

**BEFORE THE
NAVAJO NATION
TELECOMMUNICATIONS REGULATORY COMMISSION**

In the Matter of

Application for Certificate of
Convenience and Necessity
(CCN)

No. NNTRC-11-001

**COMMENTS ON REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

On August 27, 2012 the Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), adopted its Report and Order and Further Notice of Proposed Rulemaking in this matter (the “Order”). The Order was adopted following the NNTRC receipt and consideration of comments in this docket. NTUA Wireless, LLC (“NTUA Wireless”), submits the following comments with respect to certain conclusions stated in the Order and with respect to the Further Proposed Rulemaking for a Tiered Regulatory Approach set forth in the Order.

As stated in its initial comments filed in this matter on October 14, 2011 (the “NTUA Wireless Initial Comments”), NTUA Wireless supports NNTRC efforts to protect the public interest and to bring consistency and proper assurance from all providers that the public interest will be protected. NTUA Wireless, however, is concerned that in its effort to respond to all commenters and to devise a regulatory frame work, the NNTRC has proposed a regulatory framework that will unnecessarily complicate the business

environment for those carriers, like NTUA Wireless, that are currently poised and committed to bringing basic and advanced services to significant numbers of Tribal members and areas of the Navajo Nation that have thus far been left with deficient or no service. Admittedly, some of NTUA Wireless' concerns may arise from the lack of certain details in the Order's proposed tiered regulatory structure and the concerns will be eliminated in later orders. For example, the current proposal does not clearly indicate the specific categories or tiers to which each class of carrier will be subject, and lacks details related to the "public interest rate structure" for rights of way, joint use and leases that may be made available compared to what each carrier may negotiate individually.

Further, and most significantly, NTUA Wireless is concerned that wireless carriers should not be subjected to significantly greater regulation than they are currently, other than requiring wireless carriers to register with the NNTRC and to publicize retail pricing. The current proposal from NNTRC would subject wireless carriers that may be identified as PI Operators to regulation that is far greater and more onerous than is present in any state. The additional regulations proposed by NNTRC would be extremely burdensome for wireless ETCs that are already committed to bring service to unserved areas and are already subject to greater regulation than other wireless carriers as a result of their ETC status. These concerns can be alleviated by exempting wireless carriers from the proposed regulations other than a registration requirement that identifies the carrier and its service area, and with respect to wireless ETCs, by deference to the existing federal regulatory process applicable to wireless ETCs (which process already includes the requirement to engage with the NNTRC).

1. Wireless Carriers Should Be Exempt from All But a Registration Requirement

The NNTRC made the “preliminary” conclusion that “it should not distinguish between types of operators in adopting regulations...wireline and wireless carriers, satellite televisions providers, and other providers of telecommunications services...”¹ NTUA Wireless asks the Commission to reconsider this preliminary conclusion and exempt wireless from the more burdensome requirements of the proposal and particularly for wireless ETCs to defer to the existing federal regulatory process and requirements.

If wireless carriers are required to register as a Public Interest Operator (“PI Operator”), then they will be subject to the greatest regulatory burden of any classification of carrier. A wireless PI Operator’s new requirements would include the following: (1) an application filing requirement; (2) annual service plan and reports; (3) revenue tracking and reporting as to customers in the Nation and for “specific infrastructure”; (4) goals for penetration and service; (5) feasibility and sustainability planning; (6) demonstration that it is maximizing efficient use of all available infrastructure and encouraging collocation on its infrastructure prior to build out; (7) apparent requirement to prove fulfillment of Tribal Engagement Requirements after year 1; (8) annual reports of an undefined scope; and (9) review of its interconnection, collocation and other provider agreements.² While the Order does not provide any indication of what the NNTRC will do with the required information, it would appear it believes it also has authority, for example, to control each wireless carrier’s relationship with other carriers, as well as what quantity of revenue may be earned and how to

¹ Order page 8.

² Order page 9.

design infrastructure on the Navajo Nation. The result is the most burdensome regulatory oversight of any class of carrier operating on Navajo Nation property.

