No. 11-9900

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

On Petition for Review of
an Order of the Federal Communications Commission

TRIBAL CARRIERS PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

No publicly traded company owns 10% or more of the stock of Gila River Telecommunications, Inc., which is wholly owned and operated by Gila River Indian Community, a federally recognized Indian tribe.

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GLOSSARY OF TERMS

"1996 Act"	Telecommunications Act of 1996
"Broadband Plan"	*Connecting America: The Nat'l Broadband Plan*, 2010 WL 972375 (FCC Mar. 16, 2010)
"CRS REPORT"	ANGELE A. GILROY, CONG. RESEARCH SERV., RL33979, UNIVERSAL SERVICE FUND: BACKGROUND AND OPTIONS FOR REFORM (2011)
"CRS SUMMARY"	ANGELE A. GILROY & LENNARD G. KRUGER, CONG. RESEARCH SERV., R42524, RURAL BROADBAND: THE ROLES OF THE RURAL UTILITIES SERVICE AND THE UNIVERSAL SERVICE FUND (2012)
"Eligible carrier" or "ETC"	Eligible telecommunications carrier
"FCC"	Federal Communications Commission
"First USF Order"	*In re Federal-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776 (1997) (No. 96-45)
"Fund" or "USF"	Universal Service Fund
"ICC"	Intercarrier compensation
"Native Nations Notice"	Notice of Inquiry, *In re Improving Commc'ns Servs. for Native Nations*, 26 FCC Rcd. 2672 (2011) (No. 11-41)
"Order"	*In re Connect America Fund*, 26 FCC Rcd. 17663 (2011)
"*Qwest I*"	*Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001)

"*Qwest II*"	*Qwest Commc'ns Int'l Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005)
"Second Notice"	Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *In re Connect America Fund*, 26 FCC Rcd. 4554 (2011) (No. 10-90)

ISSUE PRESENTED

Whether the FCC acted arbitrarily and capriciously in attempting to implement the statutory directives governing universal service in Section 254(b) of the Telecommunications Act of 1996 ("1996 Act") through the imposition of uniform rules resulting in substantial cuts in its universal service fund's support for many carriers, which failed to take into account the substantial record evidence, undisputed by the FCC, that the state of communications services on Tribal lands is especially poor and faces unique disabilities that warrant an increase in universal service fund support for carriers serving Tribal lands.

STATEMENT OF THE CASE

A. Introduction

Congress has long been committed to the goal of universal communications service so as to ensure that "consumers throughout the nation, in both rural and urban markets, have access to an evolving range of telecommunications services." *Qwest Commc'ns Int'l Inc. v. FCC*, 398 F.3d 1222, 1226 (10th Cir. 2005) ["*Qwest II*"] (citation omitted). Congress enacted that goal into law in Section 254 of the 1996 Act, 47 U.S.C. § 254. To carry out the universal service mandate, the FCC has established a universal service fund to provide financial support to carriers. *See In re Federal-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776 (1997) (No. 96-45) ("First USF Order"). The universal service fund has made it possible to bridge service disparities between regions of the Country.

When it comes to services on Tribal lands, however, the FCC has never come close to attaining universal service. Even the most rudimentary telephone service on Tribal lands has long lagged behind the rest of the Country, and it remains profoundly unavailable today. The FCC expressly acknowledged this reality in the Order on review, *see In re Connect America Fund*, 26 FCC Rcd. 17663 (2011) ("Order") (JA at 390-1141), recognizing that additional financial support for carriers providing service on Tribal lands was needed to address significant service gaps on those lands and to achieve the goal of universal service. The Order's new universal service fund rules, however, broke company with these findings; despite finding different needs, the Order subjects most carriers serving Tribal lands to the same draconian cutbacks in financial support as other carriers. As a result, the Order actually makes matters worse on Tribal lands, and unravels the goal of universal service by locking in services that are far inferior to those available almost everywhere else in the United States.

Petitioners Gila River Indian Community and Gila River Telecommunications, Inc. (collectively, "Gila River") are signatories to the Joint Universal Service Fund Principal Brief and the Joint Intercarrier Compensation Principal Brief, which argue that the Order is arbitrary and capricious because, *inter alia*, the FCC failed to articulate how its universal service fund and intercarrier compensation rules are compatible with Sections 254 and 251,

respectively. This separate "Tribal Carriers" brief demonstrates that the Order is arbitrary and capricious for an additional, distinctive reason: there is no rational connection between the evidence before the FCC, which the FCC acknowledged established the uniquely poor state of communications services on Tribal lands, and the FCC's ultimate determination to woodenly apply the new "one-size-fits-all" universal service rules in a way that ignored undisputed and substantial disparities in the need for additional funds. The Order offers no explanation or rationale—and there is none—for the FCC's departure from its recognition that conditions on Tribal lands demanded additional support.

B. Statement Of Facts

1. Congress's Commitment To Universal Communications Services

Congress created the FCC in 1934 for the purpose of making "available *** to all the people of the United States *** a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The goal of universal service for all Americans "has been at the core of the Commission's mandate since its founding." Order ¶ 61 (JA at 411). One obstacle to achieving universal service is that "[t]he cost of providing *** services to customers varies widely." *Qwest Corp. v. FCC*, 258 F.3d 1191, 1195 (10th Cir. 2001) ["*Qwest* I"]. In particular, "it is generally more expensive for a telephone company to provide service in a rural area, where

customers are dispersed, than it is to provide the same service in an urban area, where customers are more concentrated." *Id.*

For most of the 20th century, when the Bell system held a monopoly over telecommunications service, efforts to expand service led to the development of a complex system of state and federal cross-subsidies. *Qwest II*, 398 F.3d at 1226. The cross-subsidy policies increased the number of subscribers to the network by shifting costs among the Bell subsidiaries and subscribers such that profits from lower cost urban areas helped to subsidize deployment and operation costs in higher cost rural areas. *See* ANGELE A. GILROY, CONG. RESEARCH SERV., RL33979, UNIVERSAL SERVICE FUND: BACKGROUND AND OPTIONS FOR REFORM 2 (2011) ("CRS REPORT"). The breakup of the Bell monopoly, however, rendered the system of cross-subsidies untenable. *See id.; see also Qwest II,* 398 F.3d at 1226.

