

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

**PETITION FOR RECONSIDERATION AND CLARIFICATION
OF THE UNITED STATES TELECOM ASSOCIATION**

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I. INTRODUCTION AND SUMMARY

In December 2011, the United States Telecom Association (“USTelecom”) petitioned the Commission to reconsider and clarify certain aspects of the *USF/ICC Transformation Order*,¹ including its Tribal engagement rules.² Although the Commission has addressed some of the issues raised in USTelecom’s First Reconsideration Petition and granted other clarification and

¹ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”) *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

² *Connect America Fund*, WC Docket No. 10-90, Petition for Reconsideration of the United States Telecom Association (filed Dec. 29, 2011) (“First Reconsideration Petition”).

reconsideration requests regarding the *USF/ICC Transformation Order*,³ the Commission has yet to resolve the challenges to its rules that dictate that eligible telecommunications carriers (“ETCs”) must engage and how they must engage with Tribal governments.⁴

Despite the legal cloud hanging over the Commission’s Tribal engagement rules, the Office of Native Affairs and Policy (“ONAP”) recently issued “further guidance” that appears, on its face, to impose additional obligations on ETCs “either currently providing or seeking to provide service on Tribal lands with the use of Universal Service Fund (USF) support.”⁵ While USTelecom supports efforts to increase broadband deployment and adoption in Tribal areas, the *Further Guidance* suffers from the same legal deficiencies as the Commission’s Tribal engagement rules and only compounds the compliance problems facing the industry. Accordingly, USTelecom respectfully reiterates its request for reconsideration of the Commission’s Tribal engagement rules and urges the Commission to reconsider and clarify the *Further Guidance* as well.

First, the Commission should reconsider or clarify that: (a) neither the Tribal engagement rules nor the contents of the *Further Guidance* apply to ETCs that receive no USF for serving

³ See, e.g., *Connect America Fund*, Order on Reconsideration, 26 FCC Rcd 17633 (2011); *Connect America Fund*, Order, WC Docket No. 10-90, DA 12-147 (rel. Feb. 3, 2012); *Connect America Fund*, Order, WC Docket No. 10-90, DA 12-298 (rel. Feb. 27, 2012); *Connect America Fund*, Second Order on Reconsideration, WC Docket No. 10-90 *et al.*, FCC 12-47 (rel. Apr. 25, 2012); *Connect America Fund*, Third Order on Reconsideration, WC Docket No. 10-90, FCC 12-52 (rel. May 14, 2012).

⁴ See USTelecom First Reconsideration Petition at 17-19.

⁵ *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, DA 12-1165, WC Docket Nos. 10-90 *et al.* (July 19, 2012) (“*Further Guidance*”). The ONAP prepared the *Further Guidance* in coordination with the Wireless Telecommunications and Wireline Competition Bureaus (collectively, “Bureaus”).

tribal areas or whose universal service support is being eliminated; and (b) for a provider receiving USF for tribal areas (via the Tribal Mobility Fund or CAF Phase II), the contents of ONAP's *Further Guidance* should not be considered auditable requirements but merely suggestions to guide ETC activities. Second, the Commission should reconsider the *Further Guidance* to the extent it imposes substantive obligations on ETCs because it was adopted without notice and comment in violation of the Administrative Procedure Act ("APA").⁶ Third, the Commission should reconsider the *Further Guidance* to the extent it directs the manner and nature of speech by ETCs, which contravenes the First Amendment. Fourth, the Commission should reconsider the *Further Guidance* because ONAP failed to consider that compliance would unduly burden ETCs, while offering little offsetting benefits for Tribes. Finally, reconsideration or clarification of the *Further Guidance* is warranted because it was adopted without compliance with the Paperwork Reduction Act ("PRA").

II. THE COMMISSION SHOULD RECONSIDER OR CLARIFY THAT THE TRIBAL ENGAGEMENT REQUIREMENTS DO NOT APPLY TO ETCs WHOSE SUPPORT IS BEING ELIMINATED NOR TO ETCs THAT DO NOT RECEIVE FUNDING TARGETED AT TRIBAL AREAS.

