

**Before the
Navajo Nation Telecommunications Regulatory Commission**

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

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

On July 28, 2011, the Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), in Docket No. NNTRC-11-001, published a Notice of Proposed Rulemaking for an application for a Certificate of Convenience and Necessity (“CCN”), as required pursuant to the Navajo Telecommunications Regulatory Act (“Act”), 21 N.N.C. §§ 501 *et seq.*, and for purposes of meeting fundamental principles of due process under Navajo Fundamental Law and the Navajo Bill of Rights, 1 N.N.C. §§ 1 *et seq.* A CCN is a general requirement under the Act for telecommunications operators (“operators”) who provide telecommunications services on the Navajo Nation unless such activities are preempted by federal law or operators are specifically excepted from such requirement by the NNTRC. In the July 28, 2011 Notice, the NNTRC requested written comments on the substantive and procedural requirements of the application as well as on exceptions to the CCN requirement.

On February 1, 2012, the NNTRC held a public meeting pursuant to 21 N.N.C. § 515, where it solicited and obtained additional oral comments in Docket No. NNTRC-11-001.

Based on comments that the NNTRC received in Docket No. NNTRC-11-001, and giving due consideration to the concerns raised by current or potential operators on the Navajo Nation and the public, the NNTRC publishes this Report and Order and Further Notice of Proposed Rulemaking in Docket No. NNTRC-11-001.

[Written comments on Section II are due 30 days from the date of Release]

I. REPORT.

This section summarizes comments received in the first Notice of Proposed Rulemaking in Docket No. NNTRC-11-001, and the response of NNTRC to those comments.

A. The NNTRC Has Authority and Jurisdiction for the Proposed Rulemaking.

1. *One or more commenters stated that the NNTRC lacks regulatory jurisdiction over operators, or that such jurisdiction is preempted by federal law, or that jurisdiction is lacking for wireless providers.*

Response:

2. The NNTRC has jurisdiction to regulate all operators who are providing telecommunications services on the Navajo Nation through its sovereign right to exclude non-members pursuant to the Treaty of 1868. The authority to exclude non-Indians from Navajo Nation tribal land necessarily includes the lesser authority to set conditions on their entry through regulations. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). *See also Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 8021 (9th Cir. 2011). Although the Nation agreed not to oppose “works of utility or necessity” under the Treaty of 1868, where “permitted by the laws of the United States,” 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. As long recognized by the Department of the Interior, under federal law, the Navajo Nation retains the authority to condition entry of all non-members onto the Navajo Nation, especially where they are serving the Navajo people.

3. The Navajo Nation also conditions entry of operators and all grants of rights-of-way, leases, and permits for telecommunications activities on the express written consent of operators to the full territorial, regulatory and adjudicatory authority of the Navajo Nation. The NNTRC thus also 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. *See Montana v. United States*, 450 U.S. 544, 566 (1981). As a tribal landowner, the Navajo Nation is in a different situation than states as it may condition use of its tribal lands as it wishes, including placing requirements on wireless carriers for entry onto its lands. This is unique to tribal nations. *See In the Matter of AB Fillins*, 12 FCC Rcd 11755, 11765-67 (1997).

4. Under Navajo law, the NNTRC is authorized to regulate all telecommunications activities on the Navajo Nation and to promulgate such rules and regulations as appropriate for the accomplishment of its purpose, authority, duties and responsibilities pursuant to the Act, and to enforce such rules and regulations. *See* 2 N.N.C. §3453 and 21 N.N.C. § 505. The NNTRC is

authorized to ensure that no operators are conducting telecommunications activities on the Navajo Nation without having obtained a CCN from the NNTRC, or otherwise excepted from such requirement by rule of the NNTRC. 21 N.N.C. § 510.