In the 1996 Act, Congress replaced this cross-subsidies system with new mechanisms to ensure universal service and, in doing so, explicitly codified in Section 254 its commitment to universal service. *Qwest I*, 258 F.3d at 1196. Congress laid out in Section 254(b) several principles to guide the FCC's implementation of policies and regulations to promote universal service. As relevant here, those principles are:

> **(1) Quality and rates.** Quality services should be available at just, reasonable, and affordable rates.

> **(2) Access to advanced services.** Access to advanced telecommunications and information services should be provided in all regions of the Nation.
>
> **(3) Access in rural and high cost areas.** Consumers 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, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
>
> ***
>
> **(5) Specific and predictable support mechanisms.** There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

47 U.S.C. § 254(b)(1)-(3), (5)

Congress also required the Commission to establish a universal service support mechanism under which certain carriers could receive "support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). In addition, such support was to be both "explicit and sufficient to achieve" Congress's purposes in the 1996 Act. *Id.*

2. The Universal Service Fund

Pursuant to those congressional directives, the FCC established the Universal Service Fund ("Fund" or "USF") by administrative order in 1997. *See* First USF Order. The Fund provides support and discounts for providers and subscribers through four programs. The program relevant here is the "high-cost"

program, under which carriers who generally serve rural, insular, and other high-cost areas can obtain funds to help offset the higher-than-average costs of providing communications services in such areas. CRS REPORT at 3.

Only carriers designated as "eligible telecommunications carriers" in their service area may receive Fund support in the high-cost program. 47 U.S.C. §§ 214(e), 254(c)(1). There are three types of such "eligible carriers." The first two types are "price-cap" carriers and "rate-of-return" carriers, which are incumbent landline telephone carriers. ANGELE A. GILROY & LENNARD G. KRUGER, CONG. RESEARCH SERV., R42524, RURAL BROADBAND: THE ROLES OF THE RURAL UTILITIES SERVICE AND THE UNIVERSAL SERVICE FUND 9-10 (2012) ("CRS SUMMARY"). Price-cap carriers tend to be large and mid-sized carriers (such as CenturyLink), while rate-of-return carriers tend to be smaller companies that solely serve rural areas (such as Gila River). *See id.* Almost all regions of the country, including all Tribal lands, have either a price-cap carrier or a rate-of-return carrier designated to provide service to that area. FCC, MAP: REGULATORY TYPE AT THE HOLDING COMPANY LEVEL BY STUDY AREA, http://www.fcc.gov/maps/regulatory-type-holding-company-level-study-area.

The third type of eligible carrier is the "competitive *** carrier," which typically entered the market after the breakup of the Bell monopoly (U.S. Cellular, for example, is a competitive carrier). CRS SUMMARY at 11. While some

competitive carriers are landline carriers, most are wireless carriers. *Id.* The competitive carriers compete directly with the incumbent price-cap or rate-of-return carriers providing service.

3. Intercarrier Compensation

Intercarrier compensation ("ICC") "is a system of regulated payments in which carriers compensate each other for the origination, transport and termination of telecommunications traffic." *Connecting America: The Nat'l Broadband Plan*, 2010 WL 972375, at *125 (FCC Mar. 16, 2010) ("Broadband Plan"). Under the existing system, when someone places a call that terminates on a different network, the calling party's carrier is charged a regulated fee by the recipient's carrier. Order ¶ 34 (JA at 403). This fee is based on the cost to the recipient's carrier for terminating the call. Order ¶ 742 (JA at 632-633). In the Order, the FCC discards that system for a "bill-and-keep" regime, in which the recipient's carrier must look only to the recipient, and not to the calling party's carrier, to recover the cost of connecting the call. *Id.* (JA at 632-633). Because many carriers serving Tribal lands will be net losers under the new regime, the FCC solicited comment on whether to provide additional support to certain carriers, including those serving Tribal lands, to offset lost ICC revenues. Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *In re Connect America Fund* ¶ 559, 26 FCC Rcd. 4554 (2011) (No. 10-90) ("Second Notice") (SA at 149).

4. Gila River

Petitioner Gila River Indian Community is a federally recognized Indian tribe that was established in 1859.[1] The Community is centered in an approximately 372,500-acre reservation in rural southern Arizona, where more than 11,000 Tribe members reside. Gila River Comments 2-4 (Apr. 18, 2011) (JA at 2503-05). In recent decades, the Community has sought to bolster its economy to promote the welfare of its members. Gila River Telecommunications, Inc., which was formed in 1988 when the Community purchased a local telephone company, is wholly owned and operated by the Community and provides communications services to those living on the reservation. *Id.* at 2 (JA at 2503).

The cost to Gila River Telecommunications of providing even basic telecommunications service to the Community, never mind advanced telecommunications and information services, is very high. *See* Gila River Comments 4-5 (Apr. 18, 2011) (JA at 2505-06). One reason for the high costs is the Community's low population density, which forces Gila River Telecommunications to extend expensive communications infrastructure over long distances in order to serve a relatively small number of subscribers. *See id.* (JA at 2505-06) (citing the high costs of building out infrastructure on rural, sparsely populated areas with a economically depressed subscriber base). The Community,

[1] *See* Act of Feb. 28, 1859, §§ 3-4, 11 Stat. 401.

like many Tribes, also has a "shortage of technically trained" and highly educated members, Broadband Plan, 2010 WL 972375, at *142, which forces Gila River Telecommunications to contract with more outside vendors than similarly sized carriers, and to pay higher salaries in order to lure skilled employees from the Phoenix metropolitan area, Gila River Comments 11 (Jan. 18, 2012) (JA at 4101) (discussing lack of technically trained members of Gila River).

