

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' REPLY BRIEF

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GLOSSARY OF TERMS

“APA”	Administrative Procedure Act
“ <i>Benchmark Order</i> ”	Order, <i>Connect America Fund: High-Cost Universal Service Support</i> 27 FCC Rcd 4235 (WCB 2012)
“Broadband Plan”	<i>Connecting America: The Nat’l Broadband Plan</i> , 2010 WL 972375 (FCC Mar. 16, 2010)
“COLR”	Carrier of last resort
“Eligible carrier” or “ETC”	Eligible telecommunications carrier
“FCC”	Federal Communications Commission
“Fund” or “USF”	Universal Service Fund
“ <i>Order</i> ”	<i>In re Connect America Fund</i> , 26 FCC Rcd. 17663 (2011)
“ <i>Qwest II</i> ”	<i>Qwest Commc’ns Int’l Inc. v. FCC</i> , 398 F.3d 1222 (10th Cir. 2005)
Telecommunications Act	Telecommunications Act of 1996

INTRODUCTION

Time and again, the FCC has found that to achieve the universal service goals of Section 254(b) of the Telecommunications Act, additional financial support was necessary to help redress the dire state of telecommunications service on Tribal lands. The FCC reiterated that finding in the *Order* at issue here. The actions instituted by the *Order*, however, are at cross-purposes with those findings. The *Order* subjects rate-of-return carriers serving Tribal lands to the same rules that make significant reductions in USF high-cost support to the majority of rate-of-return carriers. The *Order* fails to explain how the FCC could find one thing over and over again and then implement exactly the opposite. And no adequate explanation for this about-face appears in the FCC's response to Gila River's brief. Indeed, if anything, the FCC's response serves only to underscore the lack of rational connection between the *Order*'s recognition of the dismal condition of telecommunications service on Tribal lands, on the one hand, and the *Order*'s adoption of rules that significantly decrease USF support for the majority of rate-of-return carriers, including carriers like Gila River that serve Tribal lands, on the other hand.

Twice before, this Court has vacated USF orders issued by the FCC on the ground that the FCC failed "to provide sufficient reasoning or record evidence" to demonstrate that the orders were consistent with the universal service principles of

Section 254(b). *Qwest Corp. v. FCC*, 258 F.3d 1191, 1195 (10th Cir. 2001); *see also Qwest Commc'ns Int'l Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005). As it relates to USF support for service on Tribal lands, the reasoning and evidence underlying the *Order* at issue here are similarly deficient. Thus, under the *Qwest* decisions, this Court should set aside the *Order* and remand to the FCC.¹

I. THE ORDER'S SIGNIFICANT REDUCTION IN HIGH-COST SUPPORT FOR RATE-OF-RETURN CARRIERS IS ARBITRARY AND CAPRICIOUS WITH RESPECT TO THOSE RATE-OF-RETURN CARRIERS SERVING TRIBAL LANDS.

As Gila River demonstrated in its opening brief, the *Order* subjects rate-of-return carriers serving tribal lands to the same rules that the *Order* imposes on rate-of-return carriers generally – rules that mandate a significant reduction of funding to most rate-of-return carriers. This one-size-fits-all solution flies in the face of the FCC's consistent recognition in the *Order* and elsewhere that the deplorable state of telecommunications service on Tribal lands necessitates substantially more, rather than substantially less, financial support to carriers serving those lands. The FCC's wooden, undifferentiated approach to the problems facing Tribal lands thus also defies the statutory requirement that universal service principles be employed

¹ Although Gila River is “the only Tribal carrier to challenge the *Order*,” Federal Respondents' Response to Tribal Carriers' Principal Brief (“FCC Br.”) 14, many rate-of-return carriers that serve Tribal lands are challenging the *Order* as well. *E.g.*, Comments of the RLEC ETCs, WC Docket 10-90 *et al.* at 1 (filed Sept. 26, 2012) (JA at 4430) (identifying co-Petitioners Chippewa County Telephone Company, Hiawatha Communications, and Ontonagon County Telephone Company as rate-of-return carriers that serve Tribal lands).

so as to bridge disparities in service between regions of the country. Gila River Opening Br. 25-28. The FCC's contention that the *Order's* funding formula rests on individual characteristics of rate-of-return carriers and thus factors in the nature of the communities they serve is highly misleading. And the justifications the FCC advances for its severe treatment of rate-of-return carriers are hollow.

