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

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	

COMMENTS OF SMITH BAGLEY, INC.

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Summary

While Smith Bagley, Inc., commends the Commission for its stewardship of the universal service program and its commitment to closing the Digital Divide, SBI is concerned that the Notice of Proposed Rulemaking signals a false step, reflecting a willingness to skew the Commission's application of statutory principles governing the Universal Service Fund while ignoring more effective solutions that would achieve greater consistency within the statutory framework.

Rather than seeking to impose a topline budget cap across all USF programs, which would conflict with the legislative responsibility to take action if Congress concludes that the size of the USF funding mechanism has become politically unacceptable, the Commission should take three steps to address the issues it presents in the NPRM:

(1) Calculate the amount of funding necessary to take the universal service actions needed to ensure access to advanced broadband services in rural America.

(2) Estimate the amount of time needed to take these actions, in order to expedite deployment of advanced broadband networks in rural America.

(3) Adopt sufficient funding measures to carry out the required tasks within the specified time frame.

The central flaw with the topline budget cap proposal is that the Commission's effort to identify if there is "too much subsidization," and then to use funding reduction mechanisms to address this perceived problem, would not be consistent with the principles enacted in Section 254(b) of the Communications Act of 1934, and would ignore the Commission's responsibilities under the statute. In fact, a topline budget cap would unavoidably result in the Commission's

failing to meet what it has defined as its top priority: closing the Digital Divide, which today is imposing unacceptable disadvantages on rural Americans, especially those living on Tribal lands.

The proposed overall budget cap is at odds with Section 254(b) because it erases the principle of sufficient funding. The NPRM suggests that the cap would result in a specific and predictable funding mechanism, but fails to explain how its proposal would ensure that USF funding is sufficient to achieve the statutory mandate that rural Americans should have access to advanced broadband services comparable to services available to urban consumers.

The Commission should forge a different and more promising path toward meeting all of the USF goals enacted by Congress. An obvious route is accomplishing contribution reform, which the Commission has long acknowledged to be necessary.

SBI suggests that the Commission should refocus this rulemaking to explore ways to spread the burden of funding USF in a more equitable way, such as, for example, by increasing the contribution base. It is becoming untenable for the Commission to insist on a policy that relies overwhelmingly on contributions from interstate voice service revenues to fund USF programs that increasingly promote the deployment of advanced broadband services.

Finally, if the Commission chooses to move forward with its proposal for a topline budget cap, it should make clear that support (in any of the USF programs) used to provide voice or broadband services on remote Tribal lands is exempt from any reductions. Such an exemption is necessary and appropriate, given the Commission's acknowledgment that USF plays an important role in overcoming the extraordinary difficulties faced by remote Tribal communities in gaining access to needed services.

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Smith Bagley, Inc. ("SBI"), by its counsel, hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking seeking comment on establishing an overall budget cap on the Universal Service Fund ("USF" or "Fund") and on "ways [that such a cap] could enable the Commission to evaluate the financial aspects of the four USF programs in a more holistic way ...."[1]

I. INTRODUCTION.

SBI appreciates and supports the Commission's longstanding efforts to improve efficiencies in all universal service programs. Responsible stewardship is critical to the success of this most important FCC program, funded by contributions from American consumers of interstate telecommunications services. That said, in seeking comment on whether to impose a

[1] *Universal Service Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46 (rel. May 31, 2019) ("*NPRM*"). Comments are due not later than July 29, 2019. *Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, DA 19-628 (WCB July 5, 2019) (para. 5).

system-wide budget cap on all USF funding, the Commission appears to tip the balance well in favor of minimizing the burden on contributors rather than relieving the burdens faced by rural Americans who lack fixed and mobile broadband services.

In addition, the proposal implicates the division of labor intended by Congress in the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of 1996 ("1996 Act"). A reasonable reading of the Act is that the FCC is responsible for carrying out but not exceeding Congressional directives set forth in a statute.[2] Here, Congress never enacted any statutory directive that the Commission should adopt a topline cap for the Fund, nor did Congress legislate that the Fund should be "sustainable."[3] A fair reading of the statute is that, if as a result of the Commission's carrying out its statutory directives, the size of the USF funding mechanism becomes politically unacceptable, that is a problem for Congress to address.

