Before the
Navajo Nation Telecommunications Regulatory Commission

In the Matter of Application for	**)**	
Certificate of Convenience	**)**	
and Necessity (CCN)	**)**	**No. NNTRC-11-001**
	)	
_____	**)**	

COMMENTS OF AT&T ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

AT&T[1] submits the following comments on the August 27, 2012 Further Notice of Proposed Rulemaking ("Notice") issued by the Navajo Nation Telecommunications Regulatory Commission ("NNTRC").

Introduction

AT&T appreciates the opportunity to submit comments on the NNTRC's current proposal for telecommunications carrier certification regulations, which, unlike the NNTRC's initial proposal, appropriately acknowledges that it does not make sense to subject all carriers to the significant burden of obtaining a certificate of convenience and necessity. Nevertheless, AT&T respectfully submits that the proposed regulations remain overly burdensome, and fail to reflect the realities of the competitive marketplace and the limitations of Navajo Nation jurisdiction over non-Navajo entities.

These comments are organized into three sections. Section I explains why the Notice's proposed regulation of wireless carriers is flawed; Section II sets forth similar problems with applying the proposed regulations to providers of long distance service; and Section III addresses additional flaws in the proposed regulations.

[1] These comments are submitted by AT&T Communications of the Mountain States, Inc., New Cingular Wireless PCS, LLC, and other affiliated AT&T entities providing long distance and wireless services in Arizona, New Mexico, and Utah.

As an initial matter, as explained in Sections I.A (wireless) and II.A (long distance), wholly apart from jurisdictional considerations, there is no valid justification to subject wireless carriers and long distance carriers to the proposed regulatory framework. In particular, as a matter of policy there is no reason to require these carriers to obtain authorization from the NNTRC in order to continue providing the same services the entities have been providing for many years without an additional layer of Navajo Nation regulation. The markets for wireless services and long distance have long been competitive, and that competition has thrived in large part because of the *absence* of burdensome entry requirements. For example, wireless carriers, licensed by the FCC to provide service and unburdened by duplicative state or local entry requirements, have poured billions of dollars into deploying, updating, and expanding their networks. The current regulatory environment within the Navajo Nation has already led to robust competition, particularly in light of the often sparse population density. While the Navajo Nation, in light of the challenges imposed by geography and population density, has not received as much investment as some other areas, the FCC is already working to foster more wireless investment within tribal lands, by creating a special tribal mobility fund (which NTUA Wireless has already applied for). *See Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 481-485 (2011). But the NNTRC's proposal to impose *more regulation* upon wireless carriers could only have the effect of discouraging investment within the Navajo Nation.

Moreover, as explained below in Sections I.B (wireless) and II.B (long distance), the proposed certification requirements conflict with federal law, because the FCC has exclusive jurisdiction to authorize wireless carriers to provide service and to regulate the provision of interstate long distance services. The Federal Communications Act gives the FCC the sole authority to determine what persons may provide wireless services, and once a wireless carrier

has been licensed by the FCC to provide service in a particular area, federal law does not permit the Indian Nations to block that service by imposing their own certification requirements. Similarly, with respect to the regulation of interstate long distance services, Congress has occupied the field and given the FCC the exclusive authority to regulate such services.

In addition, as explained below in Sections I.C (wireless) and II.C (long distance), the proposed regulations exceed the Navajo Nation's limited authority to regulate nonmembers. For example, while the Notice relies upon the Navajo Nation's purported authority to exclude nonmembers (and hence to place conditions upon their entry into the Navajo Nation), that ignores the fact that under the Treaty of 1868, the Navajo Nation relinquished any right to exclude "works of utility or necessity." Further, while the Navajo Nation has some authority to regulate nonmembers who enter the Navajo Nation and create a consensual relationship to provide service to the Navajo People, the proposed regulations are not limited to those circumstances, but sweep much more broadly. For example, the proposed regulations are not limited to nonmembers that physically enter tribal land to provide wireless and/or long distance services.

Finally, as explained below in Section III, the four categories of authorization contemplated by the Notice are unreasonably vague, and fail to provide carriers any certainty as to the potential implications of seeking certification under one category or another. For example, the Notice suggests that a Public Interest Operator will assume greater regulatory burdens in exchange for certain benefits, including a proposed "public interest rate structure." However, the Notice fails to spell out all the contemplated responsibilities of a Public Interest Operator, and it does not explain what the public interest rate structure would be, or how it would differ from rates applicable to a Small Operator or General Operator. Perhaps more importantly, the Notice

fails to explain how the NNTRC possibly could establish a public interest rate structure, in light of the fact that the NNTRC appears to have no authority to lease tribal lands or set the rental rates at which the Navajo Nation leases its lands to others.