In contrast to the Order, the federal regulatory environment for wireless services established by the United States Congress and the Federal Communications Commission (“FCC”) that has successfully promoted the growth of wireless services elsewhere, applied a light regulatory approach to wireless services and carriers. Congress authorized the FCC to provide a “rapid, efficient, nationwide and world-wide wire and radio communications services with adequate facilities at reasonable charges.”³ Congress prescribed a light regulatory approach in passing the Omnibus Budget Reconciliation Act of 1993.⁴ Congress made it clear that regulators should impose only such regulations for which there is a demonstrated and clear need, and the FCC acknowledged that the congressional goal was “promoting opportunities for economic forces- not regulation- to shape the development” of the wireless market.⁵

Wireless carriers must be distinguished from other classes of carriers, if other classes of carriers are to be heavily regulated as proposed in the Order.⁶ Wireless carriers should not be subjected to excessive or unnecessary regulations that would block or retard the introduction of new services. NTUA Wireless recommends that the NNTRC, consistent with federal policy and the approach taken in states, require wireless carriers to make a registration filing with the Commission that: a) identifies the carrier; b) provides the relevant contact information for the carrier; c) identifies the service area of the carrier; d) identifies the telephone number, e-mail address and

³ 47 U.S.C. 151

⁴ 47 U.S.C. 332(c)(3)(A).

⁵ *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8004 (1994).

⁶ NTUA Wireless does not address the regulation of non-wireless carriers herein.

website for the public to use to register comments or complaints; and e) identifies the wireless carrier's web site that describes the services made available by the carrier to customers on the Navajo Nation. The NNTRC can use the material contained in that filing (which the carrier must keep current) to then develop appropriate customer protection regulations applicable to registered carriers.

2. Tribal Engagement Requirements Already Apply to Wireless ETCs .

Wireless ETCs are already subject to sufficient regulatory requirements and oversight and should not be further burdened with additional or duplicative requirements that might interfere with federal policies. The Commission should rely on the federal regulatory process applicable to wireless ETCs. By virtue of being designated as ETCs, wireless ETCs are already committed to substantial requirements to serve unserved and underserved areas in exchange for receipt of federal universal service funds.⁷ Separate from any future NNTRC action, Wireless ETCs that have been designated as ETCs are specifically committed to target specified unserved areas for new facilities and service in addition to the other requirements of FCC rules. FCC Rules require, among other things, that the Wireless ETC (1) comply with the service requirements applicable to the support it receives, (2) submit a five year plan describing with specificity the proposed improvements or upgrades to the network with an estimate of the area and population to be served, (3) demonstrate ability to remain functional in emergency situations with back up power, ability to reroute traffic and management of traffic spikes from emergency situations, and (4) satisfy applicable consumer protection and service

⁷ Admittedly, not all of the obligations set forth in this section of the text apply to "Lifeline-only" ETCs. However, even such Lifeline-only ETCs have obligations with respect to their subscribers, and their lesser level of regulation is a consequence of their not receiving high-cost and other support available to grandfathered full ETCs.

quality standards.⁸ In the context of ETCs designated to serve the Navajo Nation, these existing FCC requirements mean that many public benefits inure to the Navajo Nation without the need to impose separate regulatory requirements. Another layer of oversight and regulation is not necessary and will divert resources from the ETC needed to achieve the maximum ETC public interest benefits. To the extent the NNTRC desires participation in assuring fulfillment of ETC requirements and protecting the public interest or has relevant information related to such, it has a venue, the FCC, where the ETC must file its required reports and make certifications. The NNTRC can fulfill its responsibility to protect the public interest without imposing further burdens on the ETC or itself.

While on page 4 of the Order, it is indicated that ETCs must comply with the tribal engagement requirements (“Tribal Engagement Requirements”), the FCC requirement is that the ETC discuss such with the Tribe, not that a new layer of regulatory process and requirements be established. “A winning bidder’s engagement with the applicable Tribal government shall consist, at a minimum, of discussion regarding...” the Tribal Engagement Requirements.⁹ Very importantly, while the FCC prescribed the specific engagement topics to be discussed, again, it did not mandate that the NNTRC impose new regulatory requirements or burdens associated with those topics to be discussed.¹⁰ The NNTRC should assure the topics are being discussed between the Navajo Nation and the wireless ETC; however, NTUA Wireless believes that when it reviews such it will conclude that, particularly in the case of NTUA Wireless, the topics have been

⁸ 47 C.F.R. § 54.202

⁹ 47 C.F.R. § 54.1004(d)(1).

¹⁰ *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, ¶ 484 (“*USF Transformation Order*”)

discussed. Although the NNTRC may not intend to create unnecessary burdens for wireless ETCs and thereby divert them from achieving maximum public interest benefits, the effect of the Order on wireless ETCs appears to create such burdens. Therefore NTUA Wireless is taking this opportunity to encourage and recommend that the NNTRC clarify the Order in favor of the public interest of the Navajo Nation to favor Wireless ETC expansion of services and not impose further regulatory burden on Wireless ETCs designated to serve the Navajo Nation.

