

**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 Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

**REPLY COMMENTS of C SPIRE WIRELESS, PIONEER CELLULAR, and  
UNITED STATES CELLULAR CORPORATION  
Regarding  
UNITED STATES TELECOM ASSOCIATION  
PETITION FOR RECONSIDERATION AND CLARIFICATION**

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October 11, 2012

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## SUMMARY

The record reflects widespread support for USTelecom’s Petition seeking reconsideration and clarification of the *Further Guidance Public Notice* issued by the Office of Native Affairs and Policy, the Wireless Telecommunications Bureau, and the Wireline Competition Bureau concerning Tribal engagement obligations applicable to eligible telecommunications carriers. Opponents of the Petition fail to provide any persuasive arguments that the *Further Guidance* in its current form should be permitted to stand.

***The Further Guidance Should Not Be Mandatory.***—Commenters generally agree with USTelecom and the Joint Commenters that the Commission should clarify the *Further Guidance* by indicating that its provisions are not mandatory requirements that ETCs must follow to avoid financial and other penalties. Commenters argue, for example, that mandatory obligations are not necessary in the absence of any evidence that ETCs will not engage in good faith negotiations with Tribal governments.

***Paperwork Reduction Act Violations Must be Cured.***—Several commenters explain that both the Commission’s Tribal engagement rule and the *Further Guidance* are subject to Paperwork Reduction Act requirements that have not been met. In the case of the *Further Guidance*, if it intends to impose mandatory requirements, numerous activities that ETCs must carry out would be treated as “collections of information” as that term is broadly defined for PRA purposes. Until the Tribal engagement rule and the *Further Guidance* are brought into compliance with PRA requirements, neither the Commission nor its staff has any authority to compel ETCs to carry out Tribal engagement activities pursuant to the rule or the *Further Guidance*.

***The Further Guidance Did Not Comply with the APA.***—There is considerable support in the record for USTelecom’s claim that any obligations intended to be imposed by the *Further*

*Guidance* cannot be implemented because the notice and comment requirements of the Administrative Procedure Act applied to the *Further Guidance*, and these requirements were not met. Arguments made by some commenters that the *Further Guidance* did not violate the APA are not persuasive, because the Commission did not seek comment on the specific Tribal engagement rule adopted by the Commission or the Tribal engagement activities imposed by the *Further Guidance*.

***Obligations Should Only Apply to ETCs Receiving New Targeted Funding.***—The record provides strong support for the position taken by the Joint Commenters and USTelecom that Tribal engagement obligations should not apply to ETCs whose universal service support is being eliminated by the Commission. Commenters make the common sense argument that there is little point in mandating discussions by ETCs with Tribal authorities concerning broadband deployment if the Commission does not provide sufficient support to these ETCs for the provision of broadband services on high-cost Tribal lands.

***The Further Guidance Should Have Included a Cost-Benefit Analysis.***—Numerous commenters join the Joint Commenters and USTelecom in observing that the *Further Guidance* was issued without any evaluation of whether the benefits of requiring ETCs to meet Tribal engagement obligations would justify the costs that ETCs would encounter in meeting these obligations. Commenters point to various types of costs that should have been taken into account, arguing that these costs would be burdensome for both large and small carriers.

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C Spire Wireless,<sup>1</sup> Cellular Network Partnership, a Limited Partnership d/b/a Pioneer Cellular (“Pioneer Cellular”), and United States Cellular Corporation (“U.S. Cellular”) (collectively, the “Joint Commenters”), by counsel, and pursuant to the Public Notice released August 27, 2012, by the Office of Native Affairs and Policy (“ONAP”), in coordination with the Wire-

less Telecommunications Bureau and the Wireline Competition Bureau (collectively, the “Bureaus”),<sup>2</sup> hereby submit these Reply Comments regarding the Petition for Reconsideration and Clarification filed by the United States Telecom Association (“USTelecom”) on August 20, 2012.<sup>3</sup>

The Joint Commenters, certain of whom participated in the initial comment round in this proceeding,<sup>4</sup> are eligible telecommunications carriers (“ETCs”) committed to the use of Universal Service Fund (“USF”) support to deploy mobile voice and broadband networks throughout their designated service areas, which include Tribal lands.

## **I. INTRODUCTION.**

ONAP, in coordination with the Bureaus and pursuant to authority delegated by the Commission in the *CAF Order*,<sup>5</sup> released a Public Notice earlier this year intended to provide

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<sup>1</sup> C Spire Wireless is the business name under which Cellular South Licenses, LLC, provides commercial wireless services.