5. The Federal Communications Commission recognizes the application of tribal law to operators on tribal lands. *See, e.g., Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 637 (2011) (*USF/ICC Transformation Order*), *pets. for review pending*, *Direct Commc'ns Cedar Valley, LLC v FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases). The Navajo Nation also recognizes that some areas of telecommunications regulations by tribal governments *may* be preempted by federal law. *See* 21 N.N.C. § 502. However, this preemption does not include tribal regulation requiring local business licensing (*see Petition of the People of the State of California, Report and Order*, 10 FCC Rcd 7486 (1995)), informational filings (*Id.*), unlawful and/or deceptive billing practices (*see Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2nd Cir. 1998); *Gattegno v. Sprint Corporation*, 297 F.Supp.2d 372 (D. MA 2003)), use of tribal lands (*see Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)), and there is therefore no preemption of tribal law by the FCC in regard to the purposes and requirements of this Rulemaking.

B. Regulation by NNTRC Is Required but Should Not Be Duplicative; the NNTRC Will Work with State Regulators on Jurisdiction.

1. *One or more commenters stated that regulation by the NNTRC is not necessary to protect Navajo Nation interests and Navajo consumers.*

2. *One or more commenters stated that regulation by the NNTRC, especially if excessive, would not promote the public interest and may discourage investment and new entries into the Navajo Nation telecommunications market.*

3. *One or more commenters stated that NNTRC complaint procedures should not duplicate state regulation and requirements.*

4. *One or more commenters stated there may be jurisdictional conflicts with state regulators of telecommunication activities, and that where operators are already regulated by a state public utility commission there should not be additional regulation by the NNTRC.*

5. *One or more commenters stated any tariff set by the NNTRC should be the same as that which is set for an incumbent carrier by the state regulator.*

Response:

6. Regulation by the NNTRC is necessary to promote the interests of the Navajo people and Navajo government. State regulatory bodies have no statutory obligation to consider the conditions and interests of the Navajo people specifically, including accommodation and

preservation of their language and culture. The NNTRC is uniquely capable of evaluating the public interest on the Navajo Nation and ensuring that such interest is served, and that operators are conducting themselves on the Navajo Nation in accordance with the best interests of the Navajo people. For example, a state regulatory body has no obligation to ensure that operators are not unlawfully collecting state and local telecommunications taxes.¹ The 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.

7. As further explained below, the NNTRC agrees that where regulation is unnecessarily duplicative, it is not in the public interest to regulate in that area and the NNTRC will work with state regulatory bodies to avoid unnecessary regulation. Under the Further Notice of Proposed Rulemaking, the NNTRC is also proposing to eliminate much duplication through a tiered application process whereby qualifying operators can opt out of certain requirements.

The NNTRC will coordinate with state regulatory bodies concerning rate setting and other potential jurisdictional matters, especially where there is a de minimis tribal presence by an operator. *See* 21 N.N.C. § 508(A).

C. No Operator Will Be Exempt from Registering with the NNTRC But Only Public Interest and Negotiated Agreement Operators Will Receive a CCN; the NNTRC Is Proposing a Tiered Certification That Will Allow Operators to Select Their Preferred Level of Engagement and Regulation by the NNTRC (See Section II).

1. *One or more commenters stated that operators with a limited presence on the Navajo Nation should be exempt from the CCN requirement.*

2. *One or more commenters stated that those operators with a CCN from a state regulatory body should be exempt from the CCN requirement.*

Response:

3. If an operator is designated as an eligible telecommunications carrier (ETC) on the Navajo Nation by either the state or the FCC, the operator must comply with the tribal engagement requirements under the *USF/ICC Transformation Order*, ¶ 484. These will include: (1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements. *Id.* at ¶ 637. Pursuant to its inherent sovereignty and jurisdiction to

¹ In our government-to-government relationship, the NNTRC nonetheless appreciates all efforts of the state regulatory bodies in addressing the issue of unlawful collection of state and local taxes from exempt customers on tribal lands.

regulate on the Navajo Nation, some level of engagement will also be required by NNTRC of all operators, including those that are not ETC designated.

4. However, not all operators will be required to engage with the Navajo Nation, or be regulated by the NNTRC, at the same level of engagement and regulation. The NNTRC proposes four levels of regulation: Small Operator, General Operator, Public Interest Operator, and Negotiated Agreement Operator. Details on the levels of engagement and regulation required for each type of operator are explained in Section II, below.

