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July 8, 2013

Via E-mail

Nicholas A. Fraser
Office of Information and Regulatory Affairs
Office of Management and Budget
Nicholas_A._Fraser@omb.eop.gov

Judith B. Herman
Office of Managing Director
Federal Communications Commission
Judith.B.Herman@fcc.gov
PRA@fcc.gov

Re: Opposition of AT&T to Aspects of Proposed FCC Form 481 and Instructions; OMB Control No: 3060-0986

Dear Mr. Fraser and Ms. Herman:

AT&T Inc., on behalf of its wholly-owned operating affiliates that are federal high-cost support recipients (collectively, AT&T), hereby submits these comments in opposition to the Federal Communications Commission's (Commission's) request for Office of Management and Budget (OMB) approval of several proposed information collection and reporting requirements related to a carrier's receipt of federal high-cost support.[1] AT&T and others have commented extensively on numerous procedural and substantive deficiencies with the high-cost reporting

[1] 78 Fed. Reg. 34,096 (June 6, 2013).

obligations established in the Commission's 2011 *USF/ICC Transformation Order*.[2] Parties filed most of their comments in response to at least *five* petitions for reconsideration of the Commission's high-cost reporting rules, codified in 47 C.F.R. § 54.313(a).[3] To date, the Commission has not acted on key parts of these petitions, several of which have been pending at the Commission for over a year. Notwithstanding its failure to address all of the challenges contained in these reconsideration petitions, the Commission nonetheless has sought OMB approval for all but two of the information collections required by section 54.313(a) of its rules.[4]

Importantly for OMB's review of the Commission's proposed information collection, AT&T and other parties have detailed previously why there is no practical utility to several of the information collections contained in the Commission's pending request and how the Commission failed to consider less burdensome alternatives, in violation of its obligations under the Paperwork Reduction Act (PRA).[5] AT&T continues to have two main objections to the Commission's proposed information collection currently before OMB: There is no practical utility to requiring recipients of "frozen" high-cost support – as opposed to so-called Connect America Fund (CAF) Phase II recipients or Tribal Mobility Fund recipients – to (1) report any broadband data or (2) engage in certain, Commission-specified discussions with Tribal

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[2] *Connect America Fund*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*).

[3] Petition for Reconsideration of USTelecom, WC Docket No. 10-90 et al. (filed Dec. 29, 2011); Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition for Reconsideration, WC Docket No. 10-90 et al. (filed Dec. 29, 2011); Petition for Clarification and Reconsideration or, in the Alternative, for Waiver of CTIA and USTelecom, WC Docket No. 10-90 et al. (filed June 25, 2012); Petition for Reconsideration and Clarification of USTelecom, WC Docket No. 10-90 et al., 4-16 (filed Aug. 20, 2012); USTelecom's Petition for Reconsideration and Clarification and Comments in Response to Paperwork Reduction Act, WC Docket No. 10-90 et al. (filed April 4, 2013).

[4] In its supporting statement, the Commission indicates that it is not, "at this time," seeking OMB approval for its requirement that high-cost recipients report broadband outages or submit the results of network performance tests. *See* FCC Supporting Statement, 3060-0986, at 3 (submitted June 6, 2013).

[5] *See* 44 U.S.C. § 3506(c)(3).

governments and report the results of those discussions.[6] Based on a review of the PRA-related comments filed in April 2013 in response to the Commission's draft FCC Form 481 and instructions, many commenters share AT&T's concerns.[7] As part of its submission, the Commission provided links to parties' PRA comments. AT&T urges OMB to review these comments as it evaluates the Commission's proposed information collections because many of the commenters' concerns, including the two we identify above, remain unaddressed.

In lieu of repeating all of the arguments that we have discussed at length in our Commission filings, AT&T summarizes those arguments here and attaches copies of those pleadings (or excerpts from those filings) for OMB's consideration. For the reasons set forth herein and in the attached filings, AT&T respectfully requests that OMB *not* approve the Commission's proposed information collections related to broadband and Tribal engagement except with respect to CAF Phase II recipients and/or Tribal Mobility Fund recipients. Additionally, we ask that OMB make clear that any and all of the high-cost information collections that it does approve have prospective effect only.

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[6] AT&T also is concerned that there is no affirmative statement contained in the Commission's package of information submitted to OMB that it intends for the new information collections to be made prospective in effect. AT&T would normally agree that such a statement is obvious as a matter of administrative law such that it would be unnecessary to mention. However, based on statements contained in a staff report to the Commission, it appears that staff believes that at least one of the proposed new information collections is already in effect notwithstanding the fact that OMB has not approved it. *See* Federal Communications Commission Office of Native American Affairs and Policy 2012 Annual Report at 5 (rel. March 20, 2013), *available at* http://transition.fcc.gov/cgb/onap/ONAP-AnnualReport03-19-2013.pdf (stating that, "[i]n 2013, [eligible telecommunications carriers] will report for the first time on their compliance with the Tribal government engagement obligation . . . ."). To do so, carriers would have had to commence discussions on Commission-specified topics with Tribal governments last year – prior to the rule becoming effective.

[7] *See, e.g.*, Verizon Comments, WC Docket No. 10-90 (filed April 26, 2013); NECA, NTCA, ERTA, ITTA, USTelecom Joint Comments, WC Docket Nos. 10-90, 05-337 (filed April 26, 2013); CenturyLink Comments, WC Docket No. 10-90 et al. (filed April 26, 2013); Blooston Rural Carriers Comments, WC Docket Nos. 10-90, 05-337 (filed April 26, 2013); JSI Comments, WC Docket No. 10-90 (filed April 26, 2013); Western Telecommunications Alliance Comments, WC Docket Nos. 10-90, 05-337 (filed April 25, 2013); U.S. Cellular Comments, WC Docket No. 10-90, WT Docket No. 10-208 (filed April 26, 2013).

A. No Practical Utility to Requiring Recipients of "Frozen" High-Cost Support to Report Any Broadband Data and, in Any Event, the Commission Failed to Consider Less Burdensome Alternatives.

In its *USF/ICC Transformation Order*, the Commission "froze" the amount of high-cost support disbursed to each price cap and wireless carrier at end-of-year 2011 levels. Wireless carriers' frozen support will be eliminated by July 2016 and price cap carriers' frozen support could be eliminated on a flash cut basis beginning next year. In recognition that it makes little sense for wireless carriers to report broadband information given that their legacy high-cost support will be eliminated in a few short years, the Commission correctly exempted wireless carriers from any broadband reporting requirements. However, the Commission failed to reach this same, common sense conclusion for price cap carriers, even though these carriers could lose their frozen high-cost support several years before wireless carriers.

In support of its decision to require price cap carriers receiving "frozen" high-cost support to report certain broadband data, the Commission claimed in its *USF/ICC Transformation Order* that obtaining such data is "necessary and appropriate" to "monitor progress in achieving our broadband goals and to assist the FCC in determining whether the funds are being used appropriately."[8] However, this reasoning does not hold true for high-cost recipients whose existing high-cost support, which was designed and intended to achieve other objectives (such as the reduction of interstate switched access charges), is being eliminated. For reasons detailed in the pending petitions for reconsideration and AT&T's comments, extending broadband reporting obligations to such carriers will provide the Commission with no insight into whether its "broadband goals" are being achieved or whether legacy funds "are being used appropriately."[9] This is the case because price cap carriers have funded their existing

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[8] *USF/ICC Transformation Order* at ¶ 580.

[9] *See* Attach. 1 at 3-7; Attach. 2 at 5-9; Attach. 3 at 3-6; Attach. 4 at 9-13.

broadband-capable networks almost exclusively (if not entirely) through private investment, *not* with high-cost support.[10] As a consequence, requiring a price cap carrier to detail, for example, how many complaints it receives per 1,000 broadband connections will shed no light on whether that carrier used its frozen high-cost support appropriately. Instead, the Commission should expect that most, if not all, of those complaints will be from consumers whose broadband facilities were constructed through private investment. For these reasons and others set forth in AT&T's comments attached hereto, AT&T and other parties have urged the Commission to limit the scope of the new broadband reporting obligations to only those carriers that receive high-cost support for the sole purpose of deploying broadband-capable networks – i.e., CAF Phase II recipients.[11] By contrast, extending these information collection and reporting requirements to recipients of "frozen" high-cost support has no practical utility.

B. No Practical Utility to Requiring Non-Tribal Mobility Fund High-Cost Recipients to Engage in Certain Commission-Specified Discussions with Tribal Governments.

Section 54.313(a)(9) of the Commission's rules requires all high-cost recipients to provide "documents or information demonstrating that the ETC had discussions with Tribal governments that, at a minimum, included: a needs assessment and deployment planning with a focus on Tribal community anchor institutions; feasibility and sustainability planning; marketing services in a culturally sensitive manner; rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and compliance with Tribal

[10] Indeed, it was not until the November 2011 *USF/ICC Transformation Order* that the Commission clarified that non-rate-of-return carriers may use their high-cost support on broadband-capable networks.

[11] While it is true that so-called CAF Phase I incremental support recipients will receive high-cost support to build broadband-capable networks in certain areas, the Commission's rules already require those recipients to certify that they have deployed broadband meeting Commission-specified criteria within a certain amount of time. *See* 47 C.F.R. § 54.313(b). The Commission has not explained why this existing, less burdensome requirement is inadequate to enable the Commission to "monitor progress in achieving [its] broadband goals and to assist [it] in determining whether the funds are being used appropriately." *USF/ICC Transformation Order* at ¶ 580.

business and licensing requirements." 47 C.F.R. § 54.313(a)(9). Proposed FCC Form 481 requires high-cost recipients serving Tribal lands to attach a document explaining how the carrier complies with this rule.

The Commission created its Tribal engagement rule to facilitate "the successful deployment and provision of service" on Tribal lands in order to narrow the "deep digital divide" in those areas. *USF/ICC Transformation Order* at ¶¶ 636-37. To accomplish this goal, the Commission must, of course, provide "sufficient" high-cost support to providers in order to enable them to deploy and maintain broadband service in high-cost Tribal areas that are otherwise uneconomic to serve. *See* 47 U.S.C. § 254(e) (requiring support to be "explicit and sufficient to achieve the purpose of this section"). A carrier cannot be expected – or required – to deploy broadband service in such areas absent "specific, predictable, and sufficient" support. 47 U.S.C. § 254(b)(5). If the Commission fails to provide sufficient support to enable a carrier to deploy broadband service on high-cost Tribal lands, there is little point in mandating that the carrier commence broadband deployment discussions with the relevant Tribal government. As a consequence, the information collection required by section 54.313(a)(9) has no practical utility except for Tribal Mobility Fund recipients, who will receive high-cost support for the sole purpose of deploying mobile broadband to unserved Tribal lands. *See, e.g., USF/ICC Transformation Order* at ¶ 481.

There may be some logic to require entities that seek Tribal Mobility Fund support to show that they have complied with any validly adopted Tribal engagement rule.[12] But, that logic plainly does not apply to entities not seeking such support – irrespective of whether they receive support under other high-cost support mechanisms. Thus, for example, the Commission cannot

[12] *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, ¶ 6 (WTB rel. April 18, 2011).

reasonably justify requiring a large price cap carrier that only receives legacy interstate access support (which was intended to replace the implicit subsidies in interstate access charges and not to provide supported services in particular high-cost areas) to document that it has had discussions with all Tribal governments in its large service area on, among other topics, "a needs assessment and deployment planning."

Applying the Tribal engagement requirement to any carrier whose high-cost support the Commission is eliminating (possibly, on a flash-cut basis beginning next year) seems similarly misguided.[13] 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 year or two. Given the circumstances, the Commission should expect these carriers to spend their high-cost support on maintaining, not expanding, service.[14] The Commission has failed to explain what value there possibly could be in mandating that such carriers have discussions with Tribal governments on network deployment plans when the carriers likely have no such plans – or, at least, no such plans relying on high-cost support. In short, unless the carrier receives high-cost support for network deployments in Tribal areas, there is no practical utility to requiring it to collect and report information responsive to this Commission rule.[15]

* * * * *

For the reasons set forth above and detailed in the attached comments, AT&T urges OMB not to approve the Commission's proposed high-cost information collections related to

[13] *USF/ICC Transformation Order* at ¶¶ 180, 519.

[14] Carriers are permitted to use high-cost support to maintain facilities and services. *See* 47 U.S.C. § 254(e) (requiring universal service support recipients to use that support for the "provision, *maintenance*, and upgrading of facilities and services for which the support is intended" (emphasis added)).

[15] *See* Attach. 1 at 7-10; Attach. 2 at 9-12; Attach. 4 at 14-20; Attach. 5.

broadband and Tribal engagement except with respect to Connect America Fund Phase II recipients and/or Tribal Mobility Fund recipients. AT&T also asks that OMB make clear that any approved information collection must be given prospective effect by the requesting agency. In other words, the Commission is not permitted to require high-cost recipients to have collected information prior to the date that OMB approves that information collection.

Respectfully Submitted,

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July 8, 2013

Its Attorneys

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90

PAPERWORK REDUCTION ACT COMMENTS OF AT&T

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April 26, 2013

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I. INTRODUCTION

In a Federal Register notice published on February 25, 2013, the Commission sought comment on whether a proposed information collection complies with the Commission's obligations under the Paperwork Reduction Act (PRA). 78 Fed. Reg. 12750 (Feb. 25, 2013). The proposed information collection would be accomplished through a new form, FCC Form 481, a draft of which the Commission released on or around March 5, 2013. Prior to submitting a proposed information collection to the Office of Management and Budget (OMB) for its review, the PRA requires the Commission to evaluate: the need for the information collection; the specific, objectively supported estimate of burden; and the plan for the efficient and effective management and use of the information to be collected.[1] Additionally, as the Commission notes in its Federal Register notice, the PRA also requires it to consult with members of the public on each proposed information collection and solicit comment to determine:

> whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; [and] ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology . . . .[2]

As proposed, some of the information the Commission seeks to collect through this new form does not satisfy its statutory PRA obligations such that the Commission will be unable to certify to OMB, as it must, that its proposed information collection "is necessary for the proper performance of the functions of the agency, including that the information has practical utility; is not unnecessarily duplicative of information otherwise reasonably accessible to the agency;

[1] 44 U.S.C. § 3506(c)(1).

[2] 78 Fed. Reg. 12750 (Feb. 25, 2013). *See also* 44 U.S.C. § 3506(c)(2)(A).

reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency . . .; [and] is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond. . . ."[3] The OMB defines "practical utility" as

> the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion . . . In the case of recordkeeping requirements . . . 'practical utility' means that actual uses can be demonstrated. 5 C.F.R. § 1320.3(l).

We discuss the proposed information collection's deficiencies below.

II. DISCUSSION

A. SIGNIFICANT ASPECTS OF THE PROPOSED INFORMATION COLLECTION ARE UNNECESSARY FOR THE PROPER PERFORMANCE OF THE FUNCTIONS OF THE COMMISSION AND LACK PRACTICAL UTILITY.

