴³ *Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier*, Memorandum Opinion and Order on Reconsideration, 26 FCC Rcd 9160, ¶23 (2011) (“Standing Rock Amended ETC MO&O”).

study area. If it proposes such different definition, the Commission shall seek the agreement of the state commission according to this paragraph.”⁴⁴

Acting upon this authority, the Wireline Competition Bureau (“WCB”) has petitioned state commission’s in similar circumstances. Specifically, the WCB petitioned the North Dakota Commission in response to an ETC petition submitted by Standing Rock Telecommunications, Inc. (“Standing Rock”).⁴⁵ Similar to Navajo Pillars Telco, Standing Rock did not recognize the authority of the state commission over it or service areas located within a federally-recognized Indian reservation.⁴⁶ While the full Commission ultimately determined that redefinition of study areas was not necessary in response to Standing Rock’s petition, the Commission reiterated the WCB’s conclusion that the Commission must seek the assent of the appropriate state commission before redefining the service area of a rural telephone company.⁴⁷

Here, the FCC should take a similar approach and petition the ACC for a determination on the proposed study area waiver and the consequent study area redefinition. Such a petition will be in accordance with the FCC’s rules, the Communications Act of 1934, as amended, and FCC precedent. Moreover, it will help avoid the awkward and likely unintended requirement that would otherwise obligate a carrier not subject to the authority of a state commission, such as Navajo Pillars Telco, to petition such state commission before receiving federal universal service support.

⁴⁴ 47 C.F.R. § 54.207(d).

⁴⁵ *Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier*, Memorandum Opinion and Order, 25 FCC Rcd 25388, ¶ 27 (WCB 2010).

⁴⁶ Petition for Reconsideration, Standing Rock Telecommunications, Inc., WC Docket No. 09-197, at 2 (filed Sept. 23, 2010).

⁴⁷ Standing Rock Amended ETC MO&O at ¶ 23.

B. The Transfer Must Be In The Public Interest

The public interest will be served by a waiver of the study area freeze. As discussed herein, grant of the study area and related waivers will serve the public interest by enabling the provision of basic and advanced telecommunications services to previously unserved areas. As the Commission noted in a similar proceeding, a study area waiver is appropriate when it would result in “vastly improved telecommunications services without requiring significant increases in basic service rates.”⁴⁸ The Commission also found in that proceeding that it was in the public interest that the resulting Tribally-owned carrier, Mescalero Apache Telecom, Inc. (“MATI”), intended to “install state-of-the-art digital switching . . . and fiber optics facilities[,]” and “extend lines to previously unserved and underserved residents in remote locations on the [reservation] without imposing line extension charges.”⁴⁹

The instant Petition provides an equal, if not superior, public interest justification. Navajo Pillars Telco plans to deploy a state-of-the-art, fiber-based network that will offer residents advanced and basic telecommunications services at reasonable and affordable rates. Within five years of obtaining an RUS loan, Navajo Pillars Telco estimates that it will serve 908 subscribers. For the first time ever, these new subscribers will have access to educational, health, economic, and cultural resources once through unimaginable.

Moreover, whereas MATI planned to upgrade services to current subscribers and extend services to new subscribers, Navajo Pillars Telco will offer services to a region that has never

⁴⁸ *Mescalero Apache Telecom, Inc., GTE Southwest Inc., and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of Study Area Contained in the Part 36, Appendix Glossary of the Commission’s Rules, Mescalero Apache Telecom, Inc., Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission’s Rules, Order, 16 FCC Rcd 3813, ¶ 10 (2001) (“MATI et al.”).*

⁴⁹ *Id.*

before been served. This means that residents finally will be connected to police, fire, and emergency services. According to Navajo resident Kevin Yahzee, criminals in the region presently are emboldened by the fact that victims of crime have no way to telephone police. Yahzee has firsthand knowledge of this, as his house was robbed multiple times while his grandmother was home alone.⁵⁰ In one particular instance, “she locked herself in a bathroom all day until I returned home,” says Yahzee.⁵¹ “She could not call for help from the [police department]. We have never had a phone, none of my community members have phones. Phones will us to keep in contact with people outside our valley. And when [we] need help from the [police department].”⁵²

Perhaps even more concerning, however, is the present inability of residents to contact emergency services. Another Navajo resident, Stewart George, recalls how his father had a heart attack, but “could not call for help because there [are] not any phones available.”⁵³ Tragically, George’s father died while trying to walk to his son’s house 300 feet away.⁵⁴

There is no reason why residents of the Navajo Nation should be subjected to these conditions. Granting the requested study area waiver is an important step in rectifying this situation. Navajo Pillars Telco was founded for the very purpose of improving these conditions. Moreover, as demonstrated in Section V, Navajo Pillars Telco is committed to promoting universal service, advancing the quality of services provided to the Navajo Nation, and ensuring that its services are provided at just and reasonable rates. For these reasons, and for the reasons

⁵⁰ See Exhibit M: Hardship Stories.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

articulated in Section III herein, a waiver of the study area boundary freeze will serve the public interest.

V. THE COMMISSION SHOULD GRANT THE PETITION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

Navajo Pillars Telco respectfully petitions the Commission for designation as a rate-of-return ETC pursuant to the Commission's authority under Section 214(e)(6) of the Communications Act of 1934, as amended (the "Act")⁵⁵ within the boundaries of the proposed study area.⁵⁶ As described more fully herein, Navajo Pillars Telco satisfies all of the statutory and regulatory prerequisites for designation as an ETC.

A. Navajo Pillars Telco is Not Subject to State Commission Jurisdiction, and Therefore the Commission Has Jurisdiction Over This Petition

Section 214(e)(6) of the Act requires the Commission to designate eligible telecommunications carriers in instances where the relevant state commission lacks the authority to perform the designation. In the *Twelfth Report and Order*, the Commission established a framework for the ETC designation process under Section 214(e)(6) for carriers serving Tribal lands.⁵⁷ The first line of inquiry set out for the Commission is whether the applicant is "subject to the jurisdiction of a state commission."⁵⁸ Under both the analysis set forth in the *Twelfth Report and Order* and Commission precedent, Navajo Pillars Telco clearly is not subject to the jurisdiction of the ACC.

