

**Before the
Navajo Nation Telecommunications Regulatory Commission**

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

**SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED
RULEMAKING**

Adopted: December 11, 2014

Released: January 7, 2015

I. BACKGROUND

1. In February 2010, the NNTRC began work to establish rules, consistent with the requirements under Navajo Law, that all telecommunications providers receive permission from the Navajo Nation in order to conduct business with the Navajo people. Under Navajo law, each carrier must receive a Certificate of Convenience and Necessity (CCN).¹ Throughout the process, the NNTRC has been mindful not to duplicate other processes in the Navajo Nation such as those required by the Navajo Business Regulatory Department or Navajo Land Department.²

2. On July 28, 2011, the Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), in Docket No. NNTRC-11-001, published a *Notice of Proposed Rulemaking (NPRM)* for an application for a Certificate of Convenience and Necessity (“CCN”), as required pursuant to the Act. 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

¹ Navajo Telecommunications Regulatory Act (“Act”), 21 N.N.C. §§ 501 *et seq.*

² Foreign and Navajo domestic corporations are required to file their organizational documents and make annual reports to the Business Regulatory Department. The Navajo Land Department, Division of Natural Resources, under oversight of the Resources and Development Committee of the Navajo Nation Council, is currently responsible for issuance of telecommunications facility building permits, leases and subleases and processing of Navajo Nation consents for telecommunications rights-of-way.

well as on exceptions to the CCN requirement. In response to the *NPRM*, nine (9) comments were filed.³

3. 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.

4. Based on comments that the NNTRC received in Docket No. NNTRC-11-001, the NNTRC issued a *Report and Order and Further Notice of Proposed Rule Making (R&O and FNPRM)* on August 27, 2012. The *R&O* addressed a number of jurisdictional issues. In response to comments, the NNTRC also proposed, and invited further comments on, a tiered approach to regulation of telecommunications operators. The NNTRC proposed four categories of licensed telecommunications operators on the Navajo Nation, including: (1) a Small Operator or “SO,” for operators with a *de minimis* presence on the Navajo Nation; (2) a General Operator or “GO” for any carrier wishing to opt out of the NNTRC’s general billing, advertising and customer service requirements, but which would still require compliance with 9-1-1 requirements; (3) a Public Interest Operator or “PIO,” which would be certified as operating in the public interest and required to comply with NNTRC’s billing, advertising, customer service and heightened reporting requirements, and which would have access to a preferential schedule of land use rates (subject to approval of such rates by the Resources and Development Committee of the Navajo Nation Council); and (4) a Negotiated Agreement Operator (NAO), which would require operators of middle-mile and backhaul to provide open-access open-architecture on their facilities, and which would also be certified to operate in the public interest and have access to a preferential schedule of land use rates (subject to approval of such rates by the Resources and Development Committee of the Navajo Nation Council). In response to the *FNPRM*, nine (9) comments were filed.⁴ Those comments will be discussed *infra*.

5. On July 16, 2013, Navajo Pillars Telecommunications, Inc. (“Navajo Pillars”) filed a Petition seeking a contingent CCN from NNTRC, along with a Motion for Protective Order, and a completed application based on the draft application previously published in this proceeding.⁵ Public Notice seeking comments was issued that same date. No comments were received in response to the Public Notice. On July 18, 2013, NNTRC issued a Protective Order related to the Navajo Pillars petition and exhibits thereto. On October 16, 2013, NNTRC issued a *Report and Order*, granting the Navajo Pillars petition, approving their application, and granting them PIO status, contingent on the adoption of final rules.⁶

6. In this *Second Report and Order*, we address the issues raised in the comments filed in response to the *Further Notice of Proposed Rulemaking* and adopt rules, procedures, and forms to be used by carriers to qualify to provide services on the Navajo Nation. Because

³ See Appendix A for a list of commenters in this proceeding.

⁴ *Id.*

⁵ The Navajo Pillars Petition, and all other documents related thereto are available on the NNTRC website at <http://www.nntrc.org/navajopillars.aspx>.

⁶ As discussed in the *Order, infra*, because we decline to adopt rules at this time for PIO and NAOs, we hereby amend Navajo Pillars’ status to that of a General Operator. At the time that we adopt rules for PIOs, Navajo Pillars may request to have its status change to a PIO, assuming that it can meet the requirements adopted in those future rules.

questions remain as to certain details related to issuing CCNs to carriers requesting to operate as a PIO or NAO, this *Second Report and Order* adopts the first two tiers of operators, such that all carriers currently operating on the Navajo Nation shall follow the filing requirements as either a Small Operator (if they can so qualify), or otherwise as a General Operator. At such time as the issues discussed herein are resolved within the Navajo Government, NNTRC anticipates adopting a Third Report and Order establishing the Public Interest Operator and Negotiated Agreement Operator tiers.

7. This interim approach allows NNTRC to move forward with the registering and issuance of CCNs to all carriers now, while retaining the ability to amend its rules to allow for further regulation of those carriers wishing to take advantage of the status of the PIO and NAO tiers in the future.

II. DISCUSSION

A. The Need for a CCN Process

8. The CCN is a certificate verifying that a carrier has established its operation in a manner consistent with Navajo Law, and agrees to operate consistent with Federal requirements to provide reliable communication services on the Navajo Nation, and in accordance with basic standards for consumer protection under Navajo law. While making a phone call in many instances is a matter of convenience, it becomes a necessity when immediate emergency assistance is required by a party in critical distress. The CCN is verification by the Navajo Nation that a particular carrier will comply with Navajo law and meet the basic standards required of all entities providing services on the Navajo Nation.⁷

9. The CCN process provides the NNTRC with the foundation by which to regulate carriers on the Navajo Nation. Further, as the entity charged with overseeing the development of a NG-911 system on the Navajo Nation,⁸ NNTRC must interface with carriers in this endeavor. The CCN process determines which category of service delivery should be expected by a particular provider, and the obligations the provider has not only to the consumer but also to the Nation. Until the CCN has been completed, and the data collected, the Nation can only depend on the provider's voluntary provision of information, consumer narratives or the NNTRC's staff reports as to the availability of service on the Navajo Nation.

