THE IMPORTANCE OF FEDERAL UNIVERSAL SERVICE SUPPORT AND INTERCARRIER COMPENSATION PROGRAMS TO TRIBAL AREAS

Prepared for the benefit of Native & Tribal Telecommunications Carriers
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Summary

Recent actions by the Federal Communications Commission (FCC) have, at the very least, made the regulatory climate in which Tribally-owned and small rate of return carriers serving Tribal lands operate less predictable and stable, and at worst have severely depressed investment in areas served by these carriers. Due to the adverse effects of these FCC actions, these carriers herein demonstrate that Tribal areas, and specifically those served by Tribally-owned companies, require additional consideration as to the policies adopted by the FCC and that are harming the stated public policy goal of universal broadband service in all areas.

Contents

I. Universal Service and Intercarrier Compensation Reform

A. *FUSF and ICC Policies Have Proven Vital to Tribal Areas*

Many Tribally-owned and small rate of return carriers serving Tribal lands got their start by first recognizing a serious problem in Tribal areas - a lack of telecommunications service availability. Tribes formed their own telecommunications companies and purchased lines from the incumbent carriers that, for a variety of reasons, would not or could not bring vital communications services to Tribal areas. With the help of federal Universal Service Funding ("USF") and Intercarrier Compensation ("ICC") policies, along with loans from the USDA's Rural Utilities Service (RUS), Tribally-owned carriers were able to quickly bring these forgotten areas into the modern era in terms of communications services.

It cannot be stressed enough how important federal USF and ICC policies are to the historical and continued success of Tribally-owned and small rate of return carriers serving Tribal lands in bringing quality voice and broadband services, at affordable rates, to Tribal areas. On average, Tribal Incumbent Local Exchange Carriers receive approximately 30% of their total revenues from federal high cost loop support (which is one of the FCC's FUSF programs). Having a stable and predictable FUSF revenue stream is vital in ensuring Tribally-owned and small rate of return carriers serving Tribal lands can meet operating needs, invest in the future, and comply with loan (many relating to RUS) covenants.

B. *Tribal Areas Require Specific Attention.*

Due to the inherent challenges of serving Tribal areas, Tribally-owned carriers and the areas they serve require specific attention in terms of federal telecommunications policy. This problem is succinctly summarized by the FCC's own Office of Native Affairs and Policy in a recent report:

> "The lack of communications services in Indian Country – be it high speed internet or 'broadband', traditional wireline phone service, mobile service, radio broadcast, or TV broadcast service – is well known. As the Commission has observed previously, '[b]y virtually any measure, communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population.' The lack of robust communications services presents serious impediments to Tribal Nations' efforts to preserve their cultures and build their internal structures for self-governance, economic opportunity, health, education, public safety, and welfare." (internal footnotes omitted)
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> "Understanding the complexity of the digital divide in Indian Country requires an appreciation of the unique challenges facing Tribal Nations, which include deployment, adoption, affordability, and access to spectrum, as well as lack of investment dollars and access to credit and start-up or gap financing. Barriers to the deployment of

> communications services include rural, remote, rugged terrain, areas that are not connected to a road system, and difficulty in obtaining rights-of-way to deploy infrastructure across some Tribal lands – all of which increase the cost of installing, maintaining, and upgrading infrastructure. Affordability of communications services is affected by often endemic levels of poverty. Because Tribal Nations cannot easily collateralize assets that are held in trust by the federal government, and cannot easily access investment dollars, the ability to obtain credit and financing is limited."

The FCC itself, in its landmark ICC/USF Transformation Order, recognized that Tribal areas present unique challenges that need to be acknowledged:

> "…the Commission acknowledged the relatively low level of telecommunications deployment on Tribal lands and the distinct challenges on bringing connectivity to these areas. The Commission observed that communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population…Tribal lands are often in rural, high-cost areas, and present distinct obstacles to the deployment of broadband infrastructure." (¶479)

> "The Commission observed that greater financial support therefore may be needed in order to ensure the availability of broadband in Tribal lands." (¶479)

> "We seek comment generally on whether network operation and investment by Tribally-owned and operated carriers is significantly different from non-Tribal conditions to warrant special treatment for purposes of establishing benchmarks for permissible capital and operating costs. We seek comment above on whether the 90th percentile is the appropriate dividing line to disallow recovery of costs, or whether we should establish a lower or higher threshold, such as the 85th percentile or the 95th percentile. We seek comment here on whether a different percentile is appropriate for Tribally-owned and operated carriers, or whether we should otherwise alter the methodology to take into account the unique circumstances of Tribally-owned and operated carriers that are just beginning to serve their communities." (¶1088)

Also recognized in the ICC/USF Transformation Order is the need for ETCs serving Tribal areas and receiving USF to do so to actively engage with Tribal governments in regards to communications needs. In adopting a set of so-called Tribal Engagement rules, the FCC found:

> "The deep digital divide that persists between the Native Nations of the United States and the rest of the country is well-documented…" (¶636)

