

**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 Inter-carrier 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

**NTCA’S COMMENTS REGARDING USTELECOM PETITION FOR
RECONSIDERATION AND CLARIFICATION**

The National Telecommunications Cooperative Association (“NTCA”)¹ submits these comments regarding the United States Telecom Association’s (“USTelecom”) Petition for Reconsideration and Clarification of the *Further Guidance* Public Notice released by the Office

¹ NTCA is an industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents nearly 600 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service local exchange carriers (LECs) and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). NTCA’s members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

of Native Affairs and Policy (“ONAP”) and the Wireless Telecommunications Bureau² regarding the Tribal engagement obligations adopted in the Commission’s *USF/ICC Transformation Order*.³

I. INTRODUCTION AND SUMMARY

NTCA fully supports the Commission’s interest in increasing broadband deployment and adoption in Tribal and other high-cost areas. NTCA welcomes a greater focus on ensuring the availability and affordability of advanced services across Tribal lands and the rest of rural America. Indeed, NTCA members have shown time and again their commitment as carriers of last resort to make every reasonable effort to reach all consumers – on Tribal lands or otherwise – in their serving areas.

However, the USTelecom Petition highlights serious concerns arising out of a race to implement universal service fund (“USF”) and intercarrier compensation (“ICC”) reforms without following proper process or taking stock of practical considerations. Accordingly, NTCA requests that the Commission reconsider or clarify that (a) for a provider receiving USF for tribal areas, the contents of the ONAP’s *Further Guidance* are not requirements, but rather mere suggestions of ways in which ETCs might engage with Tribal authorities; and (b) neither the Tribal engagement rules nor the contents of the *Further Guidance* apply to eligible telecommunications carriers (“ETCs”) that receive no USF for serving tribal areas or whose universal service support is being eliminated.⁴

² *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 12-11165, WC Docket Nos. 10-90, *et al* (July 19, 2012) (“Further Guidance”).

³ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”).

⁴ USTelecom Petition, pp 2-3.

To the extent the *Further Guidance* imposes substantive obligations on ETCs, it should be reconsidered because it was adopted without notice and comment in violation of the Administrative Procedure Act (“APA”), without a small business impact analysis under the Regulatory Flexibility Act (“RFA”), and it does not comply with the Paperwork Reduction Act (“PRA”).

II. THE COMMISSION SHOULD CLARIFY THAT THE FURTHER GUIDANCE IMPOSES NO SUBSTANTIVE OBLIGATIONS ON ETCs AND REVISE ITS SUGGESTIONS IN ACCORDANCE WITH A COST-BENEFIT ANALYSIS

It is unclear from the text of the *Further Guidance* that its intent is to merely offer suggestions that an ETC may use to engage tribal entities and that it does not impose substantive obligations or establish benchmarks for which ETCs will be held accountable. The Commission should clarify that for a provider receiving USF support for tribal areas, the contents of ONAP’s *Further Guidance* are merely examples of ideas that ETCs may use and tailor to fit their individual needs and are not auditable requirements. As discussed below, a conclusion that the *Further Guidance* is binding runs afoul of several legal procedural requirements and stated policy goals.

Further, a contrary finding – that ETCs must comply – is nonsensical and unfair. As USTelecom points, out, an ETC would only be able to satisfy the *Further Guidance* when a Tribal government is itself fully engaged.⁵ ONAP itself stresses 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,

⁵ USTelecom Petition, p. 5.

by definition, changes over time.”⁶ However, ONAP also acknowledges that certain “Tribes have yet to organize their governmental or administrative systems with respect to communications services.”⁷ Such factors must be taken into account in evaluating whether ETCs have made reasonable efforts to engage in productive discussions.

The *Further Guidance* requires the ETC to put a “team” together and expects management level communication with Tribal leaders and “repeated good faith efforts to meaningfully engage” with nonresponsive Tribal governments and keep careful records. The ETCs must articulate to the Tribal entity the services they deploy, what they intend to deploy, their timeliness for the provision of services not currently available, and must work with the Tribal governments on culturally sensitive marketing plans.

