'Before the
Navajo Nation Telecommunications Regulatory Commission

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

COMMENTS OF VERIZON

Verizon respectfully submits these comments in response to the Notice of Proposed Rulemaking ("Notice") issued by the Navajo Nation Telecommunications Regulatory Commission ("Commission") on July 28, 2011.

In this proceeding, the Commission proposes to adopt rules pertaining to applications for Certificates of Convenience and Necessity ("CCN") that telecommunications operators would be required to submit "in order to provide telecommunications services on the Navajo Nation." Notice at ¶1. The Commission construes the term "telecommunication service" quite broadly, and asserts that it includes, among others, "wireless phone and data services, satellite services, and internet" services. Notice at ¶3B. Because the Navajo Nation Telecommunications Regulatory Act provides the Commission with the authority to exempt certain telecommunications services and operators from the requirement to obtain a CCN, the Commission seeks comment on what services and/or service providers should be exempted from the CCN requirement. *See id.* at ¶2, ¶¶3C and I.

Verizon's wireline and wireless affiliates provide a wide range of local and long distance voice and data services throughout the United States. Accordingly, Verizon has an interest in the proposed rules insofar as they might impose new entry or other regulations on the companies that are unnecessary, onerous, or inconsistent with other statutory schemes. For the reasons set forth

below, Verizon recommends that wireless and interexchange services be exempt from the proposed CCN requirements.

A. Commercial Mobile Radio Service ("CMRS") Providers

Verizon recommends that the Commission follow the successful regulatory regime for Commercial Mobile Radio Service established by Congress and the Federal Communications Commission ("FCC"). Rather than impose burdensome regulatory requirements on CMRS providers, for the past two decades, Congress and the FCC have successfully sought to promote the growth of wireless services with a light regulatory approach.

Congress has established extensive regulatory policy for the field of telecommunications, and has not delegated independent authority over telecommunications to Indian tribes, particularly with respect to radio services. Indeed, Congress delegated to the FCC the authority to provide "a rapid, efficient, nationwide and world-wide wire and radio communication services with adequate facilities at reasonable charges." 47 U.S.C. § 151. The FCC has explained that its authority is plenary with respect spectrum licensing:

> Under well-established case law construing Indian treaties and tribal self-government, it is clear that when Congress passes a law which is applicable nationwide, the law applies with equal force to Native Americans on reservations, subject to three well defined exceptions – Native Americans have the exclusive right to self-governance 1) over intramural matters; 2) where rights are guaranteed to them by treaty; and 3) if Congress expressly states that a law does not apply to them. None of these exceptions are applicable to radio frequency management, and more particularly the Commission's cellular licensing scheme.[1]

[1] *AB Fillins*, 12 FCC Rcd 11755, 11765 (1997). Given the pervasive scope of federal authority over wireless telecommunications services throughout the United States (*see, e.g.*, 47 U.S.C. §§ 301-309, 332), it is highly doubtful that the Commission has the legal power to regulate the activities of nonmembers through the proposed rules. *Montana v. United States*, 450 U.S. 544, 565 (1980) (while Indian tribes possess some self-governing powers, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). In the *Montana* case, the Supreme Court recognized there are limited exceptions to the general

In the Omnibus Budget Reconciliation Act of 1993, Congress took two important steps to bolster the deployment of wireless services and increase competition among wireless carriers. First, Congress preempted all state entry regulation of CMRS carriers. 47 U.S.C. § 332(c)(3)(A). As a result, CMRS providers are free to enter any state or local market without going through a CCN process and obtaining the permission of state or local authorities. Second, Congress required the FCC to treat all commercial mobile services consistently, imposing only such regulations for which there is a demonstrated clear-cut need. The FCC explained that the "overarching congressional goal" of this action was "promoting opportunities for economic forces – not regulation – to shape the development of the CMRS market."[2]

These policies have been enormously successful. Since 1993, vigorous competition has developed in the wireless industry, resulting in substantial consumer benefits, including falling prices; increased service options, including voice, data and broadband; and new and innovative devices.[3] Due to the spectacular explosion and consumer acceptance of wireless services, there are now 92% more wireless telephone subscribers (285,125,000) than wireline retail local telephone and interconnected VoIP lines (148,572,000) in service in the United States.[4] In this fiercely competitive environment, wireless carriers are continuing to make significant

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prohibition on regulating nonmembers of tribes (*id.* at 565-566), but the Commission's proposal to require carriers to obtain a CCN does not fall within either of those exceptions.