> "Engagement between the Tribal governments and communications providers either currently providing service or contemplating the provision of service on Tribal lands is vitally important to the successful deployment and provision of service." (¶637)

Finally, the FCC specifically addressed the unique needs to Tribally-owned and operated carriers as it contemplated making changes to the interstate authorized rate of return:

> "Tribal governments, and by extension, Tribally-owned and operated carriers, play a vital role in serving the needs and interests of their local communities, often in remote, low-income, and underserved regions of the country. Tribally-owned and operated carriers serve cyclically impoverished communities with a historical lack of critical infrastructure. Reservation-based economies lack fundamental similarities to non-reservation economies and are among the most impoverished economies in the country. Tribal Nations also cannot collateralize trust land assets, and as a result, have more limited abilities to access credit and capital." (¶1059)

It is important to note that the FCC has initiated other proceedings and taken other actions specifically to specifically investigate communications needs in Tribal areas, including:

- Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40)
- A Notice of Inquiry to look into ways for improving communications services for Native Nations (CG Docket No. 11-41)
- In the ICC/USF Transformation Order, the FCC established separately-funded programs to enhance the availability of mobile broadband services in Tribal areas - Tribal Mobility Phase I and Phase II funds.

It is therefore clear that the FCC recognizes that meeting national communications goals on Tribal lands presents unique and distinct challenges, the problem is taking the next step and acting to solve the problems already acknowledged.

1. *The Lifeline Program and Tribal Areas*. Since 2000, the federal Lifeline and Link Up programs have recognized that people living on Tribal lands need additional assistance in order to enjoy the benefits brought about by modern communications services. For people living on federally-recognized Tribal areas, Lifeline support in an amount of up to $25 is available to offset the cost of basic telecommunications services. This additional Tribal lands Lifeline support is correctly seen as necessary by the FCC due to the chronic depressed economies and poverty levels that exist in many Tribal areas, and in recognition of the national goal of universal service for all Americans.

2. *National Broadband Plan and Tribal Areas*. The National Broadband Plan (NBP), generated by the FCC pursuant to the American Recovery and Reinvestment Act (ARRA), provides a general blueprint on how the United States can ensure every American has access to "broadband capability." Tribal lands-specific issues were discussed in the NBP often, including:

    > **Recommendation 8.18**: "Congress should consider establishing a Tribal Broadband Fund to support sustainable broadband deployment and adoption in Tribal lands…"

> **Broadband on Tribal Lands**: "Available data, which are sparse, suggest that less than 10% of residents on Tribal lands have broadband available… Many Tribal communities face significant obstacles to the deployment of broadband infrastructure…Tribes need substantially greater financial support than is presently available to them, and **accelerating Tribal broadband deployment will require increased funding**." (*NBP, p. 152, emphasis added*)

While broadband deployment in Tribal areas served by Tribally-owned and small rate of return carriers serving Tribal lands is generally greater than the figures quoted above, thanks in large part to federal regulatory and lending programs, the fact remains that for all Tribal areas to either accelerate broadband deployment and adoption or to maintain current broadband capable networks, financial support most assuredly cannot decrease. Unfortunately, this is the situation in which many Tribally-owned and small rate of return carriers serving Tribal lands find themselves today.

3. *The FCC's Government to Government Relationship with Tribal Governments*. It must not be forgotten that the FCC committed to establish a government-to-government relationship with Indian Tribes via a policy statement released on June 23, 2000. Among other things, the Policy Statement "reaffirmed" the Commission's commitment to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."

   While Tribally-owned and small rate of return carriers serving Tribal lands appreciate the efforts the Commission has undertaken to address Tribal-specific issues, one item that has not been adequately addressed is the unique needs of Tribally-owned and operated carriers. Thus, with this summary, Tribally-owned and small rate of return carriers serving Tribal lands hopes the FCC will expeditiously remedy this oversight.

C. *Reforms Adopted by the FCC Increase Obligations and Reduce Support Revenues*

The FCC adopted substantial reforms to both the FUSF and ICC systems in November 2011. These reforms affected all areas of the industry, from large ILECs to small competitive carriers - wireless and wireline. Perhaps most affected were small, rate of return (RoR) regulated rural incumbent local exchange carriers (RLECs). While it is beyond the scope of this summary to detail each and every adverse impact of the FCC's FUSF and ICC reform, following is a list of the most harmful:

(1) Implementation of an overall per-line cap on high cost loop support (HCLS). The FCC determined that carrier HCLS should be capped at $250 in monthly per line support ($3,000 per year). This policy presents a problem for some Tribally-owned and small rate of return carriers serving Tribal lands in that such a general

cap ignores company-specific issues such as relatively high fixed (and unavoidable costs) associated with serving few customers.

(2) Application of corporate expense limitations to interstate common line support (ICLS). The FCC, prior to the ICC/USF Transformation Order, had limited the recovery of corporate operations expense via HCLS. Now, the FCC has applied the same policy to ICLS, meaning many Tribally-owned and small rate of return carriers serving Tribal lands, with relatively high corporate expenses, are recovering even less from federal sources. As argued elsewhere, many of the FCC's recent actions have caused compliance costs, which are oftentimes classified as corporate operations expenses, to increase.

