

NATIVE NATIONS COMMUNICATIONS TASK FORCE

**Recommendations for Improving Required Tribal Engagement Between Covered
Providers and Tribal Governments**

**Report to the Federal Communications Commission
from the Tribal Members of the Task Force**

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I. EXECUTIVE SUMMARY

Tribal members of the Native Nations Communications Task Force (Task Force) have developed the following report to the Commission on recommendations for improving required engagement between those eligible telecommunications carriers that are recipients of universal service high-cost funds to provide communications services on Tribal lands (covered providers) and Tribal governments regarding deployment and provisioning of service on Tribal lands. In the report, Tribal members offer recommendations concerning the five required elements of Tribal engagement and make several overarching recommendations and suggestions for additional Commission action. Those recommendations include the provision of additional guidance, initiating changes through rulemaking, and taking certain informal actions they believe will lead to better and more effective engagement between covered providers and the Tribes they serve and lead to improved broadband deployment on Tribal lands.

Key Recommendations Concerning the Five Required Elements of Tribal Engagement

1. Covered providers should request a needs assessment from the Tribe during or following engagement activities. Needs assessments would contain, but are not limited to, locations needing service; types of service requested; infrastructure updates and other relevant requirements. The FCC should clarify the specific topics that covered providers address during the discussion of deployment planning.
2. The FCC should provide clear guidelines for covered providers to communicate their intentions regarding feasible and sustainable deployment and service on Tribal lands and, examine the interplay between build-out requirements and feasibility and sustainability planning.
3. Covered providers should be encouraged to designate a Native American affairs department or representative to better enable understanding and marketing in a culturally sensitive manner.
4. The FCC should provide clear guidance to deter covered providers from using the existence of rights-of-way and other permitting processes as reasons to deny provision of service on Tribal lands.
5. The FCC should reiterate and strongly emphasize the need for covered providers to take seriously the obligation to discuss compliance with Tribal licensing and business requirements to facilitate speedy deployment and service provisioning.

Additional Actions to Improve Tribal Engagement

Issues That Can Be Addressed Through the Provision of Additional Guidance

- Designating a Single Point of Contact
- Making a Preference for In-Person Meetings When Practicable
- Improving the Effectiveness of Tribal Engagement Notices Sent to Tribes
- Clarifying What Constitutes “Good Documentation and Recordkeeping”
- Improving Carrier Compliance Reporting
- Implementing Engagement in a Flexible Manner
- Establishing a Protocol for Consent of Tribes for Projects on Tribal Lands

Issues That Require Rule Changes

- Establishing a Tribal Engagement-Specific Compliance and Complaint Process
- Broadening the Tribal Engagement Obligation
- Making Tribal Engagement an On-Going Process
- Elevating the Office of Native Affairs and Policy

Issues That Can be Addressed Through Informal Commission Action

- Holding FCC-Guided Listening Sessions
- Developing Educational Programs

II. INTRODUCTION

In the 2011 *USF/ICC Transformation Order*, the Federal Communications Commission (FCC or Commission) reformed and modernized its universal service fund (USF) and intercarrier compensation systems to maintain voice and extend broadband-capable infrastructure, including on Tribal lands.¹ To better facilitate and support connectivity and improved service on Tribal lands, the order adopted, among other things, a requirement that eligible telecommunications carriers (ETCs) receiving high-cost funds to serve Tribal lands engage at least annually with the Tribes they serve or seek to serve. During these engagements, ETCs are required to discuss with the Tribe, at a minimum:

1. Needs assessment and deployment planning
2. Feasibility and sustainability planning
3. Marketing services in a culturally sensitive manner
4. Right-of-way processes, land use permitting, facilities siting, environmental and cultural preservation and review processes
5. Compliance with Tribal business and licensing requirements.²

In addition, the *USF/ICC Transformation Order* requires covered ETCs to report annually on their engagement by certifying and summarizing their compliance as part of their annual FCC Form 481 filings.³

In July 2012, the FCC's Office of Native Affairs and Policy, Wireline Competition Bureau and Wireless Telecommunications Bureau issued a Public Notice providing further guidance on the Tribal engagement obligation.⁴ The primary goal of the guidance was "to ensure the effective exchange of information that will lead to a common understanding between Tribal governments and communications providers receiving USF support, on the deployment and

¹ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom*, *In re: FCC 11-161*, 753 F.3d 1015, paras. 1-4 (10th Cir. 2014).

² *USF/ICC Transformation Order*, 26 FCC Rcd at 17868, para. 637; 47 CFR § 54.313(a)(5), (j).

³ For ease of reference, in this report "covered ETCs" and "covered providers" refer to eligible telecommunications carriers that are recipients of universal service high-cost funds to provide communications services on Tribal lands and Tribal governments regarding deployment and provisioning of service on Tribal lands.

⁴ See *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on the Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, 26 FCC Rcd 8176 (2012) (*2012 Further Guidance PN*).

improvement of communications services on Tribal lands.”⁵ In October 2019, the Consumer and Governmental Affairs Bureau (CGB) issued a Public Notice “seeking comment on how best to facilitate and improve dialogue and coordination between Tribes and Eligible Telecommunications Carriers (ETCs) to ensure successful broadband deployment and adoption on Tribal lands.”⁶ This examination included “assess[ing] the effectiveness of the *Further Guidance Public Notice* based on the practical experiences of Tribes and carriers.”⁷

As part of this effort, the Commission asked the Tribal members of the Native Nations Communications Task Force to examine the effectiveness of the *2012 Further Guidance PN* in conjunction with the questions asked in the *2019 PN*, and advise the Commission on any improvements to better the exchange of information based on their real-world experience.⁸ In this report, Tribal members provide comments on and recommendations for improving the effectiveness of the Tribal engagement obligation based on examples of their respective Tribes’ experience with the obligation.

III. COMMENTS AND KEY RECOMMENDATIONS CONCERNING THE FIVE REQUIRED ELEMENTS OF TRIBAL ENGAGEMENT

Tribal members of the Task Force have examined the five required elements of the FCC’s Tribal engagement rule in light of the practical guidance contained in the *2012 Further Guidance PN* and their own experiences with Tribal engagement in the years since the rule went into effect. Comments and recommendations for improvements regarding engagement on each element follow.