At a minimum, the Commission should reconsider or clarify that the Tribal engagement requirements – whether embodied in its rules or the *Further Guidance* – apply only to ETCs that

⁶ As discussed below, it is possible that ONAP intended the *Further Guidance* to be nothing more than a nonbinding policy statement. However, if that is the case, the Commission should make clear that the *Further Guidance* does not constitute a binding rule to which ETCs will be required to comply. See Letter from Mary L. Henze, Assistant Vice President-Regulatory Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 3 (filed August 10, 2012) (requesting that the Commission "make clear that, as mere 'guidance,' USAC's auditors could not audit against an ETC's adherence to this document and the examples contained therein"). In the absence of such clarification, ETCs may be unable to provide the requisite certification regarding their compliance with the Tribal engagement requirements or may be subject to erroneous audit "findings" and may lose universal service support or face an enforcement action if they fail to adhere to the *Further Guidance*.

receive new high-cost support to fund deployment on Tribal lands (*i.e.*, Tribal Mobility Fund recipients and Connect America Fund (“CAF”) Phase II recipients serving Tribal lands), and not to ETCs that receive no support to fund deployment on Tribal lands or whose support is being eliminated. For an ETC that applies for and receives funds to deploy facilities to serve Tribal lands, a narrowly crafted engagement requirement may make sense, because it could provide some assurances that the USF-funded deployment would meet Tribal needs.

However, that is not the case for an ETC whose support is being eliminated nor for ETCs that do not receive funding targeted at Tribal areas, and it would be nonsensical to require those ETCs to abide by the Commission’s Tribal engagement rules or adhere to the *Further Guidance* requirements. After all, the premise of those rules and requirements is that ETCs will engage in meaningful discussions with Tribal communities regarding the ETC’s “deployment” plans in those individual communities.⁷ Such discussions would be of no value if the ETC will not be receiving support for network deployments in a Tribal area.⁸

⁷ See *infra* Section III for a discussion of the specific Tribal engagement activities identified in the *Further Guidance*, including ONAP’s expectation that ETCs will prepare and deliver presentations that articulate their deployment priorities.

⁸ Such discussions also make little sense at this juncture when an ETC cannot accurately predict the amount of support that will be available to build out in Tribal lands, if any. For example, a price cap ETC’s deployment plans would look very different depending upon whether: (i) CAF Phase II is implemented by the January 1, 2013 deadline and the ETC elects not to accept CAF Phase II support; (ii) CAF Phase II is implemented by the January 1, 2013 deadline and the ETC elects to accept CAF Phase II support; or (iii) CAF Phase II is not implemented by the January 1, 2013 deadline and the ETC must repurpose its legacy support for broadband deployment under the Commission’s three-year transition period. Competitive ETCs providing mobile wireless services similarly have no information on whether they will receive *any* support—let alone a specific amount—pursuant to either Phase I or Phase II of the Mobility Fund. In short, these ETCs cannot accurately present to Tribal communities their deployment plans when they do not know whether and how much funding they will receive and in what areas, nor do they know whether they will choose to participate in the future funding programs whenever they come online.

Likewise, it would make no sense to require an ETC whose frozen support consists only of Interstate Access Support (“IAS”) to prepare and present deployment plans to individual Tribal communities. Consistent with the Commission’s requirements, carriers use IAS to lower interstate access charges.⁹ Such support is not used “to improve service quality, coverage, or capacity,” which would be the ostensible purpose of the deployment plans that providers and Tribal representatives would discuss. And—as discussed in Section V below—requiring a senior leader for each ETC to travel to every Tribal community in the carrier’s serving territory each year merely to explain how the Commission’s IAS rules work would add no value at all.

