

**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 an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Line-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

Reply Comments of the Blooston Rural Carriers

The Blooston Rural Carriers,¹ by their attorneys, hereby submit reply comments in connection with the Petition for Reconsideration and Clarification of the United States Telecom Association (USTelecom), in which USTelecom asks the Commission to reconsider or clarify the *Further Guidance*² released by the Office of Native Affairs and Policy (ONAP), Wireless Telecommunications Bureau and Wireline Competition Bureau (collectively, referred to as the

¹ The rural incumbent local exchange carriers listed in Attachment A are participating in the filing of these Reply Comments.

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*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, released July 19, 2012 (“Further Guidance”)

Bureaus), concerning the Tribal engagement requirement in the *Order*.³ The Petition and the comments in support of the Petition present a number of compelling reasons why the Commission must reconsider or clarify the *Further Guidance* in a number of respects.⁴ Among these reasons is that the tribal engagement rule is not effective because the Commission has not complied with the Paperwork Reduction Act (PRA) and the *Further Guidance* does not create a legal obligation because none of the procedural requirements for rulemaking have been followed. As shown herein, arguments to the contrary are without merit.

I. The Commission Must Clarify that ETCs Are Not Required to Initiate Tribal Engagement At This Time.

In their comments, the Blooston Rural Carriers demonstrated that the Tribal engagement requirement in Section 54.313(a)(9) of the Commission's rules is not in effect or enforceable because the Commission has not yet complied with the PRA. Accordingly, the Blooston Rural Carriers asked the Commission to reconsider the *Further Guidance* which states that "communications providers should take immediate steps to prepare for and initiate engagement with the Tribal governments whose lands they serve"⁵ and complete such engagement during 2012 for the certification due on July 1, 2013.

One commenter suggests that the PRA is not an impediment to the implementation of the Tribal engagement requirement, however, because the *USF/ICC Order* imposes two discrete

³ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund; Report and Order and Further Notice of Proposed Rulemaking*, WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011, at ¶¶636-637, §54.313(a)(9)(*Order*).

⁴ Petition for Reconsideration and Clarification of the United States Telecom Association, WC Dockets No. 10-90, et al., filed August 20, 2012.

⁵ *Further Guidance* at ¶14.

requirements on carriers, namely, 1) to engage with the tribes and 2) to file a report about the engagement.⁶ According to the Gila River Comments, the PRA requirement only applies to the reporting requirement and, therefore, carriers must still meet the engagement requirement. An ex parte presentation in this proceeding also indicates that the staff of the ONAP provided similar advice in a meeting.⁷

The Blooston Rural Carriers contend that this is an incorrect interpretation of the Commission's *USF/ICC Order* and the PRA. Through the Tribal engagement requirement, the Commission seeks to impose a “legislative” or “substantive” rule, which requires notice and comment rulemaking.⁸ The only rule adopted by the Commission in the *USF/ICC Order* in connection with the Tribal engagement requirement as it applies to ETCs other than participants in the tribal mobility fund is the reporting requirement in Section 54.313(a)(9). However, with respect to a winning bidder for mobility fund support in Tribal lands, the Commission also adopted rule Section 54.1004(d), which establishes a requirement on a winning bidder to engage with the applicable Tribal government. The fact that a similar rule was not adopted for any other ETC demonstrates that an interpretation that the Commission adopted a requirement that all ETCs must engage with Tribal governments separate and apart from the reporting requirement in Section 54.313(a)(9) is simply wrong.

In any event, the Commission cannot avoid compliance with the PRA by declaring that there are two separate requirements. As shown in the comments of AT&T, the PRA prohibits

⁶ Opposition of the Gila River Indian Community and Gila River Telecommunications, Inc. to the USTA Petition for Reconsideration, WC Docket No. 10-90, et al., filed September 26, 2012. (“Gila River Comments”).

⁷ John Staurulakis, Inc. Notice of Ex Parte Presentation, WC Docket No. 10-90, et al., filed September 10, 2012.

⁸ 5 USC 553; see also *Lincoln v. Vigil*, 508 U.S. 182, 196,(1993); *Exelon Generation Co., LLC v. Local 15, IBEW*, 676 F.3d 566, 577 (7th Cir. Ill. 2012); *Minard Run Oil Co. v. United States Forest Serv.*, 670 F.3d 236, 254 (3d Cir. Pa. 2011).

the Commission from conducting or sponsoring the collection of information without prior approval from the Office of Management and Budget (OMB).⁹ Further, as similarly argued by AT&T in a separate context, the Commission will not be able to meet the substantive requirements of the PRA with respect to rate-of-return ETCs once it does attempt to comply with the PRA, because the collection of information proposed by the Commission will have no "practical utility." As discussed by AT&T, OMB defines "practical utility" as "the actual, not merely the theoretical or potential, usefulness of information to or for an agency" and "[in] the case of recordkeeping requirements ... "practical utility" means that actual uses can be demonstrated."¹⁰

With respect to rate-of-return ETCs, there is no "practical utility" to the FCC's requirement where the ETC already provides broadband service to the vast majority of the Tribal land it serves. The Commission justified the imposition of the Tribal engagement requirement on the basis that it is "vitally important to the successful deployment and provision of service"¹¹ on Tribal lands. This simply is not the case for the Blooston Rural Carriers and many other rate-of-return carriers serving Tribal lands. For example, some of the Blooston Rural Carriers submitted data in the *USF/ICC Order* proceeding demonstrating that they provide broadband service to over 95% of the households on Tribal lands and, in some cases, to 100% of households on Tribal lands.¹² In addition, the National Broadband Map shows that there are many

⁹ Comments of AT&T, WC Docket No. 10-90, et al., filed September 26, 2012, at 5 fn 10.

