CORRECTED BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 18-1026, 18-1080

NATIONAL LIFELINE ASSOCIATION, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Petitioners are National Lifeline Association, Assist Wireless, LLC, Boomerang Wireless, LLC, d/b/a enTouch Wireless, Easy Telephone Services Company d/b/a/ Easy Wireless (collectively, National Lifeline), and Crow Creek Sioux Tribe (Crow Creek). Respondents are the Federal Communications Commission (FCC) and the United States of America.

Oceti Sakowin Tribal Utility Authority is an intervenor in support of Crow Creek.

2. Rulings under review.

The ruling at issue is the Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, *Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, 32 FCC Rcd 10475 (2017) (JA430-519) (*Order*).

3. Related cases.

Respondents are not aware of any other related cases pending in this Court or any other court.

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GLOSSARY

ETC	Eligible telecommunications carrier
FCC	Federal Communications Commission
Joint Board Order	*Lifeline & Link Up Reform & Modernization Federal-State Joint Bd. on Universal Service Lifeline & Link Up*, 26 FCC Rcd 2770 (2011)
Order	*Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, WC Docket Nos. 17-287, 11-42, 09-197, FCC 17-155, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 2017 WL 6015800 (rel. Dec. 1, 2017)
Stay Denial Order	*Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, Order Denying Stay Petition, 2018 WL 3327652 (WCB July 5, 2018)
TracFone Forbearance Order	*Petition of TracFone Wireless, Inc. for Forbearance*, *Order*, 20 FCC Rcd 15095 (2005)
Tribal Order	*Federal-State Joint Bd. On Universal Serv.*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000)
Tribal Policy Statement	*Statement of Policy of Establishing a Gov't-to-Gov't Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000)

2012 Order	*Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012)
2015 FNPRM	*Lifeline and Link Up Reform and Modernization et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015)
2016 Order	*Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016)

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JURISDICTION

The *Order* (JA430-519) was released on December 1, 2017; a summary was published in the Federal Register on January 16, 2018. 83 Fed. Reg. 2075 (2018). National Lifeline timely filed a petition for review on January 25, 2018, and Crow Creek timely filed a petition for review on March 16, 2018. *See* 28 U.S.C. § 2344. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

1. Whether the FCC provided sufficient notice and opportunity to comment on its proposals to limit the enhanced Tribal subsidy under its Lifeline program to facilities-based providers serving rural Tribal areas.

2. Whether the FCC's *Tribal Policy Statement* creates judicially enforceable consultation obligations, and if so, whether the agency engaged in sufficient consultation with Tribal Governments before adopting its proposals.

3. Whether the FCC's decision to limit the enhanced Tribal subsidy to facilities-based providers was reasonable in light of the agency's goals of promoting infrastructure deployment on Tribal lands and managing fund expenditures.

4. Whether the FCC's decision to limit the enhanced Tribal subsidy to rural Tribal areas was reasonable in light of the agency's goal of directing that subsidy to areas with the greatest need for communications services.

STATUTES AND REGULATIONS

The relevant statutes and rules are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. The Lifeline Program.

It has long been a significant priority for the Commission to ensure the availability of communications services for low-income households. The Commission established the Lifeline program in 1985, to provide low-income

families with access to affordable telephone service. *MTS and WATS Market Structure, and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order*, 51 Fed. Reg. 1371 (1985) (JA520-526). The Lifeline program is one of several supported by the Universal Service Fund, which was established by the Commission to promote "the preservation and advancement of universal [telecommunications] service," 47 U.S.C. § 254(b), and is financed by charges on consumers of telecommunications services.

The Lifeline program offers each eligible low-income household a discount—currently, $9.25/month—to offset the costs of a telephone or broadband (Internet) service plan. Funding is not provided directly to consumers. *Lifeline & Link Up Reform & Modernization Federal-State Joint Bd. on Universal Service Lifeline & Link Up*, 26 FCC Rcd 2770, 2776 ¶ 16 (2011) (*Joint Board Order*). Instead, telecommunications companies that participate in the Lifeline program, known as "eligible telecommunications carriers" (ETCs), *see* 47 C.F.R. § 54.201, receive reimbursement from the Universal Service Fund. *Joint Board Order* ¶ 16.

B. The Enhanced Tribal Subsidy.

In 2000, the Commission adopted measures in the Lifeline program to promote telephone subscribership and infrastructure deployment for residents on Tribal lands. *Federal-State Joint Bd. On Universal Serv.*, Twelfth Report and

Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (*Tribal Order*) (JA612-718). At that time, the Commission observed, Tribal households on reservations and other Tribal lands had the lowest reported telephone subscribership levels in the country. *Id.* ¶ 5 (JA617). The Commission adopted an additional, "enhanced" Lifeline subsidy of up to $25 a month for ETCs that served low-income residents of Tribal lands (for a total subsidy of up to $34.25 per household). *Id.* ¶ 13 (JA620).

One of the key impediments to telephone subscribership on Tribal lands, the Commission found, was the high cost of facilities deployment in remote, sparsely populated areas. *Id.* ¶ 5 (JA617). It was therefore critical, the Commission determined, to "create incentives for eligible telecommunications carriers to deploy telecommunications facilities in areas that previously may have been regarded as high risk and unprofitable." *Id.* ¶ 53 (JA639). The Commission explained that the increased subsidies "may enhance the ability of eligible telecommunications carriers to attract financing to support facilities construction in unserved tribal areas" and encourage "the deployment of such infrastructure." *Id.*

C. The Facilities-Based Requirement.

The Commission initially determined that, consistent with Section 214(e) of the Communications Act, a carrier seeking designation as an ETC eligible for Lifeline support was required to own its own facilities at least in part. *See* 47

U.S.C. § 214(e) (requiring that an ETC must offer service "either using its own facilities or a combination of its own facilities and resale of another carrier's services"). Carriers that offered services solely through resale, without any use of their own facilities, were thus ineligible for Lifeline support. *In re Federal–State Joint Bd. on Universal Serv.*, First Report and Order, 12 FCC Rcd 8776, 8876 ¶ 179 (1997) (JA559-560). Such non-facilities-based providers, also known as wireless resellers, purchase telecommunications service wholesale and then resell it to Lifeline customers.

Beginning in 2005, however, the Commission permitted wireless resellers, "on a case-by-case basis," to obtain designation as an ETC. *Lifeline and Link Up Reform & Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6669 ¶ 21 (2012) (*2012 Order*) (JA874). The Commission was persuaded to broaden ETC eligibility after finding that only "one-third of Lifeline-eligible households" were Lifeline subscribers. *Petition of TracFone Wireless, Inc. for Forbearance*, *Order*, 20 FCC Rcd 15095, 15105 ¶ 24 (2005) (*TracFone Forbearance Order*) (JA729). The Commission predicted that allowing resellers to participate as Lifeline providers "should expand participation of qualifying consumers." *Id.*

D. The Rapid Growth of the Universal Service Fund, Concerns of Waste, Fraud, and Abuse, and the *2012 Order*.

The next years saw a substantial increase in the amount of Lifeline program expenditures. In 2012, $2.2 billion in Lifeline support payments were disbursed to ETCs, compared to an inflation-adjusted $582 million in 1998. *2012 Order* ¶ 23 (JA875). The rapid growth of the program was attributed to a number of factors, including expansion of the program to all 50 states, the enhanced Tribal subsidy provided to eligible ETCs serving Tribal lands, and—notably—the emergence of new entrants providing Lifeline service. *Id*. In particular, a number of pre-paid wireless providers became Lifeline-only ETCs and marketed service to low-income subscribers at no charge to the customer. *Id*.

While these developments helped expand choices for low-income consumers, they also led to "an onset of waste and abuse." *Lifeline and Link Up Reform & Modernization et al*., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 3970 ¶ 23 (2016) (*2016 Order*) (JA1348). Among other things, the Commission was deeply concerned by evidence that an estimated 15% of Lifeline subscribers were ineligible for benefits, representing as much as $360 million in wasted program funds. *2012 Order* ¶ 108 (JA914). In numerous states, the percentage of ineligible Lifeline subscribers was even higher. In Arizona, for example, nearly half of Lifeline subscribers turned

out not to qualify for discounted telephone service. *Id*., *Appendix D*, *Table 2 - Lifeline Verification Results for 2007* (JA1105).

Building on reforms the Commission considered and adopted in prior years,[1] in January 2012, the agency issued a comprehensive order improving and modernizing Lifeline operations. *2012 Order* (JA862-1160). The Commission's 2012 reforms were driven not only by the agency's concern about waste, fraud, and abuse, but also by its desire to "constrain the growth of the [Lifeline] program in order to reduce the burden on all who contribute to the Universal Service Fund." *Id*. ¶ 1 (JA865). The Commission explained that the adopted reforms could save the Fund "up to an estimated $2 billion over the next three years, keeping money in the pockets of American consumers." *Id*. ¶ 2 (JA865-866). In addition, the reforms would enable the Commission to "recapture" those funds lost and "prevent unbridled future growth in the Fund." *Id*. ¶ 108 (JA914).

In addition, the Commission granted blanket forbearance from the Act's facilities requirement for carriers seeking an ETC designation, thus allowing all wireless resellers to participate as Lifeline providers. *Id*. ¶ 368 (JA1019). The Commission cautioned, however, that "the greater availability of Lifeline services

[1] *E.g.*, *Federal-State Joint Board on Universal Service*, 25 FCC Rcd 15598 (Jt. Bd. 2010); *Lifeline and Link Up Reform and Modernization*, Notice of Proposed Rulemaking, 26 FCC Rcd 2770 (2011); *Lifeline and Link Up Reform & Modernization*, Report and Order, 26 FCC Rcd 9022 (2011).

from a variety of providers has increased the likelihood that a residence may receive more than one Lifeline-supported telephone service." *Id.* ¶ 71 (JA893-894).[2] The Commission therefore stressed that it would be "particularly vigilant" that problems with fraud and abuse "do not persist or arise elsewhere in the program." *Id.* ¶ 360 (JA1016).