⁵⁵ 47 U.S.C. 214(e)(6).

⁵⁶ See Exhibit A: Maps of Proposed Service Area.

⁵⁷ *Twelfth Report and Order* at ¶¶115-127.

⁵⁸ *Id.* at ¶116.

The *Twelfth Report and Order* sets forth that the determination of jurisdiction over a carrier serving Tribal lands is informed by principles of Tribal law, treaties, and federal law.⁵⁹ Each of these principles clearly and undoubtedly demonstrate that the ACC does not have jurisdiction in the instant situation. We address these principles in turn.

First, the Navajo Nation’s Tribal law does not recognize the authority of the ACC to regulate telecommunications within the borders of the reservation. The Navajo Nation has never consented to state jurisdiction and has always recognized its inherent legal status as that of one nation to another nation, directly with the U.S. federal government. In recognition of this tribal sovereignty, the Navajo Nation Code provides the Tribe with the authority to exercise jurisdiction over commercial activities within its borders, including the rights “to regulate all commercial activities within the Navajo Nation”⁶⁰ and “the conduct of operations of business within the Navajo Nation.”⁶¹ Specifically with respect to the regulation of telecommunications, the Navajo Nation Code affords the Tribe “the authority to assert jurisdiction over telecommunications not preempted by applicable law and regulation of the federal government of the United States.”⁶² Moreover, the Tribe has exercised its authority to assert its jurisdiction. The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”) was established “to develop and adopt a regulatory code subject to Navajo Nation Council enactment, which will govern any and all Navajo Nation telecommunications activities, not inconsistent with [FCC] regulation.”⁶³ The NNTRC exercises this authority as well, performing many of the duties

⁵⁹ *Id.* at ¶125.

⁶⁰ 5 N.N.C. § 201 B.7. (2005).

⁶¹ 5 N.N.C. § 401 (2005).

⁶² 21 N.N.C. § 502 (2005); 2 N.N.C. § 3453.

⁶³ Navajo Nation Telecommunications Regulatory Commission: About Us, http://www.nntrc.org/About_Us.aspx (last visited Jul. 26, 2013).

typically performed by state regulatory bodies.⁶⁴ Consequently, absent the jurisdiction of the FCC, the Navajo Nation, and not the ACC, has jurisdiction to regulate telecommunications provided within the borders of the Navajo Nation.

Second, an examination of relevant federal treaties further supports the conclusion that regulation of telecommunications within the Navajo Nation falls within the jurisdiction of the federal government and the Tribe. Federal treaties are the “supreme law of the land” for the U.S. federal government.⁶⁵ The Treaty of Fort Sumner (“Treaty”) between the Navajo Tribe of Indians and the United States makes clear that issues involving utilities and infrastructure (“works of utility or necessity”) were negotiated, and were intended to be negotiated in the future, directly between the Tribal government and the federal government.⁶⁶ In addition to the specific agreements outlined in the Treaty, future utility and infrastructure agreements were to be addressed by a commission of federal and Tribal officials to “pay the tribe whatever amount of damages may be assessed” for access for utilities and rights of way.⁶⁷ Therefore, under the Treaty, utility and infrastructure issues related to the Navajo Nation and its Tribal lands were negotiated between the Tribe and the federal government, and therefore not subject to the jurisdiction of the state.

Third, federal law clearly demonstrates that the ACC does not have jurisdiction in the instant situation. The Supreme Court has ruled that “[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an ‘historic immunity from state and

⁶⁴ See, Comments of the NNTRC, WC Docket No. 09-197, at 7 (filed Apr. 29, 2011) (“the NNTRC acts equivalent to a state regulatory body”).

⁶⁵ U.S. CONST. art. VI.

⁶⁶ Treaty of Fort Sumner with the Navajo Tribe, June 1, 1868, 15 Stat. 667.

⁶⁷ *Id.*

local control.”⁶⁸ The FCC’s own precedent is very clear with regard to Tribally-owned carriers serving Tribal lands. The FCC has acted favorably upon a number of ETC petitions submitted by Tribally-owned carriers serving Tribal lands in Arizona, including one such petition to serve lands belonging to the Navajo Nation.⁶⁹ In fact, the FCC has never denied an ETC petition submitted by a Tribally-owned carrier seeking to provide service in Arizona.⁷⁰

Moreover, the fact Navajo Pillars Telco is owned by a Tribal member, and not the Tribe itself, does not preclude Navajo Pillars Telco from seeking ETC designation from the Commission. The FCC itself concluded “that neither the language of Section 214(e)(6) nor its legislative history provides any indication that it applies only to tribally-owned carriers serving tribal lands.”⁷¹ Moreover, *Cohen’s of Federal Indian Law*, the definitive treatise on federal Indian law, states that:

The general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country. Unless there is a specific federal law state otherwise, they are subject to exclusive tribal jurisdiction. Congress’s

⁶⁸ *New Mexico v. Mesclero Apache Tribe*, 462 U.S. 324, 331-32. Moreover, the Supreme Court specifically has recognized the jurisdiction of the Navajo Nation over its lands. *See, e.g., Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that jurisdiction over civil suits by non-Indians against Indians on actions arising on Indian reservations lies with the Tribal court).

⁶⁹ *See Hopi Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Hopi Reservation in Arizona*, Order, 22 FCC Rcd 1866 (WCB 2007) (granting ETC designation for a service area encompassing the Hopi Reservation and a portion of the Navajo Reservation); *see also Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O’odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, 13 FCC Rcd 4547 (CCB 1998).

⁷⁰ The only such petition the Commission has not granted is the petition submitted by NTUA Wireless, LLC, which remains pending before the Commission. *See Petition of NTUA WIRELESS, LLC for Designation as an Eligible Telecommunications Carrier pursuant to Section 214(e)(6) of the Communications Act of 1934, as Amended*, WC 09-197, Mar. 3, 2011.

