

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

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| In the Matter of |) | |
| |) | |
| Connect America Fund - Modifications |) | WC Docket No. 10-90; FCC 12-138 |
| To Rules Governing Phase I |) | |
| Incremental Support |) | |

COMMENTS OF SANDWICH ISLES COMMUNICATIONS, INC.

Sandwich Isles Communications, Inc. (“Sandwich Isles” or “SIC”) herein files its Comments on potential modifications to the rules governing Connect America Phase I incremental support. Sandwich Isles files its comments pursuant to the Further Notice of Proposed Rulemaking adopted by the Commission November 14, 2012, and released November 19, 2012. In its rulemaking the Commission invites comments on potential modifications that will further accelerate the deployment of broadband facilities to consumers who lack access to robust broadband.

Sandwich Isles asserts that due to the low broadband penetration and adoption levels on Tribal lands, the Commission’s rules should grant providers serving these areas preference in receipt of Phase I and Phase II funding. Otherwise Native American groups, i.e. American Indians, Alaska Natives, and Native Hawaiians will not achieve broadband communications parity with other Americans. Since Tribal land areas are typically remote and high-cost to serve, maintaining a \$775 per unserved location metric will likely fail to bring robust broadband to Native American consumers. Also, given that Congress has passed legislation and signed

Treaties indicating its desire to bring resources to Native Americans that will help them become self-sufficient and self-sustaining, the Federal Communications Commission should establish broadband policy consistent with these Congressional directives.

I. PREFERENCES FOR CONNECT AMERICA PHASE I AND PHASE II FUNDING SHOULD BE GIVEN CARRIERS SERVING TRIBAL LANDS

When one considers the daunting task of deploying broadband in rural America, the challenge admittedly becomes much greater to deploy and sustain broadband services on Tribal lands, residence to Native Americans, i.e. American Indians, Alaska Natives, and Native Hawaiians.¹ Voice and broadband service penetration levels are lower for American Indians, for example, than any other demographic. The penetration rate for basic voice service lags the national average by 30%. And the explanation for these results begins with lack of infrastructure.

Lack of infrastructure on Tribal lands (indeed, lack of multiple communications technologies) is the reason that this Commission should establish preferences² in the Connect America Phase I and Phase II rules that facilitate Native Americans catching up with broadband speeds and penetration levels realized by the rest of the nation. The Commission should establish preferences that allow serving carriers to both deploy infrastructure and then sustain operations in recognition of the challenges and obstacles that cause broadband services to be unavailable or unaffordable on Tribal lands.

It is readily apparent that Native communities tend to be geographically remote. In Alaska and Hawaii, extreme separation from the lower 48 amplifies the cost factors and build-

¹ Sandwich Isles Communications, Inc. and Mescalero Apache Telecom Inc., Comments in the Matter of Connect America Fund, WC Docket No. 10-90, filed July 12, 2010, pp 2-13.

² “Head-of-the-line” access to CAF Phase I and Phase II funding, or in the alternative, a separate Tribal Broadband Fund. Native Telecom Coalition for Broadband, Comments in the Matter of Connect America Fund, WC Docket No. 10-90, et al., filed August 24, 2011, pp 4-8.

out times to reach unserved and underserved Native developments/villages. Where Tribal lands are or were once served by larger ILECs, there is generally a history of neglect and minimal infrastructure deployment because initial and ongoing costs are very high to reach these areas that sometimes feel light years away from urban/suburban networks.

One significant obstacle in the way of bringing broadband service to Tribal lands is that they typically are home to only relatively small pockets of Native American populations. These markets do not represent a significant source of revenue for the broadband provider.

