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 THE GILA RIVER INDIAN COMMUNITY AND GILA RIVER TELECOMMUNICATIONS, INC.

Tom W. Davidson, Esq.
Sean Conway, Esq.
Akin Gump Strauss Hauer and Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4011

Counsel for the Gila River Indian Community and Gila River Telecommunications, Inc.

August 26, 2013

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Gila River Indian Community ("GRIC") and Gila River Telecommunications, Inc. ("GRTI") (GRIC and GRTI, collectively, "Gila River") oppose the proposal contained in the Wireline Competition Bureau's recent Staff Report proposing to represcribe the rate of return for all carriers to approximately 8.5%. This one size fits all approach is financially harmful to tribally-owned telecommunications carriers and does not consider important factors unique to these carriers. Consequently, Gila River opposes such an across the board approach. Instead, Gila River agrees with the National Tribal Telecommunications Association and the National Congress of American Indians that the rate of return for tribally-owned carriers should be increased or, at a minimum, maintained at its current level.

The Staff Report does not consider two important factors unique to tribally-owned carriers: the significant differences between tribally-owned carriers and the proxy group and the Federal Communications Commission's trust relationship with tribally-owned carriers. With respect to the differences between tribally-owned carriers and the proxy group, tribally-owned carriers face more risks and are more limited in their ability to access credit and capital. These risks stem from their small size, dependence upon regulated programs, and the characteristics of their tribal service areas. Because of their small size, tribally-owned carriers face increased risks due to the limited scale and scope of their operations, the concentration of their business (and revenues) in a low number of customers, and their lack of financial resources. Tribally-owned carriers are particularly at risk to changes in regulation due to their reliance upon loans from the Rural Utilities Service and universal service support. Finally, these carriers face risks as a result of exclusively serving tribal lands as a tribally-owned carrier. These risks include serving cyclically impoverished communities, serving regions with a lack of critical infrastructure, drawing employees from a largely undereducated and unskilled labor pool, and complying with tribal requirements for the deployment and maintenance of service.

Tribally-owned carriers also are more limited in their ability to access credit and capital. Part of this difficulty stems from the fact that tribes and tribally-owned carriers cannot collateralize trust land assets to secure loans from financial institutions. In addition, an equally problematic issue facing tribally-owned carriers is their inability to seek equity investments outside of the tribal government. Recognition of these differences should be reflected in the calculations the Commission uses to determine the rate of return for tribally-owned carriers.

Second, the Staff Report does not adequately recognize the Federal Communications Commission's trust relationship with, and responsibility to, federally-recognized tribes and tribally-owned carriers. Many of these carriers, including GRTI, were created out of necessity by their tribal governments because traditional carriers failed to adequately serve their lands. Reducing the rate of return for these carriers would inhibit the ability of these tribal governments to provide vital services and raise broadband adoption rates. For its part, the proposed reduction in the rate of return would result in an estimated decrease in GRTI's revenues well in excess of $750,000 annually. As demonstrated herein, these lost revenues would result in dire consequences for Gila River.

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 THE GILA RIVER INDIAN COMMUNITY AND GILA RIVER TELECOMMUNICATIONS, INC.

The Gila River Indian Community ("GRIC") and Gila River Telecommunications, Inc. ("GRTI") (the GRIC and GRTI, collectively, "Gila River"), by its attorneys, hereby submit these reply comments in the above-referenced proceeding in which the Wireline Competition Bureau ("Bureau" or "WCB") of the Federal Communications Commission ("FCC" or "Commission") seeks comment on a staff report[1] recommending data and procedures to use to represcribe the authorized rate of return.[2]

The Commission initiated this proceeding to represcribe the authorized rate of return almost two years ago.[3] At that time, the Commission acknowledged that a different rate of return may be warranted for tribally-owned and operated carriers.[4] The Commission added:

> 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. We seek comment on how such considerations should be reflected in our analysis.[5]

In response, at least four commenters, three tribally-owned carriers and the National Tribal Telecommunications Association ("NTTA"), explained how tribally-owned carriers differ from traditional carriers and how a different rate of return would further the Commission's "general trust relationship with, and responsibility to,"[6] tribally-owned carriers.[7]

---

[1] *Prescribing the Authorized Rate of Return: Analysis of Methods for Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 10-90, Staff Report, DA 13-1111 (Wireline Comp. Bur. rel. May 16, 2013) ("Staff Report").