<sup>2</sup> *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Seek Comment on the United States Telecom Association Petition for Reconsideration and Clarification of the Further Guidance Regarding the Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, DA 12-1405, rel. Aug. 27, 2012.

<sup>3</sup> USTelecom, Petition for Reconsideration and Clarification, WC Docket No. 10-90 *et al.*, filed Aug. 20, 2012 (“Petition”).

<sup>4</sup> U.S. Cellular and Pioneer Cellular filed comments in this proceeding.

<sup>5</sup> *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 Link-Up*, WC Docket No. 03-109, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17869 (para. 637) (2011) (“*CAF Order*”), *pets. for review pending sub nom. Direct Commc’ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases).

further guidance relating to the Tribal engagement obligations adopted in the *CAF Order*.<sup>6</sup> The Petition filed by US Telecom asked the Commission to reconsider and clarify the *Further Guidance* for the purpose of rectifying numerous procedural and legal deficiencies, and addressing numerous ambiguities and uncertainties, contained in the *Further Guidance*.

Numerous parties have filed comments in support of the Petition, demonstrating that (1) the Commission should act to clarify the provisions of the *Further Guidance* by indicating that they are not intended to create requirements that must be met by ETCs in order to avoid the imposition of financial or other penalties; (2) action by the Commission is necessary to cure the failure of the *Further Guidance* to comply with the Paperwork Reduction Act; (3) the *Further Guidance* should be reconsidered to the extent it seeks to impose requirements on ETCs other than those receiving new Connect America Fund (“CAF”) or Mobility Fund support specifically targeted for Tribal lands; and (4) the *Further Guidance* must be reconsidered because it failed to engage in any comparative analysis of the costs and benefits of the requirements imposed by the *Further Guidance*.

## **II. THE VARIOUS ETC ENGAGEMENT ACTIVITIES ENUMERATED IN THE FURTHER GUIDANCE SHOULD NOT BE IMPOSED AS MANDATORY REQUIREMENTS.**

In their Comments, the Joint Commenters agreed with USTelecom’s concern that it is not clear whether ETCs’ Tribal engagement activities specified in the *Further Guidance* are intended to be binding rules or aspirational goals,<sup>7</sup> and urged the Commission to clarify that these various

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<sup>6</sup> *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, 27 FCC Rcd 8176 (ONAP 2012) (“*Further Guidance*”).

<sup>7</sup> Joint Commenters Comments at 16 (citing Petition at 7). *But see* Mescalero Apache Telecom, Inc. (“MATP”), Comments at 5 (arguing that it is clear that “the *Further Guidance* is just that, guidance . . .

engagement activities are not intended to be mandatory. There is strong support for this position in the record.

Stopping short of imposing the Tribal engagement activities as requirements makes sound policy sense, since treating the activities as “guidance” toward the achievement of meaningful and productive dialog and interaction between ETCs and Tribal governments would appropriately provide flexibility by enabling ETCs to treat the contents of the *Further Guidance* as “examples of ideas that ETCs may use and tailor to fit their individual needs . . . .”<sup>8</sup> Sprint agrees with this approach, arguing that “the Commission should clarify that such guidance is recommended or advisory only”<sup>9</sup> because, “[w]hile some Tribal ETCs may voluntarily choose to implement some or all of these engagement standards, other ETCs may find such standards to be excessively intrusive or incompatible with reasonable business practices.”<sup>10</sup>

The Joint Commenters also agree with Sprint’s further point that “there is no evidence [insofar as Sprint is aware] to suggest that ETCs have not or will not engage in good faith negotiations with Tribal authorities, and the imposition of heavy-handed regulatory requirements here is unnecessary.”<sup>11</sup> This concern is particularly important in light of the fact that, as the Joint Commenters have explained, such regulatory requirements could have the effect of “discourag-

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intended . . . as assistance for Tribal governments and ETCs in complying with the Tribal engagement rules”).

<sup>8</sup> National Telecommunications Cooperative Association (“NTCA”) Comments at 3.

<sup>9</sup> Sprint Nextel Corporation (“Sprint”) Comments at 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

ing communications carriers from giving priority to any efforts to deploy their voice and broadband infrastructure in Tribal lands.”<sup>12</sup>

MATI suggests that, although the *Further Guidance* only provides “minimum guidance on how to comply with the FCC’s Tribal engagement requirements”<sup>13</sup> adopted in the *CAF Order*, the provisions of the *Further Guidance* “should be taken a step further and be considered minimum requirements for Tribal engagement . . . .”<sup>14</sup> The Joint Commenters oppose such an approach, not only for the policy reasons discussed in the record and addressed above, but also because, “[t]o the extent the *Further Guidance* is intended to impose mandatory obligations, it is unlawful.”<sup>15</sup> This issue of the legality of imposing the *Further Guidance* provisions as requirements is discussed in the following section.