I. The NNTRC Should Decline To Impose Certification Requirements Upon Wireless Carriers.

A. Imposing New Regulatory Burdens Upon Wireless Carriers Is Likely To Inhibit The Deployment Of New Wireless Infrastructure Within The Navajo Nation.

Both as a matter of law and as a policy matter, the NNTRC should decline to impose new certification requirements upon wireless carriers. The purposes of the Navajo Telecommunications Regulatory Act ("Act") are "to make available within the Navajo Nation efficient, reasonably priced and rapid communications, to promote and expand communications within the Navajo Nation, and ensure that communication activity within the Navajo Nation is consistent with the traditions, customs and desires of the Navajo People." 21 N.N.C. § 502(A). The Notice fails to explain how imposing certification requirements upon wireless carriers would advance any of these goals. To the contrary, the imposition of such requirements would likely *discourage* the development of wireless services within the Navajo Nation and undermine the Act's goals. As a result, consistent with the authority granted by section 510(B) of the Act, the NNTRC should decline to require wireless carriers to obtain a certificate of convenience and necessity.

In the federal Omnibus Budget Reconciliation Act of 1993, Congress amended the federal Communications Act of 1934 (the "Federal Communications Act") to "dramatically revise the regulation of the wireless telecommunications industry" in order to unleash the benefits of the competitive marketplace to consumers. *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998). It attempted to establish a "*national* regulatory policy for

[wireless service], not a policy that is balkanized state-by-state." *In the Matter of Petition of the Connecticut Dept. of Public Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 FCC Rcd. 7025, 7034, ¶ 14 (FCC rel. May 19, 1995) (emphasis added). As a result, the markets for wireless services have been and continue to be fiercely competitive across the nation, all to the benefit of consumers. For example, in order to compete to attract and retain satisfied customers, wireless carriers have invested and continue to invest enormous sums to deploy, maintain, and continually increase wireless coverage and capacity. The result has been a high-capacity, nationwide wireless network so valued by consumers that wireless subscriber connections have grown to more than 322 million[2] – a number that now exceeds the U.S. population – from less than one million customers in 1986.

This large-scale investment in wireless technologies and explosive growth in wireless coverage and usage is not attributable in any way to state or local entry regulation. To the contrary, it is a result of the competitive marketplace for wireless services. Since at least 1993, Congress has exempted wireless carriers from state and local entry regulation, allowing wireless carriers to dedicate their resources to aggressively investing in quality and coverage improvements, and bringing innovative new products and services to the marketplace.

There is no evidence of any sound reason the NNTRC now suddenly needs to intervene in the continued development of the markets for wireless services by establishing certification requirements. Establishing such requirements would necessarily make it more expensive and burdensome for existing wireless carriers to continue operating within the Navajo Nation, and create obstacles to entry by new wireless carriers. Wireless carriers do not face, and will not face, these same burdens and obstacles anywhere else in the United States. Simply put, imposing

[2] http://www.ctia.org/advocacy/research/index.cfm/aid/10323.

costs and barriers on providers serving the Navajo Nation that do not exist anywhere else will not benefit the Navajo People as wireless carriers decide where in the United States to devote their resources and investments.

Moreover, the Notice does not set forth any persuasive rationale for requiring wireless carriers to obtain a certificate of convenience and necessity. The Notice states (at p.4) that "[t]he NNTRC through billing requirements will ensure that Navajo customers and the Navajo government are not charged state and local taxes for telecommunications services provided to tribal members, or the tribal government, on their own lands," but that misses the mark. Even if the NNRTC has the authority to impose such billing requirements upon wireless carriers, it has not proposed any such regulations. The requirement that it *has* proposed – to require wireless carriers to obtain a certificate authorizing the provision of wireless telecommunications services – has nothing to do with billing requirements.

The Notice also states (at p. 6) that "[t]he NNTRC is statutorily obligated to protect the Navajo public and will therefore regulate all operators, including wireless carriers, in the Navajo public interest," but that merely begs the question – will requiring wireless carriers to undertake the burden and expense of obtaining a certificate somehow protect the Navajo public interest? As explained above, it will not.

B. Federal Law Does Not Permit The NNTRC To Impose A Certification Requirement Upon Wireless Carriers.

Even if there were some sound policy rationale for requiring wireless carriers to obtain a certificate of convenience and necessity, federal law would trump the NNTRC's proposed certification requirement. That is because Congress has invested the Federal Communications Commission ("FCC") with the exclusive authority to license and certify carriers to provide wireless services.

The Federal Communications Act was enacted to promote "rapid, efficient, Nation-wide, and world-wide wire and radio communication service," by, among other things, "centralizing authority . . . with respect to interstate and foreign commerce in wire and radio communication" in the FCC. 47 U.S.C. § 151. While the FCC does not have general jurisdiction over intrastate communication services, the Federal Communications Act expressly makes an exception to this in "the provisions of section 301." 47 U.S.C. § 152(b). Section 301, in turn, addresses "license[s] for radio communication," and requires persons to obtain a license from the FCC to provide communications by radio, whether the communications are interstate or "from any place in any State . . . to another place in the same State." 47 U.S.C. § 301. In other words, the FCC's licensing authority in the context of wireless communications is not limited to interstate services, but includes the provision of wireless services anywhere in the United States.

