



PUBLIC NOTICE

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CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON EFFECTIVENESS OF ITS TRIBAL ENGAGEMENT GUIDANCE AND TO REFRESH THE RECORD ON RELATED PETITIONS FOR RECONSIDERATION

WC Docket No. 10-90

Comments: December 5, 2019
Reply Comments: January 6, 2020

Introduction and Background

The Commission has long recognized the significant barriers to broadband deployment on Tribal lands.¹ With this Public Notice, the Consumer and Governmental Affairs Bureau (CGB) seeks comment on how best to facilitate and improve dialogue and coordination between Tribes and Eligible Telecommunications Carriers (ETCs) to ensure successful broadband deployment and adoption on Tribal lands.

In the 2011 *USF/ICC Transformation Order*, the Commission comprehensively reformed and modernized the universal service and intercarrier compensation systems to maintain voice service and extend broadband-capable infrastructure to millions of Americans.² In that Order, the Commission adopted, among other things, an annual Tribal engagement obligation for ETCs that receive high-cost funds in conjunction with service to Tribal lands.³ This engagement obligation, designed to foster greater coordination and collaboration between high-cost recipients and the Tribes they serve, is intended to complement multiple Commission universal service policies and programs that fund carriers' deployment, operation and maintenance of communications infrastructure and services on Tribal lands. Following adoption of the Tribal engagement obligation, several interested parties sought reconsideration and

¹ See *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service*, Twelfth Report and Order, 15 FCC Rcd 12208, 12220, para. 20 (2000).

² See generally *Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

³ *Id.* The Commission determined that, at a minimum, the annual Tribal engagement obligation for ETCs must include: (1) needs assessment and deployment planning; (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 and review processes; and (5) compliance with Tribal business and licensing requirements. 47 CFR § 54.313(a)(5). Covered ETCs are required to report annually on their engagement through an annual certification and summary of their compliance. *USF/ICC Transformation Order*, 26 FCC Rcd at 17868, para. 637; 47 CFR § 54.313(a)(5), (j). Annual filings are made on FCC Form 481.

clarification of the *USF/ICC Transformation Order* and reporting obligation.⁴ These procedural and substantive objections remain pending.⁵

At the time of its adoption, the Commission expressly contemplated the need “to develop specific procedures regarding the Tribal engagement process” and directed “the Office of Native Affairs and Policy (ONAP), in coordination with the [Wireline Competition Bureau (WCB) and Wireless Telecommunications Bureau (WTB) (collectively, the Bureaus)] to develop best practices regarding the Tribal engagement process to help facilitate these discussions.”⁶ ONAP and the Bureaus responded by issuing Tribal Engagement Further Guidance in 2012,⁷ while anticipating that “our guidance, as well as the development of best practices, will evolve over time based on initial implementation experiences and feedback of both Tribal governments and communications providers.”⁸ Tribal governments, communications providers and the Commission now have several years of experience with the operation of the Tribal engagement obligation and the Further Guidance.⁹ The Commission has heard from many Tribes that the current engagement process is lacking in a number of respects, so we seek to address these issues to ensure more effective collaboration between ETCs and Tribes. Doing so is also consistent with a recent GAO recommendation that the Commission obtain feedback from Tribal Nations and industry stakeholders on the effectiveness of the *Further Guidance Public Notice* to determine whether to clarify this guidance.¹⁰

Revisiting Tribal Engagement

In the context of our efforts to maximize broadband deployment and adoption on Tribal lands, we seek to assess the effectiveness of the *Further Guidance Public Notice* based on the practical experiences of Tribes and carriers. Broadly stated, the goal of the guidance provided by the Bureaus was “to ensure the effective exchange of information that will lead to a common understanding between Tribal governments and communications providers receiving USF support, on the deployment and improvement

⁴ See Petition of the United States Telecom Assoc. for Reconsideration, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (*USTelecom 2011 Petition*); see also Petition of the Alaska Rural Coalition for Reconsideration, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (*ARC Petition*); Petition of the Rural Incumbent Local Exchange Carriers Serving Tribal Lands for Reconsideration, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (*RLEC Petition*).

⁵ See *USTelecom 2011 Petition* at 18-19; *RLEC Petition* at 2-8; *ARC Petition* at 17-18; 5 U.S.C. § 553(b), (c).