E. The *2015 FNPRM*.

In 2015, noting that "a fundamental, comprehensive restructuring of the program" was still necessary, *2015 FNPRM* ¶ 8 (JA1199), the Commission sought comment on a number of reforms to bring the Lifeline program "closer to its core purpose and [to] promote the availability of modern services for low-income families." *Id.* ¶ 10 (JA1200). Two of those proposals—limiting enhanced Tribal support to facilities-based providers and to rural Tribal lands—are at issue in this case.

[2] Indeed, as early as 2005, when the Commission began allowing wireless resellers to forbear from the facilities requirement, it pointed out that certain commenters argued that "the prepaid, resold nature of [the reseller]'s proposed service offering will facilitate fraud, waste, and abuse in the Lifeline program." *TracFone Forbearance Order* ¶ 20 (JA728). At the time, however, the Commission believed it had struck an "appropriate balance" between "increasing participation in the low-income program" and "deterring waste, fraud, and abuse." *Id.* ¶ 21 (JA728).

1. Proposing To Limit The Enhanced Tribal Subsidy To Facilities-Based Providers.

First, the Commission proposed to "limit enhanced Tribal Lifeline … support only to those Lifeline providers who have facilities." *Id.* ¶ 167 (JA1250). As the Commission explained, one of its "original intentions" in adopting the enhanced Tribal Lifeline subsidy was "to encourage deployment and infrastructure build-out to and on Tribal lands." *Id.* ¶ 166 (JA1250). But the evidence showed that "two-thirds of enhanced Tribal support goes to non-facilities-based Lifeline providers," and the Commission found it "unclear whether the support is being used to deploy facilities in Tribal areas." *Id.* ¶ 167 (JA1250). The agency thus sought comment on the "extent to which new infrastructure development and deployment has resulted from enhanced Tribal support" and whether such support had "attracted needed financing of facilities on unserved Tribal lands, as the Commission originally intended." *Id.* ¶ 166 (JA1250).

2. Proposing To Limit The Enhanced Tribal Subsidy To Rural Tribal Lands.

Second, the Commission sought comment on "whether [it] should focus enhanced Tribal support to those Tribal areas with lower population densities," in order to more closely align such support with the Commission's goal of "incentiviz[ing] increased 'telecommunications infrastructure deployment and subscribership on tribal lands.'" *Id.* ¶ 169 (citing *Tribal Order* ¶ 26) (JA1251). In

doing so, the Commission sought comment on "whether it is appropriate to provide such enhanced support in areas with large population densities where advanced communications facilities are widely available," or whether, instead, it should "focus enhanced support only on areas of low population density that are likely to lack the facilities necessary to serve subscribers." *Id.* (seeking comment on whether to "exclude urban, suburban, or high density areas on Tribal lands" from the enhanced Tribal subsidy).

F. *2016 Order.*

In 2016, the Commission adopted a number of other reforms proposed in the *2015 FNPRM* intended to further combat abuse of the Lifeline program. *2016 Order* (JA1340-1563). The Commission "maintain[ed] the current set of Tribal-specific eligibility programs" in that order, *id.* ¶ 205 (JA1414), but "ma[de] clear" that the questions whether to restrict enhanced Lifeline support "to certain carriers operating on Tribal lands or carriers serving certain portions of Tribal lands" remained "outstanding." *Id.* ¶ 211 (JA1416). "These and other issues for which the Commission has sought comment and which are not addressed in this order," the Commission explained, "remain open for consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands." *Id.*

G. The *Order* On Review.

In the *Order* under review, the Commission adopted the two proposed limitations to the enhanced Tribal subsidy for which it had sought comment in the *2015 FNPRM*. In so doing, the Commission explained that it sought "to ensure that the program operates consistent with the authority granted to [it] by Congress [and] the Communications Act," "to direct Lifeline funds to the areas in which they are most needed," and "to address ongoing waste, fraud and abuse that undermines the integrity of the program and limits its effectiveness." *Order* ¶ 1 (JA431).

1. The Tribal Facilities Requirement.

First, the Commission limited the enhanced Tribal Lifeline subsidy to facilities-based providers. The Commission determined that a facilities-based limitation "will focus the enhanced support toward those providers directly investing in voice- and broadband-capable networks on …Tribal lands," making more effective use of Tribal Lifeline payments that "will be reinvested in the 'provision, maintenance, and upgrading' of facilities" in Tribal areas. *Order* ¶ 27 (citing *2012 Order* ¶ 254) (JA440). The goal of such investment, the Commission stated, is "ultimately [to] provide more robust networks and higher quality service on rural Tribal lands," *id*., thereby making service "more affordable and competitive for low-income consumers." *Id.* The facilities-based limitation, the

Commission explained, also "continue[d] to follow the principles identified in [Section 214] of the Act." *Id.* ¶ 4 (JA433); *see* 47 U.S.C. § 214(e) (requiring an ETC to offer Lifeline service using "its own facilities," either in whole or in part).

Prudent management of Universal Service Fund expenditures also required the Commission to evaluate the Lifeline program in light of the significant waste, fraud and abuse in the program, *Order* ¶ ¶ 13, 17, 18, 29, n.46 (JA436-438, 441), some of which has been driven by wireless resellers. *Id.* ¶ 68, n.48 (JA437, 454). The Commission found that Lifeline subsidies disbursed to non-facilities-based providers may lower the consumer's bill, *id.* ¶ 23 (JA439), but questioned whether providing enhanced Tribal support to reseller "middle men"—who are less able or willing to monitor whether customers are truly eligible for Lifeline support, *see id.* ¶ 68 (JA454)—will target network investment to serving qualified Lifeline customers. *Id.* ¶ 28 (JA441). Nor could the Commission accept "how passing only a fraction of funds through to facilities-based carriers will mean more investment in …Tribal areas than ensuring that facilities-based carriers receive 100 percent of the support." *Id.* In any event, the Commission explained, even if revenue from resellers marginally increased the incentive of other providers to deploy facilities, this benefit was outweighed "by [the agency's] need to prudently manage Fund expenditures." *Id.* Taken together, the agency concluded that more appropriate

use could be made of the enhanced Lifeline subsidy to spur investment in facilities while also constraining the growth of the Fund. *Id.*

2. **The Tribal Rural Requirement.**

Second, the Commission limited enhanced Lifeline support to carriers serving "rural" Tribal lands. *Order* ¶ 5 (JA433). The Commission concluded that providing enhanced Lifeline subsidies to "more densely populated Tribal lands" was "inconsistent with the … primary purpose of the enhanced support." *Id.* ¶ 9 (JA435). The agency pointed out that "[a]pproximately 98 percent of Americans" in urban areas have access to high-speed Internet service, compared to only 37% of Americans "living on rural, Tribal lands." *Id.* Although those numbers relate directly only to one type of service covered by the Lifeline program, the Commission used them as a reasonable proxy, concluding that focusing enhanced support on rural areas would avoid "wasting scarce program resources," *id.*, and provide an incentive for carriers to deploy in these communities where "the need is greatest" and where there is "the least choice for communications services," *id.* ¶ 3 (JA432).

After weighing several definitions of "rural," the Commission adopted the definition used in the E-rate program (another program supported by the Universal Service Fund). *Id.* ¶ 5 (JA433). Under that definition, an area is "urban" if it is "an urbanized area or urban cluster area with a population equal to or greater than

25,000." *Id.*; *see also* 47 C.F.R. § 54.505(b)(3)(i) (specifying that the determination is made by the most recent rural-urban classification by the Census Bureau). All other areas are considered rural. *Id.* ¶ 5 (JA433). The agency rejected a number of proposals that were "more restrictive than the E-rate program's definition of rural." *Id.* ¶ 6 (JA434).

H. The Stay Denial Order.

On June 22, 2018, petitioners filed a petition for an administrative stay with the Commission. *Joint Pet. for Stay of Assist Wireless, LLC; Boomerang Wireless, LLC d/b/a enTouch Wireless; Easy Telephone Service Company d/b/a Easy Wireless; the National Lifeline Association; the Crow Creek Sioux Tribe; and the Oceti Sakowin Tribal Utility Authority*, WC Docket Nos. 17-287 et al. (June 22, 2018). The Wireline Competition Bureau denied the stay petition on July 5, 2018. *Order Denying Stay Pet., Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, 2018 WL 3327652 (WCB July 5, 2018) (*Stay Denial Order*) (JA1735-1873). On July 13, 2018, petitioners filed a judicial stay in this Court. *Motion For Stay Pending Judicial Review* (July 13, 2018).

SUMMARY OF ARGUMENT

1. The Commission provided ample notice and opportunity for comment on its proposals to restrict the enhanced Tribal subsidy to facilities-based providers on rural, Tribal lands.

In the *2015 FNPRM*, the Commission "propose[d]" "to limit enhanced Tribal Lifeline … support only to those Lifeline providers who have facilities." *2015 FNPRM* ¶ 167 (JA1250). Petitioners now contend that the Commission failed to provide notice that it would define "facilities" as requiring wireless providers to have "last-mile facilities" (Nat. Lifeline Br. 28)—the portion of the telecommunications network chain that physically reaches the end-user's premises. But the APA requires only that agencies provide a "general notice" of a proposed rule. 5 U.S.C. § 553(b)(3). Given the agency's explanation in the *FNPRM* that "one of the Commission's original intentions in adopting enhanced Tribal Lifeline support was to encourage deployment and infrastructure build-out to and on Tribal lands," (*2015 FNPRM* ¶ 166 (JA1250)), petitioners should not have been surprised by the definition of facilities the Commission adopted in the *Order*. As the *Order* explained, "last-mile facilities are critical to deploying, maintaining and building voice-and broadband-capable networks on Tribal lands." *Order* ¶ 22 (JA438).

As to the rural limitation, the Commission explicitly stated in the *2015 FNPRM* that it was "seek[ing] comment on whether we should focus enhanced

Tribal support to those Tribal areas with lower population densities" and asked whether to exclude "urban, suburban [and] high density areas." *2015 FNPRM* ¶169 (JA1251). National Lifeline complains that the *Order* failed to provide adequate notice of the precise *definition* of "rural," but notice need not include "every precise proposal which (the agency) may ultimately adopt as a rule." *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976).