A. Needs Assessment and Deployment Planning

The *2012 Further Guidance PN* explained that engagement on needs assessment and deployment planning offers covered providers and Tribal governments an opportunity to discuss the communications needs of the Tribe and deployment planning on Tribal lands.⁹ In addition, it indicated these discussions should include the provider’s deployment priorities, an explanation of how these priorities were developed, plans for deployment on Tribal lands, and timelines for the provision of service.

Needs Assessment. Tribal governments are well aware of the Tribes’ communications needs and are able to share their needs assessments with providers during engagement.

Tribes require broadband in order to provide services to their membership. Without broadband in the mostly rural and isolated reservations, Tribal members cannot participate in educational opportunities, business opportunities that increasingly require broadband access, healthcare advances such as telehealth, and communications with the increasingly connected world outside of the reservations.

⁵ *2012 Further Guidance PN*, 26 FCC Rcd at 8176, para. 2.

⁶ See *Consumer and Governmental Affairs Bureau Seeks Comment on Effectiveness of its Tribal Engagement Guidance and to Refresh the Record on Related Petitions for Reconsideration*, Public Notice, 26 FCC Rcd 8176 (2019) (*2019 PN*).

⁷ *Id.*

⁸ The Native Nations Communications Task Force consists of up to 25 Tribal leaders and appointees, or their designees, and eight FCC staff members. In the remainder of this report, the terms “Task Force” and “Task Force members” mean the Tribal Task Force members.

⁹ See *2012 Further Guidance PN*, 26 FCC Rcd at 8181, para. 17.

Tribes are well prepared for engagement when it occurs. Most Tribes have designated staff members to engage with the federal government on all levels as well as with companies and organizations that seek engagement with the Tribe. The problem is not that the Tribes are not ready to engage with communications providers, rather it is that communications providers do not take engagement seriously, and in many cases, do not engage at all.

The Ewiiapaayp Band of Kumeyaay Indians is not connected to either wireline or wireless transmission networks and its sister Tribes in east San Diego County are currently underserved without sufficient broadband transmission speed or data volume. These Tribes are therefore precluded or limited from accessing online services for governance, for example, federal Indian program funds distributed by online systems such as ASAP, federal Indian programs applied for online via Grants.gov, and federal Indian programs compliance reports by online systems such as GrantSolutions.gov. They are also precluded from accessing emergency services (such as online services through grantee.fema.gov); from participating in Indian Health Service telehealth and telemedicine programs; from delivery of online school programs; from law enforcement and public safety services; and from developing a Tribal economy for commercial enterprise that expects as an essential service broadband connectivity on Tribal lands.

The Ewiiapaayp Band of Kumeyaay Indians has found that much desired and needed discussions between Tribal government officials and communications providers, either currently providing or seeking to provide service on Tribal lands with the use of USF support, are not occurring. Nor are carriers engaging with Tribes regarding interconnection services. Tribes with new 2.5 GHz licenses obtained via the 2.5 GHz Rural Tribal Priority Window (RTPW) are seeking to identify backbone transmission in the area of Tribal lands for aggregation points and backhaul to Tribal communities for last mile distribution through EBS licenses. However, carriers and service providers, from local exchange carriers to resellers, are not sharing information with Tribes about backbone transmission, which potentially strands the Tribal 2.5 GHz network without connectivity to backbone transmission to the Internet.

In its April 16, 2020 approval of the merger of Sprint Communications Company and T-Mobile, the California Public Utilities Commission (CPUC) included a condition to mitigate potential adverse impacts on competition and to ensure delivery of services to California Tribes which requires the new T-Mobile to establish a single point of contact for California Tribes interested in gaining access to New T-Mobile spectrum holdings “to acquire EBS from New T-Mobile, partner with New T-Mobile to utilize EBS, or discuss opportunities for cooperation with New T-Mobile.”¹⁰ This condition resulted from Tribes’ experience with carriers and service providers unwillingness to engage about delivery of services to Tribal lands. A significant number of Tribes allocated spectrum licenses through the 2.5 GHz RTPW will have insufficient bandwidth within their licenses to offer a viable wireless broadband service on Tribal lands and

¹⁰ See California Public Utilities Commission, In the Matter of the Joint Application of Sprint Communications Company L.P. (U5112) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a), Application 18-07-011; Application 18-07-012, Decision Granting Application and Approving Wireless Transfer Subject to Conditions, Agenda ID #18246 (REV. 1) Section G, Educational Broadband Spectrum (EBS) at 57, para. 27 (Apr. 16, 2020) available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M333/K177/333177640.PDF>.

will want to seek from T-Mobile access to additional assigned and leased but unused EBS spectrum through sublease or assignment.

The Red Cliff Tribe has found that not having all communications providers operating on Tribal lands at the table has hampered the Tribe's ability to communicate the Tribe's needs assessment. Not being able to communicate the Tribe's needs to all providers hampers economic development, educational opportunities, and the distribution of telehealth solutions.

Inaccurate mapping data is also a problem better engagement could address. Communications providers are representing and are depicting on relevant mapping tools that they are providing services on Tribal lands. The Ewiiapaayp Band of Kumeyaay Indians, for one, has found that such reported services are not actually available. The maps and representations of the providers are not correct. For example, the National Broadband Map depicts the Ewiiapaayp Indian Reservation as served by broadband services by San Diego Broadband. The Reservation is also shown in the area of FCC CAF II awards for San Diego Broadband. However, the Ewiiapaayp Indian Reservation remains unserved by any telecommunications or broadband services, and San Diego Broadband's wireless broadband network service area is over 15 miles east of the Reservation. While Tribal members recognize that Congress and the FCC are considering a number of efforts to address mapping issues, regular engagement with providers is also needed to address this type of problem.

Similarly, the Red Cliff Tribe is shown as mostly covered by maps provided by Charter Spectrum, but when Tribal members call for service, they find out that service is not available in the indicated areas.¹¹ Service extension is offered, but at prices that Tribal members cannot afford.

