

**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

COMMENTS OF AT&T

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COMMENTS OF AT&T

On July 19, 2012, the Office of Native Affairs and Policy (ONAP), together with the Wireless Telecommunications and Wireline Competition Bureaus (Bureaus), released a public notice providing “further guidance on the Tribal engagement obligation adopted in the *USF/ICC Transformation Order*.”¹ Through this *Public Notice*, ONAP sought to provide guidance to interested parties on how they should implement the new Tribal engagement rule, which requires “high-cost recipients” that “serve[] Tribal lands” to demonstrate that they have engaged in discussions with Tribal governments on Commission-specified topics.² However, as explained by USTelecom in its petition for reconsideration and clarification, the *Public Notice* offers carriers little practical guidance and, worse, exacerbates the *USF/ICC Transformation Order*’s Administrative Procedure Act (APA), Paperwork Reduction Act (PRA), and First Amendment violations.³ AT&T Inc. (AT&T), on behalf of its high-cost eligible telecommunications carrier (ETC) affiliates, files these comments in support of the Petition and urges the Commission to act quickly to limit the application of its new Tribal engagement rule and the guidance contained in the *Public Notice* to Tribal Mobility Fund recipients. Even then, AT&T recommends that the

¹ *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, at ¶ 1 (rel. July 19, 2012) (*Public Notice*) (citing *Connect America Fund*, WC Docket No. 10-90 *et al.*, 26 FCC 17663 (2011) (*USF/ICC Transformation Order*)).

² 47 C.F.R. § 54.313(a)(9) (requiring high-cost recipients to discuss with Tribal governments “(i) A needs assessment and deployment planning with a focus on Tribal community anchor institutions; (ii) Feasibility and sustainability planning; (iii) Marketing services in a culturally sensitive manner; (iv) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (v) Compliance with Tribal business and licensing requirements”).

³ Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 10-90 *et al.* (filed Aug. 20, 2012) (Petition).

Commission request comment on the *Public Notice* so that the guidance could be refined to a point where Tribal Mobility Fund recipients could actually implement it.

The Commission Should Clarify the Scope of the Public Notice and the Underlying Rule. AT&T agrees with USTelecom that the Commission should clarify that the guidance contained in the *Public Notice* – and the Tribal engagement rule itself – apply only to providers that “receive new high-cost support to fund deployment on Tribal lands . . .,” which, under the current rules, means Tribal Mobility Fund recipients. Petition at 3-4. The *Public Notice* is inconsistent in its description of which entities are subject to the guidance. At various points, ONAP describes the guidance as applying to “communications providers either currently providing or seeking to provide service on Tribal lands *with the use of Universal Service Fund (USF) support*” but elsewhere, ONAP broadens the scope of providers ostensibly covered by the guidance to “all eligible telecommunications carriers (ETCs) either currently serving or seeking to serve Tribal lands.” *Compare Public Notice* at ¶ 1 (emphasis added) *with id.* at ¶ 6. As we discuss below, both descriptions are problematic and should be clarified or reconsidered.

The Commission’s stated purpose in creating the Tribal engagement requirement is to facilitate “the successful deployment and provision of service” on Tribal lands in order to narrow the “deep digital divide” in those areas. *USF/ICC Transformation Order* at ¶¶ 636-37. To accomplish this goal, the Commission must, of course, provide “sufficient” high-cost support to providers in order to enable them to deploy and maintain broadband service in high-cost Tribal areas that are otherwise uneconomic to serve. *See* 47 U.S.C. § 254(e) (requiring support to be “explicit and sufficient to achieve the purpose of this section”). A carrier cannot be expected – or required – to deploy broadband service in such areas absent “specific, predictable, and sufficient” support. 47 U.S.C. § 254(b)(5). If the Commission fails to provide sufficient support

to enable a carrier to deploy broadband service on high-cost Tribal lands, there is little point in mandating that the carrier commence broadband deployment discussions with the relevant Tribal government. As a consequence, the Commission should apply its Tribal engagement rule and ONAP's Tribal engagement guidance only to Tribal Mobility Fund recipients.