¹⁰ *Id.* at 8.

¹¹ *Further Guidance* at ¶6.

¹² *Petition for Reconsideration of the Rural ILECs Serving Tribal Lands*, WC Docket No. 10-90, et al., filed December 29, 2011; *Reply Comments of Golden West Telecommunications Cooperative, Midstate Communications, Inc., and Venture Communications Cooperative*, WC Docket No. 10-90, et al., filed May 23, 2011.

reservations with wireline broadband deployment to 95% or better of the population.¹³ This already meets or exceeds the nationwide broadband deployment rate of 95%, as stated in the National Broadband Plan.¹⁴ The Commission cannot justify the "practical utility" of imposing a requirement on an ETC serving Tribal land, when its rate of broadband deployment on Tribal land equals or exceeds the current nationwide average.

Even in the case of Tribal land served by a wireline rate-of-return carrier where broadband deployment currently is less than 95%, the Commission cannot justify the "practical utility" of the Tribal engagement requirement. First, such carriers are required to deploy broadband only on "reasonable request." The Tribal engagement requirements, however, are not focused only on "reasonable requests" for service and, therefore, the Commission's rule seeks to impose a reporting requirement on rate-of-return carriers that is much broader than the actual deployment requirement.

Second, the evidence cited in the *USF/ICC Order* in support of the Tribal engagement rule does not support the application of the rule to any wireline carrier. On the contrary, the materials cited by the Commission to support the rule are limited to the Commission's proposal to establish a separate Tribal mobility fund. They do not address in any way the need or benefit of any consultation requirement for wireline carriers or any fund recipient other than the Tribal mobility fund, which is a unique and limited fund that provides "one-time support to deploy mobile broadband to unserved Tribal lands."¹⁵ Thus, even if there may be some "practical utility" to support Tribal engagement in connection with a one-time funding mechanism to

¹³ See National Broadband Map, available at <http://www.broadbandmap.gov>.

¹⁴ Federal Communications Commission, *Connecting America: The National Broadband Plan*, released Mar. 16, 2010, at 20.

¹⁵ *USF/ICC Order* at ¶481 (emphasis added).

support entirely unserved areas, there is no such justification for the Tribal lands served by rate-of-return wireline carriers.

There also is no "practical utility" associated with compelling ETCs to have discussions about feasibility and deployment planning with Tribal governments when there are no inhabitants on the land served by the ETC and, therefore, no need for the deployment of facilities. This is especially the case for rate-of-return ETCs, who are only required to provide broadband service pursuant to the *USF/ICC Order* "on reasonable request." Thus, the Commission must reconsider the Bureau's statement in the *Further Guidance* and declare that ETCs are not required to take steps or initiate engagement with Tribal governments pursuant to Section 54.313(a)(9) of the Commission's rules at this time.

In light of these significant issues and the short period of time remaining in year 2012 before the rule can be effective, the Commission also should delay the reporting requirement in Section 54.313(a)(9) of the rules. Before submitting a collection of information to OMB for approval under the PRA, the Commission must provide 60-days notice in the Federal Register and before OMB makes its decision on the collection request, it must provide 30 days for public comment after the receipt of the proposed information collection. Accordingly, it is unlikely that OMB approval for rule section 54.313(a)(9) will be obtained before the end of 2012. Therefore, the Commission should delay the filing date of any reporting associated with rule Section 54.313(a)(9) until at least one year following the effective date of the rule.

II. The Commission Must Clarify that the *Further Guidance* Does Not Create a Legal Obligation on the Part of ETCs.

As shown in the Petition and the comments, to the extent the *Further Guidance* imposes new requirements on ETCs, it is not in compliance with the PRA or the APA.¹⁶ Further, to the

¹⁶ Petition at 8.

extent the *Further Guidance* is mandatory and requires the mandatory collection of information, OMB approval also must be sought for this information collection as well. Since the Bureaus have not obtained OMB approval, any mandatory information collection requirements in the *Further Guidance* also are not effective or enforceable. Accordingly, the Commission must clarify that the *Further Guidance* is not intended to impose legal obligations.

III. Conclusion

Based on their comments and the foregoing reply comments, the Blooston Rural Carriers ask the Commission to find that eligible telecommunications carriers are not required to comply with the Commission's tribal engagement rule or the Bureau's *Further Guidance* at this time. The Blooston Rural Carriers also ask the Commission to delay the filing date of any reporting associated with rule Section 54.313(9) until at least one year following the effective date of the rule.

Respectfully submitted,

The Blooston Rural Carriers

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Attachment A

Golden West Telecommunications Cooperative, Inc.

Interstate Telecommunications Cooperative, Inc.

Midstate Communications, Inc.

Penasco Valley Telephone Cooperative, Inc.

Range Telephone Cooperative, Inc.

Red River Rural Telephone Association, Inc.

Table Top Telephone Company, Inc.

The Ponderosa Telephone Co.

Townes Telecommunications, Inc.

Valley Telephone Company

Venture Communications Cooperative, Inc.

West River Cooperative Telephone Company

West River Telecom of Hazen, North Dakota