⁷¹ *Twelfth Report and Order*, 15 FCC Rcd at ¶ 106.

plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law.⁷²

Here, the FCC's authority, pursuant to the Act, and the NNTRC's authority, pursuant to the Navajo Nation Code,⁷³ combine to preempt the jurisdiction of the ACC over this Tribal-member owned company. Neither Congress nor the FCC have taken actions to suggest that state law would apply to a Native-owned company exclusively serving Tribal lands. Not surprisingly, therefore, the FCC has recognized that "state law is generally inapplicable when state commissions attempt to regulate the conduct of Tribal members directly within the reservation boundaries."⁷⁴ Consequently, an analysis of the instant situation under the framework adopted in the *Twelfth Report and Order* clearly results in a conclusion that the ACC lacks jurisdiction over Navajo Pillars Telco.

In addition, the ACC lacks jurisdiction under Commission precedent. The Commission has found that a state commission lacks authority when a carrier operating on Tribal lands consents to Tribal jurisdiction.⁷⁵ Here, Navajo Pillars Telco has consented to Tribal jurisdiction.⁷⁶ Moreover, the NNTRC has agreed in the past with the premise that carriers consenting to its jurisdiction and agreeing to be regulated by it are not subject to the ACC's

⁷² FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 520 (2005) (citations omitted).

⁷³ 5 N.N.C. § 401 (2005).

⁷⁴ *Twelfth Report and Order*, 15 FCC Rcd at ¶ 102.

⁷⁵ *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Memorandum Opinion and Order, 16 FCC Rcd 18145, ¶19-21 (2001).

⁷⁶ *See*, Exhibit E: Petition of Navajo Pillars Telecommunications, Inc. for Contingent Certificate of Convenience and Necessity at 3 (requesting a contingent CCN to "demonstrate that both [Navajo] Pillars [Telco] and the NNTRC recognize the NNTRC's regulatory authority over and the applicability of the Navajo Nation's laws to the proposed operations of [Navajo] Pillars [Telco] within the Navajo Nation.").

authority.⁷⁷ Consequently, the Commission should find that the ACC lacks authority based on Navajo Pillars Telco's consent to the NNTRC's jurisdiction.

In summary, under the U.S. Constitution, the Navajo Nation Code, the Treaty of Fort Sumner, the basic principles of federal Indian law as outlined by the Supreme Court and the Commission, Section 214(e)(6) of the Communications Act, and the Commission's own precedent, Navajo Pillars Telco, a telecommunications carrier owned by a Tribal member and consenting to the jurisdiction of the NNTRC, is not subject to the authority of the ACC.

B. Navajo Pillars Telco Satisfies All of the Statutory and Regulatory Prerequisites for Designation as an Eligible Telecommunications Carrier

Navajo Pillars Telco satisfies each of the statutory and regulatory prerequisites set forth in the Act and the Commission's Rules and precedent, including the *Section 214(e)(6) Public Notice*,⁷⁸ to be designated a federal ETC in its proposed service area.

1. Navajo Pillars Telco Will Be a Common Carrier

Section 214(e)(6) of the Act provides the Commission authority only to designate as an ETC those applicants which are common carriers.⁷⁹ Because Navajo Pillars Telco will offer telecommunications services directly to the public for a fee, it will be considered a common carrier when it begins offering services.⁸⁰

⁷⁷ Reply Comments of the Navajo Nation Telecommunications Regulatory Commission on the Petition of NTUA Wireless, LLC for Designation as an Eligible Telecommunications Carrier on the Navajo Nation, WC Docket No. 09-197, at 1-2 (filed Jun 13, 2011).

⁷⁸ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, 12 FCC Rcd 22947 (1997) ("*Section 214(e)(6) Public Notice*").

⁷⁹ 47 U.S.C. §214(e)(6).

⁸⁰ *See* 47 U.S.C. § 153(11) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire . . .").

2. Navajo Pillars Telco Will Offer the Services Supported by the Federal Universal Service Support Mechanisms

The Commission requires ETCs to offer voice telephony service in order to receive federal universal service support.⁸¹ Voice telephony services must provide:⁸²

1. Voice grade access to the public switched networks or its functional equivalent;
2. Minutes of use for local service provided at no additional charge to end users;
3. Access to the emergency services provided by local government or other public safety organizations, such as 911 or enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and
4. Toll limitation services to qualifying low-income consumers as provided in subpart E of Part 54 of the Commission's rules.

Navajo Pillars Telco certifies that it will satisfy each of these requirements.⁸³ We address each requirement in turn.

a. Voice-grade access to the public switched telephone network

Navajo Pillars Telco certifies that it will utilize a facilities-based network to provide voice grade access service to the public switched network ("PSN"). Presently, voice grade access service to the PSN is not available in the proposed service area.

b. Minutes of use for local service

Navajo Pillars Telco certifies that it will provide minutes of use for local service provided at no additional charge to end users.

⁸¹ 47 C.F.R. §54.101(b).

⁸² See 47 C.F.R. §54.101(a)

⁸³ Exhibit P: Universal Service Certification.

c. Access to emergency services

Navajo Pillars Telco certifies that it will provide access to emergency services through seven-digit dialing. The FCC's requirement that ETCs offer access to 911 or enhanced 911 applies only "to the extent that the local government in the eligible carrier's service area has implemented 911 or enhanced 911 systems."⁸⁴ The proposed service area of Navajo Pillars Telco presently is unserved by voice telephony service providers and, consequently, neither 911 nor enhanced 911 systems have been implemented. When such systems are implemented, Navajo Pillars Telco will provide access.

d. Toll limitation services to qualifying low-income consumers

Navajo Pillars Telco certifies that it will offer toll limitation services ("TLS") to qualifying low-income consumers as provided in subpart E of Part 54 ("Subpart E") of the Commission's rules.⁸⁵ The Commission recently amended Subpart E to clarify that requirement to offer TLS at no charge to the low-income consumers applies only to those service plans for which the ETC charges a fee for toll calls that is in addition to the per month or per bill cycle of the consumer's Lifeline service.⁸⁶ Because Navajo Pillars Telco plans to charge a fee for toll calls that is in addition to the per billing cycle price of a low-income consumer's Lifeline service, it certifies that it will offer TLS to qualifying low-income consumers at no charge to the Lifeline subscriber.