The Commission has repeatedly indicated that closing the Digital Divide is its number one mission.[4] Accordingly, rather than exploring steps that could ultimately reduce funding for rural broadband, the Commission should focus on taking three steps to attack the Digital Divide:

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[2] Actions by Federal agencies are circumscribed by the fundamental rule that they may not take any action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). The Commission, however, has been characterized as "an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text." *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). The Supreme Court has held that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider …." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Given that Section 254 states that the Commission "shall base" its actions carrying out the section on universal service principles specified in the statute, "the expression of one thing [in Section 254] implies the exclusion of others." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). Thus, the Commission cannot take actions under Section 254—such as imposing a topline budget cap—if there is no reason to conclude that Congress intended those actions to be within the scope of the authority Congress was granting to the agency.

[3] The *NPRM* notes that "[a] cap could promote efficiency, fairness, accountability, and sustainability of the USF programs." *NPRM* at para. 1.

[4] For example:

ONE Estimate the amount of funding necessary to accomplish the various tasks that must be carried out to ensure that rural Americans have access to advanced broadband services that are reasonably comparable to those in urban areas, in both quality and price. Such calculations depend upon accurate data, making it important that the Commission improve the mechanisms upon which it relies for the collection and reporting of broadband availability and usage data.

TWO Determine reasonable time frames for carrying out the various steps necessary to eliminate the Digital Divide, so that advanced broadband services are available to all Americans as expeditiously as possible.

THREE Once the amount of funding and the time frame within which to complete the task are determined, adopt the measures necessary to raise the funds and make program adjustments to ensure carriers complete the tasks.

A critical focus must be pursuing USF contribution reforms that will spread contribution obligations across a broader base of contributors, thus enabling the Commission to accomplish the USF goals Congress gave it, while maintaining equitable contribution obligations. The Commission also should recognize that the march of technology will not hit the pause button to await the Commission's efforts to provide sufficient funding for the deployment of advanced broadband services to rural communities. The job of deploying 4G networks in rural areas is not yet done, while 5G technology is on the near-term horizon.[5] Accordingly, the Commission needs to

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> For the past two years, the Commission has taken up the mantle [and] has made closing the digital divide between Americans with, and without, access to modern broadband networks its top priority. Modern society is an increasingly digital one, and accessing advanced services is essential to ensuring that all Americans can participate and thrive. We remain committed to ensuring that all Americans, including those in rural areas, Tribal lands, and disaster-affected areas, have the benefits of a high-speed broadband connection.

Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 18-238, 2019 Broadband Deployment Report, FCC 19-44 (May 29, 2019), at para. 1.

[5] A report issued last year projects 100 million 5G connections in the United States by 2023, and 190 million 5G connections by 2025. vMOX, "U.S. Forecast: 190M Connections by 2025 (Apr. 25, 2018), *accessed at* https://www.vmox.com/new-blog/2018/4/25/us-5g-forecast-190m-connections-by-2025#.

start planning for how it will support the deployment of higher-speed 5G networks in rural America.

The Commission's strategy to facilitate America's superiority in 5G technology (the "5G FAST Plan") currently has three components: "(1) pushing more spectrum into the marketplace; (2) updating infrastructure policy; and (3) modernizing outdated regulations."[6] It is true that the Commission has announced plans to use a reverse auction mechanism to "inject $20.4 billion into high-speed broadband networks in rural America over the next decade."[7] However, there is no guarantee that this level of funding will be adequate because the Commission has yet to engage in any systematic effort to determine the amount of funding needed to ensure that rural Americans have sufficient and timely access to 5G services.

One way to emphasize the importance of this objective would be to amend the Commission's 5G FAST Plan to add a fourth component: taking immediate steps to determine how federal USF will bring high-quality affordable 5G broadband service to rural America. By focusing on measuring the problem, fixing a timeline for solving it, and then raising the funds needed to do the job, the Commission will assist Congress in assessing whether the overall job requires an appropriation, a change to how funds are contributed, or a cap on the USF.

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[6] *See* "The FCC's 5G FAST Plan," *accessed at* https://www.fcc.gov/5G.