Simply stated, the purpose of requiring federal high-cost recipients to report certain information to the Commission is to facilitate the Commission's review into whether these providers spent their support consistent with section 254(e) of the Communications Act, as amended (Act). Section 254(e) requires high-cost recipients "to use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). In its *USF/ICC Transformation Order*, the Commission explained that it was requiring all high-cost recipients to comply with specific reporting requirements "to ensure the continued availability of high-quality voice services and monitor progress in achieving our broadband goals and to assist the FCC in determining whether the funds are being used appropriately." *USF/ICC Transformation Order*, 26 FCC Rcd 17663, ¶ 580

[3] 44 U.S.C. § 3506(c)(3).

(2011). With the statute and these Commission-stated goals in mind, we discuss why certain aspects of the proposed information collection are not "necessary for the proper performance of the functions of the agency" and why "the information has [no] practical utility," as required by the statute and OMB's rules.

1. BROADBAND REPORTING

The Commission asserts that requiring *all* high-cost recipients to provide, for example, the number of requests for broadband service that went unfulfilled during the prior calendar year, the number of broadband customer complaints per 1,000 connections in the prior calendar year, as well as data on broadband service outages from the prior calendar year, is "necessary and appropriate" to "monitor progress in achieving our broadband goals and to assist the FCC in determining whether the funds are being used appropriately."[4] However, this reasoning does not hold true for high-cost recipients whose existing high-cost support, which was designed and intended to achieve other objectives (such as the reduction of interstate switched access charges) is being eliminated. For reasons detailed in USTelecom's initial petition for reconsideration[5] and, subsequently, in its joint petition filed with CTIA,[6] extending broadband reporting obligations to these eligible telecommunications carriers (ETCs) will provide the Commission with no insight into whether its "broadband goals" are being achieved or whether legacy funds "are being used appropriately." In other words, as we explain below, this information has no "practical utility," as that term is defined by OMB.

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[4] *USF/ICC Transformation Order* at ¶ 580.

[5] Petition for Reconsideration of USTelecom, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (Petition).

[6] Petition for Clarification and Reconsideration or, in the Alternative, for Waiver of CTIA and USTelecom, WC Docket No. 10-90 et al. (filed June 25, 2012) (Joint Petition).

If broadband reporting requirements were applied to price cap ETCs receiving frozen high-cost support or CAF Phase I incremental support (collectively referred to by the Commission as "CAF Phase I support"), these ETCs would be required either to: (i) report broadband data for the entire study area; or (ii) develop the systems and processes to track and report broadband data only in those areas where the ETC is using CAF Phase I support for broadband deployment. Neither option is reasonable.

First, reporting broadband data on a study area basis would not provide the Commission with any meaningful information about the achievement of its "broadband goals" or the "appropriate[]" use of CAF Phase I support, which are the justifications offered by the Commission for its reporting requirements. *USF/ICC Transformation Order* at ¶ 580. Study-area wide data would skew the impact of CAF Phase I support because only a fraction of a price cap ETC's broadband facilities will have been deployed using such support. For example, even if a price cap carrier is repurposing one-third of its frozen support in 2013 to broadband deployment (and two-thirds in 2014), the amount of broadband facilities deployed with those dollars would pale in comparison to the amount of broadband facilities deployed through private investment.[7]

Assume a study area in which 95 percent of the housing units have access to wireline broadband that meets the Commission's definition of at least 4 Mbps downstream and 1 Mbps upstream – an assumption that would be consistent with the Commission's most recent analysis

[7] The Columbia Institute for Tele-Information has estimated that broadband providers will invest more than $240 billion between 2008 and 2015, or approximately $30 billion annually. *See* Robert C. Atkinson & Ivy E. Schultz, Columbia Institute for Tele-Information, *Broadband in America*, Preliminary Report Prepared for the Staff of the FCC's Omnibus Broadband Initiative, at 66, Table 15 (Nov. 11, 2009). By contrast, the entire amount of CAF support that will be available in price cap territories is less than $2 billion annually. *USF/ICC Transformation Order* ¶ 126.

of broadband deployment nationwide.[8] Assume further that an ETC uses CAF Phase I support to construct broadband facilities to serve some segment of the 5 percent of housing units in the study area without broadband. If an ETC were required to report the number of broadband complaints per 1,000 connections under section 54.313(a)(4) for the entire study area, as an example, the majority of such complaints would involve broadband connections not constructed with CAF Phase I support. Thus, the complaint data being reported would tell the Commission nothing about the efficacy of its CAF Phase I program and thus has no practical utility.[9]

The same would be true for information regarding the "number of requests for service . . . that were unfilled during the prior calendar year," which is information that an ETC must report under section 54.313(a)(3). The vast majority of requests for broadband service likely would be in those areas where most households already have access to the service – households to which broadband was deployed using private investment, not CAF Phase I support. Similarly, reporting broadband outages at the study area level would provide the Commission with no indication about whether it is achieving its broadband goals and funds are being used appropriately.[10]

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[8] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eighth Broadband Progress Report, FCC 12-90, ¶ 45 (2012).

[9] The General Accounting Office has questioned the need for the Commission's collection of data related to the universal service program absent "a specific data-analysis plan for the carrier data it will collect" and a clear indication of how "the FCC plans to use the data." United States Government Accountability Office, "Telecommunications – FCC Has Reformed the High-Cost Program, but Oversight and Management Could be Improved, at 20 (July 2012). Not only has the Commission failed to explain how it would or could use a carrier's study area-wide broadband data, for example, to evaluate the efficacy of its high-cost programs, AT&T does not believe it could ever make such a demonstration.

[10] While we note that the Wireline Competition Bureau (Bureau) stated last month it is not seeking PRA approval to collect broadband outage data "*at this time*," AT&T urges the Commission to clarify its rules to make clear that it will not require high-cost recipients to report broadband service outage information. *See Connect America Fund*, WC Docket No. 10-90 et al., Order, DA 13-332, n.46 (rel. March 5, 2013)

Second, broadband reporting targeted to the precise geographic areas where a price cap ETC uses CAF Phase I support for broadband deployment is impractical. ETCs would have to expend significant resources to modify systems and procedures in order to track and report the information for just those connections constructed with CAF Phase I funds. The cost associated with the modifications required to produce data at such a granular level would be tremendous. If that was the Commission's intent, it seems unlikely that it could justify such an exorbitant cost when it performs a cost/benefit analysis consistent with President Obama's directives, which the Commission has yet to do.[11] Moreover, the estimated burden hours to collect such granular data would be significant and certainly would be exponentially larger than the 20 hours that the Commission proposed as being necessary, on average, to complete the entire FCC Form 481. *See* FCC Form 481 Instructions at 1.[12]

Furthermore, extending broadband data reporting requirements to the handful of price cap carriers electing CAF Phase I incremental support is unnecessarily duplicative of the other reporting requirements that govern such support. *See* 44 U.S.C. § 3506(c)(3)(B). Specifically,

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(*March 2013 Order*). *See also* Joint Petition at 6 (requesting that the Commission reconsider requiring high-cost recipients to provide broadband outage data).

[11] In January 2011, President Obama released Executive Order 13563 that called on all executive agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)." Executive Order, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order. In July 2011, the President took this burden-reducing initiative a large step further by calling on independent regulatory agencies – including the FCC – to follow these same requirements. Executive Order 13579, *Regulation and Independent Regulatory Agencies* (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies.

[12] In comments filed last year, AT&T stated that one of its wireless affiliates that is a high-cost recipient required more than 45 hours to comply with the Commission's old high-cost reporting rules, which the Commission significantly expanded in its *USF/ICC Transformation Order*. *See* AT&T Comments, WC Docket No. 10-90 et al., at 12 (filed Feb. 9, 2012). This particular wireless affiliate had experience with the prior reporting rules but, even with that experience, still could not approach the estimated 20 hours proposed in FCC Form 481. Due to the new reporting requirements, it seems likely that this affiliate's estimated burden will be well north of 45 hours.

section 54.313(b) of the Commission's rules obligates a price cap carrier receiving CAF Phase I incremental support to file annual reports that include certifications to the effect that the carrier has met its deployment and related obligations associated with such support. These section 54.313(b) reports are more than adequate for the Commission to ensure that CAF Phase I incremental support is achieving the Commission's broadband goals and is being used appropriately.

2. TRIBAL ENGAGEMENT REPORTING

Section 54.313(a)(9) of the Commission's rules requires all high-cost recipients to provide "documents or information demonstrating that the ETC had discussions with Tribal governments that, at a minimum, included: a needs assessment and deployment planning with a focus on Tribal community anchor institutions; feasibility and sustainability planning; marketing services in a culturally sensitive manner; rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and compliance with Tribal business and licensing requirements." 47 C.F.R. § 54.313(a)(9). Proposed FCC Form 481 requires high-cost recipients to attach a document "demonstrating that the ETC had operational coordination with tribal governments" consistent with the Commission's Tribal engagement rule. *See* FCC Form 481 Instructions at 24.

The Commission's stated purpose in creating the Tribal engagement requirement is to facilitate "the successful deployment and provision of service" on Tribal lands in order to narrow the "deep digital divide" in those areas. *USF/ICC Transformation Order* at ¶¶ 636-37. To accomplish this goal, the Commission must, of course, provide "sufficient" high-cost support to providers in order to enable them to deploy and maintain broadband service in high-cost Tribal areas that are otherwise uneconomic to serve. *See* 47 U.S.C. § 254(e) (requiring support to be

"explicit and sufficient to achieve the purpose of this section"). A carrier cannot be expected – or required – to deploy broadband service in such areas absent "specific, predictable, and sufficient" support. 47 U.S.C. § 254(b)(5). If the Commission fails to provide sufficient support to enable a carrier to deploy broadband service on high-cost Tribal lands, there is little point in mandating that the carrier commence broadband deployment discussions with the relevant Tribal government. As a consequence, the information collection required by section 54.313(a)(9) has no practical utility except for Tribal Mobility Fund recipients, who will receive high-cost support for the sole purpose of deploying mobile broadband to unserved Tribal lands. *See, e.g.*, *USF/ICC Transformation Order* at ¶ 481. Moreover, this particular rule is the subject of at least four pending petitions for reconsideration, all of which identify statutory and constitutional violations.[13] By extending this rule to non-Tribal Mobility Fund high-cost recipients, the Commission also adds a PRA violation to this list.

In the context of the Tribal Mobility Fund Public Notice, which is the only public notice where the Commission sought comment on a Tribal engagement requirement, there is some logic to the Commission's proposal that, if it were to require Tribal Mobility Fund bidders to engage the affected Tribal governments in "needs assessment" and "deployment planning" discussions pre-auction (the merits of which we do not address here), it may make sense to require bidders to demonstrate that such discussions in fact occurred.[14] But, that logic falls apart when the

[13] Petition at 18-19; Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition for Reconsideration, WC Docket No. 10-90 et al., 3-5 (filed Dec. 29, 2011); Petition for Reconsideration and Clarification of USTelecom, WC Docket No. 10-90 et al., 4-16 (filed Aug. 20, 2012) (USTelecom August 2012 Petition); USTelecom's Petition for Reconsideration and Clarification and Comments in Response to Paperwork Reduction Act, WC Docket No. 10-90 et al., 11-14 (filed April 4, 2013).

[14] *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, at ¶ 6 (WTB rel. April 18, 2011).

Commission extended the proposed Tribal engagement reporting requirements to all high-cost support recipients. Under the Commission's new rules, a large price cap carrier that only receives interstate access support (IAS) (which the Commission refers to as "frozen" CAF Phase I support) now has to document having had discussions with all Tribal governments in its large service area on, among other topics, "a needs assessment and deployment planning." As the Commission knows, IAS was intended to replace implicit universal service subsidies in interstate access charges,[15] not to provide supported services in particular high-cost areas. While AT&T has long encouraged the Commission to redesign its high-cost support mechanisms for so-called non-rural carriers to target support to specific high-cost areas that otherwise would be uneconomic to serve, until the *USF/ICC Transformation Order*, the Commission steadfastly refused to do so. Instead, it has continued to rely on statewide averaging to mask the cost of, and avoid actually supporting, the provision of services in those areas. The result is that the Commission cannot directly tie any frozen high-cost support to a Tribal area any more than to any other area in a state – at least in the case of non-rural carriers. And, consequently, it makes no sense to subject such carriers to the Tribal engagement reporting requirements with respect to such support.

Applying the Tribal engagement requirement to any ETC whose high-cost support the Commission is eliminating (possibly, on a flash-cut basis beginning next year) seems similarly misguided.[16] 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. Given the circumstances, the

[15] *CALLS Order*, 15 FCC Rcd 12962, ¶185 (2000).

[16] *USF/ICC Transformation Order* at ¶¶ 180, 519.

Commission should expect these carriers to spend their high-cost support on maintaining, not expanding, service.[17] Because these ETCs "do not know whether and how much funding they will receive and in what areas, nor do they know whether they will choose to participate in the future funding programs,"[18] it does not make financial sense for ETCs to invest significant sums to deploy facilities in high-cost areas when those facilities might be stranded in a few short years. The Commission has failed to explain what value there possibly could be in mandating that carriers have discussions with Tribal governments on network deployment plans when the carriers likely have no such plans – or, at least, no such plans relying on high-cost support.

3. REPORTING VOICE AND BROADBAND PRICE OFFERINGS

To date, the Commission has yet to explain why requiring high-cost recipients to provide the prices of their voice and broadband offerings is necessary to "determin[e] whether the funds are being used appropriately." *USF/ICC Transformation Order* at ¶ 580. The relevant section of the *USF/ICC Transformation Order*, which created this requirement, states in its entirety that "ETCs must also report pricing information for both voice and broadband offerings. They must submit the price and capacity range (if any) for the broadband offering that meets the relevant speed requirement in their annual reporting." *Id*. at ¶ 594. Elsewhere in the Commission's reporting rules, a high-cost recipient is required to certify that "the pricing of [its] voice services is no more than two standard deviations above the applicable national average urban rate for voice service . . . ." 47 C.F.R. § 54.313(a)(10). *See also* FCC Form 481 at 10. Consequently, it

[17] Carriers are permitted to use high-cost support to maintain facilities and services. *See* 47 U.S.C. § 254(e) (requiring universal service support recipients to use that support for the "provision, *maintenance*, and upgrading of facilities and services for which the support is intended" (emphasis added)).

[18] USTelecom August 2012 Petition at 8.

is unclear why the Commission also requires high-cost recipients to provide detailed pricing information for their voice service offerings.

As for broadband pricing, until such time as the Commission makes broadband a supported service, it has no statutory obligation to ensure that broadband rates in rural and urban areas are "reasonably comparable" and thus collecting broadband pricing data from high-cost recipients has no practical utility. *See* 47 U.S.C. § 254(b)(3). If the rates for a supported service were not reasonably comparable between rural and urban areas, Congress would expect the Commission to take action by, among other things, making available high-cost funding to those providers offering the supported service in rural areas. Congress would not expect the Commission to make available such support to providers of non-regulated, non-USF-supported services that, nonetheless, charge significantly more for their service in rural areas than in urban areas. The fact that section 254(b)(3) requires rates for information services – which broadband service unquestionably is – to be reasonably comparable does not undermine this interpretation because the Commission has the statutory authority to make broadband service a supported service and thus support it directly with high-cost funding. It would be illogical *not* to limit the reach of section 254(b)(3) to supported services only because what would be the basis for Commission action in the event that a high-cost recipient chooses to charge customers in rural areas significantly more than customers in urban areas for the provider's enterprise web hosting service, as an example?