The Gila River Indian Community (Community), which owns and operates Gila River Telecommunications, Inc. (GRTI), offers an example of Tribal engagement over needs assessment done well between a Tribal government and its telecommunications carrier. GRTI provides communications services to the Community. The Community has developed procedures for deployment of infrastructure and communications on the reservation. Any new proposed project requiring telecommunications is made known to GRTI through the Community's Executive Office, Tribal Projects Office, as well as any business entity owned by the Community. GRTI is included in the Community's planning process and construction scheduling throughout the project by ongoing meetings. Similarly, the Community government advises any off-reservation developer to contact GRTI regarding proposed projects within the Community. This enables the Community government offices to be aware of all development on the reservation to enable engagement between the off-reservation developer and GRTI.

Northern New Mexico is a semi-remote area that is the home of eight Pueblos: Taos Pueblo, Picuris Pueblo, Ohkay Owingeh, Sant Clara, Pojoaque, San Ildefonso, Nambe, and Tesuque. In 2008, a regional economic development effort, the Northern New Mexico Regional Economic Development Initiative (REDI), identified broadband as the region's number one infrastructure priority. Funding for a broadband infrastructure network was received through the American Recovery and Reinvestment Act and the project completed in 2012. The resulting network, known as REDINet, is a high-speed, open access, community broadband network

¹¹ See Broadband Now, Charter Spectrum Coverage Map, available at <https://broadbandnow.com/Charter-Communications>.

located in Northern New Mexico. It is owned and operated by a consortium of local and Tribal governments, including Santa Fe County, Los Alamos County, Rio Arriba County, the North Central Economic Development District, City of Espanola and four Pueblos - Pueblo of Pojoaque, Ohkay Owingeh, Santa Clara Pueblo and Pueblo of Tesuque.

REDINet delivers broadband to community anchor institutions which include State/Tribally owned buildings, public safety towers and all public and private K-12 schools, public libraries and colleges that elect to participate in the project. REDINet is now an approved E-rate provider.

REDINet provides “middle mile” services and seeks to partner with qualified last-mile providers to serve business and residential customers. It has found the biggest hurdle to be “last mile” providers, the final leg of connectivity from communications service provider to a customer. Last mile providers offer retail broadband services to residential and business end users. Engaging these providers has been the most difficult aspect of extending broadband services to the communities, especially in the more remote areas, a problem likely found in other areas of Indian country as well. The FCC can help by focusing on these areas of need in Northern New Mexico and as well in other remote Tribal areas.

Recommendation: Covered providers should request a needs assessment from the Tribe during or following engagement activities. Needs assessments would contain, but are not limited to, locations needing service; types of service requested; infrastructure updates and other relevant requirements.

Deployment Planning. Tribes often receive notices regarding planned deployments and/or service discontinuances from covered providers that they have trouble processing. At times, notices are mis-addressed and therefore not received by the correct Tribal members but rather float around the Tribe’s email/mail system, delaying response times. This can have significant adverse consequences, especially in cases of response-required notices, where failure to respond results in the loss of rights or deployment opportunities. The need for Tribes to register to access FCC databases in order to find the matching data for planned deployments referenced in notices also presents problems for Tribes that are not conversant with the FCC and its processes.

For example, Viasat was awarded high-cost funding under the CAF Phase II auction for areas that included the Nez Perce reservation. As part of its process to secure ETC status, there was a lot of back-and-forth communication between Viasat and the Tribe about Viasat’s deployment plans, but the parties were speaking past one another. Viasat failed to make clear what specific geographic area(s) it received support to serve. As satellite broadband can technically be deployed anywhere, Nez Perce needed to know where the specific fixed geographic areas were on its reservation. Because neither party could understand what the other needed, Nez Perce called on ONAP to step in to provide the assistance necessary. In the end, it was a simple communication barrier.

The Red Cliff Band of Lake Superior Chippewa Indians experience with Tribal engagement has been mixed. While the only ETC serving the reservation has been somewhat responsive, the results of engagement in terms of deployment have been minimal. Other carriers that are not ETCs do not communicate their deployment intentions to the Tribe.

Recommendation: The Task Force recommends the FCC clarify the specific topics covered providers should address during the discussion of deployment planning.

B. Feasibility and Sustainability

The *2012 Further Guidance PN* recognized that this element affords the service providers and Tribal governments the opportunity to exchange perspectives, information and chart a path forward to address the feasibility and sustainability of providing service on Tribal lands.¹² It recognized the particular challenges with service sustainability on Tribal lands, and noted that “[i]ncreased coordination between Tribal governments and communications providers on specific elements of feasibility will heighten the chances of ultimate sustainability for communications business models on Tribal lands.”¹³

Tribal members have found that the feasibility and sustainability of Tribal telecommunications networks requires meaningful Tribal engagement. There must be clear guidelines for providers to communicate the provider’s intention on Tribal Lands, for example by giving detailed information on the intended network build, intended network expansion or the service they are delivering. For example, if a satellite company is receiving the federal funds to cover a geographic area of a reservation, a Tribe needs to know which areas are covered by the winning bid, what does that bid mean for Tribal entities and will there be resources for Tribal entities/members to obtain the information from such as specific reservation/plan information on the website.

From Nez Perce’s perspective, the discussions required by the Tribal engagement obligation about the feasibility and sustainability of providing service on Tribal lands are meaningless unless the FCC has also specified build-out requirements for high-cost recipients that include Tribal lands. Under CAF II funding, which does not contain a specific Tribal deployment requirement (beyond the overall deployment obligation), the only true Tribal engagement that occurred was a first meeting or phone call saying that the carrier received CAF II funding. In contrast, with ACAM II funds, carriers electing offers that included adjustments based on the incorporated “Tribal Broadband Factor” were required to separately meet the ACAM II deployment obligations for Tribal lands in addition to the deployment obligations for their service areas as a whole.¹⁴ This new ACAM II requirement gave Nez Perce the benefit of prompt deployment, and its Hatchery along with Tribal Offices received increased broadband capacity. The build-out requirement completely changed the meaning of Tribal engagement and Tribes have seen greater responses from carriers receiving federal funding who have previously said that it was not feasible to deploy on Tribal lands.

GRTI engages with its Tribal government by providing comprehensive quarterly updates to the Tribal Council on broadband deployment for residences or any project within the Community.

Recommendation: The engagement process would benefit from clear guidelines for covered providers to communicate their intentions for deployment and service on Tribal Lands.

¹² *2012 Further Guidance PN*, 26 FCC Rcd at 8181-82, para. 20.

