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 a 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

REPLY COMMENTS OF
SACRED WIND COMMUNICATIONS, INC.

Sacred Wind Communications Inc. ("Sacred Wind"), by its undersigned attorneys, respectfully submits its reply comments to oppositions to and comments on the petitions for reconsideration of the Report and Order and Further Notice of Proposed Rulemaking of the Federal Communications Commission ("Commission") in the referenced dockets, which sought to implement and sought further comment on comprehensive reform of the federal Universal Service Fund ("USF") and Intercarrier Compensation ("ICC") regimes.[1] In addition, for the reasons discussed below, Sacred Wind joins the numerous rural interests asking that the

[1] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, et al.*, WC Docket Nos. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*USF/ICC Order*" or "*USF/ICC Order and Further Notice*," as applicable).

Commission stay implementation of the high cost components of the *USF/ICC Order* to avoid irreparable harm to remote, rural, Tribal customers and the carriers that serve them.

INTRODUCTION AND SUMMARY

Sacred Wind generally supports the comments and oppositions filed by other rate-of-return rural carriers, and, in particular, those that serve primarily Tribal lands and customers, which support reconsideration of the huge and unsustainable reductions in high cost loop support ("HCLS") and interstate common line support ("ICLS") that would result from revisions to these mechanisms that will be implemented under the *USF/ICC Order and Further Notice.*[2] Specifically, Sacred Wind joins other parties in opposing the Commission's regression analysis limiting reimbursable capital and operating expenses for the purpose of determining high cost USF support for rate-of-return carriers, as well as the $250 per month limit on high cost support adopted in the *USF/ICC Order.*[3]

The Commission's regression approach fails to take into account the unique challenges facing carriers that serve Tribal areas, and will lead to gross and unsustainable reductions in critical USF high cost support, irretrievably damaging investment in facilities, the ability to operate and provide voice and broadband services, and irreparably harming Tribal customers in the process. Ironically, reversing years of neglect by other providers, this would come just at a time when a number of new carriers serving primarily Tribal lands and customers, such as Sacred Wind, have made significant investments in new facilities and operations, with the real promise of making voice and broadband services universally available to these Tribal customers

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[2] *See, e.g.,* Opposition and Comments of the Gila River Indian Community and Gila River Telecommunications, Inc. (Feb. 9, 2012) ("Gila River Comments").

[3] *USF/ICC Order and Further Notice*, at ¶¶ 210-26, 272-79, and Appendix H. In general, the *USF/ICC Order and Further Notice* includes reductions from HCL investment and operating expenses from a proposed regression analysis, revised corporate operations expense limit for HCL and applied to ICLS, and a $250 per line per month high cost support limit (which are collectively referred to herein as the "High Cost Caps").

– consistent with the explicit goals of Congress and the Commission. While the Commission delegated final responsibility to the Wireless Competition Bureau to finalize the regression methodology to be implemented by July 1, 2012,[4] Sacred Wind agrees with those commenters and petitioners that demonstrate that the Commission's regression approach is fundamentally flawed and cannot possibly be designed to adequately address the unique circumstances in Tribal areas and to adequately support the required investment in infrastructure and operations.

This fact is driven home by the application of the proposed quartile regression methodology in Appendix H, and other aspects of high cost reform adopted by the Commission, which would result in completely unsustainable reductions in high cost support for carriers serving Tribal lands and customers. Consequently, Sacred Wind agrees that the Commission should reconsider for carriers serving Tribal lands its regression approach for calculating USF support, and eliminate the $250 cap for high cost support. In addition, the Commission should stay the implementation of its high cost reforms pending the resolution of petitions for reconsideration and the judicial appeal of the *USF/ICC Order and Further Notice* pending in the Tenth Circuit.[5]

Alternatively, should the Commission decline reconsideration of its regression approach and proceed with implementation, as an interim measure the Commission should, at a minimum, defer implementation of its High Cost Caps until at least July 1, 2013 to ameliorate the unique impact that immediate implementation would have on high cost providers that serve primarily Tribal lands and customers, such as Sacred Wind.

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[4] *USF/ICC Order and Further Notice*, at ¶ 210.

[5] *See* Consolidation Order, Case MCP No. 108 (Dec. 14, 2011). As noted by other parties, "[t]he adverse impacts on rural consumers and their providers in New Mexico and throughout the country are too significant and wide-reaching to justify implementation of the Order and FNPRM while any reasonable prospect remains that all or part of the new regulatory regime may be reversed on legal grounds." Reply Comments of the New Mexico Exchange Carrier Group and Mescalero Apache Telecom, Inc. on *USF/ICC Further Notice*, at 4-5 (filed Feb. 17, 2011) ("NMEGC Comments").

