

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

**OPPOSITION
OF THE GILA RIVER INDIAN COMMUNITY AND
GILA RIVER TELECOMMUNICATIONS, INC.
TO THE USTA PETITION FOR RECONSIDERATION**

The Gila River Indian Community (“GRIC”) and Gila River Telecommunications, Inc. (“GRTI”), by its attorneys, hereby submits this opposition in the above-referenced proceeding in which the Office of Native Affairs and Policy (“ONAP”), in coordination with the Wireless Telecommunications and Wireline Competition Bureaus (collectively, the “Bureaus”) seeks comments on a petition¹ filed by the United States Telecom Association (“USTA”) for

¹ United States Telecom Association Petition for Reconsideration and Clarification, WC Docket No. 10-90 *et al.* (filed Aug. 20, 2012) (“USTA Petition”).

reconsideration of the *Further Guidance Public Notice* released by ONAP and the Bureaus² regarding the tribal engagement obligations adopted in the Commission’s *USF/ICC Order*.³

As a tribally-owned and operated telecommunications carrier, GRTI has a unique insight into the challenges of providing advanced telecommunications and information services on tribal lands. Indeed, when the GRIC decided to purchase the local exchange carrier serving the GRIC from U.S. West over twenty years ago, the telephone penetration rate in the community hovered around 20%. Today, the wireline telephone penetration rate in the GRIC is consistently above 80%. Given this perspective, GRTI is uniquely situated to comment on the USTA Petition.

The USTA Petition stems from tribal engagement obligations adopted in the *USF/ICC Order*, in which the Federal Communications Commission (“FCC” or “Commission”) concluded that eligible telecommunications carriers (“ETCs”) serving tribal lands and tribal governments should hold discussions regarding (1) a 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.⁴ The FCC further delegated to ONAP, in coordination with the Bureaus, the authority to develop specific procedures regarding the tribal engagement obligations.⁵ On July 19, 2012, ONAP and the Bureaus released the *Further Guidance*, and shortly thereafter USTA filed the instant petition. The USTA Petition raises

² *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligations Provisions of the Connect American Fund*, WC docket No. 10-90 *et al.*, Public Notice, DA 12-1165 (rel. July 19, 2012) (“*Further Guidance*”).

³ *Connect America Fund*, WC Docket Nos. 10-90, *et al.*; Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 at ¶ 636-37 (2011) (“*USF/ICC Order*”).

⁴ *Id.* at ¶ 637.

⁵ *Id.*

arguments which are substantially similar to those raised by USTA in petitions for reconsideration of the *USF/ICC Transformation Order*⁶ and the *Lifeline and Link Up Reform and Modernization Order*.⁷ None of these petitions raise issues warranting reconsideration. Consequently, the Commission should deny the USTA petitions.

I. The Tribal Engagement Obligations Apply to All ETCs Receiving and Seeking USF Support to Serve Tribal Lands

USTA seeks reconsideration or clarification that the tribal engagement obligations apply only to ETCs receiving “new high-cost support to fund deployment on Tribal lands (*i.e.*, Tribal Mobility Fund . . . and Connect America Fund (‘CAF’) Phase II recipients”⁸ As an initial matter, there is no need for the Commission to clarify a rule that is abundantly clear: the tribal engagement obligations apply to all ETCs providing or seeking to provide service on Tribal lands with the use of Universal Service Fund (“USF”) support. This includes ETCs whose support is being phased out, as well as ETCs receiving continued USF support, but no “new” support (*i.e.*, Mobility Fund or CAF support). To the extent that USTA seeks reconsideration of this rule, the Commission should deny this request in light of the numerous benefits the tribal engagement obligations offer to both residents of tribal lands and the ETCs that serve such lands.

Both the *USF/ICC Order* and the *Further Guidance* make clear to whom the tribal engagement obligations apply. In setting forth the engagement obligations, the *USF/ICC Order* states the Commission “will require that, at a minimum, ETCs to demonstrate on an annual basis that they have meaningfully engaged with Tribal governments in their supported areas.”⁹ The

⁶ Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 et al., at 18 (filed Dec. 29, 2011).

