

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matters of)	
)	
Federal-State Joint Board on)	
Universal Service;)	
Promoting Deployment and)	
Subscribership in Unserved)	
and Underserved Areas, Including)	
Tribal and Insular Areas)	
)	
Western Wireless Corporation, Crow Reservation)	
in Montana)	CC Docket No. 96-45
)	
Smith Bagley, Inc.)	
)	
Cheyenne River Sioux Tribe Telephone Authority)	
)	
Western Wireless Corporation, Wyoming)	
)	
Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc.)	
)	
Petitions for Designation as an Eligible)	
Telecommunications Carrier and for Related)	
Waivers to Provide Universal Service)	
)	

**TWELFTH REPORT AND ORDER,
MEMORANDUM OPINION AND ORDER, and
FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: June 8, 2000

Released: June 30, 2000

Comment Date: August 7, 2000

Reply Comment Date: August 28, 2000

By the Commission: Commissioners Ness and Tristani issuing separate statements; Commissioner Powell approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. In this Order, we adopt measures to: (1) promote telecommunications subscribership and infrastructure deployment within American Indian and Alaska Native tribal communities;¹ (2) establish a framework for the resolution of eligible telecommunications carrier designation requests under section 214(e)(6)² of the Communications Act of 1934, as amended (the Act);³ and (3) apply the framework to pending petitions for designation as eligible telecommunications carriers filed by Cellco Partnership d/b/a Bell Atlantic Mobile, Inc., Western Wireless Corporation, Smith Bagley, Inc., and the Cheyenne River Sioux Tribe Telephone Authority.

2. An important goal of the Telecommunications Act of 1996 is to preserve and advance universal service. The 1996 Act provides that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high[-]cost areas, should have access to telecommunications and information services....”⁴ In the *Further Notice* of this proceeding, we sought to identify the impediments to increased telecommunications deployment and subscribership in unserved and underserved regions of our Nation, including tribal lands and insular areas, and proposed particular changes to our universal service rules to overcome these impediments.⁵ Although approximately 94 percent of all households in the United States have telephone service today, penetration levels among particular areas and populations are significantly below the national average.⁶ For example, only 76.7 percent of rural households earning less than \$5,000 have a telephone,⁷ and only 47 percent of Indian tribal

¹ In this Order, the term “Indian” refers to “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . Eskimos and other aboriginal peoples of Alaska....” 25 U.S.C. § 479. The term “Indian tribe” is defined in Section III.B.2., *infra*.

² 47 U.S.C. § 214(e)(6).

³ See Pub. L. No. 104-104, 110 Stat. 56 (1996), amending the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*

⁴ 47 U.S.C. § 254(b)(3).

⁵ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177 (1999) (*Further Notice*). We defer consideration of any issues raised in the *Further Notice* that are not addressed in this Order.

⁶ See *Telephone Subscribership in the United States*, Report (Com. Car. Bur., rel. June 22, 2000), at 2 and *passim*.

⁷ See National Telecommunications and Information Administration (NTIA), *Falling Through the Net: Defining the Digital Divide, A Report on the Telecommunications and Information Technology Gap in America* (1999), at 11, Chart I-3, http://www.ntia.doc.gov/ntiahome/ftn99/FITN_1/chart-1-3.html (*Falling Through the Net* 1999). Although this result is based on a 1998 survey, the data in this area appear to have been relatively stable in the 1990s. March 2000 data analyzed by the Commission indicate a penetration rate of 80.3 percent for all households (urban and rural) with incomes below \$5,000. See *Telephone Subscribership in the United States*, Report (Com. Car. Bur., rel. June 22, 2000), at 28.

households on reservations and other tribal lands have a telephone.⁸ These statistics demonstrate, most notably, that existing universal service support mechanisms are not adequate to sustain telephone subscribership on tribal lands.

3. Central to the issues addressed in the *Further Notice* is the notion that basic telecommunications services are a fundamental necessity in modern society.⁹ As our society increasingly relies on telecommunications technology for employment and access to public services, such telecommunications services have become a practical necessity. The absence of telecommunications services within a home places its occupants at a disadvantage when seeking to contact, or be contacted by, employers and potential employers. The inability to contact police, fire departments, and medical service providers in an emergency situation may have, and in some areas routinely does have, life-threatening consequences.¹⁰ In geographically remote areas, access to telecommunications services can minimize health and safety risks associated with geographic isolation by providing people access to critical information and services they may need. Basic telecommunications services also may provide a source of access to more advanced services. For example, voice telephone is currently the most common means of household access to the Internet, and the same copper loop used to provide ordinary voice telephone service also may be used for broadband services.¹¹ Thus, as use of advanced services among the general population increases, those without basic telecommunications services may find themselves falling further behind in a number of ways.¹² In its *Falling Through the Net* report, the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) found that, while "[o]verall . . . the number of Americans connected to the nation's information infrastructure is soaring," the benefits of even basic telecommunications services have not reached certain segments of our population.¹³

4. This Order, along with a companion Report and Order and Further Notice of Proposed

⁸ *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, Bureau of the Census, SB/95, April 1995 at 2 (based on 1990 Census data). In addition, it appears that, in certain insular areas, penetration levels fall significantly below the national average. See PRTC comments at 3-4 (indicating that the average telephone penetration rate in Puerto Rico is 74.2 percent).

⁹ *Further Notice*, 14 FCC Rcd at 21179, para. 2.

¹⁰ See, e.g., *Overcoming Obstacles to Telephone Service for Indians on Reservations*, Hearings, January 29, 1999 at the Indian Pueblo Cultural Center in Albuquerque, New Mexico, www.fcc.gov/Panel_Discussions/Teleservice_reservations/tr_newmx.txt (*Albuquerque Hearings Transcript*), testimony of Raymond Gachupin, the appointed governor for the Pueblo of Jemez, at 31-32 (recounting incidents involving the death of individuals within the pueblo who failed to receive critically-needed medical attention due to the lack of telecommunications or other emergency communications services).

¹¹ See generally, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398 (1999).

¹² *Falling Through the Net 1999* at xii (predicting that “[a]s we enter the Information Age, access to information resources will be increasingly critical to finding a job, contacting colleagues, taking courses, researching products, or finding public information).

¹³ *Falling Through the Net 1999* at xii.

Rulemaking¹⁴ and Policy Statement¹⁵ that we adopt, represents the culmination of an ongoing examination of the issues involved in providing access to telephone service for Indians on reservations. This process began when the Commission convened two meetings in April and July of 1998, which brought Indian tribal leaders and senior representatives from other federal agencies to the Commission to meet with FCC Commissioners and Commission staff.¹⁶ The Commission then organized formal field hearings in January 1999 at the Indian Pueblo Cultural Center in Albuquerque, New Mexico, and in March 1999 at the Gila River Indian Community in Chandler, Arizona, at which Indian tribal leaders, telecommunications service providers, local public officials, and consumer advocates testified on numerous issues, including subscribership levels and the cost of delivering telecommunications services to Indians on tribal lands, as well as jurisdictional and sovereignty issues associated with the provision of telecommunications services on tribal lands.¹⁷ Based on information and analysis provided during these proceedings, the Commission initiated two rulemakings: one proposing changes to our universal service rules to promote deployment of telecommunications infrastructure and subscribership on tribal lands,¹⁸ and the other proposing changes to our wireless service rules to encourage the deployment of wireless service on tribal lands.¹⁹

5. In this Order, we take the first in a series of steps to address the causes of low subscribership within certain segments of our population. The extent to which telephone penetration levels fall below the national average on tribal lands underscores the need for immediate Commission action to promote the deployment of telecommunications facilities in tribal areas and to provide the support necessary to increase subscribership in these areas. We adopt measures at this time to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands,²⁰ based on the fact that American Indian and Alaska Native communities, on average, have the lowest reported telephone subscribership levels in the country. Toward this end, we adopt amendments to our universal service rules and provide additional, targeted support under the Commission's low-income programs to create financial incentives for eligible telecommunications carriers to serve, and deploy telecommunications facilities in, areas that previously may have been regarded as high risk and unprofitable. By enhancing tribal communities' access to telecommunications services, the measures we adopt are consistent with our obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance. Specifically, by enhancing tribal communities' access to

¹⁴ *Extending Wireless Service to Tribal Lands*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 00-209 (rel. June 30, 2000) (*Wireless Tribal Order*). In this companion order and further notice, we address issues relating to expanding the availability of wireless services on tribal lands.

¹⁵ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (released June 23, 2000) (*Indian Policy Statement*).

¹⁶ See *Further Notice*, 14 FCC Rcd at 21181-82, para. 6. Appendix A of the *Further Notice* contains a list of individuals who participated in those meetings.

¹⁷ See *Further Notice*, 14 FCC Rcd at 21182, para. 7.

¹⁸ *Further Notice*, 14 FCC Rcd 21177.

¹⁹ *Extending Wireless Service to Tribal Lands*, Notice of Proposed Rulemaking, WT Docket No. 99-266, 14 FCC Rcd 13679 (1999). See also *Wireless Tribal Order*.

²⁰ See Section III.B.2., *infra*, for definitions of the terms "Indian tribe" and "tribal land."

telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase their access to education, commerce, government, and public services. Furthermore, by helping to bridge the physical distances between low-income consumers on tribal lands and the emergency, medical, employment, and other services that they may need, our actions ensure a standard of livability for tribal communities. To ensure their effectiveness in addressing the low subscribership levels on tribal lands, we intend to monitor the impact of the enhanced federal support measures and to adjust the measures as appropriate.

6. In response to the requests of Indian tribal leaders, we have adopted a statement of policy that recognizes the principles of tribal sovereignty and self-government inherent in the relationships between federally-recognized Indian tribes and the federal government.²¹ In conjunction with our efforts to adopt policies that further tribal sovereignty and tribal self-determination, we note the Commission's upcoming Indian Telecom Training Initiative, in which the Commission will bring together experts on telecommunications law and technologies to provide information to tribal leaders and other interested parties to promote telecommunications deployment and subscribership on tribal lands.²²

7. In this Order, we also offer guidance on those circumstances in which the Commission will exercise its authority to designate eligible telecommunications carriers under section 214(e)(6) of the Act.²³ We conclude that, consistent with the Act and the legislative history of section 214(e), state commissions have the primary responsibility for the designation of eligible telecommunications carriers under section 214(e)(2). We direct carriers seeking designation as an eligible telecommunications carrier for service provided on non-tribal lands to first consult with the state commission, even if the carrier asserts that the state commission lacks jurisdiction. We will act on a section 214(e)(6) designation request from a carrier providing service on non-tribal lands only in those situations where the carrier can provide the Commission with an affirmative statement from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction.

8. We recognize, however, that a determination as to whether a state commission lacks jurisdiction over carriers serving tribal lands involves a legally complex and fact-specific inquiry, informed by principles of tribal sovereignty, treaties, federal Indian law, and state law. Such jurisdictional ambiguities may unnecessarily delay the designation of carriers on tribal lands. In light of the unique federal trust relationship between the federal government and Indian tribes and the low subscribership levels on tribal lands, we establish a framework designed to streamline the eligibility designation of carriers providing service on tribal lands.²⁴ Under this framework, carriers seeking a designation of eligibility for service provided on tribal lands may petition the Commission for designation under section 214(e)(6). The Commission will proceed to a determination on the merits of such a petition if the Commission determines that the carrier is not subject to the jurisdiction of a state commission. We apply the framework adopted in this Order to several pending requests for eligible telecommunications carrier designation on tribal and non-tribal lands.

²¹ See *Indian Policy Statement*.

²² *FCC Announces the Indian Telecom Training Initiative to be Held September 25-28, 2000*, News Release, April 24, 2000. See www.fcc.gov/indians/#telecom.

²³ See Section IV.C., *infra*

²⁴ See Section IV.C., *infra*

9. We also recognize that excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas. We therefore commit to resolve requests for designation for the provision of service on non-tribal lands that are properly before us pursuant to section 214(e)(6) within six months of the date of filing. Similarly, we commit to resolve the merits of a request for designation for the provision of service on tribal lands within six months of our determination that the carrier is not subject to the jurisdiction of a state commission. We encourage state commissions to act accordingly, and resolve designation requests filed pursuant to section 214(e)(2) within six months.

10. Finally, in the attached Further Notice of Proposed Rulemaking, we seek comment on the adoption of a rule that would require designation requests filed under section 214(e), either with this Commission or a state commission, to be resolved within six months of the filing date, or some shorter period. We also seek comment on alternative methods by which state commissions, tribal authorities, and this Commission can work together to further facilitate the expeditious resolution of designation requests from carriers serving tribal lands.

11. The Commission will take action in a further proceeding to address the remaining issues raised in the *Further Notice* that are not addressed in this Order. In particular, we will continue to examine and address the causes of low subscribership in other areas and among other populations, especially among low-income individuals in rural and insular areas. In addition, in areas where the cost to deploy telecommunications facilities is significantly above the national average, we anticipate that additional action may be necessary to encourage such deployment. Providing appropriate incentives for the deployment of facilities in such locations will be central to the issues that we will address, in consultation with the Federal-State Joint Board on Universal Service (Joint Board) in our consideration of rules to implement section 214(e)(3) of the Act and in considering the recommendations of the Joint Board for high-cost universal service reform for rural carriers.

II. EXECUTIVE SUMMARY

12. In this Order, we adopt measures to:

- Provide up to \$25 per month in additional federal Lifeline Assistance (Lifeline) support to eligible telecommunications carriers serving qualifying low-income individuals living on American Indian and Alaska Native lands in order to substantially reduce the cost of basic telephone service for such individuals;
- Provide up to \$70 per consumer in additional federal Lifeline Connection Assistance (Link Up) support to eligible telecommunications carriers initiating service to qualifying low-income individuals living on American Indian and Alaska Native lands to offset initial connection charges and line extension costs associated with the initiation of service on behalf of those individuals;
- Broaden our Lifeline and Link Up consumer qualification criteria for low-income consumers on tribal lands to include income-dependent eligibility criteria employed in means-tested programs in which such individuals may be more likely to participate and therefore are more suitable income proxies for such individuals. These include the Bureau of Indian Affairs (BIA) general assistance program, tribally-administered Temporary Assistance for Needy Families, Head Start (only for those meeting its income-qualifying standard), and the National School Lunch Program's free lunch program;
- Require eligible telecommunications carriers to publicize the availability of Lifeline and Link Up support in a manner reasonably designed to reach those likely to qualify for those discounts;

- Permit eligible telecommunications carriers that are not subject to rate regulation by a state commission to receive the \$1.75 of second-tier Lifeline support without state commission approval;
- Permit tribal authorities and eligible telecommunications carriers that are not subject to rate regulation by a state commission to provide the local matching funds necessary to receive third-tier federal Lifeline support;
- Establish a framework for the resolution of eligible telecommunications carrier designation requests under section 214(e)(6) of the Act; and
- Apply the framework adopted in this Order to pending section 214(e)(6) petitions for designation as eligible telecommunications carriers filed by Cellco, Western Wireless, Smith Bagley, Inc., and the Cheyenne River Sioux Tribe Telephone Authority.

III. LOW-INCOME INITIATIVES TO IMPROVE ACCESS TO TELECOMMUNICATIONS SERVICES AND SUBSCRIBERSHIP ON TRIBAL LANDS

A. Overview

13. In this section, we adopt several revisions to our universal service rules designed to increase access to telecommunications services and subscribership among low-income individuals living on American Indian and Alaska Native lands (referred to hereinafter as “tribal lands”).²⁵ Specifically, we create a fourth tier of federal Lifeline support available to eligible telecommunications carriers serving qualifying low-income individuals living on tribal lands consisting of up to an additional \$25 per month, per primary residential connection for each such qualifying individual. This amount, in conjunction with the current first-tier baseline (which may increase to as much as \$4.35 on July 1, 2000)²⁶ and \$1.75 second-tier “non-matching” federal support amounts, will entitle each qualifying low-income consumer on tribal lands to a reduction in its basic local service bill of up to \$31.10 per month. In addition, we revise our rules governing the Link Up program to provide up to \$100 of federal support to reduce the cost of both initial connection charges and line extension charges of qualifying low-income individuals living on tribal lands. To ensure their effectiveness in addressing the low subscribership levels on tribal lands, we intend to monitor the impact of the enhanced federal support measures and to adjust the measures as appropriate.

14. We also broaden our federal consumer qualification default criteria to enable low-income individuals on tribal lands to qualify for Lifeline and Link Up services by certifying their participation in certain additional means-tested assistance programs. Based on the widespread lack of awareness of the

²⁵ The term “tribal lands” is defined in Section III.B.2., *infra*.

²⁶ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (released May 31, 2000) (*CALLS Order*), para. 216. This order made several revisions to the Commission’s Lifeline rules. In particular, the order revised the first-tier federal Lifeline support amount to correspond to anticipated increases in the amount of the subscriber line charge. The first such increase, from \$3.50 to as much as \$4.35, is scheduled to take place on July 1, 2000. Under the revised Lifeline rules adopted in that order, the first-tier federal Lifeline support amount, after July 1, 2000, shall increase commensurately with any increase in the amount of the subscriber line charge that the Commission may approve.

Lifeline and Link Up programs among low-income subscribers, and within tribal communities in particular, we require *all* eligible telecommunications carriers to publicize the availability of Lifeline and Link Up services in a manner reasonably designed to reach those likely to qualify for these services. Finally, we modify our Lifeline rules to permit eligible telecommunications carriers that are not subject to rate regulation by a state commission to (1) receive second-tier federal Lifeline support without state commission approval and (2) provide the local matching funds necessary to receive third-tier federal Lifeline support.

B. Definitions of “Indian Tribe” and “Tribal Lands”

1. Background

15. The *Further Notice* referred to the definition of the term “Indian tribe” that is codified in the Federally Recognized Indian Tribe List Act of 1994.²⁷ Under that definition, the term “Indian tribe” includes “any Indian or Alaska Native tribe, band, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.”²⁸ For purposes of identifying those geographic areas for which the Commission might consider modifications to its rules to provide targeted assistance to Indians or Indian tribes, the *Further Notice* sought comment on how the Commission should define the term “tribal lands.”²⁹

2. Discussion

16. For purposes of this Order, we define the terms “Indian tribe,” “reservation,” and “near reservation” as those terms are defined in Subpart A of the regulations promulgated by the United States Department of the Interior’s Bureau of Indian Affairs (BIA).³⁰ In light of our decision below to adopt rules to benefit low-income individuals living on Indian tribal lands,³¹ we use, for purposes of this Order, the definition of “Indian tribe” contained in section 20.1(p) of the BIA regulations.³² That definition includes “any Indian tribe, band, nation, rancheria, pueblo, colony, or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is federally recognized as eligible by the U.S. Government for the special programs and services provided by the Secretary [of the Interior] to Indians because of their status as Indians.”³³ Although there are minor variations between this definition and the statutory definition of

²⁷ *Further Notice*, 14 FCC Rcd at 21181, n. 24, *citing* Pub. L. 103-454, 108 Stat. 4791 (1994); 25 U.S.C. § 479a(2).

²⁸ 25 U.S.C. § 479a(2). Under section 479a-1, the Secretary of the Interior is required to publish annually in the Federal Register a list of all Indian tribes that the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians. *See* 25 U.S.C. § 479a-1.

²⁹ *Further Notice*, 14 FCC Rcd at 21199-200, paras. 50-53.

³⁰ 25 C.F.R. § 20.1.

³¹ *See* Section III.B., *infra*.

³² 25 C.F.R. § 20.1(p).

³³ *Id.*

“Indian tribe” in section 479a(2) and cited in the *Further Notice*, the characteristic common to both definitions that is relevant for our purposes is that both refer to the list of entities compiled and published by the Secretary of the Interior.³⁴

17. For purposes of identifying the geographic areas within which the rule amendments set forth below will apply, we define the term “tribal lands” to include the BIA definitions of “reservation” and “near reservation” contained in sections 20.1(v) and 20.1(r) of the BIA regulations, respectively.³⁵ The term “reservation” means “any federally recognized Indian tribe’s reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.”³⁶ “Near reservation” means those areas or communities adjacent or contiguous to reservations that are designated as such by the Department of Interior’s Commissioner of Indian Affairs, and whose designations are published in the Federal Register.³⁷

18. We define the term “tribal lands” to include the BIA definitions of “reservation” and “near reservation” because these definitions appear to encompass the geographic areas in which the Commission may adopt, consistent with principles of Indian sovereignty and the special trust relationship, rule changes to benefit members of federally-recognized Indian tribes. In particular, we agree with commenters who argue that Alaska Native Statistical Areas and other lands conveyed pursuant to the Alaska Native Claims Settlement Act, although not Indian reservations, should be included within the definition of tribal lands insofar as these lands are federally-recognized lands that are inhabited by Alaska Native tribes.³⁸ The BIA definition of “near reservation” includes lands adjacent or contiguous to reservations that generally have been considered tribal lands for purposes of other federal programs targeted to federally-recognized Indian tribes. Again, we conclude that such lands properly should be included within our definition insofar as they

³⁴ See 25 U.S.C. § 479a-1. This list is posted on the Internet at www.doi.gov/bia/tribes/telist97.html.

³⁵ 25 C.F.R. §§ 20.1(v) and 20.1(r).

³⁶ See 25 C.F.R. § 20.1(v).

³⁷ Under section 20.1(r) of BIA’s regulations, “near reservation” is defined as “those areas or communities adjacent or contiguous to reservations which are designated by [the Department of Interior’s Commission of Indian Affairs] upon recommendation of the local [Bureau of Indian Affairs] Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: (1) Number of Indian people native to the reservation residing in the area, (2) a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation, (3) geographical proximity of the area to the reservation, and (4) administrative feasibility of providing an adequate level of services to the area. The Commissioner shall designate each area and publish the designations in the FEDERAL REGISTER.” 25 C.F.R. § 20.1(r).

³⁸ See, e.g., UUI comments at 1-2 (Alaska Native Village Statistical Areas should be included in the Commission’s definition of tribal lands insofar as these are lands occupied by Alaska Native communities with valid claims to sovereignty and self-determination and because special efforts are “clearly needed” to preserve and advance universal service.); CIRI reply comments at 3-5 (Alaska Natives experience the same geographic and economic problems as Indians on reservations. Alaska Natives are entitled to participate in programs for Native Americans as a matter of fundamental national policy. The Commission should focus on tribal status as defined in 25 U.S.C. § 450.); RCA comments at 23-24 (With the exception of the Metlakatla Reservation, Alaska Native lands do not come within the definition of “Indian Country.”).

are Indian lands on which principles of Indian sovereignty and the special trust relationship apply.³⁹ To exclude the “near reservation” lands designated by the Department of the Interior or lands on which tribal members in Alaska live, in our view, would unfairly penalize tribal members who live in tribal communities, but for historic or other reasons, do not live on an Indian reservation.

19. We believe that using the BIA regulations to define and identify the geographic areas to which our rule amendments will apply offers significant advantages in the ease of its administration. Specifically, the BIA definitions of “reservation” and “near reservation”⁴⁰ provide a widely used and readily verifiable standard by which tribes may establish and carriers may verify the eligibility of individuals who qualify for the targeted assistance made available by this Order.⁴¹ We note that the classification “on or near a reservation” is used by BIA in administration of its financial assistance and social services programs for Indian tribes.⁴² If BIA or Congress should modify these definitions in the future, we intend such modifications to apply in equal measure to the classifications adopted in this Order without further action on our part. We believe that this action is consistent with our goal of using a widely used and readily verifiable standard for defining these terms.

C. Bases for Commission Action to Increase Subscribership on Tribal Lands

1. Authority to Take Action to Improve Access to Telecommunications Services and Subscribership on Tribal Lands

20. Section 254(b) of the Act sets forth the principles that guide the Commission in establishing policies for the preservation and advancement of universal service.⁴³ Included among these is the principle that “quality services should be available at just, reasonable, and affordable rates.”⁴⁴ Our authority to take action to remedy the disproportionately lower levels of infrastructure deployment and subscribership prevalent among tribal communities derives from sections 1, 4(i), 201, 205, as well as 254 of the Act.⁴⁵ As discussed more fully below, the record before us suggests that the disproportionately

³⁹ See *Morton v. Ruiz*, 415 U.S. 199 (1974) (holding that BIA is obligated to offer Indian assistance programs to tribal members living “on or near” reservation lands, rather than simply to those living on reservations).

⁴⁰ 25 C.F.R. §§ 20.1(v) and 20.1(r).

⁴¹ USCC comments at 1, n. 2 (Commission should define “tribal lands” in a way that provides jurisdictional and regulatory certainty).

⁴² See, e.g., 25 C.F.R. §§ 20.1 and 20.20. The Secretary of the Interior also maintains a list of all federally-recognized Indian tribes on the Internet at www.doi.gov/bia/tribes/telist97.html.

⁴³ 47 U.S.C. § 254(b).

⁴⁴ 47 U.S.C. § 254(b)(1).

⁴⁵ See 47 U.S.C. § 151 (The Commission’s regulations should “make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges.”); 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”); 47 U.S.C. § 201 (Commission’s general authority to regulate common carriers’ rates and service offerings); 47 U.S.C. § 205; 47 U.S.C. § 254. See also *Federal-State Joint Board on Universal* (continued....)

lower-than-average subscribership levels on tribal lands are largely due to the lack of access to and/or affordability of telecommunications services in these areas (as compared with cultural or individual preferences that cause individuals to choose not to subscribe). Along with depressed economic conditions and low per capita incomes,⁴⁶ commenters have identified the following factors as the primary impediments to subscribership on tribal lands: (1) the cost of basic service in certain areas (as high as \$38 per month in some areas);⁴⁷ (2) the cost of intrastate toll service (limited local calling areas);⁴⁸ (3) inadequate telecommunications infrastructure and the cost of line extensions and facilities deployment in remote, sparsely populated areas;⁴⁹ and (4) the lack of competitive service providers offering alternative technologies.⁵⁰ We note that no tribal representative in this proceeding has suggested that cultural or personal preference accounts for low subscribership levels within or among particular tribes. Based on the substantial Indian tribal participation in this proceeding and in the Commission's proceedings in WT Docket No. 99-266 and BO Docket No. 99-11, we do not have any evidence to conclude that cultural or personal factors generally explain low subscribership levels on tribal lands.⁵¹

21. We conclude that the unavailability or unaffordability of telecommunications service on tribal lands is at odds with our statutory goal of ensuring access to such services to "[c]onsumers in all

(Continued from previous page) _____

Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8952-57, paras. 326-340 (1997), as corrected by Errata, CC Docket No. 96-45 (rel. June 4, 1997) (*Universal Service Order*).

⁴⁶ See, e.g., RUS comments at 7-8; Fort Belknap Community Council comments at 1; GRTI comments at 3 (below-average subscribership in tribal areas is the result of economic conditions and low incomes and not just the higher cost of serving remote and sparsely populated areas); SBI comments at 3 ("despite several aggressive marketing efforts, SBI cannot get many of these people [on the Navajo Reservation] to subscribe to its wireless service simply because the median per capita income on the reservations is approximately \$5,000."); Project Telephone reply comments at 3-4 (poverty and unemployment are major causes of nonsubscribership that are beyond the ability of carriers to resolve).

⁴⁷ See, e.g., RCA comments at 4 (local rates range between \$10 and \$38 per month in Alaska); Eastern Shoshone Tribe comments at 7-11 (local rates range between \$9.02 and \$34.81 per month on the Wind River Reservation).

⁴⁸ See, e.g., NTCA comments at 6 (the "greatest concern" for NTCA member companies serving tribal lands is toll calling. Subscribers generate high toll charges because local calling areas often do not encompass hospitals, governmental agencies, cultural centers, or entertainment centers in tribal areas); RCA comments at 19 (UII reports that the most frequently identified reason why native households do not take service is the high cost of intrastate toll calling in Alaska.).

⁴⁹ See, e.g., Qualcomm comments at 3-4; Motorola/Iridium comments at 7 (average line extension charge on Navajo Reservation is more than \$40,000 per loop).

⁵⁰ See, e.g., Crow Tribal Council comments at 1-3 (low penetration levels in tribal areas are the result of the current lack of competition among service providers).

⁵¹ We note that at least 29 Indian tribes, representing approximately a third of the Indian tribal population in the United States, have participated in some manner in this proceeding and in the proceedings in WT Docket No. 99-266 and BO Docket No. 99-11. Although cultural or personal preferences may explain why individual tribal members do not subscribe, there is no evidence to suggest that these factors account for low subscribership levels generally on tribal lands. Indeed, we believe that the substantial Indian tribal participation in the Commission's Indian tribal proceedings would have been unlikely to occur had Indian tribal leaders concluded that cultural factors or personal preference account for low subscribership levels among their membership.

regions of the Nation, including low-income consumers.”⁵² In addition, the lack of access to affordable telecommunications services on tribal lands is inconsistent with our statutory directive “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient Nationwide . . . wire and radio communication service, with adequate facilities at reasonable charges.”⁵³ In the *Universal Service Order*, the Commission stated that, where “necessary and appropriate,” the Commission, working with an affected state or U.S. territory or possession, will open an inquiry to address instances of low or declining subscribership levels and take such action as is necessary to fulfill the requirements of section 254.⁵⁴

22. Our authority to alter our rules in ways targeted to benefit tribal communities also must be informed by the principles of federal Indian law that arise from the unique trust relationship between the federal government and Indian tribes. That relationship has been characterized as “unlike that of any other two people in existence,” and “marked by peculiar and cardinal distinctions which exist no where else.”⁵⁵ The Supreme Court has repeatedly “recognized the distinctive obligation of trust incumbent upon the [Federal] Government” in its dealings with Indian tribes.⁵⁶ Moreover, Congress and the courts have recognized the federal government’s responsibility to promote self-government among tribal communities as an important facet of the federal trust relationship.⁵⁷ In *Morton v. Mancari*, for example, the Supreme Court upheld a federal regulation establishing a hiring preference for members of Indian tribes as consistent with the goal of promoting Indian self-government.⁵⁸ In that case, the Court noted that “literally every piece of legislation dealing with Indian tribes and reservations. . . singles out for special treatment a constituency of tribal Indians living on or near reservations.”⁵⁹

⁵² 47 U.S.C. § 254(b)(3).