[7] *FCC Chairman Pai Announces Major Initiatives to Promote U.S. Leadership on 5G and Connect Rural Americans to High-Speed Internet at White House Event*, Fact Sheet (Apr. 12, 2019), *accessed at* https://www.fcc.gov/document/chairman-pais-5g-auction-rural-digital-opportunity-proposals; *see* "Rural Digital Opportunity Fund," FCC Fact Sheet, Notice of Proposed Rulemaking (tentative draft on circulation) (July 11, 2019), *accessed at* https://docs.fcc.gov/public/attachments/DOC-358432A1.pdf.

II. DISCUSSION.

A. Topline USF Budget Caps Would Not Be Consistent with the Statutory Universal Service Mandates.

The *NPRM* expresses the Commission's interest in imposing a "topline" budget cap based on its fear that "too much subsidization could negatively affect the affordability of telecommunications services …."[8] The *NPRM*, however, provides little clarity regarding the means to be used in determining at what point subsidization becomes "too much."

It is certainly possible that the size of the USF could increase to a point where it becomes politically unacceptable, because Fund contribution payments passed through by service providers to their to customers would be considered too burdensome for some citizens, especially low-income Americans who do not qualify for Lifeline. It is also possible, however, that such a Fund size would be necessary to meet Congress's statutory goals for providing advanced telecommunications and information services to rural Americans, as set forth in Section 254 of the Act.[9]

Additionally, the Commission makes no attempt to quantify what level of increase in USF contributions would have a material effect on the affordability of basic connectivity for American consumers. This is especially important under the current contribution mechanism, pursuant to which heavier users of interstate telecommunications services contribute proportionately more.

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[8] *NPRM* at para. 4. The U.S. Court of Appeals for the Tenth Circuit has acknowledged that "excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)." *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005), *cited in NPRM* at para. 4 n.5. The referenced principle states that "[q]uality services should be available at just, reasonable, and affordable rates." 47 U.S.C. § 254(b)(1).

[9] 47 U.S.C. § 254.

The issue, however, is who should be charged with the task of monitoring whether the increased size of the Fund is reaching levels that are not politically defensible, and who should be charged with doing something about it. In SBI's view, the Commission must measure the Digital Divide and develop policies to close it. That involves undertaking the narrower task of making an accurate and realistic assessment of the funding necessary to ensure that rural Americans have access to "advanced telecommunications and information services"[10] that are "reasonably comparable to those services provided in urban areas …."[11] The product of this analysis would be a level of funding that is ***not*** "too much subsidization," but instead is the amount of funding the Commission must collect and make available to carry out its statutory mandate.[12] What is this mandate? The statute gives the Commission the job of creating "specific, predictable, and ***sufficient***" support mechanisms to "preserve and advance" universal service.[13]

As the expert agency charged with administering the USF, one of the Commission's core duties is to periodically inform Congress on the status of the overall Fund, as well as each individual program, including an assessment of future needs.[14] If in measuring, the FCC were to discover that, for example, $100 billion in support would be needed over the next ten years to complete the delivery of broadband to rural America, the Commission could report that finding

[10] *Id*., § 254(b)(2).

[11] *Id*., § 254(b)(3).

[12] This principle applies across all of the Commission's universal service programs.

[13] 47 U.S.C. § 254(b)(5) (emphasis added). *See also* 47 U.S.C. § 254(e) (emphasis added) (stating that any federal support for universal service "should be explicit and ***sufficient*** to achieve the purposes of this section.").

[14] *See, e.g.,* the FCC's Federal-State Joint Board Monitoring Reports, *accessed at* https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports.

to Congress, along with a projection of what the funding mechanism would look like were it to raise the necessary funds. It would be up to Congress to determine whether such funding is excessive, and to take appropriate steps. SBI urges the Commission to refrain from preempting Congress by attempting to decide what level of subsidization is "too much" and then to adopt prophylactic "topline" budget measures that ultimately undercut its statutory responsibilities.

