

TESTIMONY OF ALFRED LAPAZ
SECRETARY OF THE MESCALERO APACHE TRIBAL COUNCIL
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON UNIVERSAL SERVICE FUND REFORM: ENSURING A
SUSTAINABLE AND CONNECTED FUTURE FOR NATIVE COMMUNITIES
JUNE 7, 2012

INTRODUCTION

Good afternoon, Chairman Akaka, Vice Chairman Barrasso, and Members of the Committee. My name is Alfred LaPaz and I serve as Secretary of the Mescalero Apache Tribal Council. I am also a member of the Board of Directors of the Mescalero Apache Telecom, Inc. (MATI). I am accompanied today by Godfrey Enjady, General Manager of MATI. Thank you for the opportunity to testify today before the Committee about the impacts of the Universal Service Fund (USF) reforms on tribal communities and tribally-owned telecommunications providers like MATI.

This hearing is timely as the Mescalero Apache Tribe (Tribe) is greatly concerned about the pending July 1, 2012, implementation of the Federal Communications Commission's (FCC) Connect America Fund (CAF) Order (Order). The purpose of the Order is to modernize and reform USF and intercarrier compensation (ICC) programs to address the broadband gap in rural and underserved communities. We believe that, unless our concerns are addressed, the Order will actually have a detrimental, and even opposite, effect on reservations.

BACKGROUND

The Tribe entered into a treaty with the United States on July 1, 1852. This treaty, known as the Treaty with the Apaches, promised the Tribe a permanent homeland in its aboriginal territory. The Mescalero Apache Reservation (Reservation), located in the White and Sacramento Mountains of rural south-central New Mexico, was created by a succession of Executive Orders in the 1870's and 1880's. The Reservation spans approximately 720 square miles across south-central New Mexico. Our elevation ranges from 5,400 to over 12,000 feet above sea level. The Reservation is home to approximately 4,500 tribal citizens and approximately 200 non-Indian residents.

Like many reservations, the Tribe suffers some of the most challenging socioeconomic conditions, including high unemployment and poverty. The poverty rate on the Reservation is 18.2%, compared to 15% for the rest of the Nation. In addition, 84% of MATI customers qualify for FCC's Lifeline program, which provides monthly discounts for low-income customers, compared to 21.8% for the rest of the Nation.

Throughout the 1900's, the Reservation had limited access to telecommunications and information services. Our Reservation, like many others throughout Indian country, has a low population density, faces high costs to build communications infrastructure, and has residents with little means to pay for high cost services. These circumstances simply do not fit into the business model of a private telecommunications company. In the mid-1990's, the Tribe recognized that only 48% of its residents had access to telecommunications and information services. To address this gap, the Tribe established MATI, which is a telecommunications enterprise wholly owned by the Tribe. MATI's sole purpose is to bring quality communications services to the Tribe's residents. Since 2001, MATI has transformed the communications service landscape within its 720 square mile service area. Today, 97% of tribal residents have basic local service available to them, and 92% of these residents have access to broadband-based Internet. Closing the service gap by essentially doubling the level of service in the decade since MATI began providing services to tribal residents is an extraordinary achievement.

MATI's success is due, in part, to the help of two important federal programs – USF and USDA's Rural Utilities Service (RUS) lending program. Through RUS, MATI was able to obtain low-cost financing to assist in building the network that is in use today. USF, through its cost support programs, ensures that MATI's customers have access to affordable telecommunications services in our remote tribal area. MATI, like all tribally-owned telecommunications providers, serves an area that is historically underserved, lacks population density, exhibits chronic economic troubles, and has scarce labor resources. These factors provide little or no incentive for other providers to serve our Reservation. Without MATI and without the assistance from RUS and USF, the Mescalero Apache people would be relegated to low quality voice services and would have little or no quality Internet access service. The Reservation could easily go back to below 50% service availability.

FCC ORDER AND USF

The FCC Order leaves Indian country behind as a result of reductions in USF revenues

Last month, FCC Chairman Julius Genachowski testified before the Senate Committee on Commerce, Science, and Transportation that the Order would “spur wired and wireless broadband build-out to hundreds of thousands of rural Americans.” He said that the Order would set a path forward in order to achieve “universal broadband by the end of the decade.”