The Commission has a duty to “adopt regulation only upon a reasoned determination that its benefits justify its costs.”⁸ There was, however, no cost-benefit analysis of its Tribal engagement provisions. If they are requirements, they have been imposed without any due consideration of how they tie to the resources needed to serve Tribal areas, or the practical steps and burdens associated with such a new requirement. They are burdensome and costly to implement for all carriers. There may be benefit when a large company serves a Tribal area, and thus has some incentive to focus upon more profitable markets than the Tribal area and other less densely populated areas. But for a small company that serves only rural areas, the need for such a requirement has not been established. This is particularly true for small companies that serve multiple Tribal areas or only a small or sparsely populated portion of a Tribal area; in such cases, any potential benefit is far outweighed by the associated costs of compliance. The *Further*

⁶ *Further Guidance*, ¶ 12.

⁷ *Id.*

⁸ Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed Reg. 3821 (2022); *see also* Exec. Order No 13579 (July 11, 2011).

Guidance requires an extensive commitment of time and resources irrespective of whether there has been any finding or complaint about a deficiency in the provision of service. As just one example, a requirement to create a “team” for such engagement efforts would represent quite a burden for a company that might only have a few dozen employees or less – especially if there are few or no consumers on the Tribal lands at issue.

The engagement requirement also applies regardless of density, racial make-up or the size of the area served. For companies serving multiple Tribal areas, the tribal engagement requirements would necessitate multiple assessments, planning and marketing efforts for each specific Tribal area served. The associated cost, including time and effort, is enormous. For example, one NTCA member company serves between 5% and 95% of the geography of five different reservations. Overall, broadband is already available in 95% of the tribal areas and to all of the anchor institutions served by the member company. Despite this success, a strict requirement to comply with the *Further Guidance* as written would likely require the company to hire an additional person to coordinate the specific tribal engagement activities between all reservations. Another NTCA member serves a strip of land that has been identified as part of a reservation and therefore would be subject to the requirements, even though: (1) that strip of land is separated from the rest of the reservation by a mountain range; (2) not a single Native American lives on that strip of land; (3) the right of way to reach that land is administered by the state, not the Tribe; and (4) neither leadership in the Tribe or the Bureau of Indian Affairs has previously had any reason to interact with the NTCA member or the service offered on that strip of land. There are also situations where there are very few or *no* people residing on a sliver of Tribal lands served by a small carrier, or where the only structures on the lands are uninhabited and not accessible by any road. In these and similar situations, compliance would impose huge

costs, but result in little, if any benefit to Tribes, individual Native Americans, or to other consumers of the small carrier.

In the *USF/ICC Transformation Order*, the Commission reduced USF funding for many RLECs and began the ratcheting down of ICC revenues. In the face of such significant changes, and with many carriers facing substantial reductions in combined USF and ICC revenues, new, costly mandates for which no commensurate benefit has been identified are particularly troubling. The Commission should reconsider or clarify that the *Further Guidance* includes at most suggestions that an individual carrier may accept, reject or tailor to fit its individual needs.

NTCA agrees with US Telecom that the Commission should also reconsider or clarify that the Tribal engagement requirements apply only to ETCs that receive new high-cost support to fund deployments on Tribal lands and not to ETCs that receive no support to fund deployment on Tribal lands or whose support is being eliminated. A contrary interpretation is nonsensical and amounts to an unfunded mandate with no known or possible commiserate benefit. The Tribal engagement rules are designed to ensure that USF-funded deployment would meet Tribal needs. The discussions are of little or no value if the ETC will not receive support for network deployments in a Tribal area.