Petitioners further contend that, in the *2016 Order*, the Commission promised to issue another notice of proposed rulemaking before adopting these rules. The Commission made no such commitment. The Commission explained in that order that the proposals to limit the enhanced Tribal subsidy "[were] not addressed in [that] order [and] remain[ed] open for consideration." *2016 Order* ¶ 211 (JA1416). Consistent with that explanation, the Commission kept the docket open, and issued this *Order* 19 months later. Petitioners argue that the Commission said that the Tribal subsidy proposals would be addressed "in a future proceeding," (*id.*) but that is precisely what happened here: the issues were ultimately addressed in the *Order* under review.

2. The Commission fulfilled its voluntary commitment to consult with Tribal governments prior to adopting the *Order*. For starters, Crow Creek's contention that the Commission did not engage in adequate consultation is legally irrelevant because, by its terms, the *Tribal Policy Statement* does not give rise to

any enforceable rights—a fact that Crow Creek ignores. In any event, Commission staff met with numerous Tribes on several occasions to discuss the Commission's proposals to limit the enhanced Tribal subsidy to facilities-based carriers and rural Tribal lands. During these consultations, Tribes had the opportunity to ask questions and provide their feedback. The Commission also received over 45 comments from Tribes, many of which supported the restrictions. The views of the Tribes thus were fully aired.

3. The Commission's decision to limit the enhanced Tribal subsidy to facilities-based providers was reasonable, and consistent with its long-standing goals of promoting infrastructure development and managing fund expenditures. When the Commission adopted the enhanced Tribal subsidy in 2000, it explained that the low telephone penetration on Tribal lands "underscore[d] the need for immediate Commission action to promote the deployment of telecommunications facilities in tribal areas." *Tribal Order* ¶ 5 (JA617).

While the Commission also adopted the enhanced Tribal subsidy to promote subscribership, that was well before Lifeline spending skyrocketed and waste, fraud, and abuse grew substantially. With the exponential rise of Lifeline spending, the Commission has been rightfully concerned about preventing unbridled growth in the Fund. Over the last decade, the Commission has adopted a number of measures to constrain spending, consistent with its statutory

responsibility to "prudently manage Fund expenditures." *Order* ¶ 28 (JA441). Yet despite aggressive reforms, the Commission found that its work was not complete, and that a fundamental, comprehensive restructuring of the program was still necessary. The *Order* on review was part of that cost-saving restructuring.

The Commission's decision to limit the enhanced subsidy to facilities-based providers should be viewed against this background of significant waste, fraud, and abuse in the program, some of which has been driven by resellers. Fully "two thirds" of the enhanced Tribal subsidy went to resellers, *id*. ¶ 23 (JA439), yet the Commission has repeatedly found that resellers violate Lifeline rules, and specifically rules related to the enhanced Tribal subsidy.

The Commission's determination that limiting the enhanced Tribal subsidy to facilities-based providers would be a more effective use of the enhanced Lifeline subsidy was firmly grounded in logic and in the record. The Commission found that restricting the enhanced Tribal subsidy to Lifeline providers that are deploying, maintaining, and building last-mile facilities was a more effective way to support the expansion of networks on Tribal lands. As the Commission observed, when a facilities-based service receives the enhanced subsidy, "those funds go directly toward the cost of providing that service, including provisioning, maintaining and upgrading that provider's facilities." *Order* ¶ 22 (JA439). In contrast, directing the enhanced subsidy to resellers might "marginally increase the

ability and incentive of other providers to deploy or maintain facilities," but this benefit was "outweighed by [the Commission's] need to prudently manage Fund expenditures." *Id.* ¶ 28. (JA441). That "predictive market judgment[]," which was supported by a number of Tribal nations, is entitled to substantial deference. *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

Finally, contrary to petitioners' assertions, the Tribal facilities requirement does not contravene any provision of the Act. Resellers remain eligible for the Lifeline program—just not the enhanced Tribal subsidy.

4. The Commission's rural limitation was also reasonable. The agency determined that directing subsidies toward large urban areas where there is no "lack[] in either voice or broadband networks" (*Order* ¶ 3 (JA432)) was inconsistent with the purpose of the enhanced subsidy and wasted "scarce program resources." *Id.* Accordingly, the agency appropriately concluded that the enhanced subsidy should be targeted to areas with "the least choice for communications services" (*id.*) and the "greatest" need. *Id.* ¶ 9 (JA435).

STANDARD OF REVIEW

Petitioners bear a heavy burden to establish that the *Order* on review is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the order is entitled to a presumption of validity. *E.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The court must

uphold a rule if the Commission "examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016).

The FCC's interpretation of the Communications Act is reviewed under the deferential standards set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under that well-settled framework, if Congress's intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. An agency's interpretation of its own precedents, such as policy statements, is likewise due deference. *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998); *cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997).

ARGUMENT

I. THE COMMISSION PROVIDED AMPLE NOTICE AND OPPORTUNITY FOR COMMENT ON ITS DECISIONS TO LIMIT THE ENHANCED TRIBAL SUBSIDY TO FACILITIES-BASED PROVIDERS AND TO PROVIDERS SERVING RURAL TRIBAL LANDS.

Petitioners contend that the Commission violated the notice and comment requirements of the Administrative Procedure Act when it allegedly: (1) failed to provide adequate notice that it planned to limit the enhanced Tribal subsidy to

facilities-based carriers serving rural Tribal lands; and (2) adopted those limitations without initiating a "future proceeding." Both arguments should be rejected.

In the *2015 FNPRM*, the Commission clearly placed interested parties on notice that it was considering limiting the enhanced Tribal subsidy to facilities-based carriers and to rural Tribal lands. The fact that the agency did not act on those proposals in the *2016 Order* in no way mandated a further round of notice and comment.

A. The Commission Provided Notice of the Tribal Facilities Requirement.

In the *2015 FNPRM*, the Commission emphasized that "one of [its] original intentions in adopting enhanced Tribal Lifeline support was to encourage deployment and infrastructure build-out to and on Tribal lands." *2015 FNPRM* ¶ 166 (JA1250). But, the Commission observed, "Lifeline program data show[s] that two-thirds of enhanced Tribal support goes to non-facilities-based Lifeline providers, and it is unclear whether the support is being used to deploy facilities in Tribal areas." *Id.* ¶ 167 (JA1250). The Commission therefore "propose[d]" "to limit enhanced Tribal Lifeline … support only to those Lifeline providers who have facilities." *Id.*

Petitioners acknowledge that the Commission provided notice that it was considering limiting the enhanced Tribal subsidy to facilities-based providers. NaLA. Br. 27-28 ("the Commission proposed that recipients of enhanced Tribal

Lifeline benefits 'have' some facilities in order to be eligible to receive enhanced Tribal benefits."); Crow Br. 32-33 ("the Commission sought comment on the MVNO [wireless reseller] exclusion … in its 2015 Lifeline FNPRM."). Indeed, National Lifeline petitioners understood enough about the proposed facilities-based limitation to file comments opposing it.[3]

National Lifeline nonetheless contends that the Commission failed to apprise interested parties that it would define the "facilities" that mobile wireless providers must have to include last-mile facilities. NaLA. Br. 28. *See Order* ¶¶ 24, 26 (JA439, 440). But the APA requires only that agencies provide a "general notice" of proposed rulemaking containing "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The final rule need not be the one originally proposed; it need only be a "logical outgrowth" of the agency's notice. *Agape Church, Inc. v. FCC*, 738 F.3d 397, 422 (D.C. Cir. 2013). And the "logical outgrowth" test is met if interested parties "should have anticipated the agency's final course in light of the initial notice." *Covad Commc'ns. Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

[3] *See, e.g*, Comments of Boomerang Wireless at 9 (Aug. 31, 2015) (JA1929-1956); Comments of Assist Wireless and Easy Wireless at 15-16 (Aug. 31, 2015) (JA1896-1921).

Here, the Commission made clear that it was considering limiting enhanced Tribal support to providers that had "facilities," *2015 FNPRM* ¶ 167 (JA1250), to advance the program's goals of "encourag[ing] infrastructure build-out to and on Tribal lands," *id.* ¶ 166 (JA1250). In light of the agency's focus on infrastructure and facilities, it was entirely reasonable—and unsurprising—for the agency to have decided that in order to remain eligible for the enhanced Tribal subsidy, a provider must have "its own last-mile facilities." *Order* ¶ 26 (JA440). As the Commission observed in the *Order,* "last-mile facilities are critical to deploying, maintaining, and building voice- and broadband-capable networks on Tribal lands." *Id.* ¶ 22 (JA438). Indeed, last-mile facilities are "the most expensive to deploy and the most conspicuously lacking on Tribal lands." *Stay Denial Order* ¶ 13 (JA1739). National Lifeline does not dispute the FCC's definition of last-mile mobile wireless facilities, *Order* ¶ 24 (JA439),[4] nor do they suggest an alternative

[4] For mobile wireless providers, the FCC defined the required facilities as "a spectrum license or a long-term spectrum leasing arrangement along with wireless network facilities that … can be used to provide wireless voice and broadband services." *Order* ¶ 24 (JA439). This is consistent with the "facilities-based provider" definition the Commission uses for other purposes. *Id.* n.60 & accompanying text.

definition that would have accomplished the FCC's purpose.[5] National Lifeline can hardly have been blindsided by the Commission's straightforward conclusion that the facilities that Tribal Lifeline providers would be required to "have" meant last-mile facilities. Indeed, their comments reflect that they understood that the Commission's proposal could make resellers ineligible for the enhanced Tribal subsidy. *See, e.g.*, Comments of Assist Wireless and Easy Wireless at 15-16 (Aug. 31, 2015) (JA1914-1915) ("If the Commission limits the enhanced Tribal benefit to facilities-based providers, up to two-thirds of the Tribal subscribers could lose their enhanced service … without wireless resellers.").

National Lifeline also contends (Br. 29) that interested parties could not have been placed on notice that the Commission was proposing to entirely foreclose any "opportunity to provide service in part through resold facilities," because such a decision would violate the Act and Commission policies. Not so.

