

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	WC Docket No. 10-90
Connect America Fund)	
)	
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)	CC Docket No. 96-45
Service)	
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-209

**REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ respectfully submits these reply comments in support of its Petition for Reconsideration and Clarification² concerning the tribal government engagement procedures included in the Further Guidance Public Notice released by

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See United States Telecom Association Petition for Reconsideration and Clarification, WC Docket No. 10-90 *et al.* (filed August 20, 2012) (Petition).

the Office of Native Affairs and Policy (ONAP), the Wireline Competition Bureau and the Wireless Telecommunications Bureau.³

USTelecom supports efforts to increase broadband deployment and adoption in tribal areas. The *Further Guidance*, however, is misguided. It compounds the compliance challenges facing the industry and suffers from the same legal deficiencies as the Commission’s tribal engagement rules. Most commenters supported grant of the reconsideration and clarification requested by USTelecom. The Commission should heed the advice of the majority of commenters. It should clarify that the *Further Guidance* is non-binding and seeks to promote flexible, voluntary engagement efforts. It should promptly grant the Petition.⁴

I. The Tribal Engagement Requirements Do Not Apply to ETCs Whose Support is Being Eliminated or to ETCs That Do Not Receive Funding Targeted at Tribal Areas

There is broad agreement among the commenters that the tribal engagement requirements, whether included in the Commission’s rules or embodied in the *Further Guidance*, apply only to eligible telecommunications carriers (ETCs) that receive new high-cost support—either from the Tribal Mobility Fund or Connect America Fund (CAF) Phase II— to fund deployment on tribal lands.⁵ Receipt of legacy high-cost funding, such as Interstate Access

³ See *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 No. 10-90 *et al.*, Public Notice, DA 12-1165 (rel. July 19, 2012) (*Further Guidance*); 47 C.F.R. § 54.313(a)(9).

⁴ Contrary to the assertion in the comments of Mescalero Apache Telecom, Inc. at page 5, for all the reasons articulated in the Petition and in the instant USTelecom Reply Comments, the *Further Guidance* should be considered advisory, not “minimum requirements for tribal engagements.”

⁵ See comments of AT&T at 2-4, Sprint Nextel at 3-4, NTCA at 6, Pioneer Cellular and United States Cellular Corporation (Joint Commenters) at 5, CTIA at 9-10, Blooston Rural Carriers at 3-4, and RLEC ETCs at 2.

Support (IAS), Interstate Common Line Support (ICLS) and Local Switching Support (LSS), should not trigger new tribal engagement obligations because such support is not intended to underwrite broadband deployment.

As noted by AT&T, “interstate access support (IAS) 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).”⁶ After all, “[i]t 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.’” *Id.* (quoting *Further Guidance* at para. 18).

Other commenters note that their certificated service areas may encompass portions of tribal lands upon which they have no facilities and/or which are uninhabited, and thus the receipt of support should not trigger additional tribal engagement obligations.⁷ NTCA provides the example of a carrier that “serves a strip of land that has been identified as part of a reservation and 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 of the service offered on that strip of land.”⁸ Yet the *Further Guidance* fails to clearly limit its scope.

⁶ See comments of AT&T at 3.

⁷ See comments of RLEC ETCs at 1 and NTCA at 5.

⁸ See comments of NTCA at 5.

The premise of the rules and requirements is that an ETC will engage in meaningful discussions with tribal communities regarding the ETC's "deployment" plans in those individual communities, but such discussion would be of no value if the ETC will not be receiving support in a tribal area. Gila River Telecommunications and Gila River Indian Community contend that such discussions are nonetheless beneficial because, for example, a carrier whose support is being phased out could have discussions with tribal governments on how to maintain and improve service in the absence of high-cost support.⁹ USTelecom respectfully submits that such common sense discussions are just as likely to occur without a Commission requirement. Incumbent local exchange carriers value their customers and the communities they serve, and even in the face of economic challenges, it is in their interest to continue providing service in these areas over existing network wherever they can.

II. Any Substantive Obligations Imposed on ETCs are Not Valid Because the *Further Guidance* Was Adopted Without Notice and Comment, in Violation of the APA

To the extent the *Further Guidance* may be intended to impose mandatory obligations on ETCs serving tribal areas; such obligations are unlawful and unenforceable. The *Further Guidance* was adopted without adherence to the notice-and-comment rulemaking requirements of the Administrative Procedure Act (APA).¹⁰ Several commenters emphasize the failure to

⁹ See comments of Gila River Indian Community and Gila River Telecommunications at 3-4 (Gila River). See also *id.* at 6 (stating that the tribal engagement requirements "clearly are intended to rectify the lack of services available on tribal lands"). In order to "rectify the lack of services on tribal lands," the Commission must award support to service providers that is sufficient for them to deploy and provide services in these high-cost areas. Granting the Petition and clarifying that the tribal engagement requirements apply only to Tribal Mobility Fund and CAF Phase II support recipients that have been awarded funding to provide service on tribal lands is consistent with this goal.