¹³ *2012 Further Guidance PN*, 26 FCC Rcd at 8182, para. 23.

¹⁴ See e.g., *Wireline Competition Bureau Provides Guidance Regarding Alternative Connect America Model Final Deployment Obligations*, WC Docket No. 10-90, Public Notice, 34 FCC Rcd 5337 (2019).

Covered providers should provide quarterly updates on buildout and deployment plans to any Tribes within their service area. These updates shall include any buildout or deployment that occurs on Tribal lands or would affect services to Tribal lands. An example of the latter would be service node upgrades that would increase or decrease service on Tribal lands but where the device is not located on Tribal lands.

Tribal members also recommend that the Commission look at the interplay between the Tribal engagement requirement that covered providers discuss feasibility and sustainability planning with Tribal governments and the build-out requirements attached to high-cost support. Unless the provider is under an obligation to build-out in especially hard-to-serve areas like rural Tribal lands, engagement over deployment plans, feasibility and sustainability is meaningless.

C. Marketing in a Culturally Sensitive Manner

The *2012 Further Guidance PN* observed that the requirement that Tribal engagement include discussions about marketing in a culturally sensitive manner recognizes that each Tribal Nation has its own culture and heritage that is different from other Tribal Nations.¹⁵ Discussing these differences gives Tribal governments and service providers the opportunity to develop ways to coordinate or partner to ensure that services are marketed in a way that will relate directly to the individual community and resonate with consumers.¹⁶

Tribal members report that marketing in a culturally sensitive manner has not occurred. Tribes almost never see advertisements for service over Tribal lands that are tailored to Native Nations. Any advertisements that are used are not specific to the Tribal Nation targeted and are generic nationally/locally approved advertisements.¹⁷ Marketing that better resonates with Tribal residents and businesses is more likely to drive adoption, which could improve the economics of serving these areas. It would be beneficial if covered providers would run their advertising campaigns through the cultural centers of the Tribes in their service area or employ Tribal members on their marketing teams.

For example, Nez Perce worked extensively with its CenturyLink representative to have materials available to provide to Tribal members living in Idaho regarding services they could apply for such as Lifeline. After CenturyLink changed its corporate structure from a regional to a central office, the Tribe lost its regional representative and all calls now go to a generic support center. When the Tribe does get a return call, it is from Seattle and normally that office is not able to provide assistance for how Tribal members can obtain Lifeline support in their local areas. Even the county governments on the Nez Perce Reservation turn to the Tribe because the counties are not getting information on where Lifeline support can come from landline voice service providers.

GRTI, as a Tribally owned company, knows and understands the needs of the Community. GRTI's marketing staff meets regularly with the Community's Elders' Concerns group and other respective groups, if necessary, to understand the specific needs of service.

¹⁵ See *2012 Further Guidance PN*, 26 FCC Rcd at 8182, para. 24.

¹⁶ See *2012 Further Guidance PN*, 26 FCC Rcd at 8182-83, para. 25.

¹⁷ Further, many entities that are required to provide Lifeline support refuse to identify, or make it very difficult to find, the correct office or point of contact to provide assistance. This means that people simply go without service or pay standard commercial rates.

Education about telecommunications services is shared by the marketing group to the various segments of the Community.

Recommendation: The elimination of local/regional representation and consolidation of support means that having a dedicated department to handle Native Affairs is necessary to understand and serve the needs of Tribal Nations and better enable collaboration over marketing in a culturally sensitive manner. Tribal members therefore recommend that the Commission encourage each carrier to designate a Native American affairs department or representative so that there is a department or person that focuses on and understands the needs of the Native Nations. This has been seen successfully with AT&T FirstNet and Verizon, which each have Native liaisons.

D. Rights-of-Way and Other Permitting and Review Processes

The *2012 Further Guidance PN* stated that discussion of this element offers service providers a greater understanding of relevant rights-of-way regulations and permitting and review processes that address environmental, historic-preservation, and culturally sensitive areas on Tribal lands.¹⁸ Having such discussions up-front can avoid problems that later delay deployment schedules.

One example occurred on the Nez Perce Reservation. Some CAF II recipients use third-party construction companies to build out the upgrades for areas the carrier won. In one case, neither the carrier, nor their third-party vendor, contacted the Tribe about the upgrades before they began. It was purely coincidental that a Nez Perce Cultural Program employee drove by an area being upgraded using CAF II funding and discovered damage to culturally important sites. Immediately, the Tribe made calls to determine who was digging, what the digging was for, and who the point of contact was for the digging. Ultimately, that issue is in front of the Commission and has yet to be resolved almost two years later. Had the carrier itself engaged with the Tribe prior to commencing deployment, Nez Perce believes this unfortunate result could have been avoided.

The Red Cliff Band has an ongoing lawsuit in Tribal Court over an ETC being in trespass on Tribal Lands and for not following the Tribal Code in the course of doing business on the Reservation.

Tribal members also find it extremely frustrating that carriers continue to cite rights-of-way, permitting, siting, environmental, and/or historic-preservation requirements as barriers to deployment and reasons to deny service on Tribal Lands even in cases where Tribes provide the data necessary to complete these processes, providing the required path forward to the carrier.

When developing on the reservation, Gila River Telecommunications, Inc. (GRTI) coordinates rights-of-way with the Bureau of Indian Affairs for allotted lands, or any other Community-owned Tribal Office for Tribal lands. The Community Council approves all rights-of-way applications. Additionally, the Community's Cultural Office ensures on-site monitoring of construction projects. This office is a part of the process from the beginning to end of any project. GRTI, as a service provider, pays for the services provided by the Cultural Office.

¹⁸ See *2012 Further Guidance PN*, 26 FCC Rcd at 8183, paras. 26-28.

Recommendation: Tribal members recommend that the FCC provide guidance to deter covered providers from using rights-of-way, permitting, siting, environmental, and/or cultural requirements to deny service on Tribal Lands. Covered providers continue to cite these requirements as barriers to deployment even though Tribes continue to provide the data necessary to complete the processes associated with obtaining the necessary clearances.