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[5] National Lifeline relies on a companion notice to the *Order*, *see Bridging the Digital Divide for Low-Income Consumers*, 32 FCC Rcd 10475, 10499 ¶ 67 (2017) (JA454), to claim that the Commission remains "unsure" about its definition of facilities. NaLa. Br. 31. In that companion notice, which proposes to exclude non-facilities-based providers from the Lifeline program altogether, the FCC asked for comment on whether to adopt the definition of facilities that it adopted for enhanced Tribal support. It is hardly surprising that the Commission would call for comment on the appropriate definition of facilities for purposes of a general exclusion of non-facilities-based providers from the Lifeline program. And even if the Commission were to adopt a different definition there (which is hardly certain), that change of course would do nothing to undermine the sufficiency of the notice the Commission provided for the definition it adopted in the *Order* on review.

The Act provides that an ETC shall offer Universal Service Fund-supported services "using its own facilities or a *combination* of its own facilities and resale of another carrier's services," 47 U.S.C. § 214(e)(1)(A) (emphasis added). The facilities requirement is entirely consistent with that provision. Although the *Order* authorizes the enhanced subsidy to a provider only "for the customers it serves using its own last-mile facilities," the new rule allows the provider to offer those customers service "using its own as well as others' facilities." *Order* ¶ 26 (JA440).

Finally, even if the Commission's definition of facilities had not been a logical outgrowth of the *2015 FNPRM*, any procedural error would have been harmless because the Commission released a draft version of the *Order* on October 26, 2017, three weeks before its adoption, which contained this exact requirement. *Draft Order* ¶ 22 (JA1638). The Commission fully considered the substantial input it received in response – which included comments from, and ex parte meetings with, the National Lifeline petitioners.[6] At a minimum, then, petitioners had actual notice and an opportunity to comment on the specific details of the

[6] *See, e.g.*, Letter to Marlene Dortch from John J. Heitmann (Nov. 13, 2017) (ex parte submission of Lifeline Connects Coalition, National Lifeline Ass'n, Boomerang Wireless, LLC, and Easy Tel. Servs. Co.) (JA2195-2207); Letter to Marlene Dortch from John J. Heitmann (Nov. 9, 2017) (ex parte submission of Assist Wireless, LLC, Boomerang Wireless, LLC, and Easy Tel. Serv. Co.) (JA2169-2181).

Commission's facilities-based proposal. *See* 5 U.S.C. § 706 (courts reviewing agency action under the APA must take "due account … of the rule of prejudicial error"); *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

B. The Commission Provided Notice of the Tribal Rural Requirement.

Petitioners also had ample notice that the Commission was considering limiting the enhanced Tribal subsidy to rural Tribal lands. In the *2015 FNPRM*, the Commission stated that it was "seek[ing] comment on whether we should focus enhanced Tribal support to those Tribal areas with lower population densities, on the theory that provision of enhanced support in more densely populated areas is inconsistent with the Commission's objectives." *2015 FNPRM* ¶ 169 (JA1251). Noting its "desire to use enhanced support to incent the deployment of facilities on Tribal lands," the Commission asked for comment "as to whether it is appropriate to provide such enhanced support in areas with large population densities where advanced communications facilities are widely available," or instead, whether it should "focus enhanced support only on areas of low population density that are likely to lack the facilities necessary to serve subscribers," thereby excluding "urban, suburban, [and] high density areas." *Id*. The Commission noted that the U.S. Department of Agriculture's Food Distribution Program on Indian Reservations "excludes from eligibility residents of towns or cities in Oklahoma"

with populations "greater than 10,000," and asked whether the Commission "should implement a similar approach" to limit enhanced Tribal support. *Id*.

National Lifeline contends that the Commission nonetheless failed to provide adequate notice of the precise *definition* of the "rural" areas to which support was ultimately limited by the *Order* under review. NaLA. Br. 50-52.[7] Acknowledging that the agency "sought comment on several population-density-based definitions for 'rural' lands for purposes of receiving enhanced Tribal Lifeline support," (NaLA. Br. 50), National Lifeline nevertheless protests that the Commission did not seek comment specifically on the E-rate definition it ultimately adopted. *Id*. at 51.

But notice need not include "every precise proposal which (the agency) may ultimately adopt as a rule." *Ethyl Corp.*, 541 F.2d at 48; *see also Public Service Comm'n v. FCC*, 906 F.2d 713, 716 (D.C. Cir. 1990) ("the exact result reached after a notice and comment rulemaking need not be set out in the initial notice for the notice to be sufficient."). An agency adopting a final rule that differs from the proposed rule is required to issue new notice only where the "changes are so major that the original notice did not adequately frame the subjects for discussion." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (citation omitted).

[7] Crow Creek does not challenge the rural Tribal limitation in any respect. *See* Crow Br. 12 n.3.

Here, the Commission not only framed the subject for discussion—whether to adopt a population-density-based limitation on enhanced Tribal support, *2015 FNPRM* ¶¶ 169-70 (JA1251)—but asked whether it should implement a limitation "similar" to that of the Department of Agriculture, which excluded cities and towns of more than 10,000 persons, *id.* ¶ 170 (JA1251). Having been put on notice that the agency might exclude Tribal areas with a population of more than 10,000, petitioners cannot complain that they were taken by surprise by the less-restrictive limitation the Commission ultimately adopted, which excludes areas with populations of 25,000 or more. *Order* ¶ 5 (JA433). In addition, as with the definition of facilities, the public release of the *Draft Order* three weeks in advance of adoption, with an opportunity for parties to comment, rendered harmless any lack of notice. *See Draft Order* ¶ 5 (JA1633); *see also Lifeline Connects Coalition Ex Parte*, at (JA2195-2207); *Assist Wireless Ex Parte*, at 6-7 (JA2174-2175).[8]

[8] National Lifeline complains (Br. 51) that the *Draft Order* did not provide "searchable maps or digital 'shape files'" to further elucidate the impact of the Commission's definition of rural Tribal lands. But it does not contend that it could not perform that evaluation on its own, nor explain why such maps are required by the APA.

C. The Commission Was Not Required To Provide Another Opportunity For Comment On The Same Issues For Which Comments Had Already Been Sought And Received.

Both petitioners contend that, whatever the sufficiency of the notice provided by the *2015 FNPRM*, the Commission promised in the *2016 Order* that it would not adopt its proposals to limit the enhanced Tribal subsidy without issuing another notice of proposed rulemaking. NaLA. Br. 21-26; Crow Br. 33-35. The Commission made no such commitment.

In the *2016 Order*, the Commission chose not "to restrict Lifeline … support to certain carriers operating on Tribal lands or carriers serving certain portions of Tribal lands," "at this time." *2016 Order* ¶ 211 (JA1416). Instead, the agency stated, "[t]hese and other issues for which the Commission has sought comment and which are not addressed in this order remain open for consideration." *Id.* Agencies routinely issue multiple orders sequentially in response to the same NPRM. *See, e.g.*, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (issued in response to *Notice of Proposed Rulemaking*, 27 FCC Rcd 12357 (2012)); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 30 FCC Rcd 12025 (2015) (issued in response to same NPRM). That is precisely what the Commission said it might do, and in fact did, here.

Petitioners focus on the fact that the Commission specified that these issues "remain open for consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands." *2016 Order* ¶ 211 JA1416); *see* NaLA. Br. 22, Crow Br. 33. Again, that is precisely what happened; the *Order* under review here focused its analysis on that question, and both restrictions imposed here were designed for that precise purpose. *See Order* ¶¶ 3-4 (JA432-433).

But, petitioners argue, the agency specified that these questions would be addressed "in a future proceeding," not merely in another order issued in the same rulemaking docket. They argue that the Commission "closed the record developed" in the *2015 FNPRM*. NaLA. Br. 21.

Not so. The Commission did not terminate the docket upon release of the *2016 Order*, as it routinely does when a rulemaking is concluded. *See, e.g.*, *Fifth Generation Wireless Network & Device Sec.*, 32 FCC Rcd 1106 ¶ 2 (PSHSB 2017) (terminating docket where there was no longer a comment cycle associated with proceeding); *Policies And Rules Governing Interstate Pay-Per-Call And Other Information Services Pursuant to the Telecommunications Act of 1996*, 19 FCC Rcd 13461, 13462 ¶ 2 (2004). Instead, the docket remained open and was an appropriate vehicle for resolving the questions left unanswered in the *2016 Order*. The agency did so in a "future proceeding"—the *Order* under review here.

Nor is there any basis for petitioners' claim that the "future proceeding" to which the *2016 Order* referred had to be a new docket that included an additional notice and opportunity to comment. The APA does not define a "proceeding," and the FCC similarly has no general definition of the term. Dictionaries, too, define the term capaciously—the singular term "proceeding" refers to "[a]n act which is done by the authority or direction of the court, agency, or tribunal, express or implied," BLACK'S LAW DICTIONARY 1398 (10th Ed. 2014), and "proceeding" more generally refers to "[t]he activities … of a legal body or administrative agency." AMERICAN HERITAGE DICT. at 1404 (New College Ed. 1976).

Moreover, as the *2016 Order* stated, the issues that the Commission had left for further consideration were ones on which it had already "sought comment in the *2015 FNPRM*." *2016 Order* ¶ 211 (JA1416). And petitioners (and many others) had already filed voluminous comments on the proposed facilities-based and rural limitations in response to the *2015 FNPRM*. *See supra*, pp.22 n.3, 24. Given the comprehensive comments on the proposals at issue, it is unclear what purpose would have been served by inviting yet another round of comments on the issues for which there had already been ample discussion. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540 n.95 (D.C. Cir. 1983) (rejecting lack of adequate notice claim where petitioners did not demonstrate that

"the content of their criticisms would have been different" had agency given another opportunity for comment).

II. THE COMMISSION FULFILLED ITS NON-BINDING COMMITMENT TO CONSULT TRIBAL GOVERNMENTS.

In 2000, the Commission adopted a "statement of policy" recognizing the principles of Tribal sovereignty "inherent in the relationships between federally-recognized Indian tribes and the federal government." *Statement of Policy of Establishing a Gov't-to-Gov't Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4079 (2000) (*Tribal Policy Statement*) (JA607-611). As part of its commitment to working with Tribes, the Commission explained that it would, "to the extent practicable … consult with Tribal governments" prior to implementing regulatory action that would significantly impact "Tribal governments, their land and resources." *Id.* ¶ 2 (JA610).