SBI recognizes that there is judicial precedent for the notion that the Commission has the discretion to engage in determinations of whether universal service subsidies are excessive, and that, in doing so, the Commission must consider not only the question of whether the absence of subsidies will price some customers out of the market, but also the need to limit the burden on existing subscribers.[15] SBI is not suggesting the Commission ignore this precedent, but rather that it recognize the clear, present, and ongoing challenge posed by the Digital Divide. Any "balancing" of "sufficient funding"[16] against "equitable contributions"[17] cannot result in a level of funding that is insufficient to close that Divide, but instead must ensure that rural Americans have access to broadband services that are reasonably comparable to broadband services available to urban Americans.

The Commission therefore should determine in this rulemaking that it is not necessary, mandated by the Act, or sound public policy to impose overall USF funding caps, since doing so would result in a USF funding shortfall that, in turn, would cause the Commission to fail to meet

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[15] *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102 (D.C.Cir. 2009).

[16] *See* 47 U.S.C. § 254(b)(5).

[17] *See id*., § 254(b)(4). Section 254(b)(4) of the Act states that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."

an obligation that Congress has given it and one that it has defined as its top priority: eliminating a Digital Divide that is today imposing significant, ongoing, and avoidable disadvantages on rural Americans.

In sum, the Commission should administer the universal service provisions of the Act in a manner that accelerates broadband deployment as quickly as possible to meet the goals set forth in Section 254, while leaving to Congress the responsibility to decide whether and when the size of the Fund has reached a level that merits legislative intervention.

B. The Commission's Proposal to Protect USF Contributors with an Overall Budget Cap Would Trammel the Interests of Rural Americans.

A core problem with the *NPRM* is that it makes assumptions and explores options that avoid central issues that should drive the Commission's USF policies and reforms.

Specifically, the Commission presents in the *NPRM* an extensive discussion of various "Reduction Mechanisms" that could be put in place to reduce expenditures if projections made by the Universal Service Administrative Company ("USAC") indicate that disbursements will exceed the topline cap.[18] The Commission notes, for example, that "[t]he overall cap could be exceeded due to rising demand,"[19] and seeks comment on "prioritizing the funding among the four universal service programs [if there are projections showing] that total disbursements will exceed the overall cap."[20]

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[18] *NPRM* at paras. 17-20. The Commission notes that "[a]s part of its administrative duties, USAC projects demand for all four [USF] programs each quarter when it calculates the proposed contribution factor. We seek comment on using this existing mechanism to help USAC and the Commission project future disbursements compared to the overall cap." *Id*. at para. 13.

[19] *Id*. at para. 17. This issue of "rising demand" is discussed further below.

[20] *Id*. at para. 19.

The Commission expresses the view that "[a]dopting clear prioritization rules and evaluating the tradeoffs associated with these funding decisions could make disbursements more specific and predictable."[21] This policy direction indicates a willingness by the Commission to sacrifice a "sufficient" level of funding, which is mandated by Section 254(b)(5) of the Act,[22] on the altar of "specific and predictable" funding. Whatever comfort the Commission will find in achieving ***specific and predictable*** funding, it will be cold if that funding level is inadequate to fulfill the Commission's mandate to provide a ***sufficient*** level of funding needed to facilitate the deployment of advanced broadband networks throughout rural America.

SBI disagrees with the Commission's apparent intention to read the statute, and adopt USF mechanisms, in a manner that ignores the sufficiency mandate. For example, the Commission states that its "statutory obligation requires that the Commission's policies result in equitable and nondiscriminatory contributions to the Fund, as well as specific and predictable support programs."[23] But Section 254(b)(5) of the Act, cited by the Commission, states that "[t]here should be specific, predictable ***and sufficient*** Federal and State mechanisms to preserve and advance universal service."[24]

The Commission also explains that, "[t]he overall cap could be exceeded due to rising demand,"[25] and then proceeds to examine ways in which individual USF programs could be cut—

[21] *Id*.

[22] 47 U.S.C. § 254(b)(5).

[23] *NPRM* at para. 4 (citing 47 U.S.C. § 254(b)(4)-(5)).

[24] 47 U.S.C. § 254(b)(5) (emphasis added).

[25] *NPRM* at para. 17.

through prioritization or by "reducing each program's disbursements by the same amount ...."[26] Thus, the Commission's solution for addressing rising demand is not to expand funding to meet the nation's needs, but to reduce funding in order to stay below a topline cap. This proposed approach essentially writes the sufficiency principle in Section 254(b)(5) out of the Act, because "rising demand" by itself is an important indicator that a greater number of Americans in rural areas need an increasing amount of advanced broadband services that are comparable to those services available in urban areas.

