Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
HAWAIIAN TELCOM, INC.	)	WCB Docket No. 08-4
	)	
Petition for Waiver of Sections 54.309 and 54.313(d)(vi) of the Commission's Rules	)	

REPLY COMMENTS OF HAWAIIAN TELCOM, INC.

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Summary

In its Petition for Waiver, Hawaiian Telecom, Inc. ("HT") requests waivers to determine its eligibility to receive High Cost Model Support by averaging HT's line costs on a wire center-by-wire center basis, instead of on a statewide basis as provided in Section 54.309 of the Commission's rules. The record in this proceeding confirms that HT faces special circumstances sufficient to justify grant of the requested waivers. These special circumstances include the unique challenges facing HT, the unique needs of Hawaii residents for effective telecommunications capabilities given Hawaii's remote location, isolation, and archipelago structure, and the unique interest of the federal government in ensuring that Hawaii has those capabilities – factors which are not reflected in the non-rural model. The record also demonstrates that grant of the Petition would give rise to numerous public interest benefits, without affecting support levels for any other state or carrier.

While some commenters claim that HT could produce these benefits without federal universal service support, they have provided *no* evidence in support of this proposition. As demonstrated by HT, none of the "alternatives" presented are viable, and none is sufficient to ensure that the mandate of Section 254 of the Communications Act is satisfied. Similarly, some commenters claim that the Commission should defer its consideration of HT's Petition because universal service reform is pending in separate rulemaking proceedings. Yet, the Commission's consideration of HT's Petition is not mutually exclusive with the resolution of these proceedings, and in any event the Commission is obligated to give HT's Petition a "hard look" on its merits. As these objections are unavailing, the Commission should grant the Petition expeditiously to ensure that Hawaii residents are able to benefit from specific, predictable, and sufficient universal service funding without delay.

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Hawaiian Telcom, Inc. ("HT") hereby files these Reply Comments in the above-captioned proceeding. In its Petition for Waiver ("Petition"), filed on December 31, 2007, HT seeks a five-year waiver of Section 54.309 of the Commission's rules, and a one-time waiver of Section 54.313(d)(vi) of the Commission's rules.[1] Specifically, HT requests that the Commission direct the Universal Service Administrative Company to determine HT's eligibility to receive High Cost Model Support ("HCMS") by averaging HT's line costs on a wire center-by-wire center basis, instead of on a statewide basis as provided in Section 54.309.[2]

As explained below, the record in this proceeding establishes that HT faces special circumstances sufficient to justify grant of the requested waivers due to the unique challenges facing HT, the unique needs of Hawaii residents for effective telecommunications capabilities, and the unique interest of the federal government in ensuring that Hawaii has those capabilities. Moreover, the record demonstrates that grant of the Petition would give rise to numerous public

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[1] 47 C.F.R. §§ 54.309, 54.313(d)(vi).

[2] HT also requests a waiver of Section 54.313(d)(vi) of the Commission's rules, to the extent necessary, to ensure that HT is eligible to receive HCMS immediately upon grant of this Petition, rather than requiring the Hawaii Public Utilities Commission ("HPUC")

interest benefits without harming any other state or carrier, and provides no evidence that HT could produce these benefits in the absence of the requested waivers. Further, grant of the requested waivers would not prejudice the outcome of any pending rulemaking proceeding, and is not prohibited by the precedent set by the U.S. Court of Appeals for the Tenth Circuit in the *Qwest Corp. v. FCC* cases.[3] Accordingly, the Commission should grant the Petition expeditiously.

I. THE RECORD SUPPORTS THE GRANT OF HT'S PETITION

A. The record confirms that HT faces "special circumstances" sufficient to justify grant of the requested waiver.

1. The record establishes that HT faces unique operational challenges.

In the Petition, HT describes in detail the unique operational challenges facing Hawaii. These include: (i) the challenges of providing service to a state that is uniquely geographically isolated, comprised entirely of islands separated by deep ocean channels, characterized by dramatic changes in topography, climate, and character, and vulnerable to a broad range of natural and man-made disasters; (ii) the unique vulnerabilities extending from Hawaii's strategic importance and consequent vulnerability to foreign attack; (iii) the highly dispersed nature of the state's population outside of Honolulu; and (iv) HT's lack of alternative funding sources for network investment.[4]

The record in this proceeding supports HT's description of the operational challenges facing Hawaii. Even some parties that object to the grant of the Petition concede that HT's

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to first file the certification otherwise required by that rule. *See* 47 C.F.R. § 54.313(d)(vi).

3 *See Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) ("*Qwest I*"); *Qwest Corp. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) ("*Qwest II*").