The Federal Communications Act makes clear that the purpose of this broad grant of authority to the FCC is "to maintain the control of the United States over all the channels of radio transmission," and "to provide for the use of such channels . . . by persons . . . under licenses granted by Federal authority." *Id.* Both the federal courts and the FCC have uniformly held that the FCC's authority to license and certify wireless carriers is exclusive. For example, the Second Circuit has noted that "Congress gave the FCC the *exclusive* authority to grant licenses to [wireless] telecommunications providers." *New York SMSA Limited Partnership v. Town of Clarkstown*, 612 F.3d 97, 100 (2d Cir. 2010) (emphasis added). The Tenth Circuit has similarly concluded that "[u]nder the [Federal Communications] Act, the FCC is charged with certain regulatory authority over mobile services, even to the extent they have intrastate components," and "[t]he FCC has *exclusive* jurisdiction to regulate the . . . conditions of market entry of mobile services." *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. 2007) (emphasis

added). The Ninth Circuit also has enforced "the FCC's *exclusive* licensing authority, *i.e.*, its power to regulate market entry" in the field of wireless services. *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1010 (9th Cir. 2010) (emphasis added).

While Congress' grant to the FCC of wireless licensing authority does not specifically mention Indian Nations, it is well-settled that "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980). The FCC's exclusive licensing authority throughout the United States is just such a "generally applicable" law.

Indeed, the Navajo Telecommunications Regulatory Act itself acknowledges that the Navajo Nation's authority to regulate wireless communications services is constrained by federal law. At the outset, the Act states that "the Navajo Nation by virtue of its inherent sovereign power has the authority to assert jurisdiction over telecommunications *not preempted* by applicable law and regulation of the federal government of the United States," and "[a]reas which may be preempted include matters relating to frequency allocation, *licensing*, permissible use of specific bands and interstate commerce." 21 N.N.C. § 502(B) (emphases added).

The NNTRC's proposal to require wireless carriers to obtain authorization from the NNTRC in order to provide wireless telecommunications services is precisely such a preempted "licensing" regulation. Pursuant to the Notice, the NNTRC would purport to exercise the authority to determine what persons will be certificated, or authorized, to provide wireless services within the Navajo Nation. But that is precisely what Congress has given the FCC exclusive authority to do. Wireless licenses granted by the FCC include the authority to provide communications services (*see, e.g.*, 47 C.F.R. § 24.3 ("PCS licensees may provide any mobile communications service on their assigned spectrum"), define the specific service areas where the

carrier is permitted to provide service (*see, e.g.*, 47 C.F.R. § 24.102), and include construction, build-out, and facilities requirements (*see, e.g.*, 47 C.F.R. §§ 24.203, .232). As the Seventh Circuit has explained, "federal regulations expressly dictate the terms under which a provider may enter a new market," and "[t]he act makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure." *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 988 (7th Cir. 2000). Thus, for example, "the modes and conditions under which AT&T Wireless may begin offering service" in a market is "reserved to the FCC." *Id.* at 989. Simply put, once the FCC has authorized a carrier to provide wireless telecommunications services in a service area that includes all or part of the Navajo Nation, the NNTRC has no authority to block the carrier's provision of wireless service by imposing its own certification requirement, irrespective of how that requirement is structured.

Moreover, while there are limited exceptions to the rule set forth in *Farris*, none applies here. In particular, a law generally applicable throughout the United States may not apply to reservations where the matter involves "rights of self-governance in purely intramural matters," where it would "abrogate rights guaranteed by Indian treaties," or where it is shown "by legislative history or some other means that Congress intended [the federal law] not to apply to Indians on their reservation." *Farris*, 624 F.2d at 893-94. Here, granting authority to provide wireless services plainly is not a "purely intramural matter," as the failure of radio spectrum and wireless signals to confine themselves to geographic and political boundaries is precisely why Congress designated a single federal authority, the FCC, to regulate those communications. The second exception "applies only to subjects specifically covered in treaties" (*Farris*, 624 F.2d at 893), and no treaty with the Navajo Nation specifically addresses the licensing of wireless carriers.

