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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

COMMENTS OF HOPI TELECOMMUNICATIONS INC.

Hopi Telecommunications Inc. ("HTI" or the "Company") hereby responds to the invitation of the Federal Communications Commission ("FCC" or "Commission") to comment on questions that pertain to Tribally-owned and operated carriers and service on Tribal lands which are found in sections XVII.A-K of the Commission's *Order and Further Notice* in this proceeding.[1] Some of these questions pertain to near-term reforms for rate-of-return eligible

[1] *Connect America Fund,* WC Docket No. 10-90, *A National Broadband Plan for Our Future,* GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Docket No. 07-135, *High-Cost Universal Service Support,* WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up,*

telecommunications carriers ("ETCs") that are Tribally owned and operated[2] while others pertain to providing service on Tribal lands in Phase II of the Mobility Fund and areas where price cap carriers elect not to accept Connect America Funds ("CAF").[3] HTI is an ETC that is tribally owned and operated and serves Tribal lands. As such, HTI is especially well-qualified to provide valuable insight to the Commission on these matters.

I. Changing the Existing 11.25% Rate of Return For Tribally-Owned and Operated ETCs is Not Warranted

In section XVII.C the Commission seeks comment on several aspects of updating the rate of return for rate-of-return carriers. In this context, the FCC asks "how to account for Tribally-owned and operated carriers in this prescription, and whether a different rate of return is warranted for these carriers."[4] The Commission recognizes,

> Tribal governments, and by extension, Tribally-owned and operated carriers, play a vital role in serving the needs and interests of their local communities, often in remote, low income, and underserved regions of the country. Tribally-owned and operated carriers serve cyclically impoverished communities with a historical lack of critical infrastructure. Reservation-based economies lack fundamental similarities to non-reservation economies and are among the most impoverished economies in the country. Tribal Nations also cannot collateralize trust land assets, and as a result, have more limited abilities to access credit and capital.[5]

The Commission then seeks comment on how such considerations should be reflected in analysis to update the rate of return.

A. Record Evidence Demonstrates that Tribally-Owned and Operated Carriers Have Unique Characteristics

WC Docket No. 03-109, *Universal Service – Mobility Fund,* WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Order and Further Notice* ").

[2] See Section XVII.C seeking comment on matters related to Interstate Rate of Return Represcription and Section XVII.E Limits on Reimbursable Capital and Operating Costs for Rate-of-Return Carriers.

[3] See Section XVII.I seeking comment on Phase II of the Mobility Fund and Section XVII.J. seeking comment on areas where price cap carriers elect not to accept CAF.

[4] *Order and Further Notice* at para. 1059.

[5] *Id.*

There are currently twelve tribally-owned and operated rate-of-return carriers.[6] As described by NTTA, these carriers play a vital role in historically underserved Native American communities and "because of high unemployment and high poverty rates, [they] are the line between being unconnected and being able to reach the outside world."[7] In support of this fact, NTTA notes that one tribally-owned and operated carrier has 86% of its subscribers on Lifeline support, a second has 47% and a third, HTI, has 857 subscribers on Lifeline support.[8] NTTA provides record evidence that that these tribally-owned and operated carriers have had to incur substantial costs to overcome the unique challenges of extremely low telecom and broadband penetration on Tribal lands. For example, NTTA recounts,

> In 1990, 6 of the 8 Tribes that became their own regulated service providers had less than 10 percent service penetration in their communities. At the time of their decision to become regulated services, these 8 Native tribes felt they had no choice but to provision the communications needs of their communities. Today, each of these communities has seen 300 to 800 percent increases in service penetration accompanied by similar broadband access increases. By any measure, these Tribal build-outs have been the epitome of service and investment efficiency. But their network expansion and attainment of parity with urban and non-Native communities did not come cheaply nor were their networks the cheapest technologies support funding could provide. Yet, tribal network expansion in these communities met both the standards of parity and the standards of efficiency.[9]

These same unique challenges and characteristics are true for HTI. HTI is incorporated under the laws of the Hopi Tribe and is 100% owned by the Tribe. The vision of the Hopi Tribe for HTI is to build a profitable enterprise, more importantly, to become a fundamental and strategic solution to raise the economic, social, education and technology standards on par with

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[6] The National Tribal Telecommunications Association is comprised of the twelve Indian Tribes that have created their own telecommunications service providers (Cheyenne River Sioux, Tohono O'odham, Gila River, San Carlos Apache, Fort Mojave, Salt River Pima Maricopa, Mescalero Apache, Hopi, Standing Rock Sioux, Warm Springs, Crow Creek Sioux, and Pine Ridge Sioux tribal nations.)
[7] *See* Comments of NTTA, WC Docket 10-90, et al., filed April 19, 2011 at pp18-19.
[8] *Id.* at pp 14-15.
[9] *Id.* at p 8.

the expectations set by every American. Ubiquitous telecom and broadband coverage are key to fulfilling this mission.