[2] *Wireline Competition Bureau Seeks Comment on Rate of Return Represcription Staff Report*, WC Docket No. 10-90 et al., Public Notice, DA 13-1110 (Wireline Comp. Bur. rel. May 16, 2013).

[3] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 640 (2011) ("*USF/ICC Transformation Order and FNPRM*").

[4] *Id.* at ¶1059.

[5] *Id.* (citation omitted).

[6] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000) (citations omitted) ("*Tribal Policy Statement*").

[7] Comments of the National Tribal Telecommunications Association, WD Docket 10-90 et al., at 14-25 (filed January 19, 2012); Comments of Mescalero Apache Telecom, Inc., WC

Unfortunately, the Staff Report released this spring does not contemplate a different rate of return for tribally-owned carriers. Rather, the Staff Report recommends reducing the rate of return to approximately 8.5% for all carriers. This one size fits all approach is financially harmful to tribally-owned telecommunications carriers. Consequently, Gila River opposes such an across the board reduction.

The Staff Report does not consider two important factors unique to tribally-owned carriers. First, it does not recognize the significant differences between tribally-owned companies and the proxy group. Specifically, tribally-owned carriers face more risks than those carriers comprising the proxy group and are more limited in their ability to access credit and capital. Recognition of these differences should be reflected in the calculations the Commission uses to determine the rate of return for tribally-owned carriers.

Second, the Staff Report does not adequately recognize the Commission's trust relationship with, and responsibility to, federally-recognized tribes and tribally-owned carriers. Many of these carriers, including GRTI, were created out of necessity by their tribal governments because traditional carriers failed to adequately serve their lands. Reducing the rate of return for these carriers would inhibit the ability of these tribal governments to provide vital services and raise broadband adoption rates. For its part, the proposed reduction in the rate of return would result in an estimated decrease in GRTI's revenues well in excess of $750,000

Docket 10-90 et al., at 6-10 (filed January 18, 2012) (addressing the difficulties faced by tribally-owned carriers in accessing capital markets and advocating for a higher rate of return for tribally-owned carriers) ("MATI Comments"); Comments of Hopi Telecommunications Inc., WC Docket 10-90 et al., at 2-6 (filed January 18, 2012) (cataloguing the unique characteristics of tribally-owned carriers and advocating for a minimum rate of return of 11.25% for tribally-owned carriers) ("HTI Comments"); Comments of Gila River Telecommunications, Inc., WC Docket No. 10-90, et al., at 5-8 (filed Jan. 18, 2012) (same) ("GRTI Comments"); Reply Comments of Gila River Telecommunications, Inc., WC Docket Nos. 10-90, et al., at 2-7, 7-13 (filed Feb. 17, 2012) (same) ("GRTI Reply Comments").

annually. As demonstrated herein, these lost revenues would result in dire consequences for Gila River.

Consequently, should the Commission proceed with this represcription proceeding, Gila River supports NTTA's recommendation to increase the rate of return for tribally-owned carriers or, at a minimum, maintain the current rate of return.

I. Tribally-owned Carriers Significantly Differ From The Proxy Companies

The Commission's rules require any new rate of return to be based upon an analysis of the cost of debt and equity, and the ratio of debt to equity.[8] These calculations are then used to calculate a Weighted Average Cost of Capital, which represents the minimum rate of return required to attract capital to an investment (e.g., by incurring debt and/or selling stock).[9] Accordingly, the Staff Report uses data obtained from the proxy group of carriers, all of whom are publicly-traded, to calculate the costs of equity and debt and the ratio of debt to equity.[10] The Staff Report then relies upon these calculations to arrive at the proposed new rate of return.[11]

NTTA and NCAI state that the proxy group of carriers significantly differ from tribally-owned carriers and that, therefore, a separate rate of return should be calculated for tribally-owned carriers. NTTA specifically states that the Staff Report's cost of equity calculation does not recognize the increased risks faced by tribally-owned carriers and the more limited ability of tribally-owned carriers to access credit and capital than compared to the proxy group.[12] To account for these differences, NTTA recommends the Commission amend its cost of equity calculations for tribally-owned carriers to acknowledge the increased risks faced by tribally-

[8] Staff Report at ¶5.