⁵³ 47 U.S.C. § 151.

⁵⁴ *Universal Service Order*, 12 FCC Rcd at 8843-44, paras. 120-121.

⁵⁵ *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) (C. J. Marshall) (*Cherokee Nation*).

⁵⁶ *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942) (citing *Cherokee Nation*; *U.S. v. Kagama*, 118 U.S. 375 (1886) (“Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the Federal Government] has charged itself with moral obligations of the highest responsibility and trust [towards Indian tribes.]”); *Choctaw Nation v. U.S.*, 199 U.S. 1 (1886); *U.S. v. Pelican*, 232 U.S. 442 (1914); *U.S. v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. Washington*, 316 U.S. 681 (1942).

⁵⁷ See, e.g., The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(a), (b) (“The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination . . . [and] declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy”); see also *Morton v. Mancari*, 417 U.S. 535, 540 (1974).

⁵⁸ *Morton v. Mancari*, 417 U.S. at 540 (upholding Indian employment preferences at the Bureau of Indian Affairs, and stating that “[t]he purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government”).

⁵⁹ *Morton v. Mancari*, 417 U.S. at 552.

23. By enhancing tribal communities' access to telecommunications services, the measures we adopt today are consistent with our federal trust responsibility to encourage tribal sovereignty and self-governance.⁶⁰ Specifically, by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government, and public services.⁶¹ Furthermore, by helping to bridge physical distances between low-income individuals living on tribal lands and the emergency, medical, employment, and other services that they may need, our actions further our federal trust responsibility to ensure a standard of livability for members of Indian tribes on tribal lands.⁶²

2. Subscribership Levels on Tribal Lands

24. Section 254(i) of the Act requires that the Commission and the states ensure that universal service is available at rates that are just, reasonable, and affordable.⁶³ In the *Universal Service Order*, the Commission adopted the finding of the Joint Board that subscribership levels provide relevant information regarding whether consumers have the means to subscribe to universal service and, thus, represent an important tool in evaluating the affordability of rates.⁶⁴ The Commission found that subscribership levels alone, however, do not reveal whether consumers are spending a disproportionate amount of income on telecommunications services or whether paying the rates charged for services imposes a hardship for those who subscribe.⁶⁵ The Commission concurred in the recommendation of the Joint Board that a determination of affordability take into consideration both rate levels and non-rate factors, such as consumer income levels, that can be used to assess the financial burden subscribing to universal service places on consumers.⁶⁶ The Commission also adopted the Joint Board's finding that the scope of a local calling area "directly and significantly impacts affordability" of universal service.⁶⁷

⁶⁰ See, e.g., *Morton v. Mancari*, 417 U.S. at 540, 555 (holding that a BIA hiring preference that was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" and was "reasonably and rationally designed to further Indian self-government" did not offend the Constitution).

⁶¹ The actions we take here also are consistent with the principles contained in the Policy Statement adopted contemporaneously with this Order. See *Indian Policy Statement* at 4 ("The Commission will endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives and consistent with section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.").

⁶² See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, 443 U.S. 658 (1979) (holding that the federal government's unique relationship with Indian tribes may create a federal duty to ensure that federal regulation of tribal lands assures "Indians with . . . a moderate living").

⁶³ 47 U.S.C. § 254(i).

⁶⁴ *Universal Service Order*, 12 FCC Rcd at 8838-39, para. 112.

⁶⁵ *Universal Service Order*, 12 FCC Rcd at 8839, para. 113.

⁶⁶ *Universal Service Order*, 12 FCC Rcd at 8837-38, para. 110.

⁶⁷ *Universal Service Order*, 12 FCC Rcd at 8840, para. 114 (affordability is affected by the amount of toll charges a consumer incurs to contact essential service providers such as hospitals, schools, and government offices located outside of the consumer's local calling area).

25. In the *Further Notice*, we expressed concern that, although approximately 94 percent of all households in the United States have telephone service today, penetration levels among particular areas and populations are significantly below the national average.⁶⁸ To better understand the dimensions of the problem of low subscribership in particular areas, we sought information on subscribership levels and impediments to subscribership generally and on tribal lands in particular.⁶⁹ The *Further Notice* defined the term “penetration rate” (or subscribership level) to mean “the percentage of households within a specified area that have telephone service in the housing unit.”⁷⁰ We also asked commenters to provide information pertaining to the total population, population density, average annual income, and average unemployment rate for each area within which penetration rates were measured. The *Further Notice* noted the Commission’s particular concern that Indians living on reservations, whose nationwide subscribership level is only 46.6 percent,⁷¹ have less access to telecommunications services than other Americans.⁷² In the *Further Notice*, we sought comment on issues that may be affecting the availability of universal service in tribal communities and on possible modifications to the federal universal service support mechanisms that may be necessary to promote deployment and subscribership in these areas.⁷³

26. Consistent with our statutory goal of preserving and advancing universal service and of ensuring that consumers in all regions of the Nation have access to the services supported by federal universal service support mechanisms,⁷⁴ we modify our universal service rules, as set forth below,⁷⁵ to increase telecommunications infrastructure deployment and subscribership on tribal lands. We take action at this time primarily for the benefit of low-income individuals living on tribal lands, as that term is defined above,⁷⁶ because of the critically low telephone subscribership levels that are reported in these areas. Specifically, statistics demonstrate that, although approximately 94 percent of all Americans have a telephone,⁷⁷ only 47 percent of Indians on reservations and other tribal lands have a telephone.⁷⁸ Similarly,

⁶⁸ *Further Notice*, 14 FCC Rcd at 21180-81, para. 5, citing *Telephone Subscribership in the United States*, Report, Table 1 (Com. Car. Bur., rel. Feb. 18, 1999).

⁶⁹ *Further Notice*, 14 FCC Rcd at 21184-92, paras. 11-31.

⁷⁰ *Further Notice*, 14 FCC Rcd at 21184-85, para. 13. We use the terms “subscribership” and “penetration” interchangeably in this Order.

⁷¹ *Further Notice*, 14 FCC Rcd at 21180-81, para. 5, citing *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, Bureau of the Census, SB/95, April 1995 at 2 (based on 1990 Census data).

⁷² *Further Notice*, 14 FCC Rcd at 21181-82, para. 6.

⁷³ *Further Notice*, 14 FCC Rcd at 21183, para. 9.

⁷⁴ 47 U.S.C. § 254(b).

⁷⁵ See Section III.D., *infra*.

⁷⁶ See Section III.B., *supra*, for definitions of “Indian tribe” and “tribal lands.”

⁷⁷ *Falling Through the Net 1999* at 11, Chart I-3.

⁷⁸ *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, Bureau of the Census, SB/95, April 1995 at 2 (based on 1990 Census data). We will be reexamining subscribership levels upon release of the 2000 Census data in 2001.

an analysis of 1990 Census data found that Indians represent 89 percent of the Nation's population in the one hundred zip codes with the lowest subscribership levels.⁷⁹ More recent studies of subscribership levels for individual tribes suggest that subscribership levels for many tribes remain significantly below the national average.⁸⁰

27. Consistent with recent research that demonstrates that telephone penetration correlates directly with income,⁸¹ federal statistics reveal that tribal communities are among the poorest populations in the United States. For example, according to 1990 data published by the Bureau of the Census, the per capita income of Native Americans living on tribal lands was only \$4,478, as compared with the \$14,420 per capita income in the United States as a whole.⁸² At the time of the 1990 Census data collection, almost 51 percent of American Indians residing on reservations and trust lands had incomes below the poverty level,⁸³ compared to 13 percent of United States residents nationwide with incomes below this level.⁸⁴ Unemployment levels for a sample of 48 tribes averaged 42 percent as compared to the national unemployment figure of 4.5 percent.⁸⁵ The record before us suggests that there is a correlation between low subscribership levels and low incomes on tribal lands.⁸⁶ Indeed, the majority of commenters identify low incomes or impoverishment as the key reason for low subscribership levels on tribal lands.⁸⁷

⁷⁹ National Exchange Carrier Association comments, attachment IV, table 1, in *Inquiry on Universal Service and Open Access Issues*, Department of Commerce, National Telecommunications and Information Administration, Docket No. 940955-4255, 1994 WL 506372 (rel. Sept. 19, 1994).

⁸⁰ See, e.g., Testimony of Aloa Stevens, Citizens Communications, at FCC Hearing, Gila River Reservation, Chandler, Arizona, March 23, 1999, transcript at 91-92 (indicating penetration level of 17.9 percent for the White Mountain Apache Tribe and 22.5 percent on the Navajo Reservation).

⁸¹ *Falling Through the Net 1999* at Chart I-3.

⁸² *We, the First Americans*, U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, WE-5 (Sept. 1993), at 10 (indicating per capita income in 1989 of approximately \$4,478 for American Indians residing on all reservations and trust lands).

⁸³ *Id.* Twenty-one percent of Alaska Native families lived below the poverty level in this time period as compared with seven percent of Alaska families statewide. *Id.* at 17.

⁸⁴ *Id.* at 6.

⁸⁵ *Assessment of Technology Infrastructure in Native Communities*, Final Report, Prepared for the U.S. Department of Commerce, Economic Development Administration by the College of Engineering, New Mexico State University, June 1999 (*NMSU Report*), at 14.

⁸⁶ See, e.g., RUS comments at 7-8; Fort Belknap Community Council comments at 1; GRTI comments at 3 (below-average subscribership in tribal areas is the result of economic conditions and low incomes and not just the higher cost of serving remote and sparsely populated areas); SBI comments at 3 ("despite several aggressive marketing efforts, SBI cannot get many of these people [on the Navajo Reservation] to subscribe to its wireless service simply because the median per capita income on the reservations is approximately \$5,000"); Project Telephone reply comments at 3-4 (Poverty and unemployment are major causes of nonsubscribership that are beyond the ability of carriers to resolve.).

⁸⁷ *Id.*

28. Based on our review of these statistics and the record before us, and consistent with the unique trust relationship between the federal government and members of Indian tribes, we conclude that specific action is needed to address the impediments to subscribership on tribal lands and to ensure affordable access to telecommunications services in these areas. Specifically, the significantly lower-than-average incomes and subscribership levels of members of federally-recognized Indian tribes warrant our immediate action to increase subscribership and improve access to telecommunications on tribal lands.

29. We conclude that the potential benefits to tribal members will only increase by extending to non-Indians living on tribal lands, as well as Indians, the measures we adopt in Section III.D. of this Order. First, we believe that, by increasing the total number of individuals, both Indian and non-Indian, who are connected to the network within a tribal community the value of the network for tribal members in that community is greatly enhanced. Implicit in our decision to extend the availability of enhanced federal support to all low-income individuals living on tribal lands, is our recognition of the likelihood that non-Indian, low-income households on tribal lands may face the same or similar economic and geographic barriers as those faced by low-income Indian households.⁸⁸

30. Second, we believe that increasing the total number of individuals, both Indian and non-Indian, who are connected to the network within a tribal community will result in greater incentives for eligible telecommunications carriers to serve in those areas. We anticipate that the availability of enhanced federal support for all low-income individuals living on tribal lands will maximize the number of subscribers in such a community who can afford service and, therefore, make it a more attractive community for carrier investment and deployment of telecommunications infrastructure. As the number of potential subscribers grows in tribal communities, carriers may achieve greater economies of scale and scope when deploying facilities and providing service within a particular community.

31. Finally, we believe that, by extending the availability of enhanced federal support to all low-income individuals residing on tribal lands, carriers will avoid the administrative burden associated with distinguishing between low-income individuals who are members of federally-recognized tribes living on tribal lands and all other low-income individuals living on tribal lands.⁸⁹ By reducing the possible administrative burdens associated with implementation of the enhanced federal support, we intend to eliminate a potential disincentive to providing service on tribal lands.

32. At this time, we do not adopt commenters' suggestions to apply the actions taken in this Order more generally to all high-cost areas and all insular areas.⁹⁰ Although the record demonstrates that subscribership levels are below the national average in low-income, rural areas and in certain insular

⁸⁸ See, e.g., RCA comments at 27 (stating that, in Alaska, Native and non-Native customers live in the same villages, use the same utility infrastructure, and face the same problems obtaining affordable service).

⁸⁹ See, e.g., Letter from David Cosson, Counsel to Project Telephone Company, Inc., to Irene Flannery, FCC, dated May 15, 2000 (stressing the "importance of rules which result in simple and unambiguous determination of eligible subscribers"); RCA comments at 27 (emphasizing the administrative difficulties inherent in distinguishing between Native and non-Native subscribers and proposing that any measures applied to Alaska Natives also apply to non-Natives living in Native villages in Alaska).

⁹⁰ See, e.g., USTA/NECA comments at 1-3 (suggesting that Commission's proposals should be applied to all high-cost areas and not just to tribal or insular areas); USTA/NECA comments at 9-10 (suggesting that the Commission apply any initiatives benefitting native populations to all areas populated by Native peoples, such as the Hawaiian Homelands, American Samoa, Guam, and Palau).

areas,⁹¹ the significant degree to which subscribership levels fall below the national average among tribal communities underscores the need for immediate Commission intervention for the benefit of this population. The record before us does not permit a determination that the factors causing low subscribership on tribal lands are the same factors causing low subscribership among other populations. Indeed, the presence of certain additional factors on tribal lands that may not be present in non-tribal areas, and which appear to create disincentives for carriers to provide service in these areas, suggests that the identical strategy adopted in this Order to boost subscribership levels on tribal lands may not be appropriate for increasing subscribership in other areas. Specifically, the following combination of factors may increase the cost of entry and reduce the profitability of providing service on tribal lands: (1) the lack of basic infrastructure in many tribal communities;⁹² (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community;⁹³ (4) the process of obtaining access to rights-of-way on tribal lands where tribal authorities control such access;⁹⁴ and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands.⁹⁵

33. We are concerned that to devise a remedy addressing all low subscribership issues for all unserved or underserved populations simultaneously might unnecessarily delay action on behalf of those who are least served, *i.e.*, tribal communities. We do not believe that we should delay action to benefit those who, based on national statistics and the record before us, comprise the most underserved segment of our population. We will, however, continue to examine and address the causes of low subscribership in other areas and among other populations within the United States and, in conjunction with the release of the 2000 Census data, we will take action as appropriate at that time to address low subscribership among such other populations.⁹⁶

34. Several incumbent local exchange carriers serving tribal communities indicate that subscribership levels among tribal communities within their service territories are higher than the nationwide average penetration rate for Indians on reservations and other tribal lands.⁹⁷ These comments do not lead us to alter our conclusion that Commission action is warranted to improve subscribership levels for low-income individuals on tribal lands. As an initial matter, we recognize that penetration levels for

⁹¹ *Falling Through the Net 1999* at Chart I-3; PRTC reply comments at 3-4 (average 74.2 percent penetration on island).

⁹² A recent study found that, among households of 48 tribes surveyed, 12 percent lack electricity, 23 percent lack gas, 50 percent do not use public sewage treatment facilities, 26 percent have no 911 service, and most responded that they lack an adequate road structure, with certain reservations having only one or two roads. *NMSU Report*, at 15-22.

⁹³ *See, e.g.*, UUI comments at 15.

⁹⁴ *See, e.g.*, Bell Atlantic reply comments at 9.

⁹⁵ *See, e.g.*, Bell Atlantic reply comments at 8.

⁹⁶ Data from the 2000 Census is expected to become available by the spring of 2001.

⁹⁷ *See, e.g.*, NTCA comments at 2-5 (asserting that 25 of NTCA's member companies provide telephone service on average to 97 percent of the households within their service territory on the reservation).

particular tribal communities may exceed the 47 percent national average for Indians on tribal lands, just as certain tribes may be below the national average of 47 percent. This fact, however, is not inconsistent with our decision to adopt measures to benefit tribal communities generally because we are targeting our actions to low-income individuals on tribal lands, who we anticipate will have the lowest subscribership levels in these areas. Specifically, because research indicates that there is a correlation between income and subscribership levels, we anticipate that our actions will benefit tribal communities whose subscribership levels, as a function of low average per capita incomes, are closer to, or less than, the 47 percent national average for Indians on reservations.

35. Although we recognize the achievements of rural carriers serving tribal lands in improving subscribership levels in these areas,⁹⁸ the fact that carriers employ various methodologies when measuring subscribership levels within their service territories limits the utility of particular statistics beyond the specific service territories. For example, statistics that measure the number or percentage of homes passed within a carrier's total service territory on a reservation do not reveal the number or percentage of households that, notwithstanding the fact that facilities are present, do not subscribe because they cannot afford telephone service.⁹⁹ Even where subscribership statistics measure the number or percentage of households within a carrier's territory that have telephone service, those statistics provide no measure of reservation households outside of the carrier's service territory that have access to facilities or take service.¹⁰⁰ Therefore, we conclude that nationwide and regional statistics that measure actual subscribership throughout tribal areas provide a more complete picture than do statistics that measure only the number of homes passed within particular service territories.

D. Enhanced Federal Lifeline and Expanded Link Up Support for Qualifying Low-Income Consumers Living on Tribal Lands

1. Background

36. *Lifeline.* The Commission's Lifeline support program was designed to increase subscribership by reducing qualifying low-income consumers' monthly basic local service charges.¹⁰¹ The Lifeline program provides three tiers of universal service support to eligible telecommunications carriers that offer Lifeline service. The support associated with each tier must be passed through by the carrier to each qualifying low-income customer by an equivalent reduction in the customer's monthly bill for telephone service.¹⁰² The first tier currently provides carriers with a baseline support amount of \$3.50 per

⁹⁸ See, e.g., Letter from Daniel Mitchell, NTCA, to Magalie Roman Salas, FCC, dated February 11, 2000 (NTCA Feb. 11 *ex parte*), at 5 (reporting survey showing 97 percent coverage rates and 80 percent penetration levels in tribal areas served by NTCA member companies).

⁹⁹ See, e.g., NTCA comments at 4 (NTCA survey results showed that 25 member companies have deployed infrastructure to provide service to 15 percent to 100 percent of the geographic areas within six reservation and trust land areas.).

¹⁰⁰ See, e.g., NTCA comments at 4 (listing number of NTCA member companies that have a combined average penetration rate of 80 percent in their service territory).

¹⁰¹ *Universal Service Order*, 12 FCC Rcd at 8952-53, para. 329.

¹⁰² 47 C.F.R. § 54.403(a).

month per Lifeline customer in the form of a waiver of the federal subscriber line charge, but this amount will increase to as much as \$4.35 on July 1, 2000.¹⁰³ The second tier provides carriers with an additional \$1.75 per month per Lifeline customer if the relevant state commission approves an equivalent reduction in the amount paid by Lifeline customers in that state.¹⁰⁴ Finally, the third tier provides carriers with federal matching funds of 50 percent of the amount of state-provided Lifeline support, up to a maximum of an additional \$1.75 per month per Lifeline customer (50 percent of \$3.50), assuming that the entire amount is passed on to the carrier's Lifeline customers.¹⁰⁵ Although federal Lifeline support under the existing Lifeline program may not exceed \$7.85 per month as of July 1, 2000 under the Commission's rules, in a state that provides \$3.50 of support per month, which is the level needed to generate the full federal matching amount, a carrier currently may receive a total of \$11.35 per month per Lifeline customer in combined federal and state support.¹⁰⁶

37. In the *Further Notice*, we sought comment on whether federal universal service support mechanisms should provide additional support for low-income consumers living on tribal lands.¹⁰⁷ In recognition of the fact that local calling areas for wireline carriers are established by the states, we sought comment on what role, if any, the Commission is authorized to and should play in seeking to address impediments caused by limited local calling areas. The options proposed for addressing the issue of limited local calling areas within tribal communities included the provision of federal universal service support for: (1) intrastate toll calling; (2) calls outside of the local calling area that fall within specified federally-designated support areas; and (3) a foreign exchange line service from the remote or tribal area to the nearest metropolitan area or community of interest. Finally, we sought comment on whether the provision of service by terrestrial wireless or satellite providers would alleviate problems associated with limited local calling areas.

¹⁰³ *CALLS Order*, para 216. See also 47 C.F.R. §§ 54.403(a)(1) (rules for first-tier Lifeline as revised by the *CALLS Order*).

¹⁰⁴ 47 C.F.R. § 54.403(a)(2).

¹⁰⁵ 47 C.F.R. § 54.403(a)(3).

¹⁰⁶ Federal Lifeline support is collected and distributed as follows. The federal universal service administrator, the Universal Service Administrative Company (USAC), collects universal service contributions for all of the universal service support mechanisms, including the low-income support mechanism based on the interstate and international end-user revenues of interstate telecommunications services providers. The amount collected for the low-income support mechanism each quarter is based on a projection of demand that USAC prepares and submits to the Commission each quarter, which USAC calculates according to carrier estimates for that quarter. At the beginning of each quarter, USAC calculates the amount of support that it will provide to each carrier offering Lifeline service based on the revenues that the carrier expects to forgo during that quarter for providing Lifeline service. Low-income subscribers apply for Lifeline service according to the application procedures and qualification criteria established by each state and, upon satisfying these requirements, receive service at the discounted Lifeline rate that is applicable in that state or service territory. In states that provide no intrastate Lifeline matching funds, Commission approved qualification criteria govern subscribers' eligibility for Lifeline service. At the close of each quarter, a carrier submits to USAC the actual amount of revenues forgone during the quarter for the provision of Lifeline service and USAC adjusts the level of Lifeline support paid to the carrier in the subsequent quarter to reflect this revenue data. See generally, 47 C.F.R. § 54.400, *et seq.* and 47 C.F.R. § 54.700, *et seq.*

¹⁰⁷ *Further Notice*, 14 FCC Rcd at 21227- 28, paras. 122-123.

38. *Link Up*. The Commission's Link Up program helps qualifying low-income consumers initiate telephone service by paying half of the first \$60 of service connection charges for a subscriber's primary residential connection.¹⁰⁸ When a carrier offers eligible low-income customers a deferred payment plan for connection charges, carriers may receive reimbursement of up to \$200 under the Link Up program for waiving interest on the deferred charges.¹⁰⁹

39. In the *Further Notice*, we sought comment on whether increasing federal support to offset initial service connection charges may be necessary to increase subscribership on tribal lands.¹¹⁰ We also sought comment on whether to use federal support to address the problem of low subscribership in underserved or unserved areas caused by prohibitively high costs associated with line extension or facilities construction and the inability of low-income residents to obtain telecommunications service because they cannot afford to pay the required line extension or construction costs. We sought comment on alternative options for addressing prohibitively expensive line extension costs. Specifically, we asked whether the provision of telecommunications service to remote areas using terrestrial wireless or satellite technologies might allow service at lower cost compared to the cost of line extensions or construction of wireline facilities, and how various proposals would avoid encouraging uneconomic investments in relatively high-cost technologies.

40. *Consumer Eligibility under Lifeline and Link Up Programs*. In the *Universal Service Order*, the Commission adopted the Joint Board's recommendation to maintain the basic framework for administering the Lifeline program that existed prior to adoption of the *Universal Service Order*, under which a state providing intrastate matching funds under the Lifeline program established the qualification criteria governing customer participation in that state.¹¹¹ Thus, section 54.409(a) of our rules provides that, in states that provide intrastate matching funds, a consumer must meet the criteria established by the state commission to receive federal Lifeline support.¹¹² The Commission adopted the Joint Board's additional recommendation, however, to require states to base such Lifeline criteria "solely on income or factors directly related to income" in order to increase the availability of Lifeline support to all low-income consumers. We took this action in recognition of the fact that some states limited Lifeline support availability to certain low-income consumers, such as the elderly, or did not participate in the program.

41. For states that do not provide intrastate matching Lifeline funds, the Commission adopted the Joint Board's recommendation to establish federal default consumer qualification criteria.¹¹³ Specifically, section 54.409(b) of our rules provides that, in states that do not provide state matching funds (and thus do not establish the consumer qualifications for Lifeline participation), a consumer seeking

¹⁰⁸ 47 C.F.R. § 54.411(a)(1).

¹⁰⁹ 47 C.F.R. § 54.411(a)(1), (a)(2).

¹¹⁰ *Further Notice*, 14 FCC Rcd at 21226-28, paras. 119-121. We also sought comment on whether the Commission should provide additional support through the Link Up program for locations with significantly lower-than-average telecommunications penetration levels, e.g., below 75 percent. *Further Notice*, 14 FCC Rcd at 21227, para. 121.

¹¹¹ *Universal Service Order*, 12 FCC Rcd at 8973, para. 373.

¹¹² 47 C.F.R. § 54.409(a).

¹¹³ *Universal Service Order*, 12 FCC Rcd at 8973-74, para. 374.

Lifeline support must certify his or her participation in one of the following Commission-designated low-income assistance programs: Medicaid; food stamps; Supplemental Security Income; federal public housing assistance; or Low-Income Home Energy Assistance Program.¹¹⁴ Section 54.415 incorporates the identical framework for purposes of establishing a consumer's eligibility under the Commission's Link Up program.¹¹⁵

2. Discussion

a. Enhanced Lifeline Support for Qualifying Low-Income Consumers Living on Tribal Lands

42. In this Order, we create a fourth tier of federal Lifeline support available to eligible telecommunications carriers serving qualifying low-income individuals living on tribal lands. This fourth tier of federal Lifeline support will consist of up to an additional \$25 per month, per primary residential connection for each qualifying low-income individual living on tribal lands. This amount, in conjunction with the first-tier baseline (ranging from \$3.50 to \$4.35 after July 1, 2000)¹¹⁶ and \$1.75 second-tier "non-matching" federal support amounts, will entitle each qualifying low-income consumer on tribal lands to a reduction in its basic local service bill of up to \$31.10 per month.¹¹⁷ In taking this action, we follow the example of states such as New York and require all qualifying low-income individuals on tribal lands to pay a minimum monthly Lifeline rate of \$1.¹¹⁸ As explained further below, this enhanced Lifeline support should substantially reduce the Lifeline rate (*i.e.*, the monthly basic service rate) for all qualifying low-income consumers on tribal lands.

43. Consistent with the requirement of section 54.403(a) of our rules, we condition the receipt of this increased federal Lifeline support on carriers passing through the entire fourth-tier support amount to each qualifying low-income individual living on tribal lands by an equivalent reduction in the subscriber's monthly bill for local service.¹¹⁹ Specifically, we require each eligible telecommunications carrier to certify that it (1) will pass through the fourth-tier federal support amount to its qualifying low-income subscribers, and (2) has received the necessary approval of any non-federal regulatory authority

¹¹⁴ 47 C.F.R. § 54.409(b).

¹¹⁵ 47 C.F.R. § 54.415(a), (b).

¹¹⁶ *CALLS Order*, para. 216.

¹¹⁷ In a jurisdiction that provides state matching funds of \$3.50, which represents the amount needed to generate the full \$1.75 in third-tier federal matching funds, a qualifying low-income individual on tribal lands could receive a total basic local service rate reduction of up to \$36.35 per month.

¹¹⁸ See *Case 28961, New York Telephone Company-Moratorium Rate Decrease, and Case 28978, New York Telephone Company-Generic Rate Design Proceeding-Analysis*, Opinion 87-18, (NYPSC 1987) (establishing Lifeline rate of \$1 per month plus reduced usage charges for all local calls); see also, *Application of Bell Atlantic-Washington, D.C., Inc. for Authority to Amend the Local Exchange Services Tariff, P.S.C.-D.C.-No. 202 and General Services Tariff, P.S.C.-D.C.-No. 203*, Order No. 11286 (DCPSC 1998) (establishing Lifeline rate of \$3 per month for local service with a limit of 120 message units for low-income consumers under 65 years of age and a Lifeline rate of \$1 per month with unlimited local calling for low-income consumers over 65 years of age).

¹¹⁹ 47 C.F.R. § 54.403(a).

authorized to regulate such carrier's rates that may be required to implement the required rate reduction. As discussed in greater detail below in Section III.D.2.c., an eligible telecommunications carrier seeking to receive reimbursement during the calendar year 2000 for enhanced Lifeline and Link Up services provided during the fourth quarter 2000 must make these certifications in a letter filed with the universal service fund Administrator, the Universal Service Administrative Company (USAC), by September 1, 2000. All carriers seeking reimbursement for enhanced Lifeline or Link Up services must make these certifications in the FCC Form 497 (as revised).¹²⁰

44. Our primary goal, in taking this action, is to reduce the monthly cost of telecommunications services for 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. In view of (1) the extraordinarily low average per capita and household incomes in tribal areas,¹²¹ (2) the excessive toll charges that many subscribers incur as a result of limited local calling areas on tribal lands,¹²² (3) the disproportionately low subscribership levels in tribal areas,¹²³ and (4) the apparent limited awareness of, and participation in, the existing Lifeline program,¹²⁴ we conclude that a substantial additional amount of support is needed to have an impact on subscribership. Our conclusion to provide up to an additional \$25 for all qualifying low-income individuals living on tribal lands is consistent with the actions of state

¹²⁰ See Section III.D.2.c., *infra*, for a discussion of implementation of enhanced Lifeline and expanded Link Up support.

¹²¹ *We, the First Americans*, U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, WE-5 (Sept. 1993), at 10 (indicating per capita income in 1989 of approximately \$4,478 for American Indians residing on all reservations and trust lands); see also *NMSU Report*, at 30 (reporting that on the Navajo Reservation, "many more households have access to phone lines than is suggested by [penetration statistics]...Even where telephones are available, many low-income families simply cannot afford to maintain service.").

¹²² See, e.g., *Albuquerque Hearings Transcript* at 59, testimony of Eagle Rael, Governor, Pueblo Picuris, New Mexico ("Our local calling area is small. 97 percent of tribal government calls are long distance. Emergency 911 rings to Taos, outside the local calling area, and cannot be reached by those with cost-saving long distance [toll] block[ing service];"); *Overcoming Obstacles to Telephone Service for Indians on Reservations, Hearings*, March 23, 1999, at the Gila River Indian Community in Chandler, Arizona (*Arizona Hearings Transcript*), testimony of Nora Helton, Chairperson, Fort Mojave Tribe, at 43 ("When we make calls into Laughlin, Nevada, which is only five or seven miles up the road, it's a long distance call for us."), available at <www.fcc.gov/Panel_Discussions/Teleservice_reservations/> www.fcc.gov/Panel_Discussions/Teleservice_reservations/march23/welcome.html.