While broadband pricing data may have some "theoretical or potential [] usefulness," a point that we do not concede, that is not the standard that the Commission must satisfy. Instead, the Commission is required to demonstrate that the requested information collection has "actual . . . usefulness." 5 C.F.R. § 1320.3(l). Until such time as the Commission makes broadband

service a supported service, it will be unable to certify that requiring high-cost recipients to provide broadband pricing data "is necessary for the proper performance of the functions of the agency, including that the information has practical utility." 44 U.S.C. § 3506(c)(3)(A).

B. SOME OF THE INFORMATION PROPOSED TO BE COLLECTED THROUGH FCC FORM 481 IS UNNECESSARILY DUPLICATIVE OF INFORMATION OTHERWISE REASONABLY ACCESSIBLE TO THE AGENCY, AND DOES NOT MINIMIZE THE BURDEN ON RESPONDENTS.

There are several instances in the proposed information collection where the Commission seeks to collect "unnecessarily duplicative" information[19] and/or it fails to "reduce[] . . . the burden on persons who shall provide information to . . . the agency."[20] For example, if the Commission had performed the requisite PRA analysis, it would have, among other things, eliminated its ETC outage reporting requirement. Section 54.313(a)(2) requires high-cost recipients to report detailed network outage information to the Commission. However, the Commission already receives carrier-supplied outage information[21] and it is unclear why the Commission finds this other outage information collection inadequate.[22]

[19] 44 U.S.C. § 3506(c)(3)(B).

[20] 44 U.S.C. § 3506(c)(3)(C). *See also USF/ICC Transformation Order*, App. O at ¶ 114 (incorrectly stating that the "Order seeks to minimize reporting burdens where possible by requiring certifications rather than data collections and by permitting the use of reports already filed with other government agencies, rather than requiring the production of new ones.").

[21] *See* 47 C.F.R. § 4.9.

[22] In its 2005 *ETC Report and Order*, the Commission stated that it wanted to track ETC outage information based on a 10 percent customer threshold "because populations can vary." *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, n.194 (2005). If the Commission believes it needs to maintain this separate standard to capture outages by small providers that would not otherwise submit network outage information to the Commission pursuant to the thresholds contained in section 4.9 of its rules, then it is required under the PRA to revise the rule to target only those ETCs serving small populations.

Requiring high-cost recipients to provide voice and broadband pricing data is another example of how the Commission made no effort to minimize the reporting burden on respondents. Assuming that there was some practical utility for this particular data collection, which there is not, the Commission nonetheless could have minimized the reporting burden by permitting high-cost recipients to certify that their voice and/or broadband prices in rural areas are reasonably comparable to their prices in urban areas. If a carrier could make that certification, there would be no need for it to supply the detailed and unnecessarily burdensome pricing data proposed in FCC Form 481. *See* FCC Form 481 at 6 (requesting, for example, voice rate data for every town and exchange), 7 (e.g., requesting detailed data on every residential broadband offering, including broadband rates for various types of bundles, for every town and exchange). At a minimum, the Commission should adopt a presumption of reasonable comparability between urban and rural rates if the provider certifies that its rates in rural and urban areas are identical or within a certain percentage since the statute does not demand "identical" rates but, rather, "reasonably comparable" rates. *See* 47 U.S.C. § 254(b)(3). The Federal Register notice thus is incorrect in stating that there must be "*parity* between urban and rural areas for broadband and voice rates." 78 Fed. Reg. 12751 (emphasis added).

The proposed information collection also requires high-cost recipients to list all "affiliates," as that term is defined in the Act, "associated with the study area reported in [FCC Form 481]." FCC Form 481 Instructions at 22. In the order establishing this requirement, the Commission stated that this information would "simplify[] the process of determining the total amount of public support received by each recipient, regardless of corporate structure." *USF/ICC Transformation Order* at ¶ 603. If true, then the Commission should limit the type of affiliate that must be reported on the form to other ETCs, since under the Commission's current

rules, non-ETCs are ineligible for high-cost support. Moreover, collecting lists of affiliates that may not provide any telecommunications has no practical utility as it does nothing to further the Commission's stated goal of "determining whether the funds are being used appropriately." *Id.* at ¶ 580.

Finally, the proposed form unnecessarily requires multiple officer signatures and thus fails to reduce the burden on respondents. 44 U.S.C. § 3506(c)(3)(C). For a large company like AT&T, it is likely that multiple officers will have to sign the form due to how the Commission worded the specific certifications.[23] Instead, the Commission should revise the proposed form to require just one officer signature, which is consistent with the *USF/ICC Transformation Order*. *See USF/ICC Transformation Order* at ¶ 581 (requiring "that an officer of the company certify to the accuracy of the information").

C. THE PROPOSED INFORMATION COLLECTION ASSUMES THAT CARRIERS HAVE ALREADY COLLECTED THESE DATA DESPITE THE FACT THAT THE COMMISSION HAS NOT SOUGHT AND RECEIVED OMB APPROVAL.

There is no question that the Commission has not sought OMB approval for a number of items contained in proposed FCC Form 481. Specifically, the Commission has not sought approval for the reporting requirements set forth in section 54.313(a)(7)-(11). It is important to note that when the Commission sought OMB approval for the reporting requirements contained in section 54.313(a)(1)-(6), those paragraphs required high-cost recipients to provide responsive information for voice services only. It was not until March of this year – one year after the

[23] For example, the proposed service quality and consumer protection certification requires the signature of an individual whose "responsibilities include ensuring compliance with the applicable service quality standards as well as the consumer protection rules." FCC Form 481 at 4. That individual most likely will be different from the officer required to sign the proposed emergency functionality certification, which requires the individual to certify that his/her "responsibilities include ensuring compliance with the requirement[] . . . that the carrier be able to function in emergency situations." FCC Form 481 at 5.

Commission sought OMB approval of section 54.313(a)(1)-(6) – that the Bureau revised section 54.313(a) to clarify that any high-cost recipient must provide information and data required by paragraphs (a)(1)-(7) separately broken out for both voice and broadband service. *March 2013 Order* at ¶ 14. Until the *March 2013 Order*, section 54.313(a)(11) was the paragraph that required high-cost recipients to provide the information required by paragraphs (a)(1)-(7) separately broken out by voice and broadband service. Consequently, the Commission has yet to seek OMB approval for requiring high-cost recipients to provide broadband data for paragraphs (a)(1) through (7).

Just as there is no question about which paragraphs in section 54.313 the Commission has not sought PRA approval, there also is no doubt that, until the Commission obtains such approval, those requirements are not effective. *See USF/ICC Transformation Order* at ¶ 1428 ("The rules that contain information collections subject to PRA review WILL BECOME EFFECTIVE following approval by the Office of Management and Budget.") (emphasis in original)). It is well-settled that the Commission lacks authority to compel parties to collect information prior to the Commission obtaining OMB approval for that information collection and prior to the rule becoming effective.[24]

In addition to not having obtained OMB approval to require high-cost recipients to report broadband data for section 54.313(a)(1)-(7), the Commission also does not have approval for its Tribal engagement rule (section 54.313(a)(9)) or its rate comparability certification for voice services (section 54.313(a)(10)). *See, e.g.,* FCC Form 481 at 7, 9, 10. For this reason, the

[24] *See, e.g., Saco River Cellular, Inc v. FCC*, 133 F.3d 25, 32 (D.C. Cir. 1998) (an "agency may not, having belatedly gotten OMB approval of an information collection requirement, punish a respondent for its faulty compliance while the collection was still unauthorized.").

Commission cannot certify to OMB that the proposed information collection contained in FCC Form 481 is consistent and compatible with the "*existing* reporting and recordkeeping practices of those who are to respond." *See* 44 U.S.C. § 3506(c)(3)(E) (emphasis added). To the contrary, requiring high-cost recipients to provide broadband data for section 54.313(a)(1)-(7) and documents demonstrating compliance with section 54.313(a)(9) on July 1, 2013, for example, would turn the purpose of the PRA on its head by ostensibly requiring parties to have collected this information before the Commission even sought OMB approval. Just as it did in its *March 2013 Order* with respect to revised section 54.313(a)(11), which requires broadband performance testing, the Commission should confirm that no high-cost carrier has any obligation to comply with a rule containing an information collection subject to PRA review until OMB approves the collection and the rule becomes effective.[25] Consequently, the Commission should not submit for OMB approval those pages of its proposed FCC Form 481 and instructions that would have high-cost recipients report information required by rules that are not in effect.

[Remainder of page left intentionally blank]

[25] *See March 2013 Order* at ¶ 16.

III. CONCLUSION

AT&T urges the Commission to modify its proposed information collection consistent with our recommendations described above. By following these recommendations, the Commission will be in compliance with its PRA obligations, which will enable it to obtain OMB approval for the modified FCC Form 481.

Respectfully Submitted,

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April 26, 2013

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Proceeding

Name	Subject
10-90	In the Matter of Connect America Fund A National Brooadband Plan for Our Future High-Cost Universal Service Support. .

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ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 a 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

COMMENTS OF AT&T

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

AT&T Inc., on behalf of its operating affiliates (collectively, AT&T), hereby files these comments in support of USTelecom's most recent petition for reconsideration and clarification of the Commission's reporting requirements applicable to high-cost recipients.[1] Since December 2011, USTelecom and others have repeatedly sought timely reconsideration or clarification of the reporting requirements contained in section 54.313(a) of the Commission's rules.[2] Although the Commission has addressed discrete components of USTelecom's petitions beginning in May 2012, it has left unanswered fundamental challenges to this rule while seemingly expecting high-cost recipients to collect and file the challenged data as early as July 1, 2013.[3] AT&T urges the Commission to address the merits of USTelecom's petitions prior to requesting approval from the Office of Management and Budget (OMB) for its new high-cost reporting form, FCC Form 481.

Specifically, as USTelecom requests, the Commission should (1) clarify that high-cost recipients have no obligation to report information required by rules that are not yet in effect,[4] and (2) reconsider its decision to impose both broadband reporting obligations on high-cost

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[1] USTelecom's Petition for Reconsideration and Clarification and Comments in Response to Paperwork Reduction Act, WC Docket No. 10-90 et al. (filed April 4, 2013) (Petition).

[2] *See* Petition for Reconsideration of USTelecom, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (USTelecom First Reconsideration Petition); Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition for Reconsideration, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (Rural ILECs Reconsideration Petition); Petition for Clarification and Reconsideration or, in the Alternative, for Waiver of CTIA and USTelecom, WC Docket No. 10-90 et al. (filed June 25, 2012) (Joint Petition); Petition for Reconsideration and Clarification of USTelecom, WC Docket No. 10-90 et al., 4-16 (filed Aug. 20, 2012) (USTelecom Third Reconsideration Petition).

[3] *See, e.g.*, Draft Instructions to FCC Form 481 at 4-5 (stating that eligible telecommunications carriers (ETCs) are to file broadband data and Tribal engagement information beginning July 1, 2013), *available at* http://www.usac.org/_res/documents/hc/pdf/forms/draftfccform481_instructions.pdf.

[4] Petition at 15-16.

recipients whose support will be eliminated possibly as early as next year[5] and Tribal engagement obligations on non-Tribal Mobility Fund high-cost recipients.[6] We discuss these issues and others addressed in the Petition, below.

II. DISCUSSION

A. The Commission Cannot Compel Carriers to Collect and Report Information in Response to Rules That Are Not in Effect

There is no dispute that the Commission has not sought OMB approval for a number of the information collection and reporting requirements contained in section 54.313(a). In an order released a few weeks ago, the Wireline Competition Bureau (Bureau) confirmed that, to date, the Commission had only sought and received approval for section 54.313(a)(1) through (a)(6).[7] Just as there is no question about which paragraphs in section 54.313(a) the Commission has not sought Paperwork Reduction Act (PRA) approval, there also is no doubt that, until the Commission obtains such approval, those requirements are not effective.[8]

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[5] *Id.* at 7-11.

[6] *Id.* at 11-14.

[7] *See Connect America Fund*, WC Docket No. 10-90, Order, DA 13-1115, ¶ 3 (rel. May 16, 2013), *corrected by Erratum* (rel. May 29, 2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0529/DOC-321268A1.pdf. When the Commission sought OMB approval for the reporting requirements contained in section 54.313(a)(1)-(6) last March, those paragraphs required high-cost recipients to provide responsive information for voice services only. It was not until March of this year – one year later – that the Bureau revised section 54.313(a) to clarify that any high-cost recipient must provide information and data required by paragraphs (a)(1)-(7) separately broken out for both voice and broadband service. *Connect America Fund*, WC Docket No. 10-90 et al., Order, DA 13-332, ¶ 14 (rel. March 5, 2013) (*March 2013 Order*). Until the *March 2013 Order*, section 54.313(a)(11) was the paragraph that required high-cost recipients to provide the information required by paragraphs (a)(1)-(7) separately broken out by voice and broadband service. Thus, the Commission has yet to seek OMB approval for requiring high-cost recipients to provide broadband data for paragraphs (a)(1) through (7).

[8] *Connect America Fund*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 1428 (2011) (*USF/ICC Transformation Order*) ("The rules that

A cornerstone of administrative law is that an agency cannot compel an entity to comply with rules that are not in effect. Consequently, the Commission lacks authority to compel parties to collect information prior to the Commission obtaining OMB approval for that information collection and prior to the rule becoming effective.[9] Commission affirmation of such a fundamental principle should be unnecessary. Unfortunately, the Commission has muddied this otherwise clear principle through statements made in orders and reports that imply that parties are so obligated, and by proposing to require carriers to report on July 1, 2013, information pursuant to a collection requirement that is currently not in effect. For example, in an order issued last year, the Bureau stated that "ETCs are required to undertake their Tribal engagement obligations in 2012 after [the Office of Native Affairs and Policy (ONAP)] provides engagement process guidance, which will be the substance of the reporting beginning April 1, 2013 and annually thereafter."[10] In that same order, the Bureau also declared that "[b]eginning April 1, 2013, and annually thereafter, those ETCs must file such information [required pursuant to paragraphs 54.313(a)(1) through (a)(6)] broken out for both voice and broadband service."[11]

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contain information collections subject to PRA review WILL BECOME EFFECTIVE following approval by the Office of Management and Budget.") (emphasis in original)).

[9] *See, e.g.*, *Saco River Cellular, Inc v. FCC*, 133 F.3d 25, 32 (D.C. Cir. 1998) (an "agency may not, having belatedly gotten OMB approval of an information collection requirement, punish a respondent for its faulty compliance while the collection was still unauthorized.").

[10] *Connect America Fund*, WC Docket No. 10-90 et al., Order, DA 12-147, ¶ 11 (2012) (*February 2012 Order*). ONAP, the Bureau, and the Wireless Telecommunications Bureau issued Tribal engagement guidance last July. *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, DA 12-1165 (rel. July 19, 2012). USTelecom sought reconsideration and clarification of this public notice. *See* USTelecom Third Reconsideration Petition.

[11] *February 2012 Order* at ¶ 9 (citing 47 C.F.R. § 54.313(a)(11)).

