ORAL ARGUMENT SCHEDULED OCTOBER 25, 2018

Nos. 18-1026, 18-1080

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

NATIONAL LIFELINE ASSOCIATION ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

OCETI SAKOWIN TRIBAL UTILITY AUTHORITY,
Intervenor.

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

FINAL JOINT OPENING BRIEF OF PETITIONER CROW CREEK SIOUX TRIBE AND INTERVENOR OCETI SAKOWIN TRIBAL UTILITY AUTHORITY

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September 10, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Crow Creek Sioux Tribe and Oceti Sakowin Tribal Utility Authority certify as follows:

I. Parties and Amici

Petitioners: Assist Wireless, LLC, Boomerang Wireless, LLC, d/b/a Entouch Wireless, Crow Creek Sioux Tribe, Easy Telephone Services Company, d/b/a Easy Wireless, National Lifeline Association

Respondents: Federal Communications Commission and United States of America

Intervenors: Oceti Sakowin Tribal Utility Authority (in support of Petitioner Crow Creek Sioux Tribe)

II. Rulings Under Review

Petitioners seek review of the Federal Communications Commission's ("FCC" or "Commission") December 1, 2017 Report and Order captioned *Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, WC Docket Nos. 17-287, 11-42, 09-197, FCC 17-155, 2017 WL 6015800 (rel. Dec. 1,

2017) ("*Order*"), JA430. The Order was published in the Federal Register on January 16, 2018. *See* 83 Fed. Reg. 2104-01.

III. Related Cases

The case on review has not been previously before this court or any other court. Crow Creek Sioux Tribe and Oceti Sakowin Tribal Utility Authority are not aware of any case pending in any other court that involves substantially the same issues as these consolidated cases.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Crow Creek Sioux Tribe and Oceti Sakowin Tribal Utility Authority hereby submit the following disclosure statements:

Crow Creek Sioux Tribe is a federally recognized Indian tribe in Buffalo, Hughes, and Hyde counties in the state of South Dakota. It does not issue stock and does not have a parent corporation.

Oceti Sakowin Tribal Utility Authority is an unincorporated association that represents the interests of Tribal Nations. It does not issue stock and does not have a parent corporation.

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GLOSSARY

FCC or Commission	Federal Communications Commission
MVNO	Mobile Virtual Network Operator
ETC	Eligible Telecommunications Carriers
APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
2000 Tribal Lifeline Order	Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, *Fed.-State Joint Bd. on Universal Serv.*, 15 FCC Rcd. 12208 (2000).
TracFone Forbearance Order	Order, *Fed.-State Joint Bd. on Universal Serv.*, 20 FCC Rcd. 15095, (2005).
2011 Connect America Fund Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect Am. Fund et al.*, 26 FCC Rcd. 17,663 (2011).
2012 Lifeline Order	Report and Order and Further Notice of Proposed Rulemaking,*Lifeline and Link Up Reform and Modernization et al.*, 27 FCC Rcd. 6656 (2012).
2015 Lifeline FNPRM	Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, *Lifeline and Link Up Reform and Modernization et al.*, 30 FCC Rcd. 7818 (2015).
Oklahoma Map Order	Order, *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd. 895 (2016).

2016 Lifeline Order	Third Report and Order, Further Report and Order, and Order on Reconsideration, *Lifeline and Link Up Reform and Modernization et al.*, 31 FCC Rcd. 3962 (2016).
Order	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,* WC Docket Nos. 17-287, 11-42, 09-197, FCC 17-155, 2017 WL 6015800 (rel. Dec. 1, 2017).
American Indian Policy Statement	Policy Statement, *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd. 4078 (2000).
2011 Connect America Fund Order	Report and Order and Further Notice of Proposed Rulemaking, *Connect Am. Fund et al.*, 26 FCC Rcd. 17663 (2011).
Twentieth Report on Wireless Competition	Twentieth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993,* 32 FCC Rcd. 8968 (2017).

ORAL ARGUMENT SCHEDULED OCTOBER 25, 2018

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 47 U.S.C. §402(a) and 28 U.S.C. §§ 2342(1) and 2344. This case is before the Court on the petitioners' challenges to a final order of the FCC. The *Order* on review was published in the Federal Register on January 16, 2018. *See* 83 Fed. Reg. 2104-01. Crow Creek Sioux Tribe timely a petition for review filed within the 60-day period allowed under 28 U.S.C. § 2344. *See* Petition for Review, Crow Creek Sioux Tribe v. FCC, No. 18-1080 (D.C. Cir. filed Mar. 16, 2018); *see also* 47 C.F.R. §§ 1.103(b), 1.4(b).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in an addendum to this brief.

STATEMENT OF ISSUES

1. Whether the FCC violated procedural requirements and acted contrary to law by adopting a rule denying enhanced Lifeline support to Mobile Virtual Network Operators ("MVNOs") on tribal lands without consulting with American Indian tribal governments and without initiating the comprehensive new proceeding on tribal broadband issues that it promised.

2. Whether the FCC acted arbitrarily and capriciously and contrary to law by adopting a rule denying enhanced Lifeline support to MVNOs.

STATEMENT OF THE CASE

Congress directed the FCC to preserve and advance universal access to telecommunications for "consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas." 47 U.S.C. § 254(b) & (b)(2). To meet its universal service mandate, the Commission developed several programs designed to reduce barriers to telecommunications access. One of those programs is Lifeline, which makes service more affordable for low-income Americans. *See Fed.-State Joint Bd. on Universal Serv.*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 12208, 12228 ¶ 36 (2000) ("*2000 Tribal Lifeline Order*"); 47 U.S.C. § 254(b)(1) (providing that universal service policies should ensure that "quality services" are "available at just, reasonable, and affordable rates"). Other universal service programs, commonly referred to as "high cost" programs, reduce the cost to build telecommunications infrastructure in hard-to-serve areas.

Under the Lifeline program, the federal government provides a fixed amount of monthly financial support to participating telecommunications carriers for each qualifying low-income subscriber that the carrier serves, on the condition that the carrier provides discounted (often free) service that meets minimum standards. *See* 47 C.F.R. §§ 54.401, 403, 405, 408, 409. The baseline amount of Lifeline support

is $9.25/month for each qualifying subscriber, wherever he or she may live. *Id.* § 54.403(a).

Residents of American Indian tribes face exceptional struggles in their quest for access to affordable telecommunications. So the Commission long ago determined that it would need to provide "enhanced" amounts of Lifeline support on tribal lands in order to preserve and advance universal service. *See 2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12230-31 ¶ 42. The Commission therefore provides participating carriers with $25/month in enhanced support, in addition to the $9.25/month in baseline support, for each qualifying subscriber that lives on tribal lands. *See* 47 C.F.R. § 54.403(a)(1)&(3).

A. The Establishment of Enhanced Lifeline Support

The Commission's "primary goal" in adopting enhanced support was "to reduce the monthly cost of telecommunications services" so that low-income individuals on tribal lands without a subscription could afford to "initiate service," and "those currently subscribed" could "maintain service." *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12231-32 ¶ 44. The Commission based its decision on statistics showing dismally low rates of telecommunications subscribership among tribal residents when compared to low-income populations in the rest of country. *See id.* ¶¶ 5, 24-35. The record showed that financial barriers, and not cultural or personal preferences, explained the discrepancy. *Id.* ¶ 5; *see also id.* ¶¶ 28, 51

(noting that "the significantly lower-than-average incomes . . . of federally-recognized Indian tribes" require "low-income individuals on tribal lands [to] spend a significantly higher proportion of their incomes on telecommunications services than do other Americans"). On the Crow Creek Indian Reservation, for example, 35.2 percent of households are poor, and the unemployment rate is 17.5 percent. *See* U.S. Census Bureau, 2012-2016 American Community Survey (2016). Much of the reservation is located in Buffalo County, South Dakota, one of the most impoverished counties in the United States.

The Commission also observed that by making service more affordable to tribal residents, enhanced support would serve a secondary goal of providing carriers with the "predictable and secure revenue" they need to deploy facilities in areas often regarded as "high risk and unprofitable." *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12235-36 ¶ 53. The Commission noted, however, that even enhanced support levels "may not always be sufficient to attract the necessary facilities investment," because "the cost to extend facilities, due to the geographic remoteness of a location or other geographic characteristics, is extraordinarily high." *Id.* ¶ 55. Accordingly, the Commission "anticipate[d] that additional regulatory steps may be necessary to encourage the deployment of facilities" in high-cost areas. *Id.* It therefore subsequently developed dedicated "high-cost" universal service programs, separate from Lifeline, that directly subsidize the

deployment of facilities in high cost-of-service areas, including tribal lands. *See Connect Am. Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶¶ 479-488 (2011) ("*2011 Connect America Fund Order*"), *aff'd sub nom*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

The Commission also grounded enhanced Lifeline support in the federal government's responsibilities to federally recognized American Indian tribes. In the Commission's view, the severe lack of telecommunications access on tribal lands contravened not only its statutory universal service mandate, but also a separate obligation to "encourage tribal sovereignty and self-governance," given that access to "education, commerce, government, and public services" depends critically on access to telecommunications. *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12222 ¶ 23; *see also id.* ¶¶ 5, 22, 23, 119. Further, the Commission determined that enhanced support was necessary to meet its fiduciary duty to protect tribal interests under the federal trust doctrine. *Id.* ¶¶ 5, 119.

Before it adopted enhanced support in the *2000 Tribal Lifeline Order*, the Commission undertook serious efforts to involve tribal leaders in the policymaking process, recognizing the importance of its decision to American Indian communities. It conducted "formal field hearings in New Mexico and Arizona" with American "Indian leaders, telecommunications service providers, local public officials, and consumer advocates." *Statement of Policy on Establishing a*

Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Rcd. 4078, 4078 (2000) ("*American Indian Policy Statement*"), JA608. It also convened "two Commissioner-level meetings with Indian tribal leaders, senior representatives from other government agencies, and FCC staff," and held "numerous other informal meetings and conversations with Tribal members, officials, and advocacy organizations" to discuss specifically how the Commission could increase the penetration of universal service programs among tribal members. *Id.*, JA608.

Those consultation efforts ultimately led to the almost concurrent release, alongside the *2000 Tribal Lifeline Order*, of a policy statement to govern the Commission's relationship with tribal governments going forward. *Id.*, JA608-11. In the *American Indian Policy Statement*, the Commission committed to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." *Id.* at 4081, JA610. The Commission also committed to "remove . . . impediments" to the ability of American Indian communities to participate in the agency's rulemaking process. *Id.* at 4082, JA611.