⁶ *USF/ICC Transformation Order*, 26 FCC Rcd at 17820, para. 482.

⁷ See *Office of Native Affairs and Policy, Wireless Bureau, and Wireline Competitions Bureau Issue Further Guidance on the Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, 26 FCC Rcd 8176 (2012).

⁸ USTelecom petitioned for reconsideration of the *Further Guidance Public Notice* and reconsideration or clarification of the Tribal engagement requirements, raising procedural and First Amendment issues. See Petition of the United States Telecom Assoc. for Reconsideration, WC Docket No. 10-90 et al., at 6-16 (filed Aug. 20, 2012) (*USTelecom 2012 Petition*). The following year, USTelecom filed an additional petition for reconsideration on similar grounds in response to the *2013 USF Order* implementing aspects of the reporting obligation. See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, 28 FCC Rcd 2051 (2013) (*2013 USF Order*); Petition of the United States Telecom Assoc. for Reconsideration, WC Docket No. 10-90 et al., at 3-4, 11-14, 25 (filed April 4, 2013) (*USTelecom 2013 Petition*).

⁹ The Tribal engagement obligation took effect in 2013. 78 Fed. Reg. 47211 (Aug. 5, 2013). Following approval by the Office of Management and Budget, ETCs started submitting their annual Tribal engagement reports in October 2013. *Wireline Competition Bureau Announces Filing Deadline of October 15, 2013 for Eligible Telecommunications Carriers to File High-Cost and Low-income Annual Reports and Announces Filing Deadline of*

(continued....)

of communications services on Tribal lands.”¹¹ General guidance included recommendations that the discussions include decision-makers on both sides, highlighted the need for good documentation and recordkeeping, and outlined actions Tribal governments and providers could take in advance to prepare for the engagement.¹² Specific practical guidance included, for example, recommending Tribal governments perform assessments of the Tribe’s communications goals, needs, and priorities and keep them updated, consider Tribally-driven opportunities that would factor into the business case for deployment on Tribal lands, and identify opportunities where Tribes and carriers could partner.¹³

We seek comment generally on the effectiveness of this practical guidance in facilitating coordination between Tribal governments and ETCs on the deployment of communications services on Tribal lands, including areas where additional clarification and guidance would be beneficial. We recognize Tribal leaders and service providers have had varying experiences with the Tribal engagement requirement. Commission staff has anecdotally heard of problems with providers’ efforts to initiate engagement with Tribal leaders. In one instance, a carrier sent correspondence to a consortium of Tribes focused on social services in lieu of outreach to the Tribal leaders at the individual Tribes. In other cases, requests for engagement were either sent to former Tribal leaders who were no longer part of the Tribal government, or to the wrong Tribe altogether.¹⁴

Carriers report it is difficult to keep current with Tribal leaders, as in some cases Tribal governments change every few years due to Tribal elections. Some service providers have contacted Commission staff for information about the identity of Tribal leadership and have been referred to the Bureau of Indian Affairs (BIA) web site, which maintains a Tribal leaders directory for all 573 federally recognized Tribes that is updated on a regular basis.¹⁵ Even where the right Tribal representative can be identified, GAO found some carriers have experienced varying levels of responsiveness from Tribes.¹⁶ While some Tribes do not reply at first, others do not respond even to repeated engagement attempts.¹⁷

In light of these reports, we seek comment on specific steps the Commission can take or

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December 16, 2013 for States and ETCs to File Annual Use Certifications, Public Notice, 28 FCC Rcd 11252 (WCB 2013).

¹⁰ U.S. Government Accountability Office, *Broadband Internet FCC’s Data Overstate Access on Tribal Lands* at 35 (2018), <https://www.gao.gov/assets/700/694386.pdf> (*GAO Tribal Broadband Report*).

¹¹ *Further Guidance Public Notice*, 26 FCC Rcd at 8176, para. 2.

¹² *Id.* at 8179-80, paras. 9-15.

¹³ *Id.* at 8181, paras. 16-19. The parties were encouraged to discuss, among other things, deployment priorities and plans, including timelines. Also, the *Further Guidance Public Notice* recommended discussions on any regulatory processes for providing service on Tribal lands, including rights of way, land-use permitting, facilities siting and environmental and cultural-review processes, as well as the challenges associated with these processes. It noted that “[a]ll of this information will provide the foundation for substantive discussion of all requirements and steps for moving forward together.” *Id.* at 8183, paras. 26-27.

