

FEDERAL RESPONDENTS' FINAL RESPONSE TO TRIBAL CARRIERS' PRINCIPAL BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-9900

IN RE: FCC 11-161

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

1996 Act	The Telecommunications Act of 1996
APA	Administrative Procedure Act
CAF	Connect America Fund
ETC	Eligible Telecommunications Carrier
FCC	Federal Communications Commission
FNPRM	Further Notice of Proposed Rulemaking
HCLS	High Cost Loop Support
ICC	Intercarrier Compensation
LEC	Local Exchange Carrier
NPRM	Notice of Proposed Rulemaking
USF	Universal Service Fund
WCB	Wireline Competition Bureau

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ISSUE PRESENTED

In reforming its universal service rules in the *Order*, the Federal Communications Commission (“FCC”) took numerous steps to advance service on Tribal lands, including dedicating many millions of dollars to spur mobile service, directing FCC staff to consider costs unique to Tribal carriers when establishing a methodology for calculating a component of universal service support, and requiring providers to consult and engage with Tribes on a host of unique issues. *Connect America Fund*, 26 FCC Rcd 17663 (2011) (“*Order*”) (JA at 390).

The issue presented is whether, in light of the FCC’s numerous measures to promote universal service on Tribal lands specifically, the agency reasonably exercised its discretion in also applying to carriers on

Tribal lands the same universal service reforms designed to enhance efficiency and accountability that govern all other rate-of-return carriers.

COUNTERSTATEMENT

A. Universal Service Reform

In the *Order* on review, the FCC “comprehensively reform[ed] and moderniz[ed]” its rules for distributing high-cost universal service support. *Order* ¶1 (JA at 394). Under the Telecommunications Act of 1996 (“1996 Act”), the FCC advances universal service – *i.e.*, “access to telecommunications services” by “customers in all regions of the nation” – through a system of explicit subsidies paid from the Universal Service Fund (“USF”). *Qwest Corp. v. FCC*, 258 F.3d 1191, 1195 (10th Cir. 2001) (“*Qwest I*”). The USF is funded through contributions from carriers – and ultimately their customers – across the country. *Id.* at 1196. *See generally* FCC Preliminary Br. 3-10. One component of this support system, “high-cost support,” subsidizes the costs of carriers in areas where it is particularly expensive to provide service, such as rural areas. *Qwest I*, 258 F.3d at 1195.

In the *Order*, the FCC concluded that the existing high-cost support rules were “based on decades-old assumptions that fail[ed] to reflect today’s networks, the evolving nature of communications services, or the current competitive landscape.” *Order* ¶6 (JA at 396). In their place, the agency

“adopt[ed] fiscally responsible, accountable, incentive-based policies,” and “establish[ed] a framework to distribute universal service funding in the most efficient and technologically neutral manner possible.” *Id.* ¶1 (JA at 394).

Several facets of that reform are relevant here.

1. New Universal Service Budget

For the first time, the agency adopted a budget for the high-cost program within the USF, setting an annual target of no more than \$4.5 billion, the same as the previous year. *Id.* ¶18 (JA at 399). This sum embodied the agency’s “predictive judgment as to how best to allocate limited resources,” and was an “important step[] to control costs and improve accountability in USF” and to “protect consumers and businesses that ultimately pay for the fund through fees on their communications bills.” *Id.*

2. Reform Of Support For Rate-Of-Return Carriers

Within this new budget, the FCC also reformed the system that provides this high-cost support, with different reforms for “price cap” and “rate-of-return” carriers. *See* FCC Preliminary Br. 10 & nn.7-8. For price cap carriers, which set their rates at or below a regulatory maximum, the FCC maintained high-cost support at existing levels, and made available additional funds to spur broadband in unserved areas – \$300 million in “Phase I” and up to \$1.8 billion annually in “Phase II.” *Order* ¶¶22, 25 (JA at 400, 401).

Rate-of-return carriers, by contrast, are small, generally rural carriers that charge rates designed to recover their capital and operating costs, plus a return set by regulators. FCC Preliminary Br. 10. Petitioner Gila River Telecommunications, Inc. (“Gila River”)¹ is a rate-of-return carrier. Br. 6. Although rate-of-return carriers serve fewer than five percent of access lines in the U.S., support for these carriers amounted to nearly \$2 billion of the \$4.5 billion of high-cost support collected in 2011. *Order* ¶26 (JA at 401).