B. The Emergence of MVNOs as the Primary Providers of Wireless Lifeline Service

In the years that followed, mobile virtual network operators, or "MVNOs," substantially increased their share of wireless subscriptions in the United States,

especially among low-income subscribers. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eleventh Report, 21 FCC Rcd. 10947 ¶¶ 27-28 (2006), JA735-37 (discussing the growth and specialization of MVNOs). An MVNO is a telecommunications carrier that does not operate its own radio access network, but rather purchases wholesale wireless service at unregulated market rates from facilities-based carriers and resells that service to its own consumers.[1] MVNOs often specialize in serving distinct corners of the marketplace – such as low-income consumers – that facilities-based carriers have "traditionally ignored," and thereby allow facilities-based carriers to profit from an expanded use of their networks. *Id.* ¶ 28, JA736-37; *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twentieth Report, 32 FCC Rcd. 8968 ¶ 15 (2017) ("*Twentieth Report on Wireless Competition*") ("Agreements between an MVNO and a facilities-based service provider may occur when the MVNO has better access to some market segments than the host facilities-based service provider and can better target specific market

[1] For convenience and for the purpose of this appeal only, Crow Creek and OSTUA refer to "facilities-based" carriers as wireless carriers that own and operate a radio access network. The radio access network is the component of a mobile telecommunications network that exchanges communications between base stations (like a cell tower) and user devices (like cell phones). Though MVNOs typically do not own and operate a radio access network, they may own and operate other network facilities, such as the "core" or "backbone" network that authenticates users, handles billing, conducts routing and switching, and performs other functions necessary to provide service.

segments, such as low-income consumers or consumers with lower data-usage needs"). Facilities-based carriers may be unable to efficiently serve the market segments targeted by MVNOs for any number of reasons, including the risk of brand dilution, the lower available revenues per consumer, and the need to establish specialized operations in marketing, customer support, and regulatory compliance. *See* Letter from CTIA to FCC at 3-4, WC Docket Nos. 17-287 et al. (filed Nov. 8, 2017) ("CTIA Nov. 8, 2017 Ex Parte"), JA2144-45 (noting the "important role that [MVNOs] play in the U.S. wireless market to tailor service plans and offerings to low-income consumers' needs").

At the same time, facilities-based wireless carriers retreated from the Lifeline program across the country, including in many states home to American Indian tribes like Crow Creek. *See, e.g.*, Crow Creek Sioux Tribal Resolution, WC Docket No. 11-42 (filed June 30, 2017) ("Crow Creek Sioux Tribal Resolution"), JA2111; Letter from Boomerang Wireless to FCC at p.7 of Attachment, WC Docket Nos. 11-42 et al. (filed Aug. 14, 2012), JA2104; Comments of the Navajo Nation Telecommunications Regulatory Commission at 10, WC Docket No. 11-42 et al. (filed Aug. 28, 2015) ("Navajo Nation Comments"), JA1888; Comments of the Oglala Sioux Tribe Utility Commission at p.3 of Attachment, WC Docket Nos. 11-42 et al. (filed Aug. 31, 2015) ("Oglala Sioux Comments"), JA1972; Reply Comments of Assist Wireless, LLC et al. at 10-11, WC Docket Nos. 11-42 et al.

(filed Sept. 30, 2015), JA2038-39. In more than a dozen states, AT&T and Verizon relinquished their status as Eligible Telecommunications Carriers ("ETCs"), *i.e.*, carriers authorized to receive Lifeline support. AT&T and Verizon continue to apply for and receive permission to relinquish their ETC status in additional states, and stopped applying for ETC status in new states long ago.

T-Mobile, another nationwide facilities-based wireless carrier, also largely phased out Lifeline service, explaining that Lifeline was not a "valuable or sustainable product for [its] base" of subscribers. Joan Engebretson, *"CFO: 'Non-sustainable' T-Mobile Lifeline Business to be Phased Out,"* Telecompetitor (June 8, 2017), http://www.telecompetitor.com/cfo-non-sustainable-t-mobile-lifeline-business-to-be-phased-out/; *see also* Comments of Assist Wireless, et al., at 19 n.36, WC Docket Nos. 11-42, et al. (filed Aug. 31, 2015) ("Comments of Assist Wireless"), JA1918. In fact, among the country's four nationwide facilities-based wireless carriers, Sprint is the only one that still participates meaningfully in the Lifeline program. *See* Comments of Assist Wireless at 18-19, JA1917-18; Universal Service Administrative Co., Lifeline Funding Disbursement Search, http://www.usac.org/li/tools/disbursements/default.aspx (showing that Sprint, through its Assurance brand, serves 94 percent of all Lifeline subscribers served by a facilities-based wireless provider).

Keeping pace with these market forces, the Commission decided to permit MVNOs to provide Lifeline service in a series of orders beginning in 2005. *See, e.g.*, *Fed.-State Joint Bd. on Universal Serv.*, Order, 20 FCC Rcd. 15095, 15100 ¶ 12 (2005) ("*TracFone Forbearance Order*"), JA724; *Lifeline and Link Up Reform and Modernization et al*., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6813 ¶ 368 (2012) ("*2012 Lifeline Order*"), JA1019. Commission action was necessary because prior to the popularization of wireless (as opposed to wireline) Lifeline service, Congress determined in Section 214(e) of the Communications Act that only carriers with their "own facilities" could become ETCs eligible to receive universal service support. 47 U.S.C. § 214(e). The legislative concern behind the facilities requirement—that *wireline* resellers might benefit from a double recovery—did not apply to wireless MVNOs.[2] Thus the Commission, exercising its authority to forbear from statutory requirements in contexts where their application would be misplaced, *see* 47 U.S.C. § 160(a), forbore from applying the facilities requirement in Section 214(e)

[2] At the time, wireline incumbents generally were required to sell wholesale service at regulated rates determined by reference to the retail rates charged by the incumbent to its customers. Thus, a wireline reseller, if allowed to gain ETC status, would have been able to receive universal service subsidies both (1) directly for retail service it provided to the consumer and (2) *indirectly* by paying regulated rates for wholesale service that already "reflect[] a reduction in price" due to the underlying carrier's receipt of universal service funding. *TracFone Forbearance Order* ¶ 12, JA724. MVNOs, on the other hand, pay unregulated market rates for wholesale service, so the concern does not apply.

to MVNOs seeking to participate in Lifeline. *TracFone Forbearance Order*, 20 FCC Rcd. at 15101-02 ¶¶ 15-18 JA725-28; *2012 Lifeline Order*, 27 FCC Rcd. at 6813 ¶ 368 JA1019. The Commission found that the presence of MVNOs in the Lifeline program would "expand participation of qualifying consumers" without "result[ing] in [a] double recovery," and thereby serve the public interest. *TracFone Forbearance Order*, 20 FCC Rcd. at 15098, 15105 ¶¶ 5, 24 JA722, 729. *See also 2012 Lifeline Order*, 27 FCC Rcd. at 6814-16 ¶¶ 371, 378 JA1020-22.

As a result of these developments, approximately 62 percent of all wireless Lifeline subscribers on tribal lands currently depend on an MVNO for Lifeline service, and approximately 76 percent of wireless Lifeline subscribers nationwide receive service from an MVNO. *See* Letter from National Lifeline Association et al. to the FCC, at 2-3, WC Docket Nos. 17-287 et al. (filed Nov. 13, 2017), JA2196-97; *see also* CTIA Nov. 8, 2017 Ex Parte at 3, JA2144 (explaining that MVNOs "have responded to low-income consumer needs and the vast majority of eligible Lifeline subscribers have chosen these providers"). These MVNOs do not typically compete with their supplying facilities-based providers for Lifeline customers; as explained, in many parts of country there is simply no facilities-based provider willing to stay in or enter the Lifeline market. Rather, facilities-based wireless carriers uninterested in directly serving Lifeline subscribers largely

have left it to their wholesale partners to undertake the specialized operations required to participate in the program.

C. The *Order* on Review Excludes MVNOs from Enhanced Support.

The *Order* on review adopted new restrictions on the provision of enhanced support that threaten the fundamental viability of the Lifeline program in many tribal areas. As relevant to Crow Creek's petition, the *Order* would limit the availability of enhanced support to facilities-based carriers only, thereby excluding MVNOs from the tribal Lifeline program.[3] *Order* ¶¶ 22-31, JA438-42. Once the rule takes effect, MVNOs will be eligible to receive only $9.25 in support for service provided on tribal lands, an amount that the Commission already determined is woefully insufficient to ensure that low-income American Indians have access to telecommunications.

The Commission first proposed the MVNO exclusion in a 2015 notice of proposed rulemaking concerning potential Lifeline program reforms. *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, 7827 ¶ 14 (2015) ("*2015 Lifeline FNPRM*"), JA1202. In a 2016 order, the Commission decided several

[3] The *Order* also limited enhanced support to tribal areas that the *Order* defines as "rural." *Order* ¶¶ 2-21, JA431-38. Although Crow Creek and OSTUA question the wisdom and lawfulness of the new restriction, they do not challenge it here.

issues raised in the *2015 Lifeline FNPRM*, but expressly declined to adopt the MVNO exclusion, clarifying that the issue would remain "open for consideration" as part of a "future proceeding" more comprehensively addressing tribal connectivity issues. *See 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, 4038 ¶ 211 (2016) ("*2016 Lifeline Order*"), JA1416.

Without commencing the comprehensive new proceeding it promised, the Commission adopted the MVNO exclusion as part of the *Order* on review. To justify the new rule, the Commission reasoned that by cutting out the "middle m[a]n," it could "focus" enhanced support "toward those providers directly investing in . . . networks on rural Tribal lands," and thereby make services "more affordable and competitive for low-income consumers and also encourage[] investment." *Order* ¶¶ 27-28, JA440-41. The Commission did not consider, however, that many tribal lands do not have a facilities-based Lifeline provider available to provide affordable service, or to receive and invest the support that the Commission sought to re-"focus," even though Crow Creek and others raised this concern on the record. *See, e.g.*, Crow Creek Sioux Tribal Resolution at 1, JA2111; Letter from Dr. Michael E. Marchand, Chairman, Confederated Tribes of the Colville Reservation, to the Hon. Ajit Pai, Chairman, FCC, et al., at 2, WC Docket No. 17-287 et al., (filed Nov. 8, 2017), JA2148.

