

COMMENTS OF NOC, INC
“SAINT REGIS MOHAWK TRIBE
COMMUNICATIONS REGULATORY ACT”
9/22/14 DRAFT FOR COMMENT

A. INTRODUCTION

NOC, Inc. (“NOC”), a wholly owned subsidiary the Tarbell Management Group (“TMG”), submits these comments on the Saint Regis Mohawk Tribe’s (“SRMT” or “Tribe”) proposed Draft tribal ordinance to regulate communications activity on the St. Regis Mohawk Reservation. The Draft provided to the Community, SRMT “Communications Regulatory Act” (“CRA”) is dated September 22, 2014 and NOC has presented comments at a Public Hearing on the Act and has met twice with Tribal officials and representatives.

NOC has a significant interest in the proposed CRA. NOC owns and operates communications facilities that provide services on the Mohawk Indian Reservation and has invested considerable resources (financial and otherwise) in these facilities. (NOC’s broadband fiber alone has involved an investment of well over \$1 Million). Application of the Act to NOC would have significant impacts. Regulated businesses will be required to obtain both a Certificate of Public Convenience and Necessity (“CPCN”) (CRA, Sec. 6) and a Franchise Agreement (CRA, Sec. 7) from the Tribe. Regulated businesses will be subject to a myriad of rules and requirements under the Act: inspections, audits, regular reports and filings, tariffs, a franchise fee of 5% of gross revenue, regular performance reviews, transfer and ownership restrictions, customer billings requirements,

compliance with rates, compliance with tribal health and safety laws and rules regarding video systems, satellite dishes and pole attachments.

Specifically, NOC operates the following communications services businesses on the Reservation:

1. A private broadband system that provides internet services exclusively to TMG owned businesses and properties;
2. Two cellular towers that lease out space to two companies for wireless phone services: AT&T and Verizon; and
3. Provision of “back haul” broadband services to another tribal-member owned company, Flint Communications (“Flint”) allowing use of NOC broadband to approximately 50 Flint Reservation residence customers.

NOC’s detailed, Section by Section comments on the CRA are set forth below. As stated in its meetings with the Tribe, NOC has no issue with the Tribe regulating “Service Providers” that market and offer their services to the general public—i.e. customers on the Reservation. NOC recognizes that the Tribe has made a significant investment in its Broadband system (over \$11 Million) and some degree of regulation is appropriate so that Reservation customers are protected. And, that is exactly how NOC reads the CRA—as applying to communications companies that offer fiber-based services (telephone, internet and video) to all residences and business on the Reservation.

However, NOC believes that the CRA is not drafted clearly enough in that regard. Several key sections and provisions contain broad language that make it appear as

if the CRA and its Commission have regulatory authority over all forms of communications services regardless whether they are being offered to the public or are privately offered. See, Definitions of “Certificate of Public Convenience and Necessity” (Sec. 1(C.)); “Communications Service” (Sec. 1(E.)); Sec. 2.8 (B. 2) outlining Commission powers. In the two main Sections of the CRA dealing with CPCNs and Franchise Agreements (Sec. 6 and 7) one could be led to believe that providers of any communications services would be required to obtain a CPCN or a Franchise.

However, as set forth in our Comments below, that is not the case. A CPCN, which is usually applied to wire-based telephone services (under NYS PSC rules) is required for “[a]ny entity seeking to offer Communications Services on Tribal Land” “before constructing facilities or offering Communications Services to the public.” (Emphasis added). NOC does not provide any wire-based telephone services that are offered to the public. The only phone services it provides are through its cell tower agreements for wireless service that is offered by AT&T and Verizon to the public.

With respect to the CRA Franchise Agreement requirements (CRA, Sec. 7.1—7.10), this also applies only to fiber or wire-based services offered to the public. See, CRA Sec. 7.3—Section applies to providers of video programming via wires and fiber. And, under CRA 7.6, it applies to services that are “available to all residences, dwellings, businesses, or establishments” on Tribal lands (emphasis added). NOC has fiber-related services (broadband, internet) that are located on the Reservation but they do not include video and, more importantly, the services are a closed-system that is provided only to TMG companies and properties—it is a

business to business service. It is not being offered to the general public and is not available to “all” reservation residences and businesses. The cell tower services are also not providing any fiber-based video services—wireless only. The only service that might fall under this Section is the Flint agreement where Flint is providing video services to its roughly 50 customers. In its meetings with the Tribe, NOC has advocated for an exemption for Flint’s use of NOC fiber since it pre-dates the CRA and should be “grandfathered” under the Act. If such an exemption is not granted to NOC and it is required to obtain a Franchise Agreement and pay a 5% fee based on its gross revenues, it is likely that NOC would not be able to continue its agreement with Flint.