Constructive engagement through consultation becomes a two-way street with design and engineering for deployment of Tribes' 2.5 GHz spectrum licenses underway. Carriers are requesting detailed information about planned Tribal networks to avoid interference with their networks. Engagement must be reciprocal. With design and engineering for implementation of Tribes' 2.5 GHz spectrum licenses underway, carriers are requesting detailed information about planned Tribal networks to avoid interference with their networks. However, rarely, if ever, have carriers engaged Tribes concerning their deployment of radio spectrum potentially overlying Tribal lands, nor have they engaged Tribes about the potential to serve Tribal unmet needs for services.

E. Compliance with Tribal Licensing and Business Requirements

As sovereign Nations, Tribal governments have the authority to impose business and licensing requirements on all entities that do business on their lands. This element of Tribal engagement provides carriers the ability to learn of these requirements and discuss with Tribal governments the applications of the requirements.¹⁹

Tribal members believe that carrier knowledge of such Tribal requirements can help speed deployment and reduce costs. For example, construction on the Nez Perce Reservation requires Tribal Employment Rights Office (TERO) involvement. This is Tribal Law and is required for every construction project. TERO requires a plan detailing the length of the project, costs of the project and workforce necessary for the project. This is to enable Tribal employment where TERO can provide the skilled staffing as required for the project.

The Gila River Indian Community requires all developers, firms and vendors doing any form of business with any entity of the Community to obtain a business license before business is transacted. GRTI has a Certificate of Convenience and Necessity that is renewable every twenty-five years.

Recommendation: Tribal members recommend the FCC reiterate and strongly emphasize the need for covered providers to take seriously the obligation to discuss compliance with Tribal licensing and business requirements. Doing so will avoid unnecessary delays and facilitate deployment and service provisioning.

Carrier compliance with Tribal requirements will become imperative when Tribes deploy 2.5 GHz networks with spectrum licenses obtained through the 2.5 GHz Rural Tribal Priority Window and require comity and respect among non-Tribal and Tribal licensees.

IV. ADDITIONAL ACTIONS TO IMPROVE TRIBAL ENGAGEMENT

The Commission can improve the Tribal engagement process in several ways. It can issue additional practical guidance to Tribal governments and covered providers aimed at improving the engagement process based on the parties' experience with Tribal engagement to

¹⁹ 2012 *Further Guidance PN*, 26 FCC Rcd at 8183-84, paras. 28-29.

date. Improvements can also be made through the rulemaking process and through informal actions.

Tribal members have identified the following improvements and suggestions for the Commission's consideration.

A. Issues that Can Be Addressed Through the Provision of Additional Guidance

1. Designating a Single Point of Contact

Tribal members understand that ETCs have pushed for Tribes to identify a single point of contact. Yet Tribes often cannot get a single point of contact from providers. Even where ETCs have a designated representative for Tribes, most Tribes find that the person changes frequently. Unfortunately, communication processes take time and there is no silver bullet for fixing the problem of communication. Some commenters on the 2019 PN have mentioned having a single contact address provided by Tribes and providers for everything relating to communications with Tribes.

Recommendation: To better facilitate engagement, both Tribes and ETCs should designate a single point of contact. Each should be required to maintain contact with the designated point person or office during the engagement process.

The FCC should consider establishing a system similar to the Tower Construction Notification System to handle communications between USF-supported ETCs and Tribes about planned deployments, improvements, etc.

2. Making a Preference for In-Person Meetings When Practicable

Face-to-face communication can be difficult but must happen for meaningful engagement. Even with online meeting software, it should still be a requirement to have at least one annual face-to-face meeting when practicable. Face-to-face meetings give both parties a better awareness of who within each entity is the primary point of contact and what each party is able to accomplish to move engagement forward.

Recommendation: Tribal members recommend that Tribal engagement should occur in person whenever practicable.

3. Improving the Effectiveness of Tribal Engagement Notices Sent to Tribes

Outreach and response by covered providers are generic (e.g., "Dear Tribal Chairman") and sent to many email recipients. These generic communications indicate no more than that there is a Tribal engagement obligation and that the email is meeting that obligation for the provider. Tribal members have found that this type of communication is not only ineffective but also demonstrates how unimportant to providers the outreach is. Most Tribal email filtering systems would typically see this mass contact initiating engagement as spam and block or filter this communication. This type of engagement is not what *USF/ICC Transformation Order* intended.

Recommendation: The FCC should provide additional guidance to covered providers regarding effective and targeted communications to Tribes regarding the engagement process.

4. Clarifying What Constitutes “Good Documentation and Recordkeeping”

Tribal members believe that access to accurate documentation will help address and resolve many Tribal engagement issues. Improved recordkeeping, when done in conjunction with the ongoing conversations discussed above, will ensure that all parties are on the same page. Each party should revisit official records or shared documentation distributed after a face-to-face meeting to ensure each party understands expectations, limitations and action plans. The goal of this recommendation is to create living documents that will evolve over deployment. The documents should close out once the project is finished and when both entities have signed off on the close out. The archived documents will provide a permanent record of the interactions between the Tribe and the covered provider.

Recommendation: The FCC should clarify what constitutes “good documentation and recordkeeping.”

5. Improving Carrier Compliance Reporting

As discussed above, Native Nations often receive generic “Dear Tribal Chairman” Tribal engagement letters, and these letters frequently contain a massive amount of redacted information. Tribes also often find ETCs’ Form 481 paperwork unusable, with documentation often covering areas that are not those of the receiving Tribe. For example, Nez Perce, located in Idaho, has received documentation from ETCs for areas in Nebraska.

ETCs initially directly provided Tribes with compliance documents, which was convenient, but they often contained heavy redactions and therefore provided little useful deployment/upgrade information to the Tribe. The Universal Service Administration Corporation (USAC) now maintains an online portal, 54.314 Certification and Filing System, for Native Nations to register to obtain the unredacted versions of ETCs’ compliance documents. Many carriers now simply notify Tribes the Form 481 documentation is available online with a generic letter stating that the documentation filing was complete and that it was available for review. To access this information, Tribes must complete a registration process and obtain an access identification number.²⁰ Tribes have found the process cumbersome and confusing and have also found that it is almost impossible to change the access identification number if the Tribal staff member who made the application leaves his/her position.

Recommendation: Tribal members recommend that documentation for reporting compliance with the Tribal engagement obligation must be specific to the Tribe, without redaction of any included information, and made more easily accessible. Information included in the Tribal report should only include locations and subscribers specific to the relevant Tribe.