¹²³ *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, Bureau of the Census, SB/95, April 1995 at 2 (based on 1990 Census data).

¹²⁴ Testimony at the January 1999 Overcoming Obstacles Hearing in Albuquerque, New Mexico indicated that none of the pueblo leaders who participated as panelists in the hearing were aware of the Lifeline or Link Up programs. See, e.g., *Albuquerque Hearings Transcript* at 71-74, 105-07. In addition, despite the presence of sixty percent unemployment in the Cheyenne River Sioux Telephone Authority Area, only about ten percent of the subscribers there receive Lifeline service. See Testimony of J.D. Williams, Cheyenne River Sioux Telephone Authority, Arizona Hearing Transcript at 71.

commissions that have instituted substantial rate reductions for their low-income residents.¹²⁵ In each of these cases, substantial additional state funds have been made available to promote subscribership among qualifying low-income consumers in those jurisdictions. Our determination is informed by the experience of these jurisdictions and the increased subscribership levels achieved following their implementation of substantial Lifeline rate reductions. For example, in the four years (1992-1996) immediately following the District of Columbia Public Service Commission's (D.C. Commission) adoption of a \$1 Lifeline rate for low-income residents 65 years of age and older and a \$3 Lifeline rate for low-income residents under 65 years of age, the District of Columbia's overall subscribership levels increased by more than 4 percent, as compared with a nationwide increase of only 0.1 percent for the same time period.¹²⁶ Similarly, while only 8,850 low-income individuals previously lacking telephone service initiated service in New York in the three years preceding the New York Public State Service Commission's adoption of a \$1 Lifeline rate, 171,536 low-income individuals initiated service in the three years following adoption of the \$1 Lifeline rate, an increase in new Lifeline subscribers of almost 2000 percent.¹²⁷

45. In adopting its \$1 Lifeline program for low-income citizens in the District of Columbia, the D.C. Commission determined that a substantial rate reduction, along with the removal of other regulatory restrictions, was needed to stimulate interest among the low-income population generally, given its history of low subscription and in light of the potential importance of phone service, particularly to elderly residents, as a "Lifeline."¹²⁸ Subscribership levels on tribal lands, the multitude of obstacles to increasing subscribership on tribal lands, and the critical health and safety function of a telephone to persons in extremely remote locations suggest that tribal populations represent a similarly "at risk" population. Just as the D.C. Commission determined that an aggressive regulatory approach was needed to raise the visibility of Lifeline and stimulate interest on the part of residents there, we believe that a similarly aggressive, multi-faceted approach is needed to address the problem of low subscribership on tribal lands.

46. In combination with the "non-matching" federal first-tier Lifeline support of up to \$4.35 and second-tier support of \$1.75 per month per Lifeline customer, the additional \$25 in enhanced federal

¹²⁵ See Case 28961, *New York Telephone Company-Moratorium Rate Decrease*, and Case 28978, *New York Telephone Company-Generic Rate Design Proceeding-Analysis*, Opinion 87-18, (NYPSC 1987) (establishing Lifeline rate of \$1 per month plus reduced usage charges for all local calls); see also, *Application of Bell Atlantic-Washington, D.C., Inc. for Authority to Amend the Local Exchange Services Tariff, P.S.C.-D.C.-No. 202 and General Services Tariff, P.S.C.-D.C.-No. 203*, Order No. 11286 (DCPSC 1998) (establishing Lifeline rate of \$3 per month for local service with a limit of 120 message units for low-income consumers under 65 years of age and a Lifeline rate of \$1 per month with unlimited local calling for low-income consumers over 65 years of age).

¹²⁶ See Letter from Phylcia Bowman, District of Columbia Public Service Commission, to Praveen Goyal, FCC, dated May 22, 2000, at Section III, Table 3. It is also noteworthy that, in this same time period, the number of qualifying low-income residents participating in the Lifeline program in the District of Columbia increased from 2,867 to 9,251, an increase of more than 300 percent. See *1999 Joint Annual Report, Utility Discount Programs*, Multi-Utility Discount Working Group, Table 7 (July 27, 1999).

¹²⁷ See Case 90-C-0191 – *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York Telephone Company; Report on New York Telephone Company's Lifeline Program*, Notice Soliciting Comments (rel. Nov. 20, 1991), at 24.

¹²⁸ *Chesapeake and Potomac Telephone Company, Formal Case No. 850*, Order No. 9927, 13 DCPSC 67 (Jan. 27, 1992). Although the D.C. Commission extended its \$1 Lifeline program to all low-income citizens in the District of Columbia in this order, it later adopted a \$3 Lifeline rate for low-income citizens under the age of 65.

Lifeline support for qualifying low-income individuals living on tribal lands would reduce the cost of the most expensive basic service rates presented on the record (*e.g.*, \$38 per month in areas of Alaska and \$35 per month on the Wind River Reservation),¹²⁹ to less than \$10 per month.¹³⁰ The record before us indicates that basic local service rates for subscribers living on or near reservations range from \$5 to \$38 per month, with most subscribers receiving rates of less than \$20 per month.¹³¹ Thus, with the enhanced Lifeline support, low-income individuals on tribal lands whose local service rates are \$32.10 or less per month would pay a monthly local service rate of \$1.¹³² The enhanced support also would apply to any monthly mileage or zonal charges imposed as a condition for receiving basic local service. The enhanced support would not apply to state or federal taxes, state or federal universal service fees, or surcharges for 911 service that may appear as line items on a subscriber's bill for local service. By substantially reducing the monthly service costs for all qualifying low-income individuals on tribal lands, we find that the additional targeted Lifeline support provided here should eliminate or diminish the effect of unaffordability for those low-income individuals for whom it may be difficult to maintain telephone service even where facilities are present.¹³³

47. By creating this enhanced Lifeline support, we have attempted to reduce to \$1 per month the basic service rate for the majority of income-eligible individuals residing on tribal lands. There are, however, some isolated instances where local telephone rates are high enough that, even with the enhanced Lifeline support, monthly service rates will be greater than \$1. In addition, there are a myriad of charges, which vary from state to state, that also affect customers' bills, such as taxes, surcharges, and mileage charges. So, while we have taken significant steps toward reducing the monthly local service rates for low-income individuals on tribal lands with this program, we cannot assure each eligible customer that his or her local service bill will be \$1 per month.

48. We have ample evidence that customer confusion and lack of awareness of Lifeline discounts have contributed to low subscribership levels on tribal lands.¹³⁴ We encourage states to consider

¹²⁹ Eastern Shoshone Tribe comments at 9; RCA comments at 4.

¹³⁰ See NTCA comments at 5 (17 out of 25 companies serving reservations indicate that a \$10 per month basic local telephone rate is considered affordable); see also SBI comments at 2 (Poverty on the Navajo Reservation is "extreme and even a basic lifeline service priced at \$10.00 per month is out of reach for most families.").

¹³¹ Eastern Shoshone Tribe comments at 7-12 (reporting range of local rates of approximately \$9 to \$35, plus zonal charges); RCA comments at 4 (reporting range of local rates in Native and non-Native communities of approximately \$10 to \$38); Golden West, *et al.*, comments at 2-7 (tribal carriers in South Dakota reporting range of local rates of \$9.95 to \$15.75); NTCA Feb. 11 *ex parte* at 4 (reporting range of local rates of \$5 to \$20).

¹³² As previously noted, in a jurisdiction that provides state matching funds of \$3.50, which represents the level of state funds needed to generate the maximum \$1.75 in federal matching funds, a qualifying low-income individual living on tribal lands could receive enhanced Lifeline support of up to \$36.35 per month.

¹³³ See RUS comments at 12 ("The current Lifeline program's maximum payment covers less than half of today's average cost of monthly service, and this may not be enough for some families." The Commission should consider whether an enhanced Lifeline program would be appropriate for tribal and other impoverished areas to ensure affordability of modern telecommunications.); Salt River/NTTA comments at 17 (urging the Commission to consider other potential approaches to reducing the costs to individuals of receiving telecommunications services in Indian Country, including potentially, individually targeted subsidies and increases in Lifeline payments).

¹³⁴ See, *e.g.*, UUI comments at 15.

ways in which local charges may be simplified, particularly for low-income customers eligible to receive this enhanced Lifeline support, so as to make the Lifeline discounts easier to promote and explain to qualifying customers. We encourage the Joint Board to consider this issue in its review of Lifeline service for all low-income consumers.

49. In determining the appropriate level of enhanced Lifeline support for qualifying low-income individuals on tribal lands, we recognize that low-income individuals on tribal lands may spend a significantly greater percentage of their household income on local and toll services than do most other Americans as a result of the substantial toll charges they incur to place calls within their communities of interest. Based on data compiled by the Bureau of Labor Statistics, we observe that expenditures for residential local and toll telephone services comprise approximately two percent of the average U.S. household's annual expenditures.¹³⁵ Assuming average local service charges of approximately \$20 per month¹³⁶ and toll charges of as much as \$126 per month,¹³⁷ a tribal member may spend as much as \$1,752 per year on local and long distance telephone service. Assuming an average household income of \$12,459 per year,¹³⁸ a tribal household could spend approximately 14 percent of its annual income on telephone service. Given that an annual household income of \$12,459 is unlikely to result in any savings, we assume that all or most of this amount is dedicated to household expenditures.

50. Even if we were to use the lowest local service charge on the record of \$5 per month¹³⁹ and assume intrastate toll charges of only \$42 per month (or one-third of the \$126 toll charge figure cited above), total telephone services, excluding taxes and other charges, would cost \$47 per month, or \$564 per year. A tribal household earning \$12,459 per year would spend, in this example, approximately 5 percent of its annual income on telephone service. Thus, in comparison to the two percent of household expenditures dedicated to telecommunications services in the average U.S. household, it appears that tribal members on average commit a substantially greater percentage of household resources to pay for the same services.

51. Finally, we are mindful that a low-income individual currently receiving and paying for service without enhanced support will, upon adoption of these rules, receive a discounted rate for the same service, when that individual arguably could continue to pay the current rate without any enhancement. Nonetheless, we believe that our decision is consistent with our responsibility to ensure that our actions do not expand the federal universal service support mechanisms beyond that required to achieve our statutory mandate to preserve and advance universal service. As we noted in the *Universal Service Order*, however, the fact that an individual is connected to the network does not, in itself, reveal whether that individual is

¹³⁵ *Trends in Telephone Service*, Industry Analysis Division of the Common Carrier Bureau, FCC, at 4-3 (March 2000) (citing *Consumer Expenditure Survey*, U.S. Bureau of Labor Statistics).

¹³⁶ *Trends in Telephone Service*, Industry Analysis Division of the Common Carrier Bureau, FCC, at 4-3 (September 1999).

¹³⁷ *NMSU Report* at 18. This study found that the average tribal household incurs toll charges of \$126 per month for "long distance service within the community." *Id.*

¹³⁸ 1990 Census of Population: Social and Economic Characteristics, American Indian and Alaska Native Areas, CP-2-18, Table 12 (1990).

¹³⁹ See NTCA Feb. 11 *ex parte*, at 4.

spending a disproportionate amount of income on telecommunications services.¹⁴⁰ We have carefully examined the facts before us and structured the enhanced Lifeline support in a manner that is precisely targeted to provide qualifying low-income individuals with access to telecommunications services and to increase subscribership on tribal lands. Given that: (1) tribal members appear to spend a significantly higher proportion of their incomes on telecommunications services than do other Americans; (2) low-income tribal members' services may be more likely to be disconnected;¹⁴¹ (3) beneficiaries of enhanced support must be income eligible; and (4) qualifying individuals can use only as much support as is needed to cover the cost of the individuals' basic service rate less \$1, we are persuaded that the level of support provided here does not exceed that required to preserve and advance universal service.

52. We also believe that our adoption of enhanced Lifeline support will encourage: (1) eligible telecommunications carriers to construct telecommunications facilities on tribal lands that currently lack such facilities; (2) new entrants offering alternative technologies to seek eligible telecommunications carrier status to serve tribal lands; and (3) tribes, eligible telecommunications carriers, and states to address impediments to increased penetration that are caused by limited local calling areas. We discuss each of these in greater detail below.

53. *Infrastructure Development.* By providing carriers with a predictable and secure revenue source, the enhanced Lifeline support just discussed, in conjunction with the expanded support that we provide under the Link Up program,¹⁴² is designed to create incentives for eligible telecommunications carriers to deploy telecommunications facilities in areas that previously may have been regarded as high risk and unprofitable. We note that, unlike in urban areas where there may be a greater concentration of both residential and business customers, carriers may need additional incentives to serve tribal lands that, due to their extreme geographic remoteness, are sparsely populated and have few businesses. In addition, given that the financial resources available to many tribal communities may be insufficient to support the development of telecommunications infrastructure,¹⁴³ we anticipate that the enhanced Lifeline and expanded Link Up support will encourage such development by carriers. In particular, the additional support may enhance the ability of eligible telecommunications carriers to attract financing to support facilities construction in unserved tribal areas. Similarly, it may encourage the deployment of such infrastructure by helping carriers to achieve economies of scale by aggregating demand for, and use of, a common telecommunications infrastructure by qualifying low-income individuals living on tribal lands.

54. The enhanced Lifeline and Link Up support adopted here also may help to foster principles of tribal sovereignty and tribal self-determination in two respects. First, the availability of enhanced federal support may provide additional incentives for tribes that wish to establish tribally-owned carriers to do so by diminishing the financial risk associated with providing service to low-income customers on tribal lands. Second, to the extent that tribal leaders can aggregate service requests of large numbers of qualifying

¹⁴⁰ *Universal Service Order*, 12 FCC Rcd at 8839, para. 113.

¹⁴¹ *See, e.g., NMSU Report* at 30.

¹⁴² *See* discussion of expanded Link Up support for qualifying low-income tribal members in Section III.D.2.b., *infra*.

¹⁴³ *See, e.g.,* Testimony of Stanley Pino, Chairman of the All Indian Pueblo Council, *Albuquerque Hearings Transcript* at 27; Testimony of George Arthur, spokesman for the President of the Navajo Nation and for the Speaker of the Navajo Nation Council, *Albuquerque Hearings Transcript* at 38.

individuals eligible for enhanced support, they may have more control in choosing the carriers serving their communities and increased bargaining power in their negotiations with carriers seeking to provide universal service on tribal lands.

55. To the extent that the cost to extend facilities, due to the geographic remoteness of a location or other geographic characteristics, is extraordinarily high,¹⁴⁴ we recognize that the level of support provided here, in combination with existing levels of universal service high-cost support, may not always be sufficient to attract the necessary facilities investment. Accordingly, although we anticipate that the measures adopted in this Order will address a significant number of the obstacles to subscribership on tribal lands identified on the record before us, we anticipate that additional regulatory steps may be necessary to encourage the deployment of facilities in areas where the cost of deployment is extraordinarily high. We will address these issues, in consultation with the Joint Board, when we consider reform of the rural high cost mechanism, and implementation of section 214(e)(3) of the Act.¹⁴⁵ For this reason, we do not adopt additional measures at this time to address the problem of inadequate facilities deployment in the most geographically remote tribal areas.¹⁴⁶

56. *Competitive Service Providers.* By providing additional federal support targeted to low-income individuals on tribal lands, without regard to the specific technology used to provide the supported telecommunications services, we recognize that different technologies may offer solutions to address low subscribership levels on tribal lands. For example, commenters have suggested that wireless service may represent a cost-effective alternative to wireline service in sparsely populated, remote locations where the cost of line extensions is prohibitively expensive.¹⁴⁷ Moreover, as we discuss further below, a wireless eligible telecommunications carrier service offering that features an expanded local calling area along with

¹⁴⁴ As we observed in the *Further Notice*, in 1997, the Navajo Communications Company issued 72 line extension charge estimates that averaged more than \$40,000, including eight estimated at more than \$100,000 and one estimated at more than \$157,000. *Further Notice*, 14 FCC Rcd at 21188-89, para. 23.

¹⁴⁵ Section 214(e)(3) provides that:

if no common carrier will provide the services that are supported by Federal Universal service support mechanisms under section 254(c) 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 for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

47 U.S.C. § 214(e)(3). See *Further Notice*, 14 FCC Rcd at 21214-25, paras. 83-116 (discussing Commission's implementation of section 214(e)(3)).

¹⁴⁶ As discussed more fully in Section III.D.2.b., *infra*, however, we do provide in this Order up to an additional \$70 of federal universal service support under the Link Up program for a total of up to \$100 of federal support to offset the cost of service initiation fees and line extension charges incurred by qualifying low-income individuals on tribal lands for initiation of telephone service. This expanded Link Up support should help qualifying low-income individuals on tribal lands to initiate service by reducing the amounts carriers charge to expand the capacity of near-by existing facilities to serve the unserved community.

¹⁴⁷ See, e.g., Qualcomm comments at 3-4.

a predetermined number of calls or minutes of calling within a tribal member's community of interest, may represent a solution to the problem of limited local calling areas and excessive toll charges in tribal areas.¹⁴⁸ The enhanced Lifeline support adopted in this Order is competitively neutral because any carrier, including a wireless carrier, that receives designation as an eligible telecommunications carrier and is permitted by tribal authorities to serve on tribal lands may provide enhanced Lifeline service to qualifying low-income individuals on tribal lands.¹⁴⁹

57. *Limited Local Calling Areas.* As noted above, because the boundaries of local calling areas for wireline carriers are established by the states, we recognize that we do not have the authority to address the problem of limited local calling areas directly. We find, however, that the enhanced Lifeline support may help to alleviate the financial burden of the excessive toll charges that low-income individuals on tribal lands incur when their local calling area does not encompass their community of interest. First, the availability of enhanced Lifeline support, by reducing local service rates by as much as \$25 per month, effectively "frees up" money formerly dedicated to local service charges that a subscriber now may apply to the subscriber's toll charges. Second, the enhanced Lifeline support may spur competitive entry by non-wireline carriers whose calling plans offer an expanded local calling area. Finally, our decision to increase the level of Lifeline support to reduce basic local service rates for qualified, low-income individuals on tribal lands may encourage states to expand local calling areas for subscribers whose local calling area does not encompass their community of interest. Specifically, in instances where the entire federal Lifeline support amount (up to \$31.10 where no state matching funds are provided) is not needed to offset a subscriber's local service rate because the rate is less than this amount, the additional remaining support may provide states with incentives to examine and, where appropriate, expand local calling areas on tribal lands.¹⁵⁰ By reducing the financial burden associated with excessive toll charges and by reducing the number of calls subject to toll charges, we conclude that the actions we take today will help low-income individuals on tribal lands to maintain their access to telephone service.

58. We decline at this time to adopt other proposals included in the *Further Notice* for offsetting the cost of intrastate toll service, based on our expectation that the measures adopted in this Order, although not providing support directly for intrastate toll charges, nevertheless will help to alleviate some of the burden associated with high intrastate toll charges on tribal lands.¹⁵¹ Because we find that the provision of federal support to offset the cost of intrastate toll service would expand upon the definition of supported services in section 254(c) of the Act, and would raise issues of competitive neutrality to the extent that interexchange carriers would not be eligible to receive such enhanced Lifeline support, we do

¹⁴⁸ See Letter from David A. LaFuria, Counsel for Smith Bagley, Inc., to Mark Nadel, FCC, dated April 25, 2000 (Smith Bagley April 25 *ex parte*), at 2 (stating that SBI could offer local calling throughout its authorized service territory on the Navajo Reservation, "which would eliminate toll charges for most Native American households").

¹⁴⁹ The Commission adopted the principle of competitive neutrality in the *Universal Service Order*. See *Universal Service Order*, 12 FCC Rcd at 8801-03.

¹⁵⁰ For example, instituting one-way extended area calling for tribal lands may represent a cost-effective way to expand local calling areas of tribal members to include their communities of interest. See, e.g., UUI comments at 13-14 (recently, the RCA adopted "one-way" extended area service requirements for rural villages desiring to expand their local calling areas based on their "community of interest").

¹⁵¹ See *Further Notice*, 14 FCC Rcd at 21227-28, para. 123.

not adopt our proposal to support intrastate toll service.¹⁵² We ask the Joint Board, in connection with its upcoming review of the definition of supported services, to issue a recommendation as to whether the Commission should include intrastate or interstate toll services or expanded area service within the list of supported services on tribal lands or in other areas.¹⁵³ Finally, in recognition of the states' traditional jurisdiction and expertise in determining the appropriate size and scope of local calling areas, we concur in the view expressed by NTIA and other parties that counsel against our direct involvement in this area.¹⁵⁴

b. Expanded Link Up

59. In this Order, we provide up to \$100 of federal support under the Link Up program to reduce the initial connection charges and line extension charges of qualifying low-income individuals on tribal lands. Thus, in addition to the currently available Link Up support amount, *i.e.*, half of the first \$60 of a qualifying subscriber's initial connection charges up to a maximum of \$30, we will provide up to an additional \$70 of federal Link Up support to cover 100 percent of the remaining charges associated with initiating service between \$60 and \$130, for a total maximum support amount of \$100 per qualifying low-income subscriber. Adoption of this measure will provide up to \$100 in federal Link Up support to qualifying low-income individuals on tribal lands with initial connection or line extension costs of \$130 or more. Based on information and comment on the record pertaining to the costs associated with initiating service in many tribal areas, we conclude that the existing \$30 maximum level of Link Up support is, in many cases, far short of the support amount needed to offset such charges.¹⁵⁵ A recent study of American Indian and Alaska Native tribal communities on tribal lands found that average household telephone installation charges for responding tribes was \$78.¹⁵⁶ We note that all parties who commented on the

¹⁵² Section 254(c)(1) of the Act requires the Joint Board to recommend, and the Commission to establish, the services that should be supported by federal universal service support mechanisms. 47 U.S.C. § 254(c)(1). Section 254(c)(2) of the Act states that the "Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms." 47 U.S.C. § 254(c)(2).

¹⁵³ *Universal Service Order*, 12 FCC Rcd at 8834-35, para. 104 (adopting Joint Board's recommendation to convene a Joint Board no later than January 1, 2001, to revisit the definition of universal service). Moreover, we ask the Joint Board to consider the advisability of including prepaid calling plans within the definition of supported services. Specifically, we ask the Joint Board to examine whether support for such plans may give carriers sufficient financial incentive to extend service to low-income individuals whose service has been disconnected for failure to pay long distance charges and to waive past due charges for such individuals as a condition of receiving this support.

¹⁵⁴ Letter from Kathy Smith, NTIA, to Magalie Roman Salas, FCC, dated April 14, 2000 (NTIA *ex parte* comments) at 17; *see also* RCA comments at 21-23 (Commission lacks jurisdiction, historical experience, local presence, and regional knowledge to determine whether expansion of a local calling area is in the public interest).

¹⁵⁵ *See, e.g.*, UUI comments at 17 and n. 32 (often assistance beyond the \$30.00 of available Link Up support is needed to make the cost of establishing service more affordable; to cover the cost to establish service, *i.e.*, install jack and inside wire, purchase and test instruments, and connect line to central office, UUI charges \$177.25); Smith Bagley April 25 *ex parte*, at 2 (subscriber activation charges often amount to several hundred dollars per subscriber); Eastern Shoshone comments at 8 (in addition to "switch activation fee" of between \$33.10-\$52.00, carriers charge \$375 Rural Network Assessment Tariff plus actual construction costs exceeding \$2,300); AT&T reply at 7 (supporting the provision of greater one-time discounts on installation to the most needy).

¹⁵⁶ *NMSU Report* at 18.

appropriate amount by which to increase the level of Link Up support recommend an increase in the maximum level of support to \$100¹⁵⁷ and that no party opposes this amount or proposes an alternative amount.

60. As proposed in the *Further Notice*, we also expand the types of charges covered by the Link Up program to include any standard charges imposed on qualifying low-income individuals on tribal lands as a condition of initiating service, including both line extension and initial connection charges, up to the \$100 maximum.¹⁵⁸ Although the Link Up program traditionally has operated only to reduce qualifying consumers' initial connection or initial installation charges (*e.g.*, switch activation fees),¹⁵⁹ we conclude that the expanded Link Up support also should apply to reduce facilities-based charges associated with the extension of lines or construction of facilities needed to initiate service to a qualifying low-income individual on tribal lands.¹⁶⁰ We take this action in recognition of the fact that many low-income individuals on tribal lands face as a result of their remote locations certain supplementary charges for the installation of new lines and the initiation of service, in addition to the typical switch activation fees.¹⁶¹ For example, on Pueblo Picuris, in New Mexico, qualifying low-income consumers are charged an initial connection charge of approximately \$130 per consumer and other consumers are charged approximately \$160 per consumer, \$113 of which represents a zonal charge to cover the cost of expanding the capacity of existing facilities located near that community.¹⁶² To the extent that parties have identified line extension and construction costs as obstacles to subscribership on tribal lands, this measure is designed to increase subscribership among qualifying low-income individuals by minimizing certain of these up-front costs.¹⁶³ In addition, we conclude that several of the justifications supporting our adoption of enhanced Lifeline support also support our adoption of expanded Link Up support. Specifically, by adopting the expanded Link Up support, we intend to create incentives for (1) eligible telecommunications carriers to construct telecommunications facilities on tribal lands that currently lack such facilities; and (2) new entrants offering alternative technologies to seek eligible telecommunications carrier status to serve tribal lands.¹⁶⁴

¹⁵⁷ UUI comments at 17 (supporting additional \$100 in Link Up support); *see also* Alaska Rural Coalition comments at 11-12 (supporting increase in Link Up support up to \$100); RCA comments at 19 (supporting increase in Link Up support to \$100); NRTA & OPASTCO comments at 7-8 (increasing Link Up support for areas with unusually low subscribership is the most reasonable and targeted approach to problem of making basic telephone service more affordable to reservations and trust lands); Smith Bagley April 25 *ex parte*, at 2 (asking the Commission to increase the cap on Link Up to \$100).

¹⁵⁸ Outstanding balances from previously initiated service would not be included within the charges covered here.

¹⁵⁹ *Universal Service Order*, 12 FCC Rcd at 8959, para. 344.

¹⁶⁰ *See* UUI comments at 20 (recommending that the Commission expand Link Up assistance to cover all charges that an eligible telecommunications carrier may charge to establish service).

¹⁶¹ *See, e.g.*, Eastern Shoshone Tribe comments at 8 (in addition to "switch activation fee" of between \$33.10-\$52.00, carriers charge \$375 Rural Network Assessment Tariff plus actual construction costs exceeding \$2,300).

¹⁶² *See* US West Communications, Exchange and Network Services Tariff, New Mexico, §§4.2.1, 5.2.4 (1999).

¹⁶³ *See, e.g.*, Qualcomm comments at 3-4; Motorola/Iridium comments at 7.

¹⁶⁴ *See* Section III.D.2.a., *supra*, for a further discussion of these issues.

61. We note that the expanded Link Up support for qualifying low-income individuals living on tribal lands is competitively neutral in that it will apply to any eligible telecommunications carrier's standard charges for initiating service to qualifying consumers on tribal lands. For example, the expanded Link Up support may be used to offset the charge associated with "activating service" for an eligible telecommunications carrier that offers satellite telephone service.¹⁶⁵ We further note, however, that the expanded Link Up support cannot be applied to customer premises equipment, *i.e.*, equipment that falls on the customer side of the network interface device boundary between customer and network facilities.¹⁶⁶ We adopt this limitation in light of the fact that the federal universal service support mechanisms generally support only the cost of facilities falling on the network side of the demarcation point¹⁶⁷ and because the Commission's definition of supported services does not include customer premises equipment or inside wiring.¹⁶⁸ Expanded Link Up support would be available for qualifying consumers on tribal lands to offset charges for facilities that are necessary to enable a non-wireline eligible telecommunications carrier to provide service to the demarcation point. For example, if the provision of a fixed wireless or satellite service required the installation of a receiver on the roof of a subscriber's premises to bring service to a demarcation point, *i.e.*, a network interface device, expanded Link Up support could be used to offset the cost of installing such facilities. To the extent that a non-wireline carrier can isolate costs associated with the portion of a handset that receives wireless signals, we conclude that those costs would be covered as costs on the network side of the network interface device.

62. With respect to GTE's concern that the use of expanded Link Up support to cover line extension costs may not provide sufficient funding,¹⁶⁹ we note that, as discussed above, where the cost to extend facilities to a low-income individual's residence is extraordinarily high, additional regulatory action may be necessary to encourage the deployment of facilities in such areas.¹⁷⁰ To the extent that extraordinarily high costs pose a barrier to service in certain tribal areas, we will examine those issues in a future order implementing section 214(e)(3) of the Act¹⁷¹ and in connection with our consideration of the Joint Board's recommendations regarding high-cost universal service reform for rural carriers. We likewise are not dissuaded by GTE's concern that the expanded Link Up support will encourage inefficient investment in telecommunications infrastructure.¹⁷² We do not anticipate that the expanded Link Up

¹⁶⁵ See, *e.g.*, Motorola/Iridium comments at 17.

¹⁶⁶ *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules Filed by the Electronics Industries Association*, Third Report and Order, CC Docket No. 88-57, 15 FCC Rcd 927, 929, para. 2 (2000) (*Inside Wiring Order*); see also 47 C.F.R. § 68.3.

¹⁶⁷ The demarcation point is the "interface point between the [public switched telephone network] and the inside wiring, and is the juncture at which the telecommunications carrier's responsibilities end and the customer's control begins." *Inside Wiring Order*, 15 FCC Rcd at 929, para. 2.

¹⁶⁸ See 47 C.F.R. § 101.

¹⁶⁹ GTE reply comments at 7-8.

¹⁷⁰ See Section III.D.2.a., *supra*.