4 Petition at 5.

description of these challenges is accurate. For example, GVNW Consulting agrees that HT's Petition accurately describes the challenges of serving its customers.[5] Sandwich Isles Communications concurs, stating that the physical and demographic features of Hawaii present unique challenges.[6] Embarq concedes that HT has a "legitimate and vital need for support" stemming from a "set of unique circumstances . . . ."[7] WTA and OPASTCO state that they are "aware of the difficulties and costs of serving insular areas such as Hawaii."[8] The State PSCs also recognize that Hawaii is "geographically isolated, comprised of islands, and characterized by dramatic changes in topography, climate and character across very short distances."[9]

Notwithstanding widespread consensus regarding the challenges faced by HT, some commenters erroneously claim that these challenges are not unique, and as such do not give rise to "special circumstances" justifying grant of the Petition. In fact, while other carriers may face one or more of the challenges faced by HT, no carrier faces a multitude of challenges as substantial *and pervasive* as those faced by HT – in one study area. As such, no commenter cites a single example that presents circumstances truly equivalent to those faced by HT.

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5 Comments of GVNW Consulting, Inc. at 5 ("GVNW Comments").

6 Comments of Sandwich Isles Communications, Inc. at 3 ("SIC Comments"). *See also* Comments of Pacific LightNet, Inc. at 2 ("PLNI Comments").

7 Comments of Embarq at 2 ("Embarq Comments").

8 Comments of the Western Telecommunications Alliance and the Organization for the Promotion and Advancement of Small Telecommunications Companies at 1 ("WTA/OPASTCO Comments").

9 Opposition of the Vermont Public Service Board, the Maine and South Dakota PUCs, the Nebraska PSC, and the West Virginia PSC Consumer Advocate at 2 ("State PSC Opposition").

For example, Embarq argues that, while the Hawaii-specific cost-drivers identified by HT may be unique, other carriers face equally difficult (if different) challenges.[10] Although Embarq discusses two examples of it's own hard-to-serve study areas – Florida, where it faces the corrosive effects of salt water, destructive hurricanes, and difficulty complying with environmental laws in the Everglades, and Oregon, where it faces rugged mountain terrain[11] – these examples are not analogous to the situation faced by HT. *First*, Embarq and other carriers receive substantial federal support to help them overcome the challenges Embarq identifies in its comments. While Embarq states in its comments that it receives no high cost loop or switching support for its Florida and Oregon study areas,[12] in fact in 2007 alone it received over $17 million in Interstate Access Support ("IAS") in Florida,[13] and nearly $1.4 million in IAS (to serve only about 60,000 lines) in Oregon.[14]

Second, Embarq and other large, diversified carriers serve millions of lines across numerous study areas.[15] Isolated conditions that affect these carriers' costs to serve a few of their respective lines do not have the same level of impact on their operations as do the conditions faced by HT, which serves less than one-tenth Embarq's number of lines, all of which are located in a single study area.

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10 Embarq Comments at 4, 5.

11 *Id.* at 5.

12 *Id.* at 4.

13 Federal and State Staff for the Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, CC Docket No. 98-202, at Table 3.28 Dec. 2007) ("*Universal Service Monitoring Report*"). HT does receive a small amount of IAS funding, although this is a small fraction of total support provided to Hawaii. *See* n.18, *infra*.

14 *Id.*

15 Ind. Analysis and Tech. Div., Wir. Comp. Bur., FCC, *Trends in Telephone Service*, at Table 7.3 (Feb. 2007).

The State PSC's claims are similarly unavailing. While some states may have low population densities, contain mountainous areas, or be subject to cold weather,[16] these states are not also subject to hurricanes, earthquakes, volcanoes, or seismic activity (among other challenges), or widely varying climactic conditions (including cold weather, tropical rain forests, deserts, and other climates) within a single study area. Moreover, unlike HT, many of the carriers serving these challenging areas already receive funding from federal universal service mechanisms. Carriers in those states opposing HT's Petition – Vermont, Maine, South Dakota, Nebraska, and West Virginia – received a total of over $313 million in federal high-cost support in 2007 alone to overcome the climactic and other challenges that carriers face within their borders.[17] Yet, these states oppose HT's request for a mere $6 million annually (for only five years) to help it overcome even greater hurdles.[18]

In the same vein, while Puerto Rico may be an island, and may have an impoverished population, PRTC's situation is not comparable to that of HT.[19] Puerto Rico consists chiefly of a single, large island, so PRTC does not face the obstacles that confront HT in serving an island archipelago. Puerto Rico is not nearly as isolated from the mainland U.S. and other population centers, does not have a large, economically challenged and historically underserved native

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16 *See* State PSC Opposition at 3.

17 *Universal Service Monitoring Report* at Table 3.14.