While the Bureau subsequently changed the April 1 annual filing deadline to July 1 in response to USTelecom's request,[12] it has not qualified its previous statements about high-cost recipients being required to report broadband data as well as the results of their Tribal engagement obligations in 2013. In fact, with respect to the latter rule, Commission staff stated in March of this year that "[i]n 2013, ETCs will report for the first time on their compliance with the Tribal government engagement obligation . . . ."[13] Staff's proposed Form 481 also assumes that high-cost recipients will report broadband data and Tribal engagement information on July 1, 2013.[14]

Requiring high-cost recipients to submit broadband data in response to section 54.313(a)(1)-(7) and documents demonstrating compliance with section 54.313(a)(9) on July 1, 2013 would turn the purpose of the PRA on its head by ostensibly requiring parties to collect such information before the Commission even seeks OMB approval.[15] The Commission should

[12] *Connect America Fund*, WC Docket No. 10-90 et al., Third Order on Reconsideration, 27 FCC Rcd 5622, ¶¶ 9-10 (2012) (*Third Reconsideration Order*).

[13] Federal Communications Commission Office of Native American Affairs and Policy 2012 Annual Report at 5 (rel. March 20, 2013), *available at* http://transition.fcc.gov/cgb/onap/ONAP-AnnualReport03-19-2013.pdf. *See also* Letter from John Kuykendall, John Staurulakis, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 *et al.*, at 3 (filed Sept. 10, 2012) (stating that ONAP staff "explained that the pending [PRA] approval applies only to the obligation for ETCs to report as to how they have fulfilled the Tribal engagement requirement; it does not impact their responsibility to conduct the engagement.").

[14] *See, e.g.*, Draft Instructions to FCC Form 481 at 4 ("Beginning July 1, 2013, and annually thereafter, ETCs must separately file these data [i.e., section 54.313(a)(1)-(7)] for voice and broadband service, except that, at this time, ETCs are not required to submit outage information regarding their broadband service.") (further citations omitted), 5 ("Section 54.313(a)(9) requires ETCs, to the extent they serve Tribal lands, to undertake their Tribal engagement obligations pursuant to the Office of Native Affairs and Policy (ONAP) guidance.") (further citations omitted).

[15] The Commission's response to the current status of the Tribal engagement obligation cannot be that high-cost recipients were required to have discussions in 2012 with Tribal governments on Commission-specified topics because a "discussion" is not an "information collection," which requires OMB approval. It is inconceivable that an agency would have the authority to compel a party to have agency-specified discussions with another party even though it lacked the authority to require either party to report on those

grant the Petition and confirm that no party has any obligation to comply with a rule containing an information collection subject to PRA review until OMB approves the collection and the rule becomes effective.[16]

B. The Commission Should Reconsider Its Decisions to Impose Any Broadband Reporting Requirements on Non-CAF Phase II Recipients and Tribal Engagement Obligations on Non-Tribal Mobility Fund High-Cost Recipients

Prior to requesting OMB approval for any broadband reporting requirement and the Tribal engagement obligation, the Commission should address the merits of USTelecom's and other parties' challenges to these rules. Only after acting on USTelecom's petitions – which, if granted, would scale back the scope of these reporting rules – should the Commission request PRA approval. AT&T and other parties have addressed at length the deficiencies with these rules as adopted and we ask that the Commission incorporate by reference these pleadings.[17] While we do not repeat here all of our previously filed arguments, we do summarize several key points for the convenience of staff and other commenters.

1. Broadband Reporting Should Be Limited to CAF Phase II Recipients

The Commission asserts that requiring *all* high-cost recipients to report certain broadband-related data[18] is "necessary and appropriate" to "monitor progress in achieving our

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discussions. AT&T does not believe that such a strained interpretation of the PRA would withstand judicial review.

[16] *See March 2013 Order* at ¶ 16.

[17] *See* AT&T *USTelecom First Reconsideration Petition* Comments, WC Docket No. 10-90 et al. (filed Feb. 9, 2012); AT&T *Joint Petition* Comments, WC Docket No. 10-90 et al. (filed Aug. 6, 2012); AT&T *USTelecom Third Reconsideration Petition* Comments, WC Docket No. 10-90 et al. (filed Sept. 26, 2012); AT&T *PRA* Comments, WC Docket No. 10-90 et al. (filed April 26, 2013).

[18] These data include, among other things, the number of requests for broadband service that went unfulfilled during the prior calendar year, the number of broadband customer complaints per 1,000

broadband goals and to assist the FCC in determining whether the funds are being used appropriately."[19] However, this reasoning does not hold true for high-cost recipients whose existing high-cost support was designed and intended to achieve other objectives (such as the reduction of interstate switched access charges) and now is being eliminated. For reasons detailed in USTelecom's First Reconsideration Petition, its Joint Petition with CTIA and, most recently, in its Petition, extending broadband reporting obligations to these ETCs will provide the Commission with no insight into whether its "broadband goals" are being achieved or whether legacy funds "are being used appropriately." In other words, this information has no "practical utility," as that term is defined by OMB.[20]

If broadband reporting requirements were applied to price cap ETCs receiving frozen high-cost support or Connect America Fund (CAF) Phase I incremental support (collectively referred to by the Commission as "CAF Phase I support"), these ETCs would be required either to: (i) report broadband data for the entire study area; or (ii) develop the systems and processes to track and report broadband data only in those areas where the ETC is using CAF Phase I support for broadband deployment. Neither option is reasonable.

First, reporting broadband data on a study area basis would not provide the Commission with any meaningful information about the impact of support on achievement of its "broadband goals" or the "appropriate[]" use of CAF Phase I support, which are the justifications offered by the Commission for its reporting requirements. *USF/ICC Transformation Order* at ¶ 580.

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connections in the prior calendar year, as well as data on broadband service outages from the prior calendar year.

[19] *USF/ICC Transformation Order* at ¶ 580.

[20] *See, e.g.,* Petition at 7-11.

Requiring providers to report study-area wide data would artificially inflate the impact of CAF Phase I support insofar as only a small fraction of price cap ETCs' broadband investment will be funded with the limited amount of CAF dollars made available in Phase I. For example, even if a price cap carrier repurposes one-third of its frozen support in 2013 to broadband deployment (and two-thirds in 2014), the facilities funded by such dollars would pale in comparison to the amount of broadband facilities deployed using private investment.[21]

Assume a study area in which 95 percent of the housing units have access to wireline broadband that meets the Commission's definition of at least 4 Mbps downstream and 1 Mbps upstream – an assumption that would be consistent with the Commission's most recent analysis of broadband deployment nationwide.[22] Assume further that an ETC uses CAF Phase I support to construct broadband facilities to serve some segment of the 5 percent of housing units in the study area without broadband. If an ETC were required to report the number of broadband complaints per 1,000 connections under section 54.313(a)(4) for the entire study area, the majority of such complaints would involve broadband connections not constructed with CAF Phase I support. Thus, the complaint data being reported would tell the Commission nothing about the efficacy of its CAF Phase I program and thus has no practical utility. Similarly,

[21] The Columbia Institute for Tele-Information has estimated that broadband providers will invest more than $240 billion between 2008 and 2015, or approximately $30 billion annually. *See* Robert C. Atkinson & Ivy E. Schultz, Columbia Institute for Tele-Information, *Broadband in America*, Preliminary Report Prepared for the Staff of the FCC's Omnibus Broadband Initiative, at 66, Table 15 (Nov. 11, 2009). By contrast, the entire amount of CAF support that will be available in price cap territories is less than $2 billion annually. *USF/ICC Transformation Order* ¶ 126.

[22] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eighth Broadband Progress Report, FCC 12-90, ¶ 45 (2012).

reporting broadband outages at the study area level would provide the Commission with no indication about whether it is achieving its broadband goals and funds are being used appropriately.[23]

Second, broadband reporting targeted to the precise geographic areas where a price cap ETC uses CAF Phase I support for broadband deployment is impractical.[24] ETCs would have to expend resources to modify systems and procedures in order to track and report the information for just those connections constructed with CAF Phase I funds. The cost associated with the modifications required to produce data at such a granular level could be significant. Moreover, the estimated burden hours to collect such granular data could be exponentially larger than the 20 hours that the Commission proposed as being necessary, on average, to complete the entire FCC Form 481. *See* Draft Instructions to FCC Form 481 at 1.[25]

Furthermore, extending broadband data reporting requirements to the handful of price cap carriers electing CAF Phase I incremental support is unnecessarily duplicative of the other

[23] While the Bureau stated in March that it is not seeking PRA approval to collect broadband outage data "*at this time*," AT&T urges the Commission to clarify its rules to make clear that it will not require high-cost recipients to report broadband service outage information. *See March 2013 Order* at n.46 (emphasis added). *See also* Joint Petition at 6 (requesting that the Commission reconsider requiring high-cost recipients to provide broadband outage data).

[24] *See Connect America Fund*, WC Docket No. 10-90, Report and Order, FCC 13-73, n.70 (rel. May 22, 2013) (explaining that if a price cap carrier is not otherwise subject to high-cost reporting requirements, "receipt of Phase I incremental support triggers reporting requirements only with respect to those locations which the carrier seeks to count toward the satisfaction of its Phase I deployment obligations.").

[25] In comments filed last year, AT&T stated that one of its wireless affiliates that is a high-cost recipient required more than 45 hours to comply with the Commission's old high-cost reporting rules, which the Commission significantly expanded in its *USF/ICC Transformation Order*. *See* AT&T Comments, WC Docket No. 10-90 et al., at 12 (filed Feb. 9, 2012). This particular wireless affiliate had experience with the prior reporting rules but, even with that experience, still could not approach the estimated 20 hours proposed in FCC Form 481. Moreover, this affiliate reported data on an ETC service area-wide basis and did not have to devote significant resources toward identifying and collecting data on a relatively small number of specific locations for its annual report. Due to the new reporting requirements, it seems likely that this affiliate's estimated burden will be well north of 45 hours.

reporting requirements that govern such support. *See* 44 U.S.C. § 3506(c)(3)(B). Specifically, section 54.313(b) of the Commission's rules obligates a price cap carrier receiving CAF Phase I incremental support to file annual reports that include certifications to the effect that the carrier has met its deployment and related obligations associated with such support. These section 54.313(b) reports are more than adequate for the Commission to ensure that CAF Phase I incremental support is achieving the Commission's broadband goals and is being used appropriately.

2. Tribal Engagement Obligations Are Appropriate Only for Tribal Mobility Fund Recipients

Section 54.313(a)(9) of the Commission's rules requires all high-cost recipients to provide "documents or information demonstrating that the ETC had discussions with Tribal governments that, at a minimum, included: a needs assessment and deployment planning with a focus on Tribal community anchor institutions; feasibility and sustainability planning; marketing services in a culturally sensitive manner; rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and compliance with Tribal business and licensing requirements." 47 C.F.R. § 54.313(a)(9). Proposed FCC Form 481 requires high-cost recipients to attach a document "demonstrating that the ETC had operational coordination with tribal governments" consistent with the Commission's Tribal engagement rule. *See* Draft Instructions to FCC Form 481 at 24.

USTelecom, AT&T, and other parties have detailed how the Commission adopted this new reporting rule in violation of the Administrative Procedure Act because the Commission failed to "fairly apprise interested persons" that it was considering adopting these requirements and, importantly, the record on which the Commission relied in adopting this rule does not

support the Commission's decision to extend the rule to *all* high-cost recipients.[26] These parties also have explained how the current rule violates the First Amendment.[27] And, in its most recent petition, USTelecom again details why the Commission should modify the scope of this rule to comply with its PRA obligations.[28] AT&T agrees with USTelecom on all counts and urges the Commission reconsider its decision to impose the Tribal engagement obligation on all high-cost recipients.

The Commission's stated purpose in creating the Tribal engagement requirement is to facilitate "the successful deployment and provision of service" on Tribal lands in order to narrow the "deep digital divide" in those areas. *USF/ICC Transformation Order* at ¶¶ 636-37. To accomplish this goal, the Commission must, of course, provide "sufficient" high-cost support to providers in order to enable them to deploy and maintain broadband service in high-cost Tribal areas that are otherwise uneconomic to serve. *See* 47 U.S.C. § 254(e) (requiring support to be "explicit and sufficient to achieve the purpose of this section"). A carrier cannot be expected – or required – to deploy broadband service in such areas absent "specific, predictable, and sufficient" support. 47 U.S.C. § 254(b)(5). If the Commission fails to provide sufficient support to enable a carrier to deploy broadband service on high-cost Tribal lands, there is little point in mandating that the carrier commence broadband deployment discussions with the relevant Tribal government. As a consequence, the information collection required by section 54.313(a)(9) has

[26] *See, e.g.*, Petition at 13; USTelecom First Reconsideration Petition at 18; Rural ILECs Reconsideration Petition at 3-5; AT&T *USTelecom First Reconsideration Petition* Comments at 14-16.

[27] *See, e.g.*, USTelecom First Reconsideration Petition at 18-19; AT&T *USTelecom First Reconsideration Petition* Comments at 18-20.

[28] Petition at 11-14.

no practical utility except for Tribal Mobility Fund recipients, who will receive high-cost support for the sole purpose of deploying mobile broadband to unserved Tribal lands. *See, e.g.*, *USF/ICC Transformation Order* at ¶ 481.

There may be some logic to require entities that seek Tribal Mobility Fund support to show that they have complied with any validly adopted Tribal engagement rule.[29] But, that logic plainly does not apply to entities not seeking such support – irrespective of whether they receive support under other high-cost support mechanisms. Thus, for example, the Commission cannot reasonably justify requiring a large price cap carrier that only receives legacy interstate access support (IAS) (which was intended to replace the implicit subsidies in interstate access charges and not to provide supported services in particular high-cost areas) to document that it has had discussions with all Tribal governments in its large service area on, among other topics, "a needs assessment and deployment planning."

Applying the Tribal engagement requirement to any ETC whose high-cost support the Commission is eliminating (possibly, on a flash-cut basis beginning next year) seems similarly misguided.[30] 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 year or two. Given the circumstances, the Commission should expect these carriers to spend their high-cost support on maintaining, not

[29] *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, ¶ 6 (WTB rel. April 18, 2011).

[30] *USF/ICC Transformation Order* at ¶¶ 180, 519.

expanding, service.[31] The Commission has failed to explain what value there possibly could be in mandating that such carriers have discussions with Tribal governments on network deployment plans when the carriers likely have no such plans – or, at least, no such plans relying on high-cost support. In sum, we agree with USTelecom that "collecting and reporting information related to such discussions would have no practical utility [] if the ETC will not be receiving support for network deployments in a Tribal area." Petition at 12. For these reasons and others detailed in previously submitted pleadings, the Commission should reconsider the scope of its Tribal engagement rule and limit its application to Tribal Mobility Fund recipients only.

C. As Proposed on Draft FCC Form 481, the Commission's Pricing Information Collection Lacks Practical Utility and Does Not Minimize the Information Collection Burden on Respondents

USTelecom requests the Commission to reconsider or clarify the reporting requirements related to the prices of an ETC's voice and broadband service offerings, as reflected in the draft FCC Form 481 and instructions. Petition at 16-19. AT&T agrees. Among other things, the draft FCC Form 481 would require high-cost recipients to detail by town every rate offered to residential consumers for: standalone broadband; bundled broadband and voice; bundled broadband, voice, and video; and bundled broadband, voice, video, and mobile. Draft Instructions to FCC Form 481 at 20. To date, the Commission has not explained why collecting such granular broadband pricing data "is necessary for the proper performance of the functions of the agency." 44 U.S.C. § 3506(c)(3).