Crow Creek contends that the Commission failed to comply with its Tribal consultation policy before adopting the *Order*. Crow Br. 26-32. That claim fails at the outset: the *Tribal Policy Statement* by its terms gives rise to no enforceable rights. In any event, the Commission complied with any obligation it might have had to consult when agency officials engaged in a number of meetings with Tribes, during which agency officials explained and received feedback on these proposals.

In addition, the Commission received numerous comments from Tribes and Tribal organizations on those proposals in the rulemaking proceeding.

A. The Tribal Consultation Policy Does Not Give Rise To Enforceable Rights.

Crow Creek's challenge fails because, under the plain terms of the *Tribal Policy Statement*, the Commission's commitment to consult with Tribes before taking regulatory action affecting Tribal interests gives rise to no judicially enforceable rights.

To be sure, the Commission takes seriously the commitment it made in the *Tribal Policy Statement* "to promote a government-to-government relationship between the FCC and federally-recognized Indian Tribes." 16 FCC Rcd at 4079-4080 (JA608-609). Thus, the *Tribal Policy Statement* provides that the Commission will, "to the extent practicable," "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." *Id*. at 4081 (JA610).

But the Commission was explicit that the *Tribal Policy Statement* was "not intended to, and does not, create any right enforceable in any cause of action by any party against the United States, its agencies or instrumentalities, officers or employees, or any person." *Id*. at 4080 (JA609). Nor does Crow Creek cite to a statute or Commission rule that would give rise to an enforceable right. The policy

statement's caveat, to which Crow Creek nowhere refers, forecloses their claim that the *Order* can be rendered procedurally infirm for failure to consult with the Tribes. *See, e.g.*, *Yankton Sioux Tribe v. DHHS*, 533 F.3d 634, 643-44 (8th Cir. 2008) (no right of judicial review where consultation policy included similar language); *Northern Arapaho Tribe v. Burwell*, 118 F.Supp.3d 1264, 1281 (D.Wy. 2015) (same); *Crow Creek Sioux Tribe v. Donovan*, 2010 WL 1005170 at *4-5 (D.S.D. Mar. 16, 2010) (same). *Cf. Multicultural Media, Internet, & Telecom Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017) (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010)) (congressional policy statements "by themselves, do not create statutorily mandated responsibilities.").

The Eighth Circuit's decision in *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979), upon which Crow Creek chiefly relies (Br. 23-24), is not to the contrary. In that case, "the government d[id] not argue that the [Bureau of Indian Affairs was] not bound by [its] consultation guidelines, or that the guidelines [were] not enforceable by the affected tribes or … members of the tribes." *Id*. at 718. In stark contrast, the Commission's consultation policy, which in any event states only that the agency will consult "to the extent practicable," "is not intended to, and does not create any right enforceable in any cause of action by any party."

Tribal Policy Statement, 16 FCC Rcd at 4080-81 (JA609-610). *Oglala Sioux Tribe* is thus inapposite.[9]

B. The Commission Fully Satisfied Its Consultation Commitment Under The Tribal Policy Statement.

In any event, the Commission complied with its Tribal consultation policy here. Neither the *Tribal Policy Statement* nor Commission orders or regulations define "consult," so the Court should construe the term in accordance with its ordinary meaning—which is simply to "seek advice or information of." AMERICAN HERITAGE DICT. at 394.[10] Here, the record shows that the Commission met with Tribes to discuss the Commission's proposals to limit the enhanced Tribal subsidy to facilities-based providers and to rural Tribal lands, and the rulemaking docket contains numerous comments by Tribal entities on the Commission's proposals. The views of Tribes were thus fully aired before the Commission adopted the *Order*.

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[9] For the same reason, the *Tribal Policy Statement* does not give rise to a judicially enforceable "procedure" (Crow Br. 22-23) that can be engrafted upon the ordinary requirements of the APA.

[10] Executive Order 13175, which does not bind the Commission as an independent executive agency, defines consultation as "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67249, 67250 § 5a (Nov. 6 , 2000).

1. The Commission Held Consultations With Tribes On The Proposals To Limit The Enhanced Tribal Subsidy.

As the *Order* notes, shortly after issuing the *2015 FNPRM*, "the Commission began consultations with Tribal nations regarding the Lifeline proposals that the Commission sought comment on in the *2015 Lifeline FNPRM*." *Order* ¶ 5 (JA433). Crow Creek quibbles with this, but the Commission believed that it had satisfied its own policy. *Id*. Given the deference owed to the Commission's interpretation of its own policy, *see Cassell*, 154 F.3d at 483, especially in light of the "to the extent practicable" caveat, the Commission's conclusion that consultations were adequate suffices.

In any event, the Commission provided more information in the *Order* about its consultations. It cited to a Wireline Competition Bureau (Bureau) order, *see Order* ¶ 5 (citing *Lifeline and Link Up Reform & Modernization*, Order, 31 FCC Rcd 895 ¶ 4 (WCB 2016)) (JA433), which explained that "[i]n-person consultations between ONAP [the Commission's Office of Native Affairs and Policy],[11] other Commission staff, and Oklahoma Tribal Nations occurred in Norman, Oklahoma and Tulsa, Oklahoma on August 5 and 7, 2015, respectively,"

[11] The Commission's Office of Native Affairs and Policy (ONAP) serves as the official Commission liaison for consultation, coordination, and outreach to Tribal Nations. *See Establishment of the Office of Native Affairs and Policy in the Consumer and Governmental Affairs Bureau*, Order, 25 FCC Rcd 11104 (2010).

and that "[a]t those consultations, Commission staff met with representatives from 10 Tribal nations and 2 Native organizations to discuss the impact of the proposed changes in the *2015 Lifeline Reform Order*." *Id*. The *Order* also noted that ONAP "held additional meetings with the Affiliated Tribes of Northwest Indians on February 1-4, 2016 in Suquamish, WA and on August 12-13, 2015 in Portland, OR where the *2015 Lifeline FNPRM* proposals were discussed." *Order* n.47 (JA437).

Crow Creek does not dispute that the Commission met with Tribes on the dates and times set forth in the *Order*, but attempts to dismiss the significance of those interchanges. Crow Br. 26-31. The August 2015 consultations in Oklahoma, Crow Creek speculates, likely did not address the facilities-based limitation proposed in the *2015 FNPRM*, but instead focused on unrelated issues regarding the boundary maps for Oklahoma Tribal lands. Crow Br. 26-30. And the meetings in Suquamish and Portland should not be credited, the Tribe asserts (Br. 31), because the Commission in the *Order* did not say more than that "the *2015 Lifeline FNPRM* proposals were discussed." *Order* n.47 (JA437).

But there is no obligation—in the *Tribal Policy Statement* or the APA—that the Commission document its consultations in a final rulemaking order, let alone at greater length than this. Nor has Crow Creek pointed to any source for such an obligation. Implicit in Crow Creek's argument is a complaint that the agency did not consult *with it*. But this just goes to show the wisdom of the agency's decision

not to make the *Tribal Policy Statement* judicially enforceable. There are 573 federally recognized Indian Tribes in the United States. *U.S. Dep't of the Interior, Bureau of Indian Affairs*, https://www.bia.gov/bia (last visited July 23, 2018). It would obviously be impracticable for the Commission to individually consult with each Tribe affected by a change in policy with nationwide effect.

In any event, in responding to petitioners' request for an administrative stay of the *Order*, the Bureau recently elaborated on these consultations, and released materials associated with them. *See Stay Denial Order* ¶¶ 6-7 (JA1736-1737). These materials show that the two proposals were specifically addressed at the consultations. *See id.*; *id.* App'x A (Declaration of Daniel J. Margolis, discussing at some length each consultation and attaching documents arranging for and discussed at those consultations) (JA1747-1873).[12]

Thus, for example, in advance of the Oklahoma meetings, the head of ONAP sent an email to the majority of Tribes across the country, inviting them to attend two consultations that would focus on changes proposed in the *2015 FNPRM*—including specifically "paragraphs 158-171," in which the Commission proposed to limit the enhanced Tribal subsidy to facilities-based carriers and to carriers

[12] The Declaration was attached to the *Stay Denial Order* in response to arguments petitioners raised before the Commission about the adequacy of Tribal consultation in this case.

serving areas with lower population densities. *See* Margolis Decl. ¶ 7 (JA1748); Ex. A (JA1753-1755). At these sessions, the Tribal Nations were consulted specifically on the limitations at issue in this appeal.[13] Margolis Decl. ¶¶ 11-12 (JA1749); Ex. B (Oklahoma), at 27 (JA1783). But even had these topics *not* been specifically discussed, the Commission undoubtedly provided a forum for Tribes to address any concerns they might have about them. To satisfy its consultation policy, the Commission cannot be expected to anticipate and affirmatively raise every issue in an item that might be of interest to attending Tribes.

In sum, the record shows that on repeated occasions, at locations across the country, the Commission sought Tribal advice on its proposed limitations on enhanced Lifeline support. Having had a fair opportunity to present their concerns

[13] As explained in the *Order* and in detail in the *Stay Denial Order* and accompanying exhibits, the Commission also met with Tribes on several other occasions to discuss the proposals to limit the enhanced Tribal subsidy to facilities-based providers and to rural Tribal lands. At the two meetings with the Affiliated Tribes of Northwest Indians (*see Order* n.47 (JA437)), for example, ONAP staff explained that the Commission sought comment on the limitations to the enhanced Tribal subsidy at issue here, and gave Tribes the opportunity to offer their feedback on the proposals. Margolis Decl. ¶¶ 14-18 (JA1749-1750); Ex. C (Portland), at 23 (JA1808); Ex. D (Suquamish), at 3 (JA1812). In addition, the Commission held two Tribal Broadband, Telecom, and Broadcast Training and Consultation Workshops in Scottsdale, AZ and Rapid City, SD in September 2015, during which time the limitations to the enhanced subsidy at issue here were discussed. Margolis Decl. ¶ 19 (JA1750); Ex. E (Scottsdale) at 27 (JA1843); Ex. F (Rapid City), at 27 (JA1872). Finally, ONAP staff also held direct consultations with four Tribes in Rapid City, during which time the limitations at issue were also discussed. Margolis Decl. ¶ 27 (JA1751).

to the agency, the disappointed petitioners are now claiming that they should have been entitled to something more. But "[c]onsultation is not the same as obeying those who are consulted." *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986). The Tribes who disagreed with the Commission "were heard, even though their advice was not accepted." *Id.*; *see also Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 167 (1st Cir. 2003). That is all that the *Tribal Policy Statement* could possibly mandate.