The Commission should also clarify that—for a provider receiving new USF support for tribal areas—the contents of ONAP’s *Further Guidance* should not be considered auditable requirements but merely suggestions to guide ETC activities. As detailed below, a contrary conclusion—that the *Further Guidance* is binding—would run afoul of the APA, the First Amendment, the President’s and the Chairman’s stated goals of minimizing regulatory burdens on businesses, and the PRA. Treating the *Further Guidance* as binding would also be patently unfair because an ETC will only be able to satisfy the *Further Guidance*’s requirements when a Tribal government is itself fully engaged.¹⁰ But as ONAP readily acknowledges, certain “Tribes have yet to organize their governmental or administrative systems with respect to

⁹ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, ¶ 30 (2000).*

¹⁰ The ONAP explains that the “engagement obligation necessitates a level of organization within the Tribal government that can convey both a high degree of certainty in the communications priorities of the Tribal Nation and maintain the continuity of those priorities to the greatest extent possible in a governmental environment that, by definition, changes over time.” *Further Guidance* ¶ 12.

communications services.”¹¹ And USTelecom expects that some of these tribes will enter into engagement discussions unprepared, disorganized, and unable to convey with certainty the communications needs and priorities of their individual communities. Certainly, neither the Commission nor USAC should hold ETCs accountable for the failings of Tribal governments to actively engage in these discussions.

III. THE COMMISSION SHOULD RECONSIDER THE *FURTHER GUIDANCE TO THE EXTENT IT IMPOSES SUBSTANTIVE OBLIGATIONS ON ETCs* BECAUSE IT WAS ADOPTED WITHOUT NOTICE AND COMMENT IN VIOLATION OF THE APA.

According to the Bureaus, the *Further Guidance* is intended to “facilitate” the “Tribal engagement obligation adopted in the *USF/ICC Transformation Order*.”¹² This “facilitation” consists of a litany of activities in which an ETC “should” engage for each Tribal area it serves, including: (i) preparing and delivering a presentation to the Tribal representatives that articulates the ETC’s “deployment priorities, the process by which they arrived at these priorities, and their initial plans for deployment on Tribal lands,” including “timelines for the provision of services not currently available on Tribal lands” and “any opportunities they envision to partner with

¹¹ *Id.* ¶ 12.

¹² *Id.* ¶ 1. In the *USF/ICC Transformation Order*, the Commission required that all ETCs either currently serving or seeking to serve Tribal lands demonstrate annually that they have meaningfully engaged with Tribal governments in their universal service supported areas. *USF/ICC Transformation Order* ¶ 637. At a minimum, such engagement must consist of discussions regarding: (1) needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements. *Id.*; see also 47 C.F.R. §§ 54.313(a)(9), 54.1004(d), 54.1009. To demonstrate this engagement, USF recipients must “submit to the Commission and appropriate Tribal government officials an annual certification and summary of their compliance with this Tribal government engagement obligation.” *USF/ICC Transformation Order* ¶ 637. Failure to satisfy these obligations could subject ETCs to financial consequences, including reductions in universal service support. *Id.*

Tribal governments”;¹³ (ii) providing Tribal representatives with documentation for all rights of way, land use permitting, facilities siting, and environmental and cultural review processes with which the ETC currently complies;¹⁴ (iii) providing Tribal representatives with “evidence of compliance with any Tribal business practice licenses with which they currently comply for that Tribe”;¹⁵ and (iv) taking “immediate steps to establish a lead and/or a team” to manage its Tribal engagement efforts, which must be led by someone “with the requisite authority to make decisions.”¹⁶ In addition, in discharging its obligation to market services in a “culturally sensitive manner,” according to the *Further Guidance*, an ETC “may wish to discuss ... the tailoring of service offerings to the community through, for example, ... locating a retail presence within a Tribal community and employing members of that community ...”¹⁷

Whether these activities are binding rules or aspirational goals is unclear.¹⁸ In issuing the *Further Guidance*, the ONAP cited its delegated authority to develop “specific procedures regarding the Tribal engagement process as necessary,” which presumably would constitute

¹³ *Further Guidance* ¶ 19. Some of the information that an ETC is ostensibly required to share with Tribal representatives is likely commercially sensitive in nature and would typically only be provided subject to a nondisclosure agreement, an issue the *Further Guidance* does not even acknowledge, let alone address.