[31] Carriers are permitted to use high-cost support to maintain facilities and services. *See* 47 U.S.C. § 254(e) (requiring universal service support recipients to use that support for the "provision, *maintenance*, and upgrading of facilities and services for which the support is intended" (emphasis added)).

Until such time as the Commission makes broadband a supported service, it has no statutory obligation to ensure that broadband rates in rural and urban areas are "reasonably comparable" and thus collecting broadband pricing data from high-cost recipients has no practical utility. *See* 47 U.S.C. § 254(b)(3). This is particularly true with respect to the Commission's proposal to require high-cost recipients to file pricing information for bundled broadband offerings. At a minimum, the Commission should clarify that it will only require high-cost recipients to file standalone broadband rates.[32]

Proposed FCC Form 481 also seeks to collect detailed voice rate information from high-cost recipients. Draft Instructions to FCC Form 481 at 17-19. However, as USTelecom notes, the Commission has failed to minimize the burden of the proposed information collection on affected ETCs. Petition at 18. AT&T agrees with USTelecom that at least with respect to price cap carriers, most, if not all, of the proposed voice pricing information is already filed with the Commission. Specifically, as part of its ILECs' annual tariff filings, AT&T files detailed residential, local service voice pricing by exchange with the Commission. Requiring AT&T's ILECs to file almost identical information on FCC Form 481 is "unnecessarily duplicative of information otherwise reasonably accessible to the [Commission]." 44 U.S.C. § 3506(c)(3). On reconsideration, AT&T recommends that the Commission grant the Petition and permit high-cost recipients like AT&T's ILECs that already file the same or nearly identical information with the Commission to so indicate on Form 481 by checking a box in lieu of populating detailed Excel spreadsheets.

[32] *See also* Letter from Alan Buzacott, Verizon, to Marlene Dortch, FCC, WC Docket No. 10-90 et al., at 3-5 (filed May 3, 2013) (detailing other reasons why it is inappropriate for the Commission to require high-cost recipients to file broadband rates for anything other than standalone broadband).

III. CONCLUSION

USTelecom alone has filed four petitions of reconsideration and clarification of the Commission's high-cost reporting rules since December 2011. While the Commission has addressed a few of USTelecom's requests in the past year, its failure to resolve parties' fundamental challenges to the reporting rules has created confusion among the industry and state regulators. Various Commission statements about how broadband and Tribal engagement information is due on July 1, 2013 have exacerbated this confusion. Given the looming July 1 deadline, AT&T requests that the Commission promptly clarify that high-cost recipients will not have any obligation to report in 2013 information that is responsive to rules that are not currently in effect. Additionally, before the Commission seeks OMB approval for the remaining provisions of section 54.313(a), AT&T recommends that it address the pending petitions for reconsideration, which, if granted, will appropriately limit the applicability of any broadband and Tribal engagement reporting requirements.

Respectfully Submitted,

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June 3, 2013

Its Attorneys

Your submission has been accepted

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09-51	In the matter of a National Broadband Plan for Our Future.
07-135	In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers. .
05-337	In the Matter of Federal -State Joint Board on Universal Service High-Cost Universal Service Support. .. .
01-92	Developing a Unified Intercarrier Compensation Regime.
96-45	FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE
03-109	In the Matter of Lifeline and Link-Up
10-208	In the Matter of Universal Service Reform Mobility Fund.

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ATTACHMENT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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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 a 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

COMMENTS OF AT&T

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August 6, 2012

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	)	
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	)	
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	)	
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

COMMENTS OF AT&T

I. INTRODUCTION AND SUMMARY

AT&T Inc. ("AT&T"), on behalf of its operating affiliates, respectfully submits these comments in support of the petition for clarification and reconsideration or, in the alternative, for waiver filed by CTIA – The Wireless Association® ("CTIA") and the United States Telecom Association ("USTelecom") (collectively "Petitioners") regarding the new universal service reporting requirements established by the Commission in connection with the Connect America Fund ("CAF"). AT&T agrees with the Petitioners that the Commission should revisit 47 C.F.R. § 54.313 – an ambiguous rule that should not be construed to impose broadband reporting

obligations on eligible telecommunications carriers ("ETCs") whose universal service support is being eliminated.

In seeking to justify its new broadband reporting requirements, the Commission reasoned that the information being reported is "necessary and appropriate 'to ensure the continued availability of high-quality voice services and monitor progress in achieving our broadband goals and to assist the FCC in determining whether the funds are being used appropriately.'"[1] However, this reasoning does not hold true for ETCs whose support is being eliminated. For reasons explained in USTelecom's initial petition for reconsideration[2] and, subsequently, in its joint petition filed with CTIA,[3] extending broadband reporting obligations to ETCs will provide the Commission with no insight into whether its "broadband goals" are being achieved or whether legacy funds "are being used appropriately."

Accordingly, for the reasons explained in the Joint Petition and below, the Commission should grant the request for clarification and reconsideration or, in the alternative, for waiver.

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[1] *Connect America Fund,* WC Docket No. 10-90, Third Order on Reconsideration, FCC 12-52, ¶ 7 (rel. May 14, 2012) ("*Third Reconsideration Order*") (quoting *Connect America Fund,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 580 (2011) ("*USF/ICC Transformation Order*") *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011)).

[2] Petition for Reconsideration of the United States Telecom Assoc., CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51; WC Docket Nos. 03-109, 05-337, 07-135, 10-90; WT Docket No. 10-208 (filed Dec. 29, 2011) ("Petition").

[3] Petition for Clarification and Reconsideration or, in the Alternative, for Waiver of CTIA – The Wireless Association® and the United States Telecom Association, WC Docket No. 10-90 et al. (filed June 25, 2012) ("Joint Petition").

II. THE COMMISSION SHOULD RECONSIDER OR CLARIFY THAT BROADBAND REPORTING OBLIGATIONS DO NOT APPLY TO ETCS RECEIVING LEGACY SUPPORT (SO-CALLED CAF PHASE I FROZEN SUPPORT) OR CAF PHASE I INCREMENTAL SUPPORT.

AT&T agrees with Petitioners that the Commission should reconsider or clarify 47 C.F.R. § 54.313(a)(11), which purports to extend to broadband services the general reporting requirements in section 54.313(a)(1)-(7) (which, with the exception of subsection (7), previously were contained in former section 54.209(a)(1)-(6)) and applied only to voice services provided by common carriers designated as ETCs by the Commission). Extending these reporting requirements to broadband makes no sense and would create conflicts with other Commission decisions, for the reasons explained in the Joint Petition.[4]

At the very least, the Commission should limit any broadband reporting requirements to ETCs receiving CAF Phase II support. Extending broadband reporting requirements to price cap ETCs that receive legacy support (so-called CAF Phase I frozen support) or even CAF Phase I incremental support cannot be reconciled with the Commission's rationale for adopting such requirements in the first place.

If broadband reporting requirements were applied to price cap ETCs receiving frozen high-cost support or CAF Phase I incremental support, these ETCs would be required either to: (i) report broadband data for the entire study area; or (ii) develop the systems and processes to

[4] *See* Joint Petition at 5-7. To take but one example, section 54.313(a)(5) requires an ETC to certify that "it is complying with applicable service quality standards and consumer protection rules." For voice services subject to state regulation, such a certification may be understandable, but that is not the case for broadband services. Because broadband Internet access services are interstate in nature, *see, e.g., GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No*. 1148, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 16 (1998), *recon. denied*, 17 FCC Rcd 27409 (1999), states would have no authority to establish "service quality standards" for broadband. And, while the Commission established speed and latency "performance metrics" for broadband, *USF/ICC Transformation Order* ¶¶ 90-96, there are no "service quality standards" applicable to broadband at the federal level.

track and report broadband data only in those areas where the ETC is using CAF Phase I support for broadband deployment. Neither option is reasonable.[5]

First, reporting broadband data on a study area basis would not provide the Commission with any meaningful information about the achievement of its "broadband goals" or the "appropriate[]" use of frozen support, which are the justifications offered by the Commission for its reporting requirements.[6] Study-area wide data would skew the impact of CAF Phase I support because only a fraction of a price cap ETC's broadband facilities will have been deployed using such support. For example, even if a price cap carrier is repurposing one-third of its frozen support in 2013 to broadband deployment (and two-thirds in 2014), the amount of broadband facilities deployed with those dollars would pale in comparison to the amount of broadband facilities deployed through private investment.[7]

Assume a study area in which 95 percent of the housing units have access to wireline broadband that meets the Commission's definition of at least 4 Mbps downstream and 1 Mbps upstream – an assumption that would be consistent with the Commission's most recent (albeit dated) analysis of broadband deployment nationwide.[8] Assume further that an ETC uses CAF

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[5] The concerns we describe below apply equally to the new *voice* reporting requirements. For this reason and others, the Commission should reevaluate its decision to apply any part of the new reporting rules to frozen high-cost support recipients.

[6] *Third Reconsideration Order* ¶ 7

[7] The Columbia Institute for Tele-Information has estimated that broadband providers will invest more than $240 billion between 2008 and 2015, or approximately $30 billion annually. *See* Robert C. Atkinson & Ivy E. Schultz, Columbia Institute for Tele-Information, *Broadband in America*, Preliminary Report Prepared for the Staff of the FCC's Omnibus Broadband Initiative, at 66, Table 15 (Nov. 11, 2009). By contrast, the entire amount of CAF Phase I frozen high cost support available to price cap carriers is less than $2 billion annually. *USF/ICC Transformation Order* ¶ 126.

[8] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, ¶ 1 (2010).

Phase I frozen support or CAF Phase I incremental support to construct broadband facilities to serve some segment of the 5 percent of housing units in the study area without broadband. If an ETC were required to report the number of broadband complaints per 1,000 connections under section 54.313(a)(4) for the entire study area, as an example, the majority of such complaints would involve broadband connections not constructed with CAF Phase I support. Thus, the complaint data being reported would tell the Commission nothing about the efficacy of its CAF Phase I program.[9]

The same would be true for information regarding the "number of requests for service … that were unfilled during the prior calendar year," which is information that an ETC must report under section 54.313(a)(3). The vast majority of requests for broadband service likely would be in those areas where most households already have access to the service – households to which broadband was deployed using private investment, not CAF Phase I support.

Second, broadband reporting targeted to the precise geographic areas where a price cap ETC uses CAF Phase I frozen support or CAF Phase I incremental support for broadband deployment is impractical. ETCs would have to expend significant resources to modify systems and procedures in order to track and report the information ostensibly required by section 54.313(a)(11) for just those connections constructed with CAF Phase I funds. The expense associated with these modifications required to produce data at such a granular level would be significant. If that was the Commission's intent, the Commission was obligated to perform a

[9] The General Accounting Office has questioned the need for the Commission's collection of data related to the universal service program absent "a specific data-analysis plan for the carrier data it will collect" and a clear indication of how "the FCC plans to use the data." United States Government Accountability Office, "Telecommunications – FCC Has Reformed the High-Cost Program, but Oversight and Management Could be Improved, at 20 (July 2012). Not only has the Commission failed to explain how it would or could use a carrier's study area-wide voice or broadband data, for example, to evaluate the efficacy of its high-cost programs, AT&T does not believe it could ever make such a demonstration.

cost/benefit analysis consistent with President Obama's directives, which the agency failed to do.[10] It also failed to include the time and expense associated with the tracking and reporting of data only for those broadband connections constructed with CAF Phase I funds in its request for OMB approval, which violates the Paperwork Reduction Act ("PRA").[11]

Furthermore, extending broadband data reporting requirements under section 54.313(a)(11) to those handful of price cap ETCs electing CAF Phase I incremental support is unnecessary in light of the other reporting requirements that govern such support. Specifically, section 54.313(b) of the Commission's rules obligates a price cap ETC receiving CAF Phase I incremental support to file annual reports that include certifications to the effect that the ETC has met its deployment and related obligations associated with such support. These section 54.313(b) reports – and not the data ostensibly required under section 54.313(a)(11) – are more than adequate for the Commission to ensure that CAF Phase I incremental support is achieving the Commission's broadband goals and is being used appropriately.

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[10] In January 2011, President Obama released Executive Order 13563 that called on all executive agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)." Executive Order, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order. In July 2011, the President took this burden-reducing initiative a large step further by calling on independent regulatory agencies – including the FCC – to follow these same requirements. Executive Order 13579, *Regulation and Independent Regulatory Agencies* (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies.

[11] The PRA requires OMB to "minimize" the burden of a proposed information collection and "maximize the practical utility of and public benefit from information collected," which necessitates that the Commission provide accurate burden estimates associated with any proposed information collection. *See* 44 U.S.C. §§ 3501(1), (2) & 3504(c)(3), (4); *see also* 5 C.F.R. § 1320.1 (noting that OMB's rules aim to "to reduce, minimize and control burdens and maximize the practical utility and public benefit" of information collected by the Federal Government). The term "burden" is broadly defined to include all of the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency." 44 U.S.C. § 3502(2).

III. THE COMMISSION SHOULD REVISIT THE FIVE-YEAR SERVICE QUALITY IMPROVEMENT PLAN FILING AND RELATED REPORTING REQUIREMENTS FOR NON-CAF PHASE II RECIPIENTS.

For the reasons previously explained by USTelecom and CTIA,[12] AT&T agrees that the Commission should not require an ETC – other than an ETC receiving CAF Phase II support – to file a five-year service quality improvement plan or related progress reports. The Commission's rules do not require a common carrier designated as an ETC by a state public service commission to have a five-year build-out plan. Furthermore, it is utterly nonsensical to require any ETC whose universal service support is being eliminated in less than five years to: (i) develop a five-year plan detailing "with specificity proposed improvements or upgrades" to its network, including estimates of the "area and population" to be served by such improvements or upgrades; or (ii) file reports at the wire center or census block level "detailing its progress towards meeting its plan targets" and explaining how such support "was used to improve service quality, coverage, or capacity."[13] Such requirements would be regulatory overkill and would contravene the stated goals of the Obama Administration and the Commission to reduce regulatory burdens and costs on the private sector.[14]

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[12] Petition at 15-17; Joint Petition at 10-18; *see also* Comments of AT&T, WC Docket No. 10-90, at 9-13 (filed Feb. 9, 2012) ("AT&T Comments").

[13] 47 C.F.R. § 54.202(a)(1)(ii); 47 C.F.R. § 54.313(a)(1).

[14] President Barack Obama, "Toward a 21st Century Regulatory System," *Wall Street Journal*, January 18, 2011 (stressing the importance of "getting rid of absurd and unnecessary paperwork requirements that waste time and money") (*available at* http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html); Remarks by President Obama to the Chamber of Commerce, U.S. Chamber of Commerce Headquarters, Washington, D.C., February 7, 2011 (emphasizing the commitment to "cutting down on the paperwork that saddles businesses with huge administrative costs") (*available at* http://www.whitehouse.gov/the-pressoffice/2011/02/07/remarks-president-chamber-commerce); *Reporting Requirements for U.S. Providers of International Telecommunications Services*, First Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 7274 (2011) (Statement of Chairman Julius Genachowski) (noting the need to "streamline and modernize the Commission's rules and reduce unneeded burdens on the private sector").