Despite concern that the MVNO exclusion would disconnect many American Indians from telecommunications service, the Commission did not meaningfully consult with affected Tribes about its proposal, as two dissenting Commissioners noted. *See Order* at Dissenting Statement of Commissioner Mignon L. Clyburn, 3 ("Making radical changes without engaging Tribes is contrary to our own best practices."), JA512; *id.* at Dissenting Statement of Commissioner Jessica Rosenworcel, 2 ("Instead of consulting with Tribal authorities about changes to Lifeline that impact native communities, we hang up on the least connected."), JA519. The Commission did not dispute its obligation to conduct such consultations, but rather claimed that it had complied by holding meetings with certain tribes in Oklahoma to discuss an entirely separate issue of how to map former reservation boundaries in Oklahoma. *Order* ¶¶ 5 n.13, 17 n.47, JA433, 437. Neither Crow Creek nor OSTUA's member tribes, nor many other tribes affected by the MVNO exclusion, are located in Oklahoma, and thus were not part of those consultations.

STANDARD OF REVIEW

Reviewing courts must set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory . . . authority," or reached "without observance" of required procedure. 5 U.S.C. §706(2). Under the arbitrary and capricious standard, a

reviewing court's fundamental "task is to ensure that the [agency] engaged in reasoned decisionmaking," *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1499 (D.C. Cir. 1984), after conducting a "searching and careful inquiry" into the record, *Mississippi v. EPA*, 744 F.3d 1334, 1342 (D.C. Cir. 2013). To engage in reasoned decisionmaking, an agency must act "based on a consideration of the relevant factors," *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (internal quotation marks omitted), support its decision with "substantial evidence," *Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009), and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983). An agency fails to meet these requirements if it does not "consider an important aspect of the problem," or if it "offer[s] an explanation for its decision that runs counter to the evidence before [it]." *State Farm*, 103 S. Ct at 2867; *see also Texas Neighborhood Servs. v. HHS*, 875 F.3d 1, 6 (D.C. Cir. 2017); *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

If an agency changes policy, the agency must explicitly recognize that it is disregarding its own precedent, "show that there are good reasons for the new policy," and account for "serious reliance interests." *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal quotation marks omitted). An

"unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.* (internal quotation marks omitted).

While courts defer to agency interpretations of ambiguous provisions in statutes the agency is charged with administering, a "reviewing court must give effect to the unambiguously expressed intent of Congress." *Id.* at 2124-25.

SUMMARY OF ARGUMENT

I. The Commission failed to engage affected tribal governments prior to adopting the MVNO exclusion as required by its own policies, the Administrative Procedure Act ("APA"), and laws governing the relationship between the federal government and federally recognized American Indian tribes.

In 2000, the Commission adopted the *American Indian Policy Statement* in which it committed to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." *American Indian Policy Statement*, 16 FCC Rcd. at 4080-81, JA609-10. The Commission also committed in the statement to avoid "administrative and organizational impediments" that limit the ability of American Indian governments to engage with the FCC on "decisions and actions" that may affect American Indian Tribes. *Id.* at 4081, JA610. The Commission has attempted to follow this policy before making decisions that

affect the interests of American Indian tribes, including decisions governing the Lifeline program.

Having established tribal consultations as its own procedure, the Commission had a duty under the APA to follow the requirements here. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 236, 94 S. Ct. 1055, 1074 (1974) (an agency must "follow [its] own procedures" regardless whether they are "more rigorous than otherwise would be required"); *United States v. Caceres*, 440 U.S. 741, 760 (1979) ("[W]here internal regulations do not merely facilitate internal agency housekeeping, but rather afford significant procedural protections, we have insisted on compliance[.]"); *Massachusetts Fair Share v. Law Enf't Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) (noting that "[i]t has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated," and that "[t]his precept . . . is not limited to rules attaining the status of formal regulations"); *Nat'l Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1449 (D.C. Cir. 1984) (an "agency must follow its own procedures whether they are mandated by law or not"); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (holding that where a federal agency "has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before [agency]

policy is made, that opportunity must be afforded"). Compliance also was mandatory to meet the "overriding duty of [the] Federal Government to deal fairly with Indians wherever located," *Morton*, 94 S. Ct. at 1075, pursuant to "the most exacting fiduciary standards," *Seminole Nation v. United States*, 62 S. Ct. 1049, 1054 (1942). *See also Oglala Sioux Tribe of Indians*, 603 F.2d at 721.

Yet there is no indication in the *Order* that the Commission consulted with any tribal authority about the MVNO exclusion. The Commission claimed that it complied with its consultation requirements, citing meetings held prior to a 2016 Commission order governing how the Commission should draw boundaries of tribal lands in Oklahoma. *See Order* ¶ 5 n.13, JA433 (citing *Lifeline and Link Up Reform and Modernization*, Order, 31 FCC Rcd. 895 ¶ 4 (2016) (the "*Oklahoma Map Order*"), JA1337). That 2016 decision, however, suggests only that the Commission consulted tribes in Oklahoma about the development of a map defining boundaries of tribal lands in Oklahoma. *See Oklahoma Map Order*, 31 FCC Rcd. at 896 ¶¶ 4-5, JA1337. The Commission's reliance on meetings held with a narrow set of tribes in one state to discuss a narrow separate issue cannot satisfy its duty to consult with affected tribes about the MVNO exclusion.

Although the Commission insisted that these same mapping consultations touched on "the Lifeline proposals that the Commission sought comment on in the *2015 Lifeline FNPRM*," *Order* ¶ 5, JA433, the *Order* made no claim that out of the

myriad proposals raised in the *2015 Lifeline FNPRM*, the MVNO exclusion meaningfully was discussed—and the record belies any such suggestion.

The Commission breached the same obligations by failing to honor its commitment to commence a comprehensive new proceeding before acting on the MVNO exclusion. After it proposed the MVNO exclusion in the *2015 Lifeline FNPRM*, the Commission adopted the *2016 Lifeline Order*, in which it expressly declined to adopt its prior proposal. *2016 Lifeline Order*, 31 FCC Rcd. at 4038 ¶ 211, JA1416. The Commission stated that it nevertheless viewed the issue as "remain[ing] open for consideration," but only "in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands." *Id.*, JA1416. The Commission did not even commence that proceeding, let alone use it to build a more comprehensive record and conduct the required consultations, before it adopted the *Order* on review.

II. The MVNO exclusion is arbitrary, capricious, and an abuse of discretion, and must be set aside under the APA.

The Commission determined that MVNOs, which provide 62 percent of wireless Lifeline service on tribal lands, would no longer be eligible for enhanced Lifeline support, even though it previously concluded that enhanced support amounts are necessary to make services affordable to low-income tribal residents. *Order* ¶ 27, JA440. The Commission contended that "focus[ing]" enhanced

support toward providers that "directly invest[]" in network facilities would make telecommunications services "more affordable and competitive for low-income consumers and also [would] encourage[] investment." *Id.*, JA440.

But the Commission failed to explain how preventing facilities-based providers from selling service through MVNOs would make service more affordable. Nor did it explain how that would make a greater portion of the Lifeline subsidy amount available for network investment where, as here, MVNOs pay their facilities-based providers unregulated, market-based rates and the market has determined that MVNOs can handle marketing, support, and regulatory compliance operations more efficiently. The Commission's reliance on the fallacy that eliminating "middle men" necessarily makes product distribution more efficient was irrational and unsupported by any economic analysis in the record. *See id.* ¶ 28, JA441.

The Commission also failed to consider that many tribal lands are not served by *any* facilities-based Lifeline providers due to the mass exodus of those providers from the Lifeline program. The MVNO exclusion cannot increase network investment or affordability to consumer where there is no facilities-based provider to receive Lifeline support and offer affordable Lifeline service; indeed, there is no general mandate that a facilities-based carrier participate in Lifeline at all. Thus, regardless the merits of the MVNO exclusion in some parts of the

country, it clearly was irrational in the many tribal areas unserved by a facilities-based Lifeline provider.

The Commission also misinterpreted its own rules, precedent, and clear statutory provisions to justify the MVNO exclusion. It incorrectly concluded that Section 254(e) of the Communications Act requires carriers to spend support amounts exclusively on "facilities," but the statute expressly permits expenditures on "services" as well as facilities. The Commission also misunderstood the primary objective of enhanced Lifeline support, which is to reduce the cost of services for consumers in tribal areas, and not to fund the construction of facilities.

STANDING

The *Order* substantially injures Crow Creek Sioux Tribe and Oceti Sakowin Tribal Utility Authority ("OSTUA") because it unreasonably prohibits enhanced Lifeline support to MVNOs that provide affordable telecommunications service to low-income residents in tribal areas.

Many members of Crow Creek Sioux Tribe, including those residing on the Crow Creek reservation, subsist on low incomes and qualify for service under the Lifeline program. The Crow Creek reservation is not served by a facilities-based wireless carrier that participates in the Lifeline program and therefore relies on MVNOs for access to wireless Lifeline service. Without enhanced support, however, MVNOs will be unable to provide affordable Lifeline service to Crow

Creek members. In addition to harming Crow Creek members, the lack of access to telecommunications caused by the *Order* on review will impede the Crow Creek Sioux Tribe's substantial efforts to promote economic development. A favorable decision would redress these injuries by expanding access to Lifeline service on the Crow Creek reservation.

OSTUA represents a coalition of American Indian tribes, and was formed to provide a coordinated approach to addressing common utility and economic development issues. Like the Crow Creek Sioux Tribe, each of OSTUA's participating tribes have members that are impoverished and rely on Lifeline for access to telecommunications service.

ARGUMENT

I. The Commission Failed to Comply With Tribal Consultation Requirements.

A. The Commission Was Required To Consult With Affected Tribal Governments About the MVNO Exclusion.

Under the APA, an agency must "follow [its] own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton*, 94 S. Ct. at 1074; *see also, e.g.*, *Caceres*, 440 U.S. at 760; *Massachusetts Fair Share*, 758 F.2d at 711; *Nat'l Small Shipments Traffic Conference*, 725 F.2d at 1449. The same requirement applies pursuant to the federal trust doctrine with respect to agency decisions that affect the interests of

federally recognized American Indian tribes. *Morton*, 94 S. Ct. at 1075; *see also Seminole Nation*, 62 S. Ct. at 1054 (describing the "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

For example, in *Morton*, the Bureau of Indian Affairs ("BIA") denied federal assistance to an American Indian couple based on the fact that the couple lived too far away from a reservation. *Morton*, 94 S. Ct. at 1070-1072. The Supreme Court reversed, finding that the BIA failed to publish its residency limitation in the Federal Register as required by a provision of the BIA's internal procedures manual. *Id.* at 1074 (the BIA manual "declared that all directives that 'inform the public of privileges and benefits available' and of 'eligibility requirements' are among those to be published") (quoting the BIA manual). The Court determined that the failure of the publication violated notice requirements under the APA *and* the separate "overriding duty of our Federal Government to deal fairly with Indians wherever located[.]" *Id.* at 1075. As the Court explained, the "denial of benefits" without observance of the agency's "own procedures" was "inconsistent with the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Id.* (quotation marks omitted).