In the *Order*, the FCC noted that the then-existing regime, with a return on expenses, “impose[d] no practical limits on the type or extent of network upgrades or investment” made by rate-of-return carriers. *Order* ¶287 (JA at 496). The rules “provide[d] universal service support to both a well-run company operating as efficiently as possible, and a company with high costs due to imprudent investment decisions, unwarranted corporate overhead, or an inefficient operating structure.” *Id.*

The agency therefore instituted a new framework to determine support for these carriers in order to “increas[e] accountability and incentives for efficient use of public resources.” *Id.* ¶26 (JA at 401) ; *see id.* ¶¶285-290 (JA at 495-496). Because this reform “is focused on rooting out inefficiencies,”

¹In this brief, “Gila River” generally also refers to co-petitioner Gila River Indian Community.

it “will not affect all carriers in the same manner or in the same magnitude.” *Id.* ¶289 (JA at 496). Indeed, the agency expected that “carriers that invest and operate in a prudent manner will be minimally affected.” *Id.* Areas served by rate-of-return carriers would continue to receive up to \$2 billion in support of the total \$4.5 billion Connect America Fund (“CAF”) budget, as they had previously, and the agency’s analysis showed that nearly half of rate-of-return carriers would see no change or even a slight increase in support. *Id.* ¶¶286, 290 (JA at 495, 496). And of those that *would* see a reduction, 70% would see a reduction of less than 10%. *Id.* ¶290 (JA at 496).² “After significant analysis,” the FCC was “confident that these incremental reforms will not endanger existing service or consumers.” *Id.* ¶289 (JA at 496).

Among these reforms was a new system for determining rate-of-return carriers’ High Cost Loop Support (“HCLS”), which helps offset carriers’ capital and operating costs that are unusually high, as compared to the national average. *Id.* ¶216 & n.347 (JA at 470); *see generally* FCC Principal

² Gila River’s assertion that 66% of all rate-of-return carriers would see a reduction in high-cost support under the new rules (Br. 16) is based on a misunderstanding of the *Order*. The *Order* predicts that almost 34% of rate-of-return carriers will see no reduction in high-cost support, and more than 12% will see an increase in support, *Order* ¶290 (JA at 496), for a total of 46% who would see either no reduction or an increase.

USF Br. 40-45, 48-49. In order to “ensur[e] that companies do not receive more support than necessary to serve their communities,” the agency implemented “benchmarks for prudent levels of capital and operating costs.” *Order* ¶ 210 (JA at 468). To set those benchmarks, the FCC directed its Wireline Competition Bureau to employ a regression analysis of companies’ “cost, geographic and demographic data,” to limit support “to reasonable amounts relative to other carriers with similar characteristics.” *Id.* ¶216 (JA at 470).

3. Elimination Of The Identical Support Rule

The “identical support rule” had provided competitive eligible telecommunications carriers (“ETCs”)³ the same per-line amount of high-cost universal service support as the incumbent carriers in the same area – regardless of the competitive carriers’ actual costs of providing service. *Order* ¶¶498, 502 (JA at 552, 554); *see generally* FCC Response to Wireless Carrier USF Principal Br. 33-36. “Based on more than a decade of experience with the operation of the [existing] rule,” the FCC found that it had “not functioned as intended.” *Order* ¶502 (JA at 554). Instead of supporting “the most efficient providers as they captured customers from ...

³ An ETC is a carrier designated eligible to receive universal service support. 47 U.S.C. §254(e).

incumbent[s]” (as the agency had originally envisioned), the rule provided duplicative support to wireless ETCs serving households that had multiple mobile phones and that also still subscribed to USF-subsidized wireline service. *Id.* ¶503 (JA at 554); *see also Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1094 (D.C. Cir. 2012). The FCC concluded that this duplicative support was “no longer necessary or in the public interest,” especially in light of the explicit support for mobile services adopted by the *Order*. *Order* ¶502 (JA at 554).

4. Broadband Obligations

As part of its modernization of universal service, the FCC also set out a new requirement that supported carriers must offer broadband. *Order* ¶65 (JA at 413); *see generally* FCC Preliminary Br. 22-24; FCC Principal USF Br. 12-24. In this regard, however, the agency established a “more flexible approach” for rate-of-return carriers, which need only provide broadband “upon reasonable request.” *Order* ¶206 (JA at 467); *see* FCC Principal USF Br. 34. Because these carriers “will not necessarily be required to build out to and serve the most expensive locations within their service area,” the FCC found that this obligation was a “reasonable” part of the package of reforms. *Order* ¶207 (JA at 468).

B. Special Attention To Carriers Serving Tribal Lands

As part of this comprehensive overhaul of the high-cost support framework, the FCC recognized that communities on Tribal lands⁴ “have historically had less access to telecommunications services than any other segment of the population.” *Order* ¶479 (JA at 545). This “digital divide,” *id.* ¶636 (JA at 595), stems in part from the cost of deploying infrastructure on Tribal lands in “rural high-cost areas” – a factor shared by many carriers that serve rural, non-Tribal areas – and in part from other “distinct obstacles,” *id.* ¶479 (JA at 545), both economic and cultural. These include: “a high concentration of low-income individuals with few business subscribers,” “cultural and language barriers,” special procedures for “obtaining access to rights-of-way on Tribal lands,” and distinctive “jurisdictional issues” involving Tribal and state authorities, *id.* ¶482 (JA at 547).