Confronted with the loss of all high-cost support in a few years and no expectation that they will ever again receive new high-cost support under the new CAF mechanisms, the Commission should not be surprised if competitive ETCs use an increasing percentage – if not all – of their decreasing frozen support for the "maintenance" of supported facilities. *See* 47 U.S.C. § 254(e). By statute, maintaining supported facilities is an appropriate use of high-cost funding, and nothing in section 254 or the Commission's rules would preclude a competitive ETC from using high cost support to maintain existing infrastructure rather than to deploy new facilities.[15]

Under the circumstances, it would serve no purpose in having a competitive ETC submit a "service quality improvement plan" describing proposed network improvements or upgrades over a five-year period when they are likely to have none. As AT&T has noted previously, one of its competitive ETC affiliates receives only about $90,000 annually in interstate access support ("IAS"), which it will lose in 20 percent increments each year beginning July 1, 2012.[16] No possible regulatory interest or public benefit would be served by requiring such a competitive ETC to submit a five-year plan when it is likely to use that *de minimis* (and now shrinking) amount toward maintaining existing facilities, rather than investing in network upgrades or improvements.

The same is true for price cap ETCs that stand to lose *all* of their legacy support on a flash-cut basis beginning sometime in 2013.[17] Again, there is no value in having these ETCs

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[15] 47 C.F.R. § 54.201(d) ("A common carrier designated as an eligible telecommunications carrier ... shall be eligible to receive universal service support in accordance with section 254 …").

[16] AT&T Comments at 10.

[17] *USF/ICC Transformation Order* ¶ 180. USTelecom has requested that the Commission reconsider its decision to adopt a flash-cut approach to eliminating existing legacy support in connection with the implementation of CAF Phase II. Petition at 5-8. That request remains pending before the Commission.

submit a five-year service quality improvement plan next year to document their use of universal service support they may never receive.

In the event a price cap ETC accepts the state-level commitment for CAF Phase II support, it makes sense that it would submit a five-year plan and associated progress reports.[18] However, that is not the case for ETCs whose support is being eliminated, and the Commission should clarify, reconsider, or waive its rules accordingly.

The Commission also should clarify, reconsider, or waive its rules that purport to obligate the handful of price cap ETCs receiving CAF Phase I incremental support to submit a five-year service quality improvement plan. These ETCs will receive a defined amount of support by the end of 2012 in exchange for deploying broadband to a certain number of locations no later than July 24, 2015. 47 C.F.R. §§ 54.312(b)(4), 54.313(b). Because price cap ETCs receiving CAF Phase I incremental support are under no obligation to expend private resources to deploy broadband to additional locations, there would be nothing for these ETCs to report in years 4 and 5 of any five-year plan.

Even if there were a legitimate reason to require ETCs whose support is being eliminated to develop a five-year plan and file related progress reports, which there is not, the Commission failed to seek or obtain necessary OMB approval to impose such requirements on *every* ETC receiving high-cost support. Although the Commission claims that it "sought and has received OMB approval" for "extending section 54.313(a)(1)-(6)'s new reporting requirements to state-

[18] On the other hand, other section 54.313(a) reporting requirements do not make sense even for CAF Phase II support recipients (e.g., requiring a price cap carrier to report on consumer complaints on a study area-wide basis would result in a carrier over-reporting the number of complaints, but requiring the carrier to track and report this information for just those census blocks where the carrier is receiving CAF Phase II support would be extremely expensive and burdensome). Consequently, AT&T recommends that the Commission factor in the concerns we describe above in Section II when finalizing its CAF Phase II rules.

designated ETCs," *Third Reconsideration Order* ¶ 9, nothing in these rules obligates a state-designated ETC to prepare a five-year "service quality improvement plan" or to submit progress reports for a five-year plan that does not exist. Rather, section 54.313(a)(1) requires a "recipient of high-cost support" to file progress reports with respect to "its five-year service quality improvement plan pursuant to § 54.202(a) …." As USTelecom and CTIA correctly point out in their Joint Petition, section 54.202(a) only obligates a common carrier seeking designation by the Commission as an ETC to file a five-year plan.[19]

Furthermore, it is abundantly clear from the supporting statement submitted by the Commission to OMB in connection with the proposed information collection that the Commission did not request – and OMB did not approve – any requirement for state-designated ETCs to develop five-year build-out plans. According to the Commission:

> The order extends current federal annual reporting requirements to all ETCs, including those designated by states. *Specifically, the order requires that all ETCs must include in their annual reports the information that is currently required by section 54.209(a)(1)-(a)(6)* — specifically, a progress report on their five-year build-out plans; data and explanatory text concerning outages; unfulfilled requests for service; complaints received; certification of compliance with applicable service quality and consumer protection standards; and certification of its ability to function in emergency situations. All ETCs that receive high-cost support will file this information with the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate.[20]

Nowhere in this discussion (or anywhere else in the Commission's supporting statement) is any mention of a requirement for all state-designated ETCs to develop five-year build-out plans. Indeed, section 54.209(a)(1)–(6) referenced in the Commission's supporting statement to OMB

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[19] Joint Petition at 11-12 (citing 47 C.F.R. § 54.202(a)(1)(ii)).

[20] Supporting Statement, 3060-0986 (March 2012) at 4 (available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201201-3060-006; *see also id.* at 6 ("All ETCs must include in their annual reports the information that is currently required by section 54.209(a)(1)-(a)(6) — specifically, a progress report on their five-year build-out plans …").

did not obligate ETCs designated by the Commission to prepare a five-year build-out plan; rather that obligation is contained in section 54.202(a)(1)(ii), which plainly applies only to Commission-designated ETCs.

In short, the Commission sought and received OMB approval to require all ETCs to file annual reports that included the information previously required under section 54.209(a)(1)-(a)(6), which would include a progress report on an existing five-year build-out plan. However, the Commission did not seek and OMB did not approve any requirement that all state-designated ETCs prepare for the first time a five-year build-out plan. Accordingly, in the absence of PRA compliance, the Commission must clarify, reconsider, or waive this requirement.

IV. THE COMMISSION SHOULD CLARIFY THE REPORTING AND CERTIFICATION REQUIREMENTS FOR ETCS RECEIVING IAS.

As explained in the Joint Petition, carriers receiving IAS use that support to lower interstate access charges in accordance with the Commission's *CALLS Order*.[21] As the Commission has found, the purpose of IAS "is to provide explicit support to replace the implicit universal service support in *interstate* access charges," and thus "provides support to carriers serving lines in areas where they are unable to recover their permitted revenues from the newly revised SLCs."[22]

Because IAS is used to lower SLC rates consistent with Commission requirements, the Commission could not lawfully impose its new reporting and certification requirements on ETCs whose only high-cost support is in the form of IAS. For example, requiring an ETC that receives

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[21] Joint Petition at 18-19; *see also Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, ¶ 30 (2000) ("*CALLS Order*").

[22] *CALLS Order* ¶¶ 185 (emphasis in original), 195.

only IAS to submit a five-year plan on July 1, 2013, that "describes with specificity proposed improvements or upgrades to [its] network throughout its ... service area" ignores the purpose of IAS, which is to support universal service by lowering SLC rates, not fund network improvements or upgrades.[23] Similarly, requiring such ETCs to report outage information, number of unfulfilled service requests and, among others, customer complaints per 1,000 connections for both voice and broadband cannot be reconciled with the purpose of IAS.

Importantly, in its *USF/ICC Transformation Order*, the Commission did not direct IAS recipients to cease using this support in accordance with its rules promulgated in the *CALLS Order*. To the contrary, the Commission stated in the section titled, "*No Effect on Interstate Rates*" that, "for purposes of calculating interstate rates" a price cap carrier's frozen IAS "will be treated as IAS for purposes of our existing rules."[24] Thus, the Commission's reporting requirements cannot reasonably be extended to ETCs receiving only IAS, since this support mechanism is not intended, for example, to enable the Commission to "achiev[e] [its] broadband goals."[25]

Furthermore, although not intended for that purpose, unless IAS is excluded from the Commission's new certification requirements, 47 C.F.R. § 54.313(c)(2)-(4), ETCs receiving only IAS would be compelled to begin allocating increasingly larger portions of that support to broadband deployment. Under such circumstances, the Commission should expect these carriers "to raise their SLCs, presubscribed interexchange carrier charges, or other interstate rates," *USF/ICC Transformation Order* ¶ 152, because, as USTelecom correctly notes, these carriers

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[23] 47 C.F.R. § 54.202(a)(1)(ii) (referenced in section 54.313(a)(1)). *See also USF/ICC Transformation Order* at ¶ 587 (requiring "all ETCs to file a new five-year build-out plan in a manner consistent with 54.202(a)(1)(ii)").

[24] *USF/ICC Transformation Order* ¶ 152.

[25] *Third Reconsideration Order* ¶ 7.

cannot be directed to spend this money twice: once for broadband deployment and once for access charge replacement. Petition at 19.

V. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition for Clarification and Reconsideration or, in the Alternative, for Waiver.

Respectfully Submitted,

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Your submission has been accepted

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05-337	In the Matter of Federal -State Joint Board on Universal Service High-Cost Universal Service Support. .. .
01-92	Developing a Unified Intercarrier Compensation Regime.
96-45	FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE
03-109	In the Matter of Lifeline and Link-Up
10-208	In the Matter of Universal Service Reform Mobility Fund.

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ATTACHMENT 4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 a 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

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February 9, 2012

not.[32] Those parties have supplied copious legal and policy analyses on both sides of these ETC issues, and little would be gained by waiting for yet another round of notice and comment. Instead, the record on these ETC issues is complete, and the Commission should decide them now.

B. The Commission's New High-Cost Reporting Requirements Violate The Administrative Procedure Act And The Paperwork Reduction Act, Are Unnecessarily Burdensome And Unlawful, And Must Be Rejected.

Numerous petitioners identified fundamental flaws in the Commission's new reporting rule, section 54.313.[33] AT&T agrees with these petitioners and urges the Commission to reconsider this new reporting rule by limiting its application to only those ETCs that affirmatively seek new CAF support. And even for that class of ETC, the Commission should make significant alterations to the rule before it allowing it to become effective. The Wireline Competition Bureau and the Wireless Telecommunications Bureau's recent order clarifying aspects of the Commission's new ETC reporting rule[34] is a good start but, as we discuss below, the Commission should go further.

1. The Commission Should Not Apply Its New Reporting Requirements To Recipients Of Legacy High-Cost Support.

New section 54.313 requires every ETC that receives any high-cost support to comply with burdensome new reporting requirements, regardless of whether and how quickly the ETC

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[32] *See, e.g.*, AT&T *USF/ICC Transformation NPRM* Reply Comments, WC Docket Nos. 10-90 *et al.*, at 42-47 (filed May 23, 2011) (discussing comments on both sides).

[33] 47 C.F.R. § 54.313. *See* USTelecom Petition at 15-22; NECA Petition for Reconsideration at 22-25; Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition for Reconsideration; Alaska Rural Coalition (ARC) Petition for Reconsideration at 16-18.

[34] *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Order, DA 12-147 (WCB/WTB rel. Feb. 3, 2012) (*USF Reporting Clarification Order*).

will lose that support. In contravention of Executive Order 13579, which requires the Commission to make regulatory decisions "only after consideration of their costs and benefits (both qualitative and quantitative),"[35] the Commission failed to undertake any cost/benefit analysis prior to adopting this new rule.[36] If it had, it necessarily would have concluded the costs of requiring ETCs whose support the Commission is eliminating far exceed any conceivable benefit from requiring them, for example, to prepare and submit a five-year build-out plan by April 1, 2013.[37] AT&T notes in this regard that one of its competitive ETC affiliates receives only about $90,000/year in interstate access support (IAS), which it will lose in 20 percent increments each year beginning July 1, 2012.[38] Likewise, AT&T's ILEC affiliates could lose all of their support in a flash-cut as early as 2013. *See Order* at ¶ 180. What possible sense could it make for such providers to detail at a wire center level how they intend to use their ever-diminishing or, in some cases, soon-to-be-nonexistent support to "improve service quality, coverage, or capacity"?[39]

The Commission appears to have imposed the new ETC reporting requirements on all recipients of high-cost support in order to ensure that the cost (in time and resources) of

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[35] Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011).

[36] USTelecom Petition at 15.

[37] *Id.* (citing *Order* at ¶ 587).

[38] *Order* at ¶ 519.

[39] 47 C.F.R. §54.313(a)(1). In its recent *USF Reporting Clarification Order*, the Bureaus introduced ambiguity about the extent of a competitive ETC's broadband obligations. While clear from the *Order* that competitive ETCs whose support is being phased down have *no* broadband obligations (*Order* at n.172), the Bureaus assert that such competitive ETCs must nonetheless submit a five-year plan on April 1, 2013 "that accounts for the new broadband obligations." *USF Reporting Clarification Order* at ¶ 6. The Commission should clarify that the Bureaus were mistaken to infer that competitive ETCs whose support is being phased down have any broadband obligations, including any broadband reporting obligations.

complying with those requirements does not disproportionately burden some recipients.[40] But, plainly, not all recipients of high-cost support are similarly situated, and it thus would not violate competitive neutrality principles to impose different reporting requirements on different support recipients depending on the support they receive. In AT&T's view, the Commission should apply its new reporting requirements only to recipients that have affirmatively sought and received high-cost support awarded through one of the Commission's new permanent funding mechanisms (e.g., CAF Phase II, Mobility Fund Phase II). By contrast, recipients of legacy high-cost support (i.e., support that the Commission is eliminating), should continue to adhere to whatever reporting rules applied to them prior to the effective date of the *Order* as they ride down their support.

Even if there were a legitimate reason to impose such a reporting requirement on ETCs whose support the Commission is eliminating, which there is not, the Commission failed to seek necessary Office of Management and Budget (OMB) approval to extend its preexisting ETC reporting requirements to *every* ETC that receives any high-cost support.[41] Moreover, as USTelecom explains, the previous Commission reporting requirements applied only to ETCs designated by the Commission so when the Commission originally sought and received OMB approval in 2005 for the reporting rule, it anticipated that only 22 carriers would be affected.[42]

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[40] *USF/ICC Transformation NPRM* at ¶ 459 (seeking comment on "how to transition from the current reporting requirements to more competitively neutral reporting requirements that would apply to all high-cost and CAF recipients").

[41] USTelecom Petition at 16.

[42] *Id.*

Extending this rule to over *60 times* that number (about 1,400 carriers) clearly is a "material modification" that requires OMB approval,[43] which the Commission failed to obtain.

Assuming the Commission will seek to remedy these procedural deficiencies by requesting OMB approval for these new reporting requirements, the Commission must revisit its estimate of the average number of hours it claims respondents require to comply with the reporting rule. In 2005, when it adopted the existing rule, the Commission estimated that affected ETCs would require, on average, 11 hours to compile the information required in section 54.209 (much of which has been incorporated into section 54.313).[44] That estimate was woefully unrealistic in 2005 and it remains so. Last year, just one of AT&T's wireless affiliates required *at least* 4 times that amount of time to comply with section 54.209. While we have not calculated how long it took other AT&T affiliates to comply, the Commission's current estimate, which does not account for the additional burdens imposed under the new rules, plainly is incorrect. Having failed to consider, much less quantify, the cost – in time and resources – of complying with the new ETC reporting requirements, the Commission had no basis for its blithe conclusion that the benefits of its new ETC reporting rules outweigh "the imposition of *some additional time and cost* on individual ETCs." *Order* at ¶ 575 (emphasis added).