Nor is there any indication that Congress intended the Federal Communications Act to exclude the provision of wireless services within reservations, or to reserve to tribes the authority to regulate who may use wireless spectrum to provide communications services within reservations. To the contrary, 47 U.S.C. § 301 gives the FCC exclusive authority to determine what persons are authorized to provide communications services by radio, including "from one place in any State, Territory, or possession of the United States . . . to another place in the same State, Territory, [or] possession" and "from any State, Territory, or possession of the United States . . . to any other State, Territory, or possession of the United States." Wireless communications from within the Navajo Nation plainly are from a place physically within a State or territory of the United States. *Compare Cross v. Commissioner of Internal Revenue*, 98 T.C. 613, 616 (U.S.T.C. 1992) (Puyallup Indiana Reservation "is unquestionably physically located wholly inside the boundaries of Washington State"); *United States v. Coxe*, 59 U.S. 100, 104 (1855) ("The Cherokee country, we think, may be considered a territory of the United States"). Similarly, the Federal Communications Act makes clear that it "shall" broadly "apply to *all* interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to *all* persons engaged within the United States in such communication or such transmission of energy by radio." 47 U.S.C. § 152 (emphases added). Section 332 of the Federal Communications Act similarly confirms that it was Congress's intent to give the FCC exclusive authority to certify carriers to provide wireless service. That section expressly provides that "no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service." 47 U.S.C. § 332(c)(3). It would make little sense to construe the Federal

Communications Act to reserve that same authority to tribes, as that would create the very patchwork of wireless entry regulation that Congress sought to avoid.[3]

The FCC has already reached the conclusion that the Federal Communications Act does not permit the tribes to certify wireless carriers, because the FCC "has the *sole* authority to *license and certify* carriers wishing to operate cellular systems." *In the Matter of AB Fillins,* 12 FCC Rcd. 11755, 11765 (rel. Aug. 1, 1997). The FCC noted that "Section 301 of the Act makes clear that a major purpose of the Act is to 'maintain the control of the United States over the channels of radio transmission,'" and "[i]t is undisputed that under the Act the Commission has the sole authority to license and certify carriers wishing to operate cellular systems." *Id.* ¶ 30. The FCC noted the rule set forth in *Farris* and its exceptions, and concluded that "[n]one of these exceptions are applicable to radio frequency management, and more particularly the Commission's licensing scheme." *Id.* ¶ 31. "To allow Native Americans to exercise independent spectrum management authority and exempt them from the national cellular licensing scheme would clearly thwart the legislative intent underlying the Communications Act and the policies served by our cellular licensing rules," and even if the tribe could "deny cell sites to the Commission's licensee, it does not have the additional power to displace the Commission's licensing process." *Id.* ¶ 32.[4]

The federal district court in South Dakota reiterated a similar conclusion in *Alltel Communications, LLC v. Oglala Sioux Tribe*, 2011 WL 796409 (D.S.D. Feb. 28, 2011). There, the Oglala Sioux Tribe claimed that it owned the radio spectrum over its reservation and the FCC

[3] In any event, the Navajo Nation is a "local government" within the United States. *Compare Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 158 (1982) (referring to tribe acting in its capacity "as local government"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 56 (1978) (referring to tribes' power of "local self-government").

[4] The Notice (at p. 2) cites *AB Fillins* for the proposition that "[a]s a tribal landowner, the Navajo Nation . . . may condition use of its tribal lands as it wishes, including placing requirements on wireless carriers for entry onto its lands." That ignores the FCC's key holding that under federal law there are limits to the conditions the Navajo Nation may impose – in particular, a tribe cannot leverage any authority to deny the placement of physical facilities into an attempt "to displace the Commission's licensing process." 12 FCC Rcd. at 11766.

could not license the spectrum to any other entity. In dismissing this claim, the court held that "'Congress assigned to the Federal Communications Commission . . . exclusive authority to grant licenses'" for wireless services. *Id.* at *5 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990)). The Federal Communications Act "established the nationwide system for the regulation of the electromagnetic spectrum for radio transmissions," and "Congress delegated the authority, solely and exclusively, to the FCC to license the use of radio transmissions." *Id.* The court pointed to the FCC's decision in *AB Fillins*, and reiterated the FCC's "exclusive licensing authority over the electromagnetic spectrum." *Id.* at *5-*6.

Finally, the Notice's attempts to avoid preemption are misplaced. The Notice asserts that "preemption does not include tribal regulation requiring local business licensing, informational filings, unlawful and/or deceptive billing practices, [and] use of tribal lands" (Notice at p.3 (citations omitted)), and cites to cases holding that Congress did not preempt all claims regarding wireless rates (*id.* at p.6). Even if that is an accurate statement of the law, it has no application here. The Notice does not propose to enact land use regulations or regulations regarding rates or billing practices. Instead, it proposes to impose a certification requirement to regulate who may provide wireless services.