Consequently, commercial financing to construct the needed infrastructure and an ongoing source of operating revenue to maintain the network cannot be forecast in the market-based business plan. Entities that might be deemed to have “sufficient” resources to serve Tribal lands are not interested in building-out to these remote areas, nor do they have an appreciation for the local needs and level of commitment that is needed to fully serve Native communities. For example, a tribe’s cultural, spiritual, economic, personal and public safety, and other communications needs relevant to its service area are an integral aspect not only of network planning, but also of the continuing provision of appropriate/necessary communications services and the customer interface. The special needs of Native communities must be taken into consideration to adequately plan broadband networks that truly serve Native Americans residing on Tribal lands. Which fact underscores the reason why tribally owned telecommunications companies and small non-tribal RLECs with a local presence and focus – and a commitment to meeting the needs of their local customer base – step up to be the provider of choice.

The fact that the Commission is exploring ways to fully utilize the remaining \$185 million Phase I funds that were designated for price cap service areas is indicative of the lack of interest in small native markets, because business plans simply do not justify larger carriers

serving these markets. Even with some “significant” support made available to price cap carriers, these carriers will not dedicate their resources to overcoming the challenges of serving Tribal lands and many other rural American communities.

The history of “price cap” telephone service in Hawaii is illustrative of this phenomenon. The successive owners of the dominant Hawaiian ILEC underinvested in facilities that would improve service on the outer Hawaiian Islands and rural areas of Oahu. Although the initial long-standing owner GTE was proud to claim that it could trace Hawaiian Telephone Company’s operating authority back to the Hawaiian Monarchy, neither it nor the successor owners of Hawaiian Telcom, first Verizon and then Carlyle invested in the facilities necessary to adequately serve the outer Hawaiian Islands and the rural areas of Oahu. During the 1990’s the lack of adequate telephone service in rural Hawaii finally led the state legislature to authorize the public utility commission (PUC) to certify additional telephone companies.³ The PUC determined that telephone service in rural areas was less than adequate and ordered GTE to show cause why it should not authorize alternative providers in rural areas.⁴

The inadequate rural service was especially severe in the Hawaiian Homelands (HHL). The HHL consist of a total of 203,500 acres in 70 non-contiguous areas, 98% of which are rural, distributed over the six major islands of Hawaii. For example, during the 1990’s outer island terrestrial facilities to reach the HHL were non-existent. At best, where GTE had deployed 2nd mile facilities to pass HHL areas, they would provide only multi-party service unless the subscriber or the Department of Hawaiian Homelands (DHHL) paid the cost of converting to

³ “We passed Act 80 which lead to the Hawai’i Public Utility Commission opening the way for additional telephone companies to serve our *neglected* rural areas with modern infrastructure capable of delivering advanced services.” Letter from Robert N. Herkes, State Representative, 5th District to Marlene H. Dortch, FCC, CC Doc. 96-45, Jun. 29, 2005

⁴ Hawaii Public Utility Commission Doc. No. 7497, Order No. 13626, Nov. 2, 1994.

single party service.⁵ The reluctance of GTE to invest in facilities to serve the HHL eventually led DHHL to issue a license to Waimana Enterprises, Sandwich Isles' parent, to serve the entire HHL. The many residents that supported Sandwich Isles' study area waiver petition quickly recognized the great improvement in affordability and service.⁶ The Chairman of the Hawaiian Homes Commission commented on Sandwich Isles' study area waiver petition that, "Prior to issuing SIC the license, there were many beneficiaries living on HHL that did not have phone service due to the high cost either they or DHHL would have to pay to install the infrastructure. Today these beneficiaries enjoy the same service that is available in urban areas."⁷

II. CONNECT AMERICA PHASE I AND PHASE II SUPPORT SHOULD BE BASED ON ACTUAL COST NOT DETERMINED OR LIMITED BY COST METRICS

Maintaining the \$775 per unserved location metric will ensure only one thing – NOT all Americans will have access to robust, affordable broadband. Support must be "sufficient" and "predictable" to ensure both the initial deployment of infrastructure and a sustained provision of broadband services that meet the communications needs of a rural community. Sufficient means neither too much, so as to create windfall earnings, nor too little, so as to spiral a provider into bankruptcy. Predictable means that support will continue at a level sufficient to attract capital, whether Rural Utilities Service (RUS) or commercial loans.