We agree with USTelecom that the Commission's reporting requirements suffer from other Paperwork Reduction Act (PRA) infirmities as well. For example, the Commission failed to ensure that its data collections "minimize the burden . . . on those who are to respond."[45] If

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[43] *Id.*

[44] *Id.* at n.31.

[45] *Id.* at 16-17 (further citations omitted). *See also Order*, App. O at ¶ 114 (incorrectly stating that the "Order seeks to minimize reporting burdens where possible by requiring certifications rather than data

the Commission had performed the requisite analysis, it would have, among other things, eliminated its ETC outage reporting requirement. The Commission already receives carrier-supplied outage information and it is unclear why the Commission finds this other outage information collection inadequate.[46]

2. The Commission Should Clarify That It Intended To Preempt Existing State ETC Reporting Requirements.

AT&T agrees with USTelecom that the Commission should clarify that it intended to preempt existing state reporting requirements that are applicable to ETCs that will have to comply with the new federal reporting requirements.[47] Absent this relief, many ETCs will be subjected to different reporting requirements at different times of the year. And, in some cases, ETCs may have to collect similar information (e.g., outage information) in a different manner to account for divergent federal and state reporting standards. As USTelecom explains, affected ETCs will not experience any reduced "regulatory compliance costs" – a stated benefit of the Commission's new "uniform reporting and certification framework" – unless the Commission preempts state reporting requirements.[48]

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collections and by permitting the use of reports already filed with other government agencies, rather than requiring the production of new ones.").

[46] In its 2005 *ETC Report and Order*, the Commission stated that it wanted to track ETC outage information based on a 10 percent customer threshold "because populations can vary." *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, n.194 (2005) (*ETC Report and Order*). If the Commission believes it needs to maintain this separate standard to capture outages by small providers that would not otherwise submit network outage information to the Commission pursuant to the thresholds contained in section 4.9 of its rules, then it should refine the rule to target only those ETCs serving small populations.

[47] USTelecom Petition at 17. Again, as we note above, AT&T recommends that the Commission maintain the reporting status quo for those ETCs whose high-cost support the Commission is eliminating.

[48] *Id.* (quoting *Order* at ¶ 575).

In fact, it appears that the Commission intended to supplant existing state ETC reporting requirements. Among other things, the Commission asserted that, with its new uniform framework, "ETCs should be able to implement uniform policies and procedures in all of their operating companies to track, validate, and report the necessary information."[49] The Commission also was very clear that, in order for a state to impose additional regulations to preserve and advance universal service, it must adopt a mechanism to support those additional requirements, and states' reporting requirements cannot create burdens that thwart achievement of the Commission's reforms set forth in the *Order*.[50] Plainly, allowing states to impose different reporting obligations that differ from the Commission's ETC reporting requirements would impose significant burdens on ETCs, and prevent them from realizing the intended benefits of the "uniform reporting and certification framework" adopted in the *Order*. For these reasons, the Commission should clarify that states are preempted from imposing reporting requirements on those ETCs that must comply with the Commission's new reporting requirements.

3. The Commission Should Reconsider And Revise Its Tribal Engagement Reporting Requirements.

a. The Commission failed to provide notice of its intended action and the record does not support the Commission applying the Tribal engagement rules to all high-cost ETCs.

AT&T agrees with both USTelecom and Rural Incumbent Local Exchange Carriers Serving Tribal Lands that the Commission's adoption of the Tribal engagement reporting requirements violated the APA insofar as: (1) the Commission failed to "fairly apprise interested

[49] *Order* at ¶ 575.

[50] *Id.* at ¶ 574.

persons" that it was considering adopting those requirements,[51] and (2) the record on which the Commission relied in adopting those requirements does not support the Commission's decision to extend those requirements to *all* high-cost recipients.[52] As USTelecom correctly observes, the Commission never sought comment on this proposal in its *USF/ICC Transformation NPRM*.[53] Rather, the Commission sought comment on this proposal only in the context of a proposed Tribal Mobility Fund.

In a Public Notice released last April, the Wireless Bureau sought comment on several proposals related to a separate Tribal Mobility Fund,[54] including a "possible requirement for

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[51] USTelecom Petition at 18 (quoting *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980)).

[52] *See* Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition at 3-5. The Navajo Nation Telecommunications Regulatory Commission (NNTRC) filed an opposition to the Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition on January 9, 2012. NNTRC Opposition, WC Docket No. 10-90 (filed Jan. 9, 2012). In its opposition, NNTRC asserts that the record is "replete with evidence of the unique status and needs of Tribes, as well as the need for Tribal involvement, and government-to-government consultation." *Id.* at 14. While the record may contain such evidence, the Commission did not rely on it in adopting its Tribal engagement reporting rule. *See id.* at 14-15 & n.40 (citing statements made in the *National Broadband Plan* and submissions made in dockets not included as part of the record in the *Order*). More importantly and as we discuss below, neither the Commission nor NNTRC can find support in any record for imposing the Tribal engagement requirements set forth in 47 C.F.R. § 54.313(a)(9) on any high-cost recipient other than a Tribal Mobility Fund participant because no such record exists.

[53] *See Order* at ¶ 637; 47 C.F.R. § 54.313(a)(9) (requiring all "high-cost recipients" to comply with the Tribal reporting requirements). *See also* USTelecom Petition at 18 (explaining that the *USF/ICC Transformation NPRM* merely sought comment whether "recipients [should] be required to engage with Tribal governments to provide *broadband* to Tribal and Native community institutions" and "[a]re there additional requirements that should apply on Tribal lands?") (emphasis added by USTelecom). USTelecom is correct that, based on such generic requests, it was impossible for parties to anticipate that the Commission would adopt new section 54.313(a)(9) and thus, parties were unable to provide prior input on this rule.

[54] *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, at 1 (WTB rel. April 18, 2011) (*Mobility Fund Further Inquiry*) (explaining that the Commission is requesting further comment on issues related to the establishment of "a mechanism or program within the Mobility Fund focused on Tribal areas").

engagement with Tribal governments prior to auction."[55] But, there, the Wireless Bureau asked only whether it should require prospective bidders for Tribal Mobility Fund support to engage in discussions with the relevant Tribal government(s) prior to the Commission's auction to ensure that "the Tribal governments have been formally and effectively engaged in the planning process and that the service to be provided will advance the goals established by the Tribal government."[56] Seeking comment on whether such discussions should occur at the "short-form or long-form application stage" of a Tribal Mobility Fund auction is a far cry from the rule that the Commission ultimately adopted, which requires all high-cost ETCs to document discussions held with Tribal governments on, among other topics, a "a needs assessment and deployment planning," "feasibility and sustainability planning," and "marketing services in a culturally sensitive manner."[57] Plainly, the scope of that public notice was so narrow that no one reasonably could have anticipated the Commission was considering the broad Tribal engagement reporting requirements it adopted.

But even if the Commission had provided adequate notice, nothing in the record it received would support extension of the Tribal engagement reporting requirements to all high-cost support recipients providing service to Tribal lands. In the context of the Tribal Mobility Fund Public Notice, there is some logic to the Commission's proposal that, if it were to require Tribal Mobility Fund bidders to engage the affected Tribal governments in "needs assessment" and "deployment planning" discussions pre-auction (the merits of which we do not address here),

[55] *Id.* at ¶ 6.

[56] *Id.*

[57] 47 C.F.R. § 54.313(a)(9)(i).

it may make sense to require bidders to demonstrate that such discussions in fact occurred.[58] But, that logic falls apart when the Commission extended the proposed Tribal engagement reporting requirements to all high-cost support recipients. Under the Commission's new rules, a large price cap carrier ETC that only receives interstate access support (IAS) (which the Commission refers to in its *Order* as frozen CAF Phase I support) now has to document having had discussions with all Tribal governments in its large service area on, among other topics, "a needs assessment and deployment planning." As the Commission knows, IAS is intended to replace implicit universal service subsidies in interstate access charges,[59] not to provide supported services in particular high-cost areas. While AT&T has long encouraged the Commission to redesign its high-cost support mechanisms for so-called non-rural carriers to target support to specific high-cost areas that otherwise would be uneconomic to serve, until this *Order*, the Commission steadfastly refused to do so. Instead, it has continued to rely on statewide averaging to mask the cost of, and avoid actually supporting, the provision of services in those areas. The result is that the Commission cannot directly tie any high-cost support to a Tribal area any more than to any other area in a state – at least in the case of non-rural carriers. And, consequently, it makes no sense to subject such carriers to the Tribal engagement reporting requirements with respect to such support. Moreover, applying the Tribal engagement requirement to any ETC whose high-cost support the Commission is eliminating (possibly, on a flash-cut basis beginning some time next year) seems similarly misguided.[60]

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[58] *Mobility Fund Further Inquiry* at ¶ 6.

[59] *CALLS Order*, 15 FCC Rcd 12962, ¶185 (2000). AT&T's wireline affiliates receive only IAS high-cost support in the following states: Arkansas, California, Connecticut, Florida, Georgia, Kansas, Louisiana, Nevada, North Carolina, Oklahoma, South Carolina, and Tennessee.

[60] *Order* at ¶¶ 180, 519.

b. Current rule 54.313(a)(9) is impermissibly vague and violates the First Amendment.

Even if the Commission were to narrow the application of its Tribal engagement rule to Tribal Mobility Fund participants, it should nonetheless provide additional explanation and detail about what information it believes should be discussed and what sort of documentation the Tribal Mobility Fund participant should include in its annual report.

As USTelecom explains, many of the criteria contained in section 54.313(a)(9) are impermissibly vague.[61] Like USTelecom, AT&T has no idea what is meant by "feasibility and sustainability planning" or "marketing services in a culturally sensitive manner."[62] By "sustainability planning" discussions, does the Commission mean, discussions about deploying a network that could be capable of being operated at a profit without federal high-cost support (however unlikely)? By "marketing services in a culturally sensitive manner," does the Commission mean that Tribal Mobility Fund recipients would advertise their services in Tribal newspapers and on Tribal radio stations or does the Commission mean that such recipients would have to alter the content of their advertisements in some unclear and unlawful manner? Because there is no discussion of these terms in any Commission document, the Commission has placed affected parties in the impossible position of having to guess as to the Commission's intent. For that reason, the Commission's current Tribal engagement reporting rule is void for vagueness.[63]

To the extent that the Commission is attempting to compel speech or control the content of speech through its requirement that ETCs discuss "marketing services in a culturally sensitive

[61] USTelecom Petition at 19.

[62] *Id.* (quoting 47 C.F.R. § 54.313(a)(9)(ii), (iii)).

[63] USTelecom at 19 (citing *Hill v. Colorado*, 530 U.S. 703 (2000) & *Gentile v. State Bar*, 501 U.S. 1030 (1991)).

manner" with Tribal governments, the Commission is violating the First Amendment. However well-intentioned, such a requirement is flatly unconstitutional because it (1) *compels* speech and (2) unlawfully attempts to control the *content* of that speech, and each of those two characteristics independently violates the First Amendment. First, the government may not "force[] speakers to alter their speech to conform with an agenda they do not set." *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 9 (1986) (plurality). Second, it is a "fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message." *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Regardless whether these requirements are viewed as compelled speech or a viewpoint restriction (or both), they are subject to strict scrutiny and may stand only if "narrowly tailored" to serve a "compelling state interest." *See Pac. Gas & Elec.*, 475 U.S. at 19 (plurality). But here the Commission has not even attempted to supply such a justification, nor could it do so if it tried. This particular Tribal engagement and reporting requirement is therefore unconstitutional.

The analysis is no more lenient simply because the Tribal engagement and reporting requirements apply only to ETCs receiving high-cost support.[64] It is true that the government may "cho[ose] to fund one activity to the exclusion of the other," including by placing restrictions on what may be said using government funds. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). The government *may not*, however, condition an unrelated benefit on the recipient's "relinquishment of a constitutional right." *See Rust*, 500 U.S. at 196 (citing *Perry v. Sindermann*, 408 U.S. 593, 597

[64] *Compare* 47 C.F.R. § 54.313(a) (placing requirements on "[a]ny recipient of high cost support"), *and Order* at ¶ 637 (discussing requirements on "support recipients"), *with id.* (speaking generally of "ETCs").

(1972); *FCC v. League of Women Voters*, 468 U.S. 364 (1984)). But that is precisely what this specific Tribal engagement and reporting requirement does. The Commission's new high-cost universal service support program exists to support rural deployment of broadband facilities, not to promote "culturally sensitive" speech with regard to any particular group, and there is no plausible nexus between the former objective and the latter. The Commission therefore cannot compel such viewpoint-oriented speech as a condition of receiving funds under this spending program.

4. The Commission Should Move Its Annual Reporting Deadline To July Or Later.

Both USTelecom and the ARC ask the Commission to move its annual filing deadline from April 1 to July 1 or later.[65] AT&T supports this request for all ETCs (not just rate-of-return carriers). The Commission did not explain why it was moving its annual reporting deadline up from October 1. As USTelecom notes, perhaps, the Commission thought that a state regulator requires six months to review its ETCs' annual submissions in order for the state to certify that its ETCs are using federal high-cost support for the intended purposes.[66] If true, the Commission is mistaken. The majority of the state commissions where AT&T's affiliates operate as ETCs require ETCs to file annual ETC reports well after April 1. The following are the filing dates for annual ETC submissions in states that require at least one of AT&T's affiliates to submit a report: *March 31* – Alaska; *April 1* – Puerto Rico (although this filing is no more frequent than every other year); *June 1* – Michigan and Mississippi; *July 1* – Arkansas and West Virginia; *July*

[65] USTelecom Petition at 21-22 (asking the Commission to use July 1 as the due date); ARC Petition at 16-17 (same); NECA Petition at 25 (asking the Commission to use September 1 as the due date for rural carriers).

[66] USTelecom Petition at 21 (citing *Order* at ¶ 575).

D. The Commission Should Permit Carriers To Use Billed Revenues For Determining The Baseline Revenues For Price Cap Carriers.

AT&T agrees with USTelecom that the Commission should use "billed" interstate switched access revenues, rather than revenues "received" as of March 31, 2012, when calculating "Price Cap Baseline Revenues." USTelecom Petition at 30-31. The use of revenues received or collected as of March 31, 2012, inevitably will understate actual revenues because it sometimes takes months or even years to collect revenues that were properly billed due to disputes or other factors. Moreover, as USTelecom notes, use of collected revenues would require manual and in some cases arbitrary allocations of revenues between originating and terminating access. The Commission should instead permit the use of the simpler and more predictable "billed" revenue figure for purposes of this calculation.

III. CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission adopt an order on reconsideration that is consistent with the positions set forth in these comments.