Finally, and most importantly, the cost to Gila River Telecommunications of deploying and maintaining its network is extremely high. *See* Gila River Comments 4-5 (Apr. 18, 2011) (JA at 2505-06). Obtaining rights of way and permit approvals, deploying communications networks in regions that lack basic infrastructure like roads and bridges, and preserving historical and cultural sites are just a handful of the factors that uniquely drive up the cost of the network. *See* Gila River Comments 9-11 (Jan. 18, 2012) (JA at 4099-4101) (discussing the costs and delays of building out infrastructure on Tribal lands); *see also* Comments of Nat'l Tribal Telecommc'ns Assoc. 42 (Apr. 18, 2011) (JA at 2408) (noting regulatory hurdles for deploying infrastructure).

5. The State Of Communications Services on Tribal Lands

The FCC has long recognized that "communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population." Report and Order and Further Notice of Rulemaking 5,

Extending Wireless Telecommc'ns Servs. to Tribal Lands, 15 FCC Rcd 11794, 11798 (2000) (No. 99-266). Approximately 98% of the households in the United States presently have basic telephone service. Notice of Inquiry at ¶ 1, *In re Improving Commc'ns Servs. for Native Nations*, 26 FCC Rcd. 2672, 2673-2674 (2011) (No. 11-41) ("Native Nations Notice"). On Tribal lands, however, barely 67% of households have basic telephone service. *See id.* (citation omitted). This enormous disparity led former FCC Commissioner Michael Copps to conclude that "[e]ven plain old telephone service—which so many in this country take for granted—is at shockingly low levels of penetration" on Tribal lands. Michael J. Copps, Commissioner, Remarks to the National Congress of American Indians 2 (Nov. 17, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302854A1.pdf. The principal barriers to improved telecommunications services on Tribal lands are "[t]he rural location and rugged terrain of most tribal lands and tribes' limited financial resources." GAO, TELECOMMUNICATIONS: CHALLENGES TO ASSESSING AND IMPROVING TELECOMMUNICATIONS FOR NATIVE AMERICANS ON TRIBAL LANDS 33 (2006), *available at* http://www.gao.gov/new.items/d06189.pdf.

The divide between Tribal lands and the rest of the country over access to broadband is even sharper. As the FCC has found, 65% of Americans living off Tribal lands—but less than 10% of residents on Tribal lands—have access to

broadband in their homes. Broadband Plan at *147. As the FCC has further found, "[m]any Tribal communities face significant obstacles to the deployment of broadband infrastructure," and "[c]urrent funding programs *** are insufficient to address all of these challenges." *Id.* at *142. Accordingly, "[t]ribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding." *Id.*

C. Relevant Procedural History

1. The FCC Raised Tribal Communications Services Issues In Its Notices Regarding the Universal Service Fund

In its three notices of proposed rulemaking regarding possible cuts to the USF, the FCC asked whether, consistent with its conclusion in the Broadband Plan, funding for carriers serving Tribal lands should be increased, rather than decreased, in recognition of the need to rectify the vastly inferior service on Tribal lands. As evidenced below, the comments that the FCC received on this issue were in accord: financial assistance to support service on Tribal lands should be enhanced, not diminished.

In its first Notice of Inquiry in April 2010, the FCC sought comment on ways to stop or limit growth of the high-cost USF program generally, but also asked whether "there are any unique circumstances in Tribal lands that would necessitate a different approach." *See* Notice of Inquiry and Notice of Proposed Rulemaking at ¶ 50, *In re Connect America Fund,* 25 FCC Rcd. 6657, 6677 (2010)

(No. 10-90) (JA at 21). In response, the National Congress of American Indians and Native Public Media stated that "critical infrastructures have not historically been deployed" on Tribal lands and that conditions on Tribal lands "require[] special economic regulatory creativity." Joint Comments of Native Pub. Media and the Nat'l Congress of American Indians 5 (Jul. 12, 2010) (JA at 1677). Those entities later submitted reply comments in which they advised that, until access to communications services on Tribal lands improves, "the Commission must do nothing to cut back support for [the high-cost and low-income] programs." Joint Reply Comments 3 (Aug. 11, 2010) (JA at 1709).

The FCC issued a second notice regarding the USF in March 2011, in which it once again cited to the Broadband Plan's conclusion "that Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband will require increased funding." Second Notice, 26 FCC Rcd. at 4654 (SA at 101). In keeping with the conclusion of the Broadband Plan, the FCC asked whether, as a result of the need for greater financial support for carriers serving Tribal lands, it should treat carriers serving Tribal lands differently, and sought comment on a variety of proposals to do so. *Id.* at 4627 (SA at 74) (whether to exempt rate-of-return carriers serving Tribal lands from a cap on the amount of high-cost support per subscriber line); 4638-4639 (SA at 90) (whether to exempt competitive carriers serving Tribal lands from a proposal to

eliminate high-cost support for such carriers); 4653 (SA at 100) (whether to reserve funds for carriers seeking to provide broadband to unserved Tribal lands); 4702 (SA at 149) (whether to provide additional support to carriers serving Tribal lands to offset lost ICC revenues).

