

**Before the  
Navajo Nation Telecommunications Regulatory Commission**

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

COMMENTS OF SMITH BAGLEY, INC. RE PROPOSED RULE

I. Introduction

Smith Bagley, Inc. (“SBI”) appreciates this opportunity to provide input to the Commission as it begins to implement the Navajo Nation Telecommunications Regulatory Act (“Act”). SBI has been proud to serve substantial portions of the Navajo Nation for over a decade as a licensed wireless service provider. In that time, SBI has invested millions of dollars in its infrastructure, going from just two cell sites to 67 on Navajo lands, plus a number of others on adjacent land that also serve the Nation. SBI plans to continue to invest in new towers and facilities and eventually it hopes to expand its wireless coverage to the farthest reaches of its licensed service area and tribal lands. Although the costs and challenges to serve the most remote areas in the Nation increase as SBI expands to ever more sparsely populated areas, each year SBI covers more tribal residents with its new towers and the company is committed to continue investing in the Navajo people.

SBI values its tribal customers and considers it a privilege to be a provider of essential communications services to the Nation and its members. SBI proudly employs about 55 Navajo members throughout its organization. SBI believes it has established a cooperative and mutually

beneficial relationship with the Navajo Nation over many years and intends to do the same with this Commission.

## II. General Comments

### A. *Put the Public Interest First.*

As the Commission is surely aware, regulation should serve the public interest and promote the Navajo Nation's sovereignty over its tribal lands. One should not come at the cost of the other. Indeed, SBI believes that a restrained and nurturing approach to regulation of telecommunications can help the tribe to strengthen its sovereign authority. As the Commission knows, the nature and extent of tribal sovereignty is unique and often is subject to challenge in federal courts.<sup>1</sup> Thus, SBI encourages the Commission to move incrementally, adapting and limiting its regulations to demonstrated need. By taking measured steps, the Commission will be less likely to have its jurisdiction challenged and each step will add incrementally to the Nation's exercise of sovereignty and help establish a firm foundation and precedent for the next step, as and when it becomes necessary.

### B. *Regulation Comes at a Cost.*

Another reason for the Commission to move cautiously in exercising regulatory jurisdiction is that with power comes responsibility. Many state utility commissions have staffs of hundreds of people. Meaningful and successful regulation of complex industries is not an easy task. It takes time and expertise. Adopting a regulation that requires five experienced staff people to properly implement obviously comes at a great cost. Of course regulation often

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<sup>1</sup> For example, tribes may not regulate the use of radio spectrum used for cellular services, although it may control use of tribal lands. *See, e.g., In the Matter of AB Fillins*, 12 F.C.C.R. 11755, 11765-67 (1997).

imposes costs on businesses, too, which either pass those costs through to consumers or, in extreme cases, curtail their business in response to regulation, which in the case of Navajo lands would be particularly disfavored. Enlightened regulation can reduce regulatory costs, for example by consolidating government functions such as land use, environmental, and right of way to facilitate entry and expansion of services.

Before adopting regulations, the Commission should consider, first whether it has the expertise and the time required to implement them, and second whether there are sufficient benefits from the regulations to offset the burdens on both the Nation and the service providers.

*C. Consider the Experience of Other Sovereigns and the Benefits of Appropriately Sized Regulation.*

As the Commission alludes in Finding No. F. in its NPRM, sometimes it is better to forebear from regulation, “as a matter of public policy.” For example, many states have never regulated wireless providers, even before they were preempted by Section 332(c)(3) of the Communications Act.<sup>2</sup> And the trend among most nations for the last two decades has been toward less regulation, elimination of barriers to entry, and the promotion of competitive markets, rather than increasing regulation. Regulatory burdens have a huge impact on businesses and their ability to attract and deploy capital. Their investors, in particular, have many options where to invest. Capital is like water; it naturally flows according to resistance, and an unfavorable or burdensome regulatory environment will quickly cause businesses move investment elsewhere. The last thing the Navajo Nation can afford is to promote flight of capital.