Applying the principles announced in *Morton*, the Eighth Circuit held that where an agency "has established a policy requiring prior consultation with a tribe,

and thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded." *Oglala Sioux Tribe of Indians*, 603 F.2d at 721. The court explained that an agency's "failure . . . to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, but also . . . the distinctive obligation of trust incumbent upon the Government in its dealings" with American Indian tribes. *Id.* (internal quotation marks omitted). Accordingly, the court reversed a district court's denial of relief that would have prevented the BIA from reassigning an agency superintendent, finding that the "two meetings" held between "tribal delegates" and "Washington officials" did not meet the "meaningful consultation" promised under BIA guidelines. *Id.* at 720.

The FCC has a long-established procedure of engaging in government-to-government consultations with federally recognized American Indian tribes before reaching decisions that affect tribal nations. In 2000 the Commission adopted its *American Indian Policy Statement*, in which it committed to "consult with" federally recognized American Indian tribes "prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." *American Indian Policy Statement*, 16 FCC Rcd. at 4080-81, JA609-10. The Commission similarly committed to avoid "administrative and

organizational impediments" that limit the ability of American Indian governments to engage with the FCC on "decisions and actions" that may affect American Indian Tribes. *Id.* at 4082, JA611.

In practice, the Commission has at least attempted to follow the consultation procedure it adopted. For example, prior to adopting enhanced Lifeline support for tribal areas, and the *American Indian Policy Statement* itself, the Commission held "two Commissioner-level meetings with Indian tribal leaders," "formal field hearings" in several states with American "Indian leaders, telecommunications service providers, local public officials, and consumer advocates," and "numerous other informal meetings and conversations with Tribal members, officials, and advocacy organizations." *American Indian Policy Statement*, 16 FCC Rcd. at 4079, JA608. Moreover, in the *2015 Lifeline FNPRM*, the Commission directed various FCC bureaus and offices to "engage in government-to-government consultation with Tribal Nations" on certain specific Lifeline reform proposals then under serious consideration. *2015 Lifeline FNPRM*, 30 FCC Rcd. at 7876-7907 ¶¶ 170, 171, 257, 265-66, JA1251-52, 1278, 1282; *see also* Letter from Bill John Baker Cherokee Nation Principal Chief, to FCC, at 2, WC Docket Nos. 17-287 et al. (filed Nov. 9, 2017) ("Cherokee Nation Nov. 9, 2017 Ex Parte") , JA2088 ("The Commission has conducted a number of tribal consultations on other pending issues, but not regarding" the *Order* on review).

In light of the procedure established in *American Indian Policy Statement* and by the agency's subsequent actions, tribal governments have a "legitimate expectation" that the FCC will consult with them before adopting a decision that could substantially affect their interests, and that opportunity must be afforded under the APA and federal trust doctrine. *Morton*, 94 S. Ct. at 1075; *Oglala Sioux Tribe of Indians*, 603 F.2d at 721. Because the MVNO exclusion would affect the availability of essential services like Lifeline for residents on tribal lands, the Commission was required to consult with affected tribal governments prior to adopting such a rule. *See* National Lifeline Association Nov. 13, 2017 Ex Parte, at 2-3, JA2196-97 (62 percent of wireless Lifeline subscribers in tribal areas are served by an MVNO); *see generally infra* Section II.

B. The Commission Failed to Comply With Tribal Consultation Requirements.

In the *Order*, the Commission made no claim that the consultation requirements do not apply. The Commission merely suggested that certain meetings held after the *2015 Lifeline FNPRM* was released satisfied its tribal consultation requirements. *See Order* ¶¶ 5, 17, JA433, 437. As explained below, however, the record demonstrates that the Commission, at most, consulted with a narrow set of tribes about a narrow, separate issue. It does not show that the Commission consulted with *affected* tribes *about the MVNO exclusion*.

The Commission proposed the MVNO exclusion in the *2015 Lifeline FNPRM*. *2015 Lifeline FNPRM*, 30 FCC Rcd. at 7827 ¶¶ 166-67, JA1250. In the *Order*, the Commission claims that "it began consultations" with tribes "[s]hortly thereafter." *Order* ¶ 5 & n.13, JA433. In support, the *Order* cites to a paragraph of the *Oklahoma Map Order*, a 2016 Commission decision that followed the *2015 Lifeline FNPRM*, in which the Commission documents certain meetings that it held with tribal officials in August 2015 and January 2016. *See id.*, JA433 (citing *Oklahoma Map Order*, 31 FCC Rcd. at 896 ¶ 4, JA1337). But the *Oklahoma Map Order* does not concern the question of whether MVNOs should continue to receive enhanced Lifeline support. It instead concerns the separate issue of how the Commission should draw boundaries of tribal lands in Oklahoma, and the related issue of how long affected parties should have before the Commission transitions to the new boundaries. *See Oklahoma Map Order*, 31 FCC Rcd. at 895 ¶ 1, JA1336.

Unsurprisingly, in describing the meetings upon which the Commission now relies, the relevant paragraph of the *Oklahoma Map Order* suggests that the discussions focused on the unrelated mapping issue, and not the MVNO exclusion. It states that FCC staff met exclusively with "Oklahoma Tribal Nations" in cities in Oklahoma, even though the MVNO exclusion affects tribes all across the country. *Id.* ¶ 4, JA1337. It describes follow-up to the consultations as having involved the

Commission's release of "a digital version of the adopted Oklahoma Historical Map," *id.*, JA1337; the Commission's issuance of a letter "to Oklahoma Tribal leaders" seeking feedback on the map and no other issues, *id.* ¶ 4 & n.10, JA1337 (citing Letter from FCC to Tribal Nations Leaders dated Nov. 2, 2015, WC Docket No. 11-42 (filed Dec. 31, 2015), JA2093 (inviting "technical comments, data, and other information about the specifications of the map")); and a second round of meetings held again in Oklahoma "to discuss the use of the Oklahoma Historical Map as well as other issues," *Oklahoma Map Order*, 31 FCC Rcd. at 896 ¶ 4, JA1337. Perhaps most importantly, it made no specific reference to the MVNO exclusion whatsoever. *See generally id.* At most, it stated that these meetings, which clearly focused on the narrow issue of the Oklahoma map, also touched on some of "the proposed changes in the *2015 Lifeline Reform Order*." *Id.* ¶ 4, JA1337.

The Commission claimed that these meetings around maps in Oklahoma nevertheless satisfy its tribal consultation requirements, because they included some discussion about "proposals that the Commission sought comment on in the 2015 Lifeline FNPRM." *Order* ¶ 17 n.47, JA437. The Commission's contention must be rejected.

As an initial matter, the Commission did not and cannot explain how consulting exclusively with tribes in Oklahoma provided a valuable exchange of

ideas between the Commission and tribes actually affected by the rule in question. *See American Indian Policy Statement*, 16 FCC Rcd. at 4081, JA610 (consultations are intended to gain meaningful input from tribal governments affected by regulatory action). Indian reservations are located in many more states than just Oklahoma, and the interest of any particular tribe in the MVNO exclusion may depend on a number of factors, such as income attainment, that vary from one to the other. The Commission cannot place a nationwide issue on the agenda for meetings about an Oklahoma issue and reasonably claim compliance.

Moreover, the Commission made no claim that *the MVNO exclusion* was among the proposals in the *2015 Lifeline FNPRM* discussed during the Oklahoma mapping consultations, let alone that the issue was discussed with the preparation, depth, and modicum of exchange required to satisfy even a minimal standard for compliance with tribal consultation requirements.

The record belies any such conclusion. First, the *2015 Lifeline FNPRM* sought comment on a very large number of proposals spanning more than two hundred paragraphs, of which just two discussed eliminating enhanced support for MVNOs. *See 2015 Lifeline FNPRM*, 30 FCC Rcd. at 7818 ¶¶ 14-223, JA1202-66 (proposing various Lifeline reforms); *id.* ¶¶ 167-168, JA1250-51 (proposing the MVNO exclusion). The other proposals included foundational changes to the Lifeline program, such as the introduction of broadband internet access as a

Lifeline-supported service and the adoption of minimum service standards. It is implausible that all of these weighty proposals were discussed meaningfully at meetings convened with the primary objective of implementing a new map of tribal areas in Oklahoma.

Moreover, to the extent any proposals raised in the *2015 Lifeline FNPRM* were meaningfully discussed in the Oklahoma meetings, there is no reason to believe that the MVNO exclusion was one of them. The *2015 Lifeline FNPRM* specifically directed FCC staff to engage in tribal consultations about some proposals but not others, and the MVNO exclusion was among the proposals that staff had *not* been directed to discuss. *Compare 2015 Lifeline FNPRM*, 30 FCC Rcd. at 7876 ¶ 170, JA1251 (directing consultations on proposal to exclude urban areas from enhanced support); *see also id.* ¶ 171, JA1252 (directing consultations on proposal to modify a self-certification requirement); *id.* ¶¶ 257, 265-66, JA1278, 1282 (directing consultations on implementation of the new Oklahoma map) *with id.* ¶¶ 166-67, JA1250 (proposing the MVNO exclusion without directing any immediate consultations on the issue). In addition, days before the *Order* on review was adopted, several tribes or groups representing their interests warned the Commission that it had not conducted meaningful consultations, and urged it to do so prior to a vote. *See* Cherokee Nation Nov. 9, 2017 Ex Parte at 2, JA2168 ("The Cherokee Nation respectfully urges the FCC to ensure that timely

and meaningful government-to-government consultation is executed prior to the adoption of any changes regarding the Tribal Lifeline subsidy program."); Letter from National Congress of American Indians to FCC, WC Docket Nos. 17-287 et al. (filed Nov. 8, 2017), JA2149 (urging the Commission to "convert the [*Order* on review] to a Notice of Proposed Rulemaking" and "engage in consultation with Tribal Nations ***prior to*** adopting rules") (emphasis in original); Letter from Native Public Media to FCC, WC Docket Nos. 17-287 et al. (filed Nov. 7, 2017), JA2135 ("urg[ing] the Commission not to approve the [*Order* on review]" before it "engage[s] in meaningful Tribal consultation, consistent with the Commission's 2000 commitment"); Letter from 18MillionRising.org et al. to FCC, WC Docket No. 17-287 et al (filed Nov. 8, 2017), JA2137 (urging the Commission to "meaningfully engage with Tribal governments before it takes any further action on any portion" of the *Order*). These parties included a very large tribe in Oklahoma that participated in the discussions around the Oklahoma map, which strongly suggests that the *Order*'s decision to exclude MVNOs from enhanced Lifeline support was not adequately discussed during those meetings. *See* Cherokee Nation Nov. 9, 2017 Ex Parte at 1, JA2167; *see also Oklahoma Map Order*, 31 FCC Rcd. at 896 ¶ 5, JA1337 (discussing the input provided by the Cherokee Nation on the map issue).