18 For Hawaii, the *Universal Service Monitoring Report* shows significant increases in federal universal service support, from approximately $286,000 annually in 1998 to some $46 million annually in 2007. *Id.* As the Commission is well aware, less than 5 percent of this support (consisting of about $2 million in IAS annually) goes to HT, while remaining $44 million in annual support flows to Sandwich Isles Communications and Nextel Partners to support service to a few thousand lines in a portion of the Hawaiian Homelands. *See id.* at Table 3.30.

19 *See gen.* Comments of Puerto Rico Telephone Company, Inc. ("PRTC Comments").

population, and has a much lower cost of living.[20] Further, Puerto Rico received a total of over $185 million in federal high-cost support in 2007, over $58 million of which went to PRTC.[21]

In short, no carrier can show that any of its study areas or exchanges faces a *litany* of obstacles equivalent in magnitude or diversity to that confronting HT. Indeed, the Commission has already recognized that the unique challenges facing Hawaii give rise to a unique need for federal support. Specifically, citing an analysis from the Federal Emergency Management Agency ("FEMA"),, the Commission recognized that "the Island of Hawaii is unique within the United States for frequency and diversity of its natural disasters."[22] Thus, in 1997, for instance, the Commission waived its universal service support rules to permit universal service support to the Naalehu exchange based on costs in that individual exchange.[23]

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[20] PRTC's statement that the cost of living in Puerto Rico is "more than 30 points higher than the U.S. national average cost of living" is misleading. *See* PRTC Comments at 4. PRTC cites proprietary data that are almost a decade old, which cannot be reproduced or verified, and which cannot be directly compared to the cost of living in Hawaii. In reality the cost of living in Puerto Rico today is substantially lower than the cost of living in Hawaii. Notably, the Office of Personnel Management provides a 25 percent cost of living allowance for federal employees working in the State of Hawaii, but only a 10.5 percent allowance rate for federal employees working in Puerto Rico. *See* Office of Personnel Management, *Cost-of-Living Allowances (Nonforeign Areas)*, 71 FED. REG. 43897, 43903 (Aug. 2, 2006). Further, rent in Puerto Rico is substantially lower than rent in Hawaii. *See Nonforeign Area Cost-of-Living Allowances; Revised Living-Cost Indexes*, 71 FED. REG. 43876, 43877 (Aug. 2, 2006) (reporting a rent index of 63.49 for Puerto Rico, as compared to rent indices of over 100 for most of Hawaii, and 125.85 for Honolulu).

[21] *Universal Service Monitoring Report* at Table 3.30.

[22] *Applications of Big Island Broadcasting Company, Ltd. For Authority to Construct Three FM Broadcast Booster Stations*, Memorandum Opinion and Order, 6 FCC Rcd 422, at ¶¶ 5, 13 (1991) (citing earthquakes, flash floods, tropical storms, waterspouts and volcanic eruptions, and granting waiver in light of these severe and recurring natural disasters).

[23] *Petition for Waivers Filed by TelAlaska, Inc. and TelHawaii, Inc. Concerning Sections 36.611, 36,612, 61.41(c)(2) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 12 FCC Rcd 10309, at ¶ 12 (Acc't. and Aud. Div., Com. Car. Bur. 1997) (discussing the

The Commission should reach a similar conclusion with respect to the instant Petition. While HT acknowledges that it is not the only carrier that faces significant obstacles in serving its territory, no other carrier must serve a single study area that is isolated from the mainland United States – and indeed, the world – by thousands of miles of ocean, internally divided by deep ocean channels, subject to volcanic and seismic activity, home to widely-varying climactic and topographic conditions, of unique strategic importance to national security, and uniquely vulnerable to foreign attack (among other challenges).

2. The record establishes that Hawaii has a unique need for communications capabilities, and that the federal government has a unique interest in Hawaii.

Aside from providing ample evidence of the unique challenges facing HT, the record also vividly demonstrates that Hawaii has a unique need for robust and resilient communications capabilities, while the federal government has a unique interest in ensuring that Hawaii has those capabilities. Because these factors are independent of the specific costs facing HT, they are not reflected in the Commission's cost model.

The fact that Hawaii is isolated from the mainland, and that the Hawaiian Islands are isolated from each other, makes effective communications more critical in Hawaii than elsewhere. The Maui County Police Department, for example, observes that, because of its isolation, Hawaii cannot rely on other states for support and assistance in times of emergency,

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Ka'u area, at the southern tip of the Big Island of Hawaii, which is served by the Naalehu exchange). In 1997, GVNW Consulting supported the Commission's grant of this waiver, stating that it "comport[s] with the public interest," despite the fact that GVNW Consulting now inexplicably opposes HT's Petition seeking precisely the same result. *Id.* at ¶ 10. *See also Sandwich Isles Communications, Inc. Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules*, Order, 20 FCC Rcd 8999 (Wir. Comp. Bur. 2005).

but must rely on its own resources, making effective communications systems within the state more critical than anywhere else.[24] No other state is as geographically isolated (nor is Puerto Rico) from the mainland, nor so dependent upon inter-island communications.