Respectfully Submitted,

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February 9, 2012

Its Attorneys

ATTACHMENT

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 a 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

COMMENTS OF AT&T

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September 26, 2012

COMMENTS OF AT&T

On July 19, 2012, the Office of Native Affairs and Policy (ONAP), together with the Wireless Telecommunications and Wireline Competition Bureaus (Bureaus), released a public notice providing "further guidance on the Tribal engagement obligation adopted in the *USF/ICC Transformation Order*."[1] Through this *Public Notice*, ONAP sought to provide guidance to interested parties on how they should implement the new Tribal engagement rule, which requires "high-cost recipients" that "serve[] Tribal lands" to demonstrate that they have engaged in discussions with Tribal governments on Commission-specified topics.[2] However, as explained by USTelecom in its petition for reconsideration and clarification, the *Public Notice* offers carriers little practical guidance and, worse, exacerbates the *USF/ICC Transformation Order*'s Administrative Procedure Act (APA), Paperwork Reduction Act (PRA), and First Amendment violations.[3] AT&T Inc. (AT&T), on behalf of its high-cost eligible telecommunications carrier (ETC) affiliates, files these comments in support of the Petition and urges the Commission to act quickly to limit the application of its new Tribal engagement rule and the guidance contained in the *Public Notice* to Tribal Mobility Fund recipients. Even then, AT&T recommends that the

[1] *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, DA 12-1165, at ¶ 1 (rel. July 19, 2012) (*Public Notice*) (citing *Connect America Fund*, WC Docket No. 10-90 *et al.*, 26 FCC 17663 (2011) (*USF/ICC Transformation Order*)).

[2] 47 C.F.R. § 54.313(a)(9) (requiring high-cost recipients to discuss with Tribal governments "(i) A needs assessment and deployment planning with a focus on Tribal community anchor institutions; (ii) Feasibility and sustainability planning; (iii) Marketing services in a culturally sensitive manner; (iv) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (v) Compliance with Tribal business and licensing requirements").

[3] Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 10-90 *et al.* (filed Aug. 20, 2012) (Petition).

Commission request comment on the *Public Notice* so that the guidance could be refined to a point where Tribal Mobility Fund recipients could actually implement it.

The Commission Should Clarify the Scope of the Public Notice and the Underlying Rule. AT&T agrees with USTelecom that the Commission should clarify that the guidance contained in the *Public Notice* – and the Tribal engagement rule itself – apply only to providers that "receive new high-cost support to fund deployment on Tribal lands . . .," which, under the current rules, means Tribal Mobility Fund recipients. Petition at 3-4. The *Public Notice* is inconsistent in its description of which entities are subject to the guidance. At various points, ONAP describes the guidance as applying to "communications providers either currently providing or seeking to provide service on Tribal lands *with the use of Universal Service Fund (USF) support*" but elsewhere, ONAP broadens the scope of providers ostensibly covered by the guidance to "all eligible telecommunications carriers (ETCs) either currently serving or seeking to serve Tribal lands." *Compare Public Notice* at ¶ 1 (emphasis added) *with id.* at ¶ 6. As we discuss below, both descriptions are problematic and should be clarified or reconsidered.

The Commission's stated purpose in creating the Tribal engagement requirement is to facilitate "the successful deployment and provision of service" on Tribal lands in order to narrow the "deep digital divide" in those areas. *USF/ICC Transformation Order* at ¶¶ 636-37. To accomplish this goal, the Commission must, of course, provide "sufficient" high-cost support to providers in order to enable them to deploy and maintain broadband service in high-cost Tribal areas that are otherwise uneconomic to serve. *See* 47 U.S.C. § 254(e) (requiring support to be "explicit and sufficient to achieve the purpose of this section"). A carrier cannot be expected – or required – to deploy broadband service in such areas absent "specific, predictable, and sufficient" support. 47 U.S.C. § 254(b)(5). If the Commission fails to provide sufficient support

to enable a carrier to deploy broadband service on high-cost Tribal lands, there is little point in mandating that the carrier commence broadband deployment discussions with the relevant Tribal government. As a consequence, the Commission should apply its Tribal engagement rule and ONAP's Tribal engagement guidance only to Tribal Mobility Fund recipients.

For example, interstate access support (IAS), which is considered "high-cost support," 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). Thus, legacy IAS recipients that serve Tribal lands should not be subject to the Tribal engagement requirements. The Commission expects carriers to use legacy IAS to lower interstate access charges, which AT&T and other IAS recipients do via reduced subscriber line charges. Petition at 5 (citing *CALLS*, 15 FCC Rcd 12962 (2000)). The *USF/ICC Transformation Order* did not change that. According to the Commission, which converted legacy high-cost support to "frozen high-cost support," a price cap carrier's frozen IAS "will be treated as IAS for purposes of our existing rules." *USF/ICC Transformation Order* at ¶ 152.[4] It 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." *Public Notice* at ¶ 18.

Furthermore, even if a carrier receives high-cost support to provide service on Tribal lands, the Commission should clarify that its rule and ONAP's guidance do not apply if that

[4] *See also* 47 C.F.R. § 54.312(a)(3) ("A carrier receiving frozen high cost support under this rule shall be deemed to be receiving Interstate Access Support and Interstate Common Line Support equal to the amount of support . . . to which the carrier was eligible under those mechanisms in 2011.").

carrier's high-cost support is being eliminated either through a phase down[5] or potentially on a flash-cut basis.[6] Petition at 4. We agree with USTelecom 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. Given the circumstances, the Commission should expect these carriers to spend their high-cost support on maintaining, not expanding, service.[7] Because these ETCs "do not know whether and how much funding they will receive and in what areas, nor do they know whether they will choose to participate in the future funding programs,"[8] it does not make financial sense for ETCs to invest significant sums to deploy facilities in high-cost areas when those facilities might be stranded in a few short years. The Commission has failed to explain what value there possibly could be in mandating that carriers have discussions with Tribal governments on network deployment plans when the carriers likely have no such plans – or, at least, no such plans involving high-cost support.

For these reasons and those set forth in the Petition, the Commission should grant the Petition and clarify that its rule and the guidance in the *Public Notice* apply only to providers that receive new high-cost support to deploy and maintain facilities and services on Tribal lands – that is, Tribal Mobility Fund support.

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[5] *See USF/ICC Transformation Order* at ¶ 519.

[6] *Id.* at ¶ 180.

[7] Carriers are permitted to use high-cost support to maintain facilities and services. *See* 47 U.S.C. § 254(e) (requiring universal service support recipients to use that support for the "provision, *maintenance*, and upgrading of facilities and services for which the support is intended" (emphasis added)).

[8] Petition at 8.

The Commission Must Cure the APA and PRA Violations before the Public Notice's Guidance and the Tribal Engagement Rule May Become Effective. The *Public Notice* makes no mention of the fact that the Commission's Tribal engagement rule has been challenged by at least two parties[9] or that the Commission has not sought necessary approval from the Office of Management and Budget (OMB) for the rule's new information collection and reporting requirements. Notwithstanding their lack of authority, ONAP and the Bureaus nonetheless exhort high-cost recipients to "take immediate steps to prepare for and initiate engagement with the Tribal governments whose lands they serve." *Public Notice* at ¶ 14. However, until it cures the APA and PRA deficiencies with the *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. The Commission should clarify that the guidance contained in the *Public Notice* and the underlying rule are not in effect. It is important that the Commission issue this clarification quickly because there seems to be confusion between industry and Commission staff about the legal status of the Tribal engagement rule and the *Public Notice*'s guidance.[10]

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[9] Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 *et al.*, at 17-19 (filed Dec. 29, 2011) (USTelecom December 2011 Petition for Reconsideration); Petition for Reconsideration of the Rural ILECs Serving Tribal Lands, WC Docket No. 10-90 *et al.* (filed Dec. 29, 2011).

[10] *See* Letter from John Kuykendall, John Staurulakis, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 *et al.*, at 3 (filed Sept. 10, 2012) (stating that ONAP staff "explained that the pending [PRA] approval applies only to the obligation for ETCs to report as to how they have fulfilled the Tribal engagement requirement; it does not impact their responsibility to conduct the engagement."). If the letter provides an accurate recounting of this discussion, ONAP's advice is incorrect insofar as it ignores the fact that the PRA prohibits the Commission from "conduct[ing] or sponsor[ing] the collection of information" without prior OMB approval. 44 U.S.C. § 3507(a)(2). By directing parties to commence discussions on Commission-specified topics, ONAP is effectively causing high-cost recipients to obtain "facts or opinions by or 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. . . ." 44 U.S.C. § 3502(3)(a)(i). Until the Commission receives OMB approval for this information collection, the

First, if the Commission intended for the *Public Notice*'s guidance 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,"[11] then the Commission violated the APA by failing to adhere to the Act's notice and comment requirements. Petition at 8 (explaining how the Commission failed to "fairly apprise interested persons" of the requirements set forth in the *Public Notice*). If the Commission meant for this guidance to be anything other than an aspirational goal that is not enforceable, it is the second time that the Commission failed to comply with the APA in the Tribal engagement context.

USTelecom previously challenged the validity of the Tribal engagement rule in its December 2011 Petition for Reconsideration, which remains pending at the Commission. Among other things, USTelecom explained how the Commission failed to provide notice to interested parties about the nature of the Tribal engagement requirements that the Commission adopted in the *USF/ICC Transformation Order*. USTelecom December 2011 Petition for Reconsideration at 18. In comments supporting this petition, AT&T documented how the Commission sought comment on a "possible requirement for engagement with Tribal governments" only in the context of creating a Tribal Mobility Fund.[12] Specifically, the Wireless Bureau sought comment on whether the Commission should require prospective bidders for Tribal Mobility Fund support to engage in discussions with the relevant Tribal governments prior

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Public Notice's guidance and the rule are not in effect. *See USF/ICC Transformation Order* at ¶ 1428 ("The rules that contain information collections subject to PRA review WILL BECOME EFFECTIVE following approval by the Office of Management and Budget.") (emphasis in original)).

[11] *USF/ICC Transformation Order* at ¶ 637.

[12] *See* AT&T Comments, WC Docket No. 10-90 *et al.*, at 15-17 (filed Feb. 9, 2012) (AT&T Comments) (quoting *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, at ¶ 6 (WTB 2011) (*Mobility Fund Further Inquiry*)).

to the Commission's auction to ensure that "the Tribal governments have been formally and effectively engaged in the planning process and that the service to be provided will advance the goals established by the Tribal government." *Mobility Fund Further Inquiry* at ¶ 6. Requesting comment on whether these discussions should occur at the "short-form or long-form application stage" of a Tribal Mobility Fund auction (*id.*) is a far cry from the rule that the Commission ultimately adopted, which applies to *all* high-cost recipients that serve Tribal lands. 47 C.F.R. § 54.313(a)(9). No one could credibly assert that interested parties were fairly apprised of the Tribal engagement rule that the Commission adopted in its *USF/ICC Transformation Order* based on the extremely narrow scope of the *Mobility Fund Further Inquiry*.

Second, the Commission failed to seek comment on and OMB approval for the proposed collection of information discussed in the *Public Notice*. Petition at 14. Not only has the Commission failed to comply with the PRA for the *Public Notice*, it has yet to seek OMB approval for its Tribal engagement rule. The Commission's March submission to the OMB requesting approval for aspects of its new ETC annual reporting rule, of which the Tribal engagement rule is a part, made no mention of section 54.313(a)(9).[13] As a result, like the *Public Notice*, the Tribal engagement rule is not in effect.

Putting aside the procedural PRA deficiencies with the *Public Notice*, AT&T does not believe that the Commission can satisfy the substantive requirements of the PRA for either the *Public Notice* or the rule. Prior to providing its approval, the OMB must determine "whether the collection of information by the agency is necessary for the proper performance of the functions

[13] FCC Supporting Statement, OMB Control No. 3060-0986, at 6 (March 2012), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201201-3060-006.

of the agency, including whether the information shall have practical utility." 44 U.S.C. § 3508. The OMB defines "practical utility" as

> the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion . . . In the case of recordkeeping requirements . . . "practical utility" means that actual uses can be demonstrated. 5 C.F.R. § 1320.3(l).

To date, the Commission has not made any attempt to demonstrate that the information collection necessitated by its new Tribal engagement rule and *Public Notice* will yield any practical utility. And, AT&T does not believe that the Commission could make this showing. As we explained above, there simply is no value associated with compelling providers to have discussions about feasibility and deployment planning with Tribal governments when the provider does not receive any high-cost support to deploy and provide service on Tribal lands or when the Commission has informed the provider that it is eliminating the carrier's support in a few years. Similarly, AT&T finds no practical utility in requiring a carrier to discuss opening a retail store on Tribal lands in order to satisfy the Commission's unlawful requirement that high-cost recipients "market[] services in a culturally sensitive manner." *Public Notice* at ¶ 25 (suggesting that opening a store on Tribal lands and staffing it with members of the community "may increase awareness of and sensitivity to local cultural and communications needs").

In sum, the substantial burdens that the *Public Notice* and the Tribal engagement rule will impose on high-cost recipients serving Tribal lands are utterly counter to the Commission's obligation under the PRA to "minimize the paperwork burden for individuals, small businesses, .

. . tribal governments, and other persons resulting from the collection of information by or for the Federal Government." 44 U.S.C. § 3501(1).[14]

The Commission Should Reconsider Guidance That Compels Speech and Attempts to Control the Content of That Speech. To the extent that the Commission is attempting to compel speech or control the content of speech through its requirement that ETCs discuss "marketing services in a culturally sensitive manner" with Tribal governments, the Commission is violating the First Amendment. Petition at 9-10. AT&T raised its First Amendment concerns with the Commission's rule in comments supporting the USTelecom December 2011 Petition for Reconsideration. *See* AT&T Comments at 18-20. While we do not repeat those arguments here, our concerns about the Commission's requirement that carriers "market[] services in a culturally sensitive manner" were well-founded based on the *Public Notice.*

At the time of our comments last February, it was unclear whether the Commission expected carriers to satisfy this particular requirement by advertising services in Tribal newspapers and on Tribal radio stations or whether the Commission intended to require ETCs to alter the content of their advertisements. The *Public Notice* makes clear that it is the latter: the Commission intends carriers to discuss "developing materials, separately or jointly, specific to the Tribal community," coordinating and partnering with Tribal governments "to ensure that services are marketed in a manner that will relate directly to the community. . . ", and "tailoring [ ] service offerings to the [specific Tribal] community." *Public Notice* at ¶¶ 24, 25. If the Commission intended for this guidance to be binding, it must be "narrowly tailored" to serve a "compelling state interest" in order to withstand strict scrutiny. *See Pac. Gas & Elec. v. Pub.*

[14] *See also* Petition at 11-14 (describing the costs that the *Public Notice* will impose on ETCs and ONAP's failure to perform any cost-benefit analysis, which it is required to do pursuant to Exec. Order No. 13,563).

Util. Comm'n, 475 U.S. 1, 19 (1986) (plurality). However, as USTelecom notes, the *Public Notice* "is devoid of any discussion of the harms (real or otherwise) such requirements are intended to rectify or any explanation of how its forced speech will alleviate such harms to a material degree." Petition at 10. As a consequence, the Commission's *Public Notice* also violates the First Amendment, warranting reconsideration.

AT&T requests that the Commission grant USTelecom's Petition and reconsider the *Public Notice* and the underlying Tribal engagement rule as discussed herein.

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