¹⁴ *Id.* ¶ 27.

¹⁵ *Id.* ¶ 29.

¹⁶ *Id.* ¶¶ 10 & 14.

¹⁷ *Id.* ¶ 25.

¹⁸ That the Bureaus’ Public Notice is labeled as “guidance” is not dispositive. *See, e.g., Western Coal Traffic League v. United States*, 694 F.2d 378, 392 n.61 (5th Cir. 1983) (the fact that an agency “used the term ‘guidelines’ is not determinative; it is the impact and not the phrasing that matters”), *on rehearing* 719 F.2d 772 (5th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984).

rules, as well as the Commission’s direction for ONAP “to develop best practices regarding the Tribal engagement process . . .,” which presumably would represent goals.¹⁹ However, the ONAP did not clearly articulate the authority under which it was acting, leaving the industry and USAC to guess about the legal effect of the *Further Guidance*.²⁰

To the extent the *Further Guidance* is intended to impose mandatory obligations on ETCs serving Tribal areas, it is unlawful because it was adopted without adherence to the APA’s notice-and-comment rulemaking requirements.²¹ The Commission made no effort to “fairly apprise interested persons” of the nature of the Tribal engagement requirements set forth in the *Further Guidance*, nor can the *Further Guidance* be considered a “logical outgrowth” of the Tribal engagement obligations originally proposed.²²

The law is well settled that government agencies cannot achieve their policy objectives by seeking to impose legal obligations under the guise of a policy statement adopted in the absence of a formal rulemaking.²³ Indeed, the D.C. Circuit frequently has vacated agency

¹⁹ *Id.* ¶ 8 (citing *USF/ICC Transformation Order* ¶ 637, n.1054).

²⁰ In a footnote, ONAP suggests, but does not explicitly state, that the *Further Guidance* is aspirational, noting that its focus was “on providing guidance,” while deferring to the Commission “to clarify the existing rules regarding Tribal engagement or pursue new rules with specific procedures, if warranted in the future based on actual experiences and outcomes resulting from this guidance.” *Further Guidance* ¶ 8, n.15.

²¹ The same is true for the Commission’s Tribal engagement rules, which also were adopted without adhering to the notice-and comment requirements of the APA. *See* USTelecom First Reconsideration Petition at 18.

²² *See United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189,1221 (D.C. Cir. 1980); *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004).

²³ *See, e.g., Wilderness Soc’y v. Norton*, 434 F.3d 584, 597 (D.C. Cir. 2006) (denying claims based on document entitled “MANAGEMENT POLICIES” “because they are predicated on unenforceable agency statements of policy”); *Farrell v. Department Of Interior*, 314 F.3d 584, 590 (C.A. Fed. 2002) (“If an agency policy statement is intended to impose obligations or to

documents that, while styled as informal policy statements, constitute attempts to impose binding rules without notice and comment.²⁴ Because the *Further Guidance* was not the product of a notice-and-comment rulemaking, the Commission should reconsider the *Further Guidance* to the extent it is intended to impose legally binding obligations on ETCs in meeting their Tribal engagement obligations.

IV. THE COMMISSION SHOULD RECONSIDER THE FURTHER GUIDANCE TO THE EXTENT IT DIRECTS THE MANNER AND NATURE OF SPEECH OF ETCs, WHICH VIOLATES THE FIRST AMENDMENT.