The comments the FCC received on the issue, including comments from Gila River, uniformly stressed that "Tribal lands need substantially more financial support for broadband infrastructure and services." Gila River Comments 4 (Apr. 18, 2011) (JA at 2505); *see* Comments of the Nat'l Tribal Telecomms. Assoc. 32 (Apr. 18, 2011) (JA at 2398) (additional funding is needed "for a variety of platforms and activities essential for delivering and adapting broadband" on Tribal lands); Comments of the Native Telecom Coalition for Broadband 7-9 (Apr. 18, 2011) (JA at 2352-54) (stating that "universal service programs must be maintained at existing levels to benefit Native America communications" and recommending that an additional support mechanism be created to provide additional support to carriers on Tribal lands); *see also* Comments of Alaska Commc'ns Sys. Grp., Inc. 13 (Apr. 18, 2011) (JA at 2485) (same); Comments of the American Cable Ass'n 19 (Apr. 18, 2011) (JA at 2553) (same); Comments of MTPCS, LLC D/B/A Cellular One 3 (Apr. 18, 2011) (JA at 2445) (same); Comments of Nat'l Cable & Telecommunications Ass'n n.20 (Apr. 18, 2011) (JA at 2461) (same); Comments of the Shoshone-Bannock Tribes 1 (Apr. 8, 2011) (JA

at 2042) (same); Comments of TCA, WC Docket 10-90 et al., at 12-13 (Apr. 18, 2011) (same).

In August 2011, the FCC for the third time issued a USF notice, seeking comments on, among other things, a proposal to freeze high-cost support at 2011 levels for all carriers serving Tribal lands. Public Notice at Sec. I.G., *Further Inquiry Into Certain Issues in the Universal Serv.-Intercarrier Compensation Transformation Proceeding*, 26 FCC Rcd. 11112, 11120 (2011) (Nos. 10-90, 07-135, 05-337, 03-109) (JA at 357). Once again, the responses the FCC received, including from Gila River, uniformly advocated for an increase, not a freeze, on high-cost support for carriers serving Tribal lands. *See* Gila River Comments 15 (Aug. 24, 2011) (JA at 3716) (recommending the FCC establish minimum high-cost support levels for carriers serving Tribal lands that are equal to such carriers' 2011 high-cost program and ICC combined revenues); Reply Comments of Smith Bagley, Inc., 2 (Sept. 6, 2011) (JA at 3744) ("Commenters with tribal interests general agree that *** [the unique] factors [facing Tribal lands] warrant the exclusion of tribal areas from phase-outs and other proposed USF reform measures that would reduce existing support levels."); *see also* Comments of Alexicon Telecomms. Consulting 9 (Aug. 24, 2011) (JA at 3265) (same); Comments of Moss Adams LLP, 11 (Aug. 24, 2011) (JA at 3318) (same).

2. The Order's Decision To Group Carriers Serving Tribal Lands With All Other Carriers Despite Differing Needs

The FCC's final Order specifically found that there is a "deep digital divide that persists between the Native Nations of the United States and the rest of the country," such that "'[b]y virtually any measure, communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population.'" Order ¶ 636 & n.1048 (JA at 595) (citation omitted). The Order noted that this divide is not confined to broadband, because "[m]any residents of Tribal lands lack not only broadband access, but even basic telephone service." *Id.* ¶ 636 (JA at 595).

The Order identified the root causes of the disparities. First, the Order recognized that Tribal lands typically are in "remote and underserved areas," Order ¶ 28 (JA at 402), with "significant telecommunications deployment and connectivity challenges," *id.* ¶ 481 (JA at 546). Second, the Order observed that these "characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including," among other things, "[t]he lack of basic infrastructure in many tribal communities" and "a high concentration of low-income individuals with few business subscribers." *Id.* ¶ 482 (JA at 547) (internal quotations and citation omitted). And harkening back to the conclusions in the FCC's Broadband Plan, the Order repeated the refrain that "greater financial support *** may be needed in order to ensure the availability of broadband in

Tribal lands," Order ¶ 479 (JA at 545-46), that is "reasonably comparable to those services provided in urban areas," 47 U.S.C. § 254(b)(3).

The Order nevertheless promulgated new Fund rules that dramatically scaled back high-cost support for many carriers serving rural areas. With one minor exception, carriers serving Tribal lands were not exempted from these new rules. In opting for a uniform approach, the FCC made no reference to its own findings of the distinctive needs of such carriers.[2]

Under the Order, rate-of-return carriers, which, as indicated above (at *supra*, B.1), typically are small landline carriers, like Gila River, that serve rural and Tribal areas, face funding caps in the Order or the elimination of many of the components that make up the high-cost support program for rate-of-return carriers. *See* Joint Preliminary Brief of the Petitioners 26-34 (Sept. 24, 2012) (summarizing changes to the high-cost support rules for rate-of-return carriers). The Order estimates that more than 66% of such carriers will see reductions in high-cost support as a result of these new rules. Order ¶ 290 (JA at 496). Gila River, for its part, estimates that it will receive between $300,000 and $1.6 million less annually in high-cost support than it did in 2011. In addition, like many rate-of-return carriers, Gila River will lose hundreds of thousands of dollars in intercarrier

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[2] Standing Rock Telecommunications was granted a two-year exemption from the new rules phasing out high cost support for competitive carriers. *See infra* Part II.D.

compensation revenues. *See* Gila River Comments (July 1, 2011) (JA at 4494). At the same time, Gila River and other rate-of-return carriers are now required for the first time under the rules to provide broadband service to subscribers. Order ¶ 206 (JA at 467). In short, the Order requires Gila River and most rate-of-return carriers serving Tribal lands to provide the same level of voice service and to provide new broadband service, but with deeply reduced funding.

By contrast, under the Order, price-cap carriers, which, as indicated above (at *supra*, B.1) are typically larger landline carriers, will receive annual support equal to their 2011 high-cost support amounts. Order ¶ 22 (JA at 400). While price-cap carriers that "accept[] [this] support will be required to deploy broadband to a number of locations" within that carrier's service area, they are eligible to receive an additional $300 million of new funding to promote broadband deployment. *Id.* ¶¶ 25, 138 (JA at 401, 444).