This "rising demand"—which the Commission would treat as a trigger for enforcing a topline budget cap—is in fact a legitimate and accurate indicator that _more_ funding is needed to meet the statutory goal of preserving and advancing universal service. The *NPRM* makes no attempt to square its proposed topline cap with these important responsibilities that Congress set forth in the statute.

The Commission should abandon this approach to administering its USF program, which would erase the mandate of sufficient funding from the equation, and should instead pursue an alternative path that would enable it to promote _all_ the statutory USF goals it is charged with carrying out.[27]

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[26] *Id*. at para. 19.

[27] "The FCC may balance the [Section 254(b)] principles against one another, ***but must work to achieve each one*** unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC's authority." *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001) ("*Qwest*") (emphasis added). The Tenth Circuit held that "the FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal[,]" *id*. at 1200, and "conclude[d]" that, in the case before it, "the FCC has not explained how its funding mechanism is sufficient." *Id*.

C. The Commission Should Make Contribution Reform the Centerpiece of This Rulemaking.

Although the Commission has long recognized the need for USF contribution reform,[28] the Commission does not explore such reform in the *NPRM*[29] as an option for maintaining both equitable contributions[30] and the sufficiency of the Fund. SBI urges the Commission to give consideration to a fairer and more effective approach.

The Commission appears to be of the view that, if it were to determine that a contribution factor[31] would not be "equitable," then it has the option of imposing a topline cap on the Fund in order to reduce the size of the contribution factor and thus move toward more equitable contributions.[32] This view is not a reasonable interpretation of the statutory principle of "equitable" contributions.

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[28] *See*, *e.g*., Julius Genachowski, Michael Copps, Robert McDowell, & Mignon Clyburn, "Bringing Broadband to Rural America: The Home Stretch on USF and ICC Reform," Official FCC Blog (posted Aug. 8, 2011), *accessed at* http://www.fcc.gov/blog/bringing-broadband-rural-america-home-stretch (stating that "after reforming the distribution side of the universal service equation this fall, we will move soon to launch, and subsequently conclude, a proceeding to restructure the universal service contribution mechanism, which is equally in need of reform").

[29] The last significant action taken by the Commission relating to USF contribution reform occurred five years ago, when the Commission "ask[ed] the Federal-State Joint Board on Universal Service … to provide recommendations on how the Commission should modify the universal service contribution methodology." *Federal State Joint Board on Universal Service*, *et al*., WC Docket No. 96-45, *et al*., Order, 29 FCC Rcd 9784, 9784 (para. 1) (2014) ("*Joint Board Referral Order*"). The Joint Board has not yet submitted any recommendations to the Commission in response to this request.

[30] *See NPRM* at para. 4 (citing 47 U.S.C. § 254(b)(4)).

[31] The Commission's Office of the Managing Director is currently responsible for calculating a quarterly universal service contribution factor. *NPRM* at para. 18. The quarterly contribution factor is based on the ratio of total projected quarterly costs of the universal service support mechanisms to contributors' total projected collected end-user interstate and international telecommunications revenues, net of projected contributions. *See* 47 CFR § 54.709(a)(2).

[32] The *NPRM*, for example, reflects the Commission's willingness to make prioritized or across-the-board cuts in USF programs to avoid piercing through the "topline" budget cap. *See NPRM* at para. 19.

The Commission apparently believes that contributions cannot be "equitable" unless they are kept as low as possible, even if its policies fail to meet the need for advanced broadband services in rural America. There is no indication, however, that Congress ranked the principles, or assigned any priority to any of the principles, enacted in Section 254(b) of the Act,[33] upon which the Commission "shall base policies for the preservation and advancement of universal service …."[34]

In fashioning its universal service policies, the Commission must give equal weight to the mandates of equitable contributions and sufficient funding, or, at a minimum, exercise its discretion to balance the statutory principles against one another when they conflict.[35] The *NPRM*, however, eschews equal treatment or balancing by abandoning the mandate of sufficient funding, even going to the extent of failing to acknowledge the existence of the Section 254(b)(5) principle of a "sufficient" funding mechanism.