To the extent the *Further Guidance* mandates that an ETC provide certain documents to and share certain information with Tribal representations, this mandate expands upon the initial First Amendment violation triggered by the Tribal engagement rule itself, and thus the Commission should grant reconsideration.²⁵

The First Amendment guarantees “both the right to speak freely and the right to refrain from speaking at all.”²⁶ A rule that “requires the utterance of a particular message favored by the Government, contravenes this essential right.”²⁷ As a general matter, the government cannot

(footnote cont’d.)

limit the rights of members of the public, it is subject to the Administrative Procedure Act, and, with certain exceptions, must be published in the Federal Register as a regulation. If it is not, it is invalid.”) (citations omitted).

²⁴ See, e.g., *CropLife Am. v. EPA*, 329 F.3d 876, 885 (D.C. Cir. 2003) (finding EPA “directive” as setting forth a substantive rule but “vacat[ing]” it for failure to comply with statutory notice and comment requirements); *United States Tel. Ass’n v. FCC*, 28 F.3d 1232, 1233 (D.C. Cir. 1994) (“set[ting] aside” FCC “schedule” that set forth standards for assessing forfeitures because “the Commission violated the [APA] by issuing the standards without notice and an opportunity to comment”).

²⁵ See USTelecom First Reconsideration Petition at 18.

²⁶ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

²⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

force private parties to speak unless it carries its burden of demonstrating that forced speech will address real harms and will alleviate such harms to a material degree.²⁸ Ensuring that the government can show real harms before compelling speech is consistent with the long-standing principle that burdens on speech based on “prophylactic” rules are incompatible with the First Amendment.²⁹

Here, the *Further Guidance* purports to require ETCs (via the consistent use of the term “should”) to prepare and deliver presentations to Tribal representatives on a host of specified topics and provide Tribal representatives with various documentation – activities that plainly constitute compelled speech. Yet, the *Further Guidance* (as well as the *USF/ICC Transformation Order*) is devoid of any discussion of the harms (real or otherwise) such requirements are intended to rectify or any explanation of how its forced speech will alleviate such harms to a material degree.³⁰ Accordingly, the *Further Guidance* violates the First Amendment, which warrants reconsideration.

²⁸ *Ibanez v. Fla. Dept. of Bus. and Prof'l. Reg.*, 512 U.S. 136, 146 (1994); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-53 (1985).

²⁹ *Edenfield v. Fane*, 507 U.S. 761, 773-777 (1993); *NAACP v. Button*, 371 U.S. 415, 438 (1963).

³⁰ Platitudes about the importance of “[c]reating a substantive, meaningful dialogue” between ETCs and Tribal governments are insufficient to satisfy the harms-are-real test. *Further Guidance* ¶ 4. Under this standard, “[t]he State’s burden is not slight,” *Ibanez*, 512 U.S. at 142, because, as the Supreme Court has made clear, intrusion on First Amendment rights “may not be . . . lightly justified.” *Zauderer*, 471 U.S. at 648-49.

V. **THE COMMISSION SHOULD RECONSIDER THE *FURTHER GUIDANCE* BECAUSE ONAP FAILED TO CONSIDER THE COMPLIANCE COSTS.**

The Commission has a duty to “adopt regulation only upon a reasoned determination that its benefits justify its costs.”³¹ The Commission also has a duty—as explained by Chairman Genachowski—to “reduce unneeded burdens on the private sector.”³² ONAP did not fulfill either duty in preparing the *Further Guidance*.

That ONAP failed to conduct any cost-benefit analysis of its Tribal engagement requirements is evident from the face of the *Further Guidance*, which does not even acknowledge the compliance costs ETCs are likely to incur. Nor does ONAP (nor the FCC in its initial adoption of the Engagement Rules) explain why a complex set of mandatory engagement obligations is preferable to more flexible, voluntary engagement efforts. In fact, ONAP acknowledges that “[i]n many places, we expect that there are good and productive relationships between communications providers and Tribal nations” – an acknowledgment that undermines the premise for mandatory engagement obligations.³³ Furthermore, had ONAP bothered to conduct a cost-benefit analysis—as it was obligated to do—it would have been apparent that the costs of complying with the *Further Guidance* significantly outweigh any claimed benefits.³⁴ In addition, ONAP should have considered the potential for these requirements and their costs to

³¹ Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (2011); *see also* Exec. Order No.13,579 (Jul. 11, 2011).