⁸⁴ *Id.*

⁸⁵ See 47 C.F.R. §§ 54.400-22.

⁸⁶ *Lifeline and Link Up Reform and Modernization*, Report and Order and Notice of Proposed Rulemaking, 27 FCC Rcd 6656, ¶ 230 (2012).

3. Navajo Pillars Telco Will Offer Supported Services Through its Own Facilities

The Commission's *Section 214(e)(6) Public Notice* requires that a carrier requesting ETC designation pursuant to Section 214(e)(6) must certify that it offers the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services."⁸⁷ Navajo Pillars Telco will be a facilities-based wireline telecommunications carrier with its own switching, transport, and associated telecommunications facilities in its proposed designated ETC service area. The proposed system will provide 1 gigabit bandwidth to the company's central office and will have the ability to provide broadband and voice telephony services directly to each subscriber. Navajo Pillars Telco will provide single party service with two exchanges, located in Smoke Signal and Blue Gap, AZ, respectively. Navajo Pillars Telco intends to use its own facilities to meet its universal service obligations. As an ETC, Navajo Pillars Telco will use universal service funding to support and enhance its network facilities in its proposed designated service area.

4. Navajo Pillars will Advertise its Universal Service Offering

Navajo Pillars Telco certifies it will advertise the availability of the supported services detailed herein throughout its licensed service area by media of general distribution in accordance with Section 214(e)(1) of the Act, Section 54.201(d)(2) of the Commission's rules, and the Tribal engagement rules, as articulated in the Commission's *USF/ICC Transformation Order*⁸⁸ and the Office of Native Affairs and Policy's *Further Guidance on Tribal Engagement*

⁸⁷ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, 12 FCC Rcd 22947 (1997) ("Section 214(e)(6) Public Notice").

⁸⁸ *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 ¶ 637 (2011) ("*USF/ICC Transformation Order*"); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011).

*Rules.*⁸⁹ The methods and locations of advertising may include local and Tribal newspapers, the Navajo Pillars Telco website, Tribal officers, public benefits offices, electronic newsletters, billing inserts, and public exhibits. Navajo Pillars Telco will publicize the availability of supported services to reach all of the residents in its service area, and ensure that customers are aware of the availability of the supported services, particularly, the support to low income customers.

5. Navajo Pillars Telco Meets the Additional Requirements for Designation as an ETC Under Section 54.202 of the Commission's Rules, as Applicable

a. Navajo Pillars Telco certifies that it will comply with all relevant service requirements

Navajo Pillars Telco certifies that it will comply with all applicable requirements related to receipt of high-cost and low-income support, consistent with Section 54.202(a)(1)(i) of the Commission's rules.

b. Navajo Pillars Telco's five year service improvement plan

Pursuant to Section 54.202(a)(1)(ii) of the FCC's rules, Navajo Pillars Telco has attached its RUS loan application, which satisfies the requirement for an ETC application to submit a five year improvement plan.⁹⁰ The proposed service area currently has no telecommunications infrastructure. Granting ETC designation to Navajo Pillars Telco will enable the company to secure an RUS loan for the initial build-out of the network infrastructure. Navajo Pillars Telco cannot obtain an RUS loan without first demonstrating that sufficient universal service support will be made available to construct and maintain the proposed network and repay the RUS loan.

⁸⁹ *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, Public Notice, 27 FCC Rcd 8176 (WTB 2012) ("Further Guidance on Tribal Engagement Rules").*

⁹⁰ Exhibit I: RUS Loan Application

The proposed network will provide 1 gigabit bandwidth to Navajo Pillars Telco's central office. Navajo Pillars Telco will provide single party service after the construction of two exchanges, located at Smoke Signal and Blue Gap, AZ, and serve approximately 908 total subscribers. Once constructed, Navajo Pillars Telco will provide voice telephony and broadband services for residences, small businesses, educational institutions, and government.

c. Navajo Pillars Telco will remain functional in emergency situations

Navajo Pillars Telco's network will be designed to remain functional in emergency situations without an external power source, will be able to reroute traffic around damaged facilities, and will be capable of managing traffic spikes resulting from emergency situations as required by Section 54.202(a)(2) of the Commission's rules. Each central office building will be supplied with standby generators and battery back-up that will enable the central office to keep running until power is restored so long as fuel is available, or until system changes are made to reroute traffic. Navajo Pillars Telco will be able to change call routing translations as needed to reroute traffic around damaged facilities. Changing call routing translations also will allow Navajo Pillars Telco to manage traffic spikes throughout its network, as emergency situations require.

Upon grant of ETC designation, Navajo Pillars Telco will certify annually that it is able to function in emergency situations in compliance with Section 54.313(a)(6). Navajo Pillars Telco also will submit an annual report concerning outages in its service areas as required by Section 54.313(a)(2).

d. Navajo Pillars Telco is committed to meeting consumer protection and service quality standards

Navajo Pillars Telco was founded by a member of the Navajo Nation for the purpose of serving a presently unserved population of Navajo Nation.⁹¹ The founder is an enrolled member of the Navajo Nation and was born and raised in the service area.⁹² He has maintained his ancestral home, is intimately connected to the local population through his clan and familiar relationships, and is presently building a new home in the service area.⁹³ Navajo Pillars Telco was founded for the purposes of providing services under terms and conditions that afford its customers, all or most of whom are members of the Tribe, with the consumer protections and service quality standards required pursuant to Sections 54.202(a)(3) and 54.313(a)(5) of the Commission's rules.⁹⁴

Navajo Pillars Telco plans to develop a Local Exchange Tariff modeled, in part, after the local service tariff of Hopi Telecommunication, Inc. ("Hopi Telco"), an incumbent local exchange carrier serving nearby Tribal lands in Arizona.⁹⁵ The Commission has determined previously that the consumer protection provisions of Hopi Telco's local service tariff satisfy Sections 54.202(a)(3) and 54.313(a)(5) of the Commission's rules.⁹⁶ The rules and regulations in Navajo Pillars Telco's tariff will be based upon current rules of the ACC. Although Navajo Pillars Telco is not subject to the jurisdiction of the ACC, the consumer protections standards in Navajo Pillars Telco's tariff will be similar to those required by the ACC for telecommunications

⁹¹ See Exhibit G: Declaration of George Martinez.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Exhibit H: Section 7 of Local Service Tariff of Hopi Telco.