### **III. THE FURTHER GUIDANCE FAILED TO COMPLY WITH THE PAPERWORK REDUCTION ACT AND OTHER PROCEDURAL REQUIREMENTS.**

If the *Further Guidance* was intended to establish mandatory obligations that ETCs must follow or face the imposition of penalties, then any such obligations would be subject to various statutory requirements relating to the promulgation of regulatory requirements. The record demonstrates that the *Further Guidance* did not clear these procedural hurdles.

#### **A. ETCs Cannot Be Required To Comply with the Further Guidance Until Paperwork Reduction Act Deficiencies Are Cured.**

USTelecom contended in its Petition that the *Further Guidance* did not satisfy Paperwork Reduction Act (“PRA”) procedures requiring that Federal agencies must seek public comment on proposed information collections, and must submit the proposed collections for review by the

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<sup>12</sup> Joint Commenter Comments at 13. See CTIA–The Wireless Association® (“CTIA”) Comments at 9.

<sup>13</sup> MATI Comments at 6.

<sup>14</sup> *Id.* (emphasis added).

Office of Management and Budget (“OMB”).<sup>16</sup> There is strong support for this contention in the record.

CTIA explains, for example, that, under the broad definition of “collection of information” in the PRA, the engagement with Tribal governments mandated by the *Further Guidance* is subject to PRA requirements.<sup>17</sup> “Thus, the Commission may not require ETCs to comply with *either* the engagement steps *or* the reporting requirements in the *Tribal Guidance PN* without an OMB control number demonstrating that the PRA process has been followed.”<sup>18</sup>

In light of this failure to comply with PRA requirements (as well as Administrative Procedure Act (“APA”) requirements discussed in the following section), the Joint Commenters agree with AT&T that, “until it cures the APA and PRA deficiencies with the [*Further Guidance*] *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.”<sup>19</sup>

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<sup>15</sup> NTCA Comments at 6. *See* Blooston Rural Carriers Comments at 5-6.

<sup>16</sup> Petition at 14.

<sup>17</sup> CTIA Comments at 7.

<sup>18</sup> *Id.* at 8 (citing 44 U.S.C. § 3512(a)(1)) (footnote omitted) (emphasis in original). *See* Blooston Rural Carriers Comments at 3 (indicating that the Commission has failed to meet the PRA requirement that it must seek public comment on the proposed collection of information in the Tribal engagement rule and submit the proposed collection for review and approval by OMB); NTCA Comments at 8 (footnote omitted) (explaining that “OMB must approve an information collection and assign a number to be displayed on the information collection [and] [a]gencies may not penalize entities that fail to respond to Federal collections of information that do not display a valid OMB control number”); RLEC ETC Comments at 6-7.

<sup>19</sup> AT&T Comments at 5. The Joint Commenters also agree with AT&T that, in addition to the failure to comply with the procedural requirements of the PRA, the Commission cannot meet the substantive requirements of the PRA for either the *Further Guidance* or the Tribal engagement rule adopted in the *CAF Order*. AT&T explains, for example, that the Commission to date has failed to show that the “information collection necessitated by its new Tribal engagement rule and [*Further Guidance*] *Public Notice* will yield any public utility.” *Id.* at 8. OMB requires that information required to be collected or disclosed must have “actual . . . usefulness . . . .” 5 C.F.R. § 1320.3(l).

Arguments raised by opponents of the Petition, claiming that the PRA has not been violated or does not apply, are unavailing. Alexicon claims, for example, that USTelecom’s argument “is a bit of a red herring”<sup>20</sup> because the Tribal engagement rule and the *Further Guidance* are merely formalizing a communication process that “should have already been occurring . . . .”<sup>21</sup> Regardless of whether Alexicon is correct in its unsupported claim that the purpose of the requirements was to formalize ETC engagement practices that may or may not have already been in place, the fact remains that any formal imposition of an information collection or disclosure requirement that falls within the purview of the PRA—as the Tribal engagement rule and the *Further Guidance* do—must be carried out in accordance with PRA processes. Neither the Commission nor ONAP adhered to this procedural requirement.

Gila River takes the position that the *Further Guidance* is not subject to the PRA because it does not require any “collection of information.”<sup>22</sup> This argument, however, cannot be squared with the provisions of the PRA.<sup>23</sup> The term “collection of information,” for purposes of the PRA, is defined in part to mean “requiring the disclosure to third parties . . . of facts or opinions by or

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<sup>20</sup> Alexicon Telecommunications Consulting, Inc. (Alexicon”), Comments at 5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> Gila River Indian Community and Gila River Telecommunications, Inc. (collectively, “Gila River”), Comments at 8-9.