For example, interstate access support (IAS), which is considered “high-cost support,” is not intended to support the deployment and provision of service on Tribal lands (and certainly is not intended to enable recipients to close the “deep digital divide” that may exist on Tribal lands). Thus, legacy IAS recipients that serve Tribal lands should not be subject to the Tribal engagement requirements. The Commission expects carriers to use legacy IAS to lower interstate access charges, which AT&T and other IAS recipients do via reduced subscriber line charges. Petition at 5 (citing *CALLS*, 15 FCC Rcd 12962 (2000)). The *USF/ICC Transformation Order* did not change that. According to the Commission, which converted legacy high-cost support to “frozen high-cost support,” a price cap carrier’s frozen IAS “will be treated as IAS for purposes of our existing rules.” *USF/ICC Transformation Order* at ¶ 152.⁴ It would be nonsensical to require a carrier that receives legacy IAS to discuss “a needs assessment and deployment planning” with Tribal governments because such support is neither intended nor “sufficient” to enable the carrier to deploy broadband to, for example, “core community or anchor institutions.” *Public Notice* at ¶ 18.

Furthermore, even if a carrier receives high-cost support to provide service on Tribal lands, the Commission should clarify that its rule and ONAP's guidance do not apply if that

⁴ See also 47 C.F.R. § 54.312(a)(3) (“A carrier receiving frozen high cost support under this rule shall be deemed to be receiving Interstate Access Support and Interstate Common Line Support equal to the amount of support . . . to which the carrier was eligible under those mechanisms in 2011.”).

carrier's high-cost support is being eliminated either through a phase down⁵ or potentially on a flash-cut basis.⁶ Petition at 4. We agree with USTelecom that there is no purpose in requiring Tribal governments and carriers whose support is being zeroed out to discuss, for example, deployment or feasibility planning when these carriers are assured of losing all of their support in a few years. Given the circumstances, the Commission should expect these carriers to spend their high-cost support on maintaining, not expanding, service.⁷ Because these ETCs “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,”⁸ it does not make financial sense for ETCs to invest significant sums to deploy facilities in high-cost areas when those facilities might be stranded in a few short years. The Commission has failed to explain what value there possibly could be in mandating that carriers have discussions with Tribal governments on network deployment plans when the carriers likely have no such plans – or, at least, no such plans involving high-cost support.

For these reasons and those set forth in the Petition, the Commission should grant the Petition and clarify that its rule and the guidance in the *Public Notice* apply only to providers that receive new high-cost support to deploy and maintain facilities and services on Tribal lands – that is, Tribal Mobility Fund support.

⁵ See *USF/ICC Transformation Order* at ¶ 519.

⁶ *Id.* at ¶ 180.

⁷ Carriers are permitted to use high-cost support to maintain facilities and services. See 47 U.S.C. § 254(e) (requiring universal service support recipients to use that support for the “provision, *maintenance*, and upgrading of facilities and services for which the support is intended” (emphasis added)).

⁸ Petition at 8.

The Commission Must Cure the APA and PRA Violations before the Public Notice's Guidance and the Tribal Engagement Rule May Become Effective. The *Public Notice* makes no mention of the fact that the Commission's Tribal engagement rule has been challenged by at least two parties⁹ or that the Commission has not sought necessary approval from the Office of Management and Budget (OMB) for the rule's new information collection and reporting requirements. Notwithstanding their lack of authority, ONAP and the Bureaus nonetheless exhort high-cost recipients to "take immediate steps to prepare for and initiate engagement with the Tribal governments whose lands they serve." *Public Notice* at ¶ 14. However, until it cures the APA and PRA deficiencies with the *Public Notice* and the Tribal engagement rule, the Commission and its staff have no authority to direct any provider to commence discussions in order to comply with this rule or ONAP's guidance. The Commission should clarify that the guidance contained in the *Public Notice* and the underlying rule are not in effect. It is important that the Commission issue this clarification quickly because there seems to be confusion between industry and Commission staff about the legal status of the Tribal engagement rule and the *Public Notice's* guidance.¹⁰

⁹ Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 *et al.*, at 17-19 (filed Dec. 29, 2011) (USTelecom December 2011 Petition for Reconsideration); Petition for Reconsideration of the Rural ILECs Serving Tribal Lands, WC Docket No. 10-90 *et al.* (filed Dec. 29, 2011).

