Senate Indian Affairs Committee

Hearing on Internet Infrastructure in Native Communities:

Equal Access to E-Commerce, Jobs and the Global Marketplace

October 6, 2011

Testimony of Lance Morgan, CEO of Ho-Chunk, Inc.

**Introduction**

I am the CEO of Ho-Chunk, Inc., a successful tribal economic development corporation. I am the managing partner of Fredericks, Peebles & Morgan, the largest law firm in the country that focuses exclusively on Tribal law, and in my spare time I teach tribal economic policy and law at Arizona State University and the University of Arizona. I mention these jobs because I see the Internet from several perspectives in Indian Country. The Internet in Indian Country is several things. It allows my tribe to maintain an international corporation from a previously remote and rural location but at a higher relative cost than comparable regions. It also allows our website Indianz.com to disseminate tribal news and information at a level and speed never seen before. More importantly it is an economic opportunity that is increasingly becoming a battleground over regulation and taxation.

In this testimony I intend to discuss each issue, but I believe that the emerging battleground issue is by far the most important because it has the most potential for both growth and for conflict.

**Internet Access Cost**

A lot of the focus of federal resources has been on making sure Indian Country has access to the Internet. That is an important goal, but from my tribe’s perspective it is no longer a priority. Our tribe has internet access from our local phone company. However, our economic growth is now constrained by the lack of Internet capacity in our community. Also our access costs are about 50 percent more than in nearby urban areas where competition is plentiful. Strangely our access is also more expensive than comparable non-Indian rural communities from our area. I actually have received advertisements in my internet bill offering the exact same service at greatly reduced rates in neighboring non-Indian communities from our phone company.

When we started Ho-Chunk, Inc. in 1994, we only had dial up. But when the local phone company refused our request to bring DSL service into our community, we brought high speed internet to our company only by leasing lines and creating our own access. This potentially made us a competitor to the local rural phone company and then they almost immediately started offering DSL service.

In a neighboring native community where we have business operations, we basically promised to order twice as many lines as we needed to make the service worthwhile to install in that community. Now both communities have DSL service, but at higher than average rates.

Since our initial push of the local phone company, we have developed dramatically and we severely strain the capacity of our current Internet service. We now have multiple T1 lines coming into our corporate headquarters and we beam the internet access by microwave about 1000 yards to our other corporate facilities located in our newly developed community called the Ho-Chunk Village. The capacity of this system is now a serious growth constraint and has become an efficiency problem when running web based programs.

We applied for a highly competitive rural innovations HUD grant to cover the cost of developing a fiber optic network for high speed internet and a community wide Wi-Fi network. We did not receive the grant. We have now allocated $200,000 from our tribal capital to the project, which strains our resources and takes away from other vital social and economic projects. However, we need to upgrade or risk becoming too inefficient to function, much less grow.

Interestingly, the mere threat of the grant application was enough for the local phone company to dramatically reduce the tribe’s internet access costs (Not Ho-Chunk, Inc.’s), but they required a multi-year commitment, which I presume is intended to limit competition. The local price reduction for the tribe itself didn’t help the local home user lower their costs, but it does illustrate how competition in our environment can lead to better service and lower costs.

One last example related to affordability. We provide guest access to some of our corporate facilities and it is not uncommon for people to be sitting in their cars using our wireless service outside our buildings.

**Indianz.com**

Ho-Chunk, Inc. also owns the Internet news and information site Indianz.com. Indianz.com was started by three Native Americans in 1999 to aggregate news and information about all things Native American on the Internet. In 2000, Ho-Chunk, Inc. merged our e-commerce site Allnative.com with Indianz.com.

As part of our original partnership, all editorial and content is controlled by two of the original partners. Ho-Chunk, Inc. exercises no control over content because it was important to us that the site’s content not be encumbered by our economic or political interests. Despite now owning the entire company, the original employees still have absolute control over content and we intend to maintain that editorial independence.

Indianz.com has experienced phenomenal growth and we believe it is the most visited and influential Native American oriented site on the Internet. It has 16 million hits per month, 5 million pages views a month and 20,000 unique visits a day. Its usage is too high to be hosted by our on- reservation servers, which are already capacity constrained.

Indianz.com is used by most people as a quick reference tool to see the latest Native American issues. Indianz.com does some original reporting, but primarily offers a brief synopsis of existing articles and provides the link to the corresponding article. It also provides a very helpful list of previous articles on the same subject as reference and background information.

Our goal was that Indianz.com would grow as a news and information site and Allnative.com would be a primary advertiser and Indianz.com’s success would drive internet traffic to our ecommerce site. It worked phenomenally for 10 years. AllNative.com sold all things Native and distributed over 1 million catalogs over the last several years, but its primary product gradually became Native made tobacco products. This business was basically destroyed by the PACT Act, which prevented the mailing of tribal tobacco products. Because the tobacco business was supplementing the other native products business like jewelry, art and clothing, we completely shut down the products business 1 month after the PACT Act became effective. The shutdown hurt dozens of local and regional artists and craftspeople. It also put Indianz.com at risk financially.

Indianz.com is not a large revenue generator for Ho-Chunk, Inc. Without the support of our ecommerce site, it is marginal from a purely financial perspective. Its primary revenue sources are now banner ads and job advertisements.

Internally, indianz.com is also viewed as a marketing tool for our other corporate and affiliated entities. However, it’s impact goes far beyond just the finances. I think its primary function has been to consolidate a fragmented news sector into one place where those interested in native issues can quickly and easily survey the Native news world and that has a unique value and an important role in Indian Country. Information, knowledge and education are what we are now and our company considers that to be very valuable.