For over a decade, the FCC has worked to facilitate deployment of voice and broadband on Tribal lands. To that end, the agency has employed measures such as enhanced low-income universal service support to consumers on Tribal lands through the Lifeline and Link Up programs, and

⁴ “Tribal lands” refers to “any federally recognized Indian tribe’s reservation, pueblo or colony, including former reservations in Oklahoma,” “Alaska Native regions,” “Indian Allotments,” and “Hawaiian Home Lands.” *Order* n.197 (JA at 438).

bidding credits in spectrum license auctions for wireless providers serving qualifying Tribal lands. *See generally Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, 26 FCC Rcd 2623, 2626-27 ¶¶5-9 (2011). These programs and incentives continue. In 2010, the FCC also created an Office of Native Affairs and Policy to act as the “official Commission liaison for ongoing consultation, coordination, and outreach to” Native communities. *Establishment of the Office of Native Affairs & Policy in the Consumer & Governmental Affairs Bureau*, 25 FCC Rcd 11104, 11105 ¶5 (2010).

In the *Order* on review, the FCC implemented a number of new measures aimed at bridging this “digital divide.”

1. Additional Wireless Support

First, the FCC created the Tribal Mobility Fund Phase I, a \$50 million fund distributed by reverse auction to “provide one-time support to deploy mobile broadband to unserved Tribal lands.” *Order* ¶481 (JA at 546). While carriers on Tribal lands were also eligible for support from the \$300 million general Mobility Fund Phase I for underserved areas throughout the country, *id.*,⁵ the agency found that an additional, “more tailored approach” for Tribal

⁵ *See generally* FCC Preliminary Br. 29-30; FCC Response to Wireless Carrier USF Principal Br. 31-32.

lands was appropriate “[i]n light of the Commission’s unique government-to-government relationship with Tribes and the distinct challenges in bringing communications services to Tribal lands.” *Id.* ¶479 (JA at 545). The FCC set the size of the Tribal Mobility Fund Phase I at \$50 million after balancing the needs of carriers serving Tribal communities with the agency’s “commitment to fiscal responsibility” and competing priorities for the “limited funds” available. *Id.* ¶485 (JA at 548). The FCC predicted that this “targeted,” “significant” support would make a difference in “expanding the availability of mobile broadband in Tribal lands.” *Id.*

Second, the FCC created a 25 percent bidding credit for Tribally-owned or -controlled providers seeking support from both the general and Tribal Phase I Mobility Funds to serve their Tribal lands. *Id.* ¶¶430, 490 (JA at 534, 550). Because these funds are awarded by reverse auction, *see generally id.* ¶¶419-428 (JA at 532-534), this “‘reverse’ bidding credit ... effectively reduce[s] the bid amount by 25 percent for the purposes of comparing it to other bids, thus increasing the likelihood that a Tribally-owned or controlled entity would receive funding,” *id.* ¶430 (JA at 534). And because this makes the award of funds to carriers on Tribal lands more likely, it benefits not just Tribally-owned carriers, but also their consumers on Tribal lands.

Third, as part of the newly established \$500 million-a-year Mobility Fund Phase II for “ongoing support” of mobile broadband, the FCC “anticipate[d] that [it] would designate up to \$100 million” each year “to address the special circumstances of Tribal lands.” *Order* ¶494 (JA at 551). Because “many Tribal lands require ongoing support in order to provide service,” the agency found that this “substantial level of funding” would help “ensure that these communities are not left behind.” *Id.* ¶497 (JA at 552).

2. Tribal Engagement And Special Waiver Procedures

In response to comments from the National Tribal Telecommunications Association and others stressing the importance of “consultation with Tribes,” *Order* ¶636 (JA at 595), the FCC also required providers on Tribal lands that receive CAF support to “demonstrate on an annual basis that they have meaningfully engaged Tribal governments in their supported areas,” *id.* ¶637 (JA at 595). These discussions between carriers and Tribal governments must include, among other things, an assessment of Tribal needs and feasibility planning, culturally sensitive marketing practices, rights-of-way processes, environmental and cultural review, and compliance with Tribal business and licensing requirements. *Id.* A carrier that fails to engage Tribal governments in these discussions faces potential reduction in support. *Id.*

In addition, the FCC made special accommodations for carriers serving Tribal lands to petition for an exemption (or “waiver”) from a reduction in subsidies. *Order* ¶¶542-543 (JA at 567-569). As explained in the FCC Principal USF Brief (35), the agency permits any carrier to petition for a waiver by showing it is necessary “to ensure consumers in the area continue to receive voice service.” *Id.* ¶539 (JA at 566). The FCC invited carriers serving Tribal lands and insular areas to include information about special “operating” or “economic conditions” or other “unique characteristics of those communities” in support of a waiver request. *Id.* ¶542 (JA at 567, 569). The FCC also directed its implementing Bureaus to “prioritize” review of waiver petitions filed by providers serving Tribal lands. *Id.* ¶544 (JA at 569).

3. Consideration Of Costs Unique To Carriers Serving Tribal Lands In Creating The Benchmark Methodology

As discussed above, the FCC instituted a new framework under which the costs of rate-of-return carriers would be compared by regression analysis to the costs of “other carriers with similar characteristics.” *Order* ¶216 (JA at 470). In the accompanying Further Notice of Proposed Rulemaking, the agency sought comment “on whether network operation and investment by Tribally-owned and operated carriers [are] significantly different from non-

Tribal conditions to warrant special treatment for purposes of establishing benchmarks for permissible ... costs.” *Id.* ¶1088 (JA at 789).