B. SECTION BY SECTION COMMENTS

Set forth below are NOC’s comments on all 23 Sections of the CRA. Minor stylistic changes and typos are not included. Previously NOC made “redlined” comments to the 9/22/14 Draft and submitted them to the Tribe’s Deputy General Counsel.

SECTION 1—DEFINITIONS

NOC has comments on three definitions: 1 C., E. and F.

Sec. 1 C. :

C. “Certificate of Public Convenience and Necessity” or “CPCN” means the certificate issued by the Commission to authorize communications business or related activities within the defined service areas of the St. Regis Mohawk Tribe, as that territory from time to time may be enlarged.”

COMMENT: This definition should state clearly that a CPCN is required before a “person” can construct and operate fiber or wire based telephone services on the Reservation. This definition is not helpful since it broadly applies to “authorize communications business or related activities”. Yet, Section 6 of the Act is more limited in its application, applying only to fiber based services.

Sec. 1 E. :

E. “Communications Service” means any of the following: Telecommunications Service (as defined in 47 U.S.C. § 153(20)); Video Service; broadband service; advanced services (as defined in 47 C.F.R. § 51.5); and Internet protocol-enabled service; however these services are classified by the FCC.”

COMMENT: No objection to this; however, as noted below in comments to Sections 6 and 7 it needs to be made clear that only publicly offered, fiber or wire-based Communications Services are subject to the Act. The CRA does not apply to privately offered businesses (not publicly offered ones) and to wireless services.

Sec. 1 F. :

F. “Communications Service Provider” means a person or entity that offers Communications Services to customers on Tribal Land without regard to the technology or medium used by the person or entity to provide the Communications Service.”

ATTACHMENT TO
COMMENTS RECEIVED AND RESPONSES
SAINT REGIS MOHAWK TRIBE COMMUNICATIONS REGULATORY ACT
COMMENTS OF NOC, INC

COMMENT: Same comment above. A definition of “Customer” should also be considered so that it is clear that a regulated Provider is one that provides services to the public at large.

SECTION 2—PRACTICE AND PROCEDURE

NOC has relatively minor comments on two Sections 2.2 (3) and 2.8(2).

Sec. 2.2 (3) :

2.2 (3) “To ensure that all Communication Services provided within the jurisdiction of the St. Regis Mohawk Tribe are consistent with the traditions, customs, and desires of the Mohawk People.”

COMMENT: NOC would recommend that the phrase “consistent with the traditions, customs, and desires of the Mohawk People” be changed to something like: “consistent with the health, welfare and economic benefit of the members of the St. Regis Mohawk Tribe”.

Sec. 2.8 (2) :

2.8 (2) “To act upon and regulate any and all communications activity within the jurisdiction of the St. Regis Mohawk Tribe, including but not limited to telephone, television, telegraph, cable television, direct broadcast from satellite services and equipment, two-way radio, and other Communications Services”.

COMMENT: The Commission’s authority should be limited to regulation of what is included in the CRA—it cannot go beyond what is being regulated by the Act. This Section potentially expands authority of

the Commission beyond the definition of “Communications Service” to activities “not limited to telephone, television, telegraph, cable television, direct broadcast from satellite services and equipment, two-way radio, and other Communications Services”.

SECTION 3—COMPLIANCE AND ENFORCEMENT

Sec. 3 (D) :

3 (D) “Any person who violates any of the provisions of this Act shall be guilty of an offense and, upon conviction, shall be ordered by the Commission to pay a fine.”

COMMENT: The references to “guilty” and “conviction” suggest that the Commission has criminal authority which it does not possess. This should be revised to make these civil penalties.