In a footnote, the Commission also noted that it "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* ¶ 17 n.47, JA437. It is unclear whether the Commission actually considered these meetings to qualify as tribal consultations that met its obligations under the *American Indian Policy Statement* and the federal trust doctrine. To the extent it did, that assertion must be rejected, because the Commission failed to describe even the basics about the meetings. *See Order* ¶ 17 n.47, JA437; *see also Sorenson*, 755 F.3d at 707 (unsupported assertions are insufficient to demonstrate that procedural obligations were observed); *Sierra Club v. EPA*, 167 F.3d 658, 665 (the "rulemaking record" must provide "enough clarity for . . . the agency's path [to] reasonably be discerned") (internal quotation marks omitted); *U.S. Telecom Ass'n*, 227 F.3d at 462 (same).

C. The Commission Should Have Fulfilled Its Commitment To Consider the MVNO Exclusion As Part of a Comprehensive Future Proceeding.

Instead of reaching out to consult with affected tribes as required by the *American Indian Policy Statement* and relevant law, the Commission actively discouraged participation by tribes by leading them to believe no action was imminent. As explained, the Commission sought comment on the MVNO exclusion, among many other Lifeline program reforms, in its *2015 Lifeline*

FNPRM. *2015 Lifeline FNPRM*, 30 FCC Rcd. at 7875 ¶¶ 166-167, JA1250. Several months later, the Commission released the *2016 Lifeline Order*, in which it adopted many but not all of the proposals raised in the *2015 Lifeline FNPRM*. *See 2016 Lifeline Order*, 31 FCC Rcd. at 3963 ¶ 3, JA1341. The MVNO exclusion was one of the proposals that the Commission expressly declined to adopt. *Id.* ¶ 211, JA1416 ("[W]e are not at this time modifying the enhanced support amount or deciding whether to restrict Lifeline and/or Link Up support to certain carriers operating on Tribal lands or carriers serving certain portions of Tribal lands."). The Commission then explained that issues like the MVNO exclusion that were "not addressed in this order" would "remain open for consideration in a future proceeding more comprehensively focused on advancing broadband deployment on Tribal lands." *Id.*, JA1416.

The Commission's handling of the MVNO exclusion in the *2016 Lifeline Order* created a "legitimate expectation," *Morton*, 415 U.S. at 236, 94 S. Ct. at 1055, that the Commission would not adopt the MVNO exclusion until after it commenced a future proceeding, and that it would only consider the MVNO exclusion together with policy initiatives that address broadband access on a comprehensive basis. That expectation made perfect sense, given that restrictions on enhanced Lifeline support, if adopted on their own without counterbalancing initiatives designed to make services more affordable, stood to reduce rather than

advance the Commission's stated goal of increasing access to telecommunications in tribal areas. In light of the federal government's "distinctive obligation of trust . . . in its dealings with" American Indians, the Commission had a duty to honor the expectations it had created. *Id.*; *see also Oglala Sioux Tribe of Indians*, 603 F.2d at 721. The Commission also had an obligation to issue a notice of proposed rulemaking commencing the new proceeding, or at a minimum reopen a comment period, under the APA. *See AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 84 (D.D.C. 2007) (where subsequent developments take a "rule off the books," an agency must "engage in a 'new rulemaking in accordance with the [APA]'") (alteration in original) (quoting *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 798 (D.C. Cir. 1983)); *Nat'l Wildlife Fed'n v. Babbitt*, 835 F. Supp. 654, 670 n.18 (D.D.C. 1993) ("comments received" on a withdrawn proposal do "not satisfy . . . notice and comment requirements").

Prior to adopting the *Order* on review, however, the Commission did not initiate the "future proceeding" it promised, and did not consider the MVNO exclusion on a comprehensive basis alongside proposals to advance broadband deployment. It simply entered the *Order* in proceedings that it had commenced long ago. As a result, tribal authorities like Crow Creek and OSTUA stood blindsided by regulatory action that will have devastating effects on the people they serve. The Commission's surprise adoption of the MVNO exclusion therefore

breached its obligations under the APA and the federal trust doctrine, and should be reversed.

II. The MVNO Exclusion Violates Reasoned Decisionmaking Requirements.

The *Order* on review adopted a rule that would eliminate enhanced support for MVNOs serving qualifying low-income subscribers on tribal lands, even though MVNOs provide the clear majority—about 62 percent—of wireless Lifeline service in tribal areas today. But the alternative to MVNOs are facilities-based providers that face no general mandate to become ETCs that offer Lifeline service, and have left the Lifeline business altogether to a great extent. The record thus showed that barring MVNOs would leave many residents of tribal areas stranded in their search for affordable service, while also eliminating the revenues MVNOs pay to facilities-based carriers. Nevertheless, the Commission concluded that its new rule would create "more affordable and competitive" service and result in more "investment." *Order* ¶ 27, JA440. This was unreasonable.

A. The Commission Failed to Consider Whether Facilities-Based Providers Were Willing To Provide Lifeline Service.

The Commission determined that the MVNO exclusion would increase investment and affordability by "[d]irecting enhanced Lifeline funds" away from MVNOs and to facilities-based carriers. *Id.*, JA440. But the record demonstrated

that in many areas, there would be no facilities-based provider to whom "enhanced Lifeline funds" could be "directed."

Numerous parties, including Crow Creek, explained the problem to the Commission. In a resolution of its Tribal Council concerning the Lifeline program, Crow Creek noted that its reservation is "located in one of the most impoverished areas of the United States," and therefore critically dependent on the Lifeline program for access to telecommunications. Crow Creek Sioux Tribal Council Resolution at 1, JA2111. It also explained that residents on the Crow Creek reservation already "have limited access to essential services," including "Lifeline service," because Verizon Wireless, after acquiring Western Wireless, showed "no interest in serving this market," and in fact "relinquished its eligibility" to offer Lifeline service in the state altogether. *Id.*, JA2111.

The Navajo Nation likewise reported that "***none*** of the major facilities-based wireless carriers . . . provide Lifeline service on the Navajo Nation," though "several wireless resellers currently" do. Navajo Nation Comments at 10, JA1888 (emphasis in original). Similarly, the Oglala Sioux Tribe explained that from 2005 to 2014, the number of Lifeline subscribers served by AT&T's wireless arm and area wireline incumbents fell from 6,969 to 694. *See* Oglala Sioux Comments at p.3 of Attachment, JA1972. An MVNO serving Oklahoma explained that in that state, "not a single" Lifeline subscriber is served by a "facilities-based wireless

carrier," and that nationwide facilities-based wireless carriers "have either not secured or relinquished the necessary ETC designations in most states to provide wireless Lifeline service." Comments of Assist Wireless at 19-20, JA1918-19 ; *see also* Comments of Boomerang Wireless at 13-14, JA1947-48 (summarizing low and dwindling Lifeline subscribership among facilities-based carriers, and explaining that "with the exception of Sprint," the four nationwide wireless carriers "have not shown interest in engaging in outreach to serve Lifeline eligible low-income subscribers, especially those on tribal lands").

The situation in South Dakota is illustrative. Beginning in 2001, Verizon Wireless's predecessors had been certified as ETCs eligible to offer Lifeline service in South Dakota. *See* WWC License, LLC and RCC Minnesota, Inc. d/b/a Verizon Wireless at 2, Petition for Relinquishment of Eligible Telecommunications Carrier Designation (Pub. Util. Comm'n. of S.D. Sept. 21, 2012), https://puc.sd.gov/commission/dockets/telecom/2012/TC12-158/petition.pdf; *see also* Crow Creek Tribal Council Resolution at 1, JA2111 (explaining that Verizon Wireless' predecessor, Western Wireless, used to offer Lifeline on the Crow Creek reservation). In 2010, however, Verizon started to relinquish its ETC status in parts of the state. Verizon received less than $100 in Lifeline support from 2010 through 2013, and had exited the state altogether by 2014. *See Universal Service Administrative Co.*, Funding Disbursement Search,

https://www.usac.org/li/tools/disbursements/results.aspx; *see also* Crow Creek Tribal Council Resolution at 1, JA2111 (explaining that Verizon Wireless has shown no interest in providing Lifeline on the Crow Creek reservation). Though Sprint continues to participate in the Lifeline program in more states than its peers, it does not provide Lifeline service in South Dakota. AT&T provides wireless Lifeline service in a very small part of the state, *see* Oglala Sioux Comments at p.3 of Attachment, JA1972, and the sole remaining facilities-based wireless carrier to offer Lifeline service, Standing Rock Telecommunications, likewise serves only a portion of the Standing Rock reservation and no other areas. Thus, MVNOs that *provide* Lifeline service using the radio access networks of facilities-based carriers that *do not provide* Lifeline service are essential to expanding access to affordable telecommunications in the state. *See Universal Service Administrative Co.*, Lifeline Participation, https://www.usac.org/li/about/process-overview/stats/participation.aspx (showing that in South Dakota, just 9 percent of all eligible households participate in the Lifeline program).