The federal government also has a strategic interest in Hawaii because of Hawaii's unique military importance, as explained in the Petition.[25] The availability of reliable and diverse infrastructure in Hawaii could affect national security in a way unlikely to be true elsewhere. Moreover, the federal government has a special interest in ensuring that Hawaii's native inhabitants, a disproportionate percentage of whom are economically challenged and historically underserved, are provided with adequate telecommunications services.[26]

In addition, the comments identify other reasons why the federal government may have a special interest in Hawaii. Sandwich Isles Communications suggests, for instance, that the federal government may have a special interest in Hawaii based on its "insular" status.[27] Moreover, many commenters allude to the fact that the Commission is considering related issues in other proceedings,[28] which suggests that the federal government has an interest in Hawaii's potential role as a "test bed" for a more granular universal service support framework – a role for which Hawaii is uniquely suited given its isolation and diversity of operational characteristics.

These factors would justify a departure from the results produced by the current non-rural mechanism, even if other carriers in various study areas were able to show that they faced

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24 Maui County Police Department Comments at 1.

25 Petition at 12.

26 *Id.* at 19-21.

27 SIC Comments at 4-5. While HT agrees that Hawaii should be considered an "insular" area, the Commission need not resolve this issue to grant this Petition.

28 *See* n. 64, *infra*.

selected cost drivers similar to those faced by HT. These factors also would justify grant of the Petition even if another carrier could demonstrate that the HCMS model generated costs in some wire centers higher than those generated in Hawaii. Simply put, the model fails to accurately reflect the unique challenges faced by HT, or to account for either the unique needs of Hawaii residents for communications services, or the unique interest of the federal government in ensuring the deployment of modern, reliable telecommunications infrastructure in Hawaii. Thus, the mere fact that the model produces higher costs in certain of another carrier's individual wire centers does not establish that it has a greater need for support than HT, or that wire center-level averaging would be appropriate in that carrier's case.[29]

While components of HT's high transport costs may in fact be reflected in the model, as claimed by Embarq,[30] the model fails to account for a host of factors that affect HT's costs, such as the need for stainless steel facilities and protective housings for coastal equipment, and the need for robust and "hardened" network facilities with a higher-than-normal degree of reliability in the face of natural or man-made disasters. Thus, the Commission's premise underlying the non-rural HCMS mechanism – namely, that the model accurately predicts relative forward-looking cost differences among non-rural wire centers nationwide[31] – does not hold for HT's study area in Hawaii.

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[29] For example, Embarq suggests that costs in its five highest-cost wire centers are higher than costs in HT's five highest-cost wire centers. *See* Embarq Comments at 4. Notably, because Embarq presents data for only five wire centers and no others, those data do not establish that Embarq's costs *as predicted by the model* are generally higher than those faced by HT. Certainly, those data do not establish, in and of themselves, that Embarq faces the unique, special circumstances demonstrated by HT.

[30] *Id.* at 5.

[31] *Federal-State Joint Board on Universal Service*, Twentieth Order on Reconsideration, 15 FCC Rcd 12070, at ¶ 11 (2000) ("[W]e now clarify that the model is used to estimate relative costs among wire centers.").

B. The record supports HT's claims with respect to the public interest benefits to be gained by granting HT's petition.

In the Petition, HT identified a number of public interest benefits that would flow directly from grant of the Petition. In particular, HT noted that grant of the requested waivers would permit HT to upgrade its facilities while charging affordable rates, and would lay the foundation for increased broadband penetration – particularly in the remote portions of Hawaii – and improved public safety communications, while recognizing the needs of Hawaii's traditionally underserved native population.[32] No party disputes that grant of the waiver would create these public interest benefits, and numerous parties confirm as much.

For example, several commenters point to the benefits that grant of the Petition would have for residential and educational users. Richard Abbott notes that both individual residents and the community as a whole would benefit from improved telephone services and the deployment of new services.[33] Similarly, Representative Roy Takumi highlights the educational benefits that could be derived from the deployment of new services, including broadband services.[34]

The record also demonstrates that grant of the Petition would have substantial public health and safety benefits. As the Hawaii County Police Department notes, funds received by HT following grant of the Petition would be used to strengthen HT's network infrastructure and increase redundancy, resulting in more resilient E911 and emergency response services.[35] The

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32 Petition at 17.

