

**BEFORE THE  
NAVAJO NATION  
TELECOMMUNICATIONS REGULATORY COMMISSION**

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

**COMMENTS ON  
FURTHER NOTICE OF PROPOSED RULEMAKING OF  
THE NAVAJO TRIBAL UTILITY AUTHORITY**

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NAVAJO NATION  
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In the Matter of )  
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**COMMENTS ON  
NOTICE OF PROPOSED RULEMAKING OF  
NTUA WIRELESS, LLC**

Pursuant to the Report and Order and Further Notice of Proposed Rulemaking (“Report, Order and FNPRM”), which was adopted and released by the Navajo Nation Telecommunications Regulatory Commission (“Commission” or “NNTRC”) in this docket on August 27, 2012,<sup>1</sup> the Navajo Tribal Utility Authority (“NTUA”) submits these comments related to the Commission’s revised proposals in the FNPRM to implement Certificate of Convenience and Necessity (“CCN”) filing requirements and procedures for telecommunications operators in the Navajo Nation.

**I. INTRODUCTION**

1. NTUA is a not-for-profit Navajo Nation enterprise, established in 1959 by the Navajo Nation Council. NTUA is charged with providing various utility services, including telecommunications and information services, to residents of the 27,000 square-mile Navajo Nation.<sup>2</sup> NTUA recognizes that the Navajo Nation and

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<sup>1</sup> See Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Application for Certificate of Convenience and Necessity (CCN)*, Docket No. NNTRC-11-001 (posted August 29, 2012), available at <http://www.nntrc.org/cms/kunde/rts/nntrcorg/docs/551397848-08-28-2012-16-27-54.pdf>; Exhibit 1 available at <http://www.nntrc.org/cms/kunde/rts/nntrcorg/docs/551397848-08-28-2012-16-29-57.pdf>.

<sup>2</sup> See, e.g., 21 N.N.C. §5 (2008).

NTUA's service territory spreads across portions of the States of Arizona, New Mexico, and Utah. NTUA has successfully been operating as a utility within this service territory for over fifty-three years and has continued to expand service to the residents of the Navajo Nation during that time. NTUA having such successful operations during that period is uniquely qualified to comment on new rules and regulations issued by new regulatory agencies within the Navajo Nation.

2. As an enterprise of the Navajo Nation, NTUA ultimately exists by virtue of the authority and sovereignty of the Navajo Nation. In turn, the NTUA maintains sovereign immunity and is subject to the laws of the Navajo Nation, as iterated within the Navajo Nation Code.

3. NTUA's authority and purpose is set forth in Title 21 of the Navajo Nation Code.<sup>3</sup> Specifically, NTUA is charged under the governing Navajo Nation statute to provide utility services related to, among other things, "telecommunications and information services," including operating, maintaining, promoting, expanding, executing expansions of new telecommunications services, and otherwise providing and furnishing telecommunications and information services on the Navajo Nation.<sup>4</sup> Furthermore, the NTUA is ultimately governed by its Management Board.<sup>5</sup>

4. On March 1, 2010, NTUA was awarded a grant from the U.S. Department of Commerce's National Telecommunications Information Administration under the Broadband Technologies Opportunities Program. NTUA is in the process of

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<sup>3</sup> See 21 N.N.C. §1 *et seq.* (2008).

<sup>4</sup> 21 N.N.C. §5 (2008).

<sup>5</sup> See, *e.g.*, 21 N.N.C. §§7, 10, 22 (2008).

completing the installation of significant telecommunications infrastructure, which includes but is not limited to 550 miles of fiber and 32 new microwave towers. This infrastructure shall create a middle-mile, backhaul for the purpose of allowing increased connectivity within the Navajo Nation for the benefit of both middle-mile customers and last-mile customers (e.g., residents of the Navajo Nation).

5. NTUA notes that its subrecipient under the grant is NTUA Wireless, LLC (“NTUA Wireless”), a joint venture between NTUA and Commnet Wireless LLC (“Commnet”). NTUA Wireless is majority owned by NTUA and is jointly managed by Commnet and NTUA. As subrecipient, NTUA Wireless’ role under the grant is to implement last mile connectivity services for the residents of the Navajo Nation. NTUA Wireless is accomplishing this by installing LTE equipment, providing netbooks for schools and creating a retail wireless and broadband business for the benefit of the residents of the Navajo Nation. The efforts of NTUA and NTUA Wireless will directly and indirectly help tackle the absence of telecommunications infrastructure, including high-speed broadband services throughout the Navajo Nation.