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

[3] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fifteenth Report*, FCC WT Dkt. No. 10-133, Executive Summary (released June 27, 2011).

[4] *Local Telephone Competition: Status as of December 31, 2010*, FCC's Wireline Competition Bureau, Industry Analysis and Technology Division (October 2011) at Figure 4 and Table 17.

investments in 3G and 4G technologies in both rural and urban areas, and are adding new devices and applications at a dizzying rate.[5]

Given these dynamics, imposing regulatory constraints, including entry requirements, on wireless service on Tribal lands is not necessary to achieve the goals expressed in the Notice, and, in fact, will undermine those goals. The Notice suggests (at ¶3H) that new CCN procedures are needed to facilitate the efficient development and deployment of telecommunications infrastructure, ensure the universal availability and accessibility of high quality, affordable services, and promote the development of effective competition as a means of providing customers with the widest possible choice of services. As explained above, these objectives are already being met, precisely because the wireless industry has not been burdened by the kind of detailed regulatory and reporting requirements inherent in the proposed rules. In fact, Arizona and New Mexico exceed the national average in terms of households that only use wireless phones. According to government studies, 29.46% of Arizona adults living in households and 27.2% of those in New Mexico reside in wireless-only households.[6] Moreover, close to half (48.1%) of those Arizona adults and 38.9% of those in New Mexico receive all or almost all calls on wireless telephones, regardless of whether their households have wireline telephones.[7] At the same time, 90% of adults living in households in Utah have wireless phones.[8]

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[5] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fifteenth Report, supra,* at 8 (3G-4G deployments), 19-21 (new devices and applications).

[6] Blumberg, Stephen J. and Luke, Julian V., *Wireless Substitution: State-level Estimates From the National Health Interview Survey, January 2007-June 2010*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (April 20, 2011) at 1 and Table 1.

[7] *Id.* at 5 and Table 3.

[8] *Id.*

In addition, both this Commission and the FCC have recognized that a separate barrier to providing basic telephone service on Tribal lands is the economics of serving sparsely populated areas.[9] The FCC has worked to overcome this in part by improving the level of wireless service deployment on Tribal lands, again relying on the competitive marketplace.[10] Due in part to various federal programs, including the FCC's Enhanced Lifeline Assistance and Enhanced Linkup Support programs for Tribal lands, telephone penetration on Tribal lands increased from 47% in 1990 to 67.9% by 2003.[11] The FCC has also established a Tribal lands bidding credit program that rewards licensees in spectrum auctions that deploy facilities and make services available to Tribal lands where the wireline telephone subscription or penetration rate is 85% or less.[12] In addition, the FCC is considering new programs to promote wireless services on Tribal lands, including a Tribal licensing priority in future auctions of licenses for fixed and mobile wireless services, available to qualifying Tribal entities for unserved or underserved Tribal lands.[13]

Nothing in the FCC's current proposals to use its radio licensing authority to expand wireless deployment opportunities on Tribal lands contemplates any local certification process. On the contrary, the imposition of any new entry requirements would undermine the FCC's intention to exercise its authority under 47 U.S.C. sections 307(b) and 309(j) to promote efficient

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[9] *See* Joint Reply Comments of the Navajo Nation Telecommunications Regulatory Commission, FCC WT Dkt. No. 11-40 (filed June 20, 2011) at 5; *Extending Wireless Telecommunications Services to Tribal Lands,* 15 FCC Rcd 11794, 11797 n.8 (2000).

[10] *See Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, 26 FCC Rcd 2623 (2011).

[11] *Id.* at 2626.

[12] *Id.* at 2626-27.

[13] *Id.* at 2635-36.

use of the spectrum and ensure the rapid deployment of new services on Tribal lands.[14] Rather than adopt burdensome new regulatory requirements for wireless services on the Navajo Nation, the Commission should continue to work with the FCC to develop generally-applicable programs that will promote deployment of and competition for wireless services.