¹⁷¹ 47 U.S.C. § 214(e)(3).

¹⁷² GTE comments at 21; GTE reply comments at 7-8.

support will encourage inefficient investment in telecommunications infrastructure because: (1) support for line extension or other construction costs is capped at \$100 per qualifying low-income individual on tribal lands; (2) the line extension or other construction costs in many tribal areas will exceed the maximum amount covered under the expanded Link Up support; and (3) carriers therefore may have to absorb certain costs in excess of the maximum expanded Link Up support amount in order to induce low-income individuals to initiate service,¹⁷³. Moreover, to the extent that a competitive eligible telecommunications carrier offering an alternative to wireline technology can extend service to a remote tribal area at a substantially lower cost than a wireline carrier, we believe that it is a more economically efficient use of federal universal service funds to create incentives, in the first instance, for the lower-cost provider to provide the service.¹⁷⁴

63. Our decision to apply the expanded Link Up support exclusively to low-income individuals living on tribal lands at this time and further examine whether to extend this approach to other unserved populations, is consistent with Bell Atlantic's suggestion that we adopt a means-tested approach to funding line extensions and, before adopting such an approach, resolve whether it should be applied to other unserved areas.¹⁷⁵ With respect to Bell Atlantic's further suggestion that we resolve, prior to taking action, how much of an increase in expanded Link Up support is needed to have a significant impact on penetration, we note that the actions we take are necessarily based on our best estimates of how much support is needed to impact subscribership levels. We intend that the measures we adopt in this Order and their impact on subscribership levels will be subject to ongoing examination and possible refinement as may be appropriate.

c. Implementation Issues Associated with Rule Changes to Provide Enhanced Lifeline Support and Expanded Link Up Support to Low-Income Consumers on Tribal Lands

64. We anticipate that carriers may require additional time, beyond the effective date of this Order, to implement the tariff and billing system changes that may be necessary for eligible telecommunications carriers to offer the enhanced Lifeline and expanded Link Up services we adopt in this Order.¹⁷⁶ Accordingly, we have determined to extend until October 1, 2000 the date by which eligible telecommunications carriers must comply with the new rule sections 54.403(a)(4) and 54.411(a)(3) adopted

¹⁷³ See UUI comments at 17 (stating that, because assistance beyond the \$30.00 of available Link Up support is needed to make the cost of establishing service more affordable, UUI is forced to absorb certain costs associated with establishing service in order to increase subscribership among low-income subscribers); Smith Bagley April 25 *ex parte*, at 2 (indicating that SBI understands that it "will be expected to absorb" a portion of its subscriber activation charges that will not be "borne" by the Link Up program).

¹⁷⁴ For example, one wireless carrier has represented that, with additional Lifeline and Link Up support in the ranges provided here, it could provide service reservation-wide on the Navajo Reservation. See Smith Bagley April 25 *ex parte*. By contrast, certain wireline carriers have quoted average line extension costs of more than \$40,000 per subscriber on the Navajo Reservation. See Motorola/Iridium comments at 7 (average line extension charge on Navajo Reservation is more than \$40,000 per loop).

¹⁷⁵ Bell Atlantic reply comments at 4.

¹⁷⁶ See, e.g., Letter from Melissa E. Newman, U S West Communications, Inc. to Magalie Roman Salas, FCC, dated May 24, 2000 (US West May 24 *ex parte*) (discussing concerns associated with implementation of proposed tribal Lifeline service).

in this Order. An eligible telecommunications carrier serving tribal lands must make available, upon request by a qualifying low-income individual living on tribal lands, the enhanced Lifeline and Link Up services adopted in this Order by no later than October 1, 2000. Although we encourage eligible telecommunications carriers to implement the necessary changes and offer the expanded Lifeline and Link Up services prior to this date where possible, we believe that this date gives carriers sufficient time to comply with these rule amendments.¹⁷⁷ Because we find significant public interest in not delaying the benefits of these rules beyond that required to enable carriers to comply with them without undue burden, we decline to extend the deadline for their implementation beyond October 1, 2000.¹⁷⁸

65. In order to receive reimbursement during the calendar year 2000 for enhanced Lifeline and expanded Link Up services provided during the fourth quarter 2000, an eligible telecommunications carrier must submit to USAC by no later than September 1, 2000, a letter from a corporate officer of the carrier containing the following information and certifications: (1) an estimate of (a) the number of eligible low-income subscribers in each of the carrier's study areas that the carrier projects will receive non-enhanced federal Lifeline or Link Up discounts in the fourth quarter of 2000 (*i.e.*, number of eligible subscribers on non-tribal lands), and (b) the number of eligible low-income subscribers in each of the carrier's study areas that the carrier projects will receive enhanced Lifeline or expanded Link Up discounts in the fourth quarter of 2000 as a result of actions taken in this Order (*i.e.*, number of eligible subscribers on tribal lands); (2) a statement of the corporate officer that the estimates provided are based on the good-faith estimate of the corporate officer; (3) the carrier's monthly undiscounted service rates for subscribers eligible to receive enhanced Lifeline support; (4) the monthly amount of additional support for each low-income subscriber who the carrier projects will be eligible for enhanced Lifeline support; (5) the number of low-income individuals on tribal lands for whom the carrier expects to initiate service in the fourth quarter of 2000 and the number of other low-income individuals for whom the carrier expects to initiate service in the fourth quarter of 2000; (6) the amount charged to initiate service for low-income subscribers on tribal lands and the amount charged to initiate service for other low-income subscribers; (7) an estimate of total federal Lifeline and Link Up support that the carrier anticipates it will require in the fourth quarter of 2000; (8) a certification that the carrier will pass through all federal Lifeline support amounts to its qualifying low-income subscribers; (9) a certification that the carrier has received the necessary approval of any non-federal regulatory authority (*e.g.*, a state commission or tribal regulatory authority) that is authorized to regulate such carrier's rates that may be necessary to implement the required rate reduction; and (10) a certification that the carrier is publicizing the availability of Lifeline and Link Up services in a manner reasonably designed to reach those likely to qualify for these services.

66. We emphasize that all eligible telecommunications carriers, including those that do not submit to USAC by September 1, 2000 the letter described above, are required to make available the Lifeline and Link Up discounts adopted in this Order to all qualifying low-income consumers not later than October 1, 2000. We also remind all eligible telecommunications carriers that, as a condition for receiving federal Lifeline or Link Up support payments from USAC, they must submit to USAC at regular intervals an FCC Form 497.¹⁷⁹ We direct the Common Carrier Bureau and USAC to revise the FCC Form 497

¹⁷⁷ See, *e.g.*, Letter from David Cosson, Kraskin, Lesse & Cosson, LLP, to Irene Flannery, FCC, dated May 15, 2000 (reporting that companies should be able to modify subscriber bills to include separate tribal Lifeline rate with "little difficulty").

¹⁷⁸ See, *e.g.*, US West May 24 *ex parte* (requesting eight months to implement the changes needed to implement tribal Lifeline service).

¹⁷⁹ 47 C.F.R. § 54.407(c).

Lifeline Worksheet as necessary to implement the decisions and rule changes adopted in this Order. We delegate to the Common Carrier Bureau the authority to modify the FCC Form 497, along with any other forms that may be required to implement the decisions in this Order.

d. Expanded Lifeline and Link Up Qualification Criteria for Low-Income Consumers on Tribal Lands

(i) Background

67. In the *Further Notice*, we expressed concern that some state regulatory commissions and this Commission have adopted Lifeline and Link Up qualification criteria that may inadvertently exclude low-income consumers on tribal lands because the criteria do not include low-income assistance programs that are specifically targeted to Indians living on tribal lands.¹⁸⁰ We asked whether we should amend our rules to allow low-income individuals on tribal lands to qualify for Lifeline and Link Up support by certifying their participation in alternative means tested assistance programs, such as programs administered by BIA or Indian Health Services.¹⁸¹ Finally, we sought comment on whether the Commission could apply any new qualification criteria specifically targeted to low-income Indians living on tribal lands both to states that do not provide matching funds and in states that do provide such funds.¹⁸²

(ii) Discussion

68. We amend section 54.409(b) of our rules to enable qualifying low-income individuals living on tribal lands within a state that *does not* provide intrastate matching funds under the Lifeline program (either for the benefit of the state's population generally or tribal members specifically), to qualify for Lifeline and Linkup support by certifying their participation in certain alternative means-tested assistance programs.¹⁸³ Specifically, we expand the federal default qualification criteria for eligibility for Lifeline and Link Up assistance, as set forth in section 54.409(b), to permit low-income individuals living on tribal lands to establish their income eligibility by certifying their participation in one of the following federal assistance programs: (1) BIA general assistance;¹⁸⁴ (2) Temporary Assistance for Needy Families (TANF) tribally-administered block grant program;¹⁸⁵ (3) Head Start Programs (under income qualifying eligibility provision only);¹⁸⁶ or (4) National School Lunch Program (free meals program only).¹⁸⁷ Given

¹⁸⁰ *Further Notice*, 14 FCC Rcd at 21208-09, paras. 71-72.

¹⁸¹ *Further Notice*, 14 FCC Rcd at 21208-09, para. 72.

¹⁸² *Further Notice*, 14 FCC Rcd at 21208-09, para. 72.

¹⁸³ Section 54.415 of our rules, which establishes the consumer qualification criteria for Link Up, incorporates by reference the criteria established for Lifeline in section 54.409. Therefore, by amending the Lifeline criteria in section 54.409, we also change the criteria for Link Up.

¹⁸⁴ See 25 C.F.R. § 20.21; see also 25 C.F.R. § 20.21(c)(2) (applicant must "have insufficient resources to meet the basic and special needs defined by the Bureau standard of assistance").

¹⁸⁵ See 42 U.S.C. § 612; 45 C.F.R. § 286.

¹⁸⁶ "[C]hildren from low-income families shall be eligible for participation in programs assisted under this subchapter if their families' incomes are below the poverty line, or if their families are eligible or, in the absence of child care, would potentially be eligible for public assistance." 42 U.S.C. § 9840(a)(1)(A). Insofar as other (continued....)

that the household income thresholds for these newly added programs range from 100-130 percent of the federal poverty level or incorporate state-determined poverty thresholds,¹⁸⁸ we conclude these income thresholds are consistent with those associated with the programs included in our current federal default list.¹⁸⁹

69. We take this action based on evidence on the record before us that the existing federal qualification criteria governing eligibility under the Commission's Lifeline and Link Up programs, to the extent that these criteria do not include low-income programs specifically targeted to Indians, serve as a barrier to participation in the Lifeline and Link Up programs by low-income members of Indian tribes.¹⁹⁰ A low-income tribal member effectively may be excluded from participation in Lifeline and Link Up in instances where that individual receives assistance or benefits under a program other than one of the programs listed in section 54.409(b) of our rules. For example, a low-income tribal member who receives cash assistance benefits under the BIA general assistance program, but receives no assistance or benefits under any of the means-tested programs listed in section 54.409(b) of the Commission's rules, would not be eligible today to receive Lifeline and Link Up support by virtue of the individual's non-participation in any of the low-income programs listed under section 54.409(b). Accordingly, we have expanded the list of programs contained in section 54.409 to include means-tested programs in which, according to commenters, low-income tribal members are more likely to participate and, therefore, represent more suitable income proxies for low-income tribal members.¹⁹¹

(Continued from previous page)

provisions within the Head Start eligibility requirements permit non-means tested families to participate on a space available basis, we do not incorporate here any non-means tested eligibility criteria under the Head Start program. Only those families who satisfy the income standard of the Head Start program may rely on enrollment in Head Start for purposes of demonstrating income eligibility for Lifeline and Link Up service.

¹⁸⁷ "The income guidelines for determining eligibility for free lunches shall be 130 percent of the applicable family size income levels contained in the nonfarm income poverty guidelines prescribed by the Office of Management and Budget...." 42 U.S.C. § 1758(b)(1)(A); *see also* 7 C.F.R. § 210.2.

¹⁸⁸ *See* notes 184 - 187, *supra*.

¹⁸⁹ The income thresholds associated with the programs currently included range from 100-150 percent of the federal poverty level or incorporate state poverty thresholds. *See, e.g.*, Food Stamps program under 7 U.S.C. § 2014(c) (requiring that household income, after exclusions and deductions, cannot exceed 130 percent of the poverty level for households with elderly or disabled individuals or 100 percent of the poverty level for other households).

¹⁹⁰ *See, e.g.*, Letter from James A. Casey, Counsel for the National Indian Telecommunications Institute (NITI), to Magalie Roman Salas, FCC, dated May 3, 2000 (NITI May 3 *ex parte*); *see also* Letter from Brent A. Kennedy, San Carlos Apache Telecommunications Utility, Inc., to Helen Hillegas, FCC, dated May 4, 2000 (San Carlos Apache May 3 *ex parte*) ("As an operating local exchange carrier, San Carlos recognizes that its administrative burden is minimized by the relatively short list of programs against which to judge eligibility for Lifeline/Link Up programs. San Carlos also submits, however, that this relatively short list presents a hurdle to many Native Americans who, while eligible for the currently-specified programs, instead participate in other federal programs, including programs more narrowly targeted to tribal communities. Accordingly, many Native Americans do not currently receive the federal telecommunications assistance for which they qualify.").

¹⁹¹ *See, e.g.*, NITI May 3 *ex parte*, at 2 (proposing adoption of additional eligibility proxies, including tribally administered means-tested programs, Head Start, free school lunch programs, and BIA's general assistance program).

70. We also make available the expanded eligibility criteria enumerated above to all low-income individuals living on tribal lands. This action is consistent with our rationale discussed in Section III.C. above for extending the benefits of the enhanced Lifeline and expanded Link Up support to all qualifying low-income individuals on tribal lands, as opposed to limiting these benefits solely to qualifying low-income tribal members on tribal lands. We believe that, by increasing the total number of individuals, both Indian and non-Indian, who are connected to the network within a tribal community the value of the network for tribal members in that community is greatly enhanced. We also anticipate that reducing barriers to participation in the Commission's Lifeline and Link Up programs for all low-income individuals residing on tribal lands will help to increase the number of subscribers in a tribal community who can afford service and, thereby, provide greater incentive for carriers to invest and deploy telecommunications infrastructure on tribal lands. In addition, making the identical set of eligibility criteria available to all low-income individuals on tribal lands should make it administratively less burdensome for an eligible telecommunications carrier serving tribal lands to provide Lifeline and Link Up services in those areas. In particular, we believe that it will be less burdensome for a carrier to verify the income eligibility of all potential Lifeline and Link Up subscribers in a tribal area using the same set of eligibility criteria.

71. We decline to expand our federal default qualification criteria to include participation in services provided by the Indian Health Service of the U.S. Department of Health and Human Services given that such services are available to Indian tribal members generally, rather than exclusively to low-income tribal members, and therefore are inappropriate qualification criteria for our purposes.¹⁹² In addition to proposing the addition of certain of the means-tested programs that we adopt here, one commenter suggests that we include the Low Income Home Energy Assistance Program (LIHEAP), Aid to Families with Dependent Children (AFDC), and Tribal Work Experience Program (TWEP).¹⁹³ We note that LIHEAP is included currently in the federal default qualification criteria listed in section 54.409(b) of our rules. In light of our understanding that TANF has superseded the AFDC program, we do not include the AFDC program, but we do include the tribally-administered TANF block grant program. In addition, we do not include TWEP insofar as it appears that participation in BIA general assistance is a prerequisite to participation in TWEP and, given that our expanded default qualification criteria now include participation in the BIA general assistance program, TWEP participants need only certify their participation in the BIA general assistance program.¹⁹⁴

72. At this time, we also do not adopt a qualification procedure by which low-income individuals on tribal lands could establish their income eligibility by self-certifying that their income is below a particular level, such as that set by the Federal Poverty Guidelines, as one commenter has suggested.¹⁹⁵ Because we believe, however, that this approach may reach more low-income consumers, including low-income tribal members, than the current method of conditioning eligibility on participation in particular low-income assistance programs, we will further examine, in consultation with the Joint Board, possible revisions to section 54.409 of the Commission's rules to provide for self-certification based solely on income level.

¹⁹² See 42 C.F.R. § 36.12 (describing persons to whom Indian health programs will be provided).

¹⁹³ See San Carlos Apache May 3 *ex parte*, at 2.

¹⁹⁴ See 25 C.F.R. § 20.1(ee).

¹⁹⁵ Smith Bagley April 25 *ex parte*.

73. For qualifying low-income individuals who live on tribal lands in states that *do* provide intrastate matching funds under the Lifeline program and therefore are subject to state-created eligibility criteria, we adopt the suggestion of the Wisconsin Public Service Commission and revise our eligibility guidelines under section 54.409(a).¹⁹⁶ Specifically, in addition to establishing qualification criteria under section 54.409(a) that are based “solely on income or factors directly related to income,” we conclude that a state containing any tribal lands, as defined in Section III.B. above, also must ensure that its qualification criteria are reasonably designed to apply to low-income tribal populations within that state. We conclude that this modification to section 54.409(a), as reflected in Appendix A of this Order, is preferable to an alternative approach under which we would require states to adopt the identical expanded qualification criteria as those adopted above for purposes of the federal default qualification criteria. Our decision today will give a state whose eligibility criteria inadvertently exclude low-income tribal populations impetus to take corrective action, while giving the state flexibility to adopt eligibility criteria best-suited to the tribal populations within that state. Consistent with the Joint Board’s goal of increasing low-income subscribership and ensuring that the availability of Lifeline and Link Up is not limited to particular populations,¹⁹⁷ we conclude that this approach will help to ensure that all qualifying residents on tribal lands will receive the intended benefits of the federal Lifeline and Link Up programs.

74. We will permit, however, a low-income individual who lives on tribal lands and who is excluded from participation in the Lifeline and Link Up programs because the individual is not enrolled in any of the programs listed in a state’s qualification criteria to qualify for *federal* Lifeline and Link Up support by certifying his or her eligibility under one of the means-tested programs listed in section 54.409, as revised herein. We conclude that this action is necessary to hasten the process of bringing telecommunications services to unserved and underserved tribal lands and in recognition of the time needed for states to revise their qualification criteria where those criteria limit participation in Lifeline and Link Up to individuals who receive benefits under one or more low-income assistance programs in which low-income tribal members typically do not participate. For example, in a state where Lifeline and Link Up eligibility hinges on enrollment in the Medicaid program, a low-income tribal member who receives health services through the Indian Health Services and does not participate in Medicaid would not be eligible for Lifeline and Link Up support (state or federal) in that state by virtue of that state’s qualification criteria.¹⁹⁸ This measure recognizes the unique barriers facing low-income tribal members living on tribal lands who may have been excluded inadvertently from participation in Lifeline and Link Up as a result of a state’s qualification criteria. This action is consistent with the Commission’s statement in the *Universal Service Order* that, where a state provides matching funds under the Lifeline program, the state’s qualification criteria should apply.¹⁹⁹ Conversely, if a low-income individual living on tribal lands is excluded from participation in the Lifeline and Link Up programs because that individual participates in none of the programs used as income proxies in a state’s qualification criteria and such individual agrees to forgo state matching funds, then we find that the justification for applying state qualification criteria in that circumstance no longer applies.

¹⁹⁶ PSCW comments at 3-4.

¹⁹⁷ *Universal Service Order*, 12 FCC Rcd at 8973, para. 373.

¹⁹⁸ See, e.g., Mont. Code Ann. § 69-3-1002 (1999) (limiting eligibility for low income telephone assistance to a subscriber who is “certified by the department of public health and human services as a recipient of medicaid benefits”).

¹⁹⁹ *Universal Service Order*, 12 FCC Rcd at 8973, para. 373.

E. Requiring Eligible Telecommunications Carriers to Publicize the Availability of Lifeline and Link Up Support

1. Background

75. Section 214(e)(1)(B) of the Act requires an eligible telecommunications carrier to “advertise the availability of” the services supported by federal universal service support mechanisms “and the charges therefor using media of general distribution.”²⁰⁰ In the *Universal Service Order*, the Commission noted that “eligible telecommunications carriers will be required to advertise the availability of, and charges for, Lifeline pursuant to their obligations under section 214(e)(1).”²⁰¹ In the *Further Notice*, we expressed the concern that, although the Commission’s Lifeline and Link Up programs have been providing universal service support to qualifying low-income customers for more than a decade, carriers may have failed to publicize the programs in some areas, particularly on Indian reservations.²⁰² We noted that, in markets where carriers find it unprofitable to provide service, carriers lack incentive to publicize the availability of Lifeline and Link Up services. Accordingly, we sought comment on whether the Commission should play a role in ensuring the wide dissemination of information on tribal lands, or in other low-income, underserved areas, about the availability of low-income support. We tentatively concluded that a lack of such information may contribute to the significantly low penetration levels on tribal lands.²⁰³ We sought comment on options to promote awareness of low-income support mechanisms on tribal lands and, in particular, on whether we should amend our rules²⁰⁴ to require all eligible telecommunications carriers to publicize the availability of the Lifeline and Link Up programs in a manner reasonably designed to reach those likely to qualify for these services.²⁰⁵

2. Discussion

76. In codifying section 214(e)(1)(B), Congress recognized that merely providing a service is not enough to ensure that the needed support is received. Rather, it imposed an obligation to advertise the availability of the supported services and the charges for those services. There is evidence in the record that the lack of information concerning the availability of Lifeline and Link Up services contributes to low penetration rates.²⁰⁶ We are concerned that eligible telecommunications carriers are not advertising the availability of Lifeline and Link Up services or, if they are, that such efforts are not reasonably designed to reach those likely to qualify for the service. Based on the apparent lack of awareness of the availability of

²⁰⁰ 47 U.S.C. § 214(e)(1)(B).

²⁰¹ *Universal Service Order*, 12 FCC Rcd at 8993, para. 407.

²⁰² *Further Notice*, 14 FCC Rcd at 21228-29, paras. 125-126.

²⁰³ *Further Notice*, 14 FCC Rcd at 21229, para. 126.

²⁰⁴ 47 C.F.R. § 54.405.

²⁰⁵ *Further Notice*, 14 FCC Rcd at 21229, para. 127.

²⁰⁶ See, e.g., UUI comments at ii (penetration level increased by 4.9 percent and Lifeline subscribership increased from 395 to 1,263 subscribers following outreach campaign promoting Lifeline service within Native communities).

Lifeline and Link Up services in many rural, low-income communities²⁰⁷ and to remove any confusion concerning eligible telecommunications carriers' obligation to publicize the availability of these services, we conclude that this obligation should be codified in our rules.

77. We recognize, as pointed out by United Utilities, Inc. (UUI), the limitations of traditional advertising media in promoting awareness of low-income support mechanisms within particular low-income populations. Specifically, UUI, a Native-owned eligible telecommunications carrier serving "predominantly Alaskan native villages," describes how it achieved significant increases in both penetration rates and Lifeline subscribership through an intensive outreach effort in 26 native villages.²⁰⁸ As part of its outreach effort, UUI waived "service order and hook-up fees," identified and contacted each household that did not have service, and often spoke in its customers' Native language to inform them of the Lifeline program and toll blocking. According to UUI, as a result of this effort, the household penetration level in these 26 villages increased by 4.9 percent, and Lifeline subscribership increased from 395 to 1,263 subscribers. In its comments, UUI states that:

[R]egional advertising media generate very limited results, as does the placing locally of posters. Placing ads in regional publications and placing posters can be ineffective when carriers do not make special efforts, as did UUI, to contact low income households in person, to speak to them in their own language, and to adequately explain the Lifeline program and toll blocking options. UUI would take the position that a lack of information does ... contribute to the significantly low penetration rates on tribal lands.²⁰⁹

We commend these efforts and encourage other carriers to undertake similar efforts to comply with the rule amendments that we adopt in this Order.

78. We amend sections 54.405 and 54.411 of our rules, as reflected in Appendix A of this Order, to require eligible telecommunications carriers to publicize the availability of Lifeline and Link Up services in a manner reasonably designed to reach those likely to qualify for those services.²¹⁰ We emphasize that these rule amendments shall apply to all eligible telecommunications carriers and not merely to those serving tribal lands. We take this action based on evidence in the record that the lack of awareness of the Lifeline and Link Up programs contributes to low penetration rates and to eliminate any confusion concerning eligible telecommunications carriers' obligation to publicize the availability of these services.

79. We recognize that a method that is reasonably designed to reach qualifying low-income subscribers in one location may not be effective in reaching qualifying low-income subscribers in another location. For that reason, we do not prescribe in this Order specific, uniform methods by which eligible telecommunications carriers must publicize the availability of Lifeline and Link Up support. We do,

²⁰⁷ *Albuquerque Hearings Transcript* at 71-74, 105-07 (questions by Chairman concerning lack of awareness of Lifeline program in New Mexico); *see also* RUS comments at 8 (stating that in many low-income, rural communities, the availability of Lifeline and Link Up rates are not widely known).

²⁰⁸ UUI comments at ii, 15.

²⁰⁹ UUI comments at 15.

²¹⁰ *See* Appendix A (rule amendments).

however, require an eligible telecommunications carrier to identify communities with the lowest subscribership levels within its service territory and make appropriate efforts to reach qualifying individuals within those communities. For example, we would expect a carrier to take into consideration the cultural and linguistic characteristics of low-income communities within its service territory as well as the efficacy of particular methods in reaching the greatest number of qualifying low-income individuals within those communities. In addition, we require an eligible telecommunications carrier to provide to qualifying low-income individuals, through whatever public awareness method it selects, consumer information on the availability of toll blocking and toll limitation services for the purpose of enabling the subscriber to control the amount of toll charges that he or she may incur.

80. If we determine that eligible telecommunications carriers are not adopting methods reasonably designed to reach qualifying low-income individuals, additional action may be needed to increase public awareness among such individuals. To that end, we may address in a Further Notice of Proposed Rulemaking more specific methods by which eligible telecommunications carriers must publicize the availability of Lifeline and Link Up services. Finally, we note that the Commission's upcoming Indian telecommunications training initiative will be devoted, in part, to familiarizing carriers and tribal representatives with the Lifeline and Link Up programs generally, and the changes made to those programs by this Order, in particular.²¹¹

F. Lifeline Jurisdictional Issues

1. Background

81. *State Approval Requirement for Second-Tier Support.* In the *Further Notice*, we noted that certain eligible telecommunications carriers not subject to the jurisdiction of a state commission had sought a waiver of the requirement of state commission consent prior to our making available the \$1.75 second tier of federal Lifeline support.²¹² We stated that, in adopting section 54.403(a), we did not intend to require carriers not subject to state commission jurisdiction to seek either state commission action or a Commission waiver in order to receive the additional \$1.75 of second-tier federal Lifeline support. Rather, the requirement of state consent prior to making available the second tier of federal Lifeline support was "intended to reflect deference to the states in such areas of traditional state expertise and authority."²¹³ Accordingly, the *Further Notice* proposed to modify our rules to provide that an additional \$1.75 per qualifying low-income consumer will be available to an eligible telecommunications carrier where the additional support will result in an equivalent reduction in the monthly bill of each qualifying low-income consumer.²¹⁴

82. Following release of the *Further Notice*, the Commission's Common Carrier Bureau

²¹¹ *FCC Announces the Indian Telecom Training Initiative to be Held September 25-28, 2000*, News Release, April 24, 2000.

²¹² *Further Notice*, 14 FCC Rcd at 21207, para. 69, citing Petitions for Waiver of Section 54.403(a) filed by Gila River Telecommunications, Inc. (January 22, 1999), Tohono O'odham Utility Authority (January 26, 1999), San Carlos Telecommunications, Inc. (February 12, 1999) and Fort Mojave Telecommunications, Inc. (February 17, 1999).

²¹³ *Further Notice*, 14 FCC Rcd at 21207, para. 69.

²¹⁴ *Further Notice*, 14 FCC Rcd at 21207, para. 69.

(Bureau) released the *Gila River Order* granting a temporary waiver of section 54.403(a) of our rules in response to the petition for waiver filed by several tribally-owned carriers.²¹⁵ In that order, the Bureau found the petitioners eligible for second-tier federal Lifeline support on the condition that the carriers in question were not subject to the jurisdiction of a state commission “subject to future Commission action in the pending Unserved Areas proceeding.”²¹⁶ The Bureau noted that the tribal authorities in each case had approved, or were in the process of approving, the carriers’ plans to pass on the \$1.75 per month in lower Lifeline rates. Because these tribal authorities represent the non-federal entities that could prevent petitioners from providing the additional \$1.75 per month discounts, their approval and the lack of any opposition to the petition convinced the Bureau that granting this waiver was in the public interest.

83. *State Matching for Third-Tier Lifeline Support.* In the *Further Notice*, we sought comment on whether to modify section 54.403(a) of our rules to provide that carriers serving tribal lands may receive the third tier of federal Lifeline support, a maximum of \$1.75 per month per qualifying low-income consumer, without any requirement that the state provide matching funds.²¹⁷ We explained that, unlike in other areas, this federal support amount would not be contingent upon the state in which the tribal lands are located providing support. The *Further Notice* suggested that we would take this action “in light of [the federal government’s] trust relationship with Indian tribes.”²¹⁸

84. As noted previously, in the *Gila River Order*, the Bureau granted temporary waivers of section 54.403(a) of our rules in response to a petition for waiver filed by several tribally-owned carriers.²¹⁹ In that order, the Bureau concluded, *inter alia*, that it would serve the public interest to grant, on a temporary basis, the petitioners’ requests for waiver of the third-tier support matching requirement in section 54.403(a) of our rules. The Bureau found that a temporary waiver of the rule was further justified by the low penetration and income levels on reservations, the lack of any opposition to the petition, and the Commission’s policy of fostering access to the public telephone network for those most in need.

2. Discussion

85. *State Approval Requirement for Second-Tier Support.* We modify section 54.403(a) of our rules to make second-tier federal Lifeline support available to an eligible telecommunications carrier that is not subject to state rate regulation on the condition that the carrier certifies that it: (1) will pass through the second-tier \$1.75 federal support amount to its qualifying low-income subscribers, and (2) has received the necessary approval of any non-federal regulatory authority that is authorized to regulate such carrier’s rates that may be required to implement the required rate reduction (*e.g.*, a tribal regulatory

²¹⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 99-2970 (Com. Car. Bur. 1999) (*Gila River Order*).