<sup>23</sup> Gila River asserts that “any objection” to the reporting requirements adopted in the *CAF Order* “must be dismissed as procedurally defective” because “USTelecom had ample opportunity to object to such requirements within 30 days of publication of the [*CAF Order*] in the Federal Register, but did not do so.” *Id.* at 8 n.26. On the contrary, the Tribal engagement reporting requirement in 47 C.F.R. § 54.313 has not yet been submitted for OMB approval, and ONAP has asserted (and Gila River agrees) that the substantive engagement requirement does not even need OMB approval. Accordingly, there has been no opportunity to object to the Tribal engagement requirements in a filing with OMB.

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 . . . .”<sup>24</sup>

Gila River contends that the *Further Guidance* does not require any “collection of information” subject to the PRA because, although “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.”<sup>25</sup>

To the contrary, the *Further Guidance* does require ETCs to make specific disclosures to Tribal government representatives. For example:

- ETCs should be “ready to articulate their deployment priorities, the process by which they arrived at these priorities, and their initial plans for deployment on Tribal lands.”<sup>26</sup>

- ETCs should “be prepared to discuss their timelines for the provision of services not currently available on Tribal lands, as well as their priorities in terms of service and the factors that led them to prioritize deployment to particular areas.”<sup>27</sup>

- ETCs should “identify any opportunities they envision to partner with Tribal governments.”<sup>28</sup>

- ETCs should be “prepared to discuss the relevant rights of way and other permitting and review processes, as well as the challenges associated with these processes.”<sup>29</sup>

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<sup>24</sup> 44 U.S.C. § 3502(3)(A).

<sup>25</sup> Gila River Comments at 9 (footnote omitted).

<sup>26</sup> *Further Guidance*, 27 FCC Rcd at 8181 (para. 19).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 8183 (para. 27).

■ ETCs “should have documentation of any and all [rights of way and other permitting and review] processes with which they currently comply.”<sup>30</sup>

■ ETCs should be “prepared to discuss in detail . . . relevant Tribal business and licensing requirements.”<sup>31</sup>

■ ETCs “should be prepared to provide evidence of compliance with any Tribal business practice licenses with which they currently comply . . . .”<sup>32</sup>

Thus, the *Further Guidance* requires ETCs to disclose to third parties numerous specific facts. Moreover, the questions, in the context in which they are required to be framed by the *Further Guidance*, are identical: Each ETC that is subject to Section 54.313(a)(9) of the Commission’s Rules must, under the terms of the *Further Guidance*, answer the same questions (and disclose information) regarding (1) deployment priorities; (2) initial plans for deployment; (3) timelines for the provision of service; (4) priorities for deployment and the provision of service; (5) partnership opportunities; (6) rights of way and other permitting and review processes, including compliance with these processes; and (7) Tribal business and licensing requirements.

As the Joint Commenters discuss in Section V, *infra*, requiring responses to these questions and the disclosure of this information to Tribal authorities imposes burdens on ETCs. One of the purposes of the PRA is to ensure that the extent of these burdens is evaluated and minimized. Neither the Commission nor ONAP has initiated this process,<sup>33</sup> let alone met this test.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 8184 (para. 29).

<sup>32</sup> *Id.*

<sup>33</sup> *See, e.g.*, AT&T Comments at 5 (noting that “the Commission has not sought necessary approval from [OMB] for the . . . new information collection and reporting requirements” in Section 54.313(a)(9) of the Commission’s Rules).

**B. Any Mandatory Obligations Imposed by the Further Guidance Must Be Reconsidered Because They Were Adopted Without the Required Notice and Comment.**

USTelecom supported its argument that any mandatory obligations imposed by the *Further Guidance* are unlawful by indicating that no effort was made, prior to issuance of the *Further Guidance*, to give interested persons notice of “the nature of the Tribal engagement requirements set forth in the *Further Guidance*,”<sup>34</sup> and that the Tribal engagement obligations set forth in the *Further Guidance* cannot be considered to be a “logical outgrowth” of any previously proposed obligations.<sup>35</sup>

There is considerable agreement in the record that, if the *Further Guidance* was intended “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,”<sup>36</sup> then the *Further Guidance* “violated the APA by failing to adhere to the Act’s notice and comment requirements.”<sup>37</sup> CTIA explains, for example, that ONAP and the Bureaus “never provided notice of nor an opportunity to comment on the scope and type of engagement activities set forth in the *Tribal Guidance PN*, which are extensive.”<sup>38</sup>

Alexicon and MATI, in their oppositions to the Petition, attempt to demonstrate that the *Further Guidance* was issued in compliance with APA requirements. None of their arguments has any merit.