HTI's service territory has a significant amount of low income individuals as evidenced by the high number of Lifeline subscribers as well as to those that reside in the remote "Hopi Partitioned Land" who do not have access to basic utilities such as electricity, water and road services. In 2006, the Hopi Tribe secured an acquisition loan from the Rural Utilities Service ("RUS") for the sole purpose of purchasing three exchanges from CenturyTel. HTI was granted ETC status by the FCC on January 31, 2007 and has been making the RUS loan payments. As described in more detail in *ex parte* meetings that HTI conducted, HTI has brought reliable, advanced services to its serving area when much-larger CenturyTel was either unable or unwilling to do so.[10] Subsequently, HTI secured an RUS telecommunications infrastructure loan to upgrade the facilities and provide reliable, affordable and advanced service and more recently secured a combination loan/grant through the American Recovery and Reinvestment Act ("ARRA"). Indeed, significant costs have been incurred to ensure that the Tribe's mission is being fulfilled in the most efficient and expedient way.

B. Given these Unique Characteristics, Tribally-Owned and Operated Carriers Should Retain at Least the Existing 11.25% Rate of Return

With respect to the prescription process, the FCC cites case precedent that "[t]he rate of return must be high enough to provide confidence in the 'financial integrity' of the carrier, so that it can maintain its credit and attract capital;" that "[t]he return should also be 'commensurate with returns on investments in other enterprises having corresponding risks;'" and that "'[t]he

[10] *See* Letter from John Kuykendall, Vice President, John Staurulakis, Inc. on behalf of Hopi Telecommunications, Inc. to Marlene H. Dortch, Secretary, FCC, *ex parte* presentation in Docket No. 10-90, et al. filed on Sept. 22, 2011 ("HTI Sept. 22 *ex parte*").

return should not be higher than necessary for this purpose.'"[11] The Commission then states its belief that "updating the rate of return is necessary for rate-of-return carriers to both attract capital on reasonable terms in today's markets and encourage economically sound network investments" and seeks comment on issues raised when it last conducted an interstate rate of return prescription proceeding.[12]

In reviewing the process on which the Commission seeks comment, it becomes evident that a different rate of return is warranted for Tribally-owned and operated carriers. First, a rate of return that is lower than the current 11.25% would not fulfill the statutory requirement that the rate of return be high enough to provide confidence in the "financial integrity" of the Tribally-owned and operated carriers so that they can maintain their credit and attract capital.[13] In the *ex parte* meetings that HTI has conducted, HTI has demonstrated that while it has been able to obtain RUS loans, it is unable to secure lending from commercial lenders as there is a lack of understanding about Native American communities and their businesses.[14] Further, in the *ex parte* presentations, HTI demonstrated that without the current levels of support, the Company will fail all loan commitments and will not be able to fulfill the requirements of its ARRA award.[15]

[11] *Order and Further Notice* at para. 1045 *citing U.S. v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983) (quoting *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)); *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1260 (D.C. Cir. 1993) (quoting *Hope Natural Gas Co.*, 320 U.S. at 603); *U.S. v. FCC*, 707 F.2d at 612 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968)).
[12] *Order and Further Notice* at paras. 1047-1048 (citing *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Notice Initiating a Prescription Proceeding and Notice of Proposed Rulemaking, 13 FCC Rcd 20561, 20563 (1998).
[13] The Commission has determined that based on a preliminary analysis that it conducted, the rate of return should be "no more than 9 percent." *Order and Further Notice* at para. 1057. Accordingly, tribally owned and operated carriers should have a return premium of at least 225 basis points (2.25%) which reflects the unique challenges and characteristics of serving tribal lands.
[14] HTI Sept. 11, 2011 *ex parte* at p 21.
[15] *Id.* at p 3.