The regulatory uncertainty that is prevalent in the current environment must be replaced with long-term federal regulatory policy that is favorable toward Native Americans. Only then can broadband infrastructure continue to be deployed on Tribal lands and communications parity

⁵ Affidavit of Michael Crozier, Sandwich Isles Reply to Late-Filed Comments and Opposition, AAD 97-42, Oct. 2, 1997.

⁶ *See generally*, comments of HHL residents cited in Reply Comments of Sandwich Isles Communications, Inc., Feb. 22, 2005. pp. 2-4.

⁷ Letter from Micah A. Kane, Chairman, Hawaiian Homes Commission to Marlene H. Dortch, FCC, Dec. 23, 2004.

be achieved. Lenders will not make loans for needed infrastructure without such certainty. Native American groups on Tribal lands that are underserved will not be able to step forward with more aggressive demands for “comparable” communications services without such regulatory policy.

Insertion of appropriate 3rd party oversight, whether it be financial or technical, will foster the accountability and transparency needed to ensure confidence that funding is utilized appropriately to construct needed open access 2nd mile and dedicated last mile broadband networks on Tribal lands. For example, consulting professional engineers and the RUS have teamed up for over half a century to design, engineer, and build-out critical/utility rural infrastructure.

There are many reasons, some as unique as each construction project, that demand specific cost-based support for each rural network constructed. They include project location and equipment/materials mobilization challenges (eg, global remoteness), type of technology (wireline or wireless), aerial/underground placement, and if underground – soil type (lava rock, loose rock, coral, farm land, sand), topography (extreme wilderness, mountain range, tropical forest, deep ocean channel, Midwest plains), etc. etc.

For example, although the challenge set before Native Americans of embarking on a mission of resettlement in geographically isolated areas is daunting, under any circumstance, consider the challenge before Native Hawaiians. A relatively small group of Native Hawaiians remain to serve as a nucleus for resettlement. And to deploy reliable and secure underground broadband infrastructure in the remote areas of Hawaii that are targets for resettlement represents a tremendous construction and cost challenge. It is clearly evident from Sandwich Isles

experience that costs of constructing communications infrastructure in Hawaii are among the highest anywhere in the world.

Arguably, the HHL are remote, just considering their location on the islands of Hawaii. The bigger reality, however, is that the entire state of Hawaii is but a “smudge” in the middle of the Pacific Ocean, at least 2,600 miles from the nearest continental land mass. Mobilizing construction equipment, shipping and warehousing materials, provisioning a qualified work force for a complex construction effort, and penetrating various types of near impossible terrain create extreme cost barriers to underground broadband infrastructure construction. These factors explain to a large extent why the previous incumbent Local Exchange Carriers serving Hawaii failed to invest in critical communications infrastructure, and why Hawaiian Telcom lost significant market share and was embroiled in a bankruptcy court proceeding for several years before emerging. Support to deploy broadband infrastructure to reach the HHL parcels and sustain service must be “sufficient” and “predictable,” otherwise infrastructure deployment will not be attempted and Native Hawaiians will remain unsettled on HHL. The Native Hawaiians residing on HHL do not represent a market demand sufficient in size to warrant the infrastructure investment or the ongoing cost of operations without continuous and significant high-cost support.

III. TREATIES AND ACTS OF CONGRESS ESTABLISH NATIONAL PRIORTIES THAT SHOULD BE ADDRESSED BY FCC POLICY AND RULES

At present, the promise of the Hawaiian Homes Commission Act (“HHCA”)⁸ may never be realized. This is partially a consequence of unfavorable communications policy that is currently being implemented by the Commission and that will thwart the goals of the HHCA that became law almost 100 years ago. In 1921, while Hawaii was a United States Territory,

⁸ Hawaiian Homes Commission Act 1920, 48 Stat. 108.

