



telecommunications service on behalf of its member companies and to provide guidance and assistance to Tribal carriers who are working to provide modern telecommunications services to Tribal lands.

## I. BACKGROUND

NTTA members have been operating under the Commission's Tribal engagement rules<sup>3</sup> from the beginning. Indeed, NTTA members, being Tribally-owned and operated, have in effect been subject to Tribal engagement requirements from their inception. Once adopted in 2011, the Tribal engagement rules have undergone multiple rounds of complaint – based mostly on procedural grounds.<sup>4</sup> NTTA's position, as stated in comments filed in response to the outstanding petitions for reconsideration, has been that the Tribal Engagement rules, and the *Further Guidance*, are a necessary baseline for eligible telecommunications carriers (ETCs) to utilize when working with Tribal governments for the important issues surrounding communications services on Tribal lands.

With the 2011 *Transformation Order* the FCC adopted badly needed rules requiring ETCs under high-cost support recipient reporting obligations to affirmatively engage with Tribal governments as part of the provision of universal service.<sup>5</sup> The rationale for the Commission's adoption of Tribal engagement rules – “The deep digital divide that persists between the Native Nations of the United States and the rest of the country is well-documented...commenters have

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<sup>3</sup> 47 C.F.R. §54.313(a)(5)

<sup>4</sup> See e.g., *Public Notice* at footnotes 5 and 8

<sup>5</sup> *In the Matter of Connect America Fund*, et. al., Report and Order and Further Notice of Proposed Rulemaking WC Docket No. 10-90, et. al. (FCC 11-161, rel. Nov. 18, 2011) at 636-637 (*Transformation Order*)

repeatedly stressed the essential role that Tribal consultation and engagement play in the successful deployment of service on Tribal lands”<sup>6</sup> – is, sadly, still relevant 8 years later. It is worth revisiting what the Commission adopted in 2011 in its appropriate attempt to address Tribal consultation and engagement:

1. A needs assessment and deployment planning with a focus on Tribal community anchor institutions;
2. Feasibility and sustainability planning;
3. Marketing services in a culturally sensitive manner;
4. Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and
5. Compliance with Tribal business and licensing requirements. Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government licensure.<sup>7</sup>

In 2012, pursuant to Commission direction, the Bureaus released the *Further Guidance* that provided ETCs serving Tribal areas with ensuring 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 of communications services on Tribal lands.”<sup>8</sup> High cost support recipients were then to use the Commission rules and *Further Guidance* to engage with Tribal governments in the deployment, improvement, and

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<sup>6</sup> *Id.*, at 636

<sup>7</sup> 47 CFR § 54.313(a)(5)

<sup>8</sup> *Further Guidance* at (unnumbered) p. 1

maintenance of telecommunications networks and service on Tribal lands, and report the results in annual Form 481 compliance filings.

In the *Public Notice*, the Bureau raises relevant questions about the effectiveness of the Commission's Tribal engagement rules and the *Further Guidance*. While NTTA members, by virtue of being Tribally-owned and operated, do not have any issues with the Tribal engagement rules, NTTA is aware of other areas where the Tribal government has sometimes major problems with how the high-cost recipients perform their mandated Tribal engagement and consultation. In these comments, NTTA will discuss some of these problems and offer some solutions for the Bureau's consideration.

## **II. TRIBAL ENGAGEMENT CONTINUES TO BE IMPORTANT AND NECESSARY**

The reason the Commission initially adopted the Tribal engagement rules – to address the digital divide that exists between Tribal areas and the rest of the United States – continues to be important and necessary. The digital divide, measured as the difference between broadband availability between Tribal and non-Tribal areas of the United States, continues to exist based on the Commission's own data: only 41.3% of the population in rural Tribal areas in the lower 48 states has access to 25/3 Mbps fixed and 5/1 Mbps mobile broadband services, compared to 93.4% nationwide.<sup>9</sup> There continue to be unique circumstances in Tribal areas that present unique challenges to deploying, operating, and maintaining broadband-capable networks, and

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<sup>9</sup> *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2019 Broadband Deployment Report (FCC 19-44, rel. May 29, 2019) at Figure 10 and Figure 3a

there continue to be unique challenges to ensuring such services are that are offered to Native Americans are affordable.