A. The Order Essentially Treats All Rate-of Return Carriers In The Same Manner.

The FCC contends that the support provided to rate-of-return carriers under the *Order* is “based on each carrier’s individual costs[.]” FCC Br. 22. This argument blinks reality. When push comes to shove, the *Order* applies new and nearly *identical* limits and funding limitation formulas to *every* rate-of-return carrier.

This uniformity is reflected throughout the *Order*. All rate-of-return carriers are subjected to an across-the-board \$250 per month per line limit on high-cost support. *Order* ¶ 273 (JA at 492). Local Switching Support, which allowed the smallest rate-of-return carriers to receive increased high-cost support, and Safety Net Additive support, which was support for rate-of-return carriers that made significant network investments, are eliminated for all carriers. *Id.* ¶¶ 250, 257 (JA at 484, 487). And all rate-of-return carriers are subjected to the same new limits and modified limitations formula applied to corporate operations expenses. *Id.* ¶¶ 229-231 (JA at 474-475). Even the benchmark rule, which uses a regression

methodology to compare costs of rate-of-return carriers, Petitioners' Preliminary Br. 27-28, applies the same percentile limit on recovery of costs for *all* rate-of-return carriers. *See Order, Connect America Fund: High-Cost Universal Service Support* 27 FCC Rcd 4235, ¶ 10 (WCB 2012), *application for rev. granted in part, Connect America Fund*, 28 FCC Rcd 2572 (2013); petitions for review pending sub nom. *Nat'l Telecomm. Coop. Ass'n v. FCC*, No. 13-1661 (4th Cir. filed May 21, 2013) ("The regression-derived limits are set at the 90th percentile of costs for [capital expenses] and [operating expenses] compared to similarly situated companies."); *see generally* Petitioners' Preliminary Br. 27-29 (summarizing changes to high-cost support for rate-of-return carriers).

The FCC does not dispute that the new rules apply to rate-of-return carriers serving Tribal lands, despite their acknowledged greater needs, just as the rules apply to all other rate-of-return carriers. The FCC claims, however, that the *Benchmark Order's* inclusion of a "tribal variable" in its regression methodology demonstrates that the FCC has taken those needs into account. FCC Br. 20-21 & n.7. The FCC's reliance on the tribal variable is misplaced. As set forth in the Petitioners' Joint USF briefs, the *Order* delegates unbounded authority to an FCC bureau to concoct regression variables without adhering to APA notice and comment requirements. As a result, the tribal variable can be modified or eliminated at any time without advance notice or other rulemaking protections,

thus violating the USF statute's "predictability" mandate. 47 U.S.C. § 254(b)(5).

See Joint USF Brief 36-39; Joint USF Reply Brief 17-20.

B. The *Order*'s Significant Cuts In USF Support Undermine The Goal Of Universal Service On Tribal Lands.

The *Order* makes significant reductions in USF support for the majority of rate-of-return carriers.² And Gila River is among those carriers that will suffer from the diminished support, thus compromising telecommunications service on the Tribal land that it serves and undermining the goal of universal service. The FCC's attempts to minimize those cuts are unavailing.

First, the FCC belittles the impact of the *Order* on Gila River. It claims that Gila River's contention that it will receive between \$300,000 and \$1.6 million less in high cost support annually as a result of the *Order* is based on outdated pre-*Order* estimates, and that, by virtue of the subsequently enacted *Benchmark Order*, Gila River "has so far seen no reduction of its High Cost Loop Support." FCC Br.