33 Comments of Richard V. Abbott at 1 ("Abbott Comments").

34 Comments of Representative Roy Takumi at 1.

35 Comments of the Hawaii County Police Department at 1.

Kaua'i Economic Development Board further explains that grant of the Petition "will provide more communication channels in times of need and prevent potential system failures."[36]

The record also confirms that grant of the Petition would have numerous economic and commercial benefits, particularly in remote areas. The Chamber of Commerce of Hawaii notes that "[HT's] infrastructure plays an important role for businesses in Hawaii,"[37] such that grant of the Petition would benefit these businesses. The Molokai Chamber of Commerce observes that grant of the Petition would "bolster the business climate and bring [Molokai's] rural community to the same level of telecommunications service that larger metropolitan cities enjoy."[38] The Japanese Chamber of Commerce & Industry of Hawaii highlights the linkage between improved voice and data communication and the ability of Hawaii's business community to effectively conduct business with the rest of the world.[39] Richard Abbott recounts several instances in which broadband availability has allowed remote areas of Hawaii to retain existing business operations and attract new ones.[40]

In short, there is every reason to believe that grant of the Petition would have substantial public interest benefits for Hawaii residents.

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36 Comments of the Kaua'i Economic Development Board at 2.

37 Comments of the Chamber of Commerce of Hawaii at 1. *See also* Comments of the Hawaii Island Chamber of Commerce at 1.

38 Comments of the Molokai Chamber of Commerce at 1.

39 Comments of the Japanese Chamber of Commerce & Industry of Hawaii at 1.

40 Abbott Comments at 1.

C. Grant of the Petition would not adversely impact the universal service fund or other states.

As explained in the Petition, grant of the requested waivers would facilitate HCMS support to HT of approximately $6 million per year.[41] This level of support would have a negligible impact of approximately 0.1 percent on the high-cost fund and even less on the universal service fund as a whole.[42] The State PSCs' claim that granting the Petition could harm consumers in other states and negatively impact the universal service fund as a whole, therefore, is simply ridiculous. A grant of HT's Petition would make no perceptible difference whatsoever in universal service contribution rates or the performance of the Commission's universal service mechanisms, and would have no effect on support provided to any other carrier.[43]

The State PSCs' argument that granting the Petition would encourage other carriers to file similar waiver requests, and that the Commission would grant those requests,[44] is flawed in a number of respects. Given the unique challenges HT faces in providing service to the state of Hawaii, discussed above and in HT's Petition, a grant of this waiver would not set a precedent

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41 Petition at 23. Some commenters erroneously interpreted the Petition to indicate that HT would receive $6 million per quarter. Hawaii clarifies here that the $6 million figure is an annual amount, which should substantially ameliorate these commenters' cost concerns.

42 Projected disbursements for the fourth quarter of 2007 are $1,140,410,000 for high-cost support and $1,924,920,000 for total universal service support. *See Public Notice: Proposed Fourth Quarter 2007 Universal Service Contribution Factor*, DA 07-3928 (Sep. 13, 2007). If the Petition is granted, HT would receive support of approximately $1.5 million per quarter, or approximately 0.1 percent of the high-cost fund, or 0.07 percent of the entire universal service fund.

43 *See* Petition at 23-4 (explaining that "a grant of this Petition would have no effect on the levels of support currently provided to other non-rural carriers, because HT's line counts and costs are already incorporated into the Commission HCMS model, and such grant would not affect the computation of the national cost benchmark used to determine funding eligibility.").

44 State PSC Opposition at 8.

requiring the Commission to grant "me too" requests from other carriers. Simply put, there is no other carrier that can make the same compelling showing. Moreover, the Commission considers each waiver request on its own merits and in light of the total circumstances surrounding the request. The State PSCs' argument ignores the Commission's legal compulsion to evaluate each petition on its merits and to evaluate whether grant would serve the public interest in each case.[45]

II. CONTRARY TO THE ASSERTIONS OF SOME COMMENTERS, HT WOULD BE UNABLE TO MAKE NECESSARY IMPROVEMENTS TO ITS NETWORK AND FACILITIES IN THE ABSENCE OF FEDERAL SUPPORT

Notwithstanding the special circumstances facing HT, some commenters maintain that grant of the Petition is unnecessary because HT can obtain funding from other sources. As explained below, this is simply untrue, making grant of the Petition critical.

A. HT cannot rely on its existing local rate structure to finance needed infrastructure.

The State PSCs claim that grant of the Petition is unnecessary because "HT can offset its high costs incurred in areas described in the Petition with revenues collected in low cost urban areas."[46] This statement is inaccurate for several reasons. First, under the Telecommunications Act of 1996 and substantial Commission precedent, implicit subsidies must be eliminated from rates, not encouraged.[47] Second, as the Commission has long held, implicit subsidies are not sustainable in a competitive environment.[48] In a competitive market, such as Hawaii, a carrier

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45 *WAIT Radio v. FCC*, 418 F.2d 1153 (1969).