10. The NNTRC is obligated under Navajo Law to work in the interest of the entire Navajo Nation when it comes to the provision of telecommunications services. In order to

⁷ Although Navajo law calls the authority granted by NNTRC to operate on the Navajo Nation a Certificate of Convenience and Necessity (CCN), the rules, procedures and application we adopt today are significantly different from CCN procedures adopted by many state PUCs. We do not attempt to regulate rates or services provided on the Navajo Nation. The regulations adopted herein are much more akin to the type of "informational filing" that the FCC has concluded was not preempted in *Petition of the People of the State of California, Report and Order*, 10 FCC Rcd 7486 (1995). See, *infra*, Section II.C. As such, AT&T's allegations that NNTRC is attempting to impose state-like certification requirements on wireless operators is not correct. See *Comments of AT&T*, p. 4.

⁸ See Navajo Nation Council Resolution No. CO-51-13 (Nov. 1, 2013; signed into law Nov. 6, 2013) (amending 21 N.N.C. § 3453(B)).

formulate informed decisions, the NNTRC is in need of vital statistics as to the current state of deployment of telecommunications services. The NNTRC has compiled a series of narratives from complaints but has not been able to rule from statistics gathered from a uniform information format. The CCN is the mechanism to populate such information tables, and thus to provide sound statistical information which can be analyzed to formulate, amend, or repeal telecommunication regulations shaping the market on the Navajo Nation.

11. The following section summarizes comments received in the *Further Notice of Proposed Rulemaking* in Docket No. NNTRC-11-001, and details the response of NNTRC to those comments.

B. The Navajo Nation Did Not Lose Jurisdiction By Entering into the Treaty of 1868

12. In response to the *Further Notice of Proposed Rulemaking*, AT&T filed comments suggesting that NNTRC (and the Navajo government as a whole), lacked jurisdiction to regulate telecommunications carriers on the Navajo Nation because the Navajos gave up that jurisdiction in signing the Treaty of 1868. Specifically, AT&T states:

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.’”) ⁹

As discussed below, the Navajo Nation did not lose the right to exclude (and therefore to regulate) in entering into the Treaty of 1868.

⁹ *AT&T Further Comments*, p. 14.

1. Background: The Treaty of 1868

13. As is well documented, relations between the Navajo Tribe and the United States government were at best strained in the mid-19th Century. Beginning in 1863, some 8,000 Navajos were rounded up by U.S. soldiers and forcibly marched 300-to-400 miles to Fort Sumner, New Mexico, the Bosque Redondo, where they were imprisoned until mid-June 1868. Ever since known as “The Long Walk,” hundreds died along the way, leaving the Navajo people with the greatest historical trauma in their long history. Once there, many more died from starvation, disease, were subject to rape and many hardships just to survive. Firewood was scarce, food wouldn’t grow, the water was undrinkable and the people were subject to raids by other tribes in the area and were powerless to help themselves.

14. The Navajo Treaty of 1868 was designed to bring the conflict between the U.S. government and the Navajos to an end, and to return the Navajos to their aboriginal lands. First and foremost, the Navajo Treaty of 1868 would mark the end of war.

ARTICLE I. From this day forward all war between the parties to this agreement shall for ever [sic] cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

15. In exchange for the Navajos agreeing to peace, the federal government agreed to restore the Navajo from Bosque Redondo to their ancestral lands, and to protect those lands from encroachment by the white man.

ARTICLE II. [T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

16. In Article IX, the Navajo agreed more specifically not to “oppose” the construction of railroads, and not to attack travelers. As part of Article IX, the Navajo also agreed:

6th. They [Navajos] will not in 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; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

AT&T seizes upon this language to claim that the Navajo Nation, by signing the Treaty of 1868, may not now “oppose” (and by implication regulate) telecommunications providers wishing to serve the Navajo Nation.

2. Applying: The Navajo Treaty of 1868

a. Specific Precedent Makes Clear that the Treaty Did Not Strip the Navajo Nation of Its Right to Regulate Activities on Its Reservation Land

17. Contrary to AT&T's claim, there is specific case law precedent interpreting the Navajo Treaty of 1868, and whether that Treaty impinges the ability of the Navajo Nation to regulate non-Indian businesses entering the reservation. In *Kerr-McGee Corp. v. Navajo Tribe*, 731 F.2d 597 (9th Cir. 1984), *aff'd* 471 U.S. 195 (1985), the Ninth Circuit was presented with a challenge to a Navajo tax on mining interests. In opposition, the mining company argued that the Navajo relinquished the right to tax its activities in the Treaty of 1868. In response, the court analyzed the issue as follows:

With respect to the Treaty of 1868, Kerr-McGee asserts that Article IX expressly prohibits Tribe interference with its oil and gas operations. That provision states: "[The Tribe] will not in future oppose the construction of railroads, wagonroads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States." 15 Stat. at 670. Kerr-McGee argues that its oil and gas operations are works of utility and that by taxing its operations, the Tribe "opposes" them. *We find this argument wholly without merit.* Placed in context, it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe, and not with its power to tax.

731 F.2d at 600 (emphasis added). The Ninth Circuit then went on to analyze the issues of the case under the "right to exclude" powers tribes possess, and whether such "right to exclude," includes the right to tax. The court agreed that it did:

[The Supreme Court] has made it clear that Indian tribes do have the inherent power to tax mining activities carried on within the reservation under lease from the tribes; that the power to tax is an essential attribute of Indian sovereignty and a necessary instrument of self-government. "[The power to tax] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901, 71 L.Ed.2d 21 (1982). The Court makes it clear that Kerr-McGee's status as lessee does not deprive the Tribe of power to tax it; that such power is inherent in sovereignty and does not stem exclusively from the power to exclude one from tribal lands. Moreover, as the Court acknowledged in *Merrion*, the Tribe's interest in levying taxes for essential governmental programs on nonmembers "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 455 U.S. at 138, 102 S.Ct. at 902, *quoting* *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57, 100 S.Ct. 2069, 2082-83, 65 L.Ed.2d 10 (1980). If the Tribe's interest was found sufficiently strong in the case of the oil and gas severance taxes in *Merrion*, they can be no less strong here."

18. The U.S. Supreme Court affirmed the Ninth Circuit, and went further, indicating that reserving the rights to regulate (through taxation) is consistent with U.S. policy toward Native Tribes.