³² *See International Reporting Requirements Order*, 26 FCC Rcd 7274, 7365 (2011) (Statement of Chairman Julius Genachowski).

³³ *Further Guidance* ¶ 3.

³⁴ Notably, both the Commission and ONAP failed to consider that many of the broadband challenges in Tribal areas are the result of Tribal communities often being located in “remote, insular, [and] cyclically impoverished” areas more than the result of ineffective engagement between Tribes and ETCs. *See id.* ¶ 19.

negatively affect the ability or willingness of ETCs to serve Tribal areas. Some of these costs are highlighted briefly below.

Costs of Preparing Presentations. The *Further Guidance* purports to require that an ETC research, prepare documentation, and deliver presentations on a multitude of topics for each Tribal community that it serves. These topics include “deployment priorities, the process by which they arrived at these priorities, and their initial plans for deployment on Tribal lands” as well as compliance with rights of way, land use permitting, facilities siting, and environmental and cultural review processes and any Tribal business practice licenses.³⁵ Preparing these materials and making these presentations would require substantial resources and involve various staff, including network, legal, and marketing personnel. For ETCs that serve multiple Tribal communities, these burdens would increase exponentially. As noted in the *Further Guidance*, there are approximately 566 federally recognized Tribal lands, the vast majority of which are served by ETCs in Alaska and in the Southwest United States.³⁶ Under ONAP’s approach, a separate presentation would be required for each, which would only compound the burdens on ETCs serving these areas.

Costs of Involving Senior Executives. ONAP expects that “decision-makers” will lead and manage an ETC’s Tribal engagement efforts, because, according to the *Further Guidance*, “meaningful exchange often can come only from those with the requisite authority to make

³⁵ *Id.* ¶¶ 19, 27 & 29. And these presentations should cover the services ETCs “currently deploy,” “what services they intend to deploy” on Tribal lands, “timelines for the provision of services not currently available on Tribal lands,” “priorities in terms of service and the factors that led them to prioritize deployment to particular areas,” and “any opportunities they envision to partner with Tribal governments.” *Id.* ¶ 19.

³⁶ *Id.* ¶¶ 5, n.5 & 24.

decisions.”³⁷ Thus, in addition to involving sales and marketing personnel, who likely are most in-tune with the needs of local Tribal communities, an ETC must also involve senior executives in discharging its Tribal engagement obligations. The cost of this requirement would be significant just in terms of personnel costs and made even more so by ONAP’s requirement that these executives are expected to engage with Tribal representatives in face-to-face meetings—and not over the telephone—since the time and expense of travel must be taken into account.³⁸ For large ETCs that serve dozens (or more) Tribal communities, the guidance—if fully implemented—could literally require full-time attention from a senior leader and supporting team doing little else but traveling from Tribal community to Tribal community.

Marketing Costs. In discharging its duty to market services in a “culturally sensitive manner,” ONAP expects that an ETC will “explore and discuss” with each Tribal community it serves how its “services are marketed in a manner that will relate directly to the community, resonate with consumers, and stimulate increased adoption of services on Tribal lands.”³⁹ According to ONAP, these discussions “may” include “locating a retail presence within a Tribal community and employing members of that community . . .”⁴⁰ If such discussions are to be meaningful, ONAP apparently intends for ETCs to conduct a market analysis of the economic feasibility of opening a brick-and-mortar store in each Tribal land, which would require: (i) identifying potential site locations; (ii) estimating the costs of development and operations; and

³⁷ *Id.* ¶ 10.

³⁸ The *Further Guidance* implies that engagement almost always should be face-to-face, except in cases of “extreme weather conditions and/or extreme remoteness,” in which event engagement “by phone or video conference” may be appropriate. *Id.* n.17.

³⁹ *Id.* ¶ 24.