²¹⁶ *Gila River Order*, para. 13.

²¹⁷ *Further Notice*, 14 FCC Rcd at 21207-08, para. 70.

²¹⁸ *Id.*

²¹⁹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 99-2970 (Com. Car. Bur. 1999).

authority).²²⁰ To the extent that an eligible telecommunications carrier is not subject to rate regulation by any non-federal regulatory authority, then the carrier need only certify for this purpose that it: (1) will pass through the second-tier \$1.75 federal support amount to its qualifying low-income subscribers, and (2) is not subject to rate regulation by any non-federal regulatory authority. As discussed in greater detail above in Section III.D.2.c., an eligible telecommunications carrier seeking to receive reimbursement during the calendar year 2000 for enhanced Lifeline and Link Up services provided during the fourth quarter 2000 must make these certifications in a letter filed with USAC by September 1, 2000. All carriers seeking reimbursement for enhanced Lifeline or Link Up services must make these certifications in the FCC Form 497 (as revised).²²¹

86. By eliminating the need for eligible telecommunications carriers not subject to state rate regulation to obtain state action or seek a Commission waiver in order to receive second-tier federal Lifeline support, this revision to section 54.403(a) of our rules ensures that no category of carriers is subjected to more burdensome administrative requirements than are imposed on all other eligible telecommunications carriers seeking second-tier federal Lifeline support.²²² We conclude that this amendment maintains appropriate deference to tribal regulatory authorities because second-tier support will not be disbursed where a tribal regulatory authority that regulates the rates of an eligible telecommunications carrier does not permit an equivalent reduction in consumers' bills. In addition, by requiring eligible telecommunications carriers to certify that they are not subject to state rate regulation before we make available second-tier federal Lifeline support, this result is consistent with our overall deference to the states in areas of traditional state ratemaking.²²³

87. *Third-Tier Lifeline Support.* In light of our determination, as discussed in Section III.D.2. above, to provide enhanced federal Lifeline support of up to \$25 for low-income individuals living on tribal lands through the creation of a fourth tier of the Lifeline program, we do not adopt our proposal in the *Further Notice* to provide the third tier of federal Lifeline support to carriers serving tribal lands where no intrastate matching funds are provided. In granting a temporary waiver of the matching requirement for third-tier federal Lifeline support in the *Gila River Order*, the Bureau was aware that, absent a waiver, a tribal carrier not subject to the jurisdiction of a state commission, such as Gila River Telecommunications, Inc., could receive only first-tier Lifeline support in the amount of \$3.50 per qualifying low-income subscriber. Central to the Bureau's determination to grant a temporary waiver of the second-tier state approval requirement and the third-tier state matching requirement, was the recognition that, in light of the "low penetration and income levels on reservations," providing tribal carriers with only \$3.50 per qualifying low-income subscriber was inconsistent with the "Commission's policy of fostering access to the

²²⁰ We note that, unlike our discussion *infra* of section 214(e)(6) of the Act which, by its terms, applies to common carriers not "subject to the jurisdiction" of a state commission, the present discussion focuses more narrowly on whether a state is authorized to regulate the intrastate rates of a particular eligible telecommunications carrier. *Cf.*, Section IV., *infra*.

²²¹ See Section III.D.2.c., *supra*, for a discussion of implementation of enhanced Lifeline and expanded Link Up support.

²²² We note that all parties commenting on this issue support this result. See, e.g., Bell Atlantic reply comments at 3 (stating that the Commission should not require tribal carriers not subject to state jurisdiction to seek state commission action or Commission waiver to obtain second-tier federal Lifeline support); see also GTE comments at 19-20; NTCA comments at 24; and Salt River/NTTA comments at 16.

²²³ *Universal Service Order*, 12 FCC Rcd at 8963, para. 351.

public telephone network for those most in need.”²²⁴

88. We note that, because we modify the state approval requirement of section 54.403(a) for the provision of second-tier Lifeline support and adopt enhanced Lifeline support for qualifying low-income individuals, eligible telecommunications carriers will be entitled to receive *nonmatching* federal support of up to \$31.10 per month, per qualifying low-income subscriber. We conclude that it is not necessary to waive the third-tier state matching requirement because we anticipate the enhanced Lifeline amount of \$31.10 per month per qualifying low income subscriber will constitute a sufficient level of support, even on tribal lands where no intrastate support is generated. We further believe that the enhanced Lifeline will increase qualifying low-income individuals’ access to the public telephone network more effectively than would our proposal in the *Further Notice* to waive the third-tier matching requirement, which would yield a maximum additional level of support of only \$1.75 per qualifying subscriber. Given that all parties who commented on this issue supported our proposal to waive the third-tier state matching requirement in section 54.403(a) as a means to direct additional federal Lifeline support to low-income individuals on tribal lands, we conclude that our decision to accomplish this result through the creation of a fourth tier of the Lifeline program, in lieu of waiving the third-tier state matching requirement, is not inconsistent with the comments addressing this issue.²²⁵

89. We revise section 54.403(a), however, to permit a carrier that is not subject to state rate regulation to satisfy the third-tier intrastate matching requirement of section 54.403(a) by generating its own matching funds, independently of the actions of the state in which it operates. Although we recognize that many tribes and tribal carriers may not have adequate resources to generate the matching funds necessary to receive third-tier federal support, we find that the level of *nonmatching* federal Lifeline support that will be available for qualifying low-income individuals on tribal lands provides an adequate level of support. If a tribe or a carrier, including a wireless carrier, that is not subject to state rate regulation nevertheless wishes to provide matching funds in order to receive third-tier federal Lifeline support and reduce local rates further, we do not want to preclude such a result. Accordingly, we modify section 54.403(a) of our rules to provide third-tier federal Lifeline support, up to a maximum of \$1.75 per qualifying low-income customer as calculated in section 54.403(a), to an eligible telecommunications carrier that certifies that it: (1) is not subject to state rate regulation, and (2) will pass through the total amount of third-tier support (intrastate and federal) to its qualifying low-income subscribers by an equivalent reduction in those subscribers’ monthly bill for local telephone service. As discussed in greater detail above in Section III.D.2.c., an eligible telecommunications carrier seeking to receive reimbursement during the calendar year 2000 for enhanced Lifeline and Link Up services provided during the fourth quarter 2000 must make these certifications in a letter filed with USAC by September 1, 2000. All carriers seeking reimbursement for enhanced Lifeline or Link Up services must make these certifications in the FCC Form 497 (as revised).²²⁶

90. By maintaining the matching requirement of section 54.403(a) as a condition for receiving third-tier federal Lifeline support, we leave undisturbed a primary goal underlying the Commission’s adoption of third-tier support, namely, the creation of an incentive for states (or tribal authorities, tribal

²²⁴ *Gila River Order*, para. 13.

²²⁵ See, e.g., NTCA comments at 16; TDS Telecom comments at 8.

²²⁶ See Section III.D.2.c., *supra*, for a discussion of implementation of enhanced Lifeline and expanded Link Up support.

carriers, or wireless carriers, as the case may be) to reduce local rates even further. In the *Universal Service Order*, the Commission determined that \$5.25 represented a sufficient level of baseline federal Lifeline support.²²⁷ The Commission established the additional third tier of federal Lifeline support, which entitles an eligible telecommunications carrier to receive up to \$1.75 of federal Lifeline support per qualifying low-income consumer in a state that generates support from the intrastate jurisdiction, in order to preserve states' incentive to reduce local rates beyond that achieved under the first and second tiers of Lifeline support, as deemed appropriate by the state. Accordingly, a carrier that is not subject to state rate regulation, but that certifies that it will pass through to its qualifying low-income subscribers a rate reduction equivalent to both the intrastate and federal third-tier support amounts, will be entitled to receive third-tier federal Lifeline support. For the foregoing reasons, however, we maintain the matching requirement of section 54.403(a) as a condition for receiving third-tier federal Lifeline support.

91. *Filing of Federal Lifeline Plan.* Finally, we observe that section 54.401(d) of the Commission's rules currently does not apply to an eligible telecommunications carrier that is not subject to the rate regulatory authority of a state commission. That section directs a state commission to file, or requires a state commission to direct an eligible telecommunications carrier to file, with USAC information demonstrating that the carrier's Lifeline plan meets the requirements of Subpart E of the Commission's rules. We amend section 54.401(d) to require eligible telecommunications carriers not subject to the rate regulatory authority of a state commission to file with USAC information demonstrating that the carrier's Lifeline plan meets the requirements of Subpart E of the Commission's rules.²²⁸

IV. DESIGNATING ELIGIBLE TELECOMMUNICATIONS CARRIERS PURSUANT TO SECTION 214(e)(6)

A. Overview

92. Section 254(e) of the Act provides that only an "eligible telecommunications carrier" as designated under section 214(e) shall be eligible to receive federal universal service support.²²⁹ Section 214(e)(2) directs the state commissions to perform the designation, and section 214(e)(6) directs the Commission to perform the designation in those instances where the state commission lacks jurisdiction to perform the designation. The statute does not address the issue of whether the state or the Commission makes the threshold determination of which governmental entity has jurisdiction to make the designation. In the sections that follow, we provide a roadmap detailing the procedures that carriers seeking eligible telecommunications carrier status should follow, and describe the circumstances in which the Commission will exercise its authority to designate eligible telecommunications carriers under section 214(e)(6).

²²⁷ *Universal Service Order*, 12 FCC Rcd at 8962, para. 350.

²²⁸ Section 54.401(d) of the Commission's rules currently provides that:

The state commission shall file or require the carrier to file information with the Administrator demonstrating that the carrier's Lifeline plan meets the criteria set forth in this subpart and stating the number of qualifying low-income consumers and the amount of state assistance. 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. 47 C.F.R. § 54.401(d). *See* Appendix A reflecting revisions to section 54.401(d) adopted in this Order.

²²⁹ 47 U.S.C. § 254(e).

93. We conclude that, consistent with the Act and the legislative history of section 214(e), state commissions have the primary responsibility for the designation of eligible telecommunications carriers under section 214(e)(2).²³⁰ Accordingly, we direct carriers seeking designation as eligible telecommunications carriers for service provided on non-tribal lands to consult with the state commission, even if the carrier asserts that the state commission lacks jurisdiction over the carrier. We will act on a section 214(e)(6) designation request from a carrier providing service on non-tribal lands only in those situations where the carrier can provide the Commission with an affirmative statement from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction.

94. We are concerned, however, that excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas. We therefore commit to resolve within six months of their filing at this Commission designation requests for services provided on non-tribal lands that are properly before us pursuant to section 214(e)(6). We also strongly encourage state commissions to resolve requests under section 214(e)(2) within the same time frame. In the attached Further Notice of Proposed Rulemaking, we seek comment on whether we should adopt a rule that would require all petitions for designation under section 214(e), whether filed with the state or this Commission, to be resolved within six months, or some shorter period.

95. With regard to tribal lands, however, we recognize that a determination as to whether a state commission lacks jurisdiction over carriers serving tribal lands involves a legally complex and fact-specific inquiry, informed by principles of tribal sovereignty, federal Indian law, treaties, as well as state law. Such jurisdictional ambiguities may unnecessarily delay the designation of carriers on tribal lands. In light of the unique federal trust relationship between the federal government and members of federally-recognized Indian tribes and the low penetration rates on tribal lands, we conclude that this Commission may make the threshold determination of which entity – the state or this Commission – has jurisdiction to make the eligibility designation of carriers providing service on tribal lands. Under this framework, carriers seeking a designation of eligibility for service provided on tribal lands may petition the Commission directly for designation under section 214(e)(6). A carrier seeking designation from this Commission for the provision of service on tribal lands must demonstrate, based upon a fact-specific showing, that the state commission does not have jurisdiction over the carrier seeking designation. The state commission will have an opportunity, during the notice and comment period, to respond to the assertion that it lacks jurisdiction. In the event the Commission determines that the state commission lacks jurisdiction to make the designation and the petition is properly before the Commission under section 214(e)(6), the Commission will decide the merits of the request within six months of release of an order resolving the jurisdictional issue.

96. As described more fully below, this streamlined framework respects the sovereignty of the tribes while providing the state commission the opportunity to establish the basis for its assertion of jurisdiction over the designation of a carrier providing universal service on tribal lands. In the attached Further Notice of Proposed Rulemaking, however, we seek comment on alternative measures that may be implemented to further facilitate the designation process for the provision of service on tribal lands. Specifically, we seek comment on ways in which the state commissions, tribal authorities, and this Commission can work together toward this end. Finally, we apply the framework we adopt in this Order to several pending requests for eligible telecommunications carrier designation on non-tribal and tribal lands.

²³⁰ 47 U.S.C. § 214(e)(2).

B. Background

1. The Act

97. Section 254(e) of the Act provides that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.”²³¹ Section 214(e)(1) requires that a carrier designated as an eligible telecommunications carrier must:

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), 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.²³²

98. Section 214(e)(2) directs state commissions to designate as eligible telecommunications carriers those common carriers that meet the requirements of section 214(e)(1) for a service area designated by the state commission.²³³ When first passed into law in 1996, however, section 214(e) did not include a provision for designating carriers that were not subject to the jurisdiction of a state commission. Thus, common carriers not subject to state commission jurisdiction, “most notably, some carriers owned or controlled by native Americans,” were unable to be designated as eligible telecommunications carriers.²³⁴ As a result, these carriers would have become ineligible for universal service support as of January 1, 1998, when the eligibility requirements of the Act became effective.²³⁵ In 1997, Congress amended the Act with the addition of section 214(e)(6) to correct this “oversight.”²³⁶

99. Section 214(e)(6) authorizes the Commission, upon request, to designate as an eligible telecommunications carrier “a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission.”²³⁷ Under section 214(e)(6), the Commission

²³¹ 47 U.S.C. § 254(e).

²³² 47 U.S.C. § 214(e)(1).

²³³ 47 U.S.C. § 214(e)(2).

²³⁴ 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Rep. Bliley).

²³⁵ 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Representative Bliley). Pursuant to section 254(e) of the Act, 47 U.S.C. § 254(e), after the date on which the Commission’s regulations implementing section 254 take effect, “only an eligible telecommunicatins carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.” Section 54.201 of the Commission’s rules, 47 C.F.R. § 54.201, provides that beginning January 1, 1998 only an eligible telecommunications carrier shall be eligible to receive universal service support.

²³⁶ 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

²³⁷ 47 U.S.C. § 214(e)(6).

may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an eligible telecommunications carrier for a designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1).²³⁸ This designation must be made consistent with the public interest, convenience, and necessity. On December 29, 1997, the Commission released a Public Notice establishing the procedures that carriers must use when seeking Commission designation as an eligible telecommunications carrier pursuant to section 214(e)(6).²³⁹

100. Soon after the adoption of section 214(e)(6), the Common Carrier Bureau designated as eligible telecommunications carriers several tribally-owned carriers providing service on their respective tribal lands within the state of Arizona.²⁴⁰ As a result of these designations, these carriers continued to be eligible to receive federal universal service support and no local rate increases were necessary to replace support for which they otherwise might have become ineligible. The Bureau made these designations based on the carriers' representations that they were not subject to state commission jurisdiction, and the absence of any evidence to the contrary.

2. Further Notice

101. In the *Further Notice*, we tentatively concluded that, by adding section 214(e)(6), Congress sought to ensure that carriers serving all regions of the United States have access to a mechanism that will allow them to be designated as eligible telecommunications carriers, if they meet the statutory requirements.²⁴¹ We stated that, "[r]ecognizing that the designation of eligible telecommunications carriers is primarily a state commission function, Congress granted this Commission the authority for this task in

²³⁸ 47 U.S.C. § 214(e)(6). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.

²³⁹ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, FCC 97-419 (rel. Dec. 29, 1997) (*Section 214(e)(6) Public Notice*). The Commission instructed carriers seeking designation to, among other things, set forth the following information in a petition: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is "not subject to the jurisdiction of a state commission;" (2) a certification that the petitioner offers all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of the [supported] services and the charges therefor using media of general distribution." In addition, if the petitioner meets the definition of a "rural telephone company" pursuant to section 3(37) of the Act, the petitioner must identify its study area. If the petitioner is not a rural telephone company, the petitioner must include a detailed description of the geographic service area for which it requests a designation of eligibility from the Commission. *Id.*

²⁴⁰ See *Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, AAD/USB File No. 98-28, DA 98-392 (rel. Feb. 27, 1998). See also *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 98-2237 (rel. Nov. 4, 1998). These petitions were placed on public notice by the Bureau. The Arizona Corporation Commission was notified by Commission staff regarding the petitions for designation. The Arizona Commission did not submit comments in response to the petitions, nor did it otherwise express any objection to the Commission's designation.

²⁴¹ *Further Notice*, 14 FCC Rcd at 21210, para. 75.

the event that a carrier is not subject to the jurisdiction of a state commission.”²⁴² To that end, we sought comment on how section 214(e)(6) should be interpreted and implemented to determine whether a carrier is subject to the jurisdiction of a state commission.²⁴³ We opined that the statutory language of section 214(e)(6) is ambiguous with respect to when the Commission’s authority to designate an eligible telecommunications carrier is triggered.²⁴⁴ We tentatively concluded that the determination whether a carrier is subject to the jurisdiction of a state commission may depend on the nature of the service provided (*e.g.*, wireline, satellite, or wireless) or the geographic area in which the service is provided (*e.g.*, tribal land).²⁴⁵

102. Against the backdrop of this tentative conclusion, and out for respect for tribal sovereignty, we sought comment on the extent of state commission jurisdiction over tribally-owned and non-tribally-owned carriers providing service on tribal lands. We noted that, with regard to tribally-owned carriers providing service on tribal lands, state law is generally inapplicable when state commissions attempt to regulate the conduct of tribal members directly within the reservation boundaries, except in “exceptional circumstances.”²⁴⁶ We also noted that, with regard to a state commission’s authority to regulate a non-tribal carrier seeking to provide service on tribal lands, the appropriateness of the state commission’s exercise of authority turns on a balancing of federal and tribal interests against the interest of the state. This analysis must be made in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its “overriding goal of encouraging tribal self-sufficiency and economic development.”²⁴⁷ We recognized that this inquiry is a particularized one, and thus, specific to each state and the circumstances surrounding the provision of telecommunications services by non-tribal members within those tribal lands.²⁴⁸ Finally, we recognized, as did Congress when it enacted section 214(e)(6), that some state commissions have asserted jurisdiction over carriers seeking to provide service on tribal lands, and that these commissions regulate certain aspects of a carrier’s provision of service on tribal lands.²⁴⁹ Thus, we acknowledged that the exercise of state commission jurisdiction over carriers providing service on tribal lands varies from state to state.

103. In the *Further Notice*, we recognized that the fact-intensive and legally complex determination of whether a particular state commission has jurisdiction over a particular carrier serving tribal lands may lead to confusion, duplication of efforts, and needless controversy among carriers, tribal authorities, state commissions, and this Commission. This, in turn, might undermine the universal service goal of ensuring that all Americans, including those living on tribal lands, have access to affordable

²⁴² *Further Notice*, 14 FCC Rcd at 21210, para. 75.

²⁴³ *Further Notice*, 14 FCC Rcd at 21211, para. 76.

²⁴⁴ *Further Notice*, 14 FCC Rcd at 21211, para. 78.

²⁴⁵ *Further Notice*, 14 FCC Rcd at 21211-12, para. 78.

²⁴⁶ *Further Notice*, 14 FCC Rcd at 21212, para. 79.

²⁴⁷ *Further Notice*, 14 FCC Rcd at 21212, para. 80.

²⁴⁸ *Further Notice*, 14 FCC Rcd at 21212-13, para. 80.

²⁴⁹ *Further Notice*, 14 FCC Rcd at 21213, para. 81.

telecommunications services.²⁵⁰ Accordingly, we proposed a process for Commission designation of eligible telecommunications carriers under section 214(e)(6) for carriers serving tribal lands. This process was designed to facilitate the designation of carriers serving tribal lands in a manner that recognizes the sovereign nature of the tribal authorities. We tentatively concluded that, before asking this Commission to make the designation under section 214(e)(6), a carrier should consult with the relevant tribal authority and/or the state commission on whether the state commission has jurisdiction to designate the carrier.²⁵¹ In situations where the tribal authority and the state commission agree that the state commission has jurisdiction, we tentatively concluded that the state commission would conduct the designation pursuant to section 214(e)(2).²⁵² In instances where the tribal authority challenges the state commission's exercise of jurisdiction, we encouraged carriers, with the support of the tribal authority, to apply to this Commission for designation.²⁵³ Finally, we sought comment on whether the Commission, rather than the state commission, should have exclusive jurisdiction to designate terrestrial wireless or satellite carriers as eligible telecommunications carriers.²⁵⁴

C. Discussion

1. Scope of Section 214(e)(6)

104. *State Commission Designation of Eligible Telecommunications Carriers.* In light of the statutory framework and legislative history, we conclude that Congress, in enacting section 214(e)(6), did not intend to alter the basic framework of section 214(e), which gives the state commissions the principal role in designating eligible telecommunications carriers under section 214(e)(2). This interpretation of section 214(e) is consistent with the legislative history, which indicates that section 214(e)(6) is not intended to “restrict or expand the existing jurisdiction of State commissions over any common carrier,” but is intended to provide a means for the designation of a carrier over which a state commission lacks jurisdiction.²⁵⁵

105. We conclude that section 214(e)(6) requires the Commission to conduct a designation proceeding in instances where the relevant state commission lacks, for whatever reason, the authority to perform the designation. We are guided by the statutory framework, legislative history, and the record before us, to conclude that the threshold question in determining whether the Commission may exercise its authority under section 214(e)(6) is whether the state commission lacks jurisdiction over the carrier, for any reason. We agree with commenters who suggest that the inquiry should include, but not be limited to, whether a state commission lacks jurisdiction over the particular service or geographic area.²⁵⁶ The

²⁵⁰ *Further Notice* 14 FCC Rcd at 21213, para. 82.

²⁵¹ *Further Notice* 14 FCC Rcd at 21213, para. 82.

²⁵² *Further Notice*, 14 FCC Rcd at 21213, para. 82.

²⁵³ *Further Notice*, 14 FCC Rcd at 21213, para. 82.

²⁵⁴ *Further Notice*, 14 FCC Rcd at 21211, para. 77.

²⁵⁵ 143 Cong. Rec. H10807-09 (dail ed. Nov. 13, 1997) (statement of Rep. Bliley).

²⁵⁶ *See, e.g.*, BAM comments at 11 (contending that section 214(e)(6) “applies whenever the state has no jurisdiction for whatever reason”); NTIA *ex parte* comments at 15 (“the amendment addresses a relatively limited (continued....)”).

determination as to whether a state commission lacks jurisdiction over a particular carrier is a fact-specific inquiry that may depend on interpretations of federal, state, and tribal law where appropriate.

106. *Jurisdiction Over Carriers Serving Tribal Lands.* We are not persuaded by claims that the exercise of our authority under section 214(e)(6) is limited to designations of eligibility sought by tribally-owned carriers serving tribal lands.²⁵⁷ We conclude that neither the language of section 214(e)(6) nor its legislative history provides any indication that it applies only to tribally-owned carriers serving tribal lands.²⁵⁸ Section 214(e)(6) applies to any carrier “not subject to the jurisdiction of a state commission.” Moreover, the legislative history supports this interpretation.²⁵⁹ In sum, we agree with those commenters who contend that the legislative history of section 214(e)(6) makes clear that, although the class of carriers to be covered by section 214(e)(6) was dominated by tribally-owned carriers, it was not restricted to them.²⁶⁰

107. Nor do we find persuasive claims that the Commission generally has authority to make all eligible telecommunications carrier determinations over carriers providing telecommunications service on tribal lands.²⁶¹ We do not believe that Congress intended the Commission to use section 214(e)(6) to usurp the role of a state commission that has jurisdiction over a carrier providing service on tribal lands.²⁶² On the contrary, in adopting section 214(e)(6), Congress recognized that some state commissions had asserted jurisdiction over tribal lands.²⁶³ Congress also acknowledged pending jurisdictional disputes between (Continued from previous page) _____ number of instances in which, for one reason or another, the relevant State commission lacks jurisdiction over a particular carrier...”). See also CenturyTel comments at 8 (“Congress did not intend to replace state authority to grant [eligible telecommunications carrier] status, but rather to fill a void where states lack such authority under existing state law.”).

²⁵⁷ See, e.g., Western Alliance comments at 3-7; NRTA & OPASTCO reply comments at 11-12.

²⁵⁸ Accord NTIA *ex parte* comments at 13.

²⁵⁹ For example, according to Senator McCain, the author of section 214(e)(6), the amendment was necessary because, as enacted in 1996, “Section 214(e) [did] not account for the fact that State commissions in a few States have no jurisdiction over certain carriers. Typically States *also* have no jurisdiction over tribally-owned common carriers which may or may not be regulated by a tribal authority that is not a State Commission per se.” 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (emphasis added). This intention was shared by the proponents of the amendment in the House of Representatives who noted that “some common carriers providing service today are not subject to the jurisdiction of a State commission; *most notably* some carriers owned or controlled by native Americans.” *Id.* at H10807 (daily ed. November 13, 1997) (statement of Rep. Bliley) (emphasis added). See also *id.* at H10808 (statement of Rep. Markey) (bill allows Commission to designate as an eligible telecommunications carrier a “common carrier that is not subject to the jurisdiction of a State commission, *including* those telephone companies owned by certain federally-recognized Indian tribes”) (emphasis added); *id.* at H10808 statement of Rep. Hayworth) (existing section 214(e) “has created a serious problem for certain telecom carriers, *particularly* some Indian tribes”) (emphasis added).

²⁶⁰ See, e.g., NTIA *ex parte* comments at 13; BAM comments at 11; Western Wireless reply comments at 15-16.

²⁶¹ See, e.g., BAM comments at 10; Western Wireless comments at 5-7.

²⁶² *C.f.*, SBI comments at 5; USCC reply comments at 6-7.

²⁶³ See 143 Cong. Rec. H10808 (daily ed. Nov. 13, 1997) (statement of Rep. Hayworth) (“Some, not all, but some States have no jurisdiction over tribally-owned carriers.”).

states and tribes and made clear that the adoption of section 214(e)(6) was not “intended to impact litigation regarding jurisdiction between State and federally-recognized tribal entities.”²⁶⁴

108. As discussed above, the Commission’s authority under section 214(e)(6) applies only when a carrier is not subject to the jurisdiction of a state commission. The determination as to whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission is a complicated and intensely fact-specific legal inquiry informed by principles of tribal sovereignty and requiring the interpretation of treaties, and federal Indian law and state law. Such determinations usually consider whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether the tribe has consented to state jurisdiction, either in treaties or otherwise.²⁶⁵ The inquiry as to whether a state commission has authority to regulate the provision of telecommunications service on tribal lands is a particularized one, and thus specific to each state and the facts and circumstances surrounding the provision of the service.²⁶⁶ As the U.S. Supreme Court has stated, “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.”²⁶⁷

109. *Jurisdiction Over Particular Services.* We further conclude that the technology used to provide the telecommunications service does not *per se* determine whether the state commission or this Commission has jurisdiction over the carrier for purposes of designating the carrier as eligible to receive federal universal service support. Specifically, we conclude that the provision of service by terrestrial wireless or satellite carrier does not *per se* place the carrier outside the parameters of the state commission designation authority under section 214(e)(2). We believe that if Congress had intended to exempt particular services from the state commission designation process, it would have expressly done so in section 214(e). We therefore agree with NTIA that there is nothing in the statute or the legislative history to support the notion that, by enacting section 214(e)(6), Congress intended to remove from the state commissions the primary responsibility for designating wireless or satellite carriers as eligible telecommunications carriers.²⁶⁸

110. We further conclude that state commission designation of a Commercial Mobile Radio Service (CMRS) provider pursuant to section 214(e)(2) does not constitute entry regulation in violation of section 332(c)(3) of the Act.²⁶⁹ Section 332(c)(3) bars state and local rate and entry regulation of CMRS

²⁶⁴ See Colloquy between Representatives Thune and Bliley, 143 Cong. Rec. H10808-09 (daily ed. Nov. 13, 1997).

²⁶⁵ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²⁶⁶ *Further Notice*, 14 FCC Rcd at 21212, para. 80. The U.S. Supreme Court has cautioned that “[g]eneralizations on this subject have become . . . treacherous.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

²⁶⁷ *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142.

²⁶⁸ NTIA *ex parte* comments at 14.

²⁶⁹ 47 U.S.C. § 332(c)(3), “[n]otwithstanding section 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.” *C.f.*, BAM comments at 13.

providers, but allows the states to regulate “other terms and conditions of service.” Section 332(c)(3) prohibits direct state regulation of entry by CMRS providers (*e.g.*, a regulation that requires the CMRS provider to obtain a certificate of public convenience and necessity from the state prior to providing service), but a regulation does not necessarily run afoul of section 332(c)(3) solely because it may make it more difficult for some carriers to offer service.²⁷⁰ We conclude that the prohibition on “entry” regulation in section 332(c)(3) does not prohibit states from designating CMRS providers as eligible telecommunications carriers because such designation relates to a carrier’s right to receive federal universal service support, rather than a carrier’s legal right to do business in a state. We need not decide for present purposes whether, or under what conditions, a particular state’s eligible telecommunications carrier designation process as applied to a CMRS provider might constitute impermissible entry regulation, rather than permissible regulation of terms and conditions of service. Moreover, this conclusion does not affect our ability to determine whether a state commission’s designation process or denial of eligibility may constitute a barrier to entry under section 253 of the Act.²⁷¹

111. We note that several states have already issued orders addressing designation requests from wireless carriers.²⁷² We encourage states to move forward expeditiously to resolve pending requests in a pro-competitive manner designed to preserve and advance universal service.