Nor, contrary to the Notice's suggestion, does the proposed certification requirement fall within the scope of permissible "local business licensing" or "informational filings." Navajo law already provides for generally applicable business licensing requirements – in particular, the Navajo Nation Corporation Act requires all corporate businesses to register as a foreign or domestic corporation. *See* 5 N.N.C. § 3100 *et seq*. Even if the Navajo Nation may require wireless carriers to comply with such generally applicable business requirements, it may not create special certification requirements, not applicable to businesses in general, to control who

may provide wireless services. Similarly, while the FCC has indicated that "a requirement that licensees identify themselves to [a state commission]" may be permissible "so long as nothing more than standard informational filings is involved" (*Petition of the People of the State of California*, 10 FCC Rcd. 7486, 7550 (1995)), the proposed regulations require more than mere informational filings – they impermissibly purport to require wireless carriers to obtain authorization from the NNTRC in order to provide wireless services. That is the case even with respect to the proposed "Small Operator" and "General Operator" categories. While the Notice suggests these operators will not receive a formal certificate of convenience and necessity, these categories remain impermissible certification requirements. Indeed, the Notice refers to "four levels of authorization" and four "level[s] of certification;" makes clear that a General Operator must receive "certification;" and states that "the NNTRC would certify the [Small Operator] to conduct business." Notice at pp. 7-9. And even those seeking certification as a Small Operator or General Operator must submit an "Application for Authorization to Provide Telecommunications Services on the Navajo Nation." Notice, Exhibit A. However, as explained above, with respect to wireless carriers the authority to grant such authorization is reserved specifically and exclusively to the FCC under federal law.

C. The Proposed Regulations Exceed The Navajo Nation's Authority To Regulate Nonmembers.

Wholly apart from the issue of federal preemption, the regulations proposed in the Notice are flawed because they exceed the Navajo Nation's authority to regulate nonmember wireless carriers. Analysis of the Navajo Nation's authority here must begin with the well-settled proposition that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The Notice does not and cannot assert that the proposed regulations

are expressly authorized by any federal statute or treaty. Instead, it suggests they are authorized by the Navajo Nation's authority to exclude nonmembers, and by what is commonly referred to as the first *Montana* exception, which provides that a tribe may exercise some authority over the activities of nonmembers on a reservation who enter into a consensual relationship with the tribe. *See Montana v. United States*, 450 U.S. 544, 565 (1981).

As explained below, neither is sufficient to support the proposed regulations. The proposed regulations are not supported by the Navajo Nation's authority to exclude, both because in the Treaty of 1868 the Navajo waived any right to exclude "works of utility or necessity" and because the proposed regulations are not limited to carriers with a physical presence on tribal lands. *See* Section I.C(1), *infra*. And the first *Montana* exception is inapplicable because, among other things, the proposed regulations are not limited to carriers with a physical presence on tribal lands that enter the Navajo Nation for the purpose of providing service to the tribe or its members. *See* Section I.C(2), *infra*.

1. The Notice asserts that "[t]he authority to exclude non-Indians from Navajo Nation tribal land necessarily includes the lesser authority to set conditions on their entry through regulations." Notice at p. 2 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 8021 (9th Cir. 2011)). This proposition, even if true in many circumstances, does not support the proposed regulations for at least two reasons.

First, with respect to communications facilities, the Navajo Nation has relinquished its "authority to exclude." Under the Treaty of 1868, Article IX, the Navajo Nation agreed "[t]hey will not in [the] future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United

States." The Notice suggests that "this provision refers to rights-of-way which cross the Nation's lands and does not refer to entry onto the Navajo Nation in order to conduct business with the Navajo People, and otherwise in no way affects the Nation's ability to place reasonable conditions on its rights-of-way." Notice at p. 2. That misses the mark. The Treaty on its face is not limited to "rights-of-way," but includes, for example, physical structures like "mail stations." More to the point, it expressly includes "other works of utility or necessity," which easily encompasses the construction of facilities for more modern means of communication. The Treaty may not apply to all "entry onto the Navajo Nation in order to conduct business" (Notice at p. 2), but when the only "entry" at issue is the placement of "works of utility or necessity" (like cellular towers), the Navajo Nation has no authority to prohibit that entry. As a result, *Merrion* and *Water Wheel* provide no basis for regulation here. *See Nevada v. Hicks*, 533 U.S. 353, 359 (2001) ("Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'").

Second, wholly apart from the Treaty, the Notice's reliance on the rule of *Merrion* and *Water Wheel* also is misplaced because the proposed regulations fail to limit their application to persons that enter tribal land in order to provide wireless communications services to the Navajo People. Because of the nature of wireless service, a wireless provider could provide service without any physical entry onto tribal land. For example, the wireless carrier's facilities could be entirely upon non-tribal land or outside the boundaries of the Navajo reservation. In such circumstances, the Navajo Nation's authority to exclude nonmembers from its lands plainly does not come into play.