A better approach—and one that would be more in keeping with the Commission's duties and responsibilities under the statute—would be to explore ways to spread the burden of funding USF in a more equitable fashion. In this regard, SBI respectfully disagrees with Commissioner O'Rielly's concern that contribution reform should not be a backdoor effort to increase the level

[33] As SBI has noted, the *Qwest* decision states that the Commission must work to achieve each principle unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the Commission's authority.

[34] 47 U.S.C. § 254(b).

[35] *Qwest*, 258 F.3d at 1200.

of USF funding.[36] Contribution reform should come through the front door, with mechanisms that maintain the sufficiency of the Fund, while also reducing burdens on contributors.

The best path toward achieving these twin goals is to expand the contribution base. For example, the Commission must begin to examine whether broadband services can be added to the contribution base, since each of the USF programs now overwhelmingly provides support to broadband. State Members of the Federal-State Joint Board on Universal Service have previously recommended expanding the contribution base to include various types of broadband services because "[t]his better matches the benefits of universal access programs to the burden of supporting those programs. It also would lower the federal surcharge rate considerably and should be more resistant to the erosion of narrow-band voice service revenue."[37] Nonetheless, even though an increasing share of overall carriers' revenues comes from their broadband services, and even though consumers increasingly use non-interconnected VoIP (*e.g.*, Skype, WhatsApp, Facetime) for voice communications, the Commission heretofore has steadfastly refused to consider broadband revenues as a source of USF funding.[38]

In SBI's view, it is becoming increasingly untenable to cling to a policy that relies overwhelmingly on contributions from interstate voice service revenues to fund USF programs

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[36] *Joint Board Referral Order*, 29 FCC Rcd at 9786 (Statement of Commissioner Michael O'Rielly) (indicating that "I would caution that contributions reform should not be seen as a backdoor way of increasing the size of the universal service fund or imposing new fees on the Internet").

[37] State Members of Universal Service Joint Board Comments, WC Docket No. 10-90, *et al*. *(*filed May 2, 2011), at v-vi (the State Members' recommendation focused on DSL, cable modem, and wireless broad-band). The State Members noted generally that they supported "expansion of the goals and mechanisms of universal service to cover both broadband and mobility services." *Id*. at iii.

[38] *See* Benton Foundation, "FCC Proposes Capping Fund Used to Close the Digital Divide," (June 7, 2019), *accessed at* https://www.benton.org/blog/fcc-proposes-capping-fund-used-close-digital-divide.

that increasingly promote the deployment of advanced broadband services. While SBI fully understands the traditional limitations of Section 254(d) of the Act[39] regarding interstate telecommunications services, the Joint Board's recommendations should be front and center for public debate with the goal of making contributions more equitable and stabilizing the USF's source of funding.

D. If the Commission Chooses to Adopt a Topline USF Budget Cap, Funding Recipients Serving Remote Tribal Lands Should Be Exempt from Support Reductions.

The *NPRM* seeks comment on funding reduction mechanisms that should be employed to manage funding decisions "when [the Commission is] faced with projected disbursements exceeding the overall cap[,]"[40] and on whether these mechanisms should include "clear prioritization rules [that] could make disbursements more specific and predictable."[41]

One prioritization rule the Commission should adopt is that any USF support that is utilized by a funding recipient to provide voice or broadband services on remote Tribal lands, in any of the USF programs, should be exempt from any reductions that otherwise would apply pursuant to the rules administering the topline budget cap.[42]

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[39] 47 U.S.C. § 254(d).

[40] *NPRM* at para. 19.

[41] *Id*.

[42] In fact, the Commission not only should exempt remote Tribal areas from USF funding reductions, but also should take steps to target additional funding for these areas. SBI has recently suggested, for example, that the Commission should establish:

> a universal service grant program for remote Tribal lands where special circumstances, such as low telephone or broadband penetration, warrant targeted action by the Commission. The FCC could base the program on the U.S. Department of Agriculture's Substantially Underserved Tribal Areas program, which allows USDA to allocate funds to areas most in need in response to requests from eligible applicants. The Commission could adopt rules similar to those set forth at 7 C.F.R. §§ 1700.100-1700.150.