After notice and comment, the FCC’s Wireline Competition Bureau (“WCB”) released an order setting out the benchmark methodology. *Connect America Fund: High-Cost Universal Service Support*, 27 FCC Rcd 4235 (WCB 2012) (“*Benchmarking Order*”). The WCB agreed with commenters “that carriers serving ... Tribal lands ... could face unique challenges,” and included in its methodology a variable for the percentage of the coverage area on Tribal lands. *Id.* at 4244-45 ¶23. Because the WCB concluded that this Tribal variable correlates positively with costs, *id.* at 4266 ¶102, the variable will raise the benchmark cap in proportion to the percentage of a carrier’s territory that is Tribal land. In its recent Order on Reconsideration regarding the WCB’s benchmark methodology, the FCC left the Tribal variable intact. *See generally Connect America Fund: High Cost Support, Sixth Order on Reconsideration*, FCC 13-16, ¶2 (Feb. 27, 2013) (“*Sixth Order on Reconsideration*”).

SUMMARY OF ARGUMENT

In its comprehensive overhaul of universal service regulations, the FCC took “overdue steps” to reform its system of support for rate-of-return carriers like Gila River, moving from a framework that “no longer [made]

sense in today’s marketplace” to one that would “ensur[e] basic fiscal responsibility” and “reward only prudent and efficient investment.” *Order* ¶¶287-288 (JA at 496). Rather than instituting “indiscriminate industry-wide reductions,” *id.* ¶287 (JA at 496), the new rules “focus[] on rooting out inefficiencies,” and will only “minimally affect[]” carriers that already “invest and operate in a prudent manner,” *id.* ¶289 (JA at 496).

In undertaking this overdue reform, the FCC carefully considered the needs of carriers serving Tribal lands and acted to bridge the “deep digital divide that persists between the Native Nations of the United States and the rest of the country.” *Order* ¶636 (JA at 595). The FCC dedicated many millions of dollars to spur mobile service on Tribal lands, directed its staff to consider costs unique to Tribal carriers in formulating its wireline benchmark methodology, and required providers to consult and engage with Tribes on a variety of unique issues. All of these measures are in addition to other continuing efforts to stimulate deployment and service on Tribal lands, such as enhanced Lifeline and Link Up support for low-income consumers, *see supra* 8-9.

Gila River – the only Tribal carrier to challenge the *Order* – nonetheless argues that these measures are insufficient. Focusing on rate-of-return carriers on Tribal lands, Gila River paints a distorted picture of slashed

revenues and increased broadband obligations. Br. 16-17. In the first place, many Tribal areas are served by price cap carriers that will receive more funding, not less. Moreover, substantial additional aid will go to wireless carriers on Tribal lands. Reductions in intercarrier compensation will be offset by a new explicit CAF subsidy that helps many carriers by mitigating the extent of their declining intercarrier revenues under the status quo. And rate-of-return carriers like Gila River will continue to receive, as a group, roughly the same amount of high-cost support as before (\$2 billion), although it will be reallocated among them by measures intended to reward greater efficiency.

Gila River would apparently prefer to be exempted from reform entirely, with support “guaranteed at existing” levels. Br. 28. But the FCC reasonably balanced the special needs of carriers serving Tribal lands against its “commitment to fiscal responsibility and the varied objectives ... for ... limited funds.” *Order* ¶485 (JA at 548). The agency explained why it took the measures it did, including multiple actions designed to facilitate universal service on Tribal lands, and why it believes support will be “sufficient.” Finally, to account for any special cases requiring enhanced support, the agency established waiver procedures available to all carriers and directed its staff to give priority to requests from carriers that serve Tribal lands.

Determining how best to balance section 254's interest in providing sufficient – but not excessive – support against the need to accommodate the special circumstances of carriers serving Tribal lands is a quintessential policy judgment that Congress has entrusted to the FCC. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (“*RCA I*”).

ARGUMENT

I. THE FCC REASONABLY EXERCISED ITS DISCRETION IN BALANCING THE NEED FOR UNIVERSAL SERVICE REFORM WITH THE SPECIAL NEEDS OF CARRIERS SERVING TRIBAL LANDS.

A. The FCC Reasonably Concluded Reform Was Needed For All Rate-of-Return Carriers.

The FCC must base its universal service policies on the principles set out in section 254(b) of the Act, 47 U.S.C. §254(b), including promoting: (1) quality service available across the nation at “just, reasonable, and affordable rates,” (2) “equitable” contributions to support by carriers, and (3) support that is “specific, predictable and sufficient.” 47 U.S.C. §254(b)(1), (4)-(5). The FCC “enjoys broad discretion” in striking a balance among these competing factors. *RCA I*, 588 F.3d at 1103; *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 444 (5th Cir. 1999) (“*TOPUC*”). In particular, because excess subsidization to high-cost areas may lead to

inequitable or unaffordable rates for customers in other areas, “[t]he agency’s broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excess expenditures that will detract from universal service.” *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 620-21 (5th Cir. 2000); *see also Qwest Commc’ns Int’l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (“*Qwest II*”); *RCA I*, 588 F.3d at 1103.