2. Section 214(e)(6) Designation Process for Carriers Serving Non-Tribal Lands

112. As discussed above, the threshold question for determining whether the Commission may exercise its authority to designate a carrier as an eligible telecommunications carrier under section 214(e)(6) is whether the state commission lacks jurisdiction over the carrier, for any reason. Section 214(e) does not, however, define the circumstances under which a state commission may lack jurisdiction, nor does it address whether such jurisdictional determinations should be made by the state commission or this Commission. We conclude that carriers seeking designation from this Commission under section 214(e)(6) for service provided on non-tribal lands must first consult with the relevant state regulatory commission on the issue of whether the state commission has jurisdiction to designate the carrier, even if the carrier asserts that the state commission lacks jurisdiction over the carrier.²⁷³ In so doing, we note that jurisdictional challenges relating to the authority of the state commission to designate certain carriers or classes of

²⁷⁰ See *Petition of Pittencriff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, File No. WTB/POL 96-2, 13 FCC Rcd. 1735, 1746 (1997) (holding that requirement that CMRS providers contribute to state universal service fund does not constitute entry regulation within the meaning of section 332(c)(3)), *aff’d sub nom. CTIA v. FCC*, 168 F.3d 1332 (D.C.Cir. 1999).

²⁷¹ 47 U.S.C. §253.

²⁷² See, *e.g.*, Arkansas Public Service Commission, *In the Matter of Determining Eligible Telecommunications Carriers in Arkansas*, Order, Docket No. 97-326-U (November 7, 1997); Public Service Commission of Wisconsin, *In the Matter of Designation of Eligible Telecommunications Carriers Under Part 54 of Title 47 of the Code of Federal Regulations*, Findings of Fact, Conclusions of Law and Final Order (December 23, 1997); Washington Utilities and Transportation Commission, *Order Designating Eligible Telecommunications Carriers, United States Cellular Corporation, et. al.*, (December 23, 1997).

²⁷³ As discussed in greater detail in Section IV.C.3., *infra.*, we establish a separate framework for carriers seeking a designation of eligibility pursuant to section 214(e)(6) for service provided on tribal lands.

carriers on non-tribal lands derive almost exclusively from interpretations of state law.²⁷⁴

113. While a carrier may believe state law to preclude the state commission from exercising jurisdiction over the carrier for purposes of designation under section 214(e)(2), we conclude, as a matter of federal-state comity, that the carrier should first consult with the state commission to give the state commission an opportunity to interpret state law. We conclude that state commissions should be allowed a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers.²⁷⁵ Only in those instances where a carrier provides the Commission with an affirmative statement from a court of competent jurisdiction or the state commission that it lacks jurisdiction to perform the designation will we consider section 214(e)(6) designation requests from carriers serving non-tribal lands. We conclude that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier. Each carrier should consult with the state commission to receive such a notification, rather than relying on notifications that may have been provided to similarly situated carriers.

114. We are concerned, however, that excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas.²⁷⁶ We believe it is unreasonable to expect prospective entrants to enter a high-cost market and provide service in competition with an incumbent carrier that is receiving support, without knowing whether they are eligible to receive support. If new entrants do not have the same opportunity to receive universal service support as the incumbent, such carriers may be unable to provide service and compete with the incumbent in high-cost

²⁷⁴ For example, Cellco and Western Wireless have filed petitions asserting that state law precludes the state commissions in Delaware, Maryland, and Wyoming from making the eligible telecommunications carrier designations for wireless carriers in those states. *See Western Wireless Petition For Designation as an Eligible telecommunications carrier in the State of Wyoming*, September 29, 1999 (Wyoming Petition); *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, September 8, 1999 (contending that state law precludes the designation of CMRS carriers by the Delaware Public Service Commission and the Maryland State Public Service Commission) (Cellco Petition). Western Wireless' request for eligible telecommunications carrier designation was dismissed by the Wyoming Public Service Commission (Wyoming Commission) on the grounds that the Wyoming Telecommunications Act (Wyoming Act) denies the Wyoming Commission the authority for regulating "telecommunications services using . . . cellular technology," except for quality of service. As discussed *supra* in Section IV.C.1., we reject commenters' claims that state commission designation of CMRS carriers violates the prohibition against state entry and rate regulation under section 332(c) of the Act.

²⁷⁵ *See, e.g., Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); Letter from Susan Stevens Miller, Maryland Public Service Commission, to Magalie R. Salas, FCC, dated April 18, 2000 (Maryland Commission *ex parte* comments). "Only after a State commission finds that it lacks the jurisdiction necessary should the CMRS provider file with the FCC. The State commission, not the FCC, should be responsible for determining its jurisdiction under state law." *Id.* at 2.

²⁷⁶ *See* Letter from Competitive Universal Service Coalition, to Chairman William Kennard, FCC, dated March 8, 2000 at 2 (indicating that some state commissions have delayed consideration of eligibility designation applications by a year and a half).

areas.²⁷⁷ As the Commission has previously concluded, competitively neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services.²⁷⁸ We are therefore concerned that indefinite delays in the designation process will thwart the intent of Congress, in section 254, to promote competition and universal service to high-cost areas. Accordingly, we commit to resolve, within six months of the date filed at the Commission, all designation requests for non-tribal lands that are properly before us pursuant to section 214(e)(6). We also strongly encourage state commissions to resolve designation requests filed under section 214(e)(2) in the same time frame.²⁷⁹

3. Section 214(e)(6) Designation Process for Carriers Serving Tribal Lands

115. In this section, we establish a framework designed to streamline the process for eligibility designation of carriers providing service on tribal lands. As discussed in greater detail below, we conclude that carriers seeking eligibility designations for service provided on tribal lands may petition this Commission under section 214(e)(6) for a determination of whether the carrier is subject to the state commission's jurisdiction and, in instances where the state lacks jurisdiction, a decision on the merits of the designation request. Under this framework, a carrier seeking an eligibility designation for service provided on tribal lands will avoid any costs and delays associated with resolving the threshold jurisdictional determination in a state designation proceeding and possible court appeal of that state jurisdictional decision. Moreover, this framework will provide a safe harbor for carriers unwilling to have the jurisdictional question resolved by a state commission. This streamlined designation process for carriers serving tribal lands is intended to facilitate the expeditious resolution of such requests so as to increase the availability of affordable telecommunications services to tribal lands, while preserving the state commissions' jurisdiction consistent with federal, tribal, and state law. We believe that this process will balance carefully the principles of tribal sovereignty and the demonstrated need for access to affordable telecommunications services on tribal lands, against the appropriate exercise of state jurisdiction over carriers operating on such lands.

116. As discussed in Section IV.C.1. above, we conclude that section 214(e)(6) directs the Commission to perform the eligibility designation in instances where the carrier is not subject to the jurisdiction of a state commission. Neither section 214(e)(2) nor section 214(e)(6), however, address how such jurisdictional determinations should be made or by which commission. In the absence of specific guidance in the statute as to how such jurisdictional determinations should be made, we conclude that this Commission may resolve the threshold question of whether a carrier seeking eligibility designation for service provided on tribal lands is subject to the jurisdiction of the state commission. This conclusion is consistent with the execution of our duty to preserve and advance universal service under section 254,

²⁷⁷ The Commission has recognized the importance of competitively neutral support mechanisms between competitive entrants and incumbent carriers in promoting competition and the provision of service in high-cost areas. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

²⁷⁸ *Universal Service Order*, 12 FCC Rcd at 8801, para. 48 (“an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of *eligibility* in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework.”) (emphasis added).

²⁷⁹ In the attached Further Notice of Proposed Rulemaking, Section V., *infra*, we seek comment on whether to adopt a rule that would require all requests for designation under section 214(e), whether filed with this Commission or a state commission, to be resolved within six months of the filing date, or some shorter period.

principles of tribal sovereignty, and the unique federal trust relationship between Indians tribes and the federal government.

117. We recognize that a determination as to whether a state commission lacks jurisdiction over a carrier providing service on tribal lands is a legally complex inquiry extending beyond interpretations of state law to principles of tribal sovereignty, federal Indian law, and treaties.²⁸⁰ Evaluating the extent to which a state commission has jurisdiction over activities conducted on tribal lands, whether by members or non-members of a tribe, will involve questions of whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether a tribe has consented to state jurisdiction in treaties or otherwise. Thus, we find that such jurisdictional determinations, which will involve an analysis of principles of tribal sovereignty, federal Indian law, treaties, and state law, may be appropriately performed by this Commission.

118. The jurisdictional ambiguities associated with the question of whether a state may designate a carrier serving tribal lands may unnecessarily delay the provision of affordable services in high-cost areas. We intend this framework to facilitate the designation of carriers eligible to receive federal universal service support for service provided on tribal lands by permitting such carriers to seek resolution of the jurisdictional issue directly from this Commission. Absent this framework, the designation of such carriers as eligible to receive federal universal service support may be otherwise unnecessarily delayed pending resolution of the jurisdictional question, or potentially prevented entirely in those instances where the tribal authority will not support the carrier's submission to state commission jurisdiction.

119. Moreover, in establishing this framework for the designation of eligible telecommunications carriers serving tribal lands, we are guided by our recognition of, and respect for, principles of tribal sovereignty and self-determination. As described in the Commission's *Indian Policy Statement*, we acknowledge the principles of tribal sovereignty and self-government and the unique trust relationship between the Indian tribes and the federal government.²⁸¹ We are mindful that the federal trust doctrine imposes on federal agencies a fiduciary duty to conduct their authority in matters affecting Indian tribes in a manner that protects the interest of the tribes.²⁸² We are also mindful that federal rules and policies should therefore be interpreted in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.²⁸³

120. In light of our obligation to preserve and advance universal service under section 254, principles of tribal sovereignty and self-determination, and our unique federal trust responsibility, we adopt the following framework for resolution of designation requests under section 214(e)(6) for carriers serving tribal lands. We conclude that a carrier seeking a designation of eligibility to receive federal universal service support for telecommunications service provided on tribal lands may petition the Commission for designation under section 214(e)(6), without first seeking designation from the appropriate state

²⁸⁰ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136; *Montana v. United States*, 450 U.S. 544; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202.

²⁸¹ See *Indian Policy Statement*.

²⁸² See, e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

²⁸³ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-44; *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982).

commission. The petitioner must set forth in its petition the basis for its assertion that it is not subject to the state commission's jurisdiction, and bears the burden of proving that assertion. The petitioner must provide copies of its petition to the appropriate state commission at the time of filing with the Commission. The Commission will release, and publish in the Federal Register, a public notice establishing a pleading cycle for comments on the petition. The Commission will also send the public notice announcing the comment and reply dates to the affected state commission by overnight express mail to ensure that the state commission is notified of the notice and comment period.

121. Based on the evidence presented in the record, the Commission shall make a determination as to whether the carrier has sufficiently demonstrated that it is not subject to the state commission's jurisdiction. In the event the Commission determines that the state commission lacks jurisdiction to make the designation and the petition is properly before the Commission under section 214(e)(6), the Commission will decide the merits of the request within six months of release of an order resolving the jurisdictional issue. If the carrier fails to meet its burden of proof that it is not subject to the state commission's jurisdiction, the Commission will dismiss the request and direct the carrier to seek designation from the appropriate state commission. In such cases, we urge state commissions to act within a similar time frame (*i.e.*, six months) to resolve such requests as expeditiously as possible.

122. We emphasize that a carrier seeking a section 214(e)(6) designation for service provided on tribal lands must bear the burden of demonstrating that it is not subject to the state commission's jurisdiction. As discussed above, we reject the contention that section 214(e)(6) provides the Commission with the blanket authority to make all eligible telecommunications carrier designations over carriers providing service on tribal lands.²⁸⁴ In so doing, we recognize that the issue of whether a state commission may exercise jurisdiction over a carrier providing service on tribal lands is a particularized inquiry guided by principles of tribal sovereignty, federal Indian law, and treaties, as well as state law. Therefore, carriers seeking an eligibility designation from this Commission for the provision of service on tribal lands should provide fact-specific support demonstrating that the carrier is not subject to the state commission's jurisdiction for the provision of service on tribal lands. Such support should include any relevant case law, statutes, and treaties. We emphasize that this is a strict burden and that generalized assertions regarding the state commission's lack of jurisdiction will not suffice to confer jurisdiction on this Commission under section 214(e)(6). We would also find informative any statements and analyses the tribal authority might provide regarding the petitioner's request for designation and the state commission's exercise of jurisdiction. For example, carriers may include with their petitions a letter from the appropriate tribal authority addressing the jurisdictional question or the merits of the designation request.

123. We decline to place on the affected state commission the burden of proving that it has jurisdiction over a particular carrier.²⁸⁵ To do so would suggest that state commission bear the burden of overcoming a general presumption that states do not have jurisdiction over carriers providing service on tribal lands. Such a presumption is inconsistent with our determination that the issue of whether a state commission lacks jurisdiction over a carrier providing service on tribal lands is a particularized inquiry,²⁸⁶ and thus specific to each state and the facts and circumstances surrounding the provision of the service.

²⁸⁴ See paras. 107-108, *infra*.

²⁸⁵ See, *e.g.*, Salt River/NTTA comments at 17-18; Western Wireless reply comments at 17.

²⁸⁶ See para. 108, *infra*.

124. We strongly encourage the participation of the affected state commissions and tribal authorities in this process. The determination of whether a particular carrier is subject to the state commission's jurisdiction for service provided on tribal lands is one that will be greatly informed by the participation of the tribes and state commission or other state officials. Based on our experience to date with section 214(e)(6), we believe that there will be some state commissions that will not object to the Commission's designation of carriers serving tribal lands as eligible to receive federal universal service support.²⁸⁷ We look forward to working with the state commissions, tribal authorities, and members of industry to resolve these jurisdictional questions, and ultimately the designation requests, in an expeditious manner. To that end, we seek comment in the attached Further Notice of Proposed Rulemaking on additional measures that may be implemented to further facilitate the designation process for the provision of service on tribal lands.²⁸⁸

125. We emphasize, however, that this process is limited in several respects. First, a carrier may avail itself of this process only to seek a designation of eligibility to receive federal universal service support for service provided on *tribal lands*.²⁸⁹ Petitioners seeking an eligibility designation under section 214(e)(6) for service provided on tribal lands must accurately describe the specific geographic areas they wish to serve, and must demonstrate that such areas satisfy the definition of tribal lands we adopt in this Order. As discussed above in Section III.C.1., the federal government has a unique trust responsibility with respect to members of federally-recognized tribes. In addition, the determination of jurisdiction over a carrier serving tribal lands is an inquiry that will extend beyond questions of state law, and will be informed by principles of tribal sovereignty, federal law, and treaties.²⁹⁰ Thus, it is appropriate and reasonable that the Commission, in executing its statutory obligation to preserve and advance universal service, should determine whether a carrier seeking an eligibility designation for services provided on tribal lands is subject to the state commission's jurisdiction.

126. Second, a carrier may only avail itself of this process when it has not initiated a designation proceeding before the affected state commission. In order to avoid the potential for "forum-

²⁸⁷ See, e.g., *Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, DA 98-392 (rel. Feb. 27, 1998). See also *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 98-2237 (rel. Nov. 4, 1998). These petitions were placed on public notice by the Bureau. The Arizona Corporation Commission was notified by Commission staff regarding the petitions for designation noted above. The Arizona Commission did not submit comments in response to the petitions, nor did it otherwise express any objection to the Commission's designation.

²⁸⁸ See *infra* Section V.

²⁸⁹ For purposes of this section, we define "tribal lands" consistent with the definition adopted in the context of our actions relating to Lifeline and Link Up in Section III of this Order. Specifically, for purposes of identifying the geographic areas for which we will make the jurisdictional determination described in Section IV.C.3, we define "tribal lands" to include the definitions of "reservation" and "near reservation," as those terms are defined under BIA's regulations. See 25 C.F.R. §§ 20.1(v) and 20.1(r); see *supra* Section III.B.2..

²⁹⁰ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136; *Montana v. United States*, 450 U.S. 544; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202.

shopping" and the costs and confusion caused by a duplication of efforts between this Commission and state commissions, we will not make a jurisdictional determination under section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2). Nothing we adopt today affects the ability of a state commission to make an eligible telecommunications carrier designation for a carrier serving tribal lands, where jurisdiction may otherwise be in dispute among the parties.

127. Finally, any determination made by this Commission pursuant to section 214(e)(6) relates only to a carrier's eligibility to receive *federal* universal service support for the provision of service on tribal lands. We emphasize that the Commission's determination of whether a particular carrier is subject to the state commission's jurisdiction for service provided on tribal lands is limited to the state commission's ability to designate the carrier as eligible to receive federal universal service support.

D. Pending Requests For Designation Pursuant To Section 214(e)(6)

1. Cellco Petition For Designation As An Eligible Telecommunications Carrier For Maryland and Delaware

128. *Background.* On September 8, 1999, Cellco Partnership d/b/a Bell Atlantic Mobile, a non-tribally-owned CMRS provider, filed with the Commission a petition seeking a designation of eligibility to receive federal universal service support for service provided in Delaware and parts of Maryland.²⁹¹ Cellco contends that provisions of applicable state law in Maryland and Delaware preclude state commission designation of wireless carriers under section 214(e)(2).²⁹² Specifically, Cellco contends that the state legislatures in both Delaware and Maryland have divested their respective state regulatory commissions of jurisdiction over cellular telephone service.²⁹³ On November 16, 1999, the Common Carrier Bureau sought comment on Cellco's petition for designation as an eligible telecommunications carrier under section 214(e)(6).²⁹⁴ The Maryland Public Service Commission (Maryland Commission) filed an *ex parte* letter requesting that the Commission dismiss Cellco's petition and direct Cellco to file its petition for eligible telecommunications carrier designation with the Maryland Commission.²⁹⁵ The Delaware Public Service Commission (Delaware Commission), however, filed comments confirming that it does not believe it has jurisdiction over CMRS providers.²⁹⁶

129. *Discussion.* Consistent with the Maryland Commission's request and our conclusions above in Section IV.C.2. concerning the role state commissions play in the designation of carriers under

²⁹¹ *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, September 8, 1999 (Cellco Petition).

²⁹² Cellco Petition at 3, 6-8 *citing* Md. Ann. Code, Public Utility Companies Article, §§ 2-112, 1-101(p), 1-101(bb); 26 Del. Ann. Code §§ 102(2), 202(c).

²⁹³ Cellco Petition at 3.

²⁹⁴ *Petition of Cellco Partnership D/B/A Bell Atlantic Mobile for Designation as an Eligible Telecommunications Carrier*, Public Notice, CC Docket No. 96-45, DA 99-2544 (rel. Nov. 16, 1999).

²⁹⁵ Maryland Commission *ex parte* comments at 1-2.

²⁹⁶ Delaware Commission Cellco Petition comments at 2.

section 214(e), we dismiss without prejudice Cellco's request for designation of eligible telecommunications carrier status for service provided in Maryland. Although we do not reach the merits of the Cellco request for designation in Delaware in this Order, we conclude that the Delaware Commission's comments in this proceeding provide a sufficient basis for the exercise of our jurisdiction to consider the merits of the request for designation under section 214(e)(6). We discuss each of the requests in greater detail below.

130. *Maryland Request.* At the request of the Maryland Commission, we dismiss Cellco's request for designation as an eligible telecommunications carrier in Maryland. In a letter to the Commission on April 18, 2000, the Maryland Commission stated its intent to assert jurisdiction over CMRS providers, including Cellco, for purposes of making eligible telecommunications carrier designations in Maryland.²⁹⁷ We are not persuaded by Cellco's statement that it has "informally confirmed with the professional staffs of the Maryland and Delaware commissions that these statutory exclusions are complete exclusions from the commissions' jurisdiction."²⁹⁸ We emphasize that carriers seeking a designation from this Commission for service provided on non-tribal lands must provide to us an affirmative statement²⁹⁹ from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction for purposes of eligible carrier designation.³⁰⁰

131. We decline Cellco's invitation that we should interpret the relevant state law to conclude that it is not subject to the state commission's jurisdiction. We note that, while Cellco has cited provisions of applicable state law in both Delaware and Maryland to support its contention that the state regulatory commission has no designation authority over wireless carriers, we believe that, as a matter of federal-state comity, such interpretations are better performed by the affected state commissions. As this case demonstrates, in the absence of explicit state guidance in the form of an affirmative statement from the state commission or a court of competent jurisdiction regarding the interpretation of its state law, premature intervention by the Commission may lead to confusion and duplication of efforts with the state commission, and an improper exercise of our jurisdiction under section 214(e)(6).

132. Should Cellco challenge the Maryland Commission's exercise of authority under section 214(e)(2), resolution of the jurisdictional issue may be obtained either through the state commission proceeding or in a judicial proceeding. Should the state commission or courts ultimately determine that Cellco is not subject to the state commission's jurisdiction for purposes of the eligibility designation, the Commission will assume the designation responsibility under section 214(e)(6) upon request. We reiterate our expectation that state commissions will act as expeditiously as possible on requests for designation. Should Cellco submit to the Maryland Commission a request for designation under section 214(e)(2), we strongly encourage the Maryland Commission to resolve this request within six months of the filing date.

133. *Delaware Request.* With regard to Cellco's request for designation as an eligible

²⁹⁷ Maryland Commission *ex parte* comments at 1-2.

²⁹⁸ Cellco Petition at n. 9.

²⁹⁹ As discussed *supra* in Section IV.C.2., we find that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier.

³⁰⁰ See Maryland Commission *ex parte* comments at 2-3 (stating that carriers should seek a ruling from the state commission on the issue of jurisdiction).

telecommunications carrier for service provided in Delaware, we conclude that the statements contained in comments filed by the Delaware Commission are sufficient to warrant our assertion of jurisdiction under section 214(e)(6). In its comments, the Delaware Commission confirms that the Delaware General Assembly has, for almost two decades, withheld from the Delaware Commission jurisdiction over cellular service or other mobile radio services.³⁰¹ Specifically, the Delaware Commission cites to Delaware law stating that it “shall have no jurisdiction over the operation of telephone service provided by cellular technology or by domestic public land mobile radio service or over the rates to be charged for such service or over property, property rights, equipment or facilities employed in such service.”³⁰² According to the Delaware Commission, it has consistently taken the position that it has not been granted regulatory jurisdiction over any aspect of telephone service provided by mobile, and now fixed, cellular wireless technology.³⁰³ The Delaware Commission states that it does not currently exercise any form of supervisory jurisdiction over wireless CMRS providers, including Cellco, and acknowledges that this Commission, not the Delaware Commission, “must be the entity to . . . supervise and enforce the proper application of such support by Cellco.”³⁰⁴

134. Consistent with the framework adopted in this Order, we conclude that we have jurisdiction to consider Cellco’s request for designation as an eligible telecommunications carrier for services provided in Delaware. As a result, we will address Cellco’s Delaware request for designation as an eligible telecommunications carrier within six months from the release date of this Order.

2. Western Wireless Petition For Designation As An Eligible Telecommunications Carrier For Wyoming

135. *Background.* On September 1, 1998 Western Wireless Corporation, a wireless provider, petitioned the Wyoming Public Service Commission (Wyoming Commission) for designation as an eligible telecommunications carrier pursuant to section 214(e)(2) for service provided throughout Wyoming. On August 13, 1999, the Wyoming Commission dismissed Western Wireless’ request for designation on the grounds that the Wyoming Telecommunications Act denies the Wyoming Commission the authority for regulating “telecommunications services using . . . cellular technology,” except for quality of service.³⁰⁵ The Wyoming Commission interpreted this prohibition as preventing it from designating Western Wireless as an eligible telecommunications carrier because Western Wireless provides services using cellular technology.³⁰⁶

³⁰¹ Delaware Commission Cellco Petition comments at 2-4.

³⁰² Delaware Commission Cellco Petition comments at 3, *citing* 26 Del. Ann. Code § 202(c), *as amended* by 72 Del. Laws ch. 163 (July 16, 1999).

³⁰³ Delaware Commission Cellco Petition comments at 2-3.

³⁰⁴ Delaware Commission Cellco Petition comments at 6.

³⁰⁵ *The Amended Application of WWC Holding Co., Inc., (Western Wireless) For Authority To Be Designated As An Eligible Telecommunications Carrier*, Order Granting Motion to Dismiss Amended Application, Docket No. 70042-TA-98-1 (Record No. 4432), (Aug. 13, 1999) (*Wyoming Order*) *citing* the Wyoming Telecommunications Act of 1995.

³⁰⁶ *Wyoming Order* at 2-4.

136. On September 29, 1999, Western Wireless filed with the Commission a section 214(e)(6) petition seeking a designation of eligibility to receive federal universal service support for service provided throughout Wyoming.³⁰⁷ Western Wireless contends that the Commission should assume jurisdiction given the Wyoming Commission's determination that it lacked jurisdiction under the applicable state law to designate wireless carriers as eligible telecommunications carriers.³⁰⁸ On November 12, 1999, the Common Carrier Bureau released a Public Notice seeking comment on Western Wireless' petition for designation as an eligible telecommunications carrier.³⁰⁹

137. *Discussion.* Consistent with the framework adopted in this Order, we conclude that we have the authority under section 214(e)(6) to consider this petition. We commend the Wyoming Commission for its resolution of the threshold jurisdictional question, and encourage other state commissions to resolve such issues as expeditiously as possible. As with the Cellco Delaware request, we will promptly decide the merits of Western Wireless' request for designation in Wyoming within six months from the release date of this Order.

3. Western Wireless Petition To Be Designated As An Eligible Telecommunications Carrier For The Crow Reservation In Montana

138. *Background.* On August 4, 1999, Western Wireless, a non-tribally-owned telecommunications carrier, filed with the Commission a petition under section 214(e)(6) seeking a designation of eligibility to receive federal universal service support for a service area comprised of the Crow Reservation in Montana.³¹⁰ Specifically, Western Wireless contends that telecommunications service offered on the Crow Reservation is not subject to the jurisdiction of the state commission.³¹¹ At the time of its filing the section 214(e)(6) petition with this Commission, Western Wireless also had pending before the Montana Public Service Commission (Montana Commission) a request for designation as an eligible telecommunications carrier throughout Montana, including the Crow Reservation.³¹² On September 10, 1999, the Common Carrier Bureau released a Public Notice seeking comment on Western Wireless' section 214(e)(6) petition for designation as an eligible telecommunications carrier for the Crow Reservation.³¹³ In

³⁰⁷ *Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, September 29, 1999 (Wyoming Petition).

³⁰⁸ *See generally* Wyoming Petition.

³⁰⁹ *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier to Provide Services Eligible for Universal Service Support in Wyoming*, Public Notice, CC Docket No. 96-45, DA 99-2511 (rel. Nov. 12, 1999).

³¹⁰ *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana*, August 4, 1999 (Crow Petition). In addition, Western Wireless requested waivers of certain rules governing the amount and timing of high-cost and low-income support.

³¹¹ Crow Petition at 7-8.

³¹² *Montana PSC Docket No. D98.8.190*. Montana Commission Crow Petition comments at 1.

³¹³ *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Services Eligible for Universal Service Support to Crow Reservation, Montana*, Public Notice, CC Docket No. 96-45, DA 99-1847 (rel. Sept. 10, 1999).

its comments, the Montana Commission asks the Commission to dismiss the section 214(e)(6) petition to allow the Montana Commission to consider the designation request.³¹⁴ On November 3, 1999, Western Wireless filed a notice withdrawing from the Montana Commission its petition for section 214(e)(2) designation as an eligible telecommunications carrier throughout Montana.³¹⁵

139. *Discussion.* Consistent with the framework we adopt in this Order, we will resolve the threshold question of whether Western Wireless is subject to the jurisdiction of the Montana Commission for purposes of determining eligibility for federal support for services provided on the Crow Reservation. As discussed above in Section IV.C.1., we have concluded that section 214(e)(6) does not provide the Commission with the *per se* authority to designate carriers based solely on the provision of service on tribal lands.³¹⁶ As noted above, determinations as to whether a state commission lacks jurisdiction over carriers serving tribal lands involves a fact-specific inquiry informed by principles of tribal sovereignty, treaties, state law, and federal Indian law. Consistent with the discussion above in Section IV.C.3., we conclude that Western Wireless should bear the burden of demonstrating that it is not subject to the jurisdiction of the Montana Commission for purposes of an eligibility designation for services provided on the Crow Reservation.

140. Consistent with the framework we establish in Section IV.C.3. and to permit Western Wireless a full and fair opportunity to present a case consistent with the guidance we give in this Order, we will reopen the record in this proceeding to allow Western Wireless an opportunity to supplement its claim that the Montana Commission lacks jurisdiction to make the designation for service provided on the Crow Reservation. Western Wireless shall notify the Commission in writing within 15 days of release of this Order whether it wishes to supplement the record consistent with the determinations in this Order. If Western Wireless chooses to supplement the record, it shall do so within 30 days of the date it notifies the Commission of its intent to do so. It shall also provide copies of the supplemental filing to the Montana Commission at the time of its filing with the Commission. In any event, the Commission will release, and publish in the Federal Register, a public notice announcing that the Montana Commission, and any other interested party, shall have 30 days to respond to Western Wireless' original petition and/or supplemental filing. To ensure that the Montana Commission receives prompt notification of the 30-day period, the Commission shall also send to the Montana Commission, by overnight express mail, the public notice announcing the comment cycle deadline. Should the Commission determine, on the basis of the record developed, that the Montana Commission does not have authority to perform the eligibility designation for Western Wireless' service provided on the Crow Reservation, the Commission will exercise its authority under section 214(e)(6) to decide the merits of the request within six months after release of an order resolving the jurisdictional issue.

4. Smith Bagley Petition To Be Designated As An Eligible Telecommunications Carrier in Arizona and New Mexico

141. *Background.* On June 2, 1999, Smith Bagley, Inc., a non-tribally-owned CMRS provider,

³¹⁴ Montana Commission Crow Petition comments at 2-3 (noting that it has designated carriers serving tribal lands in Montana, including the Crow Reservation).