2. The Tribes Had Ample Opportunity To Submit Comments Voicing Their Views In The Rulemaking Record.

In addition to the direct meetings between the Commission and Tribal stakeholders, Tribal entities had ample opportunity to submit their comments and concerns in the rulemaking record. Numerous Tribal parties did so, *see, e.g.*, *Order* n.67 (JA440-441) (collecting comments). All told, the Commission received over 45 comments from Tribal Nations and members in response to the changes proposed in the *2015 FNPRM*.

Indeed, many of these Tribal comments supported the restrictions to the enhanced Tribal subsidy. The Affiliated Tribe of Northwest Indians, for example, agreed with the "Commission's proposal to limit enhanced Lifeline support to those providers that deploy, build, and maintain infrastructure on tribal lands." Reply Comments of Affiliated Tribe of Northwest Indians at 6 (Sept. 30, 2015) (emphasis in original) (JA2011). Similarly, the Confederated Tribes of Colville

Reservation asserted that the "fundamental cause" underlying the lack of penetration and adoption on Tribal lands is the "lack of broadband infrastructure deployment on the Tribes' land." Reply Comments of Confederated Tribes of Colville Reservation at 2-3, 6 (Sept. 30, 2015) (JA2065-2066, 2069). And the Nez Perce Tribe urged that "non-facility providers be removed from offering Lifeline services on tribal lands" in light of the "waste-fraud abuses … prevalent" among resellers, whose services "are offered without regard to rules." Comments of Nez Perce Tribe at 3 (Aug. 31, 2015) (JA1964).

Of course, not all Tribal entities agreed. The Navajo Nation Telecommunications Regulatory Commission, for example, at one point expressed its opposition to limiting enhanced Tribal support to facilities-based carriers. Comments of Navajo Nation Telecomm. Reg. Comm'n, at 10-11 (Aug. 28, 2015) (JA1888-1889). The National Congress of American Indians (NCAI) also opposed the Commission's proposal to limit the enhanced subsidy to more sparsely populated areas. Comments of NCAI (Aug. 31, 2015) (JA1960). And petitioner Crow Creek itself submitted its views in the rulemaking docket. (JA2111-2112).

In sum, the Commission considered seriously the concerns of Tribal Governments that were raised during the agency's exchanges with Tribal stakeholders, as well as in the numerous comments submitted by Tribal entities in

the rulemaking record before adopting the *Order* under review. Neither the APA nor the Commission's *Tribal Policy Statement* requires more.

III. THE COMMISSION REASONABLY LIMITED THE ENHANCED TRIBAL SUBSIDY TO FACILITIES-BASED PROVIDERS IN ORDER TO MANAGE FUND EXPENDITURES AND MORE EFFECTIVELY SPUR INVESTMENT IN INFRASTRUCTURE DEPLOYMENT

Petitioners also challenge on the merits the Commission's decision to limit enhanced Tribal support to facilities-based providers. Crow Br. 35-49; NaLA. Br. 32-49. The Commission's decision to adopt that limitation was entirely reasonable.

The Commission found that restricting the enhanced Tribal subsidy to Lifeline providers that are "deploying, maintaining and building" "critical" "last-mile facilities" (*Order* ¶ 22 (JA438-439)) would help the agency "prudently manage [Universal Service] Fund expenditures" (*id.* ¶ 28 (JA441)) and was a more appropriate and effective way to support the expansion of "voice and broadband-capable networks on Tribal lands." *Id.* ¶ 22 (JA438). As the Commission observed, "[w]hen the Lifeline discount is applied to a consumer's bill for a facilities-based service, those funds go directly toward the cost of providing that service, including provisioning, maintaining, and upgrading that provider's facilities." *Id.* "In contrast, Lifeline funds disbursed to non-facilities-based providers will still lower the cost of the consumer's service, but cannot directly

support the provider's network because the provider does not have one." *Id.* ¶ 23 (JA439). In light of the waste, fraud, and abuse that the Commission has found among recipients of Lifeline funds, the agency is reasonably concerned at the lack of accountability embodied in this inability to trace the funds disbursed to one group of recipients through to their intended use of supporting investment in infrastructure. The Commission therefore concluded that "[d]irecting enhanced Lifeline funds to facilities-based services encourages investment that will ultimately provide more robust networks and higher quality services on rural Tribal lands." *Id.* ¶ 27 (JA440).

Petitioners contend that the enhanced Tribal subsidy was meant to promote affordability of service, not deployment of infrastructure (NaLA. Br. 53; Crow Br. 48). In any event, they argue, it is "speculative" (NaLA. Br. 54; *see* Crow Br. 38) that excluding resellers from the enhanced Tribal subsidy will more effectively spur investment in infrastructure from facilities-based carriers. Neither contention is persuasive.

A. Promoting Infrastructure Deployment Has Been A Longstanding Goal Of The Enhanced Tribal Subsidy.

The original *Tribal Order* made clear that promoting infrastructure deployment in Tribal lands was a key reason underlying the adoption of the enhanced Tribal subsidy. As the Commission explained in 2000, the starkly lower telephone penetration on Tribal lands "underscore[d] the need for immediate

Commission action to promote the deployment of telecommunications facilities in tribal areas." *Tribal Order* ¶ 5 (JA617). And the agency noted that commenters had identified one of the "primary impediments" to subscribership on Tribal lands as "inadequate telecommunications infrastructure and the cost of line extensions and facilities deployment in remote, sparsely populated areas." *Id.* ¶ 20 (JA624). The Commission accordingly "provide[d] additional targeted support … for … carriers to serve, and deploy telecommunications facilities in, areas that previously may have been regarded as high-risk and unprofitable." *Id.* ¶ 5 (JA617). *Accord id.* ¶ 53 (JA639-640); *see also id.* ¶ 52 ("adoption of enhanced Lifeline support will encourage … carriers to construct telecommunications facilities on tribal lands that currently lack such facilities") (JA639). The Commission's emphasis on infrastructure deployment was consistent with the goals of the Communications Act, which include to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by … remov[ing] barriers to infrastructure investment." *Comcast Corp.*, 600 F.3d at 658 (quoting Section 706 of the 1996 Telecommunications Act, 47 U.S.C. § 1302).

To be sure, the Commission was also concerned about the barriers to service imposed by the high concentration of low-income individuals on Tribal lands, *Tribal Order* ¶ 32 (JA630), and the enhanced subsidy was intended to promote "subscribership" as well as "telecommunications deployment," *id.* ¶ 5 (JA617).

But that was well before the Commission allowed wireless resellers to participate in Lifeline. The Commission's accumulated experience since 2005 has been that permitting wireless resellers to participate in Lifeline has led spending to balloon such that by 2015, two-thirds of it was directed to non-facilities-based providers. *Order* ¶ 23 (JA439). In any event, as the Commission has repeatedly affirmed, "[o]ne of the … original intentions in adopting enhanced Tribal Lifeline support was to encourage deployment and infrastructure build-out to and on Tribal lands." *2015 FNPRM* ¶ 166 (JA1250); *Order* ¶ 4 (JA432) (the Commission "specifically premised" enhanced Tribal support "on the idea that enhanced support would incentivize providers 'to deploy telecommunications facilities'" on Tribal lands) (citation omitted).

B. The Tribal Facilities Requirement Is Consistent with the Commission's Responsibility Prudently to Oversee Universal Service Fund Expenditures.

The Commission's statutory responsibility to "prudently manage Fund expenditures," *Order* ¶ 28 (JA441), supports the Commission's decision to limit the enhanced subsidy to facilities-based providers. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102 (D.C. Cir. 2009). *See also Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011) (recognizing FCC's "responsibility to be a prudent guardian of the public's resources") (internal quotations omitted); *Alenco Commc'ns., Inc. v. FCC*, 201 F.3d 608, 620-21 (5th Cir. 2000) ("[t]he agency's

broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service.").

As the *Order* noted, in 2015 fully "two-thirds" of the enhanced Tribal subsidy went to resellers. *Order* ¶ 23 (JA439) (citing *2015 FNPRM* ¶ 167 & n.320 (JA1250)). The Commission's decision to limit the enhanced subsidy to facilities-based providers should be viewed against the background of significant waste, fraud, and abuse by Lifeline resellers. The Commission has repeatedly found that resellers violate Lifeline rules, and specifically rules related to the enhanced Tribal subsidy. *See, e.g.*, *Blue Jay Wireless*, Order, 31 FCC Rcd 7603 (2016) (reseller required to return $2 million in Lifeline reimbursements after it was determined company inflated number of customers served on Hawaiian Homelands to obtain enhanced Tribal subsidy); *Order* n.46 (JA437) (citing *Blue Jay Wireless* as an example of flagrant waste, fraud and abuse); News Release, *Oklahoma Telecom Company, Its Owner, and A Former Associate Charged in $25 Million Fraud In Federal Wireless Subsidy Program*, 2014 WL 12658449 (DOJ June 4, 2014) (reseller found to have defrauded Lifeline program of more than $25 million by

fabricating tens of thousands of customers and "always claim[ing] subsidies at the Tribal Lands rate of $34.25 per customer per month.") [14]

In the companion notice to the *Order* on review, the Commission pointed out that the "vast majority" of agency actions revealing waste, fraud and abuse in the Lifeline program over the last five years had been against "resellers, not facilities-based providers." *Bridging the Digital Divide for Low-Income Consumer*s, Notice of Proposed Rulemaking, 32 FCC Rcd 10475, 10499 ¶ 68 (2017) (JA454). The Commission further noted that "the proliferation of Lifeline resellers in 2009 corresponded with a tremendous increase in households receiving multiple subsidies under the Lifeline program" and questioned why problems with "self-certification," "phantom-subscriber," and "eligibility," among others, had risen since "the advent of multiple resellers within the program in 2009." *Id*. The Commission is not alone in these concerns. The Nez Perce Tribe, for example,

[14] Indeed, the Commission commenced enforcement proceedings against two of the petitioners in this case—Easy Wireless and Assist Wireless—in 2013 for violating Lifeline program rules by, among other things, having "intra-company duplicates among [their] subscribers." Notice of Apparent Liability for Forfeiture, *Assist Wireless*, 28 FCC Rcd 14456 ¶ 9 (2013); Notice of Apparent Liability for Forfeiture, *Easy Wireless*, 28 FCC Rcd 14433 ¶ 9 (2013). Thirty-seven Easy Wireless subscribers had at least *five* Lifeline accounts in their names. *Easy Wireless NAL*, Statement of then-Commissioner Ajit Pai, 28 FCC Rcd at 14443. Easy Wireless paid $100,000 to settle the proceeding against it, *see Easy Wireless*, Order, 2017 WL 6729588 (Dec. 29, 2017); the charges against Assist Wireless remain pending.

submitted comments focusing on waste and fraud by resellers. Comments of Nez Perce Tribe at 3 (Aug. 31, 2015) (JA1964).