III. TO THE EXTENT THE *FURTHER GUIDANCE* IMPOSES SUBSTANTIVE OBLIGATIONS ON ETCs, IT SHOULD BE RECONSIDERED BECAUSE PROPER LEGAL PROCEDURES WERE NOT FOLLOWED

As discussed above, it is unclear from the text of the *Further Guidance* whether it is intended to suggest best practices or impose procedures that must be followed. To the extent the *Further Guidance* is intended to impose mandatory obligations, it is unlawful. Administrative

agencies are required to comply with specific legal procedures, included the APA and RFA and the PRA.

The APA specifically requires an administrative agency to adhere to notice-and-comment procedures.⁹ First and foremost, there is no current FCC rule that requires that ETC recipients engage Tribal entities. The rule cited in the *Further Guidance* (47 C.F.R. § 54.313) is a reporting requirement, not an engagement requirement. The *Further Guidance*, to the extent it is itself enforceable, is an entirely new engagement requirement. The public was not made aware of the nature of the engagement requirements and the *Further Guidance* was not a “logical outgrowth” of the Tribal engagement obligations originally proposed, nor can the *Further Guidance* be considered an interpretation of the reporting requirement that exists in the rules.¹⁰ This flaw is fatal. To the extent the ONAP and Wireline Competition Bureau wish to make the *Further Guidance* enforceable, it must seek and consider public input.

The *Further Guidance* was also adopted without an analysis of how they impact small businesses. As discussed above, the *Further Guidance*, if strictly interpreted and applied, would create substantial new obligations that present challenges for smaller providers already doing the most they can to serve Tribal lands and other hard-to-serve areas. The RFA¹¹ requires that agencies prepare a regulatory flexibility analysis of proposed obligations. Agencies are directed to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.¹² The RFA also requires an agency to seek comment on alternatives and describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives

⁹ 5 U.S.C. § 553.

¹⁰ See *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

¹¹ See 5 U.S.C. § 691 *et seq.* The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub.L. No. 104-121, Title II, 110 Stat. 857.

¹² 5 U.S.C. § 603(b)(3).

(among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹³ The *Further Guidance*, if enforceable, imposes significant and substantial obligations on small businesses, but no comment was sought or analysis provided of how the *Further Guidance* impacts them or a description of significant, less burdensome alternatives that were considered, but rejected. It is another fatal flaw that warrants reconsideration.

The *Further Guidance*, if intended as a new substantive set of obligations, also runs headlong into the requirements of the PRA. This law 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”).¹⁴ The OMB must approve an information collection and assign a number to be displayed on the information collection. Agencies may not penalize entities that fail to respond to Federal collections of information that do not display a valid OMB control number.¹⁵

In this instance, the agency did not seek OMB approval of the information collection and therefore, there exists no OMB control number for this collection. Unless or until the *Further Guidance* complies with the PRA, it is not legally enforceable. Accordingly, the Commission should reconsider the obligations or clarify they are suggestions for compliance and not enforceable.

¹³ 5 U.S.C. § 603(c).

¹⁴ See 44 U.S.C. chapter 35, 5 C.F.R. 1320.

¹⁵ 44 U.S.C. 3512(a)(1).

IV. CONCLUSION

NTCA fully supports efforts to increase broadband deployment and adoption in Tribal and other high-cost areas. NTCA welcomes a greater focus on ensuring the availability and affordability of advanced services across Tribal lands and the rest of rural America. Indeed, NTCA members have shown time and again their commitment as carriers of last resort to make every reasonable effort to reach all consumers – on Tribal lands or otherwise – in their serving areas. For the above stated reasons, however, NTCA requests that the Commission reconsider or clarify that (a) for a provider receiving USF for tribal areas, the contents of the ONAP’s *Further Guidance* are not requirements, but rather suggestions of ways in which ETCs might engage with Tribal authorities; and (b) neither the Tribal engagement requirements nor the contents of the *Further Guidance* apply to eligible telecommunications carriers that receive no USF for serving tribal areas or whose universal service support is being eliminated.

Respectfully submitted,



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