¹⁰ See Letter from John Kuykendall, John Staurulakis, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 *et al.*, at 3 (filed Sept. 10, 2012) (stating that ONAP staff "explained that the pending [PRA] approval applies only to the obligation for ETCs to report as to how they have fulfilled the Tribal engagement requirement; it does not impact their responsibility to conduct the engagement."). If the letter provides an accurate recounting of this discussion, ONAP's advice is incorrect insofar as it ignores the fact that the PRA prohibits the Commission from "conduct[ing] or sponsor[ing] the collection of information" without prior OMB approval. 44 U.S.C. § 3507(a)(2). By directing parties to commence discussions on Commission-specified topics, ONAP is effectively causing high-cost recipients to obtain "facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons. . . ." 44 U.S.C. § 3502(3)(a)(i). Until the Commission receives OMB approval for this information collection, the

First, if the Commission intended for the *Public Notice*'s guidance to be binding so that a carrier's compliance with the guidance could be audited and, in the event of noncompliance, the Commission could subject the carrier to "financial consequences,"¹¹ then the Commission violated the APA by failing to adhere to the Act's notice and comment requirements. Petition at 8 (explaining how the Commission failed to "fairly apprise interested persons" of the requirements set forth in the *Public Notice*). If the Commission meant for this guidance to be anything other than an aspirational goal that is not enforceable, it is the second time that the Commission failed to comply with the APA in the Tribal engagement context.

USTelecom previously challenged the validity of the Tribal engagement rule in its December 2011 Petition for Reconsideration, which remains pending at the Commission. Among other things, USTelecom explained how the Commission failed to provide notice to interested parties about the nature of the Tribal engagement requirements that the Commission adopted in the *USF/ICC Transformation Order*. USTelecom December 2011 Petition for Reconsideration at 18. In comments supporting this petition, AT&T documented how the Commission sought comment on a "possible requirement for engagement with Tribal governments" only in the context of creating a Tribal Mobility Fund.¹² Specifically, the Wireless Bureau sought comment on whether the Commission should require prospective bidders for Tribal Mobility Fund support to engage in discussions with the relevant Tribal governments prior

Public Notice's guidance and the rule are not in effect. See *USF/ICC Transformation Order* at ¶ 1428 ("The rules that contain information collections subject to PRA review WILL BECOME EFFECTIVE following approval by the Office of Management and Budget.") (emphasis in original)).

¹¹ *USF/ICC Transformation Order* at ¶ 637.

¹² See AT&T Comments, WC Docket No. 10-90 *et al.*, at 15-17 (filed Feb. 9, 2012) (AT&T Comments) (quoting *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, at ¶ 6 (WTB 2011) (*Mobility Fund Further Inquiry*)).

to the Commission’s auction to ensure that “the Tribal governments have been formally and effectively engaged in the planning process and that the service to be provided will advance the goals established by the Tribal government.” *Mobility Fund Further Inquiry* at ¶ 6. Requesting comment on whether these discussions should occur at the “short-form or long-form application stage” of a Tribal Mobility Fund auction (*id.*) is a far cry from the rule that the Commission ultimately adopted, which applies to *all* high-cost recipients that serve Tribal lands. 47 C.F.R. § 54.313(a)(9). No one could credibly assert that interested parties were fairly apprised of the Tribal engagement rule that the Commission adopted in its *USF/ICC Transformation Order* based on the extremely narrow scope of the *Mobility Fund Further Inquiry*.

Second, the Commission failed to seek comment on and OMB approval for the proposed collection of information discussed in the *Public Notice*. Petition at 14. Not only has the Commission failed to comply with the PRA for the *Public Notice*, it has yet to seek OMB approval for its Tribal engagement rule. The Commission’s March submission to the OMB requesting approval for aspects of its new ETC annual reporting rule, of which the Tribal engagement rule is a part, made no mention of section 54.313(a)(9).¹³ As a result, like the *Public Notice*, the Tribal engagement rule is not in effect.