The FCC exercised this discretion in the *Order*, taking a number of “overdue steps” to “correct[] program design flaws, extend[] successful safeguards, ensur[e] basic fiscal responsibility, and clos[e] loopholes.” *Order* ¶288 (JA at 496). Whereas the old rules “provid[ed] an opportunity for a stable 11.25 percent interstate return for rate-of-return companies, regardless of the necessity or prudence of any given investment,” the new rules for these carriers “reward only prudent and efficient investment in modern networks.” *Id.* ¶287-288 (JA at 496).

Among these reforms, the FCC explained that the new benchmark methodology would incentivize “greater operational efficiencies.” *Id.* ¶¶214-216 (JA at 470). And excess subsidies that would otherwise go to carriers with unusually high costs as compared to similarly-situated peers could instead be “redistributed” to other carriers in order to advance universal service goals. *Id.* ¶220 (JA at 472). The FCC also explained the need to

eliminate the flawed identical support rule, which provided support with “no relation to the efficient cost of providing mobile voice service” and which failed to provide “appropriate incentives for entry.” *Id.* ¶¶504-505 (JA at 555); *see RCA I*, 588 F.3d at 1108 (upholding earlier interim cap on identical support rule in light of the rule’s contribution to a “dramatic increase in ... high-cost support”).

The agency explicitly balanced the principles set forth in section 254(b) and found that its package of reforms for support of rate-of-return carriers “will advance the Commission’s goals of ensuring fiscal responsibility in all USF expenditures, increasing the accountability for Fund recipients, and extending modern broadband-capable networks.” *Order* ¶194 (JA at 465). After significant analysis, including review of numerous cost studies submitted by individual small companies and cost consultants, as well as other studies from industry groups, the FCC concluded that “these incremental reforms will not endanger existing service to consumers.” *Id.* ¶289 (JA at 496).

B. The FCC Accommodated The Unique Needs Of Carriers Serving Tribal Lands And Fully Explained Its Actions.

At the same time, the FCC noted a number of factors that “may increase the cost of entry and reduce the profitability of providing service” on Tribal lands. *Order* ¶482 (JA at 547). The agency also acknowledged that

“greater financial support ... may be needed in order to ensure the availability of broadband in Tribal lands.” *Id.* ¶479 (JA at 545).

To address this need, the agency created a \$50 million Tribal Mobility Fund, with up to \$100 million more each year for ongoing support on Tribal lands. This “tailored” approach to Tribal lands was appropriate “[i]n light of the Commission’s unique government-to-government relationship with Tribes” as well as “distinct challenges in bringing communications services to Tribal lands.” *Id.* The agency predicted that “\$50 million in one-time support will help to extend the availability of mobile voice and broadband services.” *Id.* ¶482 (JA at 547). After considering the comments of Gila River and others, the FCC further explained that the \$50 million figure was sufficiently large to “make a difference,” while still remaining “consistent with [the FCC’s] commitment to fiscal responsibility and the varied objectives [for] limited funds.” *Id.* ¶485 (JA at 548). The FCC also concluded that the 25 percent bidding credit for Tribal carriers would “increas[e] the likelihood that a Tribally-owned or controlled entity would receive funding” from the Mobility Phase I funds in order to serve their lands.

Id. ¶430 (JA at 534).⁶ The agency reasoned that the “Tribal and general Mobility Fund Phase I auctions, in addition to the ongoing support mechanisms,” would provide “meaningful support” to “accelerate mobile broadband deployment on Tribal lands” for the benefit of consumers. *Id.* ¶485 (JA at 548).

In reforming High Cost Loop Support for rate-of-return carriers, the FCC again took special measures to consider costs unique to carriers serving Tribal lands. Because the agency intended to set benchmark caps for this support by comparing a carrier’s costs to “carriers with similar characteristics,” *id.* ¶216 (JA at 470), it sought further comment on how and whether this benchmark methodology should specifically account for unique conditions on Tribal lands, *id.* ¶1088 (JA at 789).⁷

⁶ Indeed, in a recent auction, carriers – including one claiming the Tribal bidding credit – won bids making them eligible to receive over \$25 million in general Mobility Fund Phase I support to provide service on twenty-six Tribal lands in eight states. *See* FCC, Wireless Telecomm’ns Bureau, “Mobility Fund Phase I Auction – Winning Bids Sorted by State and County,” *available at* http://wireless.fcc.gov/auctions/901/reports/901winning_bids_by_state_county.xls (listing winning bids); FCC, Wireless Telecomm’ns Bureau, “Biddable Items,” *available at* http://wireless.fcc.gov/auctions/901/901_biddable_items_090712.xls (describing bid areas).

⁷ Gila River argues in a footnote that the FCC’s benchmark methodology should be discounted because the methodology “fails to ensure” that the “unique circumstances” of carriers serving Tribal lands “will be considered.”