As we noted in *New Mexico v. Mescalero Apache Tribe*, 462 U. S. 324 (1983), the Federal Government is ‘firmly committed to the goal of promoting tribal self-government.’ *Id.*, at 334-335; *see, e. g., Indian Financing Act of 1974*, 88 Stat. 77, 25 U. S. C. § 1451 et seq. The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs. *See President's Statement on Indian Policy*, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983).

471 U.S. at 200-01.

19. The Secretary of the Interior has made a similar finding as to the requirement that a non-Indian seeking to build on the Navajo Nation must get approval from the Navajo government. In *Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary*, 12 IBIA 49, 90 Interior Decisions 474 (10/28/83), a company seeking to run a natural gas pipeline and build radio communications tower facilities argued that its federal license obviated any need to get Navajo approval before building on the Navajo Nation. It too argued that Article IX of the Navajo Treaty of 1868 removed the ability of the Navajo to regulate its activities. The Secretary disagreed.

Article IX, paragraph 6, of the Treaty with the Navajo is virtually identical to Article XI, paragraph 6, of the Treaty with the Sioux, April 29, 1868, 15 Stat. 635, in which the Sioux Tribe agreed not to object "to 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 Sioux treaty provision was considered in *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D. 1958), and was found not to constitute a waiver of tribal opposition to the construction of a dam and reservoir on tribal land even though the project was arguably a work of utility or necessity.

12 IBIA at 61. The Review Board went on: “The Board agrees with the tribe in this case that so long as appellant chooses to do business on the Navajo Reservation, it is subject to the right of the Navajo Nation to exercise certain governmental powers over the reservation. A generalized treaty provision, such as the one found in the 1868 Treaty, is insufficient to constitute consent to any and all rights-of-way, even for ‘works of utility or necessity,’ that might be sought through tribal lands. *Id.*¹⁰

¹⁰ *See also Star Lake R. Co. v. Lujan*, 737 F.Supp 103, (D.D.C. 1990) (although railway company had CCN issued by the Department of Commerce, and other rights-of-way for proposed rail spur, including on adjacent allotted lands and public lands, court upheld termination of railroad right-of-way for portion of easement located on Navajo Nation trust lands after the tribe requested termination of the right-of-way on the basis of its non-use).

b. General Treaty Interpretation Also Supports the Proposition that the Navajo Nation Retained the Right to Regulate Utility and Telecommunications Providers after the Treaty of 1868

20. Even without these specific cases, under the concepts of treaty interpretation, a similar conclusion would be reached. Fundamentally, in interpreting a treaty such as the Navajo Treaty of 1868, the federal government is required to interpret such treaties in ways most favoring the Indian tribe if there is any ambiguity in the treaty provisions. In *Worcester v. Georgia*, the court held that ambiguities in Federal treaties or statutes dealing with Indians “must be resolved favorably to the Indians.” *Santa Rosa Band v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975). See also *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Moreover, treaty provisions must be interpreted “in accordance with the meaning they were understood to have by the tribal representatives in council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.” *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998). Finally, the law is settled that simply because a Treaty fails to delineate specific powers of a tribe does not mean that the tribe has been divested of such powers. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The Supreme Court “has referred to Treaties made with the Indians as ‘not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.’” *Wheeler*, 435 U.S. at 327 n. 24, 98 S.Ct. at 1088 n. 24 (quoting *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905)).

21. As noted above, Articles I and II of the Navajo Treaty of 1868 set forth the proper context of the Navajo Treaty of 1868 – the Navajos agreed to lay down arms and not attack the white man in exchange for being returned to their ancestral lands **and** the promise that only the federal government or its agents or employees would enter reservation lands, which otherwise would be under the rule of the tribe. Arguing today that because the Navajos agreed not to attack government workers on railroads 150 years ago the Navajo Nation is stripped of its right to regulate commerce within its borders would abrogate the Treaty of 1868. Such an abrogation, however, cannot be done silently, as AT&T would have it done here, but must come via specific Congressional finding that rights retained by the Navajo after the Treaty have subsequently been extinguished. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002) (Interior can’t abrogate treaty, “Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so;” quoting *U.S. v. Washington*, 641 F.2d 1368, 1381 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982)).

22. There is a strong presumption under U.S. Indian law precedent that Congress enacts statutes to encourage self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149, 100 S.Ct. 2578, 2586, 65 L.Ed.2d 665 (1980) (There is a “general federal policy of encouraging tribes ‘to revitalize their self-government’ and to assume control over their ‘business and economic affairs’”) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973)). As the Supreme Court noted, the Senate Judiciary Committee “as early as 1879” stated:

We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life.

S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (emphasis added) (*quoted in Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

23. Part of the right of self-government includes the inherent right to exclude others from the Navajo Nation. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983), *cert denied*, 446 U.S. 926 (1984); *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976); *Ortiz-Barraza v. US*, 512 F.2d 1176, 1179 (9th Cir. 1975). The Ninth Circuit in *Babbitt* stated:

The power to exercise tribal civil authority over non-Indians derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44, 102 S.Ct. 894, 903-05, 71 L.Ed.2d 21 (1982). This "limited authority" over nonmembers "does not arise until the nonmember enters the tribal jurisdiction ... [by entering] tribal lands or [conducting] business with the tribe." *Id.* at 142, 102 S.Ct. at 904. Nonmembers lawfully entering tribal lands — for example, pursuant to contract with the tribe — nonetheless remain "subject to the tribe's power to exclude them." *Id.* at 144, 102 S.Ct. at 905 (emphasis in original). A tribe has the power "to place conditions on entry, on continued presence, or on reservation conduct ..., [and] nonmember[s] who [enter] the jurisdiction of the tribe [remain] "subject to the risk that the tribe will later exercise [this] sovereign power." *Id.* at 144-45, 102 S.Ct. at 905 (footnote omitted).

The *Babbitt* court concluded that the right to regulate the activities of non-Indians can apply even if the non-Indian commenced its activities prior to the Tribe adopting regulations. "The Court made clear that the mere existence of a 'lawful property right to be on Indian land' does not immunize the non-Indian from the tribe's power 'to place other conditions on the non-Indian's conduct or continued presence on the reservation.' *Merrion*, 455 U.S. at 144-45, 102 S.Ct. at 905-06 (footnote omitted). Those entering the tribe's jurisdiction remain 'subject to the risk that the tribe will later exercise its sovereign power.' *Id.* at 145, 102 S.Ct. at 905.