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<sup>34</sup> Petition at 8.

<sup>35</sup> *Id.*

<sup>36</sup> AT&T Comments at 6 (footnote and internal quotation marks omitted).

<sup>37</sup> *Id.* See Blooston Rural Carriers Comments at 5; NTCA Comments at 7.

<sup>38</sup> CTIA Comments at 7.

First, MATI suggests that, because the Commission clearly indicated in the *CAF Order* that ONAP should use its delegated authority to develop specific procedures for the Tribal engagement process, USTelecom is wrong in asserting that the *Further Guidance* was adopted “without input from interested parties.”<sup>39</sup>

This argument misses the point, which is that, to the extent the *Further Guidance* imposes requirements that are enforceable by the imposition of penalties, notice of the proposed requirements must be provided and interested parties must have an opportunity to comment. MATI seems to suggest that APA requirements are satisfied by the Commission’s mere expectation that “ONAP, in coordination with the [Bureaus], would utilize their delegated authority to develop specific procedures regarding the Tribal engagement process as necessary.”<sup>40</sup> In fact, however, neither ONAP nor the Bureaus had license to impose requirements without first providing notice and an opportunity for comment.

Second, Alexicon argues that the Commission received “adequate public comment”<sup>41</sup> in its USF reform proceedings, thus clearing the path for the Tribal engagement rules and the requirements contained in the *Further Guidance*.<sup>42</sup> While it is correct that the Commission received comments addressing “the essential role that Tribal consultation and engagement play in the successful deployment of service on Tribal lands[,]”<sup>43</sup> issues addressed in those comments cannot be leveraged as a means of expanding the scope and application of the Commission’s initial proposals regarding Tribal engagement obligations.

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<sup>39</sup> MATI Comments at 6.

<sup>40</sup> *CAF Order*, 26 FCC Rcd at 17868 (para. 637), *quoted in* MATI Comments at 6.

<sup>41</sup> Alexicon Comments at 6.

<sup>42</sup> *Id.*

<sup>43</sup> *CAF Order*, 26 FCC Rcd at 17868 (para. 636) (footnote omitted).

Thus, while the Commission touched upon the issue of Tribal engagement in the *CAF NPRM*,<sup>44</sup> it did so in very general terms, asking whether support recipients should “be required to engage with Tribal governments to provide broadband to Tribal and Native community institutions”<sup>45</sup> and whether the Commission should “adopt tailored rules relating to broadband public interest obligations on Tribal lands, in consultation with Tribal governments, to ensure that broadband becomes widely available . . . .”<sup>46</sup> The Joint Commenters support USTelecom’s view that these “generic requests did not afford parties notice that the Commission was planning to require *all* ETCs serving Tribal areas to engage with Tribal governments in a specific manner and to require documentation of specific items.”<sup>47</sup> The Commission, in the *CAF NPRM*, asked questions regarding Tribal engagement obligations, but it did not put any concrete proposals on the table for comment by interested parties.

As AT&T explains, the Commission also sought comment on possible Tribal engagement requirements in the context of creating a Tribal Mobility Fund.<sup>48</sup> The issue was whether prospective bidders for Tribal Mobility Fund support should be required to engage in discussions with Tribal governments before the Commission’s auction.<sup>49</sup> The Joint Commenters agree with

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<sup>44</sup> *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 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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (“*CAF NPRM*”).

<sup>45</sup> *Id.* at 4607 (para. 151).

<sup>46</sup> *Id.*

<sup>47</sup> USTelecom, Petition for Reconsideration, WC Docket No. 10-90 *et al.*, filed Dec. 29, 2011, at 18 (emphasis added).

<sup>48</sup> AT&T Comments at 6 (citing *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997 (Wireless Telecom. Bur. 2011)).

<sup>49</sup> *Id.* at 6-7.

AT&T that requesting comment on the nature of requirements that should apply to auction bidders “is a far cry from the rule that the Commission ultimately adopted [47 C.F.R. § 54.313(a)(9)], which applies to all high-cost recipients that serve Tribal lands.”<sup>50</sup>

In addition, even if the Commission’s promulgation of Tribal engagement obligations in the *CAF Order*<sup>51</sup> satisfied APA requirements—which it did not—the *Further Guidance* also was required to comply with these notice-and-comment provisions before imposing any additional requirements. This obligation to proceed in accordance with APA requirements was not met.