Congress enacted the HHCA to rehabilitate native Hawaiian people, particularly in returning them to the land to maintain their traditional ties with the land. The HHCA set aside approximately 203,500 acres of undeveloped rural lands for Native Hawaiian use. From 1921 until 1959 these trust lands were administered by the Hawaiian Homes Commission (“HHC”) with oversight by the United States Department of Interior. In 1959 when Hawaii became a state, the Hawaii Admission Act required the incorporation of the HHCA into the Hawaii State Constitution and transferred the trust lands to the state.⁹

Section 101 – “Purpose” of the Hawaiian Homes Commission Act explains the aims of the Hawaiian Homelands program as follows:

- (a) The Congress of the United States and the State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-determination for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians.
- (b) The principal purposes of this Act include but are not limited to:
 - (1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;
 - (2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy (emphasis added) to beneficiaries of this Act and their successors;
 - (3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity;
 - (4) Providing adequate amounts of water and supporting infrastructure, (emphasis added) so that homestead lands will always be usable and accessible; and

⁹ Hawaii Statehood Act, 73 Stat. 4 This historical description is taken largely from S. Rep. 108-85, 108th Cong. 1st Sess. (2003). Note that this portion of the Hawaii Constitution may not be amended without consent of the United States, and the United States retains the right to bring suit for breach of the trust imposed.

(5) Providing financial support and technical assistance (emphasis added) to native Hawaiian beneficiaries of this Act so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining.

Clearly the goal of facilitating a “long-term tenancy” for resettlement of the HHL was contingent upon also fostering economic opportunity and development for economic self-sufficiency of the Native Hawaiians. The challenges associated with resettling the HHL are significant. DHHL has a heavy obligation before it to bring infrastructure and utilities to unserved HHL areas.

Likewise, the challenge to Sandwich Isles is formidable. This is due in no small part to the lack of economic opportunity prevalent on HHL today that deter Native Hawaiian beneficiaries. Native Hawaiians cannot freely choose to resettle these remote areas. Even though large waiting lists give evidence of that desire, the HHL are without job opportunities sufficient to provide an economic base for continued subsistence of Native Hawaiian families. Almost 100 years after the passage of the HHCA, Native Hawaiians are still striving to achieve resettlement and perpetuation, which make broadband communications an essential component for attracting new business and creating jobs on HHL for potential Native Hawaiian residents.

Clearly the goals of this act and the intent of Congress require the Commission to do more in recognizing the special needs of Native Hawaiians and other native groups. Treaties and Acts of Congress may go unfulfilled because federal agencies, like the FCC, fail to consider and create policy that would facilitate a step forward in fulfillment of the goals of the HHCA and other Acts of Congress or Treaties. Preference should be given in Connect America Phase I and Phase II funding to providers with plans to better serve Tribal lands with broadband communications.

IV. CONCLUSION

When one considers the daunting task of deploying broadband in rural America, the challenges only become greater for Native Americans on Tribal lands. If the existing universal service programs were not in place, it is unlikely that any Native American communities on Tribal lands would have the quality of communications service they have today. And what has been accomplished is small, when compared to the need that continues to exist. Lack of infrastructure is the primary reason this Commission's rules should grant providers serving Tribal lands preference in receipt of Phase I and Phase II funding. Otherwise Native American groups, i.e. American Indians, Alaska Natives, and Native Hawaiians will not achieve broadband communications parity with other Americans. Support must be "sufficient" and "predictable" to ensure both the initial deployment of infrastructure and a sustained provision of broadband services. Sufficient support means neither too much, nor too little. Predictable means that support will continue at a level sufficient to attract capital.

Granting preferential access to Connect America Phase I and Phase II funding for the continued deployment of broadband infrastructure on Tribal lands will facilitate the accomplishment of broader congressional objectives to ensure the successful settlement of Tribal lands. Over time broadband services will help Native Americans progress through better educational curriculum, improved healthcare, and economic development opportunities on Tribal lands. While advancing in these ways, Native Americans will also be empowered to preserve and share their cultures and traditions for generations to come.

Respectfully submitted,
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