There clearly is a problem with carriers committing to deploy and following through on deploying broadband capable networks in Tribal areas, especially those in rural Tribal areas located in the lower 48 states. This digital divide – between rural Tribal areas and the rest of the country - has existed for years and continues to exist, and this stubborn fact demands a considered, but urgent, response. When the FCC adopted the Tribal engagement rules in 2011 and the Bureaus released the *Further Guidance* in 2012, the Tribal digital divide was 68.9 percent – that is, broadband availability in rural Tribal areas in the lower 48 states was measured at 8.10 percent and in the rest of the United States at 77 percent.<sup>10</sup> While this digital divide has narrowed somewhat – 52.1 percent as of the end of 2017<sup>11</sup> – more must be done to narrow this gap as soon as possible. One way to address this lack of deployment in rural Tribal areas is to target more high-cost support to Tribal lands either lacking access to broadband capable networks or to those areas where operations and maintenance costs are abnormally high. While NTTA believes more can and must be done to target support in this way, for the support already earmarked for Tribal areas, carriers receiving such support must begin with constructive engagement with Tribal governments on how to best accomplish all broadband-related goals. As NTTA and others have stated in the past, the Tribal engagement rules and *Further Guidance* provide an excellent framework from which to conduct these discussions.

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<sup>10</sup> *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, 2018 Broadband Deployment Report (FCC 18-10, rel. February 2, 2018) at p. 28, Table 5

<sup>11</sup> *2019 Broadband Deployment Report*, figures 3a and 10

### III. TRIBAL ENGAGEMENT GOING FORWARD

The *Public Notice* raises a number of relevant issues and makes some good proposals for moving the Tribal engagement process forward on a more efficient and effective basis. NTTA urges the Bureau to focus on enforcement of the Tribal engagement rules, and the penalties for ETCs failing to comply with the rules. The *Public Notice* references a statement made by a Tribal official to the GAO that providers see the Tribal engagement requirement as a “check the box” exercise.<sup>12</sup> NTTA members have heard similar complaints from non-NTTA affiliated Tribes, and ascribes this treatment of vital engagement with Tribal governments to a number of factors that are well-documented in the *Public Notice*: keeping current with Tribal leaders is certainly one of the most common.<sup>13</sup>

While NTTA understands that some carriers are reporting difficulties with contacting Tribal leaders for purposes of complying with the engagement rules<sup>14</sup> this does not obviate the importance and necessity of such engagement. Therefore, NTTA urges the Bureau and the Commission to address the outstanding petitions by strongly affirming the Tribal engagement rules and *Further Guidance* and adopt the additional engagement principles discussed in the *Public Notice* and discussed further below.

#### A. Supplemental Tribal Engagement Guidance is Necessary

NTTA agrees with the Bureau’s proposals as contained in the *Public Notice* designed to supplement Tribal engagement rule guidance to assist in making this process more efficient and

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<sup>12</sup> *Public Notice* at footnote 14, referencing the 2018 Government Accountability Office Tribal Broadband Report

<sup>13</sup> *Public Notice* at 3

<sup>14</sup> *Id.*, at 3

transparent, including the development of a set of best practices. Encouraging each party to designate a single point of contact is a reasonable starting point, as does encouraging parties to meet in person at least once per year. Only in this way can the carriers serving Tribal areas gain first-hand experience of the status of the Tribal areas being served, the challenges of expanding access to broadband services, and the best way to move forward.

In addition, having the real threat of enforcement, as discussed below, may assist in removing Tribal engagement responsibilities out of the “check the box” category into a more meaningful type of engagement. Tribal nations and their associated governments are sovereign, and it is difficult, if not impossible, to fathom a carrier not willing to engage in consultation with any other type of government when planning the deployment, operations, and maintenance of perhaps the most economically and socially important tool available – services made available by broadband networks. The issues raised in the Public Notice are therefore timely and urgent, and deserve a serious response in order to ensure Tribal governments are provided the opportunity to drive the future of their nations.