The Commission's concerns with the prudent management of the Universal Service Fund should also be viewed in light of the agency's long-standing efforts to streamline the Lifeline program. The program grew from $582 million in 1998 to an inflation-adjusted $2.2 billion by 2012. *2012 Order* ¶ 23 (JA875). That year, the Commission adopted a number of measures to "constrain the growth of the program in order to reduce the burden on all who contribute to the Universal Service Fund." *Id.* ¶ 1 (JA865). The agency explained that the adopted reforms could save the Fund "up to an estimated $2 billion over the next three years, keeping money in the pockets of American consumers." *Id.* ¶ 2 (JA865-866). The reforms also sought to "recapture" funds lost and "prevent unbridled future growth in the Fund." *Id.* ¶ 108 (JA914). But three years after the adoption of such reforms, the Commission found that its "work [was] not complete," *2015 FNPRM* ¶ 3 (JA1196), and that a "fundamental, comprehensive restructuring of the program" was still necessary. *Id.* ¶ 8 (JA1199). The *Order* was part of that cost-saving restructuring. *See Order* ¶ 1 (JA431) (reforms will, *inter alia*, "reduce the demands on ratepayers" of universal service contributions); *id.* ¶ 9 (JA435) (reforms would avoid "wasting scarce program resources").

Therefore, in more effectively managing Lifeline program expenditures and constraining the growth of the Fund, it was entirely reasonable for the Commission to find that the "more appropriate way to support the expansion of voice- and broadband-capable networks on Tribal lands" was to target enhanced support "to those providers that are actually "deploying, building, and maintaining … last-mile infrastructure." *Order* ¶ 28 (JA441). As the Commission observed, "Lifeline funds are more efficiently spent when supporting such networks." *Id.* ¶ 22 (JA438).

C. The Commission Reasonably Determined That Limiting The Enhanced Subsidy To Facilities-Based Providers Will Encourage Use of the Enhanced Tribal Subsidy More Effectively To Spur Deployment of Facilities On Tribal Lands.

The Commission's determination that limiting the enhanced Tribal subsidy to facilities-based carriers would be a more effective use of the enhanced Lifeline subsidy was also firmly grounded in logic and the record. As the Commission pointed out, "[a] number of Tribal nations, Tribally-owned Lifeline providers, and other Lifeline providers ... favor[ed] limiting enhanced support to providers with facilities," because such support "will ensure that the enhanced subsidies reach the Tribal lands and residences that have never been connected and will support those network facilities already constructed." *Order* ¶ 27 (JA440).

For example, the Navajo Nation Telecommunications Regulatory Commission explained that carriers "began a significant build-out on the portions

of the Navajo Nation [covered by the enhanced Tribal subsidy] … while infrastructure, and telephone adoption continued to languish in the Eastern Agency [where the enhanced subsidy was not available]." Letter from Navajo Nation Telecomms. Regulatory Comm'n to FCC Chairman Wheeler at 2 (Mar. 24, 2016) (JA2110). Smith Bagley, Inc., a facilities-based Lifeline provider serving Tribal areas, also explained that "[i]n SBI's service area, enhanced Lifeline has been vital to its ability to construct a network with over 200 cell sites and to upgrade its network several times over the past 17 years." Letter from Smith Bagley to FCC Secretary Marlene H. Dortch at 1-2 (Oct. 20, 2017) (JA2113-2114) (also stating that enhanced Tribal support "has … been an important reason why other facilities-based carriers have entered Tribal lands in Arizona and New Mexico to build facilities and provide competitive service.")[15]

Petitioners contend that the Commission did not "plausibly explain why excluding [non-facilities-based providers] would result in more affordable service and more investment" (Crow Br. 42; *see* NaLA. Br. 54), and assert that a "middle-

[15] *See also* Letter from Greg Guice, Counsel for Gila River Telecommunications, Inc. to Marlene Dortch (Nov. 1, 2017), at 2 ("reiterat[ing] that facilities-based carriers should receive the enhanced Lifeline support so they can continue to deploy, build, and maintain infrastructure on Tribal lands.") (JA2123); Reply Comments of Sovereign Councils of Hawaiian Homelands Assembly (Sept. 30, 2015), at 4 (limiting enhanced support to "providers that deploy, build and maintain infrastructure on tribal lands" "may … further the goal of promoting deployment of facilities on tribal lands.") (JA2084); *see Order* n.67 (JA440-441).

man" reseller in the chain of production is not necessarily inefficient. Crow Br. 42. The Commission reasonably disagreed. As it stated, "[r]esellers offer[ed] little evidence beyond their own assertions that funneling Lifeline enhanced support funding through middle men will spur facilities-based carriers to invest in their … networks." *Order* ¶ 28 (JA441). And it emphasized that "resellers cannot explain how passing only a fraction of funds through to facilities-based carriers" by purchasing wholesale minutes "will mean more investment in … Tribal areas than ensuring that facilities-based carriers receive 100 percent of the support." *Id*.

Petitioners also contend that the Commission's decision to limit enhanced support to facilities-based providers is unreasonable because there currently are Tribal areas that are not being served by any facilities-based provider. *See* Crow Br. 35-38; NaLA. Br. 43. But the fact that facilities-based providers did not serve every market that resellers serve—when both were eligible for the enhanced subsidy—does nothing to undermine the Commission's reasonable determination that limiting the enhanced subsidy to providers with facilities would be "a more appropriate way to support expansion of voice-and broadband-capable networks on Tribal lands," *Order* ¶ 28 (JA441), after resellers have developed the market for services using these networks. After all, the fact that a reseller is offering service in a location means that at least one facilities-based provider has the infrastructure in place to offer service there if the market demands it. *See Order* n.55 (JA438-

439). And the Commission has adopted other measures to spur facilities-based providers to extend service in Tribal areas. In February 2017, it launched the second phase of the Mobility Fund, which will provide up to $4.53 billion to preserve and extend mobile broadband and voice services in unserved and underserved areas, of which $340 million is expected to be reserved for Tribal areas to facilitate "the deployment of the highest quality service to the people living on Tribal lands." *Connect America Fund*, 32 FCC Rcd 2152, 2154 ¶ 38 (2017) (JA1613-1614); *Order* n.3 (JA432).

Finally, petitioners claim that the Commission's *Order* will "forc[e] out of business many providers who have developed business models in order to serve Tribal subscribers." NaLA. Br. 45-46. But petitioners' business models cannot shield them from the Commission's decision to institute reasonable reforms of the Tribal Lifeline program, and to target Tribal Lifeline funds more efficiently and appropriately. *Order* ¶¶1, 5, 27 (JA431, 433, 440). In any event, the *Order* does not prohibit wireless resellers from serving as Lifeline providers; it only excludes them from the enhanced Tribal subsidy. The petitioner resellers are still eligible for the baseline subsidy of $9.25 per month for each Lifeline-eligible subscriber. 47 C.F.R. § 54.403(a)(1). Petitioners Assist Wireless and Easy Wireless, for example, each offer basic Lifeline plans in Oklahoma that include at least 500 voice minutes, unlimited texts and 1 GB or 25 MB data per month, respectively, at

no charge (and more for a nominal $1 fee). *See* https://www.assistwireless.com/cell-phone-plan-states/ok-non-tribal/; http://www.myeasywireless.com/lifeline-plans (last visited July 23, 2018). There is no evidence that petitioners are losing money on customers subscribed to those basic plans.

As this Court has held, "[i]n circumstances involving agency predictions of uncertain futures events, complete factual support … is not possible or required" in order to uphold the agency's decision. *Rural Cellular Ass'n.*, 588 F.3d at 1105. Review is "particularly" deferential "with regard to an agency's predictive judgments about the likely economic effects of a rule." *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009); *see Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 908. The Commission's conclusion that limiting enhanced Tribal support is likely to increase the appropriate use of the enhanced Tribal subsidy for investment in facilities on Tribal lands is grounded in logic and the evidence in the record. That determination falls well within the agency's policy discretion.

D. The Tribal Facilities Requirement Does Not Violate the Act.

Finally, Petitioners contend that the Commission's limitation of the enhanced Tribal subsidy to facilities-based carriers conflicts with Sections 10, 214, and 254 of the Communications Act. NaLA. Br. 33-39; Crow Br. 46. None of these statutory provisions supports their argument.

1. The Facilities Requirement is Consistent with Section 10 of the Act.

Section 10 of the Act provides that the "Commission shall forbear from applying any regulation" if it determines that enforcement: (1) "is not necessary to ensure that … telecommunications service[s] are just and reasonable"; (2) "is not necessary for the protection of consumers"; and (3) "is consistent with the public interest." 47 U.S.C. § 160.

Beginning in 2005, the Commission on a "case-by-case basis" (*2015 FNPRM* ¶ 21 (JA874)) forbore from Section 214(e)(1)(a) of the Act, which requires "[a] common carrier designated as an eligible telecommunications carrier" to offer telecommunications services using either: (1) "its own facilities"; or (2) "a combination of its own facilities and resale of another carrier's services." 47 U.S.C. § 214(e). National Lifeline contends that the "FCC's failure to conduct a Section 10 analysis showing what has changed and why Section 10 no longer mandates forbearance" violates Section 10. (NaLA. Br. 33).