46 State PSC Opposition at 4.

47 *See* 47 U.S.C. § 254(e) ("Any . . . support should be explicit and sufficient to achieve the purposes of this section."). *See also, e.g., Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000).

48 *Federal-State Joint Board On Universal Service*, 12 FCC Rcd 8776, at ¶ 17 (1997). Among others, PLNI suggests that it is competing with HT on several fronts. *See* PLNI Comments at 1.

that attempts to charge rates above cost to a class of customers will lose many of those customers to competitors.[49] Further, as Embarq notes, the Joint Board has recognized that competition is generally focused in densely populated areas where costs are low, making it increasingly difficult for an incumbent to sustain implicit subsidies through rates that are averaged across urban and rural areas with disparate costs.[50]

The State PSCs also claim that because HT offers rates for basic local service that are lower than rates in other states, HT could simply raise its rates instead of seeking federal universal service support.[51] However, HT's rates are the result of its most recent rate case, conducted under the authority of the HPUC. These rates reflect the HPUC's judgment as to affordability and value of service in various areas of the state. In fact, the low $9.90 rate the State PSCs cite[52] is available only on the island of Lanai where much of the island is subject to economic conditions that are relatively poor and customers can call relatively few others with a local call. The $9.90 rate also does not include touch call and intrastate surcharges, the subscriber line charge, and other federal surcharges. In addition, Lanai would not qualify for funding if the Petition is granted, and given the low population of Lanai, raising rates there would not substantially increase revenues (even if reliance on implicit subsidies did not raise the concerns discussed above). Local rates in Honolulu are already considerably higher. According to the Commission's most recent analysis, residential telephone rates in Honolulu are already

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49 *Id.*

50 Embarq Comments at 3 (quoting *High-Cost Universal Service Support*, WC Docket No. 05-337, FCC 07J-4, at ¶ 22 (Nov. 20, 2007)).

51 State PSC Opposition at 3.

52 *Id.* at 2.

above the national average.[53] Moreover, HT is under a HPUC-imposed rate moratorium until test year 2009, preventing a rate increase until after that time. Absent federal funding, HT's rate structure provides no means for HT to make a sustainable investment in its infrastructure, or improve the services it is able to offer to Hawaii residents.

Ultimately, though, the question is not whether HT could increase revenues by raising its rates, but whether raising rates would be sufficient to achieve the goals of Section 254. There is *no* evidence that HT could achieve rate comparability and affordability through the use of implicit subsidies or rate increases, and the commenters offer none. In fact, all available evidence points to the fact that affordable rates in Hawaii cannot support the infrastructure upgrades HT seeks to complete.

B. HT cannot rely on explicit intrastate support from the State of Hawaii.

Some commenters suggest that grant of the Petition is unnecessary because HT can seek explicit support from the State of Hawaii.[54] However, as HT explained in the Petition, the State of Hawaii is not currently a viable source of funds. Although the HPUC has adopted rules to establish the basic framework for an explicit intrastate universal service fund,[55] it has not put this mechanism into operation, and many issues remain unresolved. In the absence of state support, the Commission should – and indeed must – act under Section 254 to ensure that Hawaii residents are adequately served, and to advance the larger public interest.

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53 *See* Ind. Analysis and Tech. Div., Wir. Comp. Bur., FCC, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, at Tables 1.1 and 1.3 (2007) (showing that as of October 2006 the monthly residential rate in Honolulu, Hawaii is higher than the average rate for local service in urban areas).

54 *See id.* at 4-5.

55 *See* HAW. ADMIN. R. ch. 6-81.

While the Commission traditionally has made states with average costs below the nationwide benchmark shoulder the burden of ensuring comparable intrastate rates, this arrangement is not mandated by Section 254. To the contrary, Section 254 imposes an independent obligation on the federal government to ensure that Hawaii residents benefit from specific, predictable, and sufficient universal service funding.[56] The Commission's decision to provide funding to states with average costs above the nationwide benchmark was merely an expedient, but one that underscores the obligation of the federal government to provide federal universal service support to those states with demonstrable need for that support, such as Hawaii. As the Federal-State Joint Board recognized in its *Second Recommended Decision*, which provides the basis for the *Ninth Report and Order*, "[s]ome states may face significant obstacles in maintaining reasonably comparable rates, and may find that solving this problem by state action alone is impossible or unreasonable in some instances. For this reason . . . , additional federal support may be needed to ensure that rates are reasonably comparable, as required by section 254(b)(3)."[57] The unique challenges faced by HT, along with the unique needs of Hawaii residents for effective communications capability, and the unique federal interests in ensuring that Hawaii residents have that capability, justify a greater level of federal involvement in supporting the deployment of modern, reliable telecommunications infrastructure in Hawaii.