² The FCC asserts that, under the *Order*, 46% of rate-of-return carriers will "see either no reduction or an increase" in support. FCC Br. 5 n.2. The *Order* does not plainly say that, however. Rather, it states that "almost 34 percent of rate-of-return carriers will see no reductions whatsoever, and more than 12 percent of providers will an increase in high-cost universal service receipts." *Order* ¶ 290 (JA at 496). Gila River read this sentence to mean that the 12% of providers that will see an increase in support under the *Order* are a subset of the 34% that will see no reductions. Based on that reading, Gila River stated in its opening brief that 66% of rate-of-rate of return carriers will see a reduction in support under the *Order*. In any event, even if the number of rate-of-return carriers seeing no reductions under the *Order* is 46% (as the FCC says it is), it remains the fact that a majority of rate-of-return carriers will experience a reduction in support as a result of the *Order*.

29-30. The FCC ignores, however, that High Cost Loop Support is only one of four forms of high cost support. Joint USF Br. 30 (identifying High Cost Loop Support, Local Switching Support, Interstate Common Line Support, and Safety Net Additive as the four forms of high cost support under the pre-*Order* rules). After the *Order* was issued, Gila River submitted to the FCC two comprehensive financial forecasts, one prepared by a private cost consultant and the other prepared by the National Exchange Carrier Association, predicting a substantial diminution of its overall high cost support under the *Order*. See Letter from Tom W. Davidson, WC Docket 10-90 *et al.* (filed Mar. 1, 2012) (JA at 4498-4508). As demonstrated in these forecasts, more than \$300,000 of Gila River's projected loss stems from the *Order's* reduction of funding that simply is not addressed by the *Benchmark Order* – specifically, losses stemming from the *Order's* extension of the modified corporate operations expense limit to Interstate Common Line Support and its elimination of the Safety Net Additive and Local Switching Support. *Id.*

The FCC fares no better in its effort to downplay the impact of the *Order* on rate-of-return carriers serving Tribal lands in general. It declares that the support provided to them will be “sufficient,” thus satisfying Section 254(b)(5) of the Communications Act. FCC Br. 23-25. But the basis for the FCC's confidence is paper thin. The FCC cites only to broad statements in the *Order*. *Id.* 24-25

(citing *Order* ¶¶ 289-291(JA at 496)). But neither in its brief nor in the *Order* does the FCC provide detailed factual analysis to back up its bold assertions about the sufficiency of support to rate-of-return carriers serving Tribal lands. Agency say-so that universal service will be attained does not cut it. *See Qwest II*, 398 F.3d at 1234.

The FCC argues that the reductions in high-cost support to rate-of-return carriers were designed to eliminate “excess subsidization to high-cost areas.” FCC Br. 16. This does not establish, however, that the remaining support will be sufficient for rate-of-return carriers serving Tribal lands.

The FCC also argues that “[r]eductions in intercarrier compensation will be offset by a new . . . subsidy” and that “rate-of-return carriers . . . will continue to receive, as a group, roughly the same amount of high-cost support.” FCC Br. 15. This ignores, however, that the new subsidy offsetting reductions in intercarrier compensation *comes out of* the \$2 billion annual high-cost budget for rate-of-return carriers. *Order* ¶ 126 (JA at 438). The upshot is that rate-of-return carriers, as a group, will realize a significant decline in total combined USF and intercarrier compensation revenues.³

³ In rural regions where rate-of-return carriers typically operate (Gila River Br. 6), USF support and intercarrier compensation constitute “60% or more of their regulated revenues.” Broadband Plan at *123.

C. The Order's Preference For Price-Cap Carriers Serving Tribal Lands Over Rate-of-Return Carriers Serving Tribal Lands Is Unfounded.

The FCC played favorites in the *Order*: it froze high-cost support for price-cap carriers while cutting such support for rate-of-return carriers. Gila River Br. 16-17. With respect to price-cap carriers serving Tribal lands, however, the *Order* offered no basis (and there is none) for such preferential treatment.

