

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	

PETITION FOR WAIVER

Frontier Communications Corporation (“Frontier”), on behalf of itself and its wholly owned subsidiary Navajo Communications Company (“Navajo Communications”), respectfully requests that the Commission waive, per section 1.3 of the rules, Frontier’s obligations under the Connect America Fund (“CAF”) Phase II model-based support program to reach its 80% year-end 2019 milestone in Arizona, New Mexico, and Utah because it has not been permitted to build on the Navajo Nation for the past year.

I. INTRODUCTION AND SUMMARY

Frontier shares the Commission’s commitment to closing the digital divide and has been a leader in deploying broadband services in rural and hard-to-reach areas. As part of this commitment to rural service, Frontier in 2015 accepted statewide commitments through the CAF-II program to provide at least 10/1 service to more than 775,000 locations in 29 states that lack such service.¹ The awards included locations in Arizona, New Mexico, and Utah. In all three states, many of these locations are located within the Navajo Nation.

¹ See *Wireline Competition Bureau Authorizes Frontier Communications Corporation to Receive Over \$283 Million in Connect America Phase II Support to Serve 1.3 Million Rural Americans in 28 States*, Public Notice, 30 FCC Rcd 6310 (WCB 2015) (“*Frontier CAF-II Award PN*”); see also *Wireline Competition Bureau Authorizes Frontier Communications Corporation to Receive*

In the first four years of the CAF Phase II term of support, Frontier reached a significant number of locations in other parts of the three states and on portions of the Navajo Nation with 10/1 service or better. To reach its 80% and eventually 100% targets in the three states, however, Frontier must deploy fiber to locations in the Navajo Nation in Arizona, New Mexico, and Utah—which requires the use of the Navajo Nation public rights of way. Frontier’s purchase agreements clearly grant access to the necessary rights of way in the Navajo Nation, and Frontier and its predecessor entities have paid property taxes on and provided voice telephony services using those same rights of way throughout the Navajo Nation since 1970. However, in November 2018, the Bureau of Indian Affairs (“BIA”) unexpectedly ordered Frontier to stop work on its fiber construction, asserting that Frontier lacks adequate rights of way to deploy the necessary fiber facilities primarily alongside longstanding existing copper facilities and proposing that Frontier and the Navajo Nation negotiate new rights-of-way agreements from scratch.

Frontier has aggressively pursued a resolution to this issue, but there is no indication that Frontier will be allowed to resume construction and provide qualifying service to the remaining locations in the Navajo Nation in time to meet its year-end 2019 obligations.

In light of the forgoing, Frontier seeks waiver of its 80% year-end 2019 milestone for Utah, Arizona, and New Mexico and any associated withholding of support corresponding to a shortfall in meeting that deadline. Frontier does not at this time seek waiver of future deadlines,

Over \$48.5 Million in Connect America Phase II Support in California and Texas, Public Notice, 31 FCC Rcd 3506 (WCB 2016).

and requests that its compliance with the 2019 and 2020 deadlines be treated cumulatively.² The unforeseeable and persistent impasse regarding Frontier’s rights of way to deploy necessary facilities represent “good cause” amply justifying a waiver.

II. FACTUAL BACKGROUND

Since accepting the model-based offer of support in 2015, Frontier has been working diligently to deploy at least 10/1 broadband service to the covered locations in its 29-state footprint. As demonstrated by Frontier’s periodic reporting to USAC, Frontier is achieving the deployment milestones required by the program.³

As noted above, although Frontier was able to identify alternative solutions to provide qualifying service to other customers in these states by deploying wireless facilities, making upgrades to equipment in switching offices and pedestals, and deploying to other areas of these states, Frontier must deploy fiber cable to reach its year-end 2019 goals and provide qualifying service to customers on the Navajo Nation.