The Commission has long recognized "the relatively low level of telecommunications deployment on Tribal lands and the distinct challenges in bringing connectivity to these areas[,]"[43] and has observed that "communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population."[44] The Commission has also noted that "Tribal lands are often in rural, high-cost areas, and present distinct obstacles to the deployment of broadband infrastructure."[45] In addition, the Commission has indicated that, "[g]iven the difficulties many Tribal consumers face in gaining access to basic services by living on typically remote and underserved Tribal lands, the Commission recognizes the important role of universal service support in helping to provide telecommunications services to the residents of Tribal lands."[46]

SBI provides service to consumers on the Navajo, Hopi, White Mountain Apache, Zuni, and Ramah Navajo Tribal lands in Arizona, New Mexico, and Utah. In numerous comments over the years, SBI has explained the importance of USF-supported services for Tribal communities, observing, for example, that "Tribal households lacking basic amenities such as electricity and

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Ex Parte Letter from David A. LaFuria, Counsel for Smith Bagley, Inc., to Merlene H. Dortch, Secretary, FCC, WT Docket No. 10-90, *et al*. (June 24, 2019), at 1.

[43] *Connect America Fund*, *et al*., WC Docket No. 10-90, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17818 (para. 479) (2011) ("*USF/ICC Transformation Order*") (citing *Universal Service Reform–Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14716, 14727 (para. 33)) (2010)).

[44] *Id*. at 17818-89.

[45] *Id*. at 17819.

[46] *Lifeline and Link Up Reform and Modernization*, *et al*., WC Docket No. 11-42, *et al*., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7873 (para. 159) (2015). *See USF/ICC Transformation Order*, 26 FCC Rcd at 17819 (para. 479) (stating that "greater financial support may be needed in order to ensure the availability of broadband in Tribal lands").

indoor plumbing, and extraordinarily low income levels prevailing in Tribal communities, taken in combination, underscore the need for these citizens to have access to voice, texting, and broadband communications services."[47]

These considerations pertaining to the extraordinary needs of people residing on remote Tribal lands, and the extraordinary challenges of bringing broadband service to these people, make it imperative that USF support needed to deliver voice and broadband services to these areas will continue to be available and will not be reduced by the application of any funding reduction mechanisms used to enforce a topline USF budget cap.

III. CONCLUSION.

If in fact the nation is in a race to 5G, then we ought to take stock of the fact that, some 23 years after enactment of the 1996 Act, too many rural Americans still do not have adequate access to fixed and mobile broadband services. Closing the Digital Divide requires a sense of urgency that should preclude the adoption of a funding cap of any sort until the Divide is closed, or until Congress speaks based on a detailed FCC report on the program's status.

What we should avoid are small bore efforts that do not close the Digital Divide within five years. To put this into perspective, if an extra $2 billion per year were needed to help the United States cover rural America and win the "race to 5G," winning could be accomplished within the current and structurally broken contribution mechanism for a cost of less than 2 gallons of gas ***per year*** at today's prices.[48] The contributions to our nation's economic growth,

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[47] SBI Comments, WC Docket No. 11-42, *et al*. (Aug. 31, 2015), at iii. *See id*. at 3-4 (presenting demographic information illustrating the challenges to providing service on Tribal lands served by SBI).

[48] According to the most recent report from the FCC's Industry Analysis and Technology Division, Wireline Competition Bureau, *Voice Telephone Services: Status as of June 30, 2017*, *accessed at* https://docs.fcc.gov/public/attachments/DOC-355165A1.pdf, there are approximately 455 million voice

rural consumer welfare, and world-wide competitiveness would completely dwarf the cost to contributing consumers.

Accordingly, SBI respectfully urges the Commission to refrain from adopting any overall "topline" budget cap applicable to USF programs, limit funding concerns to the continued and aggressive pursuit of waste, fraud, and abuse in USF programs, and focus on measuring and closing the Digital Divide within five years.

Respectfully submitted,

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subscriptions nationwide. Accordingly, even excluding approximately 11 million Lifeline subscribers, an assessment averaging just $5.00 *per year* would yield over $2 billion annually.