Other nations have learned firsthand just how effectively low entry barriers and reduced regulation can promote capital formation. In North America, the United States Congress enacted

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<sup>2</sup> 47 U.S.C. § 332(c)(3).

the Telecommunications Act of 1996 to provide a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services... by opening all telecommunications markets to competition.”<sup>3</sup> And in Canada, the *Telecommunications Act of 1993* indicated in its policy objective that it would rely on increased market forces for the provision of telecommunications services. Canada’s Act provided a set of regulatory tools to lighten and ultimately forbear from regulation when market forces are adequate to replace regulation as the means to protect the interests of users.<sup>4</sup>

In the European Union, the European Commission enacted a series of Directives to liberalize the European telecommunications sector by opening up competition and freeing entrants from undue burdens and stifling regulations. More recently, the European Union enacted a Directive that contains provisions regarding pro-competitive incentives that require *ex-ante* regulations to be withdrawn once competition is effective on a specific market.<sup>5</sup> Freedom of entry and reduction or elimination of regulation in these and many other nations around the world has led to an explosion of innovation, expansion of services, and lower prices for most telecommunications and data services.

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<sup>3</sup> The Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

<sup>4</sup> The Telecommunications Act, SC 1993, c 38.

<sup>5</sup> See European Commission Directive 96/19 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets; See also Article 7, Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

*D. Be Mindful of the Nation's Geopolitical and Economic Environment.*

While the Navajo Nation is a sovereign, it is closely tied geopolitically and economically to the United States and its neighboring states of Arizona, New Mexico, and Utah. These ties cannot be ignored and in many cases are beneficial. For example, SBI and other companies serving the Nation receive federal “high cost” support each year from the federal Universal Service Fund (“FUSF”). Much of SBI’s support goes to building cell towers to serve remote rural areas on the Navajo Nation. In many areas, the citizens served by these facilities would not have any mobile wireless service without the FUSF support. Indeed, many of them might not have telephone service at all but for the FUSF. Moreover, many Navajo Nation members would not be able to afford telephone service if it were not for federal low income, or “Lifeline,” subsidies. SBI has thousands of Lifeline customers, many of them Navajo members receiving Tribal Lifeline service for just one dollar a month.

Accordingly, the Commission should be very wary of the “law” of unintended consequences. For example, would states with high cost or low income universal service funds continue to provide subsidies to tribal residents if the states no longer had jurisdiction over the companies receiving the funds? To be clear, the Navajo Nation should not and need not cede its sovereignty to the states or the federal government. Rather, it should take care to work in harmony with the geopolitical and economic environment it lives in. By not working at cross purposes to its neighboring sovereigns, it can better protect its citizens while retaining the benefits of its environment.

*E. Consider Holding a Stakeholder Workshop to Promote a Full and Free Exchange of Ideas.*

Since many potentially affected companies may not be aware of the notice and request for public comments, SBI suggests scheduling a workshop with service providers, the Land Department, and other tribal staff who currently interface with providers. This should include small ISPs or commercial broadband resellers that may be registered or under contract within any government entity on Navajo Lands. This would increase the level of participation and promote greater coordination within the tribal government. Coordinating various governmental regulatory structures will encourage companies to do business on the Navajo Nation.

III. Wireless Specific Comments

*A. The Commission May Wish to Forebear From Regulation of—or “Grandfather”—Licensed Wireless Service Providers.*

First, SBI does not assume that the Commission will want to take on the task of implementing formal entry regulation of facilities-based wireless service providers who use licensed spectrum. The FCC licenses the spectrum, so under current federal law the Commission has little if any ability to pick and choose the licensed wireless providers to the Nation. Application of CCN could theoretically permit the Commission to exclude an FCC-licensed carrier, but to what end? Could there be any public interest benefit from reducing the number and variety of service providers available to tribal residents? The Navajo Nation can focus its regulation of such carriers on preserving critical tribal lands, the environment, and its resources through such things as regulation of the placement of facilities of wireless carriers through its Land Department. Restricting entry would not advance the interests of the Nation or its

members. And if a licensed carrier were denied entry, it would likely lead to an expensive court challenge, the outcome of which is uncertain, at best.<sup>6</sup>

Accordingly, if the Commission decides to regulate licensed wireless service providers at all, it should take a light-handed approach. To start with, SBI recommends that existing facilities-based licensed wireless service providers be “grandfathered” as to CCNs. In other words a CCN should be automatically issued to existing providers, such as SBI, with a filing of just the name(s) of contact information for the companies, including address, phone number, emergency phone numbers, email address, fax number, etc.<sup>7</sup> Although SBI takes no position on the Commission’s treatment of unlicensed wireless providers or wireless resellers, the Commission could take a different approach compared to licensed providers, since the potential for challenges based on alleged interference with the FCC’s spectrum regulation authority is less for resellers and unlicensed providers.