#### **B. Additional Enforcement of the Tribal Engagement Rules is Needed**

To NTTA’s knowledge, enforcement of the Tribal engagement rules is either non-existent or extremely rare. Given that this is the case, the Commission and Bureau should ensure each ETC serving Tribal areas is properly documenting proper compliance with the Tribal engagement rules, or has proven a good faith effort to contact the relevant Tribal governmental entity or entities and has been unsuccessful, thus making compliance with the rules infeasible. In these

cases, the ETC should be required to upload sufficient documentation<sup>15</sup> in the annual Form 481 submission that demonstrates the contact attempts were unsuccessful. As discussed further below, adopting real penalties to apply when Tribal engagement responsibilities are not met will perhaps incent more consistent compliance. However, compliance with Tribal engagement rules should consider any best practices adopted as a result of input received in response to this *Public Notice*, and any other supplemental guidance the Commission and Bureau sees fit to adopt.<sup>16</sup>

#### **IV. PENALTIES FOR NON-COMPLIANCE MUST BE APPLIED**

NTTA is not aware of any penalties being applied for non-compliance with the Commission's Tribal engagement rules. If so, then it should not be surprising that as time goes on, carriers required to comply with the Tribal engagement rules either decrease their efforts, engage in more "check the box" efforts, or, perhaps, stop trying. This issue is too vital for Tribal areas for any of these scenarios to become the norm. As a result, the Commission must adopt and consistently apply a penalty structure for non-compliance with the Tribal engagement rules.

When initially adopting the Tribal engagement rules in the 2011 *Transformation Order*, the Commission hinted at a penalty structure: "carriers failing to satisfy the Tribal government engagement obligation would be subject to financial consequences, including potential reduction in support should they fail to fulfill their engagement obligations."<sup>17</sup> To date, NTTA is not aware

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<sup>15</sup> Sufficient documentation would include, but not be limited to, written evidence of multiple attempts at contacting the relevant Tribal leader with no response (such as delivery notices)

<sup>16</sup> NTTA continues to believe that Tribally-owned and operated ETCs should be exempt from detailed enforcement of the Tribal engagement rules, given that their very structure requires engagement with the Tribal government on a frequent, sometimes daily, basis.

<sup>17</sup> *Transformation Order* at 637



that the Commission has acted on this penalty structure outline for any failure to satisfy a carrier's Tribal engagement obligation – in other words, noncompliance with a Commission rule.

NTTA recommends the Commission, after strongly affirming the Tribal engagement rules to the extent necessary in addressing the outstanding petitions, adopt a penalty structure for noncompliance with the Tribal engagement rules that is similar in operation to section 54.320 of its rules.<sup>18</sup> In essence, a carrier required to comply with the Tribal engagement rules (*i.e.*, those ETCs receiving support targeted to Tribal areas) would risk losing a portion of the support received for serving Tribal areas<sup>19</sup> until noncompliance is cured, either through actual engagement with the relevant Tribal government or sufficient documentation is provided showing compliance was accomplished.<sup>20</sup>

Penalties for noncompliance can also be calibrated to reduce or eliminate the consequences for small carriers, based on area covered, Tribal customers served, support received, or a combination of these and other factors. It is NTTA's belief that small, rate-of-return carriers receiving support to serve Tribal areas are, in large part, engaging in good faith consultation with the appropriate Tribal government. Anecdotal evidence shows that it is the large and mid-size carriers that may find it more challenging to comply with the Tribal engagement rules and thus would need to make additional efforts to cease "check the box" compliance and avoid monetary penalties.

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<sup>18</sup> 47 C.F.R. §54.320(d)

<sup>19</sup> Support targeted to Tribal areas should be identifiable for those carriers receiving model-based support, or can be apportioned for those carriers receiving cost-based support.

<sup>20</sup> Documentation showing Tribal government was properly attempted but ultimately unsuccessful would, in this scenario, be considered documentation demonstrating compliance

## CONCLUSION

NTTA appreciates the opportunity to provide input to the Bureau's timely release of the *Public Notice*. The Commission and the Bureau are correct in assuming the lack of effective communication between ETCs and Tribal governments are a major contributing factor to the stubborn persistence of the digital divide that exists between rural Tribal areas and the rest of the United States. It has been eight years since the Commission adopted the Tribal engagement rules, and nearly that long since the *Further Guidance* was issued. Given the necessity of releasing the *Public Notice*, it is clear that more work needs to be done in order for the engagement rules to reach their full potential. NTTA recommends the Commission adopt a set of best practices for ETCs receiving support, enact serious and consistent enforcement with the rules, and adopt a penalty structure to be applied in the event of noncompliance.

Respectfully Submitted,

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