To the extent the Commission was speculating that the departure of MVNOs might spark renewed interest in the Lifeline program by facilities-based carriers, it failed to explain why that assumption would be reasonable. Indeed, facilities-based carriers and trade associations representing their interests pushed the Commission to make it *easier* to relinquish their ETC designations, and supported

broad participation in the program by carriers of all types, including MVNOs. *See*, *e.g.*, Comments of United States Telecom Association at 5, WC Docket No. 10-90 et al. (filed Sept. 9, 2015), JA1995 (noting that the "widespread market entry of other Lifeline providers," like MVNOs, have made the participation of facilities-based carriers less important); Comments of AT&T at 27-29, WC Docket No. 11-42 et al. (filed Aug. 31, 2015), JA1926-28 (urging the Commission to "encourage voluntary Lifeline participation by the broadest possible range of providers," and to allow "ETCs . . . to make an independent determination as to whether they want to continue to participate in the Lifeline program[.]"); CTIA Nov. 8, 2017 Ex Parte at 3, JA2144 (opposing the elimination of "non-facilities-based providers" from the Lifeline program). As AT&T, a large facilities-based provider, explained, "[t]he significant administrative burdens of being a Lifeline ETC coupled with potential FCC enforcement actions" served as a "powerful deterrent to participation" in the Lifeline program by facilities-based providers, a state of affairs that has little to do with the ability of MVNOs to receive enhanced Lifeline support. AT&T Comments at 6 & n.10, JA1924 (citing relinquishment notices filed by its affiliate Cricket Communications and by T-Mobile). In other words, $35 of monthly support is generally not enough to interest large facilities-based carriers in providing service on tribal lands, as the Commission previously observed. *See* *TracFone Forbearance Order*, 20 FCC Rcd. at 15100 ¶ 9, 15105 ¶ 24, JA724, 729

(finding that MVNO participation results in "greater utilization of Lifeline-supported services" and would "expand participation of qualifying consumers").

Because facilities-based carriers are often unavailable to provide Lifeline service to a subscriber served by an MVNO, the Commission's entire rationale for the MVNO exclusion falls apart. Without a facilities-based Lifeline alternative, affordable service would become *less* available, not more. *See, e.g.*, Navajo Nation Comments at 10, JA1888 (noting that an MVNO exclusion would "only lead to worse service and more limited service offerings, and ultimately, fewer Navajos who have phones"); Reply Comments of Boomerang Wireless, LLC at 6, WC Docket No. 11-42 et al. (filed Sept. 30, 2015), JA2055 ("Since most facilities-based wireless providers have not focused on serving low-income Tribal residents, the Commission's proposal to restrict enhanced benefits to facilities-based providers carries with it the very real possibility that upwards of two-thirds of the Tribal Lifeline subscribers could lose their service.") ("Boomerang Reply Comments"). Moreover, there would be no mechanism by which a facilities-based carrier might invest *any* portion of a Lifeline support payment, let alone more than an MVNO already makes available by paying the facilities-based carrier for network access.

The Commission, however, failed even to acknowledge the apparent disinterest of facilities-based carriers in providing Lifeline service when it

evaluated the merits of the MVNO exclusion. As a result, the Commission "failed to consider an important aspect of the problem," and relied on a justification that "runs counter to the evidence" before it. *State Farm*, 103 S. Ct. at 2867; *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (failure to provide a "reasoned explanation" of a "critical . . . factor" was arbitrary and capricious); *Sorenson*, 755 F.3d at 709 (promulgation of a rule is "arbitrary and capricious" where the "Commission failed to articulate a satisfactory explanation for its action") (internal quotation marks omitted).

The Commission's blindness to the problem also means that it failed to justify the *Order*'s departure from the Commission's prior policy of permitting MVNOs to participate in the tribal Lifeline program. *Encino Motorcars*, 136 S. Ct. at 2126. As explained, that policy was premised on the Commission's finding that MVNOs would increase access to affordable services, *see TracFone Forbearance Order*, 20 FCC Rcd. at 15100 ¶ 9, 15105 ¶ 24, JA724, 729 (MVNO participation results in "greater utilization of Lifeline-supported services" and would "expand participation of qualifying consumers"), which the Commission provided no basis for disregarding in the *Order* on review. *See Encino Motorcars*, 136 S. Ct. at 2126 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by [an agency's] prior policy"). Nor did the Commission consider the "serious reliance interests" at stake for the many low-

income consumers in tribal areas that depend on MVNOs for Lifeline service, as it was required to do. *Id.* at 2126-27.

B. The Commission Relied on the "Middle Man" Fallacy.

Even where facilities-based carriers may be available to provide Lifeline service, the Commission failed to plausibly explain why excluding MVNOs would result in more affordable service and more investment. The Commission reasoned that "[d]irecting enhanced Lifeline funds to facilities-based" providers would "ensure[] that the payments Lifeline providers receive from the Fund to serve rural Tribal lands will be reinvested in the 'provision, maintenance, and upgrading' of facilities in those areas," *Order* ¶ 27, JA440, whereas "funneling Lifeline enhanced support funding through middle men" would have "marginal[]," if any, positive impact on network investment. *Id.* ¶ 28, JA441.

The Commission's assumption that the presence of a "middle man" in the chain of production creates inefficiency was unsupported and is irrational. MVNOs serve Lifeline customers "by buying large blocks of minutes from the major carriers and then reselling those minutes as Lifeline packages." *See* Navajo Nation Comments at 10, JA1888. Facilities-based providers are not compelled to sell service to MVNOs, and the rates that they charge MVNOs are not regulated. *See Reexamination of Roaming Obligations of Commercial Mobile Radio Serv. Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC

Rcd. 15817, 15836 ¶51 & n.122 (2007); *Worldcall Interconnect, Inc. a/k/a Evolve Broadband, Complainant*, Order, 31 FCC Rcd. 3527, 3534-35 ¶16-17 & n.48 (2016). When a facilities-based carrier sells wholesale network access to an MVNO rather than as a retail service direct to the consumer, the facilities-based carrier economizes on costs associated with retail operations, which are outsourced to the MVNO. A facilities-based provider's partnership with an MVNO therefore results from the same efficient "make or buy" decisions that "firms in the rest of the economy make." *W. Res., Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 787 (D.C. Cir. 1997) (observing the principle that firms will "buy" rather than "make" "elements of their production" that an outside firm can produce "at a lower incremental cost") (internal quotation marks omitted).

As the Commission itself explained, facilities-based providers contract with MVNOs "when the MVNO has better access to some market segments than the host facilities-based service provider," and when the MVNO "can better target specific market segments, such as low-income consumers or consumers with lower data-usage needs." *Twentieth Report on Wireless Competition*, 32 FCC Rcd. at 8969 ¶ 15; *see also* Comments of Telscape Communications, Inc. and Sage Telecom Communications, LLC at 2, WC Docket No. 11-42 et al. (filed Aug. 31, 2015), JA1992 (explaining that as an MVNO, it "has primarily focused on offering specialized services to meet the needs of Spanish-speaking consumers, including

low-income consumers"); CTIA Nov. 8, 2017 Ex Parte at 3, JA2144 (explaining the "important role that non-facilities based wireless providers play in the U.S. wireless market to tailor service plans and offerings to low-income consumers' needs"). Their decision to offer service indirectly "through wholesale relationships with wireless resellers" rather than directly suggests only that MVNOs perform these outreach and customer support functions more efficiently. Boomerang Reply Comments at 4, JA2053. The result is a "win-win-win" that the Commission failed to recognize. *Id.*, JA2053. Facilities-based providers win because they "are able to sell capacity," MVNOs win because they "are able to leverage those communications assets to reach low-income consumers on Tribal lands," and eligible low-income populations win because they "have affordable access to modern . . . wireless communications services." *Id.*, JA2053.

The Commission did not explain how divesting facilities-based providers of the freedom to reach a "make or buy" decision on the merits might improve the efficiency of the Lifeline program. The Commission just took it as a given that "ensuring that facilities-based carriers receive 100 percent of [enhanced Lifeline] support" will "mean more investment in rural Tribal areas." *Order* ¶ 28, JA441. But as explained, facilities-based providers already have determined that selling access to an MVNO would be *more* profitable than selling directly to Lifeline customers, and would make *more* resources available to build facilities, reduce

rates, and improve service. *See also* Navajo Nation Comments, at 10, JA1888 (by selling access to MVNOs, "facilities-based carriers . . . end up with a significant percentage of [Lifeline] support, which allows them to expand infrastructure deeper into the Navajo Nation"); Boomerang Reply Comments, at 6, JA2055("By generating demand, [MVNOs] help to improve the business case for these [facilities-based] providers to make investments to achieve more extensive and reliable coverage in Tribal lands"); AT&T Comments at 6 & n.10, JA1924 (explaining that the administrative burdens of serving Lifeline subscribers has led facilities-based providers to stop providing Lifeline directly); CTIA Nov. 8, 2017 Ex Parte, JA2142 (observing the important role of MVNOs in serving low-income populations). The Commission's implausible—and unexplained—assumption that these voluntary, market-driven transactions *decreased* the amount of Lifeline support available for investment was arbitrary and capricious. *See, e.g.*, *U.S. Telecom Ass'n*, 227 F.3d at 461-62 (the FCC must explain the basis for its conclusions); *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (conclusory statements inadequate under the APA); *Sierra Club*, 167 F.3d at 665 (the "rulemaking record" must provide "enough clarity for [a reviewing court] to say that the agency's path may reasonably be discerned"); *see also Sorenson*, 755 F.3d at 707-09. Especially "[i]n light of the serious reliance

interests at stake," much more was required of the Commission. *Encino Motorcars*, 136 S. Ct. at 2126-27.

C. The Commission Misinterpreted Its Rules, Precedent, and Statutory Provisions.

In addition to relying on unreasoned factfinding to justify the MVNO exclusion, the Commission also committed serious errors in assembling legal support for its new rule.

First, the Commission suggested that the MVNO exclusion would advance the goals of Section 254(e) of the Communications Act, 47 U.S.C. § 254(e), claiming that the rule would "ensure[] that the payments Lifeline providers receive from the Fund to serve rural Tribal lands will be reinvested in the 'provision, maintenance, and upgrading' of facilities in those areas." *Order* ¶ 27 & n.66, JA440, 441 (quoting 47 U.S.C. § 254(e)). The problem is that Section 254(e) does not require carriers to use Lifeline support exclusively for the provision, maintenance, and upgrading of *facilities*. It straightforwardly allows Lifeline support to be used "for the provision, maintenance, and upgrading of facilities *and services*[.]" 47 U.S.C. § 254(e) (emphasis added).