[9] *Id.* at ¶¶5-6.

[10] *Id.* at ¶¶31-116.

[11] *Id.* at ¶¶117-134.

[12] Comments of the National Tribal Telecommunications Association, WC Docket No. 10-90, at 7-10 (filed Jul. 25, 2013) ("NTTA Comments").

owned carriers and the lack of marketability or illiquidity in the stock of tribally-owned carriers.[13] Gila River agrees with these recommendations submitted by NTTA and explains why these are inherent characteristics of tribally-owned carriers.

A. Tribally-Owned Carriers are Subject to More Risks Than Those Carriers Comprising the Proxy Group

NTTA recommends an upward adjustment in the cost of equity calculations to reflect additional risks faced by its members.[14] NTTA states that tribally-owned carriers, as compared to the proxy companies, face increased risks based on their size, dependence upon regulated programs, and the characteristics of their tribal service areas.[15] As further demonstrated herein, NTTA is correct in its assessment of these risks.

1. Smaller in Size

NTTA states that tribally-owned carriers face additional risk due to their relative small size.[16] Specifically, because of their small size, tribally-owned carriers face increased risks due to the limited scale and scope of their operations, the concentration of their business (and revenues) in a low number of customers, and their lack of financial resources.[17] Notably, tribally-owned carriers face these risks not because of their inability to build large, diversified businesses, but instead due to the historical underpinnings of their creation.

GRTI, like many of the tribally-owned carriers, was created out of necessity by the GRIC government.[18] Up until 1988, telephone penetration rate in the GRIC hovered around 20%.

---

[13] *Id.* at 8-10.

[14] *Id.* at 8-10.

[15] *Id.* at 7-9.

[16] *Id.* at 8.

[17] *Id.*

[18] *See* Comments of the National Congress of American Indians, WC Docket Nos. 10-90 et al., at 3 (filed Jul. 25, 2013) ("NCAI Comments").

Infrastructure deployed on the reservation was sparse and dilapidated, so much so that U.S. West, the incumbent carrier, quoted at least one resident a telephone installation charge of $30,000. Recognizing that telephone penetration would never significantly increase without significant changes, the GRIC government took the unprecedented step of purchasing the Gila exchange from U.S. West. The GRIC government then established GRTI by tribal resolution and tasked it with the responsibility of providing telecommunications services to people living within the boundaries of the GRIC.[19]

From its inception, therefore, the primary mission of GRTI has not been to take advantage of efficiencies of scale, diversify its business, or pay large dividends to stockholders, but instead to provide reliable basic and advanced telecommunications services to GRIC residents at affordable prices. With respect to telephone service, GRTI largely has accomplished this mission. Wireline telephone penetration rates within the GRIC typically exceed 80%, and any household requesting installation of service is charged the same installation price, regardless of its location within the GRIC.

However, this business model comes with additional risk, especially when compared with the proxy groups. The scope of GRTI's operations is focused largely on basic residential telephone services. Such a narrow scope is a risk for any business. However, high poverty rates in the GRIC effectively eliminate the opportunity for GRTI to fully diversify its business model with non-regulated and business services.

Moreover, GRTI relies upon an extremely small customer base. The number of access lines serviced by GRTI is dwarfed by the proxy company average by a factor of more than one thousand. This limited customer base leaves GRTI with much fewer financial resources than the

[19] Gila River Indian Community, GR-101-88, 1988.

average proxy company. In fact, GRTI's total revenues and total plant in service are also less than one tenth of one percent the size of the average proxy company.

In the future, the difference in size between publicly-owned carriers and tribally-owned carriers likely will grow larger. As the telecommunications industry consolidates[20] and diversifies, tribally-owned carriers will remain small in size and continue to fulfill their missions of serving the residents of tribal lands that the traditional carriers forgot, with the services tribal residents use and at prices they can afford. For tribally-owned carriers, risks related to size are inherent to their existence.