³¹⁵ See Montana Commission Crow Petition supplemental comments at 1-2

³¹⁶ See, e.g., CTIA Crow Petition comments at 5; Smith Bagley Crow Petition comments at 2; Western Wireless Crow Petition reply comments at 2-3.

filed a petition seeking designation by the Commission as an eligible telecommunications carrier under section 214(e)(6) for those parts of its service areas in Arizona and New Mexico that encompass federally reserved Indian lands.³¹⁷ In April 1999, Smith Bagley submitted to the Arizona Corporation Commission (Arizona Commission) and the New Mexico Public Regulation Commission (New Mexico Commission) separate requests for designation as an eligible telecommunications carrier pursuant to section 214(e)(2). Both state commissions initiated proceedings to consider the merits of the designation requests, although neither commission has reached a decision at this time. Although Smith Bagley applied to the respective state commissions for designation, Smith Bagley contends in its section 214(e)(6) petition that this Commission should designate Smith Bagley as an eligible telecommunications carrier for all federally reserved Native American lands within its service area.³¹⁸

142. On July 6, 1999, the Common Carrier Bureau released a Public Notice seeking comment on Smith Bagley's petition for designation as an eligible telecommunications carrier in Arizona and New Mexico.³¹⁹ In response, the Arizona Commission asserted that it has jurisdiction over tribal lands served by non-tribally owned telephone companies.³²⁰

143. *Discussion.* Consistent with the framework we adopt in this Order for the designation of carriers serving tribal lands, we dismiss without prejudice Smith Bagley's section 214(e)(6) request for designation as an eligible telecommunications carrier for tribal lands in Arizona and New Mexico. Both the Arizona and New Mexico Commissions are currently considering section 214(e)(2) requests for designation filed by Smith Bagley prior to the date of their filing with this Commission. As we concluded above in Section IV.C.3., in order to avoid the possibility of forum-shopping and the costs and confusion caused by a duplication of efforts between this Commission and state commissions, we decline to address a designation request under section 214(e)(6) if a request for eligible telecommunications carrier designation is pending at the state commission.

144. Accordingly, we dismiss without prejudice Smith Bagley's request for designation under section 214(e)(6) to permit the Arizona and New Mexico Commissions to complete their proceedings on the merits of Smith Bagley's pending requests. We request, however, that both state commissions act expeditiously in consideration of Smith Bagley's designation requests. We note that those requests have now been pending for over one year. As we have discussed above, we are concerned that unreasonable delays in acting upon designation requests will hinder the availability of affordable telecommunications services in high-cost areas. We therefore strongly encourage the Arizona and New Mexico Commissions to resolve Smith Bagley's pending requests for designation as soon as possible.

³¹⁷ *Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(6)*, June 2, 1999 (Smith Bagley Petition)

³¹⁸ Smith Bagley Petition at 5.

³¹⁹ *Petition of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier*, Public Notice, CC Docket No. 96-45, DA 99-1331 (rel. July 6, 1999).

³²⁰ Letter from Maureen A. Scott, Arizona Corporation Commission, to Magalie Roman Salas, FCC, dated July 27, 1999 (Arizona Commission comments) at 1.

5. **Cheyenne River Sioux Tribe Telephone Authority Petition For Designation As An Eligible Telecommunications Carrier**

145. *Background.* The Cheyenne River Sioux Tribe Telephone Authority (Cheyenne Telephone Authority), a tribally-owned carrier, provides service within the Cheyenne River Indian Reservation.³²¹ According to the Cheyenne Telephone Authority, the South Dakota Public Utilities Commission (South Dakota Commission) lacks authority over tribal enterprises conducting business on the Cheyenne River Sioux Reservation, such as the Cheyenne Telephone Authority.³²² Accordingly, the Cheyenne River Sioux Tribe designated the Cheyenne Telephone Authority as an eligible telecommunications carrier serving the reservation.³²³

146. As a precautionary measure to avoid the serious consequences of failing to be eligible to receive federal universal service support as of January 1, 1998, the Cheyenne Telephone Authority also applied to the South Dakota Commission for eligible telecommunications carrier designation.³²⁴ In so doing, the Cheyenne Telephone Authority expressly stated its belief that the South Dakota Commission did not have jurisdiction within reservation boundaries, but that it applied to the South Dakota Commission in any event because of the ambiguous nature of the Act, which at that time did not contain section 214(e)(6).³²⁵ On December 11, 1997, the South Dakota Commission found that the Cheyenne Telephone Authority satisfied the requirements for designation as an eligible telecommunications carrier for its service area.³²⁶

147. On December 1, 1997, Congress enacted section 214(e)(6), giving the Commission jurisdiction to perform eligible telecommunications carrier designations for carriers not subject to the jurisdiction of a state commission. On January 7, 1998, the Cheyenne Telephone Authority filed a petition with the Commission seeking designation as an eligible telecommunications carrier under section 214(e)(6) and confirmation of the designation performed by the South Dakota Commission.³²⁷ On January 28, 1998,

³²¹ *Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, January 7, 1998* (Cheyenne Telephone Authority Petition) at 5.

³²² Cheyenne Telephone Authority Petition at 5. The Cheyenne River Sioux Tribe and South Dakota Commission have engaged in a lengthy dispute regarding the South Dakota Commission's authority to regulate activities on tribal land. See *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 595 N.W. 2d 604 (S.D. 1999) (concluding that the South Dakota Commission's exercise of authority to regulate sale of telephone exchanges on tribal land was not preempted by federal law).

³²³ Cheyenne Telephone Authority Petition at 7 citing Cheyenne River Sioux Tribe Resolution No. 337-97-CR (Nov. 5, 1997).

³²⁴ Cheyenne Telephone Authority Petition at 7.

³²⁵ Cheyenne Telephone Authority Petition at 7-8.

³²⁶ Cheyenne Telephone Authority Petition at 8 citing *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order*, In the Matter of the Filing by Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier, No. TC97-184 (Dec. 17, 1997).

³²⁷ See Cheyenne Telephone Authority Petition.

the Common Carrier Bureau released a Public Notice seeking comment on the Cheyenne Telephone Authority petition.³²⁸ On August 25, 1998, the South Dakota Commission submitted a letter asserting that “it has jurisdiction to designate [Cheyenne Telephone Authority] as an eligible telecommunications carrier for its presently served service area.”³²⁹

148. Although the Cheyenne Telephone Authority received its eligible telecommunications carrier designation from the South Dakota Commission pursuant to section 214(e)(2), it requests designation from this Commission due to its concern that the state commission may lack jurisdiction over tribally-owned carriers to make the eligible telecommunications carrier designation.³³⁰ Alternatively, the Cheyenne Telephone Authority asks the Commission to confirm the state commission’s designation to ensure that its eligibility status is preserved in the event the matter is reopened and a determination made that the South Dakota Commission does not have jurisdiction within the boundaries of the Cheyenne River Indian Reservation.³³¹

149. *Discussion.* In accordance with our conclusion above that section 214(e)(6) requires the Commission to designate an eligible telecommunications carrier only when the state lacks jurisdiction under section 214(e)(2), we dismiss Cheyenne Telephone Authority’s petition without prejudice. We find no reason before us to disturb the South Dakota Commission’s designation of the Cheyenne Telephone Authority as an eligible telecommunications carrier.³³² In addition, we note that this conclusion is consistent with our prior statement that, “[a]ny carrier that is able to be or has already been designated as an eligible telecommunications carrier by a state commission is not required to receive such designation from the Commission.”³³³

150. In reaching this conclusion we note that, as with the case of the Cheyenne Telephone Authority, many tribes may have ongoing jurisdictional disputes with state commissions. We are hopeful that our decision not to disturb the finding of the state commission in this instance will encourage state commissions and tribes to move forward with the designation process for determining eligibility for federal universal service support despite disagreements relating to the state’s exercise of jurisdiction over carriers providing service on tribal lands. We believe that to disturb a state commission’s prior determination that a particular carrier is eligible for federal universal service support would have the unintended effect of forcing the tribal authority to choose between delaying its designation request pending a lengthy resolution of disputed jurisdictional issues or conceding jurisdiction to the state commission for other purposes in

³²⁸ *Cheyenne River Sioux Tribe Telephone Authority Seeks FCC Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, AAD/USB File No. 98-21, DA 98-150 (rel. Jan. 28, 1998).

³²⁹ Letter from Rolayne Ailts West, South Dakota PUC, to Magalie Roman Salas, FCC, dated August 25, 1998.

³³⁰ According to the Cheyenne Tribal Authority, it submitted its request for designation to the South Dakota Commission prior to the adoption of section 214(e)(6) in order to continue to receive support after the eligibility requirements of the Act came into effect. Cheyenne Telephone Authority Petition at 7-8.

³³¹ Letter from James A. Casey, on behalf of the Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, FCC, dated August 23, 1999.

³³² See, e.g., *Universal Service Order*, 12 FCC Rcd 8859, para. 147.

³³³ *Section 214(e)(6) Public Notice* at 1.

order to be eligible for federal universal service support.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

151. *Deadline for Resolving Section 214(e) Designation Requests.* In this Further Notice of Proposed Rulemaking, we seek comment on the imposition of a time limit during which requests for designation as an eligible telecommunications carrier under section 214(e), filed either with this Commission or a state commission, must be resolved. As noted above, we are concerned that lengthy delays in addressing requests for designation may hinder the availability of affordable telecommunications services in many high-cost areas of the Nation. We believe it is unreasonable to expect a prospective entrant to enter a high-cost market and provide service in competition with an incumbent carrier that is receiving support, without knowing whether it is eligible to receive support. If new entrants do not have the same opportunity to receive universal service support as the incumbent, such carriers may be unable to provide service and compete with the incumbent in high-cost areas.³³⁴ As the Commission has previously concluded, competitively neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services.³³⁵ We believe such a result to be contrary to Congress' intent in adopting section 254 of the Act.

152. We therefore seek comment on whether to adopt a rule that would require resolution of the merits of any request for designation under section 214(e) within a six-month period, or some shorter period. In addition, we seek comment on whether to require a similar time limit for the resolution of the jurisdictional issues associated with requests for eligibility designations on tribal lands, and what that time limit should be. We intend to consult with members of the Joint Board on this issue and invite comment from the Joint Board and interested parties. We also seek on comment on the Commission's authority to enforce any such requirement imposed on state commissions. For example, we seek comment on our authority under sections 201(b), 253, 254 of the Act,³³⁶ or *AT&T v. Iowa Utilities Board*³³⁷ to enforce any deadline imposed on resolution of requests for eligibility designations under section 214(e).

153. *Alternative Frameworks for Resolving Designation Requests.* In light of the immediate need for expeditious resolution of designation requests from carriers serving tribal lands, we have adopted a framework for resolving designation requests filed at the Commission under section 214(e)(6). This framework is designed to streamline the process for designation of eligible telecommunications carriers serving tribal lands in order to expedite the availability of affordable telecommunications services to tribal communities. We are guided, however, by our desire to work cooperatively with the state commissions and

³³⁴ The Commission has recognized the importance of competitively neutral support mechanisms between competitive entrants and incumbent carriers in promoting competition and the provision of service in high-cost areas. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

³³⁵ *Universal Service Order*, 12 FCC Rcd at 8801, para. 48 (agreeing with the Joint Board that an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of *eligibility* in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework) (emphasis added).

³³⁶ 47 U.S.C. § 201(b) (allowing the Commission to prescribe such rules as may be necessary in the public interest to carry out the provisions of the Act); 47 U.S.C. § 253 (removal of barriers to entry); 47 U.S.C. § 254 (preserve and advance universal service).

³³⁷ *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

tribal authorities to consider alternative methods for facilitating the expeditious resolution of eligibility designation requests. We therefore seek comment on additional ways in which the state commissions, tribal authorities, and this Commission can work together toward this end. We look forward to collaborating further with state commissions and tribal leaders to consider additional measures we can take to resolve eligibility designation requests on tribal lands as expeditiously as possible.

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act

154. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

B. Final Regulatory Flexibility Analysis

155. As required by the Regulatory Flexibility Act (RFA),³³⁸ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice*.³³⁹ The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³⁴⁰

1. Need for and Objectives of this Report and Order and the Rules Adopted Herein

156. The Commission issues this Twelfth Report and Order (Order) as a part of its implementation of the Act's mandate that "[c]onsumers in all regions of the Nation . . . have access to telecommunications and information services . . .".³⁴¹ This Order implements that mandate by enhancing Lifeline and LinkUp support for low-income individuals living on tribal lands, as defined herein. This Order also outlines the process the Commission will follow in designating telecommunications carriers as eligible telecommunications carriers under section 214(e) of the Act³⁴² for the purposes of receiving universal service support under section 254(e).³⁴³ Our objective is to fulfill section 254's mandate that "all regions of the Nation . . . have access to telecommunications" with respect to tribal lands, which have the

³³⁸ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104- 121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

³³⁹ See *Further Notice*, 14 FCC Rcd at 21270-21282.

³⁴⁰ See 5 U.S.C. § 604.

³⁴¹ 47 U.S.C. § 254.

³⁴² 47 U.S.C. § 214(e).

³⁴³ 47 U.S.C. § 254(e).

lowest reported subscribership levels for telecommunications in the Nation.³⁴⁴

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

157. We received no comments directly in response to the IRFA in this proceeding. Some comments generally addressed small business issues, but these issues are not a part of this present Order.

3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

158. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the new rules.³⁴⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³⁴⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³⁴⁷ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁴⁸ A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”³⁴⁹ Nationwide, as of 1992, there were approximately 275,801 small organizations.³⁵⁰ And finally, “small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”³⁵¹ As of 1992, there were approximately 85,006 such jurisdictions in the United States.³⁵² This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than

³⁴⁴ See Section III.C.2., *supra*.

³⁴⁵ 5 U.S.C. § 603(b)(3).

³⁴⁶ 5 U.S.C. § 601(6).

³⁴⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

³⁴⁸ Small Business Act, 15 U.S.C. § 632.

³⁴⁹ 5 U.S.C. § 601(4).

³⁵⁰ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

³⁵¹ 5 U.S.C. § 601(5).

³⁵² U.S. Dept. of Commerce, Bureau of the Census, “1992 Census of Governments.”

50,000.³⁵³ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. In this Order, the Commission stated that the new rules will affect all providers of interstate telecommunications and interstate telecommunications services. Below, we further describe and estimate the number of small business concerns that may be affected by the rules adopted in this Order.

159. The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.³⁵⁴ We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telecommunications companies that are commonly used under our rules.

160. The most reliable source of information regarding the total numbers of common carriers and related providers nationwide, including the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).³⁵⁵ According to data in the most recent report, there are 4,144 interstate carriers.³⁵⁶ These carriers include, *inter alia*, incumbent local exchange carriers, competitive local exchange carriers, competitive access providers, interexchange carriers, other wireline carriers and service providers (including shared-tenant service providers and private carriers), operator service providers, pay telephone operators, providers of telephone toll service, wireless carriers and services providers, and resellers.

161. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”³⁵⁷ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.³⁵⁸

³⁵³ *Id.*

³⁵⁴ 13 C.F.R. § 121.201.

³⁵⁵ FCC, *Carrier Locator: Interstate Service Providers*, Figure 1 (Jan. 2000) (*Carrier Locator*). See also 47 C.F.R. § 64.601 *et seq.* (TRS).

³⁵⁶ *Carrier Locator* at Fig. 1.

³⁵⁷ 5 U.S.C. § 601(3).

³⁵⁸ Letter from Jere W. Glover, SBA, to Chmn. William E. Kennard, FCC, dated May 27, 1999. The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, *e.g.*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

162. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (“the Census Bureau”) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.³⁵⁹ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not “independently owned and operated.”³⁶⁰ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the decisions and rules in this Order.

163. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.³⁶¹ According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.³⁶² All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules in this Order.

164. *Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, Operator Service Providers, and Resellers.* Neither the Commission nor SBA has developed a definition particular to small local exchange carriers (LECs), interexchange carriers (IXCs), competitive access providers (CAPs), operator service providers (OSPs), or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.³⁶³ The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the

³⁵⁹ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (“1992 Census”).

³⁶⁰ 15 U.S.C. § 632(a)(1).

³⁶¹ 1992 Census, *supra*, at Firm Size 1-123.

³⁶² 13 C.F.R. § 121.201, SIC Code 4813.

³⁶³ 13 C.F.R. § 121.210, SIC Code 4813.

Telecommunications Relay Service (TRS).³⁶⁴ According to our most recent data, there are 1,348 incumbent LECs, 212 CAPs and competitive LECs, 171 IXC, 24 OSPs, 388 toll resellers, and 54 local resellers.³⁶⁵ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,348 incumbent LECs, 212 CAPs and competitive LECs, 171 IXC, 24 OSPs, 388 toll resellers, and 54 local resellers that may be affected by the decisions and rule changes adopted in this Order.

165. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.³⁶⁶ According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.³⁶⁷ The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules in this Order.

166. *Cellular, PCS, SMR and Other Mobile Service Providers.* In an effort to further refine our calculation of the number of radiotelephone companies that may be affected by the rules adopted herein, we consider the data that we collect annually in connection with the TRS for the subcategories Wireless Telephony (which includes Cellular, PCS, and SMR) and Other Mobile Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to these broad subcategories, so we will utilize the closest applicable definition under SBA rules – which, for both categories, is for telephone companies other than radiotelephone (wireless) companies.³⁶⁸ To the extent that the Commission has adopted definitions for small entities providing PCS and SMR services, we discuss those definitions below. According to our most recent TRS data, 808 companies reported that they are engaged in the provision of Wireless Telephony services and 23 companies reported that they are engaged in the provision of Other Mobile Services.³⁶⁹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time

³⁶⁴ See 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator* at Fig. 1.

³⁶⁵ *Carrier Locator* at Fig. 1. The total for resellers includes both toll resellers and local resellers. The TRS category for CAPs also includes competitive local exchange carriers (CLECs) (total of 129 for both).

³⁶⁶ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (“1992 Census”).

³⁶⁷ 13 C.F.R. § 121.201, SIC Code 4812.

³⁶⁸ *Id.*

³⁶⁹ *Carrier Locator* at Fig. 1.

to estimate with greater precision the number of Wireless Telephony Providers and Other Mobile Service Providers, except as described below, that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 808 small entity Wireless Telephony Providers and fewer than 23 small entity Other Mobile Service Providers that might be affected by the decisions and rules adopted in this Order.

167. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁷⁰ For Block F, an additional classification for "very small business" was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁷¹ These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.³⁷² No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we estimate that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by SBA and the Commissioner's auction rules.

168. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. The definition of a "small entity" in the context of 800 MHz SMR has been approved by the SBA,³⁷³ and approval for the 900 MHz SMR definition has been sought. The rules may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. Consequently, we estimate, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, some of which may be affected by the decisions and rules in this Order.

³⁷⁰ See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, FCC 96-278, WT Docket No. 96-59, paras. 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); see also 47 C.F.R. § 24.720(b).

³⁷¹ *Id.*, at para. 60.

³⁷² *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

³⁷³ See *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

169. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we estimate that the number of geographic area SMR licensees that may be affected by the decisions and rules in the order and order on reconsideration includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we estimate, for purposes of this IRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the decisions and rules in this Order.

170. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to Radiotelephone Communications companies.³⁷⁴ According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.³⁷⁵ Therefore, if this general ratio continues to 1999 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

171. *220 MHz Radio Service – Phase II Licensees.* The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz *Third Report and Order* we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁷⁶ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.³⁷⁷ An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.³⁷⁸ 908 licenses were auctioned in 3 different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group Licenses, and 875

³⁷⁴ 13 C.F.R. § 121.201, SIC Code 4812. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.

³⁷⁵ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

³⁷⁶ 220 MHz Third Report and Order, 12 FCC Rcd 10943, 11068-70, at paras. 291- 295 (1997). The SBA has approved these definitions. See Letter from A. Alvarez, SBA, to D. Phythyon, FCC (Jan. 6, 1998).

³⁷⁷ 220 MHz Third Report and Order, 12 FCC Rcd at 11068-69, para. 291.

³⁷⁸ See generally Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecom. Bur. Oct. 23, 1998).

Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: one of the Nationwide licenses, 67 percent of the Regional licenses, and 54 percent of the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.³⁷⁹ A reauction of the remaining, unsold licenses was completed on June 30, 1999, with 16 bidders winning 222 of the Phase II licenses.³⁸⁰ As a result, we estimate that 16 or fewer of these final winning bidders are small or very small businesses.

172. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

173. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.³⁸¹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).³⁸² We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.³⁸³ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

174. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.³⁸⁴ Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.³⁸⁵ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

175. *Fixed Microwave Services.* Microwave services include common carrier,³⁸⁶

³⁷⁹ Public Notice, "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After final Payment is Made," Report No. AUC-18-H, DA No. 99-229 (Wireless Telecom. Bur. Jan. 22, 1999).

³⁸⁰ Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," Report No. AUC-99-24-E, DA No. 99-1287 (Wireless Telecom. Bur. July 1, 1999).

³⁸¹ The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

³⁸² BETRS is defined in sections 22.757 and 22.759 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.759.

³⁸³ 13 C.F.R. § 121.201, SIC Code 4812.

³⁸⁴ The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

³⁸⁵ 13 C.F.R. § 121.201, SIC Code 4812.

³⁸⁶ 47 C.F.R. § 101 *et seq.* (formerly, Part 21 of the Commission's rules).

private-operational fixed,³⁸⁷ and broadcast auxiliary radio services.³⁸⁸ At present, there are approximately 22,015 common carrier fixed licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.³⁸⁹ We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

176. *Wireless Communications Services.* This service can be used for fixed, mobile, radio location and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees that may be affected by the decisions and rules in this Order includes these eight entities.

177. *Multipoint Distribution Systems (MDS).* The Commission has defined "small entity" for the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.³⁹⁰ This definition of a small entity in the context of MDS auctions has been approved by the SBA.³⁹¹ The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.³⁹²

178. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such

³⁸⁷ Persons eligible under Parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

³⁸⁸ Auxiliary Microwave Service is governed by Part 74 of the Commission's rules. *See* 47 C.F.R. § 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

³⁸⁹ 13 C.F.R. § 121.201, SIC Code 4812.

³⁹⁰ 47 C.F.R. § 21.961(b)(1).

³⁹¹ *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

³⁹² One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

companies generating \$11 million or less in annual receipts.³⁹³ This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this FRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, some which may be affected by the decisions and rules in this Order.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

179. In this Order, we adopt revisions to Part 54 that enhance universal service support for low-income individuals living on tribal lands, that remove certain administrative burdens that have prevented carriers not subject to state rate regulation, such as many tribal carriers, from providing certain tiers of Lifeline service to qualifying low-income consumers, and that clarify how the Commission will proceed under section 214(e) of the Act in the designation of eligible telecommunications carriers.

180. With respect to our rules enhancing Lifeline and Link-Up assistance on tribal lands, carriers will be required to ascertain applicant eligibility for these forms of low-income universal service support. Ascertainment of applicant eligibility will entail determining whether a particular applicant is (1) a low-income applicant, under the criteria for income eligibility set forth above,³⁹⁴ and (2) living on or near a reservation. This Order also clarifies and elaborates on carrier obligations to publicize the availability of Lifeline and Link-Up assistance, although no new carrier obligations are imposed. Furthermore, this Order changes the requirements placed upon carriers for the provision of second-tier and third-tier Lifeline support. A carrier not subject to state rate regulation may now obtain second-tier Lifeline support provided it certifies to the Administrator that it will pass through the full amount of any second-tier support it receives to qualifying low income subscribers, and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction. Such a carrier also may now obtain third-tier Lifeline support provided that the carrier or a tribe provides the local matching funds necessary to receive third-tier federal Lifeline support. Finally, because carriers are required to make low-income assistance available to qualifying customers, the rules and decisions in this Order expanding the level and types of support available to any carrier's customers will require that carrier to make such expanded support available to its qualifying customers.

181. Our clarification of how the Commission will proceed under section 214(e) of the Act in the designation of eligible telecommunications carriers will impose no additional reporting, recordkeeping, or other compliance requirements on carriers seeking eligible telecommunications carrier designation for the provision of service on tribal lands, but instead should diminish some carriers' legal costs by setting forth guidelines for carriers seeking such designation from the Commission. A state government, however, seeking to preserve a claim of its jurisdiction over any carrier seeking such designation from the Commission, will have to indicate to the Commission its jurisdictional claim in order for the Commission to refrain from entertaining such a designation proceeding until the state makes a final determination on its jurisdiction over that carrier.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and

³⁹³ 13 C.F.R. § 121.201.

³⁹⁴ See Section III.D.2.d., *supra*.

Significant Alternatives Considered

182. With respect to our rules enhancing Lifeline and LinkUp assistance on tribal lands, we emphasize that most of the information carriers will be required to examine in order to determine applicant eligibility are already collected pursuant to other federal programs for Indians and for low-income individuals, and are readily available. For example, BIA maintains and regularly publishes in the Federal Register lists of those areas in the Nation which fall under BIA's definition of "reservation" or are considered "near reservation." Moreover, carriers are already required to determine applicants' income eligibility under the existing Lifeline and LinkUp support mechanisms; this Order modifies those eligibility criteria merely by providing certain additional means-tested programs that low-income individuals living on tribal lands may use to establish their income eligibility. In order to apply these new eligibility criteria, carriers will not be required to make *de novo* evaluations of subscriber eligibility. Rather, carriers will only need to consult the decisions regarding particular applicants' low-income status already made by other government entities. Thus, the inquiry carriers will have to make to determine whether an applicant for the low-income support adopted in this Order meets the income eligibility requirement should not be substantially different from the inquiry carriers must already make for the Commission's existing low-income support mechanisms. Furthermore, our clarification of carrier obligations to publicize the availability of Lifeline and Link-Up assistance does not expand existing obligations or create additional ones; rather, this Order clarifies existing obligations under section 214(e) of the Act and our previous Orders.³⁹⁵ Additionally, the certifications required by our new rules for second and third tier Lifeline support impose at most a minimal burden on carriers seeking to obtain such support. Finally, to the extent the rules and decisions adopted in this Order require carriers to change their operations in order to deliver expanded support to qualifying customers, for example by changing their billing systems, we have some indication that the costs of making such modifications, if any, are minimal.³⁹⁶ Furthermore, to the extent the rules and decisions adopted in this Order entail any such costs, they also provide substantial financial benefits, by providing carriers with guaranteed revenue streams in place of billings subject to the risks of non-collection. We conclude that, in general, the compliance requirements entailed by the low-income support mechanisms adopted in this Order are not of a scope or magnitude substantially different from the compliance requirements entailed by our existing low-income support mechanisms.

183. With respect to our clarification of how the Commission will proceed under section 214(e) of the Act in the designation of eligible telecommunications carriers we conclude that the cost to a state government of filing with the Commission a statement asserting jurisdiction over any carrier seeking such designation for the provision of service to tribal lands, in order for the Commission to refrain from acting on the designation petition until the state makes a final determination regarding its jurisdiction over that carrier, will be minimal. Furthermore, because such filings would be made by the authorized state government body, rather than a local governing authority, it is doubtful that any government authority making such a filing with the Commission would be considered a small entity.³⁹⁷

³⁹⁵ See, e.g., *Universal Service Order*, 12 FCC Rcd at 8993, para. 407.

³⁹⁶ See, e.g., Letter from David Cosson, Kraskin, Lesse & Cosson, LLP to Irene Flannery, FCC, dated May 15, 2000 (citing indication by company that designs billing software for 60 rural telephone companies that billing could be "readily" modified to account for expanded Lifeline support for tribal communities).

³⁹⁷ See *supra*, at para. 158 (defining "small governmental jurisdiction").

6. Report to Congress.

184. The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

C. Effective Date of Final Rules

185. Pursuant to 5 U.S.C. § 553(d),³⁹⁸ the rules and rule changes adopted herein shall take effect thirty (30) days after their publication in the Federal Register.

D. Initial Regulatory Flexibility Analysis

186. As required by the Regulatory Flexibility Act (RFA),³⁹⁹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice provided below in section VI.E. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁴⁰⁰ In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.⁴⁰¹

1. Need for and Objectives of the Proposed Rules

187. The Commission issues the Further Notice of Proposed Rulemaking contained herein as a part of its implementation of the Act's mandate that "[c]onsumers in all regions of the Nation . . . have access to telecommunications and information services . . .".⁴⁰² The Further Notice seeks comment on rules setting a deadline for the consideration of petitions for designation of carriers as eligible telecommunications carriers under section 214(e) of the Act⁴⁰³ for the purposes of receiving universal service support under section 254(e).⁴⁰⁴ The Further Notice also seeks comment on alternative methods for facilitating expeditious resolution of eligibility designation requests. Our objective is to fulfill section 254's mandate that "all regions of the Nation . . . have access to telecommunications" with respect to tribal lands,

³⁹⁸ *See* 5 U.S.C. § 553(d).

³⁹⁹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁴⁰⁰ *See* 5 U.S.C. § 603(a).

⁴⁰¹ *See id.*

⁴⁰² 47 U.S.C. § 254.

⁴⁰³ 47 U.S.C. § 214(e).

⁴⁰⁴ 47 U.S.C. § 254(e).

which have the lowest reported subscribership levels for telecommunications in the Nation.⁴⁰⁵

2. Legal Basis

188. The legal basis as proposed for this Further Notice is contained in section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 254.

3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

189. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.⁴⁰⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁴⁰⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴⁰⁸ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁴⁰⁹ A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”⁴¹⁰ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁴¹¹ And finally, “small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”⁴¹² As of 1992, there were approximately 85,006 such jurisdictions in the United States.⁴¹³ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.⁴¹⁴ The Census Bureau estimates that this ratio is approximately accurate for all governmental

⁴⁰⁵ See Section III.C.2., *supra*.

⁴⁰⁶ 5 U.S.C. § 603(b)(3).

⁴⁰⁷ 5 U.S.C. § 601(6).

⁴⁰⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁴⁰⁹ Small Business Act, 15 U.S.C. § 632.

⁴¹⁰ 5 U.S.C. § 601(4).

⁴¹¹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁴¹² 5 U.S.C. § 601(5).

⁴¹³ U.S. Dept. of Commerce, Bureau of the Census, “1992 Census of Governments.”