Finally, recognizing that not all challenges to successful deployment on Tribal lands stem from economic causes, the FCC also required supported carriers to engage with Tribal governments annually on a variety of issues, which the agency explained were “vitally important to ... successful deployment” on Tribal lands. *Id.* ¶637 (JA at 595). And it facilitated the general waiver process for carriers serving Tribal lands by inviting them to discuss any “unique characteristics” such as special “operating” or “economic conditions,” and directing the Bureaus to expedite review of those waiver petitions. *Id.* ¶542 (JA at 567, 569).

In light of this extensive record, Gila River’s assertion that the FCC offered “no explanation” for how its reform will advance universal service, including universal service to Tribal lands (Br. 24-25), is difficult to comprehend. The FCC explained at length why general reform for rate-of-return carriers was required, and further explained why it was addressing deployment on Tribal lands through a host of other “tailored” measures. The agency consistently “ma[d]e plain its course of inquiry, its analysis, and its

Br. 28 n.3. That is incorrect. The methodology adopted by the WCB includes an “independent variable for the percentage of each study area that is a federally-recognized Tribal land” precisely to account for the possibility that “it is more costly to provide service on Tribal lands.” *Benchmarking Order*, 27 FCC Rcd at 4244-45 ¶23; *see supra* 13. The FCC has left the Tribal variable intact. *Sixth Order on Reconsideration* ¶2.

reasoning.” *Colorado Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006); *see Citizens’ Comm. To Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002). The APA requires no more.

Gila River also complains that the agency acted unreasonably by purportedly applying a “one-size-fits-all treatment” (Br. 25) to carriers serving Tribal lands and treating “apples as oranges” (Br. 28), but that assertion is equally difficult to fathom. As a threshold matter, even the general framework for rate-of-return carriers is not a “one-size-fits-all treatment,” because support is still based on each carrier’s individual costs, and the new benchmark methodology sets caps by comparison to carriers with similar characteristics. *Order* ¶216 (JA at 470). And for carriers on Tribal lands in particular, the FCC made numerous specific adjustments to its rules to accommodate their special circumstances, such as the dedicated Tribal Mobility Funds, bidding credits for Tribally-owned entities, special waiver procedures, a Tribal engagement requirement, and the consideration of unique costs in implementation of the benchmark rule. These changes were in addition to the longstanding (and continuing) FCC initiatives to advance universal service in such areas, including enhanced funding to serve low-income individuals who live on Tribal lands. *See supra* 8-9.

Gila River seems to argue that it was irrational for the FCC not to exempt rate-of-return carriers on Tribal lands from the reformed framework altogether. To be sure, some obstacles to universal service on Tribal lands “have nothing to do with inefficiency or waste.” Br. 31. But the FCC had no reason to believe rate-of-return carriers on Tribal lands were somehow systemically immune from inefficiency. And Gila River offers no basis to reach that conclusion here. The agency therefore acted within its “broad discretion,” *Alenco*, 201 F.3d at 620-21, in deciding that carriers on Tribal lands should be subject to the same general incentives to operate efficiently and invest prudently, *id.* ¶289 (JA at 496), as all other carriers. Particularly in light of the specific, tailored actions described above, that policy judgment is entitled to deference. *RCA I*, 588 F.3d at 1103; *Alenco*, 201 F.3d at 620-21; *TOPUC*, 183 F.3d at 444.

II. THE FCC REASONABLY PREDICTED THAT CARRIERS SERVING TRIBAL LANDS WILL HAVE SUFFICIENT SUPPORT TO PROVIDE UNIVERSAL SERVICE.

At root, Gila River’s fundamental complaint is not that the FCC failed to take *any* special measures to assist carriers serving Tribal lands, or that the agency failed to provide an explanation for its actions, although Gila River does frame its arguments in those terms. Rather, it disagrees with the FCC’s judgment that the measures the agency took in reforming universal service

will be “sufficient ... to preserve and advance universal service,” 47 U.S.C. § 254(b)(5), (e), on Tribal lands. Br. 30-33.

Gila River faces an uphill battle in seeking to overturn that judgment. “[W]hat constitutes ‘sufficient’ support” within the meaning of section 254 is “ambiguous.” *TOPUC*, 183 F.3d at 425. Thus, when “the FCC offer[s] reasonable explanations of why it thinks the funds will still be ‘sufficient’ to support high-cost areas,” a court must “defer to the agency’s judgment.” *Id.* at 426. This is particularly true when the agency “must make predictive judgments about the effects of increasing subsidies,” where “certainty is impossible.” *RCA I*, 588 F.3d at 1105.

In the *Order*, the FCC concluded that universal service reforms “will not endanger existing service to consumers,” will “minimally ... affect[]” rate-of-return carriers that “invest and operate in a prudent manner,” *Order* ¶289 (JA at 496), and “on the whole,” will provide such carriers with “a stronger and more certain foundation from which to operate.” *Id.* ¶291 (JA at 496). This conclusion was based on “significant analysis, including review of numerous cost studies submitted by individual small companies and cost consultants, [National Exchange Carrier Association] and [Universal Service Administrative Company] data, and aggregated information provided by the

Rural Utilities Service,” *id.* ¶289 (JA at 496), and was entirely reasonable. *See* FCC Principal USF Br. 33-38.