2. Dependence Upon Regulated Programs

NTTA also states that tribally-owned carriers face elevated risks as a result of their susceptibility to certain industry risk that are not necessarily experienced by the proxy companies.[21] Specifically, NTTA highlights changes in regulation as one of the biggest risks to which tribally-owned carriers are particularly susceptible.[22] Indeed, tribally-owned carriers are particularly at risk to changes in regulation due to their reliance upon loans from the Rural Utilities Service ("RUS") and universal service support.

As previously stated in this proceeding, tribally-owned carriers rely upon the RUS almost exclusively for access to debt-financing. The reason for this reliance lies in the unique relationship Tribes, and by extension tribally-owned carriers, have with the federal government.

---

[20] Tribally-owned carriers also are less likely to be purchased by another carrier. For example, GRTI deploys its infrastructure, including central office buildings and network points of concentration, not on private property, but instead on land owned by the GRIC and held in trust by the federal government. Consequently, non-tribal purchasers likely view assets owned by tribally-owned carriers as less valuable than similarly-sized carriers that own the land upon which its equipment is deployed. Combined with the tremendous value ascribed by tribes to their tribally-owned carriers, sales of tribally-owned carriers are unlikely to occur.

[21] NTTA Comments at 8.

[22] *Id.*

As a general rule, title to tribal land is generally held by the federal government in trust on behalf of a particular tribe. Consequently, tribes and tribally-owned carriers cannot collateralize trust land assets when seeking to access credit.[23] This poses no problems when securing telecommunications loans through the RUS. Private financial institutions, however, often refuse to offer tribally-owned carriers loans on competitive terms due to their inability to confidently collateralize their loans. As a result, almost all tribally-owned carriers rely on the RUS for their access to debt.[24] The existence of only one lender is a large risk in and of itself. However, this risk is exacerbated by the United States Department of Agriculture's present implementation of sequestration and the ongoing budget battles in Congress. Any future changes to the RUS loan program could significantly affect tribally-owned carriers' ability to secure debt on reasonable terms.

Another regulatory risk facing Tribally-owned carriers is their heavy reliance upon universal service support. As the *USF/ICC Transformation and FNPRM* notes, "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."[25] These characteristics result in reliance upon the Universal Service Fund's low-income and high-cost programs.

For the most part, all carriers serving tribal lands rely on these universal service programs to serve their communities. However, because tribally-owned carriers only serve tribal lands, their business models are completely dependent on the unaltered continuation of these programs. A current example of this reliance, and the risk associated with this reliance, can be seen in the

[23] *USF/ICC Transformation Order and FNPRM* at ¶1059.

[24] See GRTI Reply Comments at 4-5; see also HTI Comments at 8; MATI Comments at 6.

[25] *USF/ICC Transformation Order and FNPRM* at ¶1059.

current debate over the future of the Lifeline program. Approximately 80% of GRTI's subscribers qualify for Lifeline support. At the same time, lawmakers from both sides of the aisle have advocated for the discontinuation of the program.[26] If the program were discontinued, GRTI and every other tribally-owned carrier would be forced to go out of business. Effectively, their small subscriber bases are not wealthy enough to afford basic telephone service.

The proxy group carriers, on the other hand, likely have more diversified service areas. To the extent these carriers serve tribal lands, the majority of their service area is comprised of non-tribal lands. Non-tribal areas generally are less remote with higher income. As a result, if the Lifeline program were discontinued, traditional carriers would be better prepared to weather such regulatory change, likely by reducing service and costs on tribal lands while continuing to serve non-tribal lands. This significant regulatory risk is an important difference between tribally-owned carriers and the proxy group.

3. Characteristics of Tribal Service Areas

NTTA also identifies risks faced by tribally-owned carriers as a result of serving tribal lands. Based on GRTI's experience, these risks include serving cyclically impoverished communities, serving regions with a lack of critical infrastructure, drawing employees from a largely undereducated and unskilled labor pool, and obtaining necessary tribal approvals for the deployment and maintenance of service. As explained herein, these risks are significant.