Additionally, Sacred Wind, like Gila River, supports the Tribal engagement provisions of the *USF/ICC Order* (the "Tribal Engagement Requirement"),[6] and agrees the Commission should reject the petitions for reconsideration challenging those requirements.[7]

DISCUSSION

A. The Commission Should Reconsider its Regression Approach and the $250 per Month Cap on High Cost Support.

Sacred Wind is a rural eligible telecommunications carrier ("ETC") that serves approximately 2,200 residential customers spread over 3,600 square miles of Navajo Reservation and near-reservation lands in remote, rural areas of New Mexico. In 2006, Sacred Wind acquired last mile assets from the Qwest Corporation and has been building out its advanced telecommunications network that supports two exchanges. Sacred Wind represents one of the few fully IP-based carriers in the nation using an advanced 3.65 GHz Fixed Wireless Local Loop ("FWLL") WI-MAX platform to overcome severe topographical constraints in its service territory,[8] and 100% of Sacred Wind customers have access to broadband with speeds of at least 4 Mbps downstream and 1 Mbps upstream. Sacred Wind expects that the Tribal Lifeline eligibility of its subscribers will increase to over 80% of its entire subscriber base in the coming years. Since Sacred Wind's inception, it has added nearly 1,000 previously unserved customers to its network and has increased subscribership in its low-income service area from 26 Tribal

[6] *USF/ICC Order and Further Notice*, at ¶¶ 636-37.

[7] *See In the Matter of Connect America Fund, A National Broadband Plan for Our Future, et al.*, WC Docket Nos. 10-90 *et al.*, Petition for Reconsideration of the United States Telecom Association (filed December 29, 2011) ("USTA Petition"); Petition for Reconsideration of Rural Incumbent Local Exchange Carriers (filed December 29, 2011) ("RLECs Petition").

[8] *See* Sacred Wind Communications, Inc., Petition for Waiver of Commission's Rules Applicable to Operations of Licensees in the 3650-3700 MHz Band, File No. 0003893259, at 5-10 (detailing impediments to build-out of wireline facilities in Sacred Wind's territory and describing its hybrid fiber/microwave backbone and FWLL access network) (Jul. 7, 2009), available at https://wireless2.fcc.gov/UlsEntry/attachments/attachment ViewRD.jsp;ATTACHMENTS=DTJMPDBdDnpXwhZT8Lv15ZyKpcXTH0QybTvxqZknx2yhGp66dylb!2091715450!-706617180?applType=search&fileKey=1091224348&attachmentKey=18431463&attachmentInd=applAttach.

Lifeline participants at its inception to over 1,400 participants, even accounting for some offsetting subscriber losses due to payment delinquencies, the depressed economy, and to competing mobile phone companies operating along the highways adjacent to its service area.

1. The Commission's Regression Analysis Fails to Account For Unique Challenges Faced By Carriers Serving Tribal Lands.

Under the *USF/ICC Order and Further Notice*, the Commission will impose limits on the HCLS provided to carriers whose loop costs are significantly higher than the average loop costs of similarly-situated companies implied by the model.[9] Based on its current number of access lines and HCLS support, Sacred Wind calculates that its study area cost per loop of $3,182 exceeds the national average cost per loop of $502 by over 631%.[10] Additionally, it calculates that under the proposed regression methodology in Exhibit H, its combined annual HCLS and ICLS support would be reduced from $8,291,977 to $6,566,807 – a reduction in support of $1,725,169 or almost 21% in the first year alone.[11]

The Commission's regression approach is flawed in five key areas. First, the regression approach is based primarily on total access line counts.[12] However, providers having the same number of access lines do not necessarily have the same costs to provide service. In particular, carriers that serve low population areas must use costly extended loop lengths in order to reach remote customers. Sacred Wind's service area possesses a very low population density of approximately two households per square mile. While Sacred Wind must incur additional loop expenses in order to serve its sparsely populated service area, the Commission's regression approach fails to take into account a carrier's average loop length.

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[9] *USF/ICC Order and Further Notice*, at ¶¶ 210-26.

[10] NMEGC Comments, at Appendix A.