Frontier began this work in 2018, but in November 2018 was ordered to stop work by officials from the BIA. Specifically, a BIA representative orally directed Frontier employees to stop work on deploying fiber on the Navajo Nation. BIA followed up with a letter to Frontier in December 2018 in which it stated that Frontier could not continue its deployment activities because BIA does not believe that Frontier possesses the rights-of-way to do so.

² Cf. Letter from Mike Saperstein, USTelecom, to Marlene H. Dortch, FCC, WC Docket No. 10-90 at 2 (filed Oct. 18, 2019) (CAF milestone compliance treated cumulatively in the case of deletions and resubmissions).

³ As of year-end 2018, Frontier met or exceeded its 60% deployment milestone in 26 of 29 states, and it fell short by a small number of locations only in three states – Arizona, Illinois, and Ohio – in all cases reaching more than 57% of locations. Frontier fell short in Arizona due to the unforeseen permitting issues that are the subject of this Petition.

BIA's stop-work order, and its continuing reluctance to reach a resolution of the underlying issue, were not foreseeable by Frontier. At the time Frontier accepted the model-based offers of support, it had a reasonable belief that it had rights of way in place on the Navajo Nation and continues to hold this position. Frontier, through its subsidiary Navajo Communications, has owned the lines providing voice telephony service in the Navajo Nation for nearly half a century—including to most of the locations at issue in this petition. Navajo Communications' network originally was constructed by BIA, and Frontier's predecessors in interest purchased the network from BIA and the Navajo Tribe in April 1970. The purchase agreement specifically states that "the Navajo Tribe agrees that the purchase price for the system includes the right to do business on the Reservation and all rights of way in the system already granted and to be granted in the future and further agrees that by virtue of the benefits to be derived by the Tribe from the operation of the system by [Navajo Communications], that no charges shall be made to [Navajo Communications] for the right to do business or operate the system on Navajo Lands."

Moreover, by memo dated December 8, 1970, the Navajo Nation advised BIA that "Tribal consent is hereby given to grant Navajo Communications Company a right-of-way for the proposed telephone lines within all presently existing and future road rights of way," subject to specified conditions regarding the use of reasonable construction and land-use practices.⁴ By letter dated April 15, 1996, the Navajo Nation Council re-confirmed to Navajo Communications that, per the documents signed by the parties in the 1970s, "at the time of the sale, the Navajo Nation agreed that the purchase price included: 'The right to engage in the business of providing

⁴ Memo from Chairman, Raymond Nakai, Chairman, Navajo Tribal Council, to Area Director, Navajo Area Office, BIA, "Granting of Right-of-Way to the Navajo Communications Company" (Dec. 8, 1970) (Attachment A).

comprehensive communication services on the Navajo Nation ... and specifically includes all rights-of-way in the Navajo Tribal Communication System already granted and to be granted in the future.”⁵

Frontier’s possession of rights of way on the Navajo Nation is also evidenced by Frontier’s payment of rights-of-way taxes to the Navajo Nation – a total of \$103,000 in taxes in 2018. Frontier received correspondence from the Navajo Nation in June 2019 indicating that its 2019 rights-of-way taxes will increase to \$106,000.

Frontier has worked—and continues to work diligently—with both BIA and the Navajo Nation to resolve this issue. At this point, BIA continues to take the position that Frontier must negotiate new rights-of-way agreements with the Navajo Nation. Frontier is actively pursuing a resolution with the Navajo Nation but has been unable to resolve these issues. In the meantime, Frontier remains subject to BIA’s stop-work order, and has been unable to resume construction for eleven months and counting. Frontier estimates the necessary construction will take at least several months, yet Frontier still does not have authorization to build and the year-end deadline is rapidly approaching.⁶

III. DISCUSSION

The Commission’s rules may be waived “for good cause shown.”⁷ A waiver is warranted “where particular facts would make strict compliance inconsistent with the public interest.”⁸ In

⁵Letter from Elmer L. Milford, Chairman, Resources Committee of the Navajo Nation Council, to Francis Mike, Director, Navajo Communications Company (April 15, 1996) (Attachment B).