And, third, both Alexicon and MATI contend that sufficient notice of the actions taken in the *Further Guidance* was given by the Commission in a completely separate rulemaking proceeding. Specifically, the parties argue that the *Native Nations NOI*,<sup>52</sup> in asking for comment on whether carriers should be required to engage with Native Nation governments, provided a sufficient basis for the adoption of requirements in the *Further Guidance* in compliance with APA procedures.<sup>53</sup>

This contention is not persuasive. The solicitation for comment was made in the context of a notice of inquiry that, by its nature, did not propose any specific Tribal engagement requirements. Thus, the *Native Nations NOI* gave interested parties no hint of the numerous and specific obligations that ultimately found their way into the *Further Guidance*. Moreover, the *Native Nations NOI* sought comment only in the context of whether Tribal engagement require-

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<sup>50</sup> *Id.* at 7 (emphasis in original).

<sup>51</sup> See *CAF Order*, 26 FCC Rcd at 17868-89 (para. 637).

<sup>52</sup> *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672 (2011) (“*Native Nations NOI*”).

<sup>53</sup> Alexicon Comments at 6; MATI Comments at 6-7.

ments should be imposed on carriers seeking ETC designations on Tribal lands.<sup>54</sup> This context, of course, is narrower than that of the *Further Guidance*, which imposes obligations on all high-cost recipients serving Tribal lands, not just carriers that are seeking ETC designations.

**IV. THE FURTHER GUIDANCE SHOULD NOT IMPOSE ANY TRIBAL ENGAGEMENT OBLIGATIONS ON ETCs OTHER THAN THOSE RECEIVING NEW CAF OR MOBILITY FUND SUPPORT TARGETED FOR TRIBAL LANDS.**

USTelecom argued in its Petition that the *Further Guidance* (as well as the Commission’s newly promulgated Tribal engagement rule) should apply only to ETCs that receive new high-cost support to fund deployment on Tribal lands, and not to ETCs that receive no support to fund deployment on Tribal lands or whose support is being eliminated.<sup>55</sup> Under this approach, only Tribal Mobility Fund recipients and CAF Phase II recipients serving Tribal lands would be subject to the Tribal engagement requirements.<sup>56</sup>

Numerous commenters support USTelecom’s approach. A central problem highlighted in the comments is that, with respect to broadband deployment, it is unlikely that an ETC would be able to discuss with Tribal representatives topics such as deployment priorities, the process used by the ETC to establish these priorities, and initial deployment plans, because any such discussion “is so closely tied to Commission decisions on funding that have yet to be made.”<sup>57</sup> AT&T agrees that the Commission cannot have it both ways: “If the Commission fails to provide sufficient support to enable a carrier to deploy broadband service on high-cost Tribal lands, there is

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<sup>54</sup> *Native Nations NOI*, 26 FCC Rcd at 2686-87 (paras. 28, 30-31).

<sup>55</sup> Petition at 3-4.

<sup>56</sup> *Id.*

<sup>57</sup> Alaska Communications Systems (“ACS”) Comments at 6.

little point in mandating that the carrier commence broadband deployment discussions with the relevant Tribal government.”<sup>58</sup>

The Joint Commenters endorse NTCA’s argument that the requirements imposed by the *Further Guidelines* amount to an unfunded mandate, and agree with NTCA’s suggestion that the Commission should “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.”<sup>59</sup> CTIA is correct in criticizing the action taken in the *Further Guidance*, observing that “there is no reason to require legacy ETCs to engage in expensive Tribal engagement.”<sup>60</sup> The Joint Commenters agree with CTIA’s assessment that ETCs receiving only legacy support that is being phased out cannot be expected to make new investments in Tribal lands. If any investments are made by these ETCs, they would likely occur only in the near term.<sup>61</sup>

Opponents of USTelecom’s approach argue that imposing Tribal engagement obligations on ETCs whose universal service support is being eliminated could still potentially result in some benefits. Gila River suggests that, “while the Commission’s rules eliminate USF support for wireless competitive ETCs . . . , the engagement obligations may result in discussions between CETCs and tribal governments on how to improve wireless service in the absence of such

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<sup>58</sup> AT&T Comments at 2-3. The Joint Commenters agree with AT&T’s further argument 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.” *Id.* at 4.

<sup>59</sup> NTCA Comments at 6.

<sup>60</sup> CTIA Comments at 9.