That is not all. The Order also eliminates an existing support mechanism for competitive carriers known as the identical support rule, which provided competitive carriers with the same amount of high-cost support per line as an incumbent landline carrier received per line in the service area. Order ¶ 29 (JA at 402). In place of the identical support rule, the Order creates a Mobility Fund, eligible only to wireless carriers, to support mobile broadband networks. Phase I of the Mobility Fund, scheduled for 2012-2013, provides a one-time infusion of

$300 million for the expansion of mobile services in unserved areas, Order ¶ 314 (JA at 505), and an additional $50 million for expansion of mobile services to unserved Tribal lands. *Id.* ¶ 481 (JA at 546). Phase II, which is not currently scheduled, will provide $500 million per year for ongoing support of mobile broadband services, with up to $100 million of this amount reserved to support services on Tribal lands. *Id.* ¶¶ 493-494 (JA at 551). These support levels, $50 million in Phase I and then up to $100 million annually thereafter, most likely represent significantly less funding than wireless carriers serving Tribal lands previously received on an annual basis under the old rules. *See id.* ¶ 525 (JA at 561) (support provided to competitive carriers serving Tribal lands was approximately $150 million in yearly funding in 2011).

SUMMARY OF ARGUMENT

The goal of universal communications service, codified in Section 254 of the 1996 Act, remains a pipedream on Tribal lands. As the FCC itself found based on the substantial record evidence before it, communications service on Tribal lands, from the most basic telephone service to more complex broadband service, is especially poor, and carriers providing service on Tribal lands face unique and substantial barriers. In light of that evidence, the FCC acknowledged in the Order that increased USF support for such carriers was warranted. And yet, the Order ultimately subjected those carriers to the same basic set of undifferentiated USF

rules that the FCC is imposing on other carriers and that mandate significant decreases in USF support. The Order is arbitrary and capricious because it offered no explanation at all (and there is none) for the stark incongruence between the evidence about the deplorable communications conditions on Tribal lands and the FCC's decision to perpetuate those conditions through draconian USF cuts to the carriers serving those lands.

This Court's precedents in *Qwest I* and *Qwest II* require the FCC to balance the multiple Section 254 universal service factors in formulating policies that seek to meet the goal of universal service. The Order is dead silent, however, as to how the FCC balanced those factors when concluding that its essentially one-size-fits-all approach furthers the goal of universal service on Tribal lands.

The Order's continuation of current USF support levels for price-cap carriers underscores the irrationality of the FCC's actions as they pertain to Tribal lands. Tribal lands are served primarily by rate-of-return carriers, whose USF support levels are greatly diminished by the Order. But there is simply no evidence that communications service on Tribal lands served by price-cap carriers is worse than communications service on Tribal lands served by rate-of-return carriers.

The financial strait-jacket placed on rate-of-return carriers serving Tribal lands is all the more suffocating because the Order demands that those carriers offer new and costly broadband service, albeit now with much less USF support.

The Order proclaims that its reduction in USF support will eliminate purported inefficiencies and waste. But as the Order itself recognizes, inefficiencies and waste are not the primary obstacles to universal service on Tribal lands. And in any event, combining massive funding cuts with significant new service obligations is hardly the way to tackle any waste and inefficiencies that may be handicapping rate-of-return carriers that serve Tribal lands.

The Order's creation of a new Tribal Mobility Fund is woefully insufficient and does not make a real dent in the shortfall wrought by the Order. The Tribal Mobility Fund is limited to competitive wireless carriers and thus is off-limits to the vast majority of rate-of-return carriers because they provide landline service. And even as to competitive wireless carriers, the Tribal Mobility Fund pales in comparison to existing support mechanisms.

Finally, the Order's grant of a temporary exemption to one competitive Tribally owned carrier from the phase-out of high-cost support applicable to all other competitive carriers again highlights the disconnect between the evidence before the FCC and its actions. The factual considerations on which the FCC based its decision to grant the exemption to that single Tribally owned carrier apply full well to virtually all other Tribally owned carriers, be they competitive carriers or rate-of-return carriers. It is the touchstone of arbitrary and capricious

rulemaking for an agency to treat similarly situated parties in a highly different manner.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of agency action must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1257 (10th Cir. 2002). While a court should defer to an agency's reasonable interpretation of a statute it administers and not substitute its judgment for that of the agency, *Chevron, USA v. NRDC*, 467 U.S. 837, 842-843 (1984), agency action will be overturned as arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1189 (10th Cir. 2006) (internal quotation and citation omitted). An agency also acts arbitrarily and capriciously if it neither "'engage[s] the arguments raised before it,'" *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (citation omitted), nor "explain[s]

why it rejected evidence that is contrary to its findings," *Carpenters and Millwrights v. NLRB*, 481 F.3d 804, 809 (D.C. Cir. 2007) (citation omitted).

II. THE ORDER'S APPLICATION OF SECTION 254'S UNIVERSAL SERVICE PRINCIPLES IS ARBITRARY AND CAPRICIOUS BECAUSE THERE IS NO RATIONAL CONNECTION BETWEEN THE FCC'S FINDINGS REGARDING THE DISMAL STATE OF COMMUNICATIONS SERVICES ON TRIBAL LANDS AND ITS SUBJECTION OF TRIBAL CARRIERS TO RULES RESULTING IN FUNDING CUTS

Section 254 of the 1996 Act requires the FCC to "base policies for the preservation and advancement of universal service" on a set of statutorily prescribed principles. 47 U.S.C. § 254(b). As relevant here, those principles include: "Quality services should be available at just, reasonable, and affordable rates," *id.* § 254(b)(1); "Access to advanced telecommunications and information services should be provided in all regions of the Nation[,]" *id.* § 254(b)(2); and consumers nationwide, "including low-income consumers and those in rural, insular, and high cost areas," should enjoy services that are "reasonably comparable" to the services available in urban areas, at "reasonably comparable" rates, *id.* § 254(b)(3). Congress also requires the FCC to ensure that the financial support the FCC and States provide to carriers is "specific, predictable and sufficient *** to preserve and advance universal service." *Id.* § 254(b)(5); *see also* § 254(e) (requiring that financial support FCC provides must be "sufficient to achieve" universal service goal).