The FCC brands all rate-of-return carriers – and, by implication, those serving Tribal lands too – as inefficient; from there, the FCC argues that maintenance of the same high cost support levels for these carriers is unwarranted. FCC Br. 4, 28-29. The FCC's blanket characterization of rate-of-return carriers serving Tribal lands as inefficient is incorrect. Moreover, the FCC cited no evidence that price-cap carriers serving Tribal lands are more efficient and thus more worthy of support.

The fact that rate-of-return carriers received almost \$2 billion of the \$4.5 billion high-cost support awarded in 2011 despite serving only five percent of access lines in the nation (FCC Br. 4) is the product of the FCC's regulatory scheme, which divides areas of the country into either price cap or rate-of-return territories. In short, as the historical record shows, it is this system that preordains that the vast majority of high-cost support necessarily would go to support service in areas served by rate-of-return carriers, including areas that contain Tribal lands.

Until 1990, all incumbent local exchange carriers were subject to rate-of-return regulation. *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order, CC Docket No. 87-313, 5 FCC Rcd. 23, ¶ 1 (1990). In that year, however, the FCC determined that “enormous differences” existed among local exchange carriers “in the number and concentration of their access lines, the geographic location and dispersion of the affiliates, and the number of states they serve.” *Id.* ¶ 257. The FCC further determined that these local exchange carriers experienced “significant financial and operation differences in their assets, revenues, and earnings.” *Id.* In light of these differences, the FCC determined that a unitary regulatory scheme was no longer warranted, *id.*, so it adopted a price cap regulatory scheme for the “largest local exchange carriers,” *id.* ¶¶ 1, 258. The FCC noted that these carriers “provide[d] 88 percent of all local telephone lines in the U.S.,” and that they “provide[d] virtually all local exchange and access service in virtually all major metropolitan areas,” *id.*, which are the most profitable areas of the country for carriers to service, *see Implementation of Section 309(j) – Competitive Bidding*, Report and Order, 9 FCC Rcd. 5532, ¶109 (1994) (“Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas.”).

In contrast, and as the *Order* expressly acknowledges, rate-of-return carriers operate in “many of the country’s most difficult and expensive areas to serve.”

Order ¶ 26 (JA at 401). And many of the carriers serving Tribal lands (which are especially difficult and expensive to serve, *see Order* ¶ 479 (JA at 545-546)), are rate-of-return carriers. *See Universal Service Fund Reform: Hearing Before the United States Senate Committee on Indian Affairs* (June 7, 2012) (Statement of Shirley Bloomfield, CEO, National Telecommunications Cooperative Association) (at least 36 members of NTCA, a trade association representing rate-of-return carriers, serve Tribal lands).

Furthermore, even though rate-of-return carriers serve only five percent of the country's access lines, they serve approximately forty percent of the nation's landmass. *See Statement of Shirley Bloomfield, supra*. This is significant because the FCC has recognized that areas with small population densities cost more to serve. *In the Matter of Telecommunications Carriers Eligible for Universal Service Support*, Order, 26 FCC Rcd. 3472, ¶ 5 (WCB 2011).

In sum, it is not surprising that a large proportion of high-cost support historically has gone to rate-of-return carriers. The reason is not that rate-of-return carriers by their nature are inefficient. Rather, it is because of the high costs of serving the communities in which they operate, including Tribal lands. Those costs are high for price-cap carriers serving Tribal lands as well. There is, however, no evidentiary basis for the *Order's* maintenance of the prior levels of

support for price-cap carriers serving Tribal lands while exposing rate-of-return carriers serving Tribal lands to reductions in funding.

II. THE TRIBAL MOBILITY FUND PROVIDES INSUFFICIENT SUPPORT TO MEET THE GOAL OF UNIVERSAL SERVICE ON TRIBAL LANDS.

The FCC argues that the *Order's* Tribal Mobility Fund demonstrates that the FCC adopted a “tailored” approach to promoting universal service on Tribal lands. FCC Br. 19. As the record shows, however, the Tribal Mobility Fund does not make up for the cuts in high-cost support to carriers serving Tribal lands.