By grandfathering existing carriers and issuing them CCNs, the Commission will begin to establish the Nation’s jurisdiction over wireless carriers, but with very little likelihood of promoting a legal challenge. Grandfathering existing facilities-based licensed wireless service providers would promote the public interest in other important ways. Were the Commission to require a CCN “application,” as opposed to an informational filing, it would signal to wireless companies and their investors that the Commission could bar them from continuing to serve the Nation. Even if such an outcome were viewed by the Commission as remote, it could

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<sup>6</sup> Although 47 U.S.C. § 332(c)(3), which preempts state regulation of rates and entry of the rates of commercial mobile service carriers, does not expressly apply to Tribal governments, a court could find that Tribal regulation of entry would frustrate the FCC’s ability to regulate the use of radio spectrum on Tribal lands. An adverse finding would further weaken the Nation’s sovereignty over the wireless segment of the industry, as discussed above.

<sup>7</sup> For the most part, this would be consistent with Section A of the draft proposed CCN application, although even a few provisions of Section A may go further than necessary, such as A-11, A-13, and A-14. Others need clarification, which a workshop would provide the opportunity to do.

immediately chill investment, possibly causing delay or cancellation of expansion plans, or prompting legal challenges that will delay investments further. Legal challenges are expensive and the Nation risks losing an incremental measure of its sovereignty in the process, a risk that is entirely avoidable.

Second, much of the information requested in Sections B through H of the draft proposed CCN application is highly sensitive, proprietary, competitive information. Carriers will be reluctant to provide it, even with assurances of confidential treatment. Moreover, compiling the information will be time consuming and burdensome. Is there any public interest to be advanced in putting such regulatory burdens on companies that are currently serving the Nation, some of which have a long track record of service to the Navajo people?

If the Commission were to extend regulation over licensed wireless service to the full extent of the Act, the combination of CCN requirements by the Commission—which exceeds the authority of neighboring state commissions—and land use controls by the NNDNR means the Navajo Nation will have the most stringent regulatory environment of any area in the Southwest. This is not the kind of favorable regulatory environment that promotes and attracts investment. Moreover, it would be at cross purposes with the economic agenda of the current Tribal administration that is promoting a more business-friendly environment.

*B. To the Extent the Commission Regulates Any Service Providers, It Should Ensure Competitive Neutrality.*

In any regulatory scheme, it is critically important that the Commission ensure that all similarly situated providers are treated the same. This goal starts with definitions of providers. For example, if terrestrial wireless providers that offer internet access are regulated, will broadcast satellite providers that provide Internet access also be required to obtain CCN

certification to continue operating on Navajo Lands? Will all providers be taxed in the same way? The answer should be “yes.” Providers who perceive unfair or unequal treatment will scale back their investment. Providers will be particularly sensitive to perceived and actual parity of treatment vis-à-vis Tribally-owned utilities. Unless the Nation wants to drive away outside investment, it is essential that all similarly-situated providers receive equal treatment, and, if public policy requires any subsidies or regulatory streamlining, they should be made available on a competitively neutral basis.

#### IV. Summary of Recommendations and Conclusion

To summarize the main points above, SBI recommends the following:

- Start regulation “small” and grow it slowly.
- Schedule a stakeholder workshop, including service providers and other tribal agencies.
- Forbear from regulating or “grandfather” existing licensed wireless service providers.
- If existing licensed wireless service providers are required to file with the Commission, require only Sections A-1 through A-10, A-12, and A-15 of the draft proposed CCN application.
- Ensure competitive neutrality.

When it comes to development of its telecommunications infrastructure, the Navajo Nation relies heavily on outside investment and government subsidies. The current status of service may not be perfect, but if it is to improve it is essential that the Commission promotes, rather than discourages, further investment. SBI looks forward to working with the Commission

proactively to help it achieve a favorable regulatory environment that strikes the right balance needed to protect the public interest and continue to attract investment.

Dated this 13th day of October, 2011.

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