

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
**Federal-State Joint Board on Universal Service** ) CC Docket No. 96-45  
 ) WC Docket No. 08-71  
**Hopi Telecommunications, Inc. (SAC #452173)** )  
Petition for Waiver of Section 54.314(d)(1) Filing Deadline )  
For Submission of Annual Section 254(e) Certification by )  
Tribal and Other Carriers Not Subject to State Jurisdiction )

**PETITION FOR WAIVER OF SECTION 54.314(d)(1) DEADLINE  
FOR ANNUAL SECTION 254(e) CERTIFICATION**

Hopi Telecommunications, Inc. (“Hopi”; Study Area Code 452173), by its attorney and pursuant to Section 1.3 of the Commission’s Rules, requests waiver of the October 1, 2008 deadline established by Section 54.314(d)(1) of the Rules for the filing of its annual certification with the Commission and with the Universal Service Administrative Company (“USAC”) that all of its federal high-cost support will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.

The requested waiver is needed because Hopi, a relatively new Eligible Telecommunications Carrier (“ETC”) designated pursuant to Section 241(e)(6) of the Communications Act, erroneously confused its annual Section 254(e) certification with the annual Section 54.209 progress report that was also due on October 1, 2008, and believed that the Section 254(e) certification had been timely filed as part of the Section 54.209 progress report. When Hopi discovered that this was not the case shortly after the October 1, 2008 deadline, it immediately prepared and filed its Section 254(e) certification on October 6, 2008 (copy attached as Exhibit A).

Good cause exists for the requested waiver because: (1) Hopi made material and substantial attempts to comply with all of its federal high-cost filing requirements for 2008-2009, including the requisite certifications that it was using federal high-cost support for the proper purposes; (2) grant of the requested waiver will have no significant adverse impact upon USAC's administration of the ICLS program; (3) the loss of approximately \$101,454 of federal high-cost support by Hopi for the First Quarter of 2009 will impair its ability to invest in new and upgraded telecommunications infrastructure, and may ultimately result in service quality decreases or local service rate increases for its tribal customers; (4) the loss of approximately \$101,454 of federal high-cost support would constitute an excessive penalty for Hopi and its customers for what was an inadvertent error; and (5) Hopi has adopted internal procedures to ensure its future compliance with federal high-cost program filing deadlines.

## **I** **Background**

Hopi is a rural incumbent local exchange carrier ("ILEC") that has been formed to serve the Hopi Reservation and a small portion of the Navaho Reservation in northeastern Arizona. Hopi was established in April 2004 by the Hopi Tribal Council, and is wholly-owned by the Hopi Tribe. It is a Tribal Chartered Corporation whose mission is: (1) to provide better quality telecommunications services to the Hopi Reservation; (2) to create a sustainable business that provides jobs to Tribal Members; (3) to provide a telecommunications infrastructure that promotes economic and social development; and (4) to promote Tribal sovereignty through empowerment, self-sufficiency and self-regulation.

Hopi acquired its three rural exchanges – the Keams Canyon, Kykotsmovi Village and Polacca exchanges – from CenturyTel of the Southwest in early 2006. By Order (*Hopi Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier*

for the Hopi Reservation in Arizona), CC Docket No. 96-45, DA 07-459, released January 31, 2007, the Wireline Competition Bureau designated Hopi as an ETC pursuant to Section 214(e)(6) of the Communications Act because Hopi is a tribal corporation not subject to the jurisdiction of the Arizona Corporation Commission. The Bureau's Order permitted Hopi to receive federal high-cost support from June 1, 2006.

## II

### **Good Cause Exists for Waiver of the Section 54.904(d) Deadline**

Section 1.3 of the Rules permits the Commission's rules to be waived for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of hardship, equity, and the effective implementation of public policy on an individual basis. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

#### **A. Material and Substantial Compliance Efforts**

The special circumstances supporting grant of the requested waiver begin with the material, substantial and timely efforts made by Hopi to comply with the requirements and filings necessary to qualify for and receive federal high-cost support for the 2008-2009 period.