Verizon erroneously claims that HT "points to no flaw in the Commission's balancing of jurisdictional concerns in the *Ninth Report and Order* nor any change in the legal standards that

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[56] 47 U.S.C. § 254(b)(5). *See also Qwest I*, 258 F.3d at 1204 ("[T]he FCC may not simply assume that the states will act on their own to preserve and advance universal service. It remains obligated to create some inducement – a 'carrot' or a 'stick,' for example . . . for the states to assist in implementing the goals of universal service.").

[57] *See Federal-State Joint Board on Universal Service*, Second Recommended Decision, 13 FCC Rcd 24744, at ¶ 40 (1998).

underlie federal universal policy since the Tenth Circuit approved statewide averaging."[58] First, Verizon's assertion that the Tenth Circuit "approved" of statewide averaging exaggerates the court's findings; the Tenth Circuit found only that the Commission's decision to employ statewide averaging was a reasonable methodology – albeit one plagued with issues that are still unresolved.[59] Contrary to Verizon's suggestion, the court did not find that statewide averaging was required under Section 254 or that the Commission's choice was the only possible methodology, and said nothing to suggest that statewide averaging would be appropriate – or even permissible – in special circumstances such as those facing HT.

Second, HT *has* identified critical flaws in the Commission's use of statewide averaging *as applied to HT*. The Petition, and the larger record, establishes that statewide averaging of costs fails to ensure that the goals of Section 254 are met in Hawaii. There is *no* evidence that HT could achieve rate and service comparability and affordability without federal support, which the current statewide averaging mechanism does not provide. In fact, history has shown that compelling HT to rely on intrastate funding would be futile, undermining the reasons for which statewide averaging was adopted in the first place.

Section 54.309 is premised on the expectation that each state with average costs below the nationwide benchmark has the resources and political will to ensure comparable intrastate rates without federal assistance. While acknowledging that averaging costs on the basis of geographic areas smaller than the state "would have the advantage of providing a more granular measure of support, and that granularity of support is a desirable goal in a competitive

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58 Opposition of Verizon at 3.

59 *See Qwest II*, 398 F.3d at 1236-7 (remanding Commission's decision to provide support only to those states with average costs at least two standard deviations above the national average).

marketplace," the Commission implemented statewide averaging to allow states to "satisfy their own rate comparability needs *to the extent possible* before drawing support from other states."[60] In other words, the Commission expected that the loss of accuracy and efficiency in directly fulfilling Section 254's mandate on the federal level would be offset by the benefits resulting from states adopting their own intrastate non-rural mechanisms.

With respect to Hawaii, additional, uniquely federal concerns, including the importance of Hawaii to the nation's strategic and national security interests, justify federal action to provide the universal service support necessary to ensure that HT's networks are strong, modern and robust, regardless of the level of state action. The Commission, therefore, should not wait for the HPUC to complete work on an intrastate support mechanism, given that there is no legal requirement that it do so, and the incentives built into Section 54.309 have been ineffective for more than a decade. Strict application of Section 54.309 sacrifices "granularity of support," which the Commission has recognized as a desirable goal, without any offsetting benefit.

C. HT cannot rely on additional financing from lenders.

PLNI suggests that HT could or should be able to obtain additional financing from lenders in lieu of the federal government.[61] As explained in HT's Petition, though, HT is subject to numerous covenants which preclude HT from taking on additional debt. Contrary to PLNI's suggestion, this is not a sign of irresponsibility, but a feature common in secured debt facilities today. Moreover, as PLNI itself states, the HPUC has indicated its strong preference that HT not

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60 *Federal-State Join Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, at ¶ 48 (1999) (emphasis added) ("*Ninth Report and Order*").

61 PLNI Comments at 2-3. *See also* State PSC Opposition at 10 n.4 (claiming that HT could secure financing from Carlyle).

assume additional debt.[62] Additional debt would further raise HT's costs, exacerbating some of the very problems described in the Petition. In any event, as explained in the Petition, HT would not be able to raise capital from financial markets to fund infrastructure development for basic services in high-cost wire centers because investors would be unable to recoup that investment; absent federal funding, investment in infrastructure upgrades in high-cost areas simply is not economically viable.[63] This is the reason that high-cost universal service funding mechanisms exist in the first place.