Section 10 of the Act is not implicated here, however, because the Commission did not rescind its forbearance. Non-facilities-based resellers can still participate as Lifeline providers; they are just limited to the baseline subsidy of $9.25 per month. As the *Order* explained, the "facilities-based standard [the Commission adopted here] bears only on whether the Lifeline provider is eligible to receive enhanced rural Tribal support." *Order* ¶ 30 (JA441). The agency's

prior forbearance for Lifeline purposes "is unaffected by [the new facilities-based] standard and remains the same." *Id*.

2. The Facilities Requirement is Consistent with Section 214 of the Act.

National Lifeline next contends (Br. 37) that "[e]ven if the Commission did not need to reverse its previous grant of forbearance," the Commission's facilities-based limitation "independently violates Section 214(e) of the Act," because that section "specifically contemplates resale as an option for providing Lifeline service." But Section 214(e) does not contemplate resale by a provider that owns no facilities. By its terms, Section 214(e) provides that an ETC must offer service either "using its own facilities" or using "a combination of its own facilities and resale of another carrier's services." 47 U.S.C. § 214(e)(1)(A). And the Commission allowed for the enhanced subsidy to providers that rely in part on the resale of another carrier's services; it specified only that the provider "may only receive enhanced support for the customers it serves using its own last-mile facilities." *Order* ¶ 26 (JA440). Indeed, the *Order* is more consistent with the Congressional command than petitioners' reading, because the statute requires that subsidies flow to providers who use their own facilities, either in whole or in part. 47 U.S.C. § 214(e)(1)(A).

Finally, National Lifeline's Section 214 argument in any event fails for the same reason as its Section 10 argument: The *Order* does not preclude non-

facilities-based resellers from participating as Lifeline providers and receiving the baseline subsidy—only the enhanced Tribal subsidy. The Commission's facilities-based limitation is thus entirely in keeping with the terms of Section 214.

3. The Facilities Requirement is Consistent with Section 254 of the Act.

Crow Creek also argues (Br. 46) that excluding resellers from the enhanced Tribal subsidy does not "advance the goals of Section 254(e)" of the Act because that statute provides that a carrier receiving USF support "shall use that support … for the provision, maintenance, and upgrading of facilities *and services* for which the support is intended." 47 U.S.C. § 254(e) (emphasis added). But Section 254(e) applies only to ETCs that are "designated under section 214(e)," 47 U.S.C. § 254(e), which, as we have explained, must have their own facilities. Therefore, while Section 254 provides that eligible carriers can use Lifeline support for "services," the carriers that are eligible for those subsidies must—by reason of Section 214—own facilities. In any event, the fact that the statute refers to "services" in addition to "facilities" does not undercut the reasonableness of the Commission's conclusion that the *Order* would promote the goals of Section 254(e) of the Act by increasing investment in building out new facilities on Tribal lands.

IV. THE COMMISSION'S TRIBAL RURAL REQUIREMENT WAS REASONABLE.

Finally, National Lifeline (but not Crow Creek) argues that the Commission's decision to limit the enhanced Tribal subsidy to rural Tribal lands was arbitrary and capricious. NaLA. Br. 52-58. That argument fails.

The Commission limited the enhanced Tribal Lifeline subsidy to carriers serving rural Tribal lands after finding that these areas had "the least choice for communications services" (*Order* ¶ 3 (JA432)) and the "greatest" need. *Id.* ¶ 9 (JA435). The agency reasonably determined that directing subsidies toward large, urban cities where there is no "lack[] in either voice or broadband networks" (*id.* ¶ 3 (JA432)) was inconsistent with the purpose of the enhanced subsidy and wasted "scarce program resources." *Id.* ¶ 9 (JA435).

National Lifeline asserts (Br. 54) that the Commission's action will make Lifeline less affordable for Tribal residents in urban areas. But the Commission reasonably found that "the provision of enhanced support in more densely populated Tribal lands," such as "Tulsa, Oklahoma, or Reno, Nevada," was inconsistent with the Commission's desire to "target[]" enhanced Tribal support to areas "where the need is greatest." *Order* ¶ 9 (JA435).

National Lifeline next quibbles with the *Order* for "only cit[ing] fixed broadband deployment data to support its Tri[b]al Rural Limitation," notwithstanding that the "majority of Lifeline subscribers on Tribal lands subscribe

to mobile voice and broadband service."[16] NaLA. Br. 56. But the *Order* refers to data regarding the prevalence of fixed broadband simply to illustrate the unremarkable proposition that robust communications services are far more widely available in urban areas than in rural areas, particularly rural Tribal areas. In any event, National Lifeline does not contend that the data regarding broadband availability would look markedly different if the reference had been to mobile coverage figures.

National Lifeline further contends that (Br. 56) "unlike fixed service, mobile service is not tied to a particular address, such that an urban resident may in fact primarily be a rural user, or vice versa." But the program is intended to support broadband and phone service at a consumer's home address, notwithstanding that most consumers use their phones at other locations in addition to their home.[17] It was therefore perfectly reasonable for the Commission to focus on the subscriber's primary residence in limiting enhanced support to rural Tribal lands.

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[16] Fixed broadband is an Internet connection delivered to one's home, typically through a wire or cable. Mobile broadband, in contrast, is wireless Internet access through a portable smartphone or modem.

[17] *See Lifeline & Link-Up*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8306 ¶ 4 (2004) ("Lifeline provides low-income consumers with discounts of up to $10.00 off … the monthly cost of telephone service for a single telephone line in their principal residence.").

Finally, National Lifeline argues that the Commission failed to consider submissions contending that the rural limitation would remove incentives for carriers to provide service in more densely populated areas. But the Commission did consider those submissions; it just disagreed. As the agency explained, directing enhanced support to urban areas—where 98% of Americans already have access to multiple service providers—would not materially increase the deployment of facilities in those areas and "risks wasting scarce program resources." *Order* ¶ 9 (JA435).

CONCLUSION

The petitions for review should be denied.

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CERTIFICATE OF FILING AND SERVICE

I, Thaila K. Sundaresan, hereby certify that on September 14, 2018, I filed the foregoing *Corrected* Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Statutory Addendum

5 U.S.C. § 553(b)(3)

Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

* * *

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 160(a)

Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 214(e)

Extension of lines or discontinuance of service; certificate of public convenience and necessity

* * *

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible

telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

47 U.S.C. § 254(b), (e)

Universal service

* * *

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(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.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

* * *

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

47 U.S.C. § 1302(a)

Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 C.F.R. § 54.201

Definition of eligible telecommunications carriers, generally

(a) Carriers eligible to receive support.

(1) Only eligible telecommunications carriers designated under this subpart shall receive universal service support distributed pursuant to subparts D and E of this part. Eligible telecommunications carriers designated under this subpart for purposes of receiving support only under subpart E of this part must provide Lifeline service directly to qualifying low-income consumers.

(2) [Reserved]

(3) This paragraph does not apply to offset or reimbursement support distributed pursuant to subpart G of this part.

(4) This paragraph does not apply to support distributed pursuant to subpart F of this part.

(b) A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission.

(c) Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.

(d) A common carrier designated as an eligible telecommunications carrier under this section shall be eligible to receive universal service support in accordance with section 254 of the Act and, except as

described in paragraph (d)(3) of this section, shall throughout the service area for which the designation is received:

(1) Offer the services that are supported by federal universal service support mechanisms under subpart B of this part and section 254(c) of the Act, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(2) Advertise the availability of such services and the charges therefore using media of general distribution.

(3) Exception. Price cap carriers that serve census blocks that are identified by the forward-looking cost model as low-cost, census blocks that are served by an unsubsidized competitor as defined in § 54.5 meeting the requisite public interest obligations specified in § 54.309, or census blocks where a subsidized competitor is receiving federal high-cost support to deploy modern networks capable of providing voice and broadband to fixed locations, are not required to comply with paragraphs (d)(1) and (2) of this section in these specific geographic areas. Such price cap carriers remain obligated to maintain existing voice telephony service in these specific geographic areas unless and until a discontinuance is granted pursuant to § 63.71 of this chapter.

(e) For the purposes of this section, the term facilities means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part.

(f) For the purposes of this section, the term “own facilities” includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term “facilities” under this subpart.

(g) A state commission shall not require a common carrier, in order to satisfy the requirements of paragraph (d)(1) of this section, to use facilities that are located within the relevant service area, as long as the

carrier uses facilities to provide the services designated for support pursuant to subpart B of this part within the service area.

(h) A state commission shall not designate a common carrier as an eligible telecommunications carrier for purposes of receiving support only under subpart E of this part unless the carrier seeking such designation has demonstrated that it is financially and technically capable of providing the supported Lifeline service in compliance with subpart E of this part.

(i) A state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services.

(j) A state commission shall not designate a common carrier as a Lifeline Broadband Provider eligible telecommunications carrier.

47 C.F.R. § 54.403(a)(1)

Lifeline support amount

(a) The federal Lifeline support amount for all eligible telecommunications carriers shall equal:

(1) Basic support amount. Federal Lifeline support in the amount of $9.25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer, except as provided in paragraph (a)(2) of this section, if that carrier certifies to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer and that it has received any non-federal regulatory approvals necessary to implement the rate reduction.

47 C.F.R. § 54.505(b)(3)

Discounts

* * *

(b) Discount percentages. Except as provided in paragraph (f), the discounts available to eligible schools and libraries shall range from 20 percent to 90 percent of the pre-discount price for all eligible services provided by eligible providers, as defined in this subpart. The discounts available to a particular school, library, or consortium of only such entities shall be determined by indicators of poverty and high cost.

* * *

(3) The Administrator shall classify schools and libraries as "urban" or "rural" according to the following designations.

(i) The Administrator shall designate a school or library as "urban" if the school or library is located in an urbanized area or urban cluster area with a population equal to or greater than 25,000, as determined by the most recent rural-urban classification by the Bureau of the Census. The Administrator shall designate all other schools and libraries as "rural."

(ii) Any school district or library system that has a majority of schools or libraries in a rural area qualifies for the additional rural discount.