2. The Notice also suggests that the NNTRC "has regulatory jurisdiction over operators pursuant to the first prong of the *Montana* analysis, based on the consensual business relationship of operators and the Navajo Nation." Notice at p. 2. *Montana* holds that, as a "general proposition," "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). The Supreme Court also held that some exceptions apply allowing tribes "to exercise *some* forms of civil jurisdiction over non-Indians *on their reservations*," including the regulation of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (emphases added). This exception does not save the proposed regulations here, for a number of reasons.

First, the proposed regulations, on their face, are not limited to carriers that enter into commercial relationships with the tribe or its members. Rather, the regulations would purport to apply even to wireless carriers that provide service to, *e.g.*, nonmembers travelling through the reservation.

Second, the proposed regulations, on their face, are not limited to wireless carriers "on the[] reservation[]." *Montana*, 450 U.S. at 565. As the Supreme Court has made clear, "*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests." *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 332 (2008) (emphasis added). *Montana*'s first exception relied upon "four cases," and "[e]ach involved regulation of non-Indian activities *on the reservation* that had a discernable effect on the tribe or its members," and "[o]ur cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct *on tribal land*." *Id.* at 332-33 (emphases added). Thus, to the extent a wireless carrier provides

wireless services without any physical presence on the reservation, Montana's first exception clearly does not apply.

Third, even the physical presence of a wireless carrier within the Navajo Nation alone is not a ground for the exercise of jurisdiction. In particular, the mere fact that a wireless carrier may enter into a lease with the tribe to place some portion of its network facilities upon tribal land does not, as the Notice erroneously suggests, permit the Navajo Nation to regulate the provision of wireless services throughout the Navajo Nation. The placement of facilities within the Navajo reservation cannot be deemed a "consensual relationship" with the tribe under *Montana* because the Treaty requires the Navajo Nation to permit the construction of "works of utility or necessity." Indeed, a federal court rejected the application of the first *Montana* exception for much the same reason in *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015 (D.N.D. 2003), concerning the authority of a tribe to tax telephone cooperatives that operated on a reservation using federally-granted rights-of-way. The court concluded that "as a matter of law," the telephone companies "have not entered into a 'consensual relationship' with the tribe or its members as a result of providing telecommunication services on the Reservation." *Id.* at 1013. That was the case, the court concluded, because the cooperatives were using rights-of-way obtained through a Congressional grant, and they "received their authority to operate and provide telecommunication services on the Reservation from a grant of legislative authority" – namely, pursuant to certificates granted by the state commission – "which does not equate with a 'consensual relationship' to satisfy the *Montana* test." *Id.* at 1023-1024. *See also Big Horn Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (placement of utility facilities in federal rights-of-way "were insufficient to create a consensual relationship with the Tribe"). Similarly, wireless carriers here obtain authority to place facilities pursuant to the Treaty, and

obtain authority to provide wireless services within the Navajo Nation pursuant to FCC licenses, neither of which equates to a "consensual relationship" under *Montana*.

Moreover, the case law makes clear that "[e]ven with the presence of a consensual relationship, however, the first exception in *Montana* does not grant a tribe unlimited regulatory . . . jurisdiction over a nonmember." *Big Horn*, 219 at 951. Rather, the "regulation imposed by the Indian tribe [must] have a nexus to the consensual relationship itself," and "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Here, a lease for the placement of a structure is just that – a lease of real property – and whatever the Navajo Nation's authority to regulate leases and the placement of structures on land, that consensual relationship does not trigger authority in an unrelated area, including the licensing of wireless carriers to provide communications services.

Finally, a wireless carrier's provision of wireless service to some members of the Navajo Nation is not the kind of "consensual relationship" to which *Montana*'s exception applies. That exception is intended to account for instances where a nonmember purposefully enters a reservation to conduct business with the tribe or its members. In the case of wireless service, no such purposeful activity necessarily occurs, particularly where a wireless carrier does not market or have a retail presence within the Navajo Nation. For example, a member of the Navajo Nation could purchase wireless service from AT&T at a retail store in Chicago, and that service allows the member to use AT&T's wireless service anywhere in the United States. At the time of purchase, AT&T would not know whether the customer was a member or nonmember, and would have no knowledge of where the customer intended to use the service – in the Chicago area or eventually at some place within the Navajo Nation. The service, by its very nature, is

mobile. While some customers may choose to use the service within the Navajo Nation, that is not sufficient to demonstrate that a wireless carrier has entered into a consensual relationship with members on the reservation.

II. The NNTRC Should Eliminate Or Modify The Proposed Certification Requirements For Wireline Long Distance Providers.

A. There Is No Sound Policy Rationale For Imposing New Certification Requirements Upon Long Distance Carriers.

As a policy matter, the NNTRC should decline to apply its proposed certification requirements upon long distance providers. The markets for long distance services have long been competitive, with numerous carriers competing for the business of long distance customers throughout the United States. Wireline telephone customers, including those within the Navajo Nation, have a wide variety of long distance providers to choose from, and can easily switch service providers if they are dissatisfied with their current provider. There is no evidence and no sound basis to conclude that imposing new certification requirements upon long distance carriers - which could only increase the costs of serving the Navajo Nation - would benefit the Navajo People or serve the goals of the Act.