The Order sets forth an ambitious implementation schedule to accomplish its goal. The Tribe supports FCC’s goal to address the broadband gap for all Americans but is deeply concerned that USF reform efforts will leave Indian country behind as it moves the rest of the country into the 21st century. For example, the Order would reduce and eliminate support mechanisms for MATI and other tribally-owned providers. This result is in direct conflict with the goals established by the National Broadband Plan, which reads in part:

Many Tribal communities face significant obstacles to the deployment of broadband infrastructure, including high build-out costs, limited financial resources that deter investment by commercial providers and a shortage of technically trained members who can undertake deployment and adoption planning. Current funding programs administered by NTIA and RUS do not specifically target funding for projects on Tribal lands and are insufficient to address all of these challenges. ***Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding.*** (Emphasis added)

Perhaps most troubling is the lack of meaningful consultation by the FCC with tribes during development of the Order. While the FCC sought input from tribally-owned providers before and after the Order was released, the FCC did not conduct formal tribal consultations where affected tribal governments could engage in discussions with senior officials. We urge the FCC to initiate tribal consultations before implementing the Order. This request is consistent with the FCC’s Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, which reads, in part, that the FCC, “in accordance with the federal government’s trust responsibility...will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments....” Engaging in meaningful consultation also falls within the spirit of Executive Order 13175, “Consultation and Coordination with Tribal Governments” that requires all federal agencies to consult on matters that have significant impacts on tribes.

Further, while the FCC does maintain a policy of government-to-government relationship with Indian tribes, the Tribe is deeply troubled that some at the FCC question the Commission's obligation to Indian tribes because the protection of tribal sovereignty and the federal government's obligations to Indian tribes are not expressly referenced in the Communications Act of 1934. While it exists as an independent agency, the FCC is part of the federal government. The federal government, in hundreds of treaties with Indian tribes, and in hundreds of federal laws and court decisions, has acknowledged that it incurs a legal obligation to improve conditions on Indian reservations. These federal obligations stem from the hundreds of millions of acres of tribal homelands that were ceded to or taken by the United States to help build this great Nation. As a result, the Tribe urges the FCC to recognize its existing duty to engage in government-to-government consultation with all federally recognized Indian tribes that will be impacted by the proposed policy. That consultation has not yet taken place with regard to the Order.

Impacts on MATI based upon USF reforms

On October 27, 2011, the FCC adopted the Order to modernize and reform USF and ICC. As originally devised, the Order would have had significant negative impacts on MATI and many other tribally-owned providers servicing Indian country. MATI estimated that the initial cost mechanism (the Quantile Regression Analysis [QRA]) contemplated in the Order would have resulted in a massive reduction in USF annual support of over \$800,000, representing 27% of MATI's total federal support and 15% of its total revenues. Under this scheme, MATI would not have been able to meet its RUS loan repayment and other obligations.

On April 25, 2012, after hearing from a number of tribal telecoms, the FCC issued a clarifying order on the cost mechanism related to High Cost Loop Support (HCLS), a major component of USF, that contained new factors that has reduced the Order's impact on federal HCLS funding levels for tribal telecoms. MATI now estimates the annual reduction in federal support to be \$90,000 using FCC'S QRA methodology. This revision alone caused an 80% *upward* swing in MATI's federal support, unmistakably showing the unpredictable outcomes of the QRA. While the April order made adjustments to mitigate the potential devastation to tribal telecoms, it still equates to a significant reduction for MATI's HCLS.

Moreover, there are other significant aspects of the Order that still have not been addressed and could be equally damaging to MATI. For example, the Order extends the

corporate expense limitation to Interstate Common Line Support (ICLS), which is a support mechanism for improving subscriber-based basic and broadband services. MATI estimates that this modification will result in an annual loss of \$137,000.

In addition, we are concerned about other features of the Order that eliminate and phase out support mechanisms such as the Local Switching Support (LSS) and Safety Net Additive (SNA) programs, which will negatively impact rural Incumbent Local Exchange Carrier (ILEC) communities and the customers they serve. To date and resulting from the Order, the FCC has not adopted a long-term plan for getting broadband services out to consumers served through small, traditionally-regulated, rural ILECs. The Tribe is concerned that FCC's short-term solutions will have a drastic impact on tribally-owned companies, which are located in rural areas. The uncertainty created in the area of universal service support will erode the confidence needed in companies, lenders, and customers to provide, invest in, and purchase broadband-capable services. We urge the FCC to carefully consider the unique challenges of tribally-owned providers servicing Indian country as it continues to make decisions about the USF support mechanisms.