As an ETC designated by the Commission pursuant to Section 214(e)(6) of the Act, Hopi is required by Section 54.209(a) of the Commission's Rules to submit an annual progress report with respect to its five-year service quality improvement plan no later than October 1 of each year. Hopi and its cost consultants prepared the Company's 2008 annual progress report and filed it with the

Commission in timely fashion on September 30, 2008<sup>1</sup>. This progress report contained detailed information regarding the status of various capital investment projects to improve service quality, actual and projected investments in certain categories of telecommunications plant, and information regarding service outages, unfulfilled service requests and customer complaints.

Attachment 1 to Hopi's 2008 progress report begins with a paragraph entitled "Use of Support" wherein Hopi states in relevant part that "the federal support funds received by the Company and other incumbent rural telephone companies are, in fact, an integral part of the rural ILEC's recovery of expenditures incurred in the provision, maintenance and upgrading of its provision of universal service. Hopi's Attachment 1 then proceeds to detail the completion or pending status of its various infrastructure investment projects, including reasons for delays. Hopi's entire Section 54.209(a) progress report and attachments for 2008 were certified on September 30, 2008, via a Declaration under penalty of perjury by Hopi's President and General Manager.

The concurrent October 1 deadlines for the annual Section 54.209(a) progress report and the annual Section 254(e) certification can be confusing for ETCs that are not subject to State jurisdiction and that must make both filings themselves. The Section 54.209(a) progress report entails the submission and certification of detailed information regarding the use of federal universal service support for telecommunications infrastructure investment and other service quality improvements. Whereas most ETCs are included in Section 254(e) certifications filed by their State commissions, ETCs designated by the Commission under Section 214(e)(6) are not subject to State jurisdiction and must file their own Section 254(e) certifications. It is relatively easy for the managements and employees of the latter Section 214(e)(6) ETCs to presume erroneously that the certification that they are using federal high-cost support for the proper purposes is included in

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<sup>1</sup> Hopi's Section 54.209(a) progress report contains substantial amounts of confidential information that Hopi has requested not to be made available for public inspection. Hopi has filed its progress report with the Commission and will make it available to the Bureau personnel reviewing this petition at their request, but has not attached it as an exhibit to this petition due to its confidentiality concerns.

the Section 54.209(a) progress report and to overlook or mistake the need to file the separate Section 254(e) certification also.

2008 was only the second year that Hopi encountered the concurrent October 1 deadlines for the Section 54.209(a) progress report and the Section 254(e) certification. Hopi's management unfortunately forgot that two separate filings were required and had been made the prior year, and presumed erroneously that the requisite certification of appropriate use of federal high-cost support was included in and satisfied by the detailed descriptions of high-cost support usage in the progress report. When this mistake was discovered by Hopi and its cost consultant shortly after the October 1 deadline, Hopi promptly prepared and submitted its required Section 254(e) certification on October 6, 2008.

#### **B. No Adverse Impact on USF Administration**

USAC has received from Hopi all relevant data needed to project, calculate and/or true-up Hopi's High Cost Loop ("HCL") support, Local Switching Support ("LSS") and Interstate Common Line Support ("ICLS") for 2008 and 2009. The brief five-day delay from Wednesday, October 1, 2008 to Monday, October 6, 2008 in USAC's and the Commission's receipt of Hopi's Section 254(e) certification will not disrupt or delay the administration of any federal Universal Service Fund programs.

#### **C. Adverse Impacts upon Investment, Local Rates and Jobs**

In contrast, the loss of all or a significant portion of the approximately \$101,454 of high-cost support that Hopi would otherwise be entitled to receive during the First Quarter of 2009 would be a severe blow to the Hopi and the tribal customers it serves on its rural Reservations. That amount represents approximately four (4) percent of Hopi's annual revenues.