D. NNTRC Will Regulate within Its Capacity.

1. *One or more commenters stated that the NNTRC lacked the capacity to regulate.*
2. *One or more commenters stated that the requirement for submission of sensitive financial data should not be required, or should not be provided without confidentiality rules and assurances in place.*

Response:

3. The NNTRC will only regulate within its capacity. As the NNTRC develops capacity and acquires additional resources it will assume more regulatory responsibility. An operator who is unwilling to submit to more than minor regulation by the NNTRC because of concerns regarding regulatory capacity can elect to remain a General Operator or a Small Operator, if eligible. *See* Section II, below.

4. Sensitive information, including financial information, will be handled appropriately and according to rules and processes developed through an NNTRC rulemaking where operators will have the opportunity to help develop confidentiality protocols.

E. Management and Corporate Information

1. *One or more commenters stated that management information should be limited to the business unit which is the actual operator on the Nation.*

Response:

2. The NNTRC is proposing that detailed management and corporate information will only be required for Public Interest and Negotiated Agreement Operators. *See* Section II, below.

F. The NNTRC Will Regulate All Operators in the Navajo Public Interest.

1. *One or more commenters stated that wireless operators should not be regulated because competition will ensure that regulatory concerns are met.*

Response:

2. The NNTRC is statutorily obligated to protect the Navajo public and will therefore regulate all operators, including wireless carriers, in the Navajo public interest, consistent with Section 332 of the federal Telecommunications Act of 1996. *See, e.g., Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421, 423 (D. MD 2000) (“Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves”); *Moriconi v. AT&T Wireless PCS, LLC*, 280 F. Supp. 2d 867 (E.D. AK 2003); *State ex rel. v. Nextel West Corp.*, 248 F.Supp.2d 885 (E.D. Mo. 2003) (rejected claim of Section 332 preemption of claim that carrier falsely advised subscribers that rate increases were due to new government regulations); *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2nd Cir. 1998); *Gattegno v. Sprint Corporation*, 297 F.Supp.2d 372 (D. MA 2003); *Smith v. GTE Corp.*, 236 F.3d 1292, 1312 (11th Cir. 2001); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

G. The NNTRC Has No Plan to Regulate Spectrum at This Time.

1. *One or more commenters stated that the NNTRC cannot regulate spectrum.*

Response:

2. This comment is not responsive to the Rulemaking as the NNTRC has not announced any plan to regulate spectrum. Any rulemaking which impacts spectrum use on the Navajo Nation would be announced in a separate docket.

H. The Notice and Comment Procedure for This Rulemaking Is Statutorily Mandated and Appropriate for the CCN Rulemaking.

1. *One or more commenters stated that the NNTRC should hold a stakeholder workshop to promote free and full exchange of ideas.*

2. *One or more commenters requested an opportunity to comment on revisions to the proposed rulemaking.*

3. Where adoption of regulations to establish a CCN process is statutorily required, and notice and comment for NNTRC rulemakings is also mandated by statute pursuant to 21 N.N.C. § 515, the current format for this proceeding is appropriate and consistent with Navajo statutory law, principles of Navajo Fundamental Law, and is also consistent with “notice and comment” concepts embodied in the Federal Administrative Procedures Act. Operators have been provided the opportunity in this proceeding both to file written comments and make oral presentation at an open hearing, held February 1, 2012, and will have a second opportunity to comment on the Further Notice of Proposed Rulemaking in Docket No. NNTRC-11-001 as outlined below. The NNTRC may utilize the workshop approach in future proceedings.

I. The NNTRC Has No Association with Any Operator on the Navajo Nation.

1. *One or more commenters expressed the opinion that the Navajo Nation was acting as both a competitor and a regulator.*

Response:

2. The NNTRC is an independent regulatory authority under the Executive Branch of the Navajo Nation government established by the Navajo Nation Council by statute. The NNTRC has no association with the Navajo Tribal Utility Authority, a non-profit enterprise of the Navajo Nation, or with any other middle mile or last mile operator. Pursuant to Navajo law, including the Ethics in Government Law and the NNTRC Plan of Operation, the Commissioners and the Office of the NNTRC have a statutory obligation to protect the public interest, and must act accordingly.