6. Under the Broadband Technologies Opportunities Program grant, a condition precedent is that NTUA and NTUA Wireless act in a non-discriminatory fashion with regard to the provision of services, including collocation services under the middle-mile infrastructure. Although NTUA is not under jurisdiction of NNTRC for ratemaking, provision of services, or other elements of its operation, NTUA recognizes that NNTRC has been delegated the authority by the Navajo Nation as being a clearinghouse for requests from third parties (e.g., non-Navajo parties) to collocate or to install telecommunications infrastructure within the Navajo Nation. The Navajo Nation

Code itself makes clear that NTUA, as an enterprise of the Navajo Nation government, is exempted from NNTRC's authority under the Navajo Telecommunications Regulatory Act ("NTRA"). Specifically, under the language of the NTRA, NNTRC's regulatory authority is made operational at the level of a "person,"<sup>6</sup> which is defined to include natural persons, as well as business entities and governments. Notably, the definition specifically excludes "the government of the Navajo Nation and any wholly owned subdivision or enterprise of that government."<sup>7</sup> Therefore, NTUA provides these comments to caution the NNTRC to not create discriminatory CCN procedures that would violate the mandate associated with the Federal grant and to not attempt to assert jurisdiction over the activities of NTUA, consistent with existing Navajo Nation law.

### **III. NNTRC'S AUTHORITY DOES NOT AFFECT NTUA'S ABILITY TO OPERATE**

7. Similar to NTUA, the NNTRC's authority ultimately derives from the Navajo Nation's sovereign authority and is set forth in Navajo Nation Code. Although both NTUA and NNTRC exist by virtue of the Navajo Nation's authority, NTUA and NNTRC are not associated with each other and act independently from one another, as the NNTRC recently explained. *See* Report, Order and FNPRM at Sec. I.I.2, p. 7. Because NTUA and NNTRC independently derive authority to act from the Navajo Nation, NNTRC's jurisdiction does not affect NTUA's ability to operate as an enterprise of the Navajo Nation.

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<sup>6</sup> *See, e.g.*, 21 N.N.C. §506(A) (describing compliance and enforcement provisions that apply to "all persons" engaging in telecommunications services); §510 (explaining that "no person" engaged in telecommunications services can move forward without a certificate of convenience and necessity); §511 (mandating that rates "established by a person" engaged in telecommunication services must be approved by the NNTRC).

<sup>7</sup> 21 N.N.C. §503(N) (2008).

8. Furthermore, NNTRC does not have jurisdiction over NTUA with respect to NTUA's operations, including, but not limited to, establishing rates, terms and conditions as the telecommunications utility provider operating the middle mile Project.<sup>8</sup> Pursuant to the Navajo Nation Code, NTUA is solely governed by its Management Board for its utility issues.<sup>9</sup> Additionally, the section of the Navajo Nation Code that establishes the NNTRC discusses the NNTRC's delegated power to regulate certain telecommunication matters as being part of the Navajo Nation's general power to "impose restrictions on private rights to protect public welfare, order, and security...."<sup>10</sup> Accordingly, any attempt to regulate NTUA would be inconsistent with NNTRC's regulatory authority over "private" rights, given the not-for-profit, public nature and purposes of NTUA. Additionally, NTUA's projects, including the Broadband Technologies Opportunities Program grant and related funding, are based on financing arrangements that rely on current Navajo Nation law. Therefore, any action by the Navajo Nation, including the NNTRC, to modify Navajo law for which financing was based, including for the Federal Broadband Technologies Opportunities Program grant, is also a violation of the Navajo Nation Code.<sup>11</sup>

#### **IV. NNTRC'S PROPOSAL IN THE FNPRM LACKS IMPORTANT DETAILS**

9. In the FNPRM, the NNTRC reconfigures its proposed CCN regulations, directing telecommunications operators to choose one of four types of certifications, with varying levels of regulatory oversight, in order to operate on the

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<sup>8</sup> 21 N.N.C. § 22 (2008).

<sup>9</sup> See 21 N.N.C. §§ 7, 22 (2008).

<sup>10</sup> 2 N.N.C. § 3453 (2008).