⁴⁰ *Id.* ¶ 25

(iii) forecasting potential revenues. This would be a costly exercise that conceivably would have to be conducted in each of the 566 individual Tribal communities in the United States.

ONAP completely ignored these and other costs that an ETC would incur in complying with Tribal engagement requirements. Because these requirements were adopted in disregard of the Obama Administration's direction and the Commission's commitment to reducing unnecessary regulation on the private sector, the Commission should grant reconsideration.

VI. THE COMMISSION SHOULD RECONSIDER OR CLARIFY THE *FURTHER GUIDANCE* BECAUSE IT WAS ADOPTED WITHOUT COMPLYING WITH THE PRA.

Reconsideration or clarification of the *Further Guidance* also is warranted because it was issued without complying with the PRA. Before requiring the collection of information, the PRA requires that Federal agencies: (1) seek public comment on the proposed collection; and (2) submit the proposed collection for review and approval by the Office of Management and Budget ("OMB").⁴¹ If OMB approves an information collection, it assigns an OMB control number that the agency must display on the information collection. Agencies may not penalize entities that fail to respond to Federal collections of information that do not display valid OMB control numbers.⁴²

Here, ONAP did not seek OMB approval of the information collection contained in the *Further Guidance*, nor did OMB issue a control number for this collection.⁴³ Notably, the

⁴¹ See 44 U.S.C. chapter 35; see 5 C.F.R. Part 1320.

⁴² See 44 U.S.C. 3512(a)(1).

⁴³ That the *Further Guidance* purports to require ETCs to disclose information to Tribal communities rather than the Commission is immaterial. Disclosures to third parties and the general public are covered under the PRA. See "Information Collection Under the Paperwork Reduction Act," Cass Sunstein, Office of Management and Budget, at (2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf

Commission itself also failed to request or receive OMB approval for the information collection contained in its original Tribal engagement rules.⁴⁴ Absent compliance with the PRA, neither the Commission’s Tribal engagement rules nor the *Further Guidance* are legally enforceable, and the Commission should either reconsider or clarify an ETC’s Tribal engagement obligations accordingly.⁴⁵

In addition, many aspects of the *Further Guidance*—as well as the underlying Tribal engagement rules—violate other substantive provisions of the PRA. Among other things, the PRA requires federal agencies to ensure that data collections have “practical utility,” and the collection itself “minimize[s] the burden ... on those who are to respond[.]”⁴⁶ Neither the Commission nor ONAP has demonstrated that mandatory Tribal engagement requirements will add any value to existing broadband deployment efforts in Tribal lands or will improve existing

(footnote cont’d.)

(“What counts as information under the PRA? ... OMB regulations define ‘information’ as ‘any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media.’ This category includes ... third-party or public disclosures (e.g., nutrition labeling requirements for food).”) (citing 5 C.F.R. 1320.3(c)).

⁴⁴ Although the Commission sought and received OMB approval for other annual reporting requirements for high cost recipients, the Commission did not seek, nor did it receive, OMB approval for the Tribal engagement reporting requirement. See “Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support”, 77 Fed. Reg. 26,987 (May 8, 2012) (announcing OMB’s approval of the annual reporting requirements found in Sections 54.313(a)(1) through (a)(6), while making no mention of Section 54.313(a)(9)—the Tribal engagement reporting requirement).

⁴⁵ In turn, the Commission should recognize, at a minimum, that any effective date for any tribal engagement rules must be prospective, and any reporting associated with those rules should not be required until at least a year following the effective date of any tribal engagement rules.

⁴⁶ 44 U.S.C. § 3506(c)(2)(A).

voluntary relationships between ETCs and Tribal leaders. Furthermore, as detailed above, the Tribal engagement requirements amount to a scatter-shot approach that imposes significant burdens on ETCs – burdens that the *USF/ICC Transformation Order* and the *Further Guidance* overlooked rather than sought to “minimize.”

VII. CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom’s instant Petition for Reconsideration.

Respectfully submitted,

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