Indeed, the trend in recent decades throughout the United States has been to relax regulation of long distance providers, in light of the highly competitive nature of the long distance markets. For example, in 1996, the FCC adopted a "policy of complete detariffing" so that "carriers in the interstate, domestic, interexchange marketplace will be subject to the same incentives and rewards that firms in other competitive markets confront." Second Report and Order, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20730, 20733 (1996). The FCC noted that "the California Public Utilities Commission recently adopted a complete detariffing regime for intrastate long-distance services offered in California," and encouraged other state commissions to take the same approach. *Id.*

The NNTRC's first foray into the regulation of long distance should not begin by putting the Navajo Nation decades behind the modern, pro-competitive telecommunications landscape.

Moreover, intrastate long distance providers have already obtained required certifications from the pertinent state commission, authorizing them to provide service in the state. There is little to be gained by the NNTRC duplicating this process, presumably at some considerable expense to the Navajo Nation. Rather, to the extent the NNTRC has specific concerns, its resources would be better spent pursuing those specific concerns.

The Notice provides a single specific example of an asserted need to regulate long distance (and other) providers – to "ensure that operators are not unlawfully collecting state and local telecommunications taxes" from tribal members or the tribal government on their own lands. Notice at p. 4. While that may be an important goal, the Notice's proposed certification requirements do not advance, and are not necessary to advance, that goal. To the extent that the NNTRC has authority to ensure long distance carriers providing service to the Navajo People within the Navajo Nation do not unlawfully collect the taxes of other jurisdictions, then the NNTRC may exercise that authority, in concert with the appropriate taxing authorities, irrespective of any onerous certification requirements.

B. The NNTRC Should Clarify That Its Certification Requirements Do Not Apply To The Provision Of Interstate Long Distance Services.

The Federal Communications Act gives the FCC exclusive jurisdiction over the provision of interstate services, including wireline long distance services. *See* 47 U.S.C. §§ 151, 152. As a result, to avoid conflict with federal law, the NNTRC should clarify that its proposed certification requirements exclude interstate long distance services.

The FCC's regulatory authority over interstate services has long been recognized as exclusive. In the FCC's words, "Congress intended interstate communications to be regulated

exclusively by the Commission." *Georgia Preemption Order*, ¶ 6 (emphasis added).[5] In 1934, Congress established a dual regulatory regime for communications services, and gave the FCC exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged . . . in such communications," while reserving to non-federal authorities jurisdiction "with respect to intrastate communications services . . . of any carrier." 47 U.S.C. § 152. Accordingly, "[i]nterstate communications are totally entrusted to the FCC." *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). *See also Benanti v. United States*, 355 U.S. 96, 104 (1957) ("Communications Act is a comprehensive scheme for the regulation of interstate communication"); *Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co.*, 45 F.2d 995, 1000 (8th Cir. 1939) ("Congress having taken possession of the entire field, the power of states to regulate the transmission of interstate messages and interstate facilities for such transmission has been suspended."); *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law").

While Congress' grant to the FCC of exclusive authority over interstate communications does not specifically mention tribal reservations, it is well-settled, as noted above, that "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *Farris*, 624 F.2d at 893. The Federal Communications Act's grant to the FCC of authority over interstate communications services is just such a "generally applicable" law. Moreover, none of the *Farris* exceptions (*see id.*) applies here: the regulation of interstate telecommunications service plainly is not a "purely intramural matter;" no treaty guarantees the Navajo Nation the authority to regulate interstate telecommunications services; and there is no

[5] Memorandum Opinion and Order, *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd. 1619 (1992) ("*Georgia Preemption Order*").

indication that Congress intended to exclude the Navajo Nation from the operation of the Federal Communications Act.

Finally, as noted above, the Act itself acknowledges that federal law constrains the Navajo Nation's authority to regulate telecommunications. In particular, the Act recognizes that the Navajo Nation has only that authority "not preempted by applicable law and regulation of the federal government of the United States," and that "[a]reas which may be preempted include matters relating to . . . interstate commerce." 21 N.N.C. § 502(B) (emphases added). The provision of interstate long distance services is, of course, interstate commerce.

C. The Proposed Regulations Exceed The Navajo Nation's Authority To Regulate Nonmember Long Distance Providers.

The proposed regulations also impermissibly exceed the Navajo Nation's authority to regulate nonmember long distance providers for many of the same reasons explained above with respect to wireless services.