²⁰ Instructions for Tribal access to Form 481 are located on the USAC website’s Tribal Nations page, under the high-cost program section, at the second bullet, <https://www.usac.org/about/tribal-nations/>. Tribal governments can request access to the annual FCC Form 481 filing submitted by ETCs that serve their lands with support from the high-cost program through the online 54.314 Certification Filing System. In order to obtain access privileges to the 54.314 system, Tribal governments must contact the high-cost Program at Form481@usac.org to request an authorization form. Once granted access, Tribal officials will be able to log in to the 54.314 system and view Form 481 data filed by the carriers serving their lands. Tribal governments must send an email to Form481@usac.org to request for access. USAC’s high-cost staff will then respond by sending the “54.314 (Tribes) Online Authorization Form” for the requester to fill out. The “54.314 (Tribes) Online Authorization Form” is not posted on the website; it must be requested directly from USAC.

Specifically, in addition to making the un-redacted information available through the USAC online portal, the FCC should require covered providers to provide Tribes with non-redacted documentation directly. The FCC should also make the portal and process more accessible to Tribal Nations by simplifying registration and access procedures to make them more “user friendly.”

6. Implementing Engagement in a Flexible Manner

In a growing number of cases, Tribes have established their own communications entities to provide voice and broadband services to their communities. These Tribal entities are inescapably in regular communication with Tribal governments and therefore conversant with the communications needs of their communities and able to update them on their deployment plans in a timely manner.

One example is the St. Regis Mohawk Tribe, which was notified in September 2010 that it was receiving grant funding under the American Recovery and Reinvestment Act. The grant was for a total of \$10.5 million, and helped build the Tribe’s network, which now provides broadband availability to our entire reservation with approximately 80 miles of fiber coverage. Off-territory coverage has also been built with wireless towers. The telecommunications company, Mohawk Networks, is made up of a seven-member Board, with four Tribal Council members on the Board. The blended board of Tribal Council and community members keep Tribal Council aware of any and all major decisions and situations with Mohawk Networks, and keeps community members aware at the same time. There are annual meetings where any community members attending are made aware of all aspects of the company.

While Tribes do not expect the same level of engagement from other providers serving or located on sovereign Tribal areas, engagement with Tribally owned ETCs demonstrates what is possible when Tribes and providers work together. A good example is Salt River Pima Maricopa Indian Community’s (SRPMIC) Saddleback Communications. The SRPMIC Board and Council annually approve both the Operating and Capital budgets of Saddleback Communications. The Saddleback Board consists of at least four Community Members. The Company serves approximately 1,500 Community Member households and approximately 415 businesses. The Company also owns a leading national Unified Communications as a Service (UCaaS) wholesale provider, Reinvent Telecom. The Board and Company strive to make decisions that are in harmony with the Community’s well-articulated Vision, Mission and Values.

Since Saddleback acquired its telecommunications network in the early 2000’s, it has replaced a long-neglected copper infrastructure with 100% fiber optic infrastructure to Community Member homes and businesses. Saddleback chose an “active ethernet” electronic deployment which can enable a fully synchronous Gigabit of broadband Internet in anticipation of future household demand. Working closely with the Community Government, Saddleback has proactively developed wireless sites with the major providers enhancing the Community’s wireless coverage and public safety radio services. Wireless sites expanded from 5 to 25 due to Saddleback’s proactive efforts and engagement with SRPMIC. Given the current need for remote work and remote learning, the close cooperation between SRPMIC and Saddleback has enabled the company to quickly increase household Internet demand while offering Covid-19 discounts to offset high levels of unemployment in the U.S. today.

Saddleback’s development of wireless sites on behalf of SRPMIC is an example of the benefit of ongoing engagement between Tribally owned carriers and the Tribal governments

they serve. The frequency and depth of engagement between Tribally owned carriers and their Tribal governments is a reason why we would ask the FCC to be flexible with these companies in terms of assessing their Tribal engagement compliance.

Recommendation: The Commission's implementation of the Tribal engagement obligation for Tribally owned and controlled ETCs should be flexible enough to recognize that Native-owned telecommunications cooperatives and non-Tribal owned cooperatives that have Tribal members may satisfy their obligation by demonstrating member oversight and ownership without being required to engage in the same type of stand-alone engagement as a non-Native owned ETC.

7. Establishing a Protocol for Consent of Tribes for Projects on Tribal Lands

The United Nations Declaration on the Rights of Indigenous Peoples, Article 32, states consultation "in order to obtain" free, prior, informed consent is not required but must be sought.²¹ Free, prior and informed consent cannot exist independent of indigenous peoples' right to participate in decision-making, provided decision-making is not limited to indigenous peoples' internal decision-making processes and institutions. Good practices for consultation involving indigenous peoples' government decision-making and free, prior and informed consent should include within its scope requirements for negotiation of all important measures that may directly affect the status of indigenous peoples or that may implicate indigenous peoples' interests, including regulation, administrative decisions, guidelines, measures and decisions under the Commission's jurisdiction.

Recommendation: Tribal members also recommend the Commission establish a protocol for free, prior and informed consent of Tribes for projects on Tribal lands. The Commission should encourage and incent carriers to engage with Tribal governments to develop the practices necessary to implement free, prior, and informed consent, and the right to participate in decision-making directly implicating indigenous²² peoples' interests, as a condition to approval of actions or activities that would affect their rights or interests as the essential process to establishing expectation rights in Commission policy. Such Commission practices should propose effective actions when those expectation rights are violated.

B. Issues That Require Rule Changes

1. Establishing a Tribal Engagement-Specific Compliance and Complaint Process

Tribal members understand that in all deployment activities strife can occur. Through the processes identified above, the intent is to limit how often issues arise, identify how to deal with those issues, and ultimately to see actual deployment on Tribal lands, thus eliminating the digital divide. At the same time, it has become evident that without enforcement of the FCC's Tribal engagement rules, compliance will remain minimal. In our view, achieving the Commission's goal "to ensure the effective exchange of information that will lead to a common understanding between Tribal governments and communications providers receiving USF support, on the deployment and improvement of communications services on Tribal lands,"²³ is not feasible or achievable without consequences to communications providers for failure to comply.