For one, the Tribal Mobility Fund is limited to wireless carriers serving Tribal lands. It provides no support at all to wireline carriers serving Tribal lands. Promoting the development of wireless service on Tribal lands is laudable. But the *Order* pays short shrift to the continued important role that wireline carriers play on Tribal lands. That importance is readily apparent with respect to 911 calls. While 911 calls placed on wireline networks typically automatically report location of calls to the 911 dispatcher, *see* <http://www.fcc.gov/guides/emergency-communications>, 911 calls placed on wireless devices provide dispatchers with only the general vicinity in which the caller may be located. *See* 47 C.F.R. § 20.18(h) (rules addressing location accuracy standards for wireless carriers). Many Tribal lands lack traditional U.S. Postal Services address. *See* Comments of Gila River, WC Docket 10-90 *et al.* at 3 (filed Apr. 18, 2011) (JA at 2504) (“public

addresses on the approximately 8,000 structures in the community are almost nonexistent, posing significant challenges to emergency and public safety personnel attempting to respond in times of crisis.”). Thus, the ability of 911 dispatchers to automatically obtain accurate location information is critical in emergency situations on Tribal lands.

The FCC also ignores that many rate-of-return carriers serving Tribal lands are subject to state or Tribal COLR requirements, which obligate an incumbent carrier to provide service when no other carrier will do so and subject these incumbent carriers to more statutory and regulatory constraints. *Order* ¶ 862 (JA at 692) (“[I]ncumbent [carriers] have limited control over the area or customers that they serve, having been required to deploy their network in areas where there was no business case to do absent subsidies[.]”). Wireless carriers receiving General and Tribal Phase Mobility Fund support, however, need only meet minimum coverage requirements, not COLR obligations. *Id.* ¶¶ 365, 488 (JA at 519, 549) (discussing coverage requirements for General Mobility Fund Phase I and Tribal Mobility Fund Phase I, respectively). Therefore, those carriers likely will construct facilities to serve the largest population centers within Tribal lands. Because of their COLR obligations, rate-of-return carriers will thus be required to serve the very highest cost regions of Tribal lands – and with reduced funding under the new rules, to boot. This whipsaw effect of COLR demands and the

cutback in USF support impairs the ability of rate-of-return carriers to carry out their obligations. Far from promoting efficient use of USF support, this puts universal service at risk.

Even as to wireless carriers, the support provided by the Tribal Mobility Fund is inadequate. Yes, the *Order* reserves \$50 million in one-time support to wireless carriers serving Tribal lands in the Tribal Mobility Fund Phase I auction. *Order* ¶ 481 (JA at 546). Moreover, in the general Mobility Fund Phase I auction, which was held in late 2012, carriers serving Tribal lands won bids making them eligible to receive approximately \$25 million. FCC Br. 20 n.6. Therefore, the general and Tribal Phase I Mobility Funds combined make approximately \$75 million available in one-time support to wireless carriers serving Tribal lands for 2012 and 2013. In addition, beginning in 2014, the Mobility Fund Phase II authorizes “up to \$100 million” annually for ongoing support to wireless carriers serving Tribal lands. *Order* ¶ 494 (JA at 551).

The FCC pats itself on the back for offering this support for carriers serving Tribal lands. It ignores, however, that the support – \$75 million combined between 2012 and 2013, and “up to \$100 million” annually starting next year – represents a significant *reduction* in present support for wireless carriers serving Tribal lands. This is because the *Order* gives with one hand what it takes away with the other. In particular, it abolished the identical support rule, under which

competitive carriers serving Tribal lands (mostly wireless carriers) received an estimated \$150 million in high-cost support in 2011 alone. *Order* ¶ 525 (JA at 561). All told, the *Order* effectively decreases overall support for wireless carriers serving Tribal lands by 33% annually – \$50 million – once the identical support rule is phased out.

The FCC states that its Mobility Funds were “not intended as a ‘replacement’ for the identical support rule.” FCC Br. 27 n.10. This is not so. The identical support rule effectively provided wireless carriers an incentive to serve Tribal lands; the Mobility Funds now provides this incentive (FCC Br. 9-10), but does so to the tune of \$50 million less annually than the identical support rule. This is no way to obtain universal service on Tribal lands.