The *USF/ICC Transformation Order and FNPRM* noted that tribally-owned carriers serve cyclically impoverished communities and asked how this consideration should be reflected in the Commission's analysis of the appropriate rate of return for tribally-owned carriers.[27] As

---

[26] *Senate Rejects Bid to End Cellphone Subsidy*, THE HILL, Mar. 25, 2013 (noting that a Senate vote to end the Lifeline program received votes from both sides of the aisle).

[27] *USF/ICC Transformation Order and FNPRM* at ¶1059.

previously explained, the GRIC's low-income population contributes to GRTI's relatively narrow scope of service, which is focused on residential telephone service, and its reliance upon the Lifeline program. In addition, GRTI believes that serving a low-income community also has contributed to reducing GRTI's line count. Specifically, many low-income residents of the GRIC live with extended family members in one residential structure. While these extended family units might constitute multiple economic units under the Commission's Lifeline rules, these residents effectively require only one wireline telephone subscription for the residential structure. Consequently, GRTI, as well as other tribally-owned carriers, are smaller in size as a result of their impoverished service areas.

The *USF/ICC Transformation Order and FNPRM* also sought comment on how it should account for the historical lack of critical infrastructure in communities served by tribally-owned carriers.[28] Again, GRTI believes this is another risk that merits an increase in the rate of return. As an initial matter, because tribally-owned carriers largely were created out of necessity due to failure of incumbent carriers to provide service, the service areas of these carriers are more likely to suffer from a lack of infrastructure. Moreover, significant investment in critical communications infrastructure is a large risk for any carrier, but especially so for small carriers with few financial resources. Adding to the risk of these investments are the lack of infrastructure normalities (i.e., roads, bridges, tunnels, etc.) on many tribal lands, which makes deployment of infrastructure more costly and time intensive. Consequently, to attract the necessary capital to deploy this infrastructure, tribally-owned carriers require a higher rate of return.

---

[28] *Id.*

Another risk is the lack of technically-trained tribal members for tribally-owned carriers to employ.[29] This is particularly challenging for carriers located in remote areas, who have difficulty attracting non-members to their reservations. However, even for GRTI, which provides service to a region bordering the Phoenix metropolitan area, this labor pool remains problematic. Moreover, as a tribally-owned entity providing a critical service to community members, GRTI is required by its tribal government to hire GRIC members. Complying with this requirement compels GRTI to invest additional resources in training this workforce.

Finally, tribally-owned carriers face additional risk in complying with tribal rights of way processes, land use permitting, facilities siting, and environmental and cultural preservation review processes. While the underlying purposes of these requirements are sound, compliance sometimes results in additional expenses and construction delays, tying up large sums of capital for long periods of time.[30] Consequently, compliance with these requirements represents an additional risk faced by tribally-owned carriers.[31]

---

[29] *See* Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), at Box 8-4 (noting that Tribes face "a shortage of technically trained members who can undertake [broadband] deployment and adoption planning.") ("National Broadband Report").

[30] Increased expenses and delays in construction are typical even when building in areas not identified as culturally significant. For example, when plowing a trench to connect a residence, GRTI often is required to hand dig to preserve any possible cultural discoveries. This highly increases GRTI's construction costs and delays project completion. By comparison, the proxy carriers likely will use a much quicker and less expensive backhoe technique to plow a trench. Consequently, tribally-owned carriers have more capital tied-up in pending construction projects as a result.

[31] While non-tribally-owned carriers serving tribal lands are required to comply with these rules, many historically have failed to do so. The tribal engagement rules adopted by the Commission are aimed, in part, to encourage compliance with such requirements. However, it is yet to be seen if these recently effective rules will accomplish this goal.

B. Tribally-Owned Carriers are More Limited in Their Ability to Access Credit and Capital

As the *USF/ICC Transformation Order and FNPRM* recently noted, tribal nations have more limited abilities to access credit and capital.[32] As previously discussed herein, part of this difficulty stems from the fact that tribes and tribally-owned carriers cannot collateralize trust land assets. However, as NTTA points out, an equally problematic issue facing tribally-owned carriers is their inability to seek equity investments outside of the tribal government. NTTA accurately states that tribal by-laws often forbid the sale or transfer of stock in tribally-owned carriers.[33] In such instances, these tribal by-laws render equity shares in tribally-owned carriers completely illiquid and unmarketable.