The Commission did not explain how limiting Lifeline funds to facilities-based carriers would advance the objectives of a statutory provision that does not require or even favor expenditures on facilities. Nor could it reasonably do so. The Commission long ago rejected the argument that Section 254(e) requires

carriers to spend support amounts on facilities. *See TracFone Forbearance Order*, 20 FCC Rcd. at 15095, 15105 ¶ 26, JA719, 729; *see also 2011 Connect America Fund Order*, 26 FCC Rcd. 17663 ¶ 64 (Section 254(e) refers "to 'facilities' and 'services' as distinct items for which federal universal service funds may be used"). Moreover, the Commission's Lifeline regulations merely require that the full amount of the Lifeline support be passed through to consumers, and do not require that *any* portion be spent specifically on "facilities." *See* 47 C.F.R. § 54.403. Thus, the Commission's reliance on Section 254(e) for legal support was misplaced. *See Encino Motorcars*, 136 S. Ct. 2117 at 2126 (unexplained inconsistencies in agency policy are arbitrary and capricious); *see also id.* at 2124-25 (an agency's irrational statutory interpretation must be rejected).

Second, the Commission determined that the MVNO exclusion would advance the "intent of the" *2000 Tribal Lifeline Order*'s adoption of enhanced Lifeline support. *Order* ¶ 4, JA432. In doing so, the Commission suggested that the primary objective of enhanced support was to incent investment, and that reducing costs for the consumer was merely a secondary goal that the *2000 Tribal Lifeline Order* casually "referenced." *Id.*, JA 432.

The Commission got its precedent exactly backwards; indeed, the *2000 Tribal Lifeline Order* could not have been clearer on this point. It stated that the Commission's "primary goal" in adopting enhanced support was "to reduce the

monthly cost of telecommunications services for or qualifying low-income individuals on tribal lands, so as to encourage those without service to initiate service and better enable those currently subscribed to maintain service." *2000 Tribal Lifeline Order*, 15 FCC Rcd. at 12231-32 ¶ 44, JA635-36. While the Commission also sought to encourage investment through enhanced support, it sought to do so *by increasing affordability* (*i.e.* increasing demand). *Id.* ¶ 53, JA639. As the Commission explained, by making service more affordable for low-income consumers, enhanced support amounts would allow carriers to reach a critical mass of customers in the area, thereby providing "carriers with a predictable and secure revenue source," and "economies of scale." *Id.*, JA639. Moreover, the Commission recognized that enhanced support would be largely *ineffective* as a subsidy program if its intent were to reduce the "cost to extend facilities," explaining that improved high-cost support mechanisms, which directly subsidize facilities-based construction, would be necessary "to encourage the deployment of facilities in [tribal] areas where the cost of deployment is extraordinarily high." *Id.* ¶ 55, JA640. The Commission thus erred in assuming that subsidizing infrastructure deployment was the primary "intent" of enhanced support. The Commission should have acknowledged that it was fundamentally repurposing the Lifeline program, explained its basis for doing so, and considered

the impact that the shift in policy would have on consumers. *See Encino Motorcars*, 136 S. Ct. at 2126-27.

CONCLUSION

The Commission should grant the petitions for review and vacate the *Order*.

Dated: September 10, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), I hereby certify that this brief complies with the type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), this brief contains 10,888 words, which is under the 13,000 word limit. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2016) used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify on this 10th day of September, 2018, I caused the foregoing Final Joint Opening Brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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ADDENDUM

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5 U.S.C. § 706

§ 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 C.F.R. 54.401

§ 54.401 Lifeline defined.

(a) As used in this subpart, Lifeline means a non-transferable retail service offering provided directly to qualifying low-income consumers:

(1) For which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in § 54.403; and

(2) That provides qualifying low-income consumers with voice telephony service or broadband Internet access service as defined in § 54.400. Toll limitation service does not need to be offered for any Lifeline service that does not distinguish between toll and non-toll calls in the pricing of the service. If an eligible telecommunications carrier charges Lifeline subscribers a fee for toll calls that is in addition to the per month or per billing cycle price of the subscribers' Lifeline service, the carrier must offer toll limitation service at no charge to its subscribers as part of its Lifeline service offering.

(b) Eligible telecommunications carriers may allow qualifying low-income consumers to apply Lifeline discounts to any residential service plan with the minimum service levels set forth in § 54.408 that includes fixed or mobile voice telephony service, broadband Internet access service, or a bundle of broadband Internet access service and fixed or mobile voice telephony service; and plans that include optional calling features such as, but not limited to, caller identification, call waiting, voicemail, and three-way calling.

(1) Eligible telecommunications carriers may permit qualifying low-income consumers to apply their Lifeline discount to family shared data plans.

(2) Eligible telecommunications carriers may allow qualifying low-income consumers to apply Lifeline discounts to any residential service plan that includes voice telephony service without qualifying broadband Internet access service prior to December 1, 2021.

(3) Beginning December 1, 2016, eligible telecommunications carriers must provide the minimum service levels for each offering of mobile voice service as defined in § 54.408.

(4) Beginning December 1, 2021, eligible telecommunications carriers must provide the minimum service levels for broadband Internet access service in every Lifeline offering.

(c) Eligible telecommunications carriers may not collect a service deposit in order to initiate Lifeline for voice-only service plans that:

(1) Do not charge subscribers additional fees for toll calls; or

(2) That charge additional fees for toll calls, but the subscriber voluntarily elects toll limitation service.

(d) When an eligible telecommunications carrier is designated by a state commission, the state commission shall file or require the eligible telecommunications carrier to file information with the Administrator demonstrating that the carrier's Lifeline plan meets the criteria set forth in this subpart and describing the terms and conditions of any voice telephony service plans offered to Lifeline subscribers, including details on the number of minutes provided as part of the plan, additional charges, if any, for toll calls, and rates for each such plan. To the extent the eligible telecommunications carrier offers plans to Lifeline subscribers that are generally available to the public, it may provide summary information regarding such plans, such as a link to a public Web site outlining the terms and conditions of such plans. Lifeline assistance shall be made available to qualifying low-income consumers as soon as the Administrator certifies that the carrier's Lifeline plan satisfies the criteria set out in this subpart.

(e) Consistent with § 52.33(a)(1)(i)(C) of this chapter, eligible telecommunications carriers may not charge Lifeline customers a monthly number-portability charge.

(f) Eligible telecommunications carriers may aggregate eligible subscribers' benefits to provide a collective service to a group of subscribers, provided that each qualifying low-income consumer subscribed to the collective service receives residential service that meets the requirements of paragraph (a) of this section and § 54.408.

47 C.F.R. 54.403

§ 54.403 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.

(2) For a Lifeline provider offering either standalone voice service, subject to the minimum service standards set forth in § 54.408, or voice service with broadband below the minimum standards set forth in § 54.408, the support levels will be as follows:

(i) Until December 1, 2019, the support amount will be $9.25 per month.

(ii) From December 1, 2019 until November 30, 2020, the support amount will be $7.25 per month.

(iii) From December 1, 2020 until November 30, 2021, the support amount will be $5.25 per month.

(iv) On December 1, 2021, standalone voice service, or voice service not bundled with broadband which meets the minimum standards set forth in § 54.408, will not be eligible for Lifeline support unless the Commission has previously determined otherwise.

(v) Notwithstanding paragraph (a)(2)(iv) of this section, on December 1, 2021, the support amount for standalone voice service, or voice service not bundled with broadband which meets the minimum standards set forth in § 54.408, provided by a provider that is the only Lifeline provider in a Census block will be the support amount specified in paragraph (a)(2)(iii) of this section.

47 C.F.R. § 54.405

§ 54.405 Carrier obligation to offer Lifeline.

All eligible telecommunications carriers must:

(a) Make available Lifeline service, as defined in § 54.401, to qualifying low-income consumers.

(b) Publicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service.

(c) Indicate on all materials describing the service, using easily understood language, that it is a Lifeline service, that Lifeline is a government assistance program, the service is non-transferable, only eligible consumers may enroll in the program, and the program is limited to one discount per household. For the purposes of this section, the term “materials describing the service” includes all print, audio, video, and web materials used to describe or enroll in the Lifeline service offering, including application and certification forms.

(d) Disclose the name of the eligible telecommunications carrier on all materials describing the service.

(e) De-enrollment—

(1) De-enrollment generally. If an eligible telecommunications carrier has a reasonable basis to believe that a Lifeline subscriber no longer meets the criteria to be considered a qualifying low-income consumer under § 54.409, the carrier must notify the subscriber of impending termination of his or her Lifeline service. Notification of impending termination must be sent in writing separate from the subscriber's monthly bill, if one is provided, and must be written in clear, easily understood language. A carrier providing Lifeline service in a state that has dispute resolution procedures applicable to Lifeline termination that requires, at a minimum, written notification of impending termination, must comply with the applicable state requirements. The carrier must allow a subscriber 30 days following the date of the impending termination letter required to demonstrate continued eligibility. A subscriber making such a demonstration must present proof of continued eligibility to the carrier consistent with applicable annual re-certification requirements, as described in § 54.410(f). An eligible telecommunications carrier must de-enroll any subscriber who fails to demonstrate eligibility within five business days after the expiration of the subscriber's time to respond. A carrier providing Lifeline service in a state that has dispute resolution procedures applicable to Lifeline termination must comply with the applicable state requirements.

(2) De-enrollment for duplicative support. Notwithstanding paragraph (e)(1) of this section, upon notification by the Administrator to any eligible telecommunications carrier that a subscriber is receiving Lifeline service from another eligible telecommunications carrier or that more than one member of a subscriber's household is receiving Lifeline service and therefore that the subscriber should be de-enrolled from participation in that carrier's Lifeline program, the eligible telecommunications carrier must de-enroll the subscriber from participation in that carrier's Lifeline program within five business days. An eligible telecommunications carrier shall not be eligible for Lifeline reimbursement for any de-enrolled subscriber following the date of that subscriber's de-enrollment.

(3) De-enrollment for non-usage. Notwithstanding paragraph (e)(1) of this section, if a Lifeline subscriber fails to use, as "usage" is defined in § 54.407(c)(2), for 30 consecutive days a Lifeline service that does not require the eligible telecommunications carrier to assess and collect a monthly fee from its subscribers, an eligible telecommunications carrier must provide the subscriber 15 days' notice, using clear, easily understood language, that the subscriber's failure to use the Lifeline service within the 15–day notice period will result in service termination for non-usage under this paragraph. Eligible telecommunications carriers shall report to the Commission annually the number of subscribers de-enrolled for non-usage under this paragraph. This de-enrollment information must be reported by month and must be submitted to the Commission at the time an eligible telecommunications carrier submits its annual certification report pursuant to § 54.416.