In addition to the Tribal Mobility Fund, the FCC lauds its low-income support program, which provides enhanced universal service support to low-income residents on Tribal lands. FCC Br. 8-9, 14, 22, 26. Here too the FCC’s self-plaudits are unwarranted. In 2010, the FCC found that federal support for telecommunications service to residents on Tribal lands was insufficient, even with the enhanced low-income support program. Broadband Plan at *142. The FCC’s invocation of programs that pre-date the *Order*, such as the creation of the Office of Native Affairs and Policy and the bidding credits in spectrum license auctions for wireless providers serving qualifying Tribal lands, FCC Br. 8-9, are beside the

point. And the Tribal engagement and consultation requirements that the FCC also lists as feathers in its cap, *id.* at 11, 14, 21-22, do nothing to address the “greater financial support” needed “to ensure the availability of broadband in Tribal lands,” *Order* ¶ 479 (JA at 545-546).

III. THE EXEMPTION FOR STANDING ROCK IS ARBITRARY AND CAPRICIOUS AND CANNOT BE CURED THROUGH AD HOC WAIVERS FOR OTHER CARRIERS.

As Gila River demonstrated in its opening brief, the *Order’s* grant of a temporary exemption from the USF funding reductions to one – and only one – carrier serving Tribal lands, Standing Rock Telecommunications, is arbitrary and capricious and necessitates the invalidation of the *Order* because the same considerations on which the exemption for Standing Rock rests apply in spades to a number of other carriers serving Tribal lands. Gila River Br. 33-35. The FCC’s defense of the Standing Rock exemption is muddled. And its offer of possible waivers from the rules for other carriers does not cure the *Order’s* defects.

The FCC asserts that Standing Rock deserved an exemption because it is a “nascent” carrier that is only a few years old. FCC Br. 31. The FCC fails to explain, however, why the age of Standing Rock should be dispositive here, separating it from other carriers. Support for older carriers could promote Tribal self-sufficiency and economic development just as much as support for newer carriers. Standing Rock itself recognized as much. It did not request that any

exemption be limited to just itself in comments it submitted to the FCC; rather, it requested an exception for all Tribal areas. Comments of Standing Rock, WC Docket No. 10-90 at 3 (filed Aug. 23, 2011) (JA at 3247) (“Existing ... levels of support ... should be preserved to the greatest extent possible.”) Furthermore, Standing Rock did not even rely on its age, or the age of any tribal carrier. Rather, in its comments, Standing Rock emphasized the “less than” seventy percent telephone penetration rate on Tribal lands generally and the “high cost” of providing service there as reasons for the FCC to ensure that support for all Tribal carriers not be decreased. *Id.* at 6-7 (JA at 3250-3251).

The FCC argues that, if other carriers are unduly burdened by the *Order*, they can seek a Standing Rock-type exemption by applying for temporary waivers. FCC Br. 30-32. It is a fundamental principle of administrative law, however, that the availability of waivers does not salvage a rule that is arbitrary and capricious to begin with. As the D.C. Circuit has admonished, “the very essence of waiver is the assumed validity of the general rule.” *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988). Under this tenet, “[w]hile a rational rule that would otherwise be impermissibly broad can be saved by a ‘safety valve’ waiver or exception procedures, the mere existence of a safety valve does not cure an irrational rule.” *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004). If an agency were able to insulate its rules from invalidation by dint of a waiver

mechanism, “no rule, no matter how irrational, could be struck down[.]” *ALLTEL*, 838 F.2d at 561-62. In short, the fact that other carriers might be able to secure a waiver from the *Order*, along the lines of the Standing Rock exemption, does not render the *Order* lawful.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Gila River’s Opening Brief, as well as in the Joint Universal Service Fund Opening and Reply Briefs and the Joint Opening and Reply Intercarrier Compensation Briefs, this Court should set aside the Order and remand to the FCC.

Respectfully submitted,

Dated: July 30, 2013

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) AND
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I hereby certify that on July 30, 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.

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