3. The NNTRC is also the delegated entity of the Navajo Nation government charged by the Navajo Nation Council with interfacing with the Federal Communications Commission and the state regulatory bodies on a government-to-government basis. *See* 21 N.N.C. § 508. In that role, it has an obligation to advocate for tribal interests when engaging with other jurisdictions.

II. FURTHER PROPOSED RULEMAKING FOR A TIERED REGULATORY APPROACH.

1. After thoroughly reviewing the comments filed in this proceeding, and listening to the oral testimony presented, the NNTRC concludes that a tiered regulatory approach is more appropriate than the approach originally contemplated in the Notice of Proposed Rulemaking. In place of the CCN Application proposed in its July 28, 2011 Notice of Proposed Rulemaking in Docket No. NNTRC-11-001, the NNTRC herein proposes to utilize the Application attached to this document as Exhibit A. As demonstrated in Exhibit A, rather than requiring every operator to obtain a CCN, the NNTRC proposes four levels of authorization, with concomitant engagement and regulatory requirements. The categories for Small Operator and General Operator are intended to be the least burdensome, and require only an informational filing without financial information. All operators must acknowledge that they are subject to Navajo Nation laws of general application for businesses operating on the Navajo Nation, and to Navajo taxes, and will be required to comply with the Nation's general business requirements.

2. The NNTRC invites comments on this overall regulatory approach. Commenters should keep in mind the statutory mandate of the NNTRC under Navajo law to protect the interest of the Navajo people. The regulatory approach proposed below provides operators with a high degree of flexibility in operating on the Navajo Nation. There is an approach for those carriers who wish to minimize their regulatory burden, as well as approaches for operators who truly wish to serve the public interest, and thus receive significant benefits that come with such a trusted responsibility. The NNTRC preliminarily concludes that it should not distinguish

between types of operators in adopting regulations, and each of these categories should be available to wireline and wireless carriers, satellite television providers, and other providers of telecommunications services as defined at 21 N.N.C. § 503(V). Operators may opt in at any level of certification, including as a Small Operator provided they qualify. The NNTRC invites comments on this approach. Are there any reasons to treat different technologies differently from a regulatory perspective (other than as required to be consistent with federal telecommunications law)?

3. If these categories are adopted, in future rulemakings the NNTRC will identify the category(ies) of operator to which such rule will apply.

A. The proposed categories of operators are as follows:

1. Small Operator. Many commenters suggested that the NNTRC treat differently carriers who provide service to only a small number of customers on the Navajo Nation, and suggested that the regulatory burden for such small operators should be minimized. The NNTRC concludes that for operators serving less than 50 customers on the Navajo Nation that have maximum gross revenues of \$100,000.00 or less, or who do not file FCC Form 499-A, the NNTRC will require a one-time basic non-proprietary informational filing as a Small Operator (SO), which would not include financial information. An SO would pay a nominal annual reauthorization fee. Upon receipt of such filing, by letter the NNTRC would certify the SO to conduct business on the Navajo Nation. An SO would have to acknowledge that it is subject to Navajo Nation laws of general application for businesses operating on the Navajo Nation, and to Navajo taxes, and would be required to comply with the Nation's general business requirements. An SO would not be certified as serving the public interest and would not be entitled to the established public interest rate structure for telecommunications rights-of-way, joint use and co-location permits, or leases, outlined below. Payment for access to Navajo Nation land would be on an established or negotiated basis, at the discretion of the Navajo Nation. The NNTRC invites comments on this regulatory approach.