[11] Calculation is based on application of *USF/ICC Order and Further Notice*, Appendix H methodology and includes reductions from the various High Cost Caps.

[12] *Id.*, at Appendix H.

Second, carriers serving Tribal populations often encounter difficult terrain conditions, including extreme mountainous and desert environments. Carriers regularly incur additional expenses to cut or remove obstructing terrain in order to conduct network expansion or maintenance. As with average loop length, the Commission's regression approach analysis does not and cannot have the necessary sophistication to appraise the unique terrain difficulties faced by carriers that serve Tribal areas.

Third, carriers serving Tribal subscribers must deal with costly and time-consuming permitting requirements.[13] Tribal-affiliated carriers have reported spending upwards of $30,000 per year in order to manage the cultural right-of-way process.[14] Sacred Wind similarly expended funds to hire outside consultants and additional employees to handle the necessary cultural clearances with the Navajo Nation authority and the Bureau of Indian Affairs, a process which on average takes at least two years to complete.[15] Even after Sacred Wind obtains a right-of-way, prospective Sacred Wind customers must provide a current copy of their home site lease agreement or allotment authorization, as well as proof of Tribal Lifeline eligibility where applicable, before they can apply for service – unheard of requirements anywhere but in Indian country. While Sacred Wind has taken proactive steps to address this issue by placing employees with battery operated scanners to capture customer authorization documents in the field, the Commission's regression approach does not capture these types of additional necessary

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[13] Sacred Wind has detailed a number of its unique permit and deployment related costs and obstacles to deployment in comments it filed in the barriers to deployment rulemaking. *See In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Comments of Sacred Wind Communications, Inc. (filed July 18, 2011), available at http://apps.fcc.gov/ecfs/document/view?id=7021693588 ("Sacred Wind ROW Deployment Barrier Comments"). *See also* Gila River Comments, at 19.

[14] Gila River Comments at 19.

[15] Sacred Wind ROW Deployment Barrier Comments, at 11.

expenses faced by Tribal providers, nor could a regression be designed that could reasonably be expected to do so.

Fourth, carriers operating on Tribal lands must comply with Tribal employment preferences, such as Navajo Preferences in Employment Act,[16] which require companies serving Tribal areas to employ members of the local tribe. Sacred Wind complies with the Navajo Preferences in Employment Act, with the vast majority of Sacred Wind's Navajo hires possessing no prior telecommunications experience. Sacred Wind incurred substantial expenditures in training these employees and hiring non-Tribal individuals to mentor and supervise the Navajo employees in their duties and responsibilities.[17] The Commission would ignore these demanding employment conditions that are faced by few other carriers under its regression approach.

Fifth, the Commission's current study area data used in the development of the regression analysis severely undercounts Sacred Wind's service territory. As demonstrated in Sacred Wind's initial comments in response to the *USF/ICC Further Notice*, the Commission's current data fails to include approximately 3,000 square miles of Sacred Wind's service area and omits an entire Sacred Wind exchange.[18] As Sacred Wind noted, this miscalculation may be due to mapping data taken from databases prior to December 2006, when Sacred Wind first established its study area, or the regression analysis's dependence on census block data, which results in substantial miscalculations in areas where multiple carriers serve different portions of the same census block. For example, Frontier Corporation serves portions of the Coyote Canyon,

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[16] Navajo Nation Code Ann. tit. 15, Ch. 7.

[17] Gila River Comments, at 19 ("As any economist can attest, when the supply of technically trained workers and their services is low, the price for such workers and their services increases.").

[18] *See In the Matter of Connect America Fund, A National Broadband Plan for Our Future, et al.*, WC Docket Nos. 10-90 *et al.*, Comments of Sacred Wind Communications (filed Jan. 18, 2012).

Pinedale, and a dozen other Chapter areas that are also served by Sacred Wind. Sacred Wind provided the Commission with its study area boundary map filed with the New Mexico Public Regulation Commission which shows the true scope of Sacred Wind's service area.[19]

As noted by Gila River, by failing to account for the average loop length, difficult terrain, permitting challenges, documentation requirements, employment restrictions, and study area miscalculations, the Commission regression approach is "arbitrary and capricious when applied to tribally-owned areas."[20] The regression approach adopted by the Commission is fundamentally flawed, as it cannot be reasonably designed to address the Tribal-specific complexities of Sacred Wind and other carriers serving primarily Tribal lands and customers, and consequently will always serve to under-support these uniquely situated high cost providers.