⁹⁶ See *Hopi Telecommunications, Inc.*, Order, 22 FCC Rcd 1866 (WCB 2007).

carriers subject to state jurisdiction. Navajo Pillars Telco also will provide an annual report to the Commission on consumer complaints per 1,000 lines, pursuant to Section 54.313(a)(4).

C. Navajo Pillars Telco’s Proposed Service Area

As addressed in Section II herein, Navajo Pillars Telco requests ETC designation throughout the proposed service area demonstrated in Exhibit A.⁹⁷

D. Grant of this Application Will Serve the Public Interest

The Commission should find that designating Navajo Pillars Telco as an ETC in the proposed service area “is in the public interest.”⁹⁸ The Commission has adopted a fact-specific public interest analysis when considering ETC applications.⁹⁹ The Commission considers “a variety of factors in the overall ETC determination, including the benefits of increased consumer choice, and the unique advantages and disadvantages of the [ETC applicant’s] service offering.”¹⁰⁰

The public interest analysis for the instant petition clearly favors Commission designation. Navajo Pillars Telco’s ETC designation will serve the public interest by introducing voice telephony and broadband services to a presently unserved area, enhancing health and safety benefits, offering increased educational opportunities, and improving economic opportunities for a historically impoverished and isolated area of the Navajo Nation. ETC designation, and the accompanying receipt of federal universal service support, are critical to the operations of Navajo Pillars Telco and provision of affordable service to future subscribers in the proposed service area.

⁹⁷ See Exhibit A: Maps of Proposed Service Area.

⁹⁸ 47 C.F.R. § 54.202(b).

⁹⁹ *Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371, ¶ 41 (WCB 2005).

¹⁰⁰ *Id.*

1. Introducing Telecommunications Services to the Region

The proposed service area has been overlooked by traditional carriers. The vast scale of the proposed service area, along with its remote, isolated, and low population density characteristics, has inhibited penetration of communications services in the past. Today, residents and businesses in the proposed service area have no access to voice telephony or broadband services. Granting the instant petition will provide such access for the first time, furthering the statutory goal of the advancement of universal service.¹⁰¹

2. Advantages of the Particular Service Offering

The proposed system will offer numerous advantages to the residents of the proposed service area. For example, not only will the proposed network be the first of its kind in the region, it will also provide Navajo Pillars Telco with excess broadband capacity in order to offer higher speed broadband services in the future. Navajo Pillars Telco estimates that barriers to broadband adoption such as digital relevancy and digital literacy will limit, initially, demand for high speed broadband services. However, as such barriers are addressed, the company expects demand for high speed broadband to increase. The proposed fiber network, with a 1 gigabit bandwidth connection to Navajo Pillars Telco's central office, will offer Navajo Pillars Telco the ability to meet this increased demand.

In addition, because the company will be owned and operated by members of the Navajo Nation, cultural barriers to the deployment and maintenance of communications infrastructure will be minimized. Moreover, as a Native-owned business, Navajo Pillars Telco is committed to providing such services at affordable prices to this economically-challenged service area.

¹⁰¹ 47 U.S.C. § 254(b).

3. Introduction of Affordable Voice Telephony and Broadband Services

Enhanced Health and Safety Benefits. With ETC designation, Navajo Pillars Telco will mitigate health and safety risks associated with living and working in a remote and rural location. The availability of wireline universal services will provide access to emergency services that are presently not accessible. In addition, ETC designation will provide residents with access to telemedicine services, a vital benefit for an area that presently has no medical services nearby.

Increased Educational Opportunities. ETC designation will also afford with increased educational opportunities. The new network will provide a fiber, high-bandwidth broadband connection to the K-12 school. This service will bring with it numerous opportunities for online learning in this remote and isolated community. The Navajo Nation hopes that these opportunities will help combat the Tribe's high school dropout rate.

Moreover, the educational benefits of broadband service will not be relegated to K-12 students. Online adult continuing education opportunities also are being developed, and high school graduates will be able to pursue higher education by taking online courses.

Improving Economic Opportunities. ETC designation also will enable improved economic opportunities for residents and businesses. Small businesses, which are virtually non-existent today, will be able to connect to markets, and potential purchasers and vendors, outside of their isolated community. In addition, residents will benefit from access to online job training and telework employment opportunities. For a region plagued by high unemployment, these improved economic opportunities will significantly improve the quality of life for local residents.

E. Anti-Drug Abuse Certification

Navajo Pillars Telco certifies that no party to this petition is subject to a denial of federal benefits, including FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §862.¹⁰²

VI. THE COMMISSION SHOULD FIND THAT SECTION 54.305 OF ITS RULES DOES NOT APPLY BECAUSE NAVAJO PILLARS TELCO IS NOT ACQUIRING AN EXCHANGE FROM FRONTIER

Section 54.305 of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the lesser of (i) support based on the actual costs of the acquired exchanges or (ii) the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.¹⁰³ However, the Commission has found that Section 54.305 does not apply in those instances in which the modifications to study areas do not involve transfers of facilities or customers.¹⁰⁴ In *Skyline*, the Commission granted a study area waiver to Skyline Telephone, Qwest and Verizon that allowed Qwest and Verizon to modify their respective study areas by relinquishing certain unserved areas from their study areas.¹⁰⁵ In turn, Skyline Telephone was designated the ETC of a new study area that was comprised of the relinquished unserved areas.¹⁰⁶ Because the modifications to Qwest's and Verizon's study areas did not involve transfers of facilities or customers to Skyline Telephone, the Commission determined that Section 54.305 did not apply and that Skyline Telephone was eligible for high-cost universal service support based on its own embedded costs.¹⁰⁷ Here, the

¹⁰² See Exhibit K: Anti-Drug Abuse Certification.

¹⁰³ 47 C.F.R. § 54.305(b).

¹⁰⁴ See *Skyline* at ¶ 16.