⁷ Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 12-23, et al., at 16 (filed Apr. 2, 2012).

⁸ USTA Petition at 3-4.

⁹ *USF/ICC Order* at ¶ 637.

Further Guidance also provides that such engagement obligations are required by “communications providers either currently providing or seeking to provide service on Tribal lands with the use of Universal Service Fund support.”¹⁰ Consequently the applicability of the engagement obligations is clear.

Moreover, USTA fails to offer a convincing justification for reconsideration of this rule. USTA argues the engagement obligations are “nonsensical” as applied to ETCs whose support is being eliminated or whose support consists solely of Interstate Access Support.¹¹ Unfortunately, USTA’s argument misses the point. The engagement obligations benefit both tribal residents and ETCs. By engaging in genuine dialogue about the challenges faced by each side, ETCs and tribal governments will come to common understandings about the factors necessary to improve services on tribal lands. For example, while the Commission’s rules eliminate USF support for wireless competitive ETCs (“CETCs”), the engagement obligations may result in discussions between CETCs and tribal governments on how to improve wireless service in the absence of such support. In this scenario, residents of tribal lands would benefit from increased access to wireless services while CETCs would benefit from an increased subscriber base. In the absence of such obligations, however, both CETCs and tribal residents are less likely to surmount the communications barriers facing tribal America and enjoy the subsequent collective benefits.

II. The Engagement Obligations Are Timely

USTA is incorrect in its assertion that discussions between ETCs and tribal governments “make little sense at this juncture”¹² According to USTA, it is difficult for ETCs to predict at this time the amount of support that will be available to build out in tribal lands before the

¹⁰ *Further Guidance* at ¶ 1.

¹¹ USTA Petition at 4-5.

¹² *Id.* at fn. 8

CAF Phase II and Mobility Fund Phase I and II are implemented.¹³ However, the deep communications divide that separates Indian Country from the rest of America necessitates immediate action. Therefore, while ETCs may not be able to provide exact details of their future deployment plans until the Commission implements the CAF Phase II and Mobility Fund Phases I and II, the information ETCs can provide will be better than no information at all. Moreover, by beginning dialogue on other issues subject to the tribal engagement obligations, such as needs assessment, marketing of services, rights of way processes, land use permitting, facilities siting, environmental and cultural preservation of review processes, and compliance with tribal business and licensing requirements, ETCs and tribal governments can make substantial progress in establishing open lines of dialogue immediately.

III. The Tribal Engagement Obligations Are Constitutionally Sound USTA argues that the *USF/ICC Order* and *Further Guidance* infringe upon First Amendment rights by requiring ETCs to “provide certain documents to and share certain information with Tribal representatives.”¹⁴ According to USTA, the failure to demonstrate that the tribal engagement obligations will address real harms and will alleviate such harms to a material degree constitutes a violation of the First Amendment.¹⁵ Contrary to USTA’s claims, the tribal engagement obligations as addressed in both the *USF/ICC Order* and the *Further Guidance* are constitutionally sound.

As an initial matter, any claim by USTA requesting reconsideration of the *USF/ICC Order* should be dismissed as untimely.¹⁶ Moreover, to the extent that USTA claims that the

¹³ *Id.*

¹⁴ USTA Petition at 9-10.

¹⁵ *Id.*

¹⁶ 47 C.F.R. § 1.106(f) (“The petition for reconsideration . . . shall be filed within 30 days . . .”).

USF/ICC Order failed to discuss the harms intended to be avoided by the tribal engagement obligations,¹⁷ such claims are off base. For example, in noting the “deep digital divide” that separates tribal lands and the rest of the country, the FCC concluded that “engagement between Tribal governments and communications providers either currently providing service or contemplating the provision of service on Tribal lands is vitally important to the successful deployment and provision of service.”¹⁸ Thus, the tribal engagement obligations clearly are intended to rectify the lack of services available on tribal lands.