**Economic Opportunity and Risks**

The Internet has been a boon for Indian Country in several ways. Ho-Chunk, Inc. is headquartered in rural Nebraska, but we have operations in over a dozen states and in four foreign countries. We sell houses in Canada and work for the Federal Government in Mexico, Iraq and Afghanistan. All of our domestic and international operations are run from the Winnebago Tribe of Nebraska’s reservation. All of our primary offices are linked by email, web-based accounting and human resource programs, internal Intranets and video conferencing. While sitting in my office in Nebraska, I once got bumped out of a video conference with our sales team for our housing company in Northern Minnesota to deal with an emergency issue with our government contracting people in Mexico City.

Government Contracting

The Internet has made this kind of international company possible on the reservation. Prior to the Internet, a tribal company wouldn’t have had the resources to compete with the reporting, financial, and human resource infrastructure of larger companies. The Internet has been especially valuable in the government contracting arena where partnerships are common and communication and rapid access to information is vital to success.

The rise of SBA 8a program in Indian Country has been largely facilitated by the Internet. Without it, the large contractors would have all the access to information, contracting officers, and potential partners. It has allowed tribal entities to be prime contractors. Prior to the Internet’s development, tribal government contracting was largely sub contractor work where tribes would be assigned some low level task and largely left out of the higher end of the contract due to lack of contacts, lack of information and lack of knowledge. Now a tribal company can use the Internet to have contract information delivered to them each day by email They can search for possible partners and advertise their skill sets and past performance on the Internet.

Civil Regulatory Issues and State Control

There is another area where tribes have used the Internet to develop their economies. They have passed laws to create civil regulatory advantages for economic gain. This is not an unusual economic development strategy. States pass laws creating varying rules, regulations and tax rates to attract capital and development all the time. Tribes have been largely prevented from doing this by powerful state interests being influenced by the desire for control, tax revenue or the economic interests of non-tribal competitors. The legal system also has created dozens of exceptions allowing state incursion in our regulatory environment which prevents tribes from being too aggressive.

Largely due to sovereign immunity, states cannot directly enforce their will upon tribes. Therefore, the states have evolved a system of indirect control. Under this indirect system, the states move the incidence of tax to off reservation entities. They regulate the non-Indian company and threaten it will civil or even criminal liability if they follow the tribal law instead of the state. Companies are forced to choose between which law to follow or which tax to pay. This can result in double taxation or more likely it will result in the reservation being the last place to be developed, if at all. Tribes are then forced to make the decision to have nothing or to “take what they can get.” This sort of exploitation and control is quite common and unfortunately considered quite legal under multiple U.S. Supreme Court opinions.

The Internet has been the wild card in this nicely established system of state control. The players are not as defined and harder to directly influence by the states. Therefore, the state system of controlling tribes indirectly is not nearly as effective. Also, a growing number of tribal companies are interacting with each other and typically will have sovereign immunity which further insulates them from state demands.

Tribes have been establishing their own laws and legal systems outside of state control to create an economy. The Native Internet Tobacco business is one example of such a development. States wanted control over the tax and Master Settlement Agreement revenue, but had no direct way to stop the tribes from selling their products. The products were made on reservations and sold on reservations. All of this economic activity took place outside of state jurisdiction and often by tribally owned entities with sovereign immunity.

There is no limit to how far a state will go in this area. The Attorney General of New York, the now infamous Elliot Spitzer, threatened the credit card companies and they voluntarily quit processing tribal credit card transactions. That didn’t stop the business so he then threatened UPS and Federal Express and they quit shipping our products. All of this happened without any law or legal case deciding this issue. When the U.S. Post Office refused to bow to pressure, the states worked with Congress to pass the PACT Act, which prevented the Post Office from shipping tribal products. This effectively ended the Internet business and put thousands of Native Americans out of work and wiped out large portions of tribal governments tax income. It is ironic to us that it is now almost illegal for us to make, tax and sell a product which was invented by tribes.

Future Civil Regulatory Issues

States are often highly regulated places. Tribes can now use their own powers to pass laws creating regulatory advantages in areas of taxation, insurance, lending, and others. The emerging tribal internet lending business is just another example of this type of growth. The states don’t like it, but they don’t have an easy indirect target to threaten, and thereby, isolate and control tribes.

However, I am concerned because the states now have a new playbook. They requested the Federal Government to pass the PACT ACT giving them indirect control over tribes by making it illegal to ship tribal products and I believe they will try this tactic again in other areas. This committee is well positioned to see these threats to tribal economic and political sovereignty and has a responsibility to prevent this type of control from evolving again.

In summary, the states use a vertical strategy to cut off tribes from the stream of commerce by simply moving up the economic chain and passing a law to threaten those who deal with tribes. The Internet has largely stumped this strategy. Now after their success with the PACT Act, they think they can go all the way to the top and have Congress pass laws giving them indirect power and control over tribes. This type of exploitation of tribes needed to be stopped a long time ago, but we have so many laws and legal precedents making it legal that we can’t unwind these anachronisms. But Congress has the power to prevent this same old system from reemerging in the new economy that is made possible by the Internet. I ask that you be vigilant in our defense as we struggle to emerge from the depths of generations of exploitation, control and poverty.

Thank you for your consideration.



Lance G. Morgan, Winnebago Tribal Member.