Even where explicit tribal by-laws do not exist, however, implicit prohibitions exist on the sale or transfer of stock in tribally-owned carriers. For example, no tribal by-law explicitly outlaws the sale or transfer of GRTI stock, yet outside equity investment in GRTI is effectively forbidden. The carrier was created by tribal resolution[34] in 1988 after the incumbent carrier, U.S. West, had failed to provide a level of adequate service to residents of the GRIC. Because GRTI provides an important governmental service, the GRIC maintains a strong governmental interest in maintaining control over the services rendered by GRTI. For this reason, GRTI largely operates within the GRIC as an extension of the GRIC government. The carrier's operations, corporate management, and financial affairs are subject to oversight by the GRIC government, and it even enjoys the benefits of sovereign immunity under the laws of the GRIC.[35] Consequently, just as equity investments in tribal governments, such as the GRIC, are implicitly

[32] *USF/ICC Transformation Order and FNPRM* at ¶1059.

[33] NTTA Comments at 9.

[34] GR-101-88.

[35] GR-10-99

forbidden, outside equity investments in tribal entities such as GRTI similarly are implicitly forbidden.

To reflect the increased risk of loss due to this lack of liquidity, Gila River supports NTTA's recommendation for an upward adjustment in the calculation of the cost of equity for tribally-owned carriers.[36]

II. The Commission's Trust Responsibility With, and To, Indian Tribes and Tribal Carriers Further Warrants the Development of a Separate Rate of Return for Tribally-Owned Carriers

A second basis for the Commission to adopt a separate rate of return for tribally-owned carriers rests on the Commission's trust relationship with Indian Tribes.[37] The federal government (Congress, Executive Branch and Judicial Branch) has long recognized that it has a unique relationship with Indian tribes, which is set forth in the Constitution of the United States.[38] This relationship has been described as a political relationship whereby tribes are "domestic dependent nations" and the United States serves as a "guardian" with respect to Indian lands.[39] Thus, the relationship is commonly referred to as a "trust relationship," similar to that of a trustee to a beneficiary.[40] In fact, federal courts have often found that this relationship "requires the federal government to adhere to certain fiduciary standards in its dealing with Indian Tribes."[41]

This trust relationship between the federal government and Indian tribes has allowed the federal government to assist tribes in assuming "a greater degree of self-government, both

---

[36] *See* NTTA Comments at 8-10.

[37] *See* MATI Comments at 4.

[38] U.S. CONST. art. I, § 8; Exec. Order No. 12,647, 78 Fed. Reg. 39,539 at 1 (June 26, 2013).

[39] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[40] *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

[41] *Tribal Policy Statement* (citations omitted).

politically and economically."[42] This responsibility includes helping tribes manage their lands in a manner that helps generate revenue, develop natural resources, and identify other economic opportunities.[43] These programs, services and monies help fulfill the federal government's responsibility for preserving and respecting the status of tribes as distinct sovereigns within the United States and promoting tribal self-sufficiency, self-determination and self-governance.[44] Federal agencies administering these responsibilities must grant tribes "the maximum administrative discretion possible" when creating policy that has implications on the trust relationship.[45] Administrative agencies are closest to the implementation of the trust relationship, which has become a robust legal doctrine in American jurisprudence since the twentieth century.[46]

Policy statements from most modern presidents reaffirm that trust relationship and direct Executive agencies to implement policy and regulations to support the rights of tribes to self-government and self-determination.[47] Two months ago today, President Obama issued an

---

[42] *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding federal regulation establishing a hiring preference for members of Indian tribes as consistent with the goal of promoting Indian self-government).

[43] *See Mitchell*, 463 U.S. 206; *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009).

[44] *See* the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450 et seq.)

[45] Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

[46] *See Cohen's Handbook of Federal Indian Law* § 22.01 (2005 ed.).