Putting aside the procedural PRA deficiencies with the *Public Notice*, AT&T does not believe that the Commission can satisfy the substantive requirements of the PRA for either the *Public Notice* or the rule. Prior to providing its approval, the OMB must determine “whether the collection of information by the agency is necessary for the proper performance of the functions

¹³ FCC Supporting Statement, OMB Control No. 3060-0986, at 6 (March 2012), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201201-3060-006.

of the agency, including whether the information shall have practical utility.” 44 U.S.C. § 3508.

The OMB defines “practical utility” as

the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account accuracy, validity, adequacy, and reliability, and the agency’s ability to process the information it collects (or a person’s ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion . . . In the case of recordkeeping requirements . . . “practical utility” means that actual uses can be demonstrated. 5 C.F.R. § 1320.3(l).

To date, the Commission has not made any attempt to demonstrate that the information collection necessitated by its new Tribal engagement rule and *Public Notice* will yield any practical utility. And, AT&T does not believe that the Commission could make this showing. As we explained above, there simply is no value associated with compelling providers to have discussions about feasibility and deployment planning with Tribal governments when the provider does not receive any high-cost support to deploy and provide service on Tribal lands or when the Commission has informed the provider that it is eliminating the carrier’s support in a few years. Similarly, AT&T finds no practical utility in requiring a carrier to discuss opening a retail store on Tribal lands in order to satisfy the Commission’s unlawful requirement that high-cost recipients “market[] services in a culturally sensitive manner.” *Public Notice* at ¶ 25 (suggesting that opening a store on Tribal lands and staffing it with members of the community “may increase awareness of and sensitivity to local cultural and communications needs”).

In sum, the substantial burdens that the *Public Notice* and the Tribal engagement rule will impose on high-cost recipients serving Tribal lands are utterly counter to the Commission’s obligation under the PRA to “minimize the paperwork burden for individuals, small businesses, .

. . tribal governments, and other persons resulting from the collection of information by or for the Federal Government.” 44 U.S.C. § 3501(1).¹⁴

The Commission Should Reconsider Guidance That Compels Speech and Attempts to Control the Content of That Speech. To the extent that the Commission is attempting to compel speech or control the content of speech through its requirement that ETCs discuss “marketing services in a culturally sensitive manner” with Tribal governments, the Commission is violating the First Amendment. Petition at 9-10. AT&T raised its First Amendment concerns with the Commission’s rule in comments supporting the USTelecom December 2011 Petition for Reconsideration. See AT&T Comments at 18-20. While we do not repeat those arguments here, our concerns about the Commission’s requirement that carriers “market[] services in a culturally sensitive manner” were well-founded based on the *Public Notice*.

At the time of our comments last February, it was unclear whether the Commission expected carriers to satisfy this particular requirement by advertising services in Tribal newspapers and on Tribal radio stations or whether the Commission intended to require ETCs to alter the content of their advertisements. The *Public Notice* makes clear that it is the latter: the Commission intends carriers to discuss “developing materials, separately or jointly, specific to the Tribal community,” coordinating and partnering with Tribal governments “to ensure that services are marketed in a manner that will relate directly to the community. . .”, and “tailoring [] service offerings to the [specific Tribal] community.” *Public Notice* at ¶¶ 24, 25. If the Commission intended for this guidance to be binding, it must be “narrowly tailored” to serve a “compelling state interest” in order to withstand strict scrutiny. See *Pac. Gas & Elec. v. Pub.*

¹⁴ See also Petition at 11-14 (describing the costs that the *Public Notice* will impose on ETCs and ONAP’s failure to perform any cost-benefit analysis, which it is required to do pursuant to Exec. Order No. 13,563).

Util. Comm'n, 475 U.S. 1, 19 (1986) (plurality). However, as USTelecom notes, the *Public Notice* “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.” Petition at 10. As a consequence, the Commission’s *Public Notice* also violates the First Amendment, warranting reconsideration.

AT&T requests that the Commission grant USTelecom’s Petition and reconsider the *Public Notice* and the underlying Tribal engagement rule as discussed herein.

Respectfully Submitted,

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