⁶ 47 C.F.R. § 54.310(c).

⁷ *Id.* § 1.3.

⁸ *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

particular, waiver of the Commission's rules is appropriate if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.⁹ The Commission also may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁰

The current impasse regarding Frontier's rights of way in the Navajo Nation amply represents good cause justifying a waiver. The facts of this case—in particular, BIA's unforeseeable rejection of Frontier's longstanding agreements granting Navajo Communications access to necessary rights of way on the Navajo Nation—represent special circumstances that warrant a deviation from the general rule, and a waiver would serve the public interest.

The Commission routinely has waived deadlines established in Commission rules when petitioners are unable to comply due to unforeseen circumstances.¹¹ In particular, the Commission has waived universal service build-out requirements “based upon permitting delays that were not reasonably anticipated” where the provider has worked diligently to resolve the

⁹ *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹¹ See, e.g., *Requests for Waiver by Grants/Cibola County School District, Jemez Pueblo Tribal Consortium*, Order, 33 FCC Rcd 10048 (TAPD WCB 2018) (waiver appropriate “when (1) the applicant was unable to complete implementation for reasons beyond the service provider’s control, and (2) the petitioner made good faith efforts to comply with Commission rules and procedures”); *Request for Extension of Time to Construct a Cellular Site*, Order, 24 FCC Rcd 11574 (Mob. Div. WTB 2009) (waiver appropriate because petitioner “demonstrated that its failure to meet its construction requirement ... is due to factors beyond its control” and applicant “appears to have been diligent in constructing this site”); *SES Americom, Inc.*, Order, 21 FCC Rcd 14785, 14788 (IB 2006) (waiver granted in part in light of “the unforeseen difficulties and delay” surrounding the satellite’s launch).

issue.¹² Frontier believed, and continues to believe, it possessed all necessary rights of way to deploy broadband facilities to the covered locations when it accepted the model-based offers of support in Arizona, New Mexico, and Utah. As discussed above, (i) Frontier and its predecessors in interest have provided telecommunications service throughout the Navajo Nation for over half a century, relying on rights of way throughout the Nation to do so; (ii) the documents pursuant to which Frontier's predecessors purchased the telephone system from BIA and the Tribe indicate that the conveyance included all necessary rights of way; (iii) Frontier has been paying rights-of-way fees—currently totaling over \$100,000 per year—to the Navajo Nation as required; and (iv) Frontier currently owns copper lines serving virtually all of the locations that are the subject of this waiver petition. Moreover, Frontier has worked, and continues to work, diligently with BIA and the Navajo Nation to resolve the issue, but there is little prospect for a timely resolution. It would be inequitable for Frontier to be subject to penalties for its failure to make qualifying service eligible to the covered locations at issue given these circumstances. Thus, consistent with Commission precedent, a waiver is justified.

Frontier requests a waiver that appropriately addresses the fact that it has unable to build on the Navajo Nation all year. It is unclear whether Frontier will be able to resolve its rights-of-way issues with BIA and the Navajo Nation this year, but even if Frontier were allowed to start building today, there is not enough time left in the year for Frontier to reach its location goal. Frontier therefore requests that the Commission waive Frontier's obligation to reach the year-end 2019 milestone and any associated withholding of support, and that its compliance with the 2019 and 2020 milestones be considered cumulatively.

¹² See, e.g., *Leaco Rural Telephone Cooperative, Inc. and Pine Belt Cellular, Inc.*, Order, 31 FCC Rcd 9001, 9006 (Auctions and Spectrum Access Div., WTB 2016).

IV. CONCLUSION

For the foregoing reasons, Frontier requests that the Commission waive Frontier's obligation to provide at least 10/1 service by year-end 2019 to 80% of its covered locations in Utah, New Mexico and Arizona as well as any associated withholding of support associated with that deadline, and consider its compliance with this deadline cumulatively with the 2020 100% milestone.