The *Further Guidance* also recognizes the harm that the tribal engagement obligations are intended to rectify. For example, the *Further Guidance* states that each Tribal Nation has its own “unique . . . communications needs and priorities,” and that effectively articulating such needs, as mandated in the *Further Guidance*, is a critical first step in addressing such needs. Furthermore, the *Further Guidance* contains numerous additional explanations of how the tribal engagement obligations will help address the communications needs of Tribal Nations, such as by fostering “new opportunities for genuine dialogue that could achieve an alignment of interest and goals.”¹⁹ Accordingly, the *Further Guidance* does not violate the First Amendment.

¹⁷ USTA Petition at 10 (“[T]he *Further Guidance* (as well as the *USF/ICC Order*) is devoid of any discussion of the harms (real or otherwise) such requirements are intended to rectify . . .”).

¹⁸ *USF/ICC Order* at 637.

¹⁹ *Further Guidance* at ¶9; see also *id.* at ¶17 (“engagement obligation affords both Tribal governments and communications providers the opportunity to move forward with a shared vision.”); *id.* at ¶20 (“engagement obligation affords both parties the opportunity to share specific perspectives and information and to begin charting a path forward to address feasibility and sustainability in coordination with one another.”); *id.* at ¶23 (“engagement obligations provides Tribal governments and communications providers with the opportunity discuss and explore ways in which they can coordinate or partner to ensure that services are market in a manner that will relate directly to the community, resonate with consumers, and stimulate increased adoption services on Tribal lands.”).

IV. The Tribal Engagement Obligations Are Not Unduly Burdensome USTA argues that ONAP failed to conduct a cost-benefit analysis of the tribal engagement obligations in violation of Executive Order 13,563.²⁰ Again, USTA fails to present an argument warranting reconsideration.

As an initial matter, USTA states that it is evident that ONAP failed to conduct a cost-benefit analysis because the *Further Guidance* “does not even acknowledge the compliance costs ETCs are likely to incur.”²¹ However, contrary to USTA’s unsupported assertion, it is clear that ONAP not only engaged in a cost-benefit analysis in the *Further Guidance*, but that the substantial benefits of the tribal engagement obligations outweigh the minimal administrative costs that must be borne by ETCs. These benefits extend not only to tribal governments and residents living on tribal lands, but also to ETCs serving tribal lands. For example, the engagement obligation that Tribal governments and ETCs discuss needs assessment and deployment planning on tribal lands “affords both Tribal governments and communications providers the opportunity to move forward with a shared vision.”²² Likewise, the requirement to discuss feasibility and sustainability planning allows “both parties the opportunity to share specific perspective and information to begin charting a path forward to address feasibility and sustainability in coordination with one another.”²³ In fact, for each of the five tribal engagement obligations, the *Further Guidance* provides benefits that will be realized by such engagement.²⁴

²⁰ USTA Petition at 11 (*citing* Exec. Order no. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (2011)).

²¹ *Id.* at 11.

²² *Further Guidance* at ¶ 17.

²³ *Id.* at ¶ 20.

²⁴ *See, e.g., id.* at ¶ 24 (stating that discussions regarding marketing services will provide both parties with the opportunity to “explore ways in which they can coordinate or partner to ensure that services are marketed in a manner that will relate directly to the community, resonate with consumers, and stimulate increased adoption of services”); *id.* at ¶ 26 (stating that

Moreover, USTA notably fails to offer any concrete examples of how the tribal engagement obligations are overly burdensome. Instead, USTA merely references a litany of costs that may be incurred by ETCs with no demonstration of the extent or consequences of such burdens.²⁵ Indeed, USTA fails to provide any evidence of the costs of such activities. Consequently, USTA’s argument must be rejected.