24. Thus, under general treaty interpretation, the Navajo Nation did not cede its right to regulate non-Indians wishing to do business on its lands by signing the Treaty of 1868, and may impose reasonable regulation on such persons or entities, even if they are already operating on the Navajo Nation prior to when such regulations are adopted.

25. Further, Because the Nation's consent is required for the issuance of telecommunications rights-of-way, leases, subleases and permits pursuant to federal laws for use

of tribal lands, the Navajo Nation can and for several decades has conditioned its consent to issuance of such land use documents on an applicant's express consent to adjudicatory and regulatory jurisdiction of the tribe and to the application of Navajo law. See *Montana v. United States*, 450 U.S. 544, 565 (1981) ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members, *through commercial dealing, contracts, leases, or other arrangements.*") (emphasis added). In addition to its already approved business site lease regulations, the Navajo Nation has recently assumed *all* authority for issuance of surface land use authorizations, including telecommunications leases, subleases and permits under general leasing regulations approved by the Secretary of the Interior pursuant to 25 U.S.C. § 415(e),¹¹ and its consent is required for any federally approved rights-of-way on its lands under federal regulation, see 25 C.F.R. § 169.3(a) ("[n]o right-of-way shall be granted over and across *any* tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.") (emphasis added); see also 5 N.N.C. § 401-404 (e.g., § 403 "The grant of the privilege of doing business within the Navajo Nation . . . is conditioned upon the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases, permits, or contracts authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation.").

C. Federal Law Has Not Preempted NNTRC's Regulatory Authority

26. Both AT&T and Verizon argue that NNTRC's regulatory authority over wireless carriers has been preempted by the 1996 Telecommunications Act.¹² Both argue that since the FCC has the sole licensing authority for the frequencies used by wireless carriers, the NNTRC has no regulatory authority over their activities.¹³ AT&T goes as far as to claim that the FCC's *AB Fillins* case¹⁴ definitively demonstrates that the NNTRC has no jurisdiction to promulgate regulations related to carriers serving the Navajo Nation.¹⁵ AT&T would be correct if the NNTRC was attempting to license, certify, or otherwise manage the frequencies used by AT&T and other wireless carriers seeking to serve the Navajo Nation.

27. The CCN regulations adopted herein fully acknowledge the FCC's preemptive frequency licensing and management roles, and nothing in the regulations we adopt today encroaches on this area. Instead, the regulations we adopt today are based on the Navajo Nation's fundamental right to exclude non-members from conducting business activities on the Navajo Nation, and the Nation's inherent right to require businesses to conduct themselves according to Navajo law while doing business on the Navajo Nation. This right was fully acknowledged by the FCC in *AB Fillins*. Indeed, the FCC concluded that Sections 253 and 332

¹¹ See Navajo Nation Council Resolution No. CO-51-13 (Nov. 1, 2013; signed into law Nov. 6, 2013) (approved by the Secretary of the Interior, May 16, 2014).

¹² See, Comments of AT&T, pp. 7-11; Comments of Verizon, p. 2.

¹³ *Id.*

¹⁴ *In the Matter of AB Fillins*, 12 FCC Rcd. 11755, 11765 (rel. Aug. 1, 1997).

¹⁵ Comments of AT&T, p. 11.

of the 1996 Act which generally preempts state and local entry regulations of wireless carriers do not apply to Tribes.

It is well settled that Congress has the plenary political power to displace Native American jurisdiction over tribal relations and tribal territory. Nowhere in the Communications Act or other statute, however, has Congress expressed the intent to preempt tribal regulation of cellular service or to give the Commission the power to do so. To the contrary, to the extent that Sections 332(c)(3), 332(c)(7)(B), and 253 expressly preempt certain regulation, as noted above, they do so only with respect to ‘State or local government.’ In general, federal policy favors the strengthening of tribal self-government. Thus, ‘a proper respect both for tribal sovereignty itself and for the plenary authority of Congress’ has caused the courts to hesitate to imply any preemption of tribal authority absent an express statement of legislative intent. The same principles of respect for tribal and Congressional authority lead us, in the absence of a clear Congressional authorization, to decline to preempt Native American power over tribal lands.¹⁶

28. Even if Sections 253 and 332 generally preempted NNTRC’s regulatory authority, which they do not, the FCC and courts have made clear that State and local governments do have regulatory authority over the business activities of wireless carriers in many instances. These areas include local business licensing and informational filings;¹⁷ the regulation of late fees;¹⁸ advertising practices;¹⁹ misleading advertising of rate increases;²⁰ deceptive billing;²¹ complaints of consumer fraud;²² and issues related to zoning and tower placement.²³ Many of the CCN obligations adopted herein touch on these issues.²⁴

¹⁶ *In the Matter of AB Fillins*, 12 FCC Rcd. At 11761-2 (internal citations and footnotes omitted).

¹⁷ *See Petition of the People of the State of California, Report and Order*, 10 FCC Rcd 7486 (1995)

¹⁸ *See 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”).

¹⁹ *See Moriconi v. AT&T Wireless PCS, LLC*, 280 F. Supp. 2d 867 (E.D. Ark. 2003).

²⁰ *See 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).

²¹ *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).

²² *See Smith v. GTE Corp.*, 236 F.3d 1292, 1312 (11th Cir. 2001).

²³ *See Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *compare N.Y. SMSA Ltd. Partnership v. Town Of Clarkstown*, 603 F.Supp.2d 715 (S.D. NY 2009) (Zoning ordinance partly upheld and partly struck down; portions that dealt with traditional zoning issues such as aesthetics, setbacks, process and fees upheld, provisions that gave preferences for lower power transmissions and required RF interference certifications struck down as preempted. However, entire ordinance struck down when court concluded that it couldn’t sever the preempted portions without doing damage to the ordinance as a whole).

29. The NNTRC concludes that it has the necessary jurisdictional authority to regulate all carriers providing service to the Navajo Nation in matters not explicitly preempted by Congress (i.e. frequency licensing and management).