Revenue losses of this magnitude are extremely onerous and disruptive for small companies like Hopi that have been making substantial telecommunications infrastructure investments to improve service and service quality in areas that have long had very inadequate telecommunications facilities and service. Given that such revenue losses are not accompanied by any offsetting reductions in costs or loan repayment obligations, Hopi will have no choice but to reduce its current operating expenses and/or to postpone or cancel planned investments. Cutting \$101,454 from Hopi's 2009 budget not only will delay service and service quality improvements urgently needed by tribal members to participate more fully in economic, political and social activities, but also will impair the economic development of the entire Hopi Reservation by eliminating jobs and service contracts urgently needed by tribal residents and small businesses residing there.

Hopi notes that it does not have the option of increasing the local service rates paid by its tribal subscribers. The projected \$101,454 of lost federal high-cost support represents an average of \$57.61 for each of Hopi's approximately 1,761 access lines, or \$19.20 per month during the First Quarter of 2009. Rate increases of this magnitude would constitute a substantial hardship as well as an unwarranted penalty to Hopi's subscribers, and would not advance the fundamental Universal Service principle of just, reasonable and affordable rates.

#### **D. Excessive and Onerous Penalty**

Penalties and forfeitures are not favored by the law, and should be enforced only when they are within both the spirit and letter of the law. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939). In determining whether penalties and fines are excessive, courts have examined whether they are "so disproportionate to the offense as to shock public sentiment" or

“contrary to the judgment of reasonable people concerning what is proper under the circumstances.” *Hindt v. State*, 421 A.2d 1325, 1333 (Del. 1980).

The imposition of an effective penalty of approximately \$101,454 upon Hopi for an innocent and harmless delay of three business days in meeting a confusing deadline would be wholly disproportionate to the alleged “offense” and would be deemed “excessive” in the judgment of virtually all reasonable people. In this respect, it should be noted that Section 503(b)(2)(B) of the Act imposes a smaller maximum penalty of \$100,000 upon a common carrier for a willful violation of a law or regulation.

#### **E. New Internal Procedures to Ensure Future Compliance**

Hopi has already revised its internal schedule of FCC, USAC and National Exchange Carrier Association (“NECA”) filing requirements and deadlines to indicate clearly and explicitly that a separate annual Section 54.209(a) progress report and a separate annual Section 254(e) certification must be prepared during September of each year and filed with the Commission (and with USAC regarding the annual Section 254(e) certification) on or before October 1 of each year. Hopi has also arranged with its cost consultant that both Hopi management and the cost consultant’s staff will send each other email reminders and monitor the preparation and timely submission of all required federal high-cost program filings and reports.

### **III** **Conclusion**

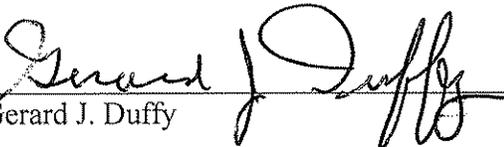
Good cause, as well as considerations of hardship, equity, and the effective implementation of the Commission’s universal service policies, warrant grant of Hopi’s requested waiver of the Section 54.314(d)(1) deadline for the filing of annual Section 254(e) certifications by ETCs not subject to State jurisdiction. Hopi did comply in timely fashion with the more detailed annual Section 54.209 progress report deadline, and demonstrated in that

concurrent filing that it has been using its federal high-cost support for the intended purposes. Whereas grant of the requested waiver will not disrupt or impair USAC's administration of federal high-cost support programs, the potential loss or delayed receipt by Hopi of approximately \$101,454 of expected federal high-cost support during the First Quarter of 2009 would impose severe and unwarranted hardships upon its customers, employees and investment plans and constitute an excessive and onerous penalty for an innocent mistake regarding confusing concurrent deadlines.