Gila River nonetheless contends that the FCC’s reform will result in “massive” and “draconian” funding cuts to carriers serving Tribal lands. Br. 19-20. That is not so. First, Gila River ignores the fact that many carriers serving Tribal lands are price cap carriers, to which the agency made available considerable additional funding to spur broadband deployment – in CAF Phase I, \$300 million in addition to 2011 levels, and in CAF Phase II, up to \$1.8 billion annually. *Order* ¶¶22, 25 (JA at 400, 401). And, for rate-of-return carriers like Gila River, the *Order* makes clear that as a group they will continue to receive up to \$2 billion in support just as they did before reform, and nearly half of those carriers will see no change or even a slight increase in support. *Id.* ¶290 (JA at 496); *see supra* n.2. As for those rate-of-return carriers that do receive less funding, the substantial majority (70 percent) will experience reductions of less than 10 percent. *Id.*⁸

⁸ The FCC recently made a minor modification to the regression methodology to “provide [rate-of-return] carriers with greater flexibility to account for the specific needs of their locales and networks,” directing the WCB to use a single cap on all supported costs, rather than separate caps on capital and operating expenses as contemplated by the WCB’s *Order*. *Sixth Order on Reconsideration* ¶26.

Moreover, challenges to the sufficiency of universal service support can be evaluated only in light of the “full extent of federal support.” *Qwest I*, 258 F.3d at 1205. Here, Gila River ignores the fact that consumers in Tribal communities are also eligible for “additional, targeted support under the Commission’s low-income programs” – Lifeline and Link Up – that create “financial incentives” for telecommunications service to Tribal lands. See *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12208, 12213 ¶5 (2000); see also 47 C.F.R. §54.400(e). In addition, carriers serving Tribal lands may be eligible to receive support from the \$100 million the FCC has budgeted for CAF support in “the most remote areas.” *Order* ¶¶533-538 (JA at 564-566). These additional sources of support for universal service on Tribal lands further affirm the reasonableness of the agency’s sufficiency determination.⁹

⁹ Gila River argues in passing that “the Order’s ‘bill-and-keep’ intercarrier compensation changes ... will result in reduced funding for those carriers serving the most insular and high-cost areas.” Br. 31 n.4. Gila River fails to mention that the *Order* provides a new CAF recovery mechanism to supplement revenue reductions from intercarrier compensation (“ICC”) reform. *Order* ¶918 (JA at 721). This “measured, predictable” supplement, *id.* ¶917 (JA at 721), represents an improvement over the status quo, under which many carriers’ ICC revenues were declining more rapidly. *Id.* ¶¶894, 900-901 (JA at 707, 710-711). The FCC therefore reasonably predicted that the reformed ICC regime would be “more than sufficient to provide carriers

Gila River also contends (Br. 25-28) that the new rules conflict with the *Order*'s observation that "greater financial support ... may be needed in order to ensure the availability of broadband in Tribal lands." *Order* ¶479 (JA at 545, 546) (citing *Universal Service Reform*, 25 FCC Rcd 14716, 14727 ¶33 (2010) (JA at 223, 234) ("*NPRM*"). But, as we have shown, the *Order* takes account of the special circumstances governing service to Tribal lands in a number of ways, including by setting aside millions of dollars for mobility services on Tribal lands,¹⁰ *see id.* ¶¶481, 497 (JA at 546, 552), and by establishing a bidding credit for Tribally-owned or -controlled providers, *id.* ¶487 (JA at 548). Moreover, in observing that "greater financial support ... may be needed," *id.* ¶479 (JA at 545), the FCC never suggested that each

reasonable recovery for regulated services," *id.* ¶924 (JA at 723); *see generally* FCC Principal ICC Br. 45-54.

¹⁰ Gila River disparages the Tribal Mobility Fund support of \$50 million and up to \$100 million annually as "insufficient replacements for the identical support rule," which the *Order* eliminated as duplicative and unnecessary. Br. 17, 32-33. However, the \$50 million in Tribal Mobility Fund Phase I was in addition to the general Phase I Mobility Fund, for which carriers serving Tribal lands were also eligible. *Order* ¶481 (JA at 546); *see supra* n.6 (carriers serving Tribal lands won bids worth over \$25 million from general Mobility Fund). In any event, the Tribal Mobility Fund was not intended as a "replacement" for the identical support rule. That rule was abolished because it created misaligned incentives by offering substantial duplicative funding to competitors where an incumbent already offered service. *Id.* ¶498 (JA at 552). The Mobility Funds serve the entirely distinct purpose of offering support for mobile broadband "where such services are unavailable." *Id.* ¶314 (JA at 505).

and every carrier serving Tribal lands must receive an increase in support regardless of section 254's requirements that support be sufficient but not excessive, *see RCA I*, 588 F.3d at 1102-03, or regardless of the agency's commitment "to fiscal responsibility and the varied objectives ... for [its] limited funds." *Order* ¶485 (JA at 548).