D. Federal Tribal Engagement Provisions are Insufficient to Satisfy the Requirements of Navajo Law

30. Several commenters suggest that the Tribal Engagement Provisions enacted by the FCC²⁵ would provide the NNTRC with the information it needs in order to satisfy its delegated authority under Navajo Law.²⁶ For the reasons we set forth below, we find that while the FCC's Tribal Engagement Provisions are vitally important, they are insufficient to provide the information needed by NNTRC to carry out its statutory mandate under Navajo Law.

31. First, the FCC's Tribal Engagement Provisions apply only to Eligible Telecommunications Carriers (ETCs) that receive support from the Universal Service Fund's High Cost or other Connect America Fund programs.²⁷ Carriers which are not ETCs are not subject to the Tribal Engagement Provisions. Further, Lifeline-only ETCs also are not required to engage with Tribes.²⁸ Many carriers providing service to the Navajo Nation, therefore, are not required to undertake formal Tribal Engagement pursuant to Section 54.313(a)(9) of the FCC's rules. The NNTRC is charged under Navajo Law to oversee *all* carriers serving the Navajo Nation, not just ETCs.²⁹ *See, e.g.*, 24 N.N.C. §§ 507, 519. Thus, relying on the FCC's Tribal Engagement Provisions would be insufficient to meet the NNTRC's statutory mandate.

32. Second, the FCC's Tribal Engagement Provisions, including the filing of FCC Form 481, while providing a platform for dialog between carriers and Tribes, generate insufficient information about the carriers' activities on the Navajo Nation. The information requested in our CCN forms would not necessarily be transmitted to the FCC in the Tribal Engagement process.

²⁴ *See Comments of SBI*, p. 3 (necessary for NNTRC to demonstrate that the proposed regulations do not fall within the areas preempted by the 1996 Telecommunications Act).

²⁵ *See*, 47 C.F.R. § 54.313(a)(9); see also Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Telecommunications Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund, WC Docket Nos. 10-90 et al., 27 FCC Rcd 8176 (2012).

²⁶ *See, e.g., Comments of Navajo Communications Company (Frontier)*, p. 5; *Comments of NTUA Wireless*, p.7; *Comments of SBI*, pp. 5-6

²⁷ *See* 47 C.F.R. § 54.313 (ETCs receiving High Cost and Mobility Fund support subject to Tribal Engagement Provisions).

²⁸ *Compare* 47 C.F.R. § 54.313 (ETCs receiving High Cost and Mobility Fund support subject to Tribal Engagement Provisions) *with* 47 C.F.R. § 54.422 (ETCs receiving only Lifeline support not subject to Tribal Engagement Provisions).

²⁹ *See* discussion of regulatory status of Navajo Tribal Utility Authority and NTUA Wireless, *infra*.

33. The NNTRC will use the results of the Tribal Engagement activities with carriers, along with information received through the CCN process, to oversee the provision of telecommunications services on the Navajo Nation.

E. The Regulations Adopted Herein Strike the Proper Balance Between the NNTRC's Need for Information Without Being Overly Burdensome on Carriers

34. Several commenters suggest that the regulations proposed by the NNTRC are costly and overly burdensome.³⁰ Throughout this proceeding the NNTRC has attempted to adopt regulations and a process which will not be overly burdensome to carriers, and we believe that the regulations and application adopted today strike the proper balance. The majority of information requested has already been prepared by carriers for other purposes, so we believe that collecting and producing those materials should not be time-consuming for carriers. We reject the notion put forward by Navajo Communications that filling out a 9 page application asking for the same types of information that carriers have at their disposal will require them to raise rates to subscribers.³¹

35. As the NNTRC noted in its Further Notice of Proposed Rule Making, by creating a four-tier approach to regulation, carriers wishing to be free of providing information they deem to be burdensome can simply choose to be regulated as a General Operator and therefore respond to only a subset of the questions asked in the CCN application.³² Verizon, for example, argues that requesting information beyond item A-17 of the proposed application form is highly burdensome.³³ Moreover, in this *Second Report and Order*, we adopt only regulations that will result in a grant of a CCN to a Small Operator or General Operator. As such, carriers will not need to respond to items beyond A-12 on the CCN application.

36. Verizon suggests that carriers be allowed to cite or link to publicly available documents to provide the information requested in the CCN Application.³⁴ We will allow carriers to provide links to documents which are responsive to the CCN Application so long as those citations and links allow the NNTRC to retrieve the documents without incurring any fees or charges for such access.

37. Windstream generally supported what it called NNTRC's "more flexible regulatory approach," by establishing different tiers of telecommunications operators, but requested that the SO criteria be expanded from 50 to 100 customers.³⁵ Verizon would like to

³⁰ See *Comments of Navajo Communications Company*, pp. 3-5; *Comments of Verizon*, pp. 5 & 8-9; *Comments of Sacred Wind*, p. 4; *Comments of NTUA Wireless*, p. 2

³¹ See *Comments of Navajo Communications Company*, p. 3. Further, as noted herein, the rules adopted today require only the Small Operator and General Operator portions of the application to be completed, which consists of only 12 questions on one and one-half pages.

³² See *Report and Order and Further Notice of Proposed Rulemaking*, p. 7.

³³ *Comments of Verizon*, p. 8.

³⁴ *Id.*

³⁵ *Comments of Windstream*, p. 2.

see this number increased to 250.³⁶ The NNTRC believes that the 50 customer threshold is reasonable for a SO, and does not find that the GO requirements are particularly more burdensome than the SO requirements. Additionally, as a matter of public safety, if a carrier is serving more than 50 customers, it should be required to comply with NNTRC's 9-1-1 requirements under the Nation's 9-1-1 Program, as will be required of all GOs.