2. General Operator. The NNTRC also received comments from carriers who suggested that they should be allowed to operate on the Navajo Nation with minimal regulatory oversight. The NNTRC concludes that it can create a classification of carriers called General Operators to whom a minimal regulatory regime could be applied. All operators who serve more than 50 customers on the Navajo Nation or have gross revenues greater than \$100,000.00 would make a non-proprietary informational filing with the NNTRC as a General Operator (GO), which would not include financial information. A GO would also pay a nominal annual fee, and would be required to annually update existing general service delivery systems information. A GO would have to acknowledge that it is subject to Navajo Nation laws of general application for businesses operating on the Navajo Nation, and to Navajo taxes, and would be required to comply with the Navajo Nation's general business requirements. A GO would not be certified as serving the public interest and would not be entitled to the established public interest rate

structure for telecommunications rights-of-way, joint use or co-location permits, or leases, outlined below. Payment for access to Navajo Nation land would be on an established or negotiated basis, at the discretion of the Navajo Nation.

The NNTRC would not require a General Operator to meet the NNTRC's billing, advertising, or customer service requirements. However, a General Operator would be required to comply with E-911 requirements as set by the NNTRC for all facilities and equipment located on the Navajo Nation, and would have to meet basic consumer protection standards.

For operators designated as an eligible telecommunications carrier (ETC), certification as a GO would not satisfy tribal engagement obligations under the *USF/ICC Transformation*, ¶ 637. Additional reporting requirements may apply to an ETC that is certified by the NNTRC as a GO. The NNTRC requests comments on this regulatory approach.

3. Public Interest Operator. For those operators who wish to take advantage of certain benefits that NNTRC can provide (as outlined below), the NNTRC proposes to create a classification of operator known as a Public Interest Operator. An operator wishing to be a Public Interest Operator (PIO) would be required to file an application with the Office of the NNTRC which would be approved by the NNTRC only upon a finding that the operator would serve the public interest. A PIO would be required to certify by affidavit that they will file an annual Navajo service plan and report. The report would include, but not be limited to, identification of revenue generated from customers on the Navajo Nation, revenue by specific infrastructure located on the Navajo Nation, identification of unserved/underserved areas within the PIO's territory on the Navajo Nation and goals for penetration and service of such areas, and feasibility and sustainability planning. A PIO would be required to commit to conduct activities in a culturally sensitive manner. A PIO would be required to demonstrate that it is maximizing efficient use of all available infrastructure to the extent practicable in the circumstances. This would include, where practicable, utilizing infrastructure of other providers through co-location, and encouraging co-location on its infrastructure, prior to it or other providers engaging in new build out. Certification as a PIO would presumptively satisfy the tribal engagement requirements under the FCC CAF Order for the first year of operation. Annual reports consistent with the FCC's Tribal Engagement Provisions would apply.

NNTRC would have the right to review interconnection, co-location, and other provider agreements of a PIO where the public interest so requires. As a privilege of serving the public interest, a PIO would be entitled to an established *public interest rate structure* for all telecommunications rights-of-way, joint use and co-location permits, and leases. The NNTRC seeks comments on this regulatory classification.

4. Negotiated Agreement Operator. Finally, the NNTRC concludes that a class of operator should be established for operation of 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. A Negotiated Agreement Operator (NAO) would have

the same rights and responsibilities as a Public Interest Operator, except that it would 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. Rates would be subject to approval by the NNTRC pursuant to the agreement. Payment of consideration by a NAO for rights-of-way, joint use and co-location permits, and leases for telecommunications infrastructure, are anticipated to be waived, subject to approval of the Resources and Development Committee of the Navajo Nation Council. The NNTRC seeks comment on this regulatory classification.

III. ORDER.

It is hereby ordered that:

1. The NNTRC and the Office of the NNTRC will exercise regulatory jurisdiction over all operators on the Navajo Nation.
2. The Further Proposed Rulemaking in NNTRC-11-001, as described herein, is available for public comment and written comments shall be received by the Office of the NNTRC no later than 30 days from the date of this Order.
3. The Office of the NNTRC is directed to investigate market conditions and going rates for telecommunications infrastructure in the United States and North America; the Executive Director, Office of the NNTRC, shall recommend infrastructure rates for wireless and wireline telecommunications services on Navajo Nation lands to the NNTRC and the Resources and Development Committee of the Navajo Nation Council for their joint approval.

Adopted: August 27, 2012

/s/

**Marlene Lynch
Chairwoman
Telecommunications Regulatory Commission
The Navajo Nation**