⁴¹⁴ *Id.*

entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. The new rules proposed in this Further Notice may affect all providers of interstate telecommunications and interstate telecommunications services. Below, we further describe and estimate the number of small business concerns that may be affected by the rules proposed in this Further Notice.

190. The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.⁴¹⁵ We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telecommunications companies that are commonly used under our rules.

191. The most reliable source of information regarding the total numbers of common carrier and related providers nationwide, including the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).⁴¹⁶ According to data in the most recent report, there are 4,144 interstate carriers.⁴¹⁷ These carriers include, *inter alia*, incumbent local exchange carriers, competitive local exchange carriers, competitive access providers, interexchange carriers, other wireline carriers and service providers (including shared-tenant service providers and private carriers), operator service providers, pay telephone operators, providers of telephone toll service, wireless carriers and services providers, and resellers.

192. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁴¹⁸ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.⁴¹⁹ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

⁴¹⁵ 13 C.F.R. § 121.201.

⁴¹⁶ FCC, *Carrier Locator: Interstate Service Providers*, Figure 1 (Jan. 2000) (*Carrier Locator*). See also 47 C.F.R. § 64.601 *et seq.* (TRS).

⁴¹⁷ *Carrier Locator* at Fig. 1.

⁴¹⁸ 5 U.S.C. § 601(3).

⁴¹⁹ Letter from Jere W. Glover, SBA, to Chmn. William E. Kennard, FCC, dated May 27, 1999. The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, *e.g.*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

193. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (“the Census Bureau”) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.⁴²⁰ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not “independently owned and operated.”⁴²¹ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the rules proposed in this Further Notice.

194. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.⁴²² According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.⁴²³ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the rules proposed in this Further Notice.

195. *Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, Operator Service Providers, and Resellers.* Neither the Commission nor SBA has developed a definition particular to small local exchange carriers (LECs), interexchange carriers (IXCs), competitive access providers (CAPs), operator service providers (OSPs), or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.⁴²⁴ The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).⁴²⁵ According to our most recent data, there are 1,348

⁴²⁰ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (“1992 Census”).

⁴²¹ 15 U.S.C. § 632(a)(1).

⁴²² 1992 Census, *supra*, at Firm Size 1-123.

⁴²³ 13 C.F.R. § 121.201, SIC Code 4813.

⁴²⁴ 13 C.F.R. § 121.210, SIC Code 4813.

⁴²⁵ See 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator* at Fig. 1.

incumbent LECs, 212 CAPs and competitive LECs, 171 IXCs, 24 OSPs, 388 toll resellers, and 54 local resellers.⁴²⁶ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,348 incumbent LECs, 212 CAPs and competitive LECs, 171 IXCs, 24 OSPs, 388 toll resellers, and 54 local resellers that may be affected by the rules proposed in this Further Notice.

196. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.⁴²⁷ According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.⁴²⁸ The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the rules proposed in this Further Notice.

197. *Cellular, PCS, SMR and Other Mobile Service Providers.* In an effort to further refine our calculation of the number of radiotelephone companies that may be affected by the rules proposed herein, we consider the data that we collect annually in connection with the TRS for the subcategories Wireless Telephony (which includes Cellular, PCS, and SMR) and Other Mobile Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to these broad subcategories, so we will utilize the closest applicable definition under SBA rules – which, for both categories, is for telephone companies other than radiotelephone (wireless) companies.⁴²⁹ To the extent that the Commission has adopted definitions for small entities providing PCS and SMR services, we discuss those definitions below. According to our most recent TRS data, 808 companies reported that they are engaged in the provision of Wireless Telephony services and 23 companies reported that they are engaged in the provision of Other Mobile Services.⁴³⁰ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Wireless Telephony Providers and Other Mobile Service Providers, except as described below, that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 808 small entity Wireless Telephony Providers and fewer than 23 small entity Other Mobile Service Providers that might be affected by the rules

⁴²⁶ *Carrier Locator* at Fig. 1. The total for resellers includes both toll resellers and local resellers. The TRS category for CAPs also includes competitive local exchange carriers (CLECs) (total of 129 for both).

⁴²⁷ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (“1992 Census”).

⁴²⁸ 13 C.F.R. § 121.201, SIC Code 4812.

⁴²⁹ *Id.*

⁴³⁰ *Carrier Locator* at Fig. 1.

proposed in this Further Notice.

198. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁴³¹ For Block F, an additional classification for “very small business” was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴³² These regulations defining “small entity” in the context of broadband PCS auctions have been approved by SBA.⁴³³ No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we estimate that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by SBA and the Commissioner’s auction rules.

199. *SMR Licensees.* Pursuant to section 90.814(b)(1) of the Commission’s rules, 47 C.F.R. § 90.814(b)(1), the Commission has defined “small entity” in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. The definition of a “small entity” in the context of 800 MHz SMR has been approved by the SBA,⁴³⁴ and approval for the 900 MHz SMR definition has been sought. The rules may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. Consequently, we estimate, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, some of which may be affected by the decisions and rules in this Order.

200. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we estimate that the number of geographic area SMR licensees that may be affected by

⁴³¹ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, FCC 96-278, WT Docket No. 96-59, paras. 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); see also 47 C.F.R. § 24.720(b).

⁴³² *Id.*, at para. 60.

⁴³³ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

⁴³⁴ See *Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

the decisions and rules in the order and order on reconsideration includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we estimate, for purposes of this IRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the rules proposed in this Further Notice.

201. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to Radiotelephone Communications companies.⁴³⁵ According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.⁴³⁶ Therefore, if this general ratio continues to 1999 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

202. *220 MHz Radio Service – Phase II Licensees.* The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz *Third Report and Order* we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁴³⁷ We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁴³⁸ An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.⁴³⁹ 908 licenses were auctioned in 3 different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: one of the Nationwide licenses, 67 percent of the Regional licenses, and 54 percent of

⁴³⁵ 13 C.F.R. § 121.201, SIC Code 4812. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.

⁴³⁶ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

⁴³⁷ 220 MHz Third Report and Order, 12 FCC Rcd 10943, 11068-70, at paras. 291- 295 (1997). The SBA has approved these definitions. See Letter from A. Alvarez, SBA, to D. Phythyon, FCC (Jan. 6, 1998).

⁴³⁸ 220 MHz Third Report and Order, 12 FCC Rcd at 11068-69, para. 291.

⁴³⁹ See generally Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecom. Bur. Oct. 23, 1998).

the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.⁴⁴⁰ A reauction of the remaining, unsold licenses was completed on June 30, 1999, with 16 bidders winning 222 of the Phase II licenses.⁴⁴¹ As a result, we estimate that 16 or fewer of these final winning bidders are small or very small businesses.

203. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

204. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.⁴⁴² A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).⁴⁴³ We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.⁴⁴⁴ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

205. *Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.⁴⁴⁵ Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.⁴⁴⁶ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

206. *Fixed Microwave Services.* Microwave services include common carrier,⁴⁴⁷

⁴⁴⁰ Public Notice, "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After final Payment is Made," Report No. AUC-18-H, DA No. 99-229 (Wireless Telecom. Bur. Jan. 22, 1999).

⁴⁴¹ Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," Report No. AUC-99-24-E, DA No. 99-1287 (Wireless Telecom. Bur. July 1, 1999).

⁴⁴² The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

⁴⁴³ BETRS is defined in sections 22.757 and 22.759 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.759.

⁴⁴⁴ 13 C.F.R. § 121.201, SIC Code 4812.

⁴⁴⁵ The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

⁴⁴⁶ 13 C.F.R. § 121.201, SIC Code 4812.

⁴⁴⁷ 47 C.F.R. § 101 *et seq.* (formerly, Part 21 of the Commission's rules).

private-operational fixed,⁴⁴⁸ and broadcast auxiliary radio services.⁴⁴⁹ At present, there are approximately 22,015 common carrier fixed licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.⁴⁵⁰ We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

207. *Wireless Communications Services.* This service can be used for fixed, mobile, radio location and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees that may be affected by the rules proposed in this Further Notice includes these eight entities.

208. *Multipoint Distribution Systems (MDS).* The Commission has defined "small entity" for the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁴⁵¹ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁴⁵² The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities.⁴⁵³

209. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such

⁴⁴⁸ Persons eligible under Parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

⁴⁴⁹ Auxiliary Microwave Service is governed by Part 74 of the Commission's Rules. *See* 47 C.F.R. § 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

⁴⁵⁰ 13 C.F.R. § 121.201, SIC Code 4812.

⁴⁵¹ 47 C.F.R. § 21.961(b)(1).

⁴⁵² *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

⁴⁵³ One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.

companies generating \$11 million or less in annual receipts.⁴⁵⁴ This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this IRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, some which may be affected by the rules proposed in this Further Notice.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

210. Currently, there is no deadline for the consideration of petitions for designation of carriers as eligible telecommunications carriers under section 214(e) of the Act⁴⁵⁵ for the purposes of receiving universal service support under section 254(e).⁴⁵⁶ Under the rules proposed in the Further Notice, state commissions and the Commission would each have a set time frame within which to consider such petitions before them.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

211. Wherever possible, the Further Notice proposes general rules, or alternative rules to reduce the administrative burden and cost of compliance for small telecommunications service providers. Finally, the Further Notice seeks comment on measures to avoid significant economic impact on small business entities, as defined by section 601(3) of the Regulatory Flexibility Act.

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.

212. None.

E. Comment Dates and Filing Procedures

213. We invite comment on the issues and questions set forth in the Further Notice of Proposed Rulemaking and Initial Regulatory Flexibility Analysis contained herein. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,⁴⁵⁷ interested parties may file comments as follows: comments are due **August 7, 2000**, and reply comments are due **August 28, 2000**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

214. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the

⁴⁵⁴ 13 C.F.R. § 121.201.

⁴⁵⁵ 47 U.S.C. § 214(e).

⁴⁵⁶ 47 U.S.C. § 254(e).

⁴⁵⁷ 47 C.F.R. §§ 1.415, 1.419.

caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

215. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. Parties also should send three paper copies of their filing to Sheryl Todd, Accounting Policy Division, Common Carrier Bureau, Federal Communications Commission, 445 Twelfth Street, S.W., Room 5-B540, Washington, D.C. 20554.

216. Parties who choose to file by paper should also submit their comments on diskette to Sheryl Todd, Accounting Policy Division, Common Carrier Bureau, Federal Communications Commission, 445 Twelfth Street, S.W., Room 5-B540, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM-compatible format using Microsoft Word 97 for Windows or a compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read-only" mode. The diskette should be clearly labeled with the commenter's name, proceeding, including the lead docket number in the proceeding (CC Docket No. 96-45), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ("Disk Copy Not an Original.") Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

VII. ORDERING CLAUSES

217. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 218-220, 254, 303(r), 403, this REPORT AND ORDER, MEMORANDUM OPINION AND ORDER, AND FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED. The collections of information contained within this Order are contingent upon approval by the Office of Management and Budget. The Commission will publish a notice announcing the effective date of the collections of information.

218. IT IS FURTHER ORDERED that Part 54 of the Commission's rules, 47 C.F.R. Part 54, IS AMENDED as set forth in Appendix A attached hereto, effective thirty (30) days after the publication of this REPORT AND ORDER, MEMORANDUM OPINION AND ORDER, AND FURTHER NOTICE OF PROPOSED RULEMAKING in the Federal Register.

219. IT IS FURTHER ORDERED that Cellco's Petition for Designation as an Eligible Telecommunications Carrier IS DISMISSED WITHOUT PREJUDICE to the extent that it seeks designation for service in Maryland.

220. IT IS FURTHER ORDERED that Smith Bagley's Petition for Designation as an Eligible Telecommunications Carrier is DISMISSED WITHOUT PREJUDICE.

221. IT IS FURTHER ORDERED that the record in Western Wireless' Petition for Designation as an Eligible Telecommunications Carrier on the Crow Reservation SHALL BE

REOPENED, as discussed herein.

222. IT IS FURTHER ORDERED that Cheyenne River Sioux Tribe Telephone Authority's Petition for Designation as an Eligible Telecommunications Carrier is DISMISSED WITHOUT PREJUDICE.

223. IT IS FURTHER ORDERED that AUTHORITY IS DELEGATED to the CHIEF OF THE COMMON CARRIER BUREAU pursuant to section 0.291 of the Commission rules, 47 C.F.R. § 0.291, to modify, or require the filing of, any forms that are necessary to implement the decisions and rules adopted in this Order.

224. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
FINAL RULES

1. Section 54.400 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 54.400 Terms and definitions.

* * * * *

(a) *Qualifying low-income consumer.* A “qualifying low-income consumer” is a consumer who meets the qualifications for Lifeline, as specified in § 54.409.

* * * * *

(e) *Eligible resident of Tribal lands.* An “eligible resident of Tribal lands” is a “qualifying low-income consumer,” as defined in paragraph (a) of this section, living on or near a reservation, as defined in 25 CFR 20.1(r) and 20.1(v).

2. Section 54.401 is amended by revising paragraph (d) to read as follows:

§ 54.401 Lifeline defined.

* * * * *

(d) 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 stating the number of qualifying low-income consumers and the amount of state assistance. Eligible telecommunications carriers not subject to state commission jurisdiction also shall make such a filing with the Administrator. 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.

3. Section 54.403 is amended by revising paragraphs (a)(2) and (a)(3), adding a new paragraph (a)(4), and revising paragraph (b) to read as follows:

§ 54.403 Lifeline support amount.

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

* * * * *

(2) *Tier Two.* Additional federal Lifeline support in the amount of \$1.75 per month will be made available to the eligible telecommunications carrier providing Lifeline service to the qualifying low-income consumer, if that carrier certifies to the Administrator that it will pass through the full amount of Tier-Two support to its qualifying, low-income consumers and that it has received any non-federal regulatory approvals

necessary to implement the required rate reduction.

(3) *Tier Three*. Additional federal Lifeline support in an amount equal to one-half the amount of any state-mandated Lifeline support or Lifeline support otherwise provided by the carrier, up to a maximum of \$1.75 per month in federal support, will be made available to the carrier providing Lifeline service to a qualifying low-income consumer if the carrier certifies to the Administrator that it will pass through the full amount of Tier-Three support to its qualifying low-income consumers and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction.

(4) *Tier Four*. Additional federal Lifeline support of up to \$25 per month will be made available to a eligible telecommunications carrier providing Lifeline service to an eligible resident of Tribal lands, as defined in § 54.400(e), to the extent that:

(i) This amount does not bring the basic local residential rate (including any mileage, zonal, or other non-discretionary charges associated with basic residential service) below \$1 per month per qualifying low-income subscribers; and

(ii) The eligible telecommunications carrier certifies to the Administrator that it will pass through the full Tier-Four amount to qualifying eligible residents of Tribal lands and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction.

(b) For a qualifying low-income consumer who is not an eligible resident of Tribal lands, as defined in § 54.400(e), the federal Lifeline support amount shall not exceed \$3.50 plus the tariffed rate in effect for the primary residential End User Common Line charge of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service, as determined in accordance with § 69.104 or § 69.152(d) and (q) of this chapter, whichever is applicable. For an eligible resident of Tribal lands, the federal Lifeline support amount shall not exceed \$28.50 plus that same End User Common Line charge. Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges shall apply Tier-One federal Lifeline support to waive the federal End-User Common Line charges for Lifeline consumers. Such carriers shall apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in § 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.

4. Section 54.405 is revised to read as follows:

§ 54.405 Carrier obligation to offer Lifeline.

All eligible telecommunications carriers shall:

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

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

5. Section 54.409 is amended by revising paragraphs (a) and (b) and adding a new paragraph (c) to read as follows:

§ 54.409 Consumer qualification for Lifeline.

(a) To qualify to receive Lifeline service in a state that mandates state Lifeline support, a consumer must meet the eligibility criteria established by the state commission for such support. The state commission shall establish narrowly targeted qualification criteria that are based solely on income or factors directly related to income. A state containing geographic areas included in the definition of “reservation” and “near reservation,” as defined in 25 CFR 20.1(r) and 20.1(v), must ensure that its qualification criteria are reasonably designed to apply to low-income individuals living in such areas.

(b) To qualify to receive Lifeline service in a state that does not mandate state Lifeline support, a consumer must participate in one of the following federal assistance programs: Medicaid; food stamps; Supplemental Security Income; federal public housing assistance; and Low-Income Home Energy Assistance Program. In a state that does not mandate state Lifeline support, each eligible telecommunications carrier providing Lifeline service to a qualifying, low-income consumer must obtain that consumer’s signature on a document certifying under penalty of perjury that the consumer receives benefits from one of the programs listed in this paragraph and identifying the program or programs from which that consumer receives benefits. On the same document, a qualifying low-income consumer also must agree to notify the carrier if that consumer ceases to participate in the program or programs.

(c) Notwithstanding paragraphs (a) and (b) of this section, an individual living on a reservation or near a reservation, as defined in 25 CFR 20.1(r) and 20.1(v), shall qualify to receive Tiers One, Two, and Four Lifeline service if the individual participates in one of the following federal assistance programs: Bureau of Indian Affairs general assistance; Tribally administered Temporary Assistance for Needy Families; Head Start (only those meeting its income qualifying standard); or National School Lunch Program’s free lunch program. Such qualifying low-income consumer shall also qualify for Tier-Three Lifeline support, if the carrier offering the Lifeline service is not subject to the regulation of the state and provides carrier-matching funds, as described in § 54.403(a)(3). To receive Lifeline support under this paragraph for the eligible resident of Tribal lands, the eligible telecommunications carrier offering the Lifeline service to such consumer must obtain the consumer’s signature on a document certifying under penalty of perjury that the consumer receives benefits from at least one of the programs mentioned in this paragraph or paragraph (b) of this section, and lives on or near a reservation, as defined in 25 CFR 20.1(r) and 20.1(v). In addition to identifying in that document the program or programs from which that consumer receives benefits, an eligible resident of Tribal lands also must agree to notify the carrier if that consumer ceases to participate in the program or programs.

6. Section 54.411 is amended by adding new paragraphs (a)(3) and (d) and revising paragraph (b) to read as follows:

§ 54.411 Link Up program defined.

(a) * * * * *

(3) For an eligible resident of Tribal lands, a reduction of up to \$70, in addition to the reduction in

paragraph (a)(1) of this section, to cover 100 percent of the charges between \$60 and \$130 assessed for commencing telecommunications service at the principal place of residence of the eligible resident of Tribal lands. For purposes of this paragraph, charges assessed for commencing telecommunications services shall include any charges that the carrier customarily assesses to connect subscribers to the network, including facilities-based charges associated with the extension of lines or construction of facilities needed to initiate service. The reduction shall not apply to charges assessed for facilities or equipment that fall on the customer side of demarcation point, as defined in § 68.3 of this chapter.

(b) A qualifying low-income consumer may choose one or both of the programs set forth in paragraphs (a)(1) and (a)(2) of this section. An eligible resident of Tribal lands may participate in paragraphs (a)(1), (a)(2), and (a)(3) of this section.

* * * * *

(d) An eligible telecommunications carrier shall publicize the availability of Link Up support in a manner reasonably designed to reach those likely to qualify for the support.

7. Section 54.415 is revised to read as follows:

§ 54.415 Consumer qualification for Link Up.

(a) In a state that mandates state Lifeline support, the consumer qualification criteria for Link Up shall be the same as the criteria that the state established for Lifeline qualification in accord with § 54.409(a).

(b) In a state that does not mandate state Lifeline support, the consumer qualification criteria for Link Up shall be the criteria set forth in § 54.409(b).

(c) Notwithstanding paragraphs (a) and (b) of this section, an eligible resident of Tribal lands, as defined in § 54.400(e), shall qualify to receive Link Up support.

8. Section 54.417 is removed.

**APPENDIX B
PARTIES FILING INITIAL COMMENTS**

<u>Commenter</u>	<u>Abbreviation</u>
Air Touch Communications and Globalstar USA, Inc.	Air Touch
Arizona Telemedicine Program	ATP
Alaska Rural Coalition	Alaska Coalition
Alaska, Regulatory Commission of	RCA
Alaska, State of	Alaska
AMSC Subsidiary Corporation	AMSC
American Samoa Telecommunications Authority	ASTCA
AT&T Corp.	AT&T
Bell Atlantic Mobile, Inc.	BAM
Cellular Telecommunications Industry Association	CTIA
CenturyTel, Inc.	CenturyTel
CCI International, N.V. (Constellation)	
Crow Tribal Council	
Department of Health and Human Services, US	
Dobson Communications Corporation	
Eastern Shoshone Tribe	
Fort Belknap Community Council	
General Communication, Inc.	GCI
Gila River Telecommunications, Inc.	GRTI
Golden West Telecommunications Cooperative, Inc. Midstate Telephone Company Mount Rushmore Telephone Company Roberts County Telephone Cooperative Association	Golden West, <i>et al.</i>

RC Communications, Inc. Sully Buttes Telephone Cooperative, Inc. Interstate Telecom Cooperative Vivian Telephone Company	
GTE Service Corporation	GTE
Guam, Government of	Guam
Hawaii, State of	
Minnesota Public Utilities Commission	MNPUC
Montana Public Service Commission	Montana PSC
Motorola, Inc., and Iridium North America	Motorola/Iridium
National Rural Telecom Association and Organization for the Promotion and Advancement of Small Telecommunications Companies	NRTA & OPASTCO
National Telephone Cooperative Association	NTCA
Northern Mariana Islands, Commonwealth of	CNMI
Palau, Republic of	
Puerto Rico Telephone Company, Inc.	PRTC
Qualcomm, Inc.	Qualcomm
Rural Utilities Service	RUS
Salt River Pima-Maricopa Indian Community and the National Tribal Telecommunications Alliance	Salt River/NTTA
SkyBridge, L.L.C.	SkyBridge
Small Business in Telecommunications	SBT
Smith Bagley, Inc.	SBI
South Dakota Independent Coalition, Inc.	SDITC
Summit Telephone and Telegraph Company of Alaska	Summit
TDS Telecommunications Corporation	TDS Telecom

Titan Wireless	Titan
Tuscarora Indian Nation	
United States Cellular Corporation	USCC
United States Telecom Association and National Exchange Carrier Association	USTA/NECA
US West Communications, Inc.	US West
United Utilities, Inc.	UUI
Virgin Islands Telephone Corporation	Vitelco
Virgin Islands, the Public Service Commission	VIPSC
Western Alliance	
Western Wireless Corp.	Western Wireless
Wisconsin, Public Service Commission of	PSCW

**APPENDIX C
PARTIES FILING REPLY COMMENTS**

<u>Commenter</u>	<u>Abbreviation</u>
Alaska, State of	
Alaska Rural Coalition	
AT&T Corp.	AT&T
Bell Atlantic Telephone Co.	Bell Atlantic
Cook Inlet Region, Inc.	CIRI
Cheyenne River Sioux Tribe Telephone Authority	
General Communications, Inc.	GCI
GTE Service Corporation	GTE
Miami Tribe of Oklahoma	Miami Tribe
Motorola, Inc.	Motorola
Northern Mariana Islands, Commonwealth of	CNMI
National Telephone Cooperative Association	NTCA
National Rural Telecom Association	NRTA
Project Telephone Company, Inc., Scobey, Montana	Project Telephone
Puerto Rico Telephone Company	PRTC
Qualcomm, Inc.	Qualcomm
Rural Utilities Service	RUS
Satellite Industry Association	SIA
Tuscarora Indian Nation	Tuscarora
United States Cellular Corporation	USCC
US West Communications, Inc.	US West
Western Wireless Corp.	Western Wireless

**SEPARATE STATEMENT OF
COMMISSIONER SUSAN NESS**

*Re: Federal-State Joint Board on Universal Service; Promoting Deployment and
Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas
(CC Docket No. 96-45); Extending Wireless Telecommunications Services to Tribal
Lands (WT Docket No. 99-266)*

I support the actions we take today to expand access to basic telephone services for a segment of the population that has one of the lowest penetration rates in the United States. In a world that is moving towards broadband communications, we must remember that many Americans still lack basic services. The steps we take today for tribal and Alaska Native lands are long overdue. I am also pleased that the Commission has taken steps to encourage the deployment of wireless services, because terrestrial and satellite wireless services may prove critical to getting basic and advanced telecommunications services to tribal lands and other remote areas. I would urge the Commission to continue its efforts to increase telephone subscribership throughout the country, particularly in rural and insular areas; when more of us are connected, all of us benefit.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, 12th Report and Order and Memorandum Opinion and Order, CC Docket No. 96-45; *Extending Wireless Telecommunications Services*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-266.

I am proud to cast my vote in support of these items. Our decisions here reflect this agency's commitment to improving access to telephone service on tribal lands and, in turn, to opening the door to the Information Age.

Section 254 of the Communications Act requires the Commission to assure that all Americans have access to telecommunications services.¹ While 94 percent of Americans enjoy phone service today, just 47 percent of Indian tribal households on tribal lands have telephones. The policies we adopt today, including expanded Lifeline and Link Up coverage, should boost subscribership on tribal lands and create incentives for new infrastructure investment. We appropriately recognize that wireless-based services offer unique solutions to increasing telephone access in often-isolated and remote tribal lands. I strongly support the decision to award bidding credits in upcoming auctions to wireless carriers that commit to deploy facilities and offer service to tribal areas that have telephone subscription rates below 70 percent.

I am also pleased that the Commission has established an expedited process for handling petitions by carriers seeking designations as Eligible Telecommunications Carriers on tribal lands. Excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas. By committing to prompt resolution of pending petitions, we should speed deployment of telecommunications infrastructure.

Finally, I am pleased that the Commission is reaffirming its commitment to promote a government-to-government relationship with tribal nations and to recognize that tribal nations have rights to set their own communications priorities and goals. To that end, I look forward to the training session the Commission will hold this September to assist tribal nations in making decisions about telecommunications.²

Our actions today, and our commitment to continue to act in the future, will help fulfill the

¹ 47 U.S.C. § 254(b)(3).

² See "FCC Announces the Indian Telecom Training Initiative to be Held September 25-28, 2000" (rel. Apr. 24, 2000) <http://www.fcc.gov/Bureaus/Wireless/News_Releases/2000/nrw10012.doc>.

mandate of Congress and, I believe, our moral obligation to ensure that all Americans enjoy the benefits of the Information Age.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, APPROVING IN PART AND DISSENTING IN PART

Re: Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas (CC Docket No. 96-45)

Like my colleagues, I wholeheartedly support the decision to begin addressing the incredibly low rates at which American Indians and Alaska Natives living on tribal lands currently subscribe to basic telephone service. Pursuant to Section 254 of the Act, we are duty-bound to promote the availability of phone service to all Americans. Even before the 1996 Act was passed, the historic universal service policies of this Commission and state commissions had yielded a remarkable rate of telephone subscribership, well above 90% for the country nationwide. And yet according to statistics obtained from the 1990 Census, subscribership among certain populations languishes: subscribership among the rural poor falls roughly 20% behind that of the nation as a whole, and American Indians living on tribal lands are only *half* as likely as other Americans to subscribe to phone service.

The Commission cannot turn a blind eye to these enormous disparities; we have an affirmative duty, at a minimum, to investigate and understand these disparities. Moreover, if these disparities result from factors that we cannot tolerate under section 254, we must take steps to reduce these disparities. That is why I support the vast majority of the measures we adopt in this *Order*. Among other things, I generally support expanding the eligibility criteria of our low income universal service programs to include income-dependent eligibility criteria employed in programs in which poor tribal members are more likely to participate. I also support requiring carriers receiving Lifeline and Link Up support to publicize the availability of such support in a manner that is likely to reach poor tribal members. In addition, I support establishing more effective procedures by which carriers not subject to state commission jurisdiction may seek designation as telecommunications carriers eligible to receive universal service support. With Indian subscribership statistics like those before us, I agree that we must do *something*.

But as a government agency, the Commission cannot do just *anything*, no matter how well-intended or politically-appealing. We must take action based on an adequate record and a thorough and logical examination of what that record does and *does not* tell us. Further, we need to balance carefully the interests of those who would benefit directly from our actions against the interests of those who would be affected indirectly. I believe it is incumbent upon me to carry out these responsibilities even when my personal sympathies would allow me to accept a weaker justification for our actions.

I regret that, given the state of the record before us now, I cannot conclude that the Commission has satisfied its responsibility to substantiate narrow portions of this decision, and thus I must regretfully dissent in part. As the *Order* correctly notes, universal service funding should be "sufficient" to satisfy the statute, but should not be more than is necessary. Yet this *Order* is hardly faithful to that principle; we have failed to show why increases in Lifeline funding are, in fact, necessary. Repeatedly, commenters noted that one central problem on tribal lands is that residents fail to avail themselves of the existing Lifeline program, thereby leaving money to which they should be eligible on the table. The reason identified is that tribal members often do not participate in the state and federal government programs that we use as proxies for low income (e.g., social security, federal housing assistance, etc.). Instead, many of these individuals subscribe to programs administered by tribal governments. It is entirely possible that establishing new and more appropriate proxies for income, which we do in this item, will sufficiently offset the cost of service and, consequently, increase penetration, without adding new money to the program. The

record simply does not offer any solid justification for actually expanding the program given this possibility.¹ To expand the program without substantiation of need contravenes the limiting principle we purport to abide by when considering expansion of funding.

As is my practice, I remain open to being persuaded that expanding funding in the manner contemplated in this decision is necessary to improve Indian subscribership. But that will require more time, explanation and credible data than could reasonably be provided at this time. Thus, with respect to these narrow aspects of this *Order*, I must respectfully and reluctantly dissent.

¹ Indeed, the *Order's* attempt to justify expansion of funding on the basis of the current record is, at best, curious. The *Order* merely points to evidence of a correlation between low income and low subscribership, without making any effort to show why this *correlation* demonstrates *causation* (*i.e.*, that this correlation shows that inhabitants of tribal lands do not subscribe *because* they are poor). Similarly, the *Order's* reliance on efforts to increase Lifeline support in other areas to justify expanding such support to the poor on tribal lands is undermined by the central premise of our efforts to improve subscribership on these lands: that methods successful in promoting subscribership in most poor areas have not been effective in promoting subscribership in tribal areas.