2. At a Minimum, the Commission Should Defer Application of the High Cost Caps to Rural Carriers Primarily Serving Tribal Lands and Customers.

If the Commission elects to nonetheless impose a regression methodology, it should defer implementation of the various High Cost Caps for at least a year, until July 1, 2013. Despite the numerous challenges faced by Sacred Wind described above, Sacred Wind plans to add new unserved customers every month and expects to net no less than 300 new subscribers in 2012 and no less than 600 in 2013. Sacred Wind remains confident that, by employing an aggressive outreach program to its most remote potential customers and with support from recent reforms to the Tribal Lifeline program,[21] over time it can increase its access line count to a point which will mitigate the impact of the High Cost Caps.

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19 *Id.* at 2.

20 Gila River Comments, at 17-18.

21 *In the Matter of Lifeline and Link Up Reform and Modernization, et al.*, WC Docket Nos. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb 6, 2012) (establishing a "one-per-household" Tribal Lifeline eligibility rule which recognizes that multiple families or households in Tribal areas can live in a single residence at a single location, and households often lack a definitive mailing address).

The impact of the Commission's High Cost Caps falls disproportionately hard on new carriers, such as Sacred Wind, that have committed huge resources, supported by USF and RUS funding, to deploying the most advanced telecommunications and broadband infrastructure exclusively in the most remote and sparsely populated, economically depressed, topographically challenging, and deployment-hostile areas of the country, just at a point of inflection on this investment where its advanced facilities are coming online, and customer access lines are in a significant growth mode. In addition, deferring implementation of the High Cost Caps would enable high cost carriers to implement organizational changes, including mergers or service agreements with other carriers, to achieve economies of scale, rather than a flash cut to the new High Cost Caps on July 1, 2012. Additionally, deferring implementation for high cost providers of services to Tribal lands until at least July 1, 2013 would avoid the need and expense to engage in the burdensome waiver process established by the *USF/ICC Order*.[22] In light of these disadvantages and the substantial challenges faced by carriers that primarily serve Tribal lands, Sacred Wind requests, to the extent the Commission declines to vacate its regression approach and additional High Cost Caps, that it, as an alternative for these carriers, defer implementation for at least one year, until July 1, 2013.

B. Sacred Wind Supports the Commission's Adoption of the Tribal Engagement Requirement.

The *USF/ICC Order and Further Notice* adopted a requirement that ETCs serving Tribal lands must "meaningfully engage" Tribal governments in their support areas, which a number of parties challenge on reconsideration.[23] As noted by Gila River, the Tribal Engagement Requirement was fully supported by the record before the Commission and will result in

[22] *See USF/ICC Report and Further Notice*, at ¶ 278-79.

[23] *USF/ICC Order and Further Notice*, at ¶ 637. *See, e.g.*, USTA Petition; RLECs Petition.

increased broadband access in Tribal areas.[24] Additionally, as the Tribal Engagement Requirement has yet to be implemented, petitions for reconsideration of these obligations based on undue burden or vagueness remain premature.[25] Consequently, the Commission should reject any petition for reconsideration which challenges the Tribal Engagement Requirement.

That said, Sacred Wind recognizes the importance of the Commission and the tribes coordinating and regulating all ETCs equally, regardless of the technology used to deliver services. Any imbalance in regulation among companies would create a governmental handicapping of one company over another. The Commission, state authorities, and Tribal governments will need to collaborate closely with the tribes in order to avoid undue overlapping regulations which increase costs to Tribal carriers and provide a disincentive to further investments for the benefit of Tribal residents.

CONCLUSION

For the above stated reasons, Sacred Wind supports those petitions and commenters that requests reconsideration of the regression analysis and other elements of the High Cost Caps given the unique challenges faced by carriers serving Tribal lands, and likewise supports a stay of the *USF/ICC Order and Further Notice*. As an alternative, if the Commission declines to reconsider the High Cost Caps, it should defer application to high cost providers serving primarily Tribal lands and customers until at least July 1, 2013.

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[24] Gila River Comments, at 14-15.

[25] *See* RLEC Petition, at 13; USTA Petition, at 19.

Respectfully Submitted,

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Dated: February 21, 2012

CERTIFICATE OF SERVICE

I, J. Bradford Currier, herby certify that on this 21st day of February 2012, I caused a copy of the forgoing Reply Comments of Sacred Wind Communications, Inc. to be filed electronically in the Commission's Electronic Comment Filing System and a copy to be delivered by first-class mail to the following:

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