Second, given the unique challenges and characteristics of small number of Tribally-owned and operating carriers, it is not possible for the Commission to ensure that the rate of return of these companies is "commensurate with returns on investments in other enterprises having corresponding risks." For example, as part of the presubscription process, the Commission "must select an appropriate set of surrogate firms, for which there is available financial data and that face similar risks to rate-of-return carriers."[16] Given the small number and unique characteristics of tribally-owned and operated carriers, it would be impossible to select a surrogate which reflects the business risks and cost of capital of these carriers. Accordingly, to avoid imposing an arbitrary and capricious rate of return on these carriers, the Commission should retain at least the existing 11.25% rate of return for these carriers which the Commission previously found was not "higher than necessary for this purpose."

II. Exemption from Benchmarks for Capital and Operating Costs is Warranted for Tribally-Owned and Operated Carriers

It its *Order and Further Notice*, the Commission has adopted the policy to place carrier-specific limits on capital and operating costs for rate-of-return carriers receiving High-Cost Loop Support ("HCLS") and Interstate Common Line Support ("ICLS"). It delegates to the Wireline Competition Bureau the authority to finalize a methodology for HCLS and ILCS limits. HTI has investigated the methodology proposed by the Wireline Competition Bureau and has found it to be fundamentally flawed.[17] Accordingly, this methodology should be rejected. If the Commission decides to adopt such a methodology, HTI hereby demonstrates that the network operation and investment by Tribally-owned and operated carriers has such unique characteristics that an exemption for these carriers from application of this methodology is justified.

[16] *Order and Further Notice* at para. 1052.
[17] HTI is aware that these flaws will be enumerated and expanded upon by other commenters in this proceeding.

The record is replete with evidence demonstrating that the network operation and investment by Tribally-owned and operated carriers has unique and significantly different characteristics from non-Tribal conditions. While some of the record evidence exists in the form of comments and *ex parte* presentations,[18] the most detailed information on network operation and investment by Tribally-owned and operated carriers is contained in the annual reports that these carriers must file by virtue of the fact that they are certified as ETCs by the FCC. These reports include specific data on progress on the carrier's five-year service quality improvement plan, detailed information on any outages, the number of requests from potential customers within the carrier's service area that were unfilled and details regarding the number and type of complaints.

In HTI's case, the annual reports have shown that one of the most significant challenges in fulfilling its five-year plan and in meeting requests for telecom and broadband services are delays in rights-of-way and permit approvals which have prevented construction of necessary facilities. Some of the reasons why rights-of-way issues present such significant challenges on Tribal lands are the lengthy process of obtaining approval from the Bureau of Indian Affairs ("BIA") which could take well over a year as well as the need to obtain approval from other authorities, all of which results in an expensive and time consuming process. For example, as part of a project to provide a currently unserved village to HTI's network, HTI must first have an environmental assessment conducted and obtain a Finding of No Significant Impact report. It then must provide this report to the Hopi Tribal Realty Office along with a rights-of-way

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[18] *See, e.g.,* Comments of Gila River Telecommunications, Inc., CG Docket No. 11-41 at p 3, filed June 20, 2011 (explaining how the carrier continues to dedicate significant resources to improvements of its 911 system due to the fact that many of the street names do not have signs, public addresses on the approximately 8,000 structures in the community are almost non-existent and "the existing wireline 911 service inherited from US West employed an address-based system and did not have GPS capabilities"); HTI Sept. 11, 2011 *ex parte* at pp 10-11 (explaining the challenges HTI has faced in bringing reliable, advanced services to the reservation when CenturyTel was either unable or unwilling to do so).

application. The Hopi Tribal Realty Office provides supporting documentation for the Hopi General Counsel's office to review which then will be presented to the Hopi Tribal Council for approval. After council review and approval, Hopi Tribal Realty Office with Hopi Agency of BIA will issue Grant of Easement which is the rights-of-way document.[19]

HTI's annual reports have also detailed the challenges of providing service to those in the most remote portions of its service area which differs significantly than other remote areas of the U.S. For HTI, this remote portion, known as the "Hopi Partitioned Land" or "HPL," is comprised of land assignments for residential and agricultural use that are scattered and are not accessible to basic utilities such as electricity, water and road services. To serve this area, HTI had to request maps of the land assignments from the Director of the Offices of Hopi Lands to see if it can determine how many residences are in these areas since land assignments do not necessarily equate to residences. After it was determined that maps were not available, the residences were identified by conducting a drive through of the HPL through the assistance of the Hopi Resource Enforcement Service (Hopi Rangers). Subsequently, HTI received over 30 applications for service. In order to provide service in the most cost efficient manner, HTI researched and selected a satellite voice and data connectivity option for these subscribers which it is now deploying.