V. **The *Further Guidance* is Not Subject to the Paperwork Reduction Act Because It Does Not Require the “Collection of Information”**

Contrary to the assertions of USTA, the *Further Guidance* was not subject to the requirements of the Paperwork Reduction Act (“PRA”). The *Further Guidance* provided by ONAP was expressly limited to clarifying how ETCs could satisfy the obligation imposed by the *USF/ICC Order* that they engage with tribal governments. The *Further Guidance* in no way involved the “collection of information” as defined by the PRA and, accordingly, was not subject to the requirements of the PRA.²⁶

The obligations imposed under the PRA apply only when agencies “conduct or sponsor the collection of information.”²⁷ The PRA defines, in pertinent part, the “collection of

discussions relating to rights of way and other permitting and review processes will help both parties realize “a plan for information communications providers of procedures in a helpful and instructive manner, designed to bring companies into compliance”); *id.* at ¶ 29 (stating that discussions relating to compliance with tribal business and licensing requirements will help both parties achieve “greater mutual understanding about the relevant Tribal business licensing requirements and a plan for bringing companies into compliance”).

²⁵ *See, e.g.*, USTA Petition at 12 (estimating that the preparation of presentations to tribal governments will “require substantial resources and involve various staff”); *id.* at 13 (projecting that the costs of involving decision-making personnel in discussions will be “significant”); *id.* at 13-14 (calculating that the marketing services will be a “costly exercise”).

²⁶ The reporting requirements imposed by the *USF/ICC Order* were fully compliant with the PRA. Nonetheless, to the extent such requirements were not compliant, USTA had ample opportunity to object to such requirements within 30 days of the publication of the *USF/ICC Order* in the Federal Register, but did not do so. Accordingly, any objection at this juncture must be dismissed as procedurally defective.

²⁷ 44 U.S.C. § 3507(a).

information” as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency . . . calling for . . . answers to *identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons . . .*”²⁸ For purposes of the PRA, typical information collection requests include tax forms, Medicare forms, financial loan applications, job applications, questionnaires, compliance reports, and tax or business records.²⁹

The tribal engagement obligations adopted by the FCC in the *USF/ICC Order* impose two specific and discrete obligations on ETCs: (1) ETCs must meaningfully engage with tribal governments; and (2) ETCs must demonstrate on an annual basis that they have meaningfully engaged tribal governments in their supported areas.³⁰ The *Further Guidance* provided by ONAP was specifically directed at clarifying the first obligation.³¹ In other words, the *Further Guidance* explained how to conduct meaningful engagement; it did not address in any way specifically what must be disclosed, let alone adopt identical questions or reporting or recordkeeping requirements for each ETC.³² Indeed, the *Further Guidance* expressly stated as much when it acknowledged “there is no one size fits all guidance that can be provided that will be universally applicable.”³³ Accordingly, because the required disclosures are not identical, the

²⁸ 44 U.S.C. § 3503(A)(i).

²⁹ *See Dole v. United Steelworkers of America*, 494 U.S. 26, 33 (1990).

³⁰ *USF/ICC Order* at ¶ 637.

³¹ *Further Guidance* ¶ 1 (“This document is intended to facilitate the required discussions between Tribal government officials and communications providers either currently providing or seeking to provide service on Tribal lands with the use of [USF] support.”).

³² *Further Guidance* ¶ 1. The *Further Guidance* reiterates that “the purpose of this guidance is to ensure the effective exchange of information . . .” *Id.* at ¶ 9.

³³ *Further Guidance* ¶ 4. The Commission recommends issues each party “should come to the table prepared to discuss” and other issues parties “may wish to discuss.” *See e.g., id.* at ¶¶ 18, 19, 22, 25. Nowhere are identical questions or dialogues required.

Further Guidance did not involve the “collection of information” as envisioned by the PRA and thus no public comment or OMB approval was required.

VI. **Conclusion**

As the Commission transforms the way in which advanced telecommunications and information services are deployed throughout the nation, the Commission should fulfill its responsibility to Indian Country. As former Commissioner Michael J. Copps stated:

We are also moving toward fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment and adoption strategies for their areas and populations. I feel encouraged that we are at long last positioning ourselves to make progress by working more closely and creatively together. The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now.³⁴

Accordingly, GRTI and the GRIC respectfully request the Commission to deny the USTA Petition.

Respectfully Submitted,

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September 26, 2012

³⁴ *USF/ICC Order* at Statement of Commissioner Michael J. Copps.