Twice before, this Court overturned prior universal service orders after concluding that the FCC had failed "to provide sufficient reasoning or record evidence to support [their] reasonableness" when measured against Section 254(b)'s universal service principles. *Qwest I*, 258 F.3d at 1195; *see also Qwest II*, 398 F.3d at 1234. The Fund rules adopted in the FCC Order here are equally deficient and necessitate the same judicial intervention. The evidence before the FCC showed conclusively that the state of communications services on Tribal lands remains dire. Indeed, the FCC's Order made specific findings about the dismal state of communications services on Tribal lands, how far they lag behind Congress's universal service goal, and the need for increased funding to bring services on Tribal lands up to par with other areas and congressional intent. In fact, the FCC's findings mirrored its conclusion just a few years earlier that "Tribes need substantially greater financial support than is presently available to them[.]" Broadband Plan at *142.

The FCC's Order, however, ignored the very problem it said needed to be fixed. Instead, the Order subjects rate-of-return carriers serving Tribal lands to the same Fund rules that the FCC imposed on rate-of-return carriers serving non-Tribal lands. These rule changes result in reduced support to more than 66% of rate-of-return carriers. Order ¶ 290 (JA at 496). Still worse, the Order directed all of these carriers to expand broadband services, leaving these carriers with even fewer

resources to put into meeting the telecommunications needs of Tribal residents, and compounding the impairment of universal service prospects on Tribal lands. Nowhere in its Order does the FCC "'articulate[] a rational connection between the facts found and the decision made.'" *Cliffs Synfuel*, 291 F.3d at 1257 (citation omitted). Instead, the Order simply ignored the problems that the Order itself had identified, and thereby tied itself to new universal service policies "that run[] counter to the evidence before [it]." *Ecology Center*, 451 F.3d at 1189.

A. The FCC Offered No Explanation For Its Failure To Correlate Funding To Need Or To Advancement Of Congress's Universal Service Goal

While the FCC proclaims in the Order that it balanced the Section 254(b) principles in arriving at the conclusion that uniform application of rate-of-return rules is consistent with the goal of universal service and will "eliminate waste and inefficiency," Order ¶¶ 194-195 (JA at 465), its actions do not match its words. In particular, the Order leaves the public in the dark, with no explanation for how its quest for efficiency advances Congress's command of universal access to advanced telecommunications and information services in all regions of the country (Section 254(b)(2)), including Tribal lands, and that consumers in all regions of the country, including Tribal lands, should have access to telecommunications and information services that are reasonably comparable to services provided in urban areas (Section 254(b)(3)).

To be sure, there may be instances in which some of the Section 254(b) principles will conflict with one another, requiring the FCC to balance as best as possible its accomplishment of congressional goals. *Qwest II*, 398 F.3d at 1234. But the FCC is not entitled to carte blanche when attempting to strike that balance. Rather, an FCC universal service order issued under Section 254(b) will be overturned if "the FCC *** [fails] to demonstrate that its balancing calculus t[ook] into account the full range of principles Congress dictated to guide the Commission in its actions." *Id.* In short, agency say-so is no substitute for reasoned explanation. The FCC's failure to articulate how it balanced the Section 254(b) principles as they pertain to rate-of-return carriers serving Tribal lands, despite specific comments directed to the problem and its own repeated acknowledgment of the special issues facing such lands, renders the Order arbitrary and capricious with respect to such carriers. *See Ecology Ctr.,* 451 F.3d at 1189 (agency action is arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency") (citation omitted).

B. The One-Size-Fits-All Treatment Of Rate-Of-Return Carriers Contravenes The FCC's Own Findings And Substantial Record Evidence Establishing The Need For Increased Funding On Tribal Lands

Even if it had tried, it is doubtful that the FCC could rationally have explained its undifferentiated and wooden treatment of rate-of-return carriers on

Tribal lands given the Order's multiple, simultaneous findings concerning the distinct need for increased funding and support for services on Tribal lands. But this case is even easier because the FCC made no effort to explain itself. The Procrustean goal of uniformity for its own sake defeats rather than promotes congressional intent.

Here is what the FCC itself said in the Order on the subject of communications services on Tribal lands: The FCC deplored the "relatively low level of telecommunications deployment on Tribal lands and the distinct challenges in bringing connectivity to these areas." Order ¶ 479 (JA at 545). The FCC expressed concern that persons living in "Tribal lands have historically had less access to telecommunications services than any other segment of the population." *Id.* (JA at 545-46). The FCC also observed that "[m]any residents of Tribal lands lack not only broadband access, but even basic telephone service." *Id.* ¶ 636 (JA at 595). And precisely because of these lingering poor conditions on Tribal lands, the FCC concluded that "greater financial support therefore may be needed in order to ensure the availability of broadband in Tribal lands." *Id.* ¶ 479 (JA at 546). Those are the FCC's own words and findings.

None of this was a revelation to the FCC. In its 2010 Broadband Plan, the FCC acknowledged the same dismal facts about the state of communications conditions on Tribal lands and the need for increased funding to correct that

problem. In particular, "[c]urrent funding programs *** are insufficient to address all of [the] challenges ***" faced by Tribal communities, "including high build-out costs, limited financial resources that deter investment by commercial providers and a shortage of technically trained members who can undertake deployment and adoption planning." 2010 WL 972375, at *142. The FCC therefore advocated "greater financial support [for tribes] than is presently available to them," and admonished that "accelerating Tribal broadband deployment will require increased funding." *Id.*

The FCC did not stop there. Later in 2010 and again in 2011, the FCC reaffirmed the conclusion that "substantially greater financial support" is "need[ed]" than "is presently available to [Tribes], and accelerating Tribal broadband will require increased funding." Notice of Proposed Rulemaking ¶ 33, *In re Universal Serv. Reform Mobility Fund*, 25 FCC Rcd. 14716, 14728 (2010) (No. 10-208) (JA at 234); Native Nations Notice ¶ 9, at 2678 ("[T]he National Broadband Plan states that Native Nations need substantially greater financial support than is presently available through existing federal programs to accelerate broadband deployment on Tribal lands.").