Given the high degree of detail on network operations and investment that is provided to the Commission each year by Tribally-owned and operated carriers, as well as other record evidence, the Commission can clearly see that certain unique characteristics and challenges such

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[19] For further record evidence of why rights-of-way issues present such significant challenges on Tribal lands see Letter from Martin L. Stern, K&L Gates LLP on behalf of Sacred Wind Communications, Inc. ("SWC"), WC Docket No. 11-59, filed on Sept. 9, 2011at p 1 **(**explaining that "for simple fiber attachments to existing poles in utility easements that date back decades, SWC is required to go through a de novo process for a new telecom easement, including the negotiation of separate compensation and full-blown environmental studies – even though there is no ground disturbance. This has added years and hundreds of thousands of dollars in costs to construction projects that would otherwise take several weeks to complete").

as the ones enumerated above are faced by these carriers. The methodology proposed by the Wireline Competition Bureau relies on the comparison of similarly situated carriers. However, it is well-known that Tribal lands are unique.[20] Accordingly, there would be no way to ensure that the characteristics and challenges faced by Tribally-owned and operated carrier are being accounted for and, as a result, these carriers would most assuredly be penalized. As these carriers are truly a class unto themselves, an exemption from the application of a methodology comparing these companies to non-similarly situated rate-of-return companies is warranted.

III. Benefits and Obligations in Phase I of the Mobility Fund Pertaining to Tribal Lands Should be Extended in Other Contexts Where Auctions are Utilized

In sections XVII.I and XVII.J, the *Order and Further Notice* makes recommendations to apply to Phase II of the Mobility Fund and to areas where price cap carriers elect not to accept CAF, the same Tribal engagement obligation and 25 percent bidding credit preference for Tribally-owned or controlled providers which are part of Phase I of the Mobility Fund.[21] Comments are also sought on whether other benefits afforded to Tribally-owned or controlled entities and to those that propose to serve on Tribal lands that are part of Phase I of the Mobility Fund should be applied in these contexts as well as adopting the use of "priority units" to Tribal governments.[22]

HTI strongly supports the Tribal engagement obligation and urges the Commission to extend this requirement to the Mobility Fund Phase II and in areas where price cap carriers elect not to accept CAF. As the Commission has found, "[t]hroughout this proceeding, commenters have repeatedly stressed the essential role that Tribal consultation and engagement plays in the

[20] One of the ways that the FCC has recognized the uniqueness of Tribal lands is by the creation of the Office of Native Affairs and Policy ("ONAP"). According to the FCC's Tribal Homepage, a key mission of ONAP is to "promote the deployment and adoption of communications services and technology throughout Tribal Lands and Native Communities." It is HTI's observation that ONAP is making significant progress in achieving these goals.
[21] *See Order and Further Notice* at paras. 1166 & 1219.
[22] *See Order and Further Notice* at paras. 1167-1171 & 1219.

successful deployment of mobile broadband service."[23] Extension of this obligation to ETCs in other contexts is consistent with and furthers these objectives. HTI also supports the continuation of the 25 percent bidding credit and other preferences and benefits that are afforded to Tribally-owned or controlled providers which the Commission has already adopted for Phase I in these other contexts.

IV. Conclusion

For the reasons enumerated herein, the rate of return for Tribally owned and operated ETCs should be at least 11.25% and these carriers should be exempted from benchmarks for capital and operating costs for these carriers. HTI looks forward to providing further input on additional proposals for Phase II of the Mobility Fund and in areas where price cap carriers elect not to accept CAF that recognize the unique challenges faced by Tribally-owned or controlled providers as well as the benefits that can be afforded by these providers when they are the ones providing these essential services to those on the reservation.

Respectfully submitted,

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[23] *Order and Further Notice* at para. 489.