<sup>61</sup> *Id.*

support.”<sup>62</sup> Gila River envisions circumstances in which these discussions could lead to increased access to wireless services for Tribal communities and an expanded subscriber base for wireless carriers.<sup>63</sup>

This speculation is unjustified. Conditioning the receipt of new universal service funding (that is targeted for Tribal lands) on ETCs’ agreement to meet Tribal engagement obligations is appropriate, but, when USF support is withdrawn, engaging in discussions regarding the deployment of wireless networks and services should be a matter of mutual agreement between the parties involved, and should not be imposed by the Commission. Moreover, as a practical matter, wireless carriers simply will not have the resources to provide such networks and services in the absence of universal service support, in which case there would be little to discuss.<sup>64</sup>

Finally, MATI argues that no clarification of the Tribal engagement requirements is needed because the Commission has already made clear in the *CAF Order* that the requirements apply to carriers currently providing service on Tribal lands.<sup>65</sup> In the Joint Commenters’ view, however, there is still a need for clarification. In the *CAF Order*, the Commission concluded that competitive ETCs whose support is being phased down “will not be required to submit any of the new information or certifications . . . related solely to the new broadband public interest obligations,” including those pertaining to the Tribal engagement obligation.<sup>66</sup> The Commission has

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<sup>62</sup> Gila River Comments at 4.

<sup>63</sup> *Id.*

<sup>64</sup> *See* Petition at 4.

<sup>65</sup> MATI Comments at 4 (citing *CAF Order*, 26 FCC Rcd at 17868 (para. 637) (indicating 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”). *See* Gila River Comments at 3.

<sup>66</sup> *CAF Order*, 26 FCC Rcd at 17853 (para. 583). *See Connect America Fund*, WC Docket No. 10-90, *et al.*, Third Order on Reconsideration, 27 FCC Rcd 5622, 5625 (para. 8) (2012).

been asked to clarify whether the Tribal engagement obligation applies to competitive ETCs in light of the above language.<sup>67</sup> Moreover, the Commission determined that ETCs must “engage[ ] [with] Tribal governments in their supported areas.”<sup>68</sup> At a minimum, the Commission should clarify that this engagement obligation will no longer apply when a wireless carrier’s legacy support has been completely phased out (unless the carrier receives new CAF or Mobility Fund support targeted for Tribal lands).

The Joint Commenters also urge the Commission to take a further step by reconsidering the wisdom of imposing Tribal engagement obligations on wireless carriers during the funding phase-out period. The development and implementation of broadband deployment plans will become increasingly problematic over the course of this phase-out period, making the engagement obligations less and less relevant as the phase-out progresses. Alternatively, if the Commission chooses to permit the Tribal engagement obligation adopted in the *CAF Order* to remain intact in the case of carriers whose funding is being phased out, then the Commission should at least reconsider the *Further Guidance* and provide that the numerous additional requirements imposed by the *Further Guidance* will not apply to these carriers.

**V. THE FURTHER GUIDANCE WAS NOT ACCOMPANIED BY ANY COMPARATIVE ANALYSIS OF THE COSTS AND BENEFITS OF THE REQUIREMENTS IMPOSED ON ETCs.**

Numerous parties support USTelecom’s and the Joint Commenters’ position that the *Further Guidance* should be reconsidered because ONAP and the Bureaus did not conduct any cost-benefit analysis of its Tribal engagement requirements.<sup>69</sup> The Joint Commenters agree with

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<sup>67</sup> See Ex Parte Letter from John Kuykendall, Vice President, John Staurulakis, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al.* (filed Sept. 10, 2012), at 2 (unpaginated)

<sup>68</sup> *CAF Order*, 26 FCC Rcd at 17868 (para. 637) (emphasis added).

<sup>69</sup> Petition at 11; Joint Commenters Comments at 10.

NTCA, for example, that ONAP and the Bureaus conducted no cost-benefit analysis of the 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.”<sup>70</sup>

The policy of the Commission is to engage in a comparative analysis of the costs and benefits of proposed regulatory requirements.<sup>71</sup> If such an examination of the impact of the Tribal engagement requirements had been undertaken, it would have revealed that “[t]hey are burdensome and costly to implement for all carriers.”<sup>72</sup> To take one example, CTIA argues that “[g]iven the number of federally recognized Tribes, carriers operating in multiple states would have to devote overwhelming numbers of senior executive hours to travel to and meet with Tribal officials. These costs would be burdensome for both large and small carriers.”<sup>73</sup>

One opponent of USTelecom’s Petition asserts that ONAP did in fact engage in a cost-benefit analysis prior to issuing the *Further Guidance*. Specifically, Gila River claims that “it is

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<sup>70</sup> NTCA Comments at 4. *See* CTIA Comments at 9 (indicating that “ONAP and the Bureaus made no effort to determine either the significant costs that the guidance would impose or the benefits it would produce, nor to balance them against one another. Significantly, ONAP and the Bureaus failed to consider the extent to which extensive engagement obligations would deter ETCs from serving Tribal lands in order to avoid the significant and unfunded costs engagement would entail.”).