²¹ United Nations Declaration on the Rights of Indigenous Peoples, Article 32 (2007) available at https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

²² See MuralNet 2019 PN Comments at 7-8.

²³ 2012 *Further Guidance PN*, 26 FCC Rcd at 8176, para. 2.

Recommendation: Tribal members recommend that the Commission establish a complaint process for Tribal governments specific to the Tribal engagement obligation.²⁴ The process for addressing issues should be comprehensive, and have specific timelines for uncovering facts, developing resolution paths, and education to prevent future strife. The complaint process needs to have mechanisms to identify the strife, bring the parties together in a confidential manner, and understand that moving forward no retaliation to the complainant will occur.

Further, the Commission should establish a standard response whereby a Tribal government's complaint about a lack of engagement by an ETC designated to serve Tribal area(s) triggers a mandatory request for information from the ETC, with responses filed with the Commission.²⁵ This process would reveal the actions needed to obtain adequate service for the Tribal lands.

The FCC's Office of Native Affairs and Policy (ONAP) should have oversight of these complaints and work with the FCC's Enforcement Bureau in the event compliance issues are not resolved. In enforcement cases that reveal ETC non-compliance, the Commission should consider financial penalties consistent with the 2011 *USF/ICC Transformation Order*.²⁶

2. Broadening the Tribal Engagement Obligation

Tribal members believe the digital divide with Indian country could be bridged more quickly and effectively if all FCC-regulated carriers, and not just covered ETCs, were required to share deployment plans that affect Tribal lands.

The largest problem the Red Cliff Band of Lake Superior Chippewa Indians sees with engagement, for example, is that other providers that serve the reservation are not required to participate in engagement. There are significant service issues, build-out questions, and comments that the Tribe would like to bring forth in engagement, but non-ETCs are not required to engage with the Tribes they serve. Red Cliff only has one ETC on Tribal Lands and many unregulated carriers. The actions of the unregulated carriers have been impossible for the Tribe to track or direct. The largest non-ETC in the Tribe's area has done patchy build-out that makes no sense from the service perspective of the Tribe. Some people have the service, but their close neighbor cannot get services. This sort of inequitable treatment should be discussed but cannot be as there is no leverage to bring the provider to the table and the provider is not required to engage by the FCC.

The FCC regulates all telecommunications carriers, terrestrial and non-terrestrial, facilities-based and non-facilities based, wired and wireless. However, the FCC currently requires only carriers that receive high-cost funds to participate in Tribal Engagement. Major providers that do not receive USF high-cost funding, and thus do not participate in Tribal Engagement are not required to engage with Tribes even though they operate on Tribal lands. Examples of these carriers include Charter (Spectrum) Communications and Verizon Wireless. Tribal officials have no recourse through the normal government-to-government consultation process to bring these carriers to the table. Tribal members believe that because the providers

²⁴ See NTTA 2019 PN Comments at 9-10 and Oceti Sakowin Tribal Utility Authority 2019 PN Comments at 10 (the Commission should establish a mechanism for enforcement of Tribal engagement rules with penalties for non-compliance and also that ONAP have oversight.)

²⁵ See GRTI 2019 PN Comments at 5 and MuralNet 2019 PN Comments at 2.

²⁶ *USF/ICC Transformation Order*, 26 FCC Rcd at 17868, para. 637.

are using the public airwaves and rights-of-way through license and lease, all operations, subsidized or non-subsidized, should be subject to Tribal Engagement. Imposing this obligation would not burden the carriers' non-Tribal customers.

Recommendation: Tribal members recommend that all FCC-regulated carriers be subject to the Tribal Engagement obligation if they are operating on Tribal lands or hold a spectrum license that covers or overlaps with Tribal lands.

3. Making Tribal Engagement an On-Going Process

While the annual face-to-face communications are necessary, ongoing conversations are what gets the work done of maintaining realistic consultation. Ongoing communication provides both entities an avenue to check in, update and adjust as necessary. It also gives both entities an opportunity to resolve barriers or tactically address issues.

Requiring multiple contacts, perhaps quarterly, would help ETCs better understand Tribal communications needs, and provide Tribes better insight into where deployment is taking place and when they can expect upgraded facilities. Additionally, Tribes would benefit more if ETCs provided continuous updates on their deployment plans and any changes to such plans.

Recommendation: Tribal members recommend that an ongoing communication requirement, preferably no less than quarterly, be added to the Tribal engagement rule. Recommendations in the form of guidance and/or best practices are weak and unlikely to be followed, leaving a rule change as the preferred course of action.

4. Elevating the Office of Native Affairs and Policy

Tribal members believe that Tribes see more compliance with rules intended for their benefit in government departments and agencies where a fully funded Tribal liaison or office reports directly to the top decisionmaker. By extension, the foundation for productive communications carrier/Tribal government engagement begins with full funding and support for ONAP and NNCTF, including moving ONAP out of the Consumer and Governmental Affairs Bureau and establishing it as an independent office reporting directly to the Office of the FCC Chairman, similar to the Office of Legislative Affairs. ONAP, together with the NNCTF, would then be better positioned to impress upon communications carriers such things as the need for them to provide service at a price affordable to the Tribes' anchor institutions, such as government buildings, hospitals, and schools. ONAP and NNCTF could then better assist with the engagement process between communications carriers and Tribal governments, especially in cases where the carrier fails to respond to a Tribe's request for engagement.

Recommendation: Tribal members recommend that ONAP be established as an independent FCC Office reporting directly to the Office of the FCC Chairman.

C. Issues That Can Be Addressed Through Informal Commission Action

1. FCC-Guided Listening Sessions

Tribal members believe the Commission should conduct listening sessions or hold forums for Tribes to describe what is happening in Indian country in terms both of cross-cutting communications issues that affect all Tribes, such as the persistent lack of facilities and services in rural and remote areas, and those specific to different Tribes and regions, such as U.S. Border radio interference issues.

Recommendation: The Commission should hold listening sessions with the Tribal members of the NNCTF on an annual basis. To facilitate greater understanding between Tribal governments and providers, these sessions can be open to carriers and other providers of voice and broadband services on Tribal lands.