F. Status of NTUA Under the Adopted Regulations

38. In the comments filed by the Navajo Tribal Utility Authority ("NTUA"), NTUA asserts that it is not subject to regulation by the NNTRC, although it acknowledges that it could fit the description of the category 4 operator, or NAO, as proposed in the Report and Order.³⁷ The NNTRC agrees that NTUA is currently not subject to regulation by the NNTRC under Navajo law. The NNTRC agrees that NTUA thus cannot currently be required by the NNTRC to be licensed as a telecommunications operator, unless NTUA voluntarily subjects itself to such regulation by NNTRC pursuant to a voluntary compliance agreement or similar mechanism. Although not addressed in NTUA's comments, NTUA and its co-venturer Commnet Wireless, LLC are expressly subject to NNTRC regulation pursuant to Order of the FCC, for the activities of their joint venture, NTUA Wireless, LLC.³⁸ NTUA also acknowledges that telecommunications customers of NTUA operating on its back-haul and middle-mile infrastructure are subject to regulation by the NNTRC.³⁹

39. In its comments, NTUA acknowledges that it is an enterprise of the Navajo Nation. For purposes of land use and occupation, NTUA, like other tribal enterprises, is regulated by both the Navajo Nation and the BIA and subject to lease and rights-of-way requirements and federal and Navajo Nation laws, including environmental laws and regulations. Absent a legislative exception, NTUA is subject to whatever rates are set for telecommunications leases, permits and rights-of-way by the Resources and Development Committee of the Navajo Nation Council ("RDC"). NTUA is mistaken that the NNTRC is proposing to set discriminatory rates for access to middle-mile and back haul infrastructure. Rather, NNTRC is proposing that all middle-mile and back-haul infrastructure operated by a NAO would be "open access/open architecture available at an established rate for all common carriers," pursuant to agreement with the Navajo Nation.⁴⁰

G. Public Interest Rate Structure and the PIO Tier

40. Sacred Wind commented that there may be problems implementing the approach where no public interest rate structure is yet available.⁴¹ NNTRC currently does not have

³⁶ *Comments of Verizon*, p. 5.

³⁷ *Comments of NTUA*, pp 3-4.

³⁸ *See Telecommunications Carriers Eligible for Universal Service Support (NTUA Wireless)*, DA 14-200, released February 18, 2014, ¶ 16.

³⁹ *Comments of NTUA*, p. 6

⁴⁰ *See Report and Order & RNPRM*, p. 10.

⁴¹ *See Comments of Sacred Wind*, p. 3.

statutory authority, or delegated authority, to adopt a public interest rate structure for land use for telecommunications infrastructure, and which will require either approval by the Resources and Development Committee (“RDC”), as discussed *supra*, or delegation to the NNTRC from RDC for such rate setting. The NNTRC agrees that the proposed rate structure is intended as an inducement to build-out,⁴² as well as an inducement to other actions of a PIO that would serve the public interest, including information to and coordination and planning with the NNTRC for provision of telecommunication services.

41. The NNTRC is not addressing Sacred Wind’s comments on appropriate criteria for PIOs in this Report and Order. As discussed further below, the NNTRC is taking a phased approach to adoption of the four proposed tiers of telecommunications operators. Carriers and the public are hereby invited to provide further comments in this rulemaking to specifically propose criteria for NNTRC to consider in determining whether a carrier is operating in the public interest. The NNTRC intends to schedule a workshop and/or hearing for that purpose, and carriers and the public are invited to comment on how many days should be set aside for any such workshop and/or hearing (the “Workshop”). NNTRC will also consider Sacred Wind’s already submitted comments on this issue in its further rulemaking.

42. Sacred Wind also commented that NNTRC should work to improve land use authorization processes that hinder telecommunications development on tribal lands.⁴³ The NNTRC is committed to working toward such improvement within its statutory authority under Navajo law.

43. Because NNTRC is not addressing reporting requirement of PIOs in this document, it is generally not addressing Sacred Wind’s comments regarding requirements for PIOs to report facilities-specific data now. However, carriers and the public are hereby invited to provide further comments in this rulemaking on such reporting requirements to be considered at the proposed Workshop.

H. Confidentiality of Carrier Information

44. Several commenters raise concerns about the confidentiality of information submitted as part of the CCN process.⁴⁴ The CCN Application we adopt today includes provisions for seeking confidential treatment of information. Specifically, the CCN Application states:

PROTECTED MATERIAL: Place hard copies of any documents for which the applicant is seeking confidential treatment in a separate envelope marked “confidential,” and include a motion for protective order, a proposed protective order, and an affidavit. Do not submit protected material in electronic form.⁴⁵

⁴² See *Comments of Sacred Wind* at p. 3.

⁴³ *Id.* at p. 2.

⁴⁴ See *Comments of Sacred Wind*, p. 6; *Comments of NTUA Wireless*, pp. 9-10.

⁴⁵ CCN Application, Filing Instructions, ¶ III.

Further, Section H of the Application requests that the applicant check a box indicating whether they are seeking confidential treatment of any information submitted, and restates the filing instruction above.⁴⁶ The NNTRC will also treat as confidential any information which reasonably fits within the definitions of protected records provided under the Navajo Nation Privacy Act, 2 N.N.C. § 85(A), including financial information and information which is proprietary in nature. In addition, the NNTRC will issue protective orders, as it did regarding the petition of Navajo Pillars, to protect confidential information.

I. Status of Carriers Already Providing Service on the Navajo Nation

45. Several commenters argue that since they have been providing telecommunications services to the Navajo Nation for many years, they should either be exempt from the CCN process, or their status otherwise “grandfathered.”⁴⁷ The NNTRC intends that its new CCN requirements be applicable to all carriers, not just new carriers.

46. The Ninth Circuit in *Babbitt* concluded that the right to regulate the activities of non-Indians can apply even if the non-Indian commenced its activities prior to the Tribe adopting regulations. “The Court made clear that the mere existence of a ‘lawful property right to be on Indian land’ does not immunize the non-Indian from the tribe’s power ‘to place other conditions on the non-Indian’s conduct or continued presence on the reservation.’ *Merrion*, 455 U.S. at 144-45, 102 S.Ct. at 905-06 (footnote omitted). Those entering the tribe’s jurisdiction remain ‘subject to the risk that the tribe will later exercise its sovereign power.’ *Id.* at 145, 102 S.Ct. at 905. The NNTRC therefore concludes that it has the right to impose these new limited regulations to carriers who are already operating on the Navajo Nation.

J. Reporting of Infrastructure and Services on the Navajo Nation

47. The existence of the “Digital Divide” is well-documented on the Navajo Nation. Basic telephone service has traditionally lagged far behind the rest of the United States, and the presence of highspeed broadband has, until recently, been essentially non-existent on the Navajo Nation. More important, the actual provision of services on the Navajo Nation by carriers is not well known to many Navajos or even the Navajo government. Part of this CCN process is designed to collect vital data as to what telecommunications infrastructure exists on the Navajo Nation. The CCN Application we adopt today will require all carriers to report to NNTRC their service offerings on the Navajo Nation, as well as facilities operated on the Navajo Nation by carriers.