¹⁰⁵ *Id.* at ¶¶ 11-18.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at ¶ 16.

modification to Frontier's study area does not involve transfers or facilities or customers to Navajo Pillars Telco. Consequently, the limitations on the receipt of USF support contained in Section 54.305 are not applicable to Navajo Pillars Telco.

VII. THE COMMISSION SHOULD WAIVE SECTIONS 36.611 AND 36.612 OF IT'S RULES TO ENABLE NAVAJO PILLARS TELCO TO RECEIVE USF SUPPORT IMMEDIATELY

Navajo Pillars Telco respectfully requests a waiver of Section 36.611 and 36.612 of the Commission's rules to enable it to receive USF support immediately upon commencement of operations. Correspondingly, Navajo Pillars Telco also requests the Commission to direct the Universal Service Administrative Company to disburse these payments consistent with this request.

Pursuant to Sections 36.611 and 36.612 of the Commission's rules, HCLS is determined based on historical cost data. Section 36.611 requires each incumbent LEC to file the preceding year's loop costs data with the National Exchange Carrier Association ("NECA") on July 31 of every year.¹⁰⁸ NECA then analyzes these data in order to calculate the appropriate levels of support, and, thus, carriers generally do not receive HCLS until the beginning of the second calendar year after the costs are incurred.¹⁰⁹ As a newly established incumbent LEC operating in a new study area that previously had been unserved, Navajo Pillars Telco will not have the historical data necessary to compute HCLS immediately. Specifically, Navajo Pillars Telco likely will not be able to offer services until Year 2 after receiving its RUS loan due to the time it will take to construct the network. If service is first offered in Year 2, this means that the carrier

¹⁰⁸ 47 C.F.R. § 36.611.

¹⁰⁹ See 47 C.F.R. §§ 36.611, 36.612; see also *MATI et al.* at ¶ 23.

would have to wait until Year 4 (its third year of operating) to receive high-cost support.¹¹⁰ Up until this time, Navajo Pillars Telco would need to look to its subscriber base for cost recovery of amounts that otherwise would have been recovered from the Universal Service Fund. Such a result would be contrary to public policy, the goals of the universal service program, and Commission precedent as it would effectively punish a carrier for providing service to a previously unserved study area.

Approximately one-third of Navajo Pillars Telco's estimated revenues in Years 2-3 are comprised of Universal Service support. Without waivers of Sections 36.611 and 36.612, however, these revenues will not be realized in these critical years, and RUS may not be willing to issue a loan to Navajo Pillars Telco. Moreover, because Navajo Pillars Telco's estimated local network services revenue (i.e., subscriber revenue) will be less than seven percent of the carrier's estimated revenues in Years 2-3, Navajo Pillars Telco could not recover the lost universal service support through additional subscriber charges.

Even if the carrier could recover this lost revenue through subscriber charges, such higher rates also would do nothing to further the goals of Section 254 of the Communications Act, which provides, among other things, that consumers in rural, insular, and high-cost areas should have access to telecommunications services at rates that are "reasonably comparable to

¹¹⁰ While the quarterly update provision of Section 36.612 could reduce the waiting period to an extent, the data submission and filing requirements of Part 36 typically operate to postpone the receipt of high-cost loop support for a newly established LEC until its third year of operation. *See, e.g., Skyline* at ¶ 19; *MATI* at ¶ 23. NECA and the United States Telecom Association previously have alerted the FCC of the adverse effects of this delay in receiving support, stating that carriers seeking to provide service to previously unserved areas are "required to wait for up to two years following the time that they incur costs in serving these areas before they can receive high cost support." Comments of the United States Telecom Association and the National Exchange Carrier Association, Inc., CC Docket No. 96-45, at 8 (filed Dec. 17, 1999).

rates charged for similar services in urban areas.”¹¹¹ Instead, adherence to the Commission’s rules in this instance would frustrate, rather than further, the goals of this section by denying high cost support to a new company offering telecommunications service to a rural, low-income, and previously unserved area.

Consequently, the Commission has granted waivers of these sections in similar situations, “primarily to accelerate the provision of support to cover costs incurred by new carriers initiating or extending service in predominantly unserved areas.”¹¹² Commission grant of a waiver in this case would serve a similar purpose. Waiver will allow Navajo Pillars Telco to recoup the substantial investments made during its initial years of operation, meet its RUS loan repayment obligations, and extend lines to new subscribers at reasonable costs.

Waiver also will be consistent with the Commission’s “obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage Tribal sovereignty and self-governance, and to ensure a standard of livability for members of Indian tribes on Tribal lands.”¹¹³ In granting a similar waiver to another carrier serving Tribal lands, the Commission stated:

The grant of this waiver will enhance the . . . tribe’s access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, and thereby increase the tribe’s access to education, commerce, government, and public services. These measures will also help bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation.¹¹⁴

¹¹¹ 47 U.S.C. 254(b)(3).

¹¹² *Adak Eagle Enterprises LLC d/b/a Adak Telephone Utility*, Order, 20 FCC Rcd 20543, ¶ 9 (WCB 2005). *See also MATI* at ¶ 30; *Sacred Wind Communications, Inc. and Qwest Corporation*, Order, 21 FCC Rcd 9227, ¶ 16 (WCB 2006) (“*Sacred Wind*”).

¹¹³ *MATI* at ¶ 29.

¹¹⁴ *Id.*

The instant request will offer the same benefits.

Accordingly, the Commission should grant requested waivers and issues a directive to USAC to calculate and remit USF support based on Navajo Pillars Telco's current and projected costs. Navajo Pillars Telco requests this treatment until such time as the company obtains historical cost data upon which USF recovery can be calculated pursuant to Sections 36.611 and 36.612 of the Commission's rules.