[47] *See* Exec. Order No. 12,647, 78 Fed. Reg. 39,539 at 1 (June 26, 2013); President Barack Obama, Memorandum for Heads of Executive Departments and Agencies on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009); President George W. Bush, Exec. Order No. 13336, American Indian and Alaska Education, 40 Weekly Comp. Pres. Doc. 713 (April 30, 2004); President William Jefferson Clinton, Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662 (June 14, 1991).

executive order reiterating many of these points.[48] This recent executive order acknowledges that the federal government "cannot ignore a history of mistreatment and destructive policies that have hurt tribal communities" and that "our more recent history demonstrates that tribal self-determination – the ability of tribal governments to determine how to build and sustain their own communities – is necessary for successful and prospering communities."[49] Consequently, the executive order commits the United States to pursue a number of policies that will "promote the development of prosperous and resilient tribal communities."[50] Many of these policies are relevant to this rulemaking proceeding, including the promotion of "sustainable economic development, particularly…infrastructure…to drive future economic growth."[51] The implementation of these policies cannot be achieved through mere consultation but must take the form of thoughtful policy decisions aimed to effect specific goals to support and not hinder progressive growth in tribal communities.[52]

In addition to the federal government's trust relationship with tribes, the Commission has recognized "its own general trust relationship with, and responsibility to, federally-recognized Indian Tribes."[53] This trust responsibility requires the Commission to promote tribal sovereignty, self-sufficiency and economic development as well as to provide adequate access to communications services to Tribes.[54] Relying upon this trust responsibility, the Commission has taken a number of actions to benefit tribal lands, including adopting enhanced Lifeline support

---

[48] Exec. Order No. 12,647, 78 Fed. Reg. 39,539 (June 26, 2013).

[49] *Id.* at 1.

[50] *Id.*

[51] *Id.* at 1-2.

[52] *See id.* at 1.

[53] *Tribal Policy Statement*.

[54] *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, MB Docket No. 09-52, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 1583, ¶ 4 (2010) ("*Rural Radio Service Order*").

on tribal lands,[55] a tribal priority for rural radio service on tribal lands,[56] and a 25% bidding credit for tribal governments and tribally-owned carriers participating in Phase I Mobility Fund auctions.[57] These actions are in furtherance of the Commission's trust responsibility towards tribes and are consistent with Executive mandates to take "flexible policy approaches" to granting policy exceptions to tribes to that end.[58] Moreover, the National Broadband Plan recognizes that "Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding."[59]

The Commission's trust responsibility to tribes extends to tribally-owned and operated enterprises. Tribal governments often form tribal entities to help implement various federal and tribal programs that promote the health, safety and general welfare of their citizens. As previously discussed, GRTI, like many of the tribally-owned carriers, was created by the GRIC government to implement such a program.

Prior to 1988, most of the community and its members were unserved by the incumbent telecommunications carrier. Today, telephone penetration rates exceed 80%, and the availability of telephone service has changed the way of life in the GRIC. For example, residents are able contact emergency services and access telehealth resources, two important options for low-income residents who often cannot afford cars or other modes of transportation. Telephone service also make applying for and maintaining jobs easier, as residents can now list home phone

---

[55] *See Federal-State Joint Board on Universal Service, et al.,* Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 at ¶20-23 (2000).

[56] *See Rural Radio Service Order* at ¶7.

[57] *USF/ICC Transformation Order and FNPRM* at ¶ 355.

[58] Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

[59] Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), National Broadband Report at Box 8-4.

numbers on job applications and provide advance notice to employers on days in which they are sick. From an educational perspective, children can call classmates to get school assignments, and from a governmental perspective, concerned citizens can call elected officials and government agencies regarding basic services.

Broadband is the next challenge for Gila River. While less than 30% of households currently subscribe to broadband, evidence of its transformative effect already is being noticed. Children and young adults are accessing educational resources, cultural resources are being preserved online, and residents are starting web-based businesses.

To meet the challenge of increasing broadband adoption, GRTI will need sufficient revenues to maintain and upgrade its network in coming years. Unfortunately, the proposed reduction in the rate of return will deprive GRTI of its ability to accomplish this with regulated revenues. Specifically, the Staff Report's recommendation will result in an annual decrease of more than $750,000 in regulated revenues.[60] If GRTI's regulated revenues decrease by such a large extent, it will be forced either to reduce network investment or subsidize such investment with unregulated revenues.