In the new Fund rules set forth in the Order, however, the FCC turned its back on its own findings and its own evidence. The FCC simply ignored what it had said about the need for greater funding for carriers serving Tribal lands in the

Broadband Plan, in the subsequent reaffirmation of that position in 2010, in yet another reaffirmation in 2011, and in the Order itself. The nearly universal cutbacks in support for rate-of-return carriers simply cannot be squared with the evidentiary record that the FCC itself made documenting quite powerfully that Tribal carriers are in an entirely different situation from other carriers. It is arbitrary and capricious for the FCC to treat apples as oranges—to treat as the same that which the FCC and the overwhelming record evidence have specifically recognized are different.[3]

Finally, the FCC's treatment of price-cap carriers does not cure its failure to address the needs on Tribal lands served by rate-of-return carriers. Importantly, nowhere did the FCC conclude that Tribal lands served by price-cap carriers were worse served than Tribal lands served by rate-of-return carriers. Consequently, the Commission's decision to maintain the annual support of *price-cap* carriers, including those serving Tribal lands, at 2011 levels, while also making these same carriers (but not rate-of-return carriers) eligible for up to an additional $300 million of new funding to promote broadband deployment, is arbitrary and capricious. At

[3] The Order's regression methodology, which is based on an evolving and uncertain set of variables, does not cure the FCC's failure to address the needs of carriers serving Tribal lands because it fails to ensure that their unique circumstances will be considered. Instead, it delegates the function of choosing the relevant regression variables to the Wireline Competition Bureau, Order ¶ 217 (JA at 471), whose ultimate methodology will not even be subject to APA procedures, *see U.S. Telecom Ass'n v. FCC,* 400 F.3d 29, 34 (D.C. Cir. 2005). *See generally* Joint Universal Service Fund Principal Brief, at II.D.

minimum, *all* carriers serving Tribal lands should have had existing support levels guaranteed at 2011 levels.

Moreover, it is unclear whether the support for price-cap carriers will be used to make any meaningful impact on the state of communications services on Tribal lands. In order to obtain such additional funding, price-cap carriers had to agree to a full broadband deployment obligation. Order ¶ 147 (JA at 448). However, because of lack of interest among price-cap carriers in deploying broadband to high-cost, unserved areas, only $115 million of the available $300 million was claimed. *See* Press Release, FCC, *FCC Kicks-Off 'Connect America Fund' With Major Announcement*, Public Notice (July 25, 2012). Some of the largest price-cap carriers, including Verizon and AT&T, declined to accept this funding and the attendant deployment obligations. In addition, even for those few price-cap carriers that did accept funding, it is unclear how much of the support will go towards Tribal lands in light of the high costs of deploying infrastructure on such lands. For example, Alaska Communications Systems Group, Inc., a price-cap carrier serving Tribal lands that accepted the additional funding and took on broadband deployment obligations, recently petitioned the FCC for a waiver of the broadband build-out obligations because of the "high costs of deployment" and the lack of a business case for broadband in the proposed service area. Alaska Commc'ns Sys. Grp., Inc.'s Pet. for Waiver at i (Sept. 26, 2012) (JA at 4443).

C. The FCC Failed to Articulate How Its One-Size-Fits-All Approach to Rate-of-Return Carriers Will Provide Sufficient Support to Carriers Serving Tribal Lands To Enable Them To Fulfill New Obligations Imposed By The Order

At the same time it financially hobbled rate-of-return carriers serving Tribal lands, the FCC increased their load, imposing new and expensive broadband obligations on them. Put another way, the Order irrationally mandates that rate-of-return carriers serving Tribal lands do vastly more while depriving them of the funding needed just to break even. That is not "efficiency," Order ¶ 194 (JA at 465); that is blinking reality. And it confounds the fundamental purpose of Section 254.

The Order devotes chapter and verse to its argument that the new Fund rules will prevent *excessive* support and therefore—the FCC assumes—necessarily will provide sufficient support. Order ¶ 194 n.315 (JA at 465). But a rational Section 254 analysis also must account for whether *too little* support is being provided. *See Alenco Commc'ns, Inc. v FCC*, 201 F.3d 608, 620 (5th Cir. 2000). The statute requires "a reasonable *balance* between the Commission's mandate to ensure sufficient support for universal service and the need to combat wasteful spending." *Id.* (emphasis added). Here, the FCC put all its weight on the latter half of that equation, leaving support for universal service on Tribal lands served by rate-of-return carriers out of the equation altogether.