¹⁴ Another Tribal representative told GAO a provider refused his request to meet more than once per year. *GAO Tribal Broadband Report* at 32-33. The *GAO Tribal Broadband Report* found similar problems with providers’ engagement efforts. For example, one Tribal official stated that while some providers are very focused and transparent about deployment plans, others see the engagement as a “check the box” exercise. *Id.* at 33.

¹⁵ See U.S. Dept. of Interior, Bureau of Indian Affairs, *Tribal Leaders Directory*, <https://www.bia.gov/tribal-leaders-directory> (last visited Oct. 16, 2019).

¹⁶ *GAO Tribal Broadband Report* at 33.

¹⁷ *Id.*

recommend to assist parties with their engagement efforts. We also seek comment on specific steps the Commission can take or recommend in assisting parties with their engagement efforts. To the extent we consider supplemental guidance, we seek comment on the advantages and/or disadvantages of recommending that parties meet more than once a year, as well as the impact additional meetings could have on the associated cost of engagement and its productivity. In recognition of reported difficulties in initiating engagement, we seek comment on the cause of these problems. We seek comment on the possibility of encouraging each party to designate a specific point of contact to lessen the challenge of arranging engagement. To the extent it would be beneficial and appropriate to offer guidance on appropriate decision-makers on behalf of ETCs for engagement purposes, we seek comment on whether to recommend regional managers or senior executives be involved.¹⁸ Further, we seek comment on the benefits of in-person meetings as compared to phone or video-conference engagement.¹⁹ Interested parties are encouraged to identify the benefits with either approach, particularly in terms of whether relationships between Tribal leaders and ETCs can be fostered when engagement is conducted remotely. We also seek comment on measures taken thus far to alleviate the issues raised and any additional concerns associated with this engagement.

In many instances, the *Further Guidance Public Notice* has resulted in open and meaningful discussions between the parties. In this light, we believe the development of best practices will also help advance the dialogue between parties and provide a path forward for those Tribal governments and ETCs that continue to be discontented with their engagement efforts. We seek comment on any best practices that have been developed, and thereby solicit input on any procedures and policies that have been adopted in the field, including those that have and have not worked effectively and why. Parties should articulate whether and to what extent their practices have changed over the years and provide any other information that will aid in the evaluation of the effectiveness of the *Further Guidance Public Notice*.

We also encourage interested parties to refresh the record with respect to the Petitions for Reconsideration and indicate whether any issues raised therein have been resolved or otherwise rendered moot. We specifically invite ETCs challenging the engagement obligation on the basis of undue burden to provide specific information about the nature and magnitude of the burdens and expenses they have incurred and whether such burdens and costs have increased or decreased over the years.

Procedural Matters

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the

¹⁸ The Commission previously identified appropriate Tribal government officials for engagement purposes. *USF/ICC Transformation Order*, 26 FCC Rcd at 17869, para. 637, n.1053. We recognize industry representatives have questioned the *Further Guidance Public Notice* insofar as it recommends the "discourse should be between decision-makers on both sides" as potentially burdensome and inappropriate. *See, e.g.*, Comments of CTIA, WC Docket No. 10-90 et al., at 4-5 (rec. Sept. 26, 2012) (CTIA Comments).

¹⁹ Tribal leaders have anecdotally told Commission staff that providers are often reluctant to travel to Indian Country, especially remote areas. Carrier representatives have themselves noted the potential cost burdens and travel challenges with in-person engagement meetings. *See* CTIA Comments at 4-5; Comments of Alaska Communications Systems, WC Docket No. 10-90 et al., at 2-4 (rec. Sept. 26, 2012). We note the *Further Guidance Public Notice* recommends engagement occur by phone or video conference where extreme weather conditions and/or extreme remoteness are present. *Further Guidance Public Notice*, 26 FCC Rcd at 8179, para. 9, n.17.

ECFS: <https://www.fcc.gov/ecfs/>

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²⁰ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies).

To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

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²⁰ 47 CFR §§ 1.1200 *et seq.*