SECTION 4—COMPLAINTS, NOTICE OF HEARINGS, DECISIONS AND APPEALS.

COMMENT: No comments. Comment on the correct name of the St. Regis Mohawk Tribal Court already included in redlined comments.

SECTION 5—COOPERATION WITH OTHER JURISDICTIONS

COMMENT: No comments.

SECTION 6—CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This is a critical Section of the CRA that, in NOC’s opinion, needs to be revised to make sure that it applies only to publicly offered, wire-based communications service, in fact more particularly, telephone services (consistent with NYS and industry practices).

Secs. 6.1, 6.2 and 6.3 :

6.1 “Any entity seeking to offer Communications Services on Tribal Land must obtain a CPCN from the Commission before constructing facilities or offering Communications Services to the public.”

6.2 “A CPCN is required for both a Facilities-Based Provider and Reseller of Communications Services.”

6.3 “A description of each type of Communications Service that the applicant proposes to provide, including:

a. Whether the services will be offered to residential customers, businesses, or both”.

COMMENT: It is essential that this Section be revised to make it absolutely clear what types of communications services are required to obtain a CPCN. NOC’s

understanding of this Section is that it applies only to a communications service that is being offered to the public—see, Sec. 6.1. And as shown in Sec. 6.3 the services would be offered to residents or businesses. NOC assumes that the Tribe is following NYS CPCN practice and that a CPCN is required for companies that offer telephone services (local exchange (dial tone)), long distance, alternative operator and other types of telephone services. A CPCN is not required for providers of wireless services. NOC does not provide any telephone services (local exchange (dial tone)), long distance, alternative operator or other types of telephone services. It has pole attachment agreements and owns fiber that is strung on poles but does not use this fiber for provision of any telephone services or, for that matter, any communications services (internet, video, etc.) to the public. NOC has two cell towers that have space leased to two companies—AT&T and Verizon; but that is for wireless (cellular phone) services. Therefore, NOC is not subject to Section 6 of the Act and, at least for its current services, is not required to obtain a CPCN.

To the extent that there are questions or ambiguities about Section 6's application, it should be clarified that it applies not to all “communications services” but only to those that are publicly offered and wire based, telephone services.

SECTION 7—FRANCHISE AGREEMENT

This is also an extremely critical Section that needs to be revised and clarified so that it is understood that it only applies to entities and facilities that publicly offer wire-based or fiber-based communications services.

Secs. 7.1, 7.3 and 7.6 :

7.1 “No Person shall be permitted to construct, operate, or maintain a Communications Service on Tribal Land without having first obtained a valid Franchise from the Commission as evidenced by the execution of a Franchise Agreement unless such entity is exempted under Federal law or the law of the St. Regis Mohawk Tribe.”

7.3 (A) “An entity wishing to obtain a Franchise must first submit an application for a Franchise that must include the following:

1. A detailed description of the Communications Service System to include:
 - a. The types of wires and fibers to be laid on Tribal Land and to be connected to buildings;
 - b. Technological specifications of how video programming is delivered to the home;
 - c. Areas of Tribal Land which must be excavated to install wires;
 - d. Proposed Pole Attachment locations;
 - e. Any facilities the applicant proposes to build for the purposes of providing Communication Service; and
 - f. Any requirements that the Franchise collocate with any existing utilities.”

7.6 “The franchisee shall make service available to all

residences, dwellings, businesses, or establishments located on Tribal Land unless there is commercial impracticability and the Commission has approved an exclusion of services. The franchisee shall bear the burden of proving commercial impracticability.”

COMMENT: NOC’s understanding of this provision is that it applies to providers of video programming via wires and fiber (Sec. 7.3) for services that are “available to all residences, dwellings, businesses, or establishments” on Tribal lands (Sec. 7.6, emphasis added). NOC has fiber-related services (broadband, internet) that are located on the Reservation but they do not include video and, more importantly, the services are a closed-system that is provided only to Tarbell Management Group companies. It is a completely private network that is not being offered to the general public and is not available to “all” reservation residences and businesses. Therefore, NOC and its services are not subject to Section 7 and are not required to obtain a Franchise.

To the extent that there are questions or ambiguities about Section 7’s application, it should be clarified that it applies not to all “communications services” but only to wire or fiber-based services that are publicly offered.