Good cause having been shown, the Commission is requested to waive the Section 54.314(d)(1) certification deadline, and to order USAC to distribute to Hopi the approximately \$101,454 of HCL, LSS and ICLS to which Hopi would otherwise be entitled during the First Quarter of 2009.

Because the federal high-cost support at stake is so substantial and critical for Hopi, the Commission is requested to act expeditiously upon this petition.

Respectfully submitted,  
**HOPI TELECOMMUNICATIONS, INC.**

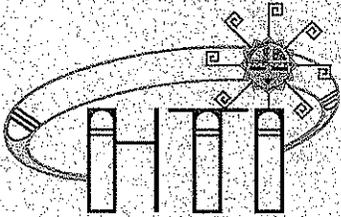
By   
Gerard J. Duffy

Its Attorney

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Dated: October 29, 2008

## Exhibit A



# HOPITELECOMMUNICATIONS, INC.

5200 E. Cortland Blvd, E200  
Flagstaff, Arizona 86004

(928) 522-8428 Office  
(928) 527-4959 Fax

www.hopitelecom.net

## VIA ECFS

October 6, 2008

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

RE: Certification of Compliance with Section 254(e) in Lieu of State Certification, Pursuant to the Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45

Dear Ms. Dortch:

Pursuant to the provisions in the above referenced Order and 47 C.F.R. § 54.314(b), filed herewith is my executed affidavit on behalf of Hopi Telecommunications, Inc. ("Hopi"), study area code 452173. As a tribally-owned carrier not subject to the jurisdiction of the Arizona Corporation Commission, Hopi is filing its certification with Section 254(e) directly with the FCC.

If you have any questions concerning this filing, please contact me.

Sincerely,

Carroll Onsaie

Attachment

cc: Ms Karen Majcher  
Vice President High Cost and Low Income Division  
Universal Service Administration Company  
2000 L Street, NW, Suite 200  
Washington, D.C. 20036

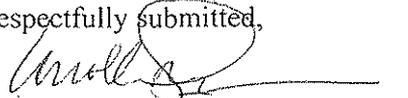
**AFFIDAVIT OF COMPLIANCE WITH  
SECTION 254(e) TO RECEIVE FEDERAL  
UNIVERSAL SERVICE FUNDS PURSUANT  
TO THE FOURTEENTH REPORT AND ORDER**

§ **FEDERAL**  
§ **COMMUNICATIONS**  
§ **COMMISSION**  
§

I, Carroll Onsaе, an officer of Hopi Telecommunications, Inc. ("Hopi") with substantial knowledge of Hopi's operations, do hereby certify under penalty of perjury that the following is true and accurate to the best of my knowledge and belief:

1. My name is Carroll Onsaе. I am employed by Hopi in the position of General Manager. In this position, I am personally familiar with the Federal Universal Service Support received by Hopi and how Hopi uses these funds.
2. Hopi is an Eligible Telecommunications Carrier ("ETC") within the meaning of §214(e) of the Federal Telecommunications Act of 1996 ("Act"), having been designated by the FCC as an ETC on January 31, 2007.
3. The Federal Universal Support funds received by Hopi are used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended, as designated by the Federal Communications Commission consistent with Section 254(e) of the Act.
4. These funds will be used to provide the supported services as designated in 47 C.F.R. §54.101 which are available throughout Hopi's study area

Respectfully submitted,



Carroll Onsaе

10/6/08  
Date

**DECLARATION**

I, Carroll Onsaе, hereby declare, under penalty of perjury, as follows:

1. I am the President and General Manager of Hopi Telecommunications, Inc. ("Hopi").
2. I have reviewed Hopi's "Petition for Waiver of Section 54.314(d)(1) Deadline for Annual Section 254(e) Certification," dated October 29, 2008, and declare that the factual statements and representations therein are true and correct to the best of my knowledge, information and belief.



Carroll Onsaе

10/29/08

Date