<sup>71</sup> *See, e.g.*, Statement of Chairman Julius Genachowski, FCC, Hearing on “FCC Process Reform,” before Subcomm. on Communications and Technology, Comm. on Energy and Commerce, U.S. House of Representatives, July 7, 2011 (explaining that, “[t]o ensure that FCC rules intelligently carry forward the Agency’s statutory mission, it is common practice for FCC rulemaking decisions to analyze the costs and benefits of proposed regulations. . . . I have also directed FCC staff to comply with the spirit of the recent Executive Order [13563] on cost-benefit analysis.”). Executive Order 13563, which applies to federal executive agencies, provides that an agency “must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs . . . .” *Improving Regulation and Regulatory Review*, Executive Order 13563 (Jan. 18, 2011), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).

<sup>72</sup> NTCA Comments at 4. *See* RLEC ETC Comments at 3-4; Rural Incumbent Local Exchange Carriers Serving Tribal Lands, Petition for Reconsideration, WC Docket No. 10-90 *et al.*, filed Dec. 29, 2011, at 13.

<sup>73</sup> CTIA Comments at 5 (footnote omitted).

clear that ONAP . . . engaged in a cost-benefit analysis in the *Further Guidance*[,]”<sup>74</sup> but Gila River does not point to any instance in the *Further Guidance* (or elsewhere) in which ONAP enumerates and evaluates the various costs that ETCs would face in complying with the requirements imposed by the *Further Guidance*. Instead, Gila River expresses its own unsupported view “that the substantial benefits of the tribal engagement obligations outweigh the minimal administrative costs that must be borne by ETCs.”<sup>75</sup> This view not only lacks any merit, but also cannot serve to erase the fact that ONAP had an obligation to engage in a cost-benefit analysis<sup>76</sup> but failed to do so in the *Further Guidance*.

Gila River also argues that USTelecom’s request for reconsideration of the *Further Guidance* should be rejected because USTelecom failed “to provide any evidence of the costs of [the] activities” required by the *Further Guidance*.<sup>77</sup> There are two problems with this argument. First, the argument is not relevant. USTelecom’s request for reconsideration is grounded in the fact that ONAP did not meet its obligation to compare costs and benefits before deciding whether to impose Tribal engagement obligations on ETCs. This argument stands on its own merits, and is not dependent upon USTelecom’s independently presenting “concrete examples of how the tribal engagement obligations are overly burdensome.”<sup>78</sup>

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<sup>74</sup> See Gila River Comments at 7.

<sup>75</sup> *Id.*

<sup>76</sup> See Petition at 11 (indicating that the Commission has a duty to adopt a regulation only upon a reasoned determination that its benefits justify its costs and a duty to reduce unneeded burdens on the private sector, and that “ONAP did not fulfill either duty in preparing the *Further Guidance*”).

<sup>77</sup> Gila River Comments at 8.

<sup>78</sup> *Id.*

And, second, USTelecom did enumerate several categories of costs that should have been considered by ONAP before deciding whether to adopt the *Further Guidance*.<sup>79</sup> The categories related to preparing presentations, involving senior executives in Tribal engagements, and marketing. The costs likely to be associated with these categories underscored and validated USTelecom's argument that it was incumbent upon ONAP to examine these costs prior to issuing the *Further Guidance*.

## VI. CONCLUSION.

For the foregoing reasons, the Joint Commenters respectfully request that the Commission act expeditiously to grant the Petition for Reconsideration and Clarification filed by USTelecom.

The Joint Commenters also agree with AT&T that, because the *Further Guidance* is deficient in complying with APA and PRA requirements, “the Commission and its staff have no authority to direct any provider to commence discussions in order to comply with” Section 54.313(a)(9) of the Commission's Rules or the *Further Guidance*.<sup>80</sup> Therefore, the Joint Petitioners join AT&T in respectfully encouraging the Commission to (1) act quickly to clarify that

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<sup>79</sup> Petition at 11-14.

<sup>80</sup> AT&T Comments at 5.

neither the rule nor the *Further Guidance* is currently in effect; and (2) request comment on the *Further Guidance* to refine its terms and facilitate its implementation.<sup>81</sup>

Respectfully submitted,



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October 11, 2012

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<sup>81</sup> *See id.* at 1-2, 5.