III. COMMISSION CONSIDERATION OF HT'S PETITION, AND THE NEEDS OF HAWAII RESIDENTS, SHOULD NOT BE STAYED PENDING THE RESOLUTION OF OTHER PROCEEDINGS

A number of commenters agree with HT's claim that statewide averaging does not serve the interests of Hawaii residents, but nevertheless object to the Petition on the grounds that the Commission should instead pursue a more comprehensive overhaul of universal service funding mechanisms in the course of one or more open rulemaking proceedings.[64] While HT recognizes that the Commission is currently considering universal service reform in other proceedings, the Commission can and should grant HT's Petition while continuing its ongoing consideration of similar issues in the course of those rulemaking proceedings. The fact that broader policy changes might serve the public interest does not negate the fact that granting HT's Petition would also serve the public interest. Similarly, the Commission's consideration of the Petition is not mutually exclusive with the Commission's consideration of new interim support mechanisms for non-rural insular areas.

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62 PLNI Comments at 2-3.

63 Petition at 21-2.

64 *See* GVNW Comments at 6, 8-9; Embarq Comments at 6; SIC Comments at 5-6; State PSC Opposition at 9-10; WTA/OPASTCO Comments at 1-3.

Further, the Commission is obligated to give HT's Petition a "hard look" on its merits, notwithstanding the fact that similar issues may arise in the context of other proceedings. As the D.C. Circuit explained in *WAIT Radio v. FCC*, the fact "[t]hat an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."[65] Hawaii residents should not suffer while pending rulemaking proceedings – which have persisted in various forms for years – remain unresolved. When the Commission acts to reform existing universal service mechanisms, it can also consider at that time how best to re-integrate HT into the generally applicable support methodology.

Moreover, granting HT's Petition would provide an excellent opportunity for the Commission to study one potential reform of the existing universal service framework and thus better inform its consideration of these issues in its other ongoing reform proceedings. As discussed above, granting HT's Petition would offer an excellent opportunity to examine how a more granular universal service framework might function in an isolated market. Grant of HT's Petition would have a minimal impact on the fund, but would provide a meaningful opportunity to observe the potential public interest benefits of widespread wire center-level cost averaging.

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[65] 418 F.2d 1153 (1969).

IV. THE COMMISSION SHOULD REJECT CALLS TO IMPOSE BURDENSOME RESTRICTIONS ON HT'S USE OF HCMS FUNDS

In its Comments, PLNI requests that the Commission only grant the Petition subject to conditions that (i) HT use any HCMS funds received to shorten loop lengths in wire centers that qualify for HCMS funding, and (ii) HT provide wire center detail, in addition to or in lieu of service area detail, in its annual ETC certification reports provided to the Hawaii Commission.[66]

HT does not object in principle to a requirement that it report its use of HCMS funds at the wire center level, and has described its expectations for increases in broadband availability as a result of plant upgrades it would be able to make with federal universal service support. HT strongly objects, though, to PLNI's suggestion that this support should be used solely for shortening loop lengths in those qualifying wire centers. Although shortening loop lengths is unquestionably an important step, switching and transport upgrades are equally vital, as explained in HT's Petition.[67] Section 254(e) of the Communications Act mandates that such funds may only be used for the "provision, maintenance, and upgrading of facilities and services for which the support is intended."[68] There is no reason to question HT's commitment to compliance with this requirement, or to impose restrictions on HT not applicable to other carriers. Imposing additional *ex ante* restrictions on HT's use of HCMS funds would limit HT's ability to develop and implement the most effective engineering solutions to lower its costs of operations. HT will be held accountable for its actions through the state certification process, which is sufficient to ensure that HT does not abuse any funding it may receive.

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66 PLNI Comments at 4.

67 *See, e.g.*, Petition at 3.

68 *See* 47 U.S.C. § 254(e).

HT also questions whether the Commission can or should require HT to include wire center-level data in a report to be filed under Hawaii state law with the HPUC. In the state proceeding PLNI identifies, the HPUC established procedures for eligible telecommunications carriers to certify, on an annual basis, their compliance with the requirements of Section 254(e). The Commission has historically left the procedures underlying this certification process within the sound discretion of the various state public utility commissions,[69] and there is no need to depart from this practice here. The HPUC exercises the sovereign authority of the State of Hawaii, and is fully equipped to determine what level of detail it requires before it can appropriately certify to the Commission that HT has properly used its universal service funds. If PLNI believes that more detailed reporting is necessary, PLNI should address that claim to the HPUC.

V. CONCLUSION

For the foregoing reasons, and those set forth in the Petition, HT requests that the Commission expeditiously grant the requested waivers of Sections 54.309 and 54.313(d)(vi), to permit it to receive federal HCMS calculated on a wire-center-by-wire-center basis, beginning immediately upon grant of this Petition, for a period of five years.

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69 *Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371, at ¶ 71 ("Individual state commissions are uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements.").

Respectfully submitted,

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