48. The NNTRC takes this action to establish administrative data gathering tools to better report the progression of telecommunication services on the Navajo Nation. Virtually all of this data is currently required to be filed with the FCC on Form 477, so the NNTRC believes

⁴⁶ *Id.* at Section H.

⁴⁷ *Comments of Navajo Communications Company*, pp. 2-3 (“[w]ith the contractual agreement with the BIA and prior authorization by the Navajo Nation at the time NCC began operations on the Navajo tribal lands, NCC has a pre-established right to do business on the Navajo tribal lands, and that existing right takes precedence over any subsequent rulings by the NNTRC requiring additional levels of authorization”); *Comments of Tabletop Telephone*, p. 2.

that the reporting of services and facilities will not create an undue burden on carriers seeking to provide services on the Navajo Nation.

III. FURTHER NOTICE OF PROPOSED RULEMAKING

49. In this *Second Report and Order*, we adopt the first set of rules designed to allow the NNTRC to regulate telecommunications carriers doing business on the Navajo Nation, pursuant to Navajo law. As previously stated in the *Further Notice of Proposed Rulemaking*, the NNTRC eventually intends on providing additional tiers of regulated carriers, beyond the Small Operator and General Operator rules adopted today.

50. The CCN process provides the NNTRC with the foundation by which to regulate carriers on the Navajo Nation. Further, as the entity charged with overseeing the development of a NG-911 system on the Navajo Nation,⁴⁸ NNTRC must interface with carriers in this endeavor. The CCN process determines which category of service delivery should be expected by a particular provider, and the obligations the provider has not only to the consumer but also to the Nation. Until the CCN has been completed, and the data collected, the Nation can only depend on the provider's voluntary provision of information, consumer narratives or the NNTRC's staff reports as to the availability of service on the Navajo Nation.

51. Developing additional tiers of carriers through this CCN process would serve as the foundation for determining if the provider should be granted special consideration for administrative processes, fees, or leases. For instance, providers demonstrating that they are working in the public interest of the Navajo People could be granted waivers to processes or fees. Conversely, carriers who seek to serve only the more populated portions of the Navajo Nation, leaving many of our people bereft of service should not be granted any special consideration.

52. The NNTRC therefore requests comments to supplement the record as to how the NNTRC should adopt rules to establish the PIO and NAO categories. What criteria should the NNTRC utilize in determining whether a carrier is providing service to as many Tribal members as possible? Should the NNTRC adopt build-out criteria in order for a carrier to be deemed a PIO? Should the NNTRC adopt provisions similar to the FCC's Tribal Engagement Provisions in evaluating whether a carrier is operating as a PIO such as whether the carrier takes into account Navajo Anchor Institutions in its deployment and whether the carrier markets and otherwise deals with its customers on the Navajo Nation in a culturally sensitive manner?

53. What types of special considerations would entice carriers to want to amend their status from a General Operator to a PIO or NAO? The NNTRC requests input on all of these issues and any others that would aid it in establishing regulations for PIOs and NAOs.

54. The definition of "person" under the Navajo Telecommunications Regulatory Act, 21 N.N.C. § 503, is very broad. The NNTRC seeks comment as to whether Internet Service

⁴⁸ See Navajo Nation Council Resolution No. CO-51-13 (Nov. 1, 2013; signed into law Nov. 6, 2013) (amending 21 N.N.C. § 3453(B)).

Providers (ISPs)⁴⁹ conducting business on the Navajo Nation, should be required to apply for licensure and be licensed by the NNTRC. Since ISPs can easily provide Voice Over Internet Protocol (VOIP) with just the installation of a soft-switch, ISPs can quickly and easily become competitive providers for both voice and data services on the Navajo Nation. Is there any specific reason to exclude ISPs from the regulatory structure being adopted herein? The NNTRC proposes that ISPs would only be required to file a one-time basic non-proprietary informational filing which would identify the location of any infrastructure on the Navajo Nation that the ISP owns, operates, leases or subleases for the purpose of access to the Internet but which will not include financial information. An ISP would pay a nominal annual authorization fee, as set by rule of the NNTRC, which would be \$750.00 for 2015. Upon receipt of said informational filing and the payment of said authorization fee, by letter the NNTRC would certify the ISP to conduct business on the Navajo Nation. An ISP would be required to acknowledge that it is subject to Navajo Nation laws of general applicability 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. An ISP would have to meet consumer protection standards set pursuant to the Navajo Nation Unfair Consumer Practices Act, 5 N.N.C. § 1101 *et seq.*, as amended, or other applicable statutory law.

55. The NNTRC agrees with Sacred Wind that gathering broadband-related information from Internet service providers is critical to telecommunications planning on the Navajo Nation⁵⁰. The NNTRC also agrees that Internet *services* are currently unregulated under federal law, which likely preempts NNTRC regulation of such services. However, as discussed *supra*, NNTRC and the Navajo Nation have the ability to exclude non-members and therefore to condition entry by such persons onto the Navajo Nation, including placing requirements on Internet service providers. Such providers are also generally under the authority of the NNTRC pursuant to the Navajo Nation Telecommunications Act.⁵¹ The NNTRC seeks comments on this regulatory approach.

56. SBI suggests that the NNTRC hold a workshop with carriers to discuss these issues.⁵² The NNTRC agrees and will issue a Public Notice in the near future establishing the date and location of such a workshop, which the NNTRC hopes to hold during the first quarter of 2015.

57. Comments to this *Further Notice of Proposed Rulemaking* will be due sixty (60) days after release.

⁴⁹ An Internet service provider (ISP) is a company that provides customers with Internet access. Data may be transmitted using several technologies, including dial-up, DSL, cable modem, wireless or dedicated high-speed interconnects. A company which operates as an ISP may also be subject to NNTRC CCN requirements if it also qualifies as a telecommunications carrier.

⁵⁰ See *Comments of Sacred Wind* at p. 5.

⁵¹ See 21 N.N.C. §§ 503(N), (W), 510(A).

⁵² See *Comments of SBI*, p. 6.