2. Developing Educational Programs

Tribal members suggest the FCC develop educational programs on Tribal engagement for Tribes and carriers to enroll in at the same time. Keeping the sessions small and organized would open doors to understanding, as education helps people identify with one another and allows dialogue to occur. Online education programs can cover the structure for engagement, give the requirements for documentation, and address the minimum frequency for meaningful engagement. Particularly when federal funds are dispersed for set purposes, an education requirement can ensure compliance.

Recommendation: The FCC should conduct educational programs to bring ETCs and Tribes together to make Tribal engagement function as designed in light of new guidance.

IV. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

This report is intended to highlight areas where the Tribal engagement obligation has been successful as well as instances where it has not. Based on the forgoing we offer the Commission and other policy makers the following recommendations aimed at increased and more efficient engagement between eligible telecommunications carriers and Tribal governments, on whose lands they serve or seek to serve, that will better achieve the goal of increasing broadband deployment and service provisioning on Tribal lands.

Summary of Recommendations for Improving Tribal Engagement

I. Recommendations Concerning the Five Required Elements of Tribal Engagement

A. Needs Assessment and Deployment Planning

Covered providers should request a needs assessment from the Tribe during or following engagement activities. Needs assessments would contain, but are not limited to, locations needing service; types of service requested; infrastructure updates and other relevant requirements.

The FCC should clarify the specific topics covered providers should address during the discussion of deployment planning.

B. Feasibility and Sustainability

The FCC should develop clear guidelines for providers to communicate their intentions for deployment and service on Tribal Lands.

Providers should provide quarterly updates on buildout and deployment plans to any Tribes within their service area. These updates shall include any buildout or deployment that occurs on Tribal lands or would affect services to Tribal lands.

The FCC should look at the interplay between the Tribal engagement requirement that covered providers discuss feasibility and sustainability planning with Tribal governments and the build-out requirements attached to high-cost support.

C. Marketing in a Culturally Sensitive Manner

The FCC should encourage each carrier to designate a Native American affairs department or representative so that there is a department or person that focuses on and understands the needs of the Native Nations. The elimination of local/regional representation and consolidation of support means that having a dedicated department to handle Native Affairs is necessary to understand and serve the needs of Tribal Nations.

D. Rights of Way and Other Permitting Processes

The FCC should provide guidance to deter carriers from using rights-of-way, permitting, siting, environmental, and/or cultural requirements to deny service on Tribal Lands, particularly where Tribes provide carriers with the data necessary to complete the processes associated with obtaining the necessary clearances.

E. Compliance with Tribal Licensing and Business Requirements

The FCC should reiterate and strongly emphasize the need for carriers to take seriously the obligation to discuss compliance with Tribal licensing and business requirements as a means of avoiding unnecessary delays and facilitating deployment and service provisioning.

II. Additional Actions to Improve Tribal Engagement

A. Issues That Can be Addressed Through the Provision of Additional Guidance

1. Designating a Single Point of Contact

To better facilitate engagement, Tribes and ETCs should designate a single point of contact. Each should be required to maintain contact with the designated point person or office during the engagement process.

The FCC should consider establishing a system similar to the Tower Construction Notification System to handle communications between USF-supported ETCs and Tribes about planned deployments, improvements, etc.

2. Making a Preference for In-Person Meetings When Practicable

Tribal engagement should occur in person whenever practicable.

3. Improving the Effectiveness of Tribal Engagement Notices Sent to Tribes

The FCC should provide additional guidance to covered providers regarding effective and targeted communications to Tribes regarding the engagement process.

4. Clarifying What Constitutes “Good Documentation and Recordkeeping”

The FCC should clarify what constitutes “good documentation and recordkeeping.”

5. Improving Carrier Compliance Reporting

Documentation for reporting compliance with the Tribal engagement obligation must be specific to the Tribe, without redaction of any included information, and made more easily accessible. Information included in the Tribal report should only include locations and subscribers specific to the relevant Tribe.

Specifically, in addition to making the un-redacted information available through the USAC online portal, the FCC should require carriers to provide Tribes with non-redacted documentation directly.

The FCC should also make the portal and process more accessible to Tribal Nations by simplifying registration and access procedures to make them more “user friendly.”

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7. Establishing a Protocol for Consent of Tribes for Projects on Tribal Lands

The Commission should establish a protocol for free, prior and informed consent of Tribes for projects on Tribal lands. The Commission should encourage and incent carriers to engage with Tribal governments to develop the practices necessary to implement free, prior, and informed consent, and the right to participate in decision-making directly implicating indigenous peoples' interests, as a condition to approval of actions or activities that would affect their rights or interests as the essential process to establishing expectation rights in Commission policy. Such Commission practices should propose effective actions when those expectation rights are violated.

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The FCC should establish a complaint process for Tribal governments specific to the Tribal engagement obligation.

The process for addressing issues should be comprehensive, and have specific timelines for uncovering facts, developing resolution paths, and education to prevent future strife.

This should include a standard response procedure whereby a Tribal government's complaint about a lack of engagement by an ETC designated to serve Tribal area(s) triggers a mandatory request for information from the ETC, with responses filed with the Commission.

ONAP should have oversight of these complaints and work with the FCC's Enforcement Bureau in the event compliance issues are not resolved.

In enforcement cases that reveal ETC non-compliance, the Commission should consider financial penalties consistent with the 2011 *USF/ICC Transformation Order*.

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All FCC-regulated carriers should be subject to the Tribal engagement obligation if they are operating on Tribal lands or hold a spectrum license that covers or overlaps with Tribal lands.

3. Making Tribal Engagement an On-Going Process

Tribal members recommend that an ongoing communication requirement, preferably no less than quarterly, be added to the Tribal engagement rule. Recommendations in the form of guidance and/or best practices are weak and unlikely to be followed, leaving a rule change as the preferred course of action.

4. Elevating the Office of Native Affairs and Policy

ONAP should be established as an independent FCC Office reporting directly to the Office of the FCC Chairman. Tribes are more likely to see compliance with rules intended for their

benefit in government departments and agencies where a fully funded Tribal liaison or office reports directly to the top decisionmaker.

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The FCC should hold listening sessions with the Tribal members of the NNCTF on an annual basis and these sessions can be open to carriers and other providers of voice and broadband services on Tribal lands to facilitate greater understanding between Tribal governments and providers.

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