(3) Adoption and implementation of a process to limit per-line recovery of operating and capital expenses via a statistical analysis-based mechanism (commonly referred to as HCLS benchmarking). This statistical analysis, quantile regression analysis or QRA, imposes arbitrary limits on the recovery of certain levels of expenses, without any specific investigation as to why such expenses might legitimately be higher. In addition, the QRA, as adopted, contains numerous errors and non-cost causative variables.
   - The QRA can dramatically change an individual carrier's support, even though the total support paid out (to all carriers) will not decrease. This makes the QRA-based mechanism a major cause of the uncertainty facing RLECs today.

(4) ICC reforms adopted by the FCC included in essence freezing the revenues available to most Tribally-owned and small rate of return carriers serving Tribal lands to cover certain access costs (where "access" is a service provided to long distance companies to reach local customers). In addition to freezing these revenues, the FCC decided to decrease such revenues by 5% each year. This process is applied to all RoR regulated carriers, which covers most of Tribally-owned and small rate of return carriers serving Tribal lands, no matter what the company-specific circumstances may be. In other words, even if a company made significant investment during a given period, its recovery would be severely limited by the FCC's ICC reforms.
   - It should be noted that the FCC determined to ultimately phase out all forms of intercarrier compensation, meaning most Tribally-owned and small rate of return carriers serving Tribal lands will no longer be compensated for the third party use of their networks

(5) The FCC decided to change the interstate authorized rate of return for small companies, which is applied to investments made in regulated telecommunications plant. While a final decision has not yet been made, the FCC Staff recommended a sizeable decrease to the current 11.25% RoR.

Unfortunately, the above-listed reforms, which have the overall effect of reducing Tribally-owned and small rate of return carriers serving Tribal lands support, were not accompanied by decreases in regulatory obligations or compliances costs. On the contrary, obligations and compliance increased - sometimes dramatically. For example, the FCC decided that certain levels of broadband speeds, performance, and accountability are necessary. Since these are all new policies, and none of the previously existing public interest obligations disappeared, the cost of compliance increased

II. Effects of FCC Activity on Investment

While the purpose of the FCC's ICC and USF reforms ostensibly was to "ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation," reality tells a different story. Many of the FCC's reforms reduced available support and other revenues, which were used by Tribally-owned and small rate of return carriers serving Tribal lands to provide quality, affordable voice and broadband services to Tribal areas. In addition, many of the FCC's reforms caused an exponential increase in regulatory uncertainty, which in turns leads, logically, to decreased investment and, in some cases, decreased access to capital markets. Some RLECs, including Tribally-owned and small rate of return carriers serving Tribal lands, were forced to cut costs, including in some instances by workforce reductions, in order to avoid being within the FCC's arbitrary definition of an unreasonably high cost carrier.

- According to The Tri-County Telephone Association (Kansas), "although TCT began fiber deployment in 2009, that effort was the culmination of years of forecasting and planning. By way of example, TCT explained that the process of obtaining loans prior to builds requires at least 18 months of prior work, and that a half-decade of forecasting and planning can precede the loan process. In this context, carriers plan with a ten-to-twenty year horizon. The level of regulatory certainty necessary to foster the confidence necessary to complete those plans, however, is not discernible as the QRA descends upon the industry."

- The RUS informed the FCC that it "remains concerned over network investment in rural communities upon the issuance of the USF Transformation Order in November 2011."

- According to Balhoff and Williams, LLC, a "startling discovery is that rural investment loan activity is down sharply in the wake of the new reforms, both because the companies are gravely concerned about their ability to repay debt and because the lenders are more cautious in lending due to their judgments about industry fundamentals."

III. Solutions for Tribally-Owned Carriers

Tribally-owned and operated carriers exist for one reason: to provide the best possible service to Native Americans. Many Tribally-owned and small rate of return carriers serving Tribal lands started providing service relatively recently, and thus depended on then-current USF and ICC rules in formulating long range business plans. With the changes brought about by the ICC/USF Transformation Order, Tribally-owned carriers find themselves in situations that could not have possibly been foreseen. As a result, choices have to be made (such as reducing workforces), which in most cases do not, in any way, benefit the Native Americans served or the areas in which they live.

- Implement a Tribal Broadband Fund, as recommended in the National Broadband Plan
- Adopt an interstate authorized rate of return that recognizes the unique circumstances faced by Tribally-owned telecommunications carriers. The National Tribal Telecommunications Association recommended to the FCC an interstate authorized rate of return of 16.08%.
- Maintain and strengthen the federal Lifeline program, and expand it to include broadband services in Tribal areas.
- Grant a blanket waiver for Tribally-owned carriers relating to the ICC frozen baseline and automatic 5% annual reduction
- Grant a blanket waiver for Tribally-owned carriers for the QRA-based HCLS benchmarking rule
- Grant a blanket waiver for Tribally-owned carriers for the monthly $250 per-line cap on support ($3,000 annually)