Respectfully submitted,

FRONTIER COMMUNICATIONS CORP.

/s/ AJ Burton

AJ Burton

FRONTIER COMMUNICATIONS CORP.

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October 31, 2019

ATTACHMENT A

THE NAVAJO TRIBE

WINDOW ROCK, ARIZONA

RAYMOND NAKAI
CHAIRMAN, Navajo Tribal Council

8 December 1970

NELSON DAMON
VICE-CHAIRMAN, Navajo Tribal Council



Memorandum

To: Area Director, Navajo Area Office
Attention: Area Real Property Management
Officer

From: Chairman, Navajo Tribal Council

Subject: Granting of Right-of-Way to the Navajo
Communications Company

The Navajo Communications Company of Window Rock, Arizona, has filed application to survey and construct telephone lines within existing road rights of way on Navajo Lands.

Tribal consent is hereby given to grant Navajo Communications Company a right-of-way for the proposed telephone lines within all presently existing and future road rights of way, provided that the consent of the holder of any right of way affected is obtained by Navajo Communications Company prior to survey and construction, and subject to the provisions of 25 CFR § 161.5:

1. To construct and maintain the right of way in a workmanlike manner.
2. To pay promptly all damages and compensation, in addition to the deposit made pursuant to §161.4, determined by the Secretary to be due the land-owners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the right of way.

3. To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees, contractors and their employees, or subcontractors and their employees.
4. To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.
5. To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and to dispose of all vegetative and other material cut, or otherwise accumulated during the construction and maintenance of the project.
6. To take soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way.
7. To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right-of-way.
8. To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.
9. That upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.
- * 10. To at all times keep the Secretary informed of its address, and in case of corporations, of the address of its principal place of business and of the names and addresses of its principal officers.
11. That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent

with the primary purpose for which the
right-of-way is granted.

THE NAVAJO TRIBE OF INDIANS

By 

Chairman, Navajo Tribal
Council

done this 8th day of December, 1970.

ATTACHMENT B

April 15, 1996

Francis Mike, Director
Navajo Communication Company
P.O. Box 6000
Window Rock, Arizona 86515

RE: Response to Letter of March 6, 1996

Dear Mr. Mike,

This response is prepared based on the documents filed with the Navajo Communications and Records Department regarding the Contract of Sale Between the Navajo Tribe of Indians and NCC Systems, Inc (hereafter referred to as "Contract"). Pursuant to Resolution No. ACJA-12-77, the Contract was consummated November 23, 1976, by Chairman Peter MacDonald signing the Contract for the Navajo Nation as Seller.

Under the Contract, the Navajo Nation sold tribal communication equipment, which included: Two-way radio communication systems; television translators and other equipment such as buildings and related services; physical and intangible assets, permits, rights-of-way and use permits used at the time of sale by the Navajo Tribal Communication System.

It was agreed and understood by the Navajo Nation that NCC Systems, Inc., will:

Maintain . . . communication equipment for users holding licenses issued by various regulatory authorities, all to be in accordance with applicable rules and regulations of various regulatory authorities. (*Page Two of the Contract*)

Further, at the time of the sale, the Navajo Nation agreed that the purchase price included:

The right to engage in the business of providing comprehensive communication services on the Navajo Nation . . . and specifically includes all rights-of-way in the Navajo Tribal Communication System already granted and to be granted in the future. (*Page Two of the Contract*)

Pursuant to the Contract, NCC Systems, Inc., should continue to engage in communication services on the Navajo Nation on all existing rights-of-ways and existing communication sites (*See Provision (11), Page five of the Contract*) already granted by the Contract dated November 23, 1976, unless amended or otherwise modified by the Navajo Nation and NCC Systems, Inc.

Sincerely,



Elmer L. Milford, Chairman
Resources Committee of the Navajo Nation Council

cc: Members of the Resources Committee
Division of Natural Resources
Project Review Office, DNR