¹⁰ 5 U.S.C. 551 *et seq.*

comply with the APA.¹¹ NTCA notes that “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. Sec. 54.313) is a reporting requirement, not an engagement requirement.”¹² Contrary to the assertion of Alexicon that the Commission received adequate public comment,¹³ the *USF/ICC Transformation Order* was not specific as to the activities included in the *Further Guidance*¹⁴ nor clear on whether those activities are binding rules or aspirational goals.¹⁵ Additionally, as CTIA explained, “[r]egardless of the name of the document, the *Tribal Guidance PN* must be adopted in accordance with the notice-and-comment procedures of the APA if it contains mandatory obligations.”¹⁶

Furthermore, as noted by NTCA, if the *Further Guidance* is a substantive rule, it “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”¹⁷ and thus requires preparation of a regulatory flexibility analysis of the proposed obligations. Such analysis was wholly missing from the *Further Guidance*. Similarly, as AT&T observes, if the Commission intended for the *Further Guidance* to bind ETCs and to have them audited to that standard, the carriers

¹¹ See comments of Blooston Rural Carriers at 5, CTIA at 6-7, AT&T at 5-7, Joint Commenters at n.7, and NTCA at 7.

¹² See comments of NTCA at 7.

¹³ See comments of Alexicon at 6.

¹⁴ See *Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, FCC 11-161, at para. 636 (*USF/ICC Transformation Order*).

¹⁵ Moreover, the Commission has failed to address pending petitions for reconsideration of its tribal engagement rule. See, e.g., Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 *et al.*, at 17-19 (filed Dec. 29, 2011) (arguing that the Commission adopted this new rule in violation of the APA’s notice and comment requirements); Petition for Reconsideration of the Rural ILECs Serving Tribal Lands, WC Docket No. 10-90 *et al.* (filed Dec. 29, 2011).

¹⁶ See comments of CTIA at 7.

¹⁷ See comments of NTCA at 7.

could be subject to financial consequences for lack of compliance.¹⁸ Such potential consequences plainly mandate Commission compliance with the full notice and comment requirements of the APA.

III. ONAP Failed to Consider the Compliance Costs of the *Further Guidance*

The *Further Guidance* fails to acknowledge the substantial, and very real, compliance costs that ETCs are likely to incur as a result of the new tribal engagement obligations.¹⁹ Nor does ONAP (or the FCC in its initial adoption of the tribal engagement rule) explain why a complex set of mandatory engagement obligations is preferable to more flexible, voluntary engagement efforts.

The substantial compliance costs imposed by the *Further Guidance* are summarized by several commenters.²⁰ CTIA perhaps best expresses the problem: “Though motivated by good intentions, the *Tribal Guidance PN* would impose such overwhelming burdens on providers that it actually would create disincentives for eligible telecommunications carriers (“ETCs”) to serve Tribal lands at all, contrary to the goals of the commission and mobile wireless providers alike.”²¹ The burdens to which CTIA refers would be common to wireline and wireless ETCs

¹⁸ See comments of AT&T at 6; *Further Guidance* at para. 7. See also comments of Native Public Media and National Congress of American Indians at 4 (explaining that if USTelecom’s members fail to “meaningfully engage with the Tribal government[s],” they will be unable to make certifications required to receive high-cost support).

¹⁹ We thus disagree with Gila River that “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.” See comments of Gila River at 7. To the contrary, given the utter lack of *any* discussion in the *Further Notice* about compliance costs to ETCs, ONAP plainly did not perform any cost-benefit analysis.

²⁰ See comments of Joint Commenters at 9-15, Blooston Rural Carriers at 4, RLEC ETCs at 3, NTCA at 4, and CTIA at 4-6.

²¹ See comments of CTIA at 3.

serving tribal areas. Moreover, the Commission’s requirements are not needed to advance the goal of universal service. Neither the Commission nor the Bureau has demonstrated that mandatory tribal engagement requirements will add any real value to existing broadband deployment efforts in tribal lands or will improve existing voluntary relationships between ETCs and tribal leaders.

Many commenters provide specific concerns about the burdens imposed by the *Further Guidance*. NTCA explains that, “[f]or 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.”²² CTIA shares that concern for both large and small carriers.²³ The Blooston Rural Carriers note that the *Further Guidance* “requires ETCs to research, prepare documentation, and deliver presentations on topics including deployment priorities and compliance with rights of way, permitting and business practice licenses for each tribal community served. The *Further Guidance* also requires that the ETC make available a high level employee, authorized to make decisions on behalf of the company, for face-to-face meetings.”²⁴ These costs are genuinely substantial.