IV. ORDER.

It is hereby ordered that:

58. All carriers conducting business on the Navajo Nation are required to apply for licensure and be licensed in at least one of the following four categories of telecommunications carriers, which are hereby established by the NNTRC: (1) Small Operator or “SO”; (2) General Operator or “GO”; (3) Public Interest Operator or “PIO”; and (4) Negotiated Agreement Operator or “NAO”. Currently, NNTRC will only accept applications for licensure as a SO or GO, pending establishment of final criteria for certification of PIOs and NAOs, *see* discussion and request for comments, *supra*, and pending further Order of the NNTRC in this docket. Carriers shall have ninety (90) days from the release of this Order to make application to the NNTRC. The Final Application for CCN is attached at Appendix C.

59. To qualify for licensure as a Small Operator, a carrier will be required to annually certify that it either serves less than 50 customers on the Navajo Nation and has maximum gross revenues of \$100,000.00 or less from such service on the Navajo Nation, or is a carrier which is not required to file FCC Form 499-A. For an SO, the NNTRC will require a one-time basic non-proprietary informational filing, but which will not include financial information. An SO will pay a nominal annual authorization fee, as set by rule of the NNTRC, which is \$750.00 for 2014. A SO which claims financial hardship for payment of such fee may seek waiver of the fee by appearing before the NNTRC, and which will provide a decision upon such waiver within fifteen (15) days of such appearance. Upon receipt of said informational filing and the payment of said authorization fee, by letter the NNTRC will certify the SO to conduct business on the Navajo Nation. An SO will be required to acknowledge that it is subject to Navajo Nation laws of general applicability for businesses operating on the Navajo Nation, to Navajo taxes, and to telecommunications fees and surcharges, and will be required to comply with the Navajo Nation’s general business requirements. An SO will have to meet consumer protection standards set pursuant to the Navajo Nation Unfair Consumer Practices Act, 5 N.N.C. § 1101 *et seq.*, as amended, or other applicable statutory law. An SO will not be certified as serving the public interest and will not be entitled to any established public interest rate structure for telecommunications land use authorizations or other incentives available to PIOs or NAOs. Payment for access to Navajo Nation land will be on an established or negotiated basis, at the discretion of the Navajo Nation.

60. Unless licensed as a PIO or NAO, all carriers who serve more than 50 customers on the Navajo Nation or have gross revenues greater than \$100,000.00 will be required to apply for licensure and be licensed by the NNTRC as a General Operator. A GO will be required to make a non-proprietary informational filing with the NNTRC, which will not include financial information, but which will identify the location of any telecommunications infrastructure on the Navajo Nation that the GO owns, operates, leases or subleases, copies of all leases, permits or rights-of-way authorizing such use of Navajo tribal lands, and the GO’s general service delivery systems information. A GO will be required to pay an annual licensure fee, which is \$2,500 for 2015, and will be required to annually update existing general service delivery systems information. A GO will be required to acknowledge that it is subject to Navajo Nation laws of general application for businesses operating on the Navajo Nation, to Navajo taxes, and to telecommunications fees and surcharges, and will be required to comply with the Navajo Nation’s general business requirements. Upon receipt of the informational filing, payment of the

authorization fee, and acknowledgement of Navajo jurisdiction, a GO will be licensed to operate on the Navajo Nation. A GO will not be certified as serving the public interest and will not be entitled to any established public interest rate structure for telecommunications land use authorizations or other incentives available to PIOs or NAOs. Payment for access to Navajo Nation land will be on an established or negotiated basis, at the discretion of the Navajo Nation. The NNTRC will not require a General Operator to meet the NNTRC's billing, advertising, or customer service requirements set forth by rule of the NNTRC. A GO will be required to comply with 9-1-1 requirements as set by the NNTRC for the GO's telecommunications systems located on the Navajo Nation, and will have to meet consumer protection standards set pursuant to the Navajo Nation Unfair Consumer Practices Act, 5 N.N.C. § 1101 *et seq.*, as amended, or other applicable statutory law. For carriers designated as an eligible telecommunications carrier (ETC), certification as a GO will not satisfy tribal engagement obligations under the *USF/ICC Transformation*, ¶ 637, if applicable.⁵³ The NNTRC will be establishing such tribal engagement obligations, which may have additional reporting requirements, in a separate docket.

61. This *Second Report and Order* will become effective sixty (60) days following its release. The Executive Director of the NNTRC is hereby directed to send copies of this *Second Report and Order and Further Notice of Proposed Rulemaking* to all commenters listed in Appendix A, and all carriers identified in Appendix B. The Executive Director is further directed to place this *Order* on the NNTRC website, and publish a link to this order in the following newspapers of general circulation:

The Navajo Times;
The Farmington Daily Times;
The Gallup Independent;
The Arizona Daily Sun; and
The Navajo-Hopi Observer.

⁵³ USF/ICC Transformation Order, 26 FCC Rcd 17663, ¶ 637 (Nov. 2011); *see also* 47 C.F.R. § 54.313(a)(9)

62. Accordingly, It is ORDERED that pursuant to the Statutory Authority of the NNTRC under 2 N.N.C. §§ 3451-55 and 21 N.N.C. §§ 501-529, as amended, this *Second Report and Order and Further Notice of Proposed Rulemaking* is HEREBY ADOPTED.

The Navajo Nation Telecommunications Regulatory Commission.

/s/

Bob Begaye, Chairman
Navajo Nation Telecommunications Regulatory Commission

Appendix A: Commenters in Proceeding

Appendix B: Service List in Proceeding

Appendix C: CCN Application

Appendix A
Commenters in Proceeding

Comments Filed in Response to NPRM

AT&T
CenturyLink, Inc.
Navajo Communications (Frontier)
NTUA Wireless
Sacred Wind
Smith Bagley, Inc. (d/b/a CellularOne)
Verizon
Western New Mexico Telephone Company
Windstream

Comments Filed in Response to First Report and Order and FNPRM

AT&T
Navajo Communications (Frontier)
Navajo Tribal Utility Authority (NTUA)
NTUA Wireless
Sacred Wind
Smith Bagley, Inc. (d/b/a CellularOne)
TableTop Telephone
Verizon
Windstream
Valor Telecommunications of Texas, LLC (d/b/a/ Windstream Communications Southwest)