VIII. THE COMMISSION SHOULD WAIVE SECTION 54.903(a)(3) OF ITS RULES FOR ICLS

Section 54.903(a)(3) of the Commission's rules provides that rate-of-return LECs must file certain cost and revenue data on March 31 of each year to receive ICLS from July 1 of the same year through June 30 of the next year.¹¹⁵ For the reasons stated above with regard to the waiver of the Commission's rules for high-cost loop support, similar good cause exists to grant Navajo Pillars Telco waiver of this rule to allow the company to be eligible to receive ICLS promptly. As a matter of public policy, allowing Navajo Pillars Telco to be eligible to receive immediate ICLS will avoid the possibility of increases to subscriber rates and will encourage local telephone subscribership in the low-income, rural service area, consistent with the goals of universal service. Moreover, grant of this waiver would be consistent with previous Commission action with respect to ICLS.¹¹⁶ In accordance with previous Commission precedent, Navajo Pillars Telco certifies that it will file with the USF Administrator and the Commission, on the date it first files its line count information pursuant to Section 54.903, a certification that all

¹¹⁵ 47 C.F.R. § 54.903(a)(3).

¹¹⁶ See *Sacred Wind* at ¶ 19.

ICLS support provided to the company will be used only for the provision and maintenance, and upgrading of facilities and services for which the support is intended.¹¹⁷

IX. THE COMMISSION SHOULD WAIVE SECTIONS 69.2(hh) OF ITS RULES TO ALLOW NAVAJO PILLARS TELCO TO PARTICIPATE IN NECA POOLS AND TARIFFS.

In order to become a member of NECA and participate in NECA pools and tariffs, a carrier must be a “telephone company,” as defined in Part 69 of the Commission’s rules. Section 69.2(hh) of the Commission’s rules defines a “telephone company” as an incumbent LEC as defined in Section 251(h)(1) of the Act. Section 251(h)(1) defines an “incumbent local exchange carrier” as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act. While a successor or assign of an incumbent is also an incumbent LEC under Section 251(h)(1) of the Act, Navajo Pillars Telco will be a newly established carrier, and therefore neither a successor nor assign of an incumbent LEC. Consequently, Navajo Pillars Telco respectfully requests a waiver of Section 69.2(hh) of the Commission’s rules in order to allow it to join NECA.

Granting a waiver of Section 69.2(hh) is in the public interest. Participation in NECA will allow Navajo Pillars Telco to avoid the costs of filing and maintaining its own company-specific interstate tariffs. The company estimates that it will serve less than 1,000 subscribers in the proposed service area. The costs of preparing company-specific tariffs could be disproportionately excessive given such a small subscriber base. In addition, because Navajo Pillars Telco plans to make large capital investments to provide services, its company-specific rates have the potential to be extremely high over the long term. Therefore, it is in the public

¹¹⁷ *Id.* at n. 69.

interest to permit Navajo Pillars Telco and its customers to benefit from the cost savings and lower rates available through NECA participation.

In addition, granting a waiver of Section 69.2(hh) is consistent with Commission precedent. Indeed, other carriers not qualifying as incumbent LECs under the statutory definition, yet providing service in unserved rural areas, have been granted waivers of Section 69.2(hh) for the purpose of joining NECA and effectuating the goals of the USF program.¹¹⁸

For the foregoing reasons, the Commission should grant the waiver the definition of “telephone company” in Section 69.2(hh) of its rules.

X. THE COMMISSION SHOULD GRANT A FIVE-YEAR WAIVER OF SECTION 51.909 OF THE COMMISSION’S RULES ESTABLISHING THE TRANSITION TO BILL-AND-KEEP

Navajo Pillars Telco respectfully requests that the Commission waive, for a period of five years, the applicability of the *USF/ICC Transformation Order and NPRM*’s rules governing the transition to bill-and-keep.¹¹⁹ Specifically, Navajo Pillars Telco requests a waiver of the cap on interstate originating and terminating rates and intrastate terminating rates and the transition path for interstate and intrastate terminating rates as set forth in Section 51.909 in the Commission’s rules.¹²⁰ The FCC’s rules do not appear to provide any means for new carriers to derive intercarrier compensation (“ICC”) revenues during the transition. The requested waiver will correct this, enabling Navajo Pillars Telco to receive ICC revenues that will help ensure the company meets its RUS loan repayment obligations during its first five years of operations.

The *USF/ICC Transformation Order and NPRM* caps interstate originating and terminating rates and intrastate terminating rates at the levels in effect for each carrier on

¹¹⁸ See, e.g., *Skyline* at ¶¶ 25-28, *Adak* at ¶¶ 14-16.

¹¹⁹ *USF/ICC Transformation Order and NPRM* at ¶ 801.

¹²⁰ *Id.*

December 29, 2011, and establishes a transition path for all terminating rates.¹²¹ The FCC's transition path reduces terminating rates to zero over a nine year period. During the transition, each carrier's interstate and intrastate terminating rates as of December 29, 2011 are the variables used to determine terminating rates in successive years.¹²² However, the transition path does not account for new carriers, such as Navajo Pillars Telco, who did not have terminating rates on December 29, 2011. Consequently, a strict interpretation of the Commission's ICC transition timeline would preclude Navajo Pillars Telco from receiving any interstate originating and terminating revenues and intrastate terminating revenues. Surely this was not the Commission's intent.

The Commission instead should grant Navajo Pillars Telco a waiver of the transition to bill-and-keep for a period of five years. Such a waiver would allow the company to receive ICC revenues throughout the nine-year transition to bill-and-keep. During the five years that the waiver is in effect, Navajo Pillars Telco will participate in NECA's pools and tariffs. At the conclusion of the five year period, Navajo Pillars Telco would be subject to the same rules as all other rate-of-return carriers, except that Navajo Pillars Telco's ICC rates in effect at the conclusion of the waiver period should be used to determine the company's transition rates, as opposed to those rates in effect as of December 29, 2011.

In the *USF/ICC Transformation Order and NPRM*, the Commission "recognized that some areas are uneconomic to serve absent implicit or explicit support."¹²³ As demonstrated herein, the region of the Navajo Nation which Navajo Pillars Telco plans to serve is a prime

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at ¶ 853.

example of such an area. In the absence of the requested waiver, Navajo Pillars Telco will not be able to obtain an RUS loan.¹²⁴

Moreover, the waiver will not provide Navajo Pillars Telco with excessive ICC revenues. Because Navajo Pillars Telco plans to become a member of NECA and participate in NECA's pools and tariffs, the company's ICC rates would transition downward during the five-year waiver period in order to stay consistent with NECA's rates. In essence, Navajo Pillars Telco would begin the transition to bill-and-keep, but at a more gradual pace than those carriers operating as of 2011. Further, because Navajo Pillars Telco estimates that it will serve less than 1,000 subscribers by its fifth year of operation, the increase in ICC charges that competing carriers will incur as a result of this waiver will be negligible.