The Navajo Nation's authority to exclude nonmembers from tribal land does not support the proposed regulations because the Navajo Nation has relinquished authority to exclude "works of utility and necessity." Treaty of 1868, Article IX. This includes any communications lines placed by long distance carriers.

In addition, the proposed regulations are not limited to long distance providers with a presence on tribal land. Long distance carriers may have little or no facilities on tribal land to provide long distance service. That is because long distance carriers rely upon a customer's local carrier to "originate" and "terminate" calls to customers using the *local carrier's* facilities. As a result, the service provided by the long distance carrier – transporting telephone calls from one local carrier's network to another local carrier's network – may occur entirely outside of tribal

land. In other words, a long distance carrier may never "enter" the reservation in order to provide long distance services to persons located within the Navajo Nation.

Similarly, even where a long distance carrier has facilities within the Navajo Nation, those facilities may not be located on tribal land. They could, for example, be located entirely upon non-tribal lands and/or within federally-granted rights-of-way. In such circumstances, even putting aside the Treaty, the Navajo Nation's authority to exclude nonmembers from its lands is not implicated. Indeed, the Supreme Court has "rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'" *Hicks*, 533 U.S. at 359.

The proposed regulations also fail to conform to the first exception of *Montana*. Again, that exception applies to nonmember conduct on tribal land inside a reservation where a nonmember has formed a voluntary, consensual relationship through a commercial transaction with the tribe or its members. Here, the proposed regulations are not limited to the provision of services to members of the Navajo Nation on tribal land, but would include long distance carriers that (1) provide service only to nonmembers, and/or (2) do not go upon tribal land in order to provide services.

Finally, as in *Reservation Telephone*, the provision of long distance services is not necessarily the kind of "consensual relationship" that satisfies the *Montana* test. Intrastate long distance providers currently provide service within the Navajo Nation pursuant to certifications from the pertinent state commissions – not pursuant to tribal authorization. And to the extent their facilities are placed in federal rights-of-way or other land over which the Navajo Nation has no right to exclude (including pursuant to the Treaty), the placement of those facilities does not

equate to a "consensual relationship" with the tribe. *See Reservation Telephone*, 278 F. Supp. 2d at 1023-24.

III. The Proposed Regulations Are Vague And Intrude Upon Areas Reserved To Other Agencies Of The Navajo Nation.

The proposed regulations suffer from additional flaws. In particular, they are unreasonably vague and appear to exceed the authority granted to the NNTRC under the Navajo Nation Code.

The Notice contemplates four levels of certification, each with different burdens and purported benefits. For example, the Notice suggests that carriers seeking certification as a "Public Interest Operator" will be subject to more burdensome regulation but will also be entitled to "significant benefits" including a "public interest rate structure for all telecommunications rights-of-way, joint use and co-location permits, and leases." Notice at pp. 7-8. However, it is not at all clear what this "public interest rate structure" will be, or precisely what it will apply to. Nor is it clear what rates, in the NNTRC's view, should apply to carriers electing Small Operator or General Operator certifications. While the Notice contemplates further investigation into "going rates for telecommunications infrastructure" and the development of "recommend[ed] infrastructure rates" (Notice at p. 10), it is not clear whether the NNTRC contemplates that these rates will apply to Small Operators and General Operators, or whether it intends to discriminate against carriers electing such certifications by requiring them to pay above-market rates for, *e.g.*, joint use of poles, ducts, and conduits.

It is also not clear what the NNTRC intends by the "Negotiated Agreement Operator" classification. The Notice suggests that this category will apply to middle-mile and backhaul systems "that based on market conditions are not in the best interest of the public if operated competitively or if duplicative," and that infrastructure fees "are anticipated to be waived."

Notice at pp. 9-10. It appears as if the Notice contemplates that some favored carrier will be exempted from infrastructure fees that all other carriers will be required to pay, and will be granted an effective monopoly by the NNTRC on the theory that competition would not serve the public interest. AT&T is not aware of any basis for the conclusion that competition in the markets for telecommunications services are not in the best interest of the public, and the Notice fails to provide any explanation of how the NNTRC could or would reach such a conclusion.

Finally, there does not appear to be any authority in the Navajo Nation Code for the NNTRC to regulate rates for rights-of-way and leases. 21 N.N.C. § 524 authorizes the NNTRC to regulate the "joint use of public utility poles, ducts, and conduits located within the Navajo Nation, owned or controlled by a public utility company," but nothing in the Code gives the NNTRC jurisdiction over the lease of tribal land or the acquisition of rights-of-ways over tribal land.[6]

[6] It should also be noted that, to the extent Small Operators and General Operators do not operate under a certificate of convenience and necessity, they do not constitute a "public utility company" subject to section 524.

Conclusion

For the reasons explained above, AT&T respectfully suggests that the NNTRC should revise its proposed regulations to exclude wireless carriers and wireline long distance carriers.

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Respectfully submitted,

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