Gila River next argues that the FCC should have frozen support for all carriers serving Tribal lands at 2011 levels, as the agency did for price cap carriers, because the FCC did not conclude that areas "served by price cap carriers were worse served than Tribal lands served by rate-of-return carriers." Br. 28. This contention overlooks the historical distinctions between the existing universal service regimes for price cap and rate-of-return carriers. Because the previous framework for rate-of-return carriers provided a stable return "regardless of the necessity or prudence of any given investment," the FCC reformed the rules to "reward only prudent and efficient investment." *Order* ¶¶287, 288 (JA at 496). By contrast, price cap carriers remain subject to a different regulatory regime that already incorporates its own incentives for efficiency.

Moreover, "more than 83 percent of the unserved locations in the nation are in price cap areas, yet such areas currently receive approximately 25 percent of high-cost support." *Order* ¶158 (JA at 452). The FCC

therefore reasonably “conclude[d] that increased support to areas served by price cap carriers” through additional CAF funding for broadband was “warranted.” *Id.* ¶159 (JA at 452). That rationale did not apply to rate-of-return carriers like Gila River.

Gila River complains that at the same time the FCC reformed its universal service framework for rate-of-return carriers, it “increased their load” by requiring them to provide broadband “upon reasonable request.” Br. 30. *See Order* ¶206 (JA at 467). But, as we have explained, under that “flexible approach,” *id.*, service need not be provided where doing so would be “unreasonable” (that is, where high-cost support would be insufficient to make deployment economically reasonable). *See FCC Principal USF Br.* 34. Indeed, the FCC “exempted the most remote areas” of the country (which include many Tribal lands) from the obligation to provide broadband services precisely because such areas are “difficult-to-serve.” *Order* ¶533 (JA at 564).

Finally, Gila River asserts that “it will receive between \$300,000 and \$1.6 million less annually in high-cost support” as a result of the FCC’s reforms. Br. 16. But this estimate relies on comments filed before the FCC’s *Order* was even issued (*see id.*), and thus cannot be based on the framework the FCC actually adopted. Indeed, when the WCB implemented the benchmark rule for rates in 2012 and 2013, Gila River’s costs were

considerably under the benchmark cap, *Benchmarking Order*, App. B, 27 FCC Rcd at 4284, and Gila River therefore has so far seen no reduction of its High Cost Loop Support as a result of the FCC's reform. Moreover, even if Gila River were to receive less support, "[t]he purpose of universal service is to benefit the customer, not the carrier." *RCA I*, 588 F.3d at 1103-04 (quoting *Alenco*, 201 F.3d at 621). Because Gila River "include[s] no cost data showing [it] would, in fact, have to leave customers without service as a result" of the agency's reforms, it offers "no valid reason to believe the principle of 'sufficiency' ... will be violated." *RCA I*, 588 F.3d at 1103-04.

III. ANY CARRIER'S ADDITIONAL SPECIAL CIRCUMSTANCES MAY BE ADDRESSED BY A WAIVER.

Finally, even if it were the case that Gila River – or any other individual carrier serving Tribal lands – lacked sufficient support to continue serving customers, this would "not establish that the cap unreasonably fails to provide sufficient service" as a general matter, but would instead "at most ... present[] an anomaly that can be addressed by a request for a waiver."

Alenco, 201 F.3d at 621; *see also Vermont Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011); *RCA I*, 588 F.3d at 1104; FCC Principal USF Br. 35. The FCC specifically has invited carriers that submit waiver applications to attempt to show that provision of service on Tribal lands presents unique

“operating” or “economic conditions” that “warrant[] relief.” *Order* ¶542 (JA at 567). The agency has already granted Standing Rock, “a nascent Tribally-owned” competitive carrier, a “two-year exception to the phase-down of support” under the identical support rule. *Id.* ¶531 (JA at 564); *see also* FCC Principal USF Br. 35 (citing waivers granted to two non-Tribal carriers since release of *Order*).

Gila River now argues that the exception for Standing Rock should have compelled a similar exception for all carriers serving Tribal lands. Br. 33-34. But the FCC predicated its exception for Standing Rock in part on that carrier’s “nascent status” as “the only ... [eligible telecommunications carrier (“ETC”)] to have its ETC designation modified” since release of the NPRM that preceded the *Order*. *Order* ¶531 (JA at 564). A two-year exception was necessary for Standing Rock to “ramp up its operations in order to reach a sustainable scale.” *Id.* The same cannot be said for other carriers on Tribal lands, including Gila River. *Cf.* Br. 8 (Gila River Telecommunications founded in 1988). *See Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 188-90 (D.C. Cir. 2009) (agency does not abuse discretion in denying waiver where prior grant involved different circumstances).

Needless to say, if Gila River (or any other carrier serving Tribal lands) believes that it merits a waiver from the FCC’s universal service rules

because it cannot otherwise serve its customers – whether due in part to the unique characteristics of Tribal lands or otherwise, *id.* ¶ 542 (JA at 567, 569) – it is free to apply for one. But the FCC has fully supported its prediction that universal service support generally will be sufficient for rate-of-return carriers, including those on Tribal lands, taking into account the special measures the agency has adopted. This reasonable predictive judgment warrants deference. *RCA I*, 588 F.3d at 1105.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.
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July 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, I caused the foregoing Federal Respondents' Final Response to the Tribal Carriers' Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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July 24, 2013