Finally, if the Commission grants this waiver, the Commission should also grant a five year waiver of Section 51.917 of the Commission's rules, which sets forth the revenue recovery mechanism for rate-of-return carriers. Specifically, Section 51.917 uses a carrier's 2011 revenue data to determine that carrier's revenue Baseline, which then is used to determine whether the carrier is eligible to recover lost ICC revenues through an Access Recovery Charge assessed on the carrier's subscribers and/or support from the Connect America Fund. Because Navajo Pillars Telco will have no 2011 revenue data upon which to base its revenue Baseline under § 51.917 once its five year waiver of the bill-and-keep rules expires, Navajo Pillars Telco requests that the Commission specify that revenue data from the fifth year of Navajo Pillars Telco's waiver be used to determine the carrier's revenue Baseline.

¹²⁴ See Exhibit I: RUS Loan Application.

XI. THE COMMISSION SHOULD GRANT A WAIVER OF THE CAPEX AND OPEX LIMITS

Navajo Pillars Telco respectfully requests a five-year waiver of the rule limiting reimbursable capital and operating expenses for HCLS (“CapEx and OpEx Limits”).¹²⁵

The *USF/ICC Transformation Order and NPRM* stated that a waiver will be warranted in those instances “where an ETC can demonstrate that, without additional universal service funding, its support would not be ‘sufficient to achieve the purposes of [Section 254 of the Act].’”¹²⁶ Such circumstances plainly exist here. Absent the requested waivers, Navajo Pillars Telco will not be able to secure an RUS loan, the network will not be constructed, and the Navajo people residing in the service area will continue to go without access to telecommunications services. Alternatively, grant of the requested waivers will strengthen, rather than undermine, the Commission’s objectives to extend modern communications infrastructure to unserved areas in an efficient manner.

A. The Network Will Not Be Constructed Without A Waiver of the CapEx and OpEx Limits

The FCC employs a regression analysis formula that compares the capital expenses and operating expenses of similarly situated carriers to determine CapEx and OpEx Limits for each rate-of-return carrier.¹²⁷ In April of 2012, the FCC provided public notice of the company-specific CapEx and OpEx Limits for all rate-of-return carriers.¹²⁸ However, it is not possible to quantify at this time what the CapEx and OpEx Limits will be for a new rate-of-return carrier, such as Navajo Pillars Telco. Moreover, the CapEx and OpEx limits will change over time,

¹²⁵ *USF/ICC Transformation Order and NPRM* at ¶ 220.

¹²⁶ *Id.* at ¶ 540 (quoting 47 U.S.C. § 254(e)).

¹²⁷ *USF/ICC Transformation Order and NPRM* at ¶ 220.

¹²⁸ *Connect America Fund, High-Cost Universal Service Support*, Order, 27 FCC Rcd 4235, App. B (WCB 2012).

adding significant risk for new carriers, such as Navajo Pillars Telco, whose revenues are already subject to uncertainty based on their uncertain line counts.

The uncertainty created by the CapEx and OpEx limits make it impossible for Navajo Pillars Telco to provide RUS with adequate assurance that it will be able to meet its loan repayment obligations. Moreover, the company expects that the costs of constructing a network in the proposed high-cost service area will place the company near, at, or above the CapEx and OpEx Limits, once such limits are determined. As a result, the company's RUS loan application is contingent upon a waiver of the five-year waiver of the CapEx and OpEx Limits.

At the conclusion of the five-year waiver period, Navajo Pillars Telco expects to be in a much improved financial position to abide by the CapEx and OpEx Limits. Navajo Pillars Telco will complete construction of its network within two years of beginning construction. Once this occurs, capital expenses will be significantly lowered, and much of the financial uncertainty associated with the construction of a network will be eliminated. Moreover, during this five-year period, the company will see what CapEx and OpEx Limits to which it may be subject and how such limits may vary over time. In addition, the company expects to obtain a critical mass of subscribers by Year 5, which will mean more stable line counts and reduced fluctuations with respect to capital and operating expenses on a per line basis. Consequently, Navajo Pillars Telco believes it will be able to abide by the CapEx and OpEx Limits at the conclusion of the five-year waiver period.

B. The Commission's Objectives Will Be Strengthened, Not Undermined, by Grant of the Waiver

The requested waiver will not undermine the Commission's objective to "eliminate waste and inefficiency and improve incentives for rational investment and operation by rate-of-return

LECs.”¹²⁹ Instead, grant of this waiver would strengthen efficiency while extending the benefits of access to telecommunications services to more Americans.

The requested waiver would be in effect for a mere five years. During this time period, Navajo Pillars Telco will construct a modern, efficient network and raise subscribership levels to sustainable levels. As time progresses, the higher costs of constructing a network and commencing operations will subside. At the same time, line counts will grow, raising both subscriber revenues and the various caps to which the company will be subject. By the end of Year 5, the company will bring its costs in line with those prescribed by the Commission’s rules, while also providing telecommunications services to this previously unserved region.

C. Financial Data and Other Information

In accordance with the *USF/ICC Transformation Order and NPRM*’s requirement that “petitions must include all financial data and other information sufficient to verify the carrier’s assertions,”¹³⁰ Navajo Pillars Telco submits the following:

1. Density Characteristics

The proposed service area is rural in the extreme. Located in northeast Arizona, the service area lies between 35° 52’ 30” and 36° 15’ 0” north latitude, and 109° 52’ 30” and 110° 07’ 30” west longitude. The area is approximately 239 square miles and has a very low population density. The company estimates that it will serve approximately 908 subscribers within five years of securing an RUS loan, which equates to approximately 3.8 subscribers per square mile.

¹²⁹ *USF/ICC Transformation Order* at ¶ 195.

¹³⁰ *Id.* at ¶ 542.