ADDITIONAL COMMENT ON 7.7 FEE: Section 7.7 imposes a “Franchise fee” of “5% of annual gross revenues” on regulated businesses. While NOC is not subject to this requirement for the reasons stated above, it would like to comment that this fee is extremely onerous and excessive. The telecommunications industry and its businesses, especially small and startup businesses, operate on very small

profit margins and a 5% fee on their gross earnings would likely cripple such a business. NOC would recommend that the Tribe revised this provision to either eliminate or lower the fee (or make it apply to “net” earnings). Certainly tribal member owned businesses should be entitled to waivers of this fee as well.

SECTIONS 8—16

CRA Sections 8—16 deal with specific requirements that regulated businesses must comply with under the Act: “Transfer, Ownership, and Authority to Issue Stock” (Sec. 8); “Reorganization” (Sec. 9); “Publication of Rates and Terms” (Sec. 10); “Certified Financial Statements, Audits” (Sec. 11); “Quality Of Service” (Sec. 12); “Health And Safety” (Sec. 13); “Prohibited Practices” (Sec. 14); “Violations Of The Act” (Sec. 15); “Injunctions; Show Cause Orders; Contempt” (Sec. 16).

COMMENT: NOC has no comment on these Sections and notes that they only apply to regulated businesses and do not apply to NOC.

SECTION 17—VIDEO SERVICE SYSTEMS

Secs. 17.1, 17.2, 17.3 and 7.4 :

17.1 “Pursuant to the regulatory guidance of the FCC, the Commission may issue, promulgate, and enforce rules and regulations governing multi-point distribution systems, multi-channel and multi-point distribution systems, satellite main antenna systems, direct broadcast systems, two-way television

systems, and any other television programming delivery systems involving the use of microwave, fiber optic, and other video technology, video storage devices, and electromagnetic spectrum frequencies, as those technologies evolve into commercial or private use within the jurisdiction of the St. Regis Mohawk Tribe.”

17.2 “Any Person providing television programming delivery services for the purpose of generating revenues from subscribers must adhere to the rules and regulations, decisions, orders, or other official pronouncements of the Commission, including but not limited to securing a Franchise before providing service.”

17.3 “Any Person providing television programming delivery services in a non-profit capacity, or as a public service, must also adhere to the rules and regulations, decisions, orders, or other official pronouncements of the Commission.”

17.4 “Any person using a satellite dish for retransmission of Communications Services for hire, monetary consideration, or reimbursement shall be subject to the provisions of this Act except for those systems expressly preempted by applicable federal law as non-regulated.”

COMMENT: This Section introduces entirely different types of communication that the Commission may decide to regulate and also suggests that “private use”

may be regulated. It is not clear whether this power is being reserved by the Commission for future regulation. This needs to be stated.

SECTION 18—ATTACHMENTS TO POLES, DUCTS AND CONDUITS

Secs. 18.1, 18.2:

18.1 “The Commission is authorized to issue and promulgate rules and regulations governing use of public utility facilities, including Pole Attachments.”

18.2 “In order to provide efficient and quality Communication Services, the Commission may authorize joint use of public utility poles, ducts, and conduits owned or controlled by a public utility company and located within the jurisdiction of the St. Regis Mohawk Tribe. All joint use agreements, including the compensation provisions thereof for wire or cable attachments to a pole, duct, or conduit, must be approved by the Commission. Upon the approval of the joint use agreement for pole attachments, all Persons to such agreement shall have the right to use or share in and enjoy the use of the right-of-way easement granted to the pole owner.”

COMMENT: NOC has a number of pole attachment agreements in connection with its broadband fiber and is concerned that these agreements and its rights under the agreements might be affected.

SECTIONS 19—23

CRA Sections 19—23 deal with general subjects and items that regulated businesses must comply with under the Act: “Taxes and Surcharges” (Sec. 19); “General Provisions” (Sec. 20); “Severability” (Sec. 21); “Prior Inconsistent Law Superseded” (Sec. 22); and “Effective Date” (Sec. 23).

COMMENT: NOC has no comment on these Sections and notes that they only apply to regulated businesses and do not apply to NOC.