For all these reasons, the detailed and cumbersome CCN procedures proposed in the Notice are not needed in the case of CMRS providers, either to advance the goals laid out by the Commission or to satisfy any other legitimate regulatory or public policy goal. Imposing a new set of regulations on CMRS providers would be contrary to the way in which these carriers are treated for regulatory purposes across the country, a light-handed approach that has been critical to the rapid growth and expansion of wireless services for the benefit of consumers everywhere. Exempting CMRS providers from the proposed CCN requirements is consistent with the Commission's acknowledgment that the manner of regulation should be commensurate with the level of competition in the relevant telecommunications service market. Notice at ¶3H.

B. Interexchange Services

The new rules are intended to apply to companies that "*engage in providing* telecommunications services within the Navajo Nation." *Id.* at ¶3A (emphasis added). According to the Notice, a primary purpose of the proposed regulations is to "ensure that the public interest is met in the provision of telecommunications services on the Navajo Nation." *Id.* at ¶3I. But because of the nature of interexchange service, many interexchange carriers ("IXCs") are not actively engaged in providing long distance service, and do not hold themselves out as providing long distance service, in the Navajo Nation. Accordingly, Verizon understands that these carriers would not fall within the proposed CCN application requirements.

[14] *See id.* at 2632-33.

Some interexchange carriers may affirmatively market, or hold themselves out as offering, their long distance services to customers residing or located on the Navajo Nation. Such companies can elect to be a "primary interexchange carrier," or the PIC, for individual customers. In those instances, the IXCs' customers can place long distance calls simply by dialing 1+ seven or ten digits; the calls are then routed by the originating local exchange carrier to the long distance carrier selected by the customer.

There is no need for economic regulation, including entry regulation, of IXCs because the interexchange market is intensively competitive. Imposing such regulations would be contrary to the nationwide trend of eliminating regulations like those the Commission proposes here, which would require submission of a substantial amount of information including, among other things, financial statements, tax returns, revenue reports, an explanation of the company's operations in other states, copies of tariffs, a business plan, a construction plan and budget, a customer service plan, and proof of insurance, along with a description of the carrier's geographic service area and projections of the number of subscribers the carrier expects to serve over a three-year period. *See* Notice at Exhibit 1. In a vigorously competitive marketplace, such as the long-distance marketplace, these kinds of regulations only increase providers' costs without providing any consumer benefits.

If the Commission nevertheless decides to apply its proposed regulations to IXCs operating in the Navajo Nation, it should make clear that they do not apply to carriers that do not actively provide telecommunications services within the Navajo Nation, but that may deliver traffic to consumers that reside there. The FCC requires IXCs to deliver calls to whatever terminating number is dialed by the calling party that originates the call. Thus, if a customer in South Dakota calls someone in Arizona or New Mexico, the caller's IXC routes the call to the

local exchange carrier that serves the called party at the terminating end, regardless of whether that IXC "provides service" or has any long distance customers in the area where the called party resides. The IXC may route the call directly or indirectly (*e.g.*, through a CenturyLink/Qwest tandem) to the local exchange carrier that terminates the call to the end user.

In addition, even though an IXC does not affirmatively market its services or seek to provide service within a geographic area, end users often have the ability to reach that IXC's network through various dial-around arrangements. Thus, a person who is not a customer of a given IXC may still be able to place calls over that carrier's network. The IXC need not have facilities in the local service area, but calls could be routed to its network nevertheless.

In each of these situations, the IXCs have, at most, only a tangential connection to the Navajo Nation.[15] Accordingly, there is no legitimate rationale for subjecting such carriers to local CCN application and approval requirements, and the Commission should make clear that its proposed rule is not intended to cover IXCs that do not market or hold themselves out as offering service to consumers and businesses in the Navajo Nation. As Verizon explained above, it would be unduly burdensome to require any IXCs to produce the amount and type of information contemplated by the proposed rules, let alone entities that do not market or actively provide service in the Navajo Nation.

Verizon urges the Commission to adopt its recommendations, which will help ensure that consumers receive the maximum benefits of competitive markets.

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[15] The Commission's authority to impose regulations on entities that do not operate facilities located on the Navajo Nation is tenuous at best. *Montana v. United States*, *supra*; *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 330 (2008) ("Given *Montana*'s 'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" (internal citations omitted).

Dated: October 14, 2011

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