Yet, GRTI's unregulated revenues already are dedicated to important programs. In fact, because GRTI acts as an extension of the GRIC government, these programs are aimed at promoting the health, safety, and general welfare of citizens of the GRIC. For example, GRTI computer purchase program allows residents of the GRIC to purchase low-cost computers

---

[60] The majority of these revenues come from universal service support. *See* NTTA Comments at 4 ("The direct impacts [of lowering the rate of return] on NTTA members are related to (1) federal high cost loop support (HCLS) and (2) interstate common line and special access including, importantly, DSL services."). Because there only are nine tribally-owned rate-of-return carriers, the impact of a separate rate of return for tribally owned carriers on the Universal Service Fund's size would be negligible compared to the fund's current $4.5 billion budget for Connect America Fund disbursements.

utilizing repayment plans. GRTI also is participating in the FCC's Broadband Adoption Lifeline Pilot Project, which costs more than $200,000 in program administrative costs. GRTI also offers an Alert One Program that provides emergency pendants for senior citizens within the GRIC at no charge. Other programs are aimed at benefitting GRTI's staff, more than 60% of whom are members of the GRIC. For example, GRTI runs up to three or four vans daily to transport employees to and from work for those employees who cannot afford other modes of transportation.

All of these programs will be put at risk of being cut or reduced by the expected reductions in GRTI's regulated revenues. And unlike non tribally-owned carriers who might perform these activities merely as an example of being a good civic-minded neighbor if they chose to, GRTI is *expected* to perform these activities specifically because it is a tribal government owned enterprise. It would be unacceptable to the citizens and government of GRIC for GRTI not to perform these activities.

The furtherance of any policy that would erode significant gains made by GRTI and GRIC in the provision of telecommunication services to tribal members is not only contradictory to the Commission's own stated prerogatives but offends sound management and business policy for the federal government. Such a result would be inconsistent with the FCC's trust relationship with GRTI and the GRIC, be contrary to the public interest, and deviate from policy objectives set forth by nearly every President since Lyndon Johnson. In addition, forcing GRTI to subsidize its regulated operations with its unregulated revenues would be patently unfair and similarly go against the Commission's trust relationship with tribes. GRTI receives a substantial portion of its unregulated revenues from residential, business and the tribal government customers who choose GRTI in part to support a tribally-owned company. These customers see the value in supporting the tribal economy and increasing tribal self-sufficiency. Using these revenues to subsidize GRTI's regulated operations effectively would punish GRTI and its customers of unregulated services for their good intentions.

The services and programs provided by GRTI and other tribally-owned carriers are a legitimate function of tribal sovereignty, tribal self-determination, and tribal self-governance. As governments, and as an exercise of sovereignty and control over their land, tribes make decisions that protect and promote their communities' growth and well-being. They are responsible for helping meet the basic needs of their citizens.[61] Thus, tribally-owned carriers have a unique responsibility to and relationship with tribal governments and tribal members that is very different from non tribally-owned carriers. The activities and community services in which GRTI engages and provides are a result of the GRIC's tribal sovereignty, which is enabled, in part, through the Commission's trust relationship. Such trust relationship and the critical importance of ensuring the continued provision of the services and benefits provided by tribally-owned carriers to their communities mandate that the FCC adopt a separate rate of return for these carriers.

III. CONCLUSION

The Commission should recognize that the Staff Report does not consider two important factors unique to tribally-owned carriers. First, it does not recognize the significant differences between tribally-owned companies and the proxy group. Second, the Staff Report does not recognize the Commission's trust relationship with, and responsibility to, federally-recognized tribes when represcribing the rate of return for tribally-owned carriers. Recognition of these

[61] *See Cohen's Handbook of Federal Indian Law* § 4.01[a]-[b] (2005 ed.).

differences should be reflected in the calculations the Commission uses to determine the rate of return for tribally-owned carriers if it moves forward with represcription.

Respectfully Submitted,

Gila River Indian Community and Gila River Telecommunications, Inc.

By: /s/ Tom W. Davidson
Tom W. Davidson, Esq.
Sean Conway, Esq.
Akin Gump Strauss Hauer and Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4011

Its Attorneys

August 26, 2013