Not only do the tribal engagement requirements demonstrate few if any benefits to justify their significant cost, the ONAP failed to conduct any such cost-benefit analysis. Indeed, the *Further Guidance* does not discuss or even acknowledge the compliance costs that ETCs would be bound to incur. USTelecom agrees with a wide range of commenters that it is unlikely that

²² See comments of NTCA at 5.

²³ See comments of CTIA at 5 (noting, for example, ONAP’s suggestion that ETCs open retail stores within tribal communities to satisfy the Commission’s “marketing services in a culturally sensitive manner” requirement).

²⁴ See comments of Blooston Rural Carriers at 4.

those costs could be cost-justified. Based on compliance costs alone, the Commission should reconsider the *Further Guidance*.

IV. The *Further Guidance* was Adopted Without Complying with the PRA

The Commission also should reconsider the *Further Guidance* because ONAP failed to comply with the requirements of the Paperwork Reduction Act (PRA).²⁵ ONAP did not seek approval from the Office of Management and Budget (OMB) of the information collection contained in the *Further Guidance*. The fact that the required disclosure is to tribal communities, rather than the Commission, is immaterial, because disclosures to third parties and the general public are covered under the PRA.²⁶

Several commenters note that the data collections contemplated lack the required practical utility, and the Commission has not attempted to minimize the burden on those who are to respond.²⁷ As noted by the Joint Commenters, the tribal engagement provisions require numerous disclosures to be made by ETCs to tribal government representatives, such as deployment planning, feasibility planning and marketing plans.²⁸ Further, as AT&T points out, “the Commission has not made any attempt to demonstrate that the information collection necessitated by its new Tribal engagement rules and Public Notice will yield any practical utility.”²⁹ Not only has the Commission failed to request PRA approval, it is doubtful that the

²⁵ 44 U.S.C. 3501 *et seq.*

²⁶ 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

²⁷ See Paperwork Reduction Act, 44 U.S. C. 3508. Also see comments of CTIA at 7, NTCA at 8, Joint Commenters at n.7, AT&T at 5, RLEC ETCs at 6 and Blooston Rural Carriers at 5.

²⁸ See comments of Joint Commenters at n.7.

²⁹ See comments of AT&T at 7-8.

engagement rules would meet the statutory standard if it did so. Given the lack of PRA approval alone, the Commission should reconsider the *Further Guidance*, or at least clarify that it is not binding on ETCs and cannot properly form the basis for USAC audit review.³⁰

V. The *Further Guidance* Raises Needless Constitutional Concerns.

AT&T points out that the *Further Guidance* compels speech by purporting to require ETCs to prepare and deliver presentations and various documentation to tribal representatives on a wide range of specified topics. Yet no real harms have been demonstrated that the forced speech will alleviate to any material degree.³¹ Several commenters agree with USTelecom's *Petition* on this point and express a similar concern.³² USTelecom believes the Commission should be sensitive to these genuine constitutional concerns and the troubling precedent if the *Further Guidance* requirements were mandatory. Given the many commenters' concerns about APA compliance, PRA compliance, and the substantial costs involved, raising constitutional concerns should be unnecessary.

VI. Conclusion

Given the many troubling legal and policy issues, the Commission should promptly grant USTelecom's *Petition*. The Commission should reconsider the *Further Guidance* or clarify that (1) neither the tribal engagement rules nor the contents of the *Further Guidance* apply to ETCs that receive no USF for serving tribal areas, and that, (2) for providers that receive legacy support but do not receive Tribal Mobility Fund or CAF Phase II support for tribal areas, the

³⁰ Gila River contends that the *Further Guidance* does not violate the PRA because "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." See comments of Gila River at 9. If the Commission agrees that compliance with its *Further Guidance* is voluntary and cannot be enforced, it should make that clear in its order reconsidering the *Further Guidance*.

³¹ See comments of AT&T at 10.

³² See comments of AT&T at 6-7 and Joint Commenters at n.7.

Further Guidance should not be considered auditable requirements but merely suggestions to guide ETC activities. The Commission should also reconsider the *Further Guidance* to the extent substantive obligations imposed on ETCs were adopted without notice and comment in violation of the APA. Also, to the extent the *Further Guidance* directs the manner and nature of speech in contravention of the First Amendment, fails to consider substantial compliance costs while offering minimal offsetting benefits for tribes, and was adopted with compliance with the PRA, the Commission should reconsider or clarify the *Further Guidance*.

Respectfully submitted,

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