(4) De-enrollment for failure to re-certify. Notwithstanding paragraph (e)(1) of this section, an eligible telecommunications carrier must de-enroll a Lifeline subscriber who does not respond to the carrier's attempts to obtain re-certification of the subscriber's continued eligibility as required by § 54.410(f); or who fails to provide the annual one-per-household re-certifications as required by § 54.410(f). Prior to de-enrolling a subscriber under this paragraph, the eligible telecommunications carrier must notify the subscriber in writing separate from the subscriber's monthly bill, if one is provided, using clear, easily understood language, that failure to respond to the re-certification request will trigger de-enrollment. A subscriber must be given 60 days to respond to recertification efforts. If a subscriber does not respond to the carrier's notice of impending de-enrollment, the carrier must de-enroll the subscriber from Lifeline within five business days after the expiration of the subscriber's time to respond to the re-certification efforts.

(5) De-enrollment requested by subscriber. If an eligible telecommunications carrier receives a request from a subscriber to de-enroll, it must de-enroll the subscriber within two business days after the request.

47 C.F.R. § 54.408

§ 54.408 Minimum service standards.

(a) As used in this subpart, with the following exception of paragraph (a)(2) of this section, a minimum service standard is:

(1) The level of service which an eligible telecommunications carrier must provide to an end user in order to receive the Lifeline support amount.

(2) The minimum service standard for mobile broadband speed, as described in paragraph (b)(2)(i) of this section, is the level of service which an eligible telecommunications carrier must both advertise and provide to an end user.

(b) Minimum service standards for Lifeline supported services will take effect on December 1, 2016. The minimum service standards set forth below are subject to the conditions in § 54.401. The initial minimum service standards, as set forth in paragraphs (b)(1) through (3) of this section, will be subject to the updating mechanisms described in paragraph (c) of this section.

(1) Fixed broadband will have minimum service standards for speed and data usage allowance, subject to the exceptions in paragraph (d) of this section.

(i) The minimum service standard for fixed broadband speed will be 10 Megabits per second downstream/1 Megabit per second upstream.

(ii) The minimum service standard for fixed broadband data usage allowance will be 150 gigabytes per month.

(2) Mobile broadband will have minimum service standards for speed and data usage allowance.

(i) The minimum service standard for mobile broadband speed will be 3G.

(ii) The minimum service standard for mobile broadband data usage allowance will be:

(A) From December 1, 2016 until November 30, 2017, 500 megabytes per month;

(B) From December 1, 2017, until November 30, 2018, 1 gigabyte per month;

(C) From December 1, 2018 until November 30, 2019, 2 gigabytes per month; and

(D) On and after December 1, 2019, the minimum standard will be calculated using the mechanism set forth in paragraphs (c)(2)(ii)(A) through (D) of this section. If the data listed in paragraphs (c)(2)(ii)(A) through (D) do not meet the

criteria set forth in paragraph (c)(2)(iii) of this section, then the updating mechanism in paragraph (c)(2)(iii) will be used instead.

(3) The minimum service standard for mobile voice service will be:

(i) From December 1, 2016, until November 30, 2017, 500 minutes;

(ii) From December 1, 2017, until November 30, 2018, 750 minutes; and

(iii) On and after December 1, 2018, the minimum standard will be 1000 minutes.

(c) Minimum service standards will be updated using the following mechanisms:

(1) Fixed broadband will have minimum service standards for speed and data usage allowance. The standards will updated as follows:

(i) The standard for fixed broadband speed will be updated on an annual basis. The standard will be set at the 30th percentile, rounded up to the nearest Megabit-per-second integer, of subscribed fixed broadband downstream and upstream speeds. The 30th percentile will be determined by analyzing FCC Form 477 Data. The new standard will be published in a Public Notice issued by the Wireline Competition Bureau on or before July 31, which will give the new minimum standard for the upcoming year. In the event that the Bureau does not release a Public Notice, or the data are older than 18 months, the minimum standard will be the greater of:

(A) The current minimum standard; or

(B) The Connect America Fund minimum speed standard for rate-of-return fixed broadband providers, as set forth in 47 CFR 54.308(a).

(ii) The standard for fixed broadband data usage allowance will be updated on an annual basis. The new standard will be published in a Public Notice issued by the Wireline Competition Bureau on or before July 31, which will give the new minimum standard for the upcoming year. The updated standard will be the greater of:

(A) An amount the Wireline Competition Bureau deems appropriate, based on what a substantial majority of American consumers already subscribe to, after analyzing Urban Rate Survey data and other relevant data; or

(B) The minimum standard for data usage allowance for rate-of-return fixed broadband providers set in the Connect America Fund.

(2) Mobile broadband will have minimum service standards for speed and capacity. The standards will be updated as follows:

(i) The standard for mobile broadband speed will be updated when, after analyzing relevant data, including the FCC Form 477 data, the Wireline Competition Bureau determines such an adjustment is necessary. If the standard for mobile broadband speed is updated, the new standard will be published in a Public Notice issued by the Wireline Competition Bureau.

(ii) The standard for mobile broadband capacity will be updated on an annual basis. The standard will be determined by:

(A) Dividing the total number of mobile-cellular subscriptions in the United States, as reported in the Mobile Competition Report by the total number of American households, as determined by the U.S. Census Bureau, in order to determine the number of mobile-cellular subscriptions per American household. This number will be rounded to the hundredths place and then multiplied by;

(B) The percentage of Americans who own a smartphone, according to the Commission's annual Mobile Competition Report. This number will be rounded to the hundredths place and then multiplied by;

(C) The average data used per mobile smartphone subscriber, as reported by the Commission in its annual Mobile Competition Report. This number will be rounded to the hundredths place and then multiplied by;

(D) Seventy (70) percent. The result will then be rounded up to the nearest 250 MB interval to provide the new monthly minimum service standard for the mobile broadband data usage allowance.

(iii) If the Wireline Competition Bureau does not release a Public Notice giving new minimum standards for mobile broadband capacity on or before July 31, or if the necessary data needed to calculate the new minimum standard are older than 18 months, the data usage allowance will be updated by multiplying the current data usage allowance by the percentage of the year-over-year change in average mobile data usage per smartphone user, as reported in the Mobile Competition Report. That amount will be rounded up to the nearest 250 MB.

(d) Exception for certain fixed broadband providers. Subject to the limitations in paragraphs (d)(1) through (4) of this section, the Lifeline discount may be applied for fixed broadband service that does not meet the minimum standards set forth in paragraph (b)(1) of this section. If the provider, in a given area:

(1) Does not offer any fixed broadband service that meets our minimum service standards set forth in paragraph (b)(1) of this section; but

(2) Offers a fixed broadband service of at least 4 Mbps downstream/1 Mbps upstream in that given area; then,

(3) In that given area, a fixed broadband provider may receive Lifeline funds for the purchase of its highest performing generally available residential offering, lexicographically ranked by:

(i) Download bandwidth;

(ii) Upload bandwidth; and

(iii) Usage allowance.

(4) A fixed broadband provider claiming Lifeline support under this section will certify its compliance with this section's requirements and will be subject to the Commission's audit authority.

(e) Except as provided in paragraph (d) of this section, eligible telecommunications carriers shall not apply the Lifeline discount to offerings that do not meet the minimum service standards.

(f) Equipment requirement.

(1) Any fixed or mobile broadband Lifeline provider, which provides devices to its consumers, must ensure that all such devices provided to a consumer are Wi–Fi enabled.

(2) A Lifeline provider may not institute an additional or separate tethering charge for any mobile data usage that is below the minimum service standard set forth in paragraph (b)(2) of this section.

(3) Any mobile broadband Lifeline provider which provides devices to its consumers must offer at least one device that is capable of being used as a hotspot. This requirement will change as follows:

(i) From December 1, 2017 to November 30, 2018, a provider that offers devices must ensure that at least 15 percent of such devices are capable of being used as a hotspot.

(ii) From December 1, 2018 to November 30, 2019, a provider that offers devices must ensure that at least 20 percent of such devices are capable of being used as a hotspot.

(iii) From December 1, 2019 to November 30, 2020, a provider that offers devices must ensure that at least 25 percent of such devices are capable of being used as a hotspot.

(iv) From December 1, 2020 to November 30, 2021, a provider that offers devices must ensure that at least 35 percent of such devices are capable of being used as a hotspot.

(v) From December 1, 2021 to November 30, 2022, a provider that offers devices must ensure that at least 45 percent of such devices are capable of being used as a hotspot.

(vi) From December 1, 2022 to November 30, 2023, a provider that offers devices must ensure that at least 55 percent of such devices are capable of being used as a hotspot.

(vii) From December 1, 2023 to November 30, 2024, a provider that offers devices must ensure that at least 65 percent of such devices are capable of being used as a hotspot.

(viii) On December 1, 2024, a provider that offers devices must ensure that at least 75 percent of such devices are capable of being used as a hotspot.

47 C.F.R. § 54.409

§ 54.409 Consumer qualification for Lifeline.

(a) To constitute a qualifying low-income consumer:

(1) A consumer's household income as defined in § 54.400(f) must be at or below 135% of the Federal Poverty Guidelines for a household of that size; or

(2) The consumer, one or more of the consumer's dependents, or the consumer's household must receive benefits from one of the following federal assistance programs: Medicaid; Supplemental Nutrition Assistance Program; Supplemental Security Income; Federal Public Housing Assistance; or Veterans and Survivors Pension Benefit.

(b) A consumer who lives on Tribal lands is eligible for Lifeline service as a "qualifying low-income consumer" as defined by § 54.400(a) and as an "eligible resident of Tribal lands" as defined by § 54.400(e) if that consumer meets the qualifications for Lifeline specified in paragraph (a) of this section or if the consumer, one or more of the consumer's dependents, or the consumer's household participates in one of the following Tribal-specific federal assistance programs: Bureau of Indian Affairs general assistance; Tribally administered Temporary Assistance for Needy Families; Head Start (only those households meeting its income qualifying standard); or the Food Distribution Program on Indian Reservations.

(c) In addition to meeting the qualifications provided in paragraph (a) or (b) of this section, in order to constitute a qualifying low-income consumer, a consumer must not already be receiving a Lifeline service, and there must not be anyone else in the subscriber's household subscribed to a Lifeline service.

47 U.S.C. § 160 (a)

§ 160. 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)

§ 214. 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)(1), (2)

§ 254. 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.

47 U.S.C. § 254(e)

§ 254. Universal service

(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.