The FCC specified that the Tribal Engagement Requirements to be discussed, 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.¹¹ NTUA Wireless, however, believes that each of the Tribal Engagement Requirements is either already being discussed and the intent of them accomplished by existing Navajo Nation processes and coordination between it and various Tribal representatives or can be accomplished without additional paperwork burden on Wireless ETCs. Again, NTUA Wireless recommends the NNTRC modify its proposal to acknowledge that the Tribal Engagement Requirements are presently being satisfied, particularly in the case of NTUA Wireless which is a partnership including the NTUA, a Navajo governmental entity, or that NNTRC now provide the details of what it considers necessary to comply. The present Order is far too uncertain and vague.

¹¹ *USF Transformation Order* ¶ 637.

As described above, the Order subjects the Public Interest Operator (“PI Operator”) to the greatest regulatory burden and oversight and apparently provides an exception from such regulation for a carrier opting to be a General Operator in exchange for forgoing Public Interest Rates. However, if the carrier is also a wireless ETC, it appears that even as a General Operator it may face similar heavy regulatory burdens as the PI Operator.

While the Order purports to allow a carrier to elect out of such heavy regulation by forgoing the Public Interest Rates and choosing to be classified as a General Operator, that election does not appear to remove the burden as to a wireless ETC. It appears that some or many of these regulatory impositions applicable to the PI Operator are based on the NNTRC interpretation of the scope of its authority under the FCC Tribal Engagement Obligations. To the extent that is a correct assumption, the General Operator that is also a wireless ETC will thus face similar burdensome regulations as the PI Operator. The Order provides that: “For operators designated as an eligible telecommunications carrier (ETC), certification as a GO would not satisfy tribal engagement obligations ...”¹² Thus the General Operator who also has taken on responsibilities of a wireless ETC has no relief from more burdensome regulation. This, however, would send the wrong message to carriers attempting to bring advanced telecommunications services to areas and customers that all other carriers ignored or refused to serve. The Commission should find and acknowledge the compliance with the Tribal Engagement Requirements by wireless ETCs that have recently committed to serve unserved areas of the Navajo Nation.

¹² Order page 9.

3. Treatment of Confidential Information

Finally, with regard to PI Operators and Negotiated Agreement Operators, the Order proposes to require an annual report that includes, among other information, the revenue generated from customers on the Navajo Nation, revenue by specific infrastructure located on the Navajo Nation, identification of unserved/underserved areas within the Operator's territory on the Navajo Nation and goals for penetration and service of such areas, and feasibility and sustainability planning. The proposed Application also requires such Operators to submit their articles of incorporation/organization and associated bylaws (see Application at Sec. A-21), as well as financial statements (Application at Sec. C-1), past tax filings (Application at Sec. C-2), and a general business plan (Application at Sec. D-1). Such information is highly sensitive and contains business-confidential information that could result in competitive disadvantage and economic harm if it were disclosed or made available to competitors.

While NTUA Wireless believes, as discussed above, this information should not be required of wireless carriers, it also stresses the importance of establishing a robust mechanism that ensures the confidential treatment of all financial and business sensitive information. In connection with the proposed annual reporting requirement for at least PI Operators and Negotiated Agreement Operators, NTUA Wireless stresses its desire to ensure that any information submitted under this provision, as well as other information submitted under provisions requiring business-sensitive information in any non-CCN context, can be made confidential.

The process set forth in the proposed CCN application calls for the entity submitting confidential information to “[p]lace 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.” Exhibit 1, “Filing Instructions” at ¶ III. The Order does not detail NNTRC’s process for evaluating a motion for protective order, nor the consequence of having the motion denied. Given the commercially-important nature of several of the document proposed to be received by the Commission from the applicant, NTUA Wireless seeks further clarification from the Commission that in no event—even if the motion for protective order is denied—will the Commission release information submitted to it that is marked as confidential without first consulting with the submitter, and without first affording the submitter the opportunity to seek relief in the Tribal courts.

Conclusion

NTUA Wireless appreciates the opportunity to participate in this process and request that the NNTRC modifies its proposed requirements consistent with the above comments to exempt wireless from the requirement other than a registration requirement.

Respectfully submitted,
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