<sup>11</sup> See 21 N.N.C. § 7.B and § 22 (2008) (enumerating various powers of the NTUA Management Board, including authority to execute guaranties, enter into contracts, borrow funds, accept grants and loans, as well as approve "all rates and charges for utility services.").

Navajo Nation: 1) Small Operators, 2) General Operators, 3) Public Interest Operators, or 4) Negotiated Agreement Operators. While the FNPRM provides important details related to each of the four proposed categories, the FNPRM lacks some important details. For example, the proposed rule indicates that a Public Interest Operator and a Negotiated Agreement Operator will be “entitled to an established public interest rate structure for all telecommunications rights-of-way, joint use and co-location permits, and leases.” FNPRM at Section II.A.3 and II.A.4. Unfortunately, there are no further details in the FNPRM related to the Commission's reference to establishing a "public interest rate structure," including what the rate structure might look like, what the rate might be, how it might be calculated, and in what circumstances it would apply. As discussed further herein, NTUA does not support any mechanism that would provide discriminatory treatment between CCN applicants, especially as it relates to securing services along NTUA's middle mile/ backhaul services.

10. As mentioned above, one of the proposed categories of CCN regulation is the Negotiated Agreement Operators. *See* FNPRM at Section II.A.4. According to the FNPRM, this class of operator relates to "those systems that are principally middle-mile and backhaul and that based on market conditions are not in the best interest of the public if operated competitively or if duplicative." *Id.* Such an operator would also "operate its middle-mile and backhaul infrastructure as open access/open architecture available at an established rate for all common carriers, and would be required to enter into an agreement with the Navajo Nation." *Id.* Finally, the FNPRM expressly states that such an operator's "[r]ates would be subject to approval by the NNTRC pursuant to the agreement." *Id.*

11. Because the Navajo Nation Middle/Last Mile Project being constructed by NTUA generally fits the description of the Negotiated Agreement Operator, NTUA requests that NNTRC document in its final order that NTUA is not subject to these regulations, pursuant to and consistent with the Navajo Nation Code. In the context of this NNTRC proceeding related to CCN provisions, the Navajo Nation Code specifically exempts NTUA from CCN regulation, as referenced above.<sup>12</sup> Moreover, as explained above, NTUA and NNTRC each operate independently from one another, and NNTRC's jurisdiction does not affect NTUA's ability to operate the middle mile Project. In particular, since NTUA's establishment as a Navajo enterprise in 1959, the NTUA Management Board approves and sets any and all of NTUA's utility rates, including any telecommunication-related rates.<sup>13</sup>

12. Moreover, the existence of the Navajo Nation Middle/Last Mile Project is due, in part, to the Broadband Technologies Opportunities Program grant that NTUA was awarded by the U.S. Department of Commerce. As a condition of receiving and using those federal grant dollars in furtherance of the construction and deployment of the Navajo Nation Middle/Last Mile Project, NTUA is required to provide service on a non-discriminatory basis, which is not how the NNTRC, under the FNPRM, is proposing to review and treat applications. Therefore, to the extent that the category for Negotiated

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<sup>12</sup> The definition of “person” specifically excludes “the government of the Navajo Nation and any ... enterprise of that government.” 21 N.N.C. §503(N) (2008), and the CCN provisions of the Navajo Nation Code specifically address NNTRC’s regulatory authority at the level of “person.” See 21 N.N.C. §510 (A) (explaining that “no person engaged in providing telecommunications services” can move forward without a CCN) and §510(C) (explaining that “no person engaged, or intending to engage, in providing telecommunications services” can begin construction of any related project without a CCN).

<sup>13</sup> See 21 N.N.C. § 22 (2008) (explaining that “All rates and charges for utility services shall be adopted by [NTUA’s] management board ...” (emphasis added), and “telecommunications and information services” are one of NTUA’s utility services specified in Navajo Nation Code, 21 N.N.C. § 5.A. (2008)).

Agreement Operators (or the Public Interest Operators, for that matter) contemplates establishing a uniform rate that would be subject to NNTRC approval and binding on NTUA as a middle mile / backhaul utility provider, NTUA disagrees with such an application of the Commission's jurisdictional authority and requests the Commission state that it is not establishing rates or requiring approval of rates for such utility services from NTUA as part of this proceeding.

**V. CONCLUSION**

NTUA appreciates this opportunity to comment on the Commission's recent FNPRM, and NTUA supports the promulgation of regulations for a Certificate of Convenience and Necessity, consistent with the above comments.

Respectfully submitted,

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