In particular, the Order is devoid of any rational explanation of how its rules resulting in draconian cuts combined with increased burdens will preserve and enhance communications services on Tribal lands served by rate-of-return carriers. The Order claims that reductions in support will universally "root[] out inefficiencies," Order ¶ 289 (JA at 496), which sounds fine in the abstract, but simply ignores the FCC's own-acknowledged realities confronting Tribal lands. The Order also basically disregards the substantial additional costs of complying with the new obligation that, to receive Fund support, rate-of-return carriers serving Tribal lands must provide minimum broadband capability of 4 Mbps down and 1 Mbps up (*e.g.,* Order ¶ 206) (JA at 467). Because the Order itself recognizes that the problems with universal service on Tribal lands are caused by a multitude of factors that have nothing to do with inefficiency or waste, *see, e.g.*, Order ¶¶ 28, 481-482 (JA at 401-02, 546-47), the tagteam of cuts and increased burdens bear no logical correlation, much less direct relationship, to the root causes of inadequate service on Tribal lands. The Order's proposed cure does not fit the Order's diagnosed disease.[4]

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[4] Likewise, the Order's "bill-and-keep" intercarrier compensation changes, which will result in reduced funding for those carriers serving the most insular and high-cost areas, will not cure any of the serious problems the Order recognizes, either. During the proceeding below, Gila River submitted data demonstrating that these changes will have an immediate, significant adverse impact on Tribal revenues. *See* Gila River Comments (July 1, 2011) (JA at 4493). Nevertheless, the FCC declined to exempt carriers serving Tribal lands from the new bill-and-

The Order's creation of a Tribal Mobility Fund for competitive wireless carriers does not cure the sufficiency defect. In fact, the Order likely will result in substantially less financial support for the provision of wireless services on Tribal lands. Specifically, the Order eliminates an existing support mechanism for competitive carriers known as the identical support rule, which provided these carriers with the same per-line amount of high-cost support as the incumbent landline carrier. Order ¶ 29 (JA at 402). Competitive carriers serving Tribal lands received approximately $150 million in 2011 in high-cost support as a result of the identical support rule. The Order replaces the identical support rule with the Mobility Fund, which will provide support for competitive carries providing wireless services.

But the Mobility Fund is an insufficient replacement for the identical support rule. Phase I of the Mobility Fund provides a one-time infusion of $300 million for the expansion of mobile services, Order ¶ 314 (JA at 505), but only an additional $50 million for expansion of mobile services to unserved Tribal lands. *Id.* ¶ 481 (JA at 546). Phase II of the Mobility Fund provides $500 million per year for ongoing support of mobile services, with "up to $100 million" of this

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keep regime. *See* Order ¶ 802 n.1506 (JA at 663); *see generally* Joint Intercarrier Compensation Principal Brief Sec. II.

amount reserved to support services on Tribal lands. *Id.* ¶¶ 493-494 (JA at 551).[5] In short, while the Mobility Funds give Tribal lands some support, the Order takes away far more support through the elimination of the identical support rule.[6]

D. The FCC's Grant Of A Temporary Exemption To One Tribally Owned But Not Any Other Tribally Owned Carriers Is Arbitrary And Capricious

The Order generally requires a five-year funding phase-out of all high-cost support that competitive carriers receive under the identical support rule. The sole competitive carrier exempt from the phase-out is Standing Rock Telecommunications, a Tribally owned competitive carrier, which was granted a two-year freeze at current funding levels. Order ¶ 530 (JA at 563). The FCC's stated reasons for sparing Standing Rock (at least temporarily) from the financial chopping block included the following considerations:

- "Tribally-owned [carriers] play a vital role in serving their communities, often in remote, low-income, and unserved and underserved regions";

[5] Because the amount awarded under Phase II of the Mobility Fund is "up to $100 million," and because the Order does not explain how this support will be awarded, competitive carriers serving Tribal lands may receive far less than the full $100 million per year in support. Order ¶ 28 (JA at 401-02).

[6] The fact that adversely affected carriers can seek a waiver, Order ¶ 293 (JA at 497-98), does not mean that they will receive "sufficient" support. In any event, a waiver cannot paper over an otherwise unreasonable rule. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50-51 (D.C. Cir. 1977) (holding that "the rules must be assessed without reference to the waiver provisions," which were "[m]anifestly" inadequate to cure rules' problems).

- "[A] tailored approach" was appropriate "because of the unique federal trust relationship we share with federally recognized Tribes," such that "the federal government [must] adhere to certain fiduciary standards in its dealings with Tribes";

- The government has "a longstanding policy of promoting Tribal self-sufficiency and economic development";

- "As an independent agency of the federal government, 'the Commission recognizes its own general trust relationship with, and responsibility to, federally recognized Tribes'"; and

- "[T]he Commission has previously taken actions to aid Tribally-owned companies, which are entities of their Tribal governments and instruments of Tribal self-determination."

Order ¶ 530 (JA at 563); *see also id.* n.885.

The rub for the FCC is that these considerations apply equally to Gila River and the other Tribally owned carriers (all of which are rate-of-return carriers), not just to Standing Rock. Indeed, Gila River and the National Tribal Telecommunications Association cited the very same considerations in advocating increased funding for Tribally owned carriers. *See* Gila River Comments 2 (Apr. 18, 2011) (JA at 2503) (advocating for additional support "to ensure the financial viability of tribally-owned telecommunications serving Tribal lands"); Comments of National Tribal Telecomms. Assoc. 3 (Apr. 18, 2012) (JA at 2369) ("Because of their unique status, Tribally-owned [carriers] should be protected from cuts to high-cost support to enable [these carriers] to continue to provide essential broadband service to their communities.").

The FCC offered no credible explanation for its refusal to extend the temporary exemption to other Tribal carriers, aside from Standing Rock. The very essence of arbitrariness and capriciousness is the erratic and profoundly disparate treatment of identically situated entities without any reasoned explanation. *See Carpenters and Millwrights*, 481 F.3d at 809 (agency acts arbitrarily when it fails to "explain why it rejected evidence that is contrary to its findings").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Joint Universal Service Fund Principal Brief and the Joint Intercarrier Compensation Principal Brief, this Court should set aside the Order and remand to the FCC.

Respectfully submitted,

Dated: July 17, 2013

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2013, and pursuant to the Court's Order Governing Procedures for the Electronic Filing of All Briefs in the Consolidated Proceedings, I electronically filed the foregoing with the Court via e-mail to **FCC_briefs_only@ca10.uscourts.gov**, which will send notification of such filing to all counsel who have entered appearances in the consolidated proceedings. I have also this day mailed 20 copies of this brief for filing with the Court.

Dated: July 17, 2013

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