Finally, the FCC continues to offer the waiver process as a relief mechanism available to providers who fear financial ruin as a result of the Order. However, the waiver process remains unclear and uncertain. According to the Order, the waiver application will be subjected to a "rigorous, thorough and searching review comparable to a total company earnings review." The Tribe is concerned that this process may require disclosures of tribal government finances and other wholly tribally-owned enterprises and businesses. Further, given the importance of the waiver and its uncertain requirements, a waiver application may be highly expensive and cumbersome for small tribal providers, like MATI, to complete. Without some certainty and transparency in the waiver process, the threshold to obtain a waiver seems unattainable as there is no guarantee that the FCC will grant the requested relief. We urge the FCC to consider an alternate process that respects tribal governments and honors the legal treaty and trust obligations of the United States to the Tribe and all of Indian country as well as acknowledges the unique challenges facing tribes and tribal telecommunications providers.

In general, the uncertainty created by the Order has compelled MATI to shift its planning priorities from expansion of services through continued reinvestment to a system of sustaining current operations with reduced funding. Taking steps to reduce costs and develop solutions to

mitigate the adverse impacts of the Order will put an end to MATI's reinvestment program as it halts plans to build-out its broadband capable network and ceases upgrades on its existing network, which will result in a degradation of service quality on its current network. This scenario will severely limit the Tribe's plans for economic growth, lead to less capital, likely lead to substantial loss of employment opportunities, and possibly shutter business operations altogether.

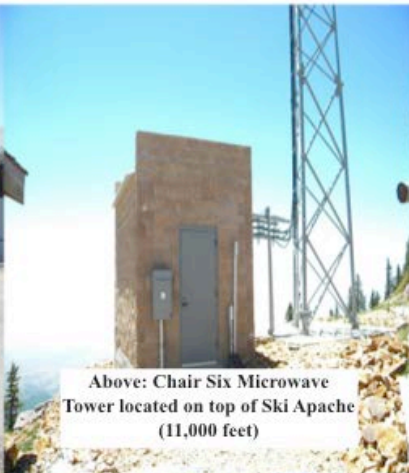
CONCLUSION

While the Tribe appreciates the goal of the FCC to modernize and reform USF to address the broadband gap in rural and underserved communities, we do not believe that the Order takes into account the gaps that will be created in Indian country as a result of many of the reforms. Instead of increased investment in broadband-capable networks, there is likely to be less. Instead of increased availability of quality broadband-capable services, customers in many areas will be lucky to maintain the current level of services and affordable costs. Without adequate support and relief mechanisms in place, which is what Congress clearly contemplated in Section 254 of the Telecom Act of 1996, some tribal communities run the risk of becoming an under- or even unserved area, which ironically, is at odds with FCC's goals. The Tribe urges the Committee to take action now by working with the FCC and the authorizing Committee to ensure that Native Americans have access to a connected future. If the FCC's Order remains intact without any further modifications, the lofty goals of the National Broadband Plan will be unreachable.

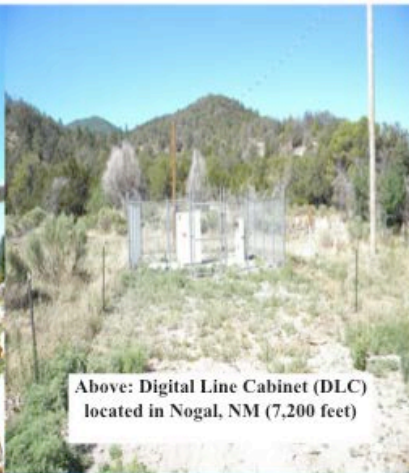
Thank you again for the opportunity to provide these views on behalf of the Tribe. I welcome any questions that the Committee may have at this time.



Above: MATI administrative offices, which consist of six single-wide leased trailers (7,200 feet)



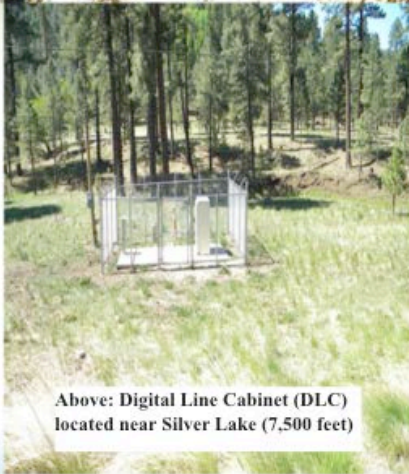
Above: Chair Six Microwave Tower located on top of Ski Apache (11,000 feet)



Above: Digital Line Cabinet (DLC) located in Nogal, NM (7,200 feet)



Above: Communications Hut adjacent to microwave tower on Cow Mountain (10,000 feet)



Above: Digital Line Cabinet (DLC) located near Silver Lake (7,500 feet)



Above: Digital Line Cabinet (DLC) near Whitetail (7,600 feet)