Comments submitted by Shana Barehand  

I am writing in support of the Standing Rock application for ETC designation within the jurisdiction of the Standing Rock Tribe. I feel compelled to comment in this case; as it seems fundamentally unfair that FCC is not doing all it can to eliminate the barriers for tribes to serve their own community. I believe that it will take more than good will visits and meetings between tribal representatives and FCC staff, for agencies like FCC to learn to appropriately include tribes in its regulations and its day to day work. It will take the legal understanding and sincere integration of the modern day Indian Law and Policies that the government created, to govern all things tribal.

As an expert in Indian law and administrative law, I think that there is something fundamentally wrong with allowing a state to have regulatory authority to designate calling or study areas within Indian Country, particularly as it applies to tribally owned businesses, where the tribe has a regulatory body. I don’t believe there is anything in the Telecom Act or applicable case law that specifically gives the states the authority to designate calling areas within a tribe’s jurisdiction. Absent this specific grant of authority, the FCC should first be required to go to the tribal utility to see if they can designate the calling areas. If a tribe does not have an appropriate utility authority (or if the tribe wants the state utility corporation to regulate the tribe) then the FCC should take it upon its self to designate calling areas within the tribe’s jurisdiction.

Second, on its face, this decision is contrary to the principles in Western Wireless and other ETC decisions by the FCC regarding tribal areas, which recognize the tribe’s overwhelming interest in regulating within its jurisdiction.

Thirdly, it is fundamentally unfair that when it comes to tribes, the FCC appears to not only drag its feet and prolong approvals that are critical to the survival of tribal telecom companies, but also create unnecessary barriers. Past tribal ETC designations seem to take longer than other similarly situated FCC decisions. On its face it seems that when it comes to tribes, the tribes who already lack resources, must always work extra hard to have a voice within the FCC.

In the order at #27, the FCC cites “in accordance to our rules, we will submit this order to the North Dakota Commission and request that the state commission treat it as a petition to redefine West River Service area”. FCC rules at 47 CFR 54, fail to give the state PUC specific authority to regulate over the tribe’s jurisdiction. In fact, the FCC regulation fails to recognize the tribes at all. Therefore, state’s lack this authority if it is not specifically delegated by the Federal government. This failure should not be interpreted as affirmatively giving state’s authority over tribe’s jurisdiction. The FCC must recognize the sovereignty of tribes and in the meantime reinterpret them to include a tribe’s authority within its own jurisdiction or in the alternative place the decision wholly within the FCC’s jurisdiction. Nowhere in the rules or Statute is the state specifically given the authority to designate the areas within the tribe’s jurisdiction.
Under the current principles of Indian law and policy, there are new notions of self-governance and tribal sovereignty. The FCC must begin to appropriately include tribes into its regulatory structure. FCC must recognize this era of self determination in which the Federal government is to empower the tribes with authority, knowledge and resources so that the tribes can provide for themselves and their citizens. Agencies such as the Environmental Protection Agency (EPA) include and empower tribes even when tribes are not mentioned in the implementing Act. The EPA does this in the case of TSCA. As illustrated on EPA’s website it states “Although the Toxic Substances Control Act (TSCA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) do not explicitly provide for EPA to delegate programs to tribes, EPA has taken the position that it has the discretion to approve tribes to implement certain programs in the same manner as states in order to fill gaps in how the statutes are implemented in Indian country.”

The FCC must begin to do what other agencies are already doing when implementing and interpreting its statutory authority; it must appropriately include tribes.

Since the Telecom Act does not mention tribes anywhere in the Act, the FCC must conclude as EPA did in TSCA, that the Telecom Act meant to include tribes. The FCC should allow tribes to regulate and make the decisions concerning telecom activity within their own tribal jurisdictions. Therefore in the case of Standing Rock, absent legislative history that specifically excludes tribes, the FCC must interpret the provision, to include tribes as sovereign entities, where states are mentioned The Telecom Act must mean to include that the tribes have the authority to designate the jurisdiction within their tribal area that they intend to serve. It is the tribe’s rightful authority, not the states’, to determine their boundaries, if these boundaries are those of the tribal lands of that tribe.

Therefore in cases such as these, states should not be able to designate calling areas or have a preemptive say regarding study areas within the tribes jurisdiction. The decision in Standing Rock is incorrect. It should be Standing Rock and the FCC, not the individual state PUCs, to determine the ETC status of this tribal company.