

**Before the
Navajo Nation Telecommunications Regulatory Commission**

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

**SACRED WIND COMMUNICATION, INC.’S RESPONSE TO THE NAVAJO NATION
TELECOMMUNICATIONS REGULATORY COMMISSION’S
FURTHER PROPOSED RULEMAKING FOR A TIERED REGULATORY APPROACH**

SACRED WIND COMMUNICATIONS, INC. (“Sacred Wind” or “SWC”), hereby provides its comments on the Notice of Proposed Rulemaking issued by the Navajo Nation Telecommunications Regulatory Commission (“NNTRC”) on August 27, 2012, regarding the adoption of new rules to govern the issuance of certificates of convenience and necessity to telecommunications companies providing service within the Navajo Nation. For its comments, Sacred Wind states the following:

Introduction

SWC agrees with the four-tiered approach the NNTRC is proposing, and contends that the proposed tiered approach will protect the interests of the Navajo People while providing telecommunications carriers greater flexibility needed to operate on tribal lands.

We raise questions herein about this tiered approach, however, not about the tiers themselves but on a fair balance between the amount of regulation imposed on a Public Interest Operator (PIO) or Negotiated Agreement Operator (NAO) versus the amount of rights- of-way benefit that such carriers might receive. An obvious reason for the concern is that no *public interest rate structure* for land use authorization has yet been developed for carriers operating on Navajo lands. A second reason for concern is that the NNTRC’s regulation versus rights-of-way benefit plan presumes that most, if not all, of a PIO or NAO’s network actually resides on tribal lands. How does the NNTRC intend to deal with wireless telecommunications facilities that are not located on tribal lands but that serve the Navajo people? Greater discussion of these points are found in Item 1 below.

Specific responses:

1. “Are there any reasons to treat different technologies differently from a regulatory perspective?” (Section II.2, pg 8)

No, the most effective and fair regulatory measures attempted by federal and state regulatory jurisdictions have avoided governmental handicapping of one technology over another. New Mexico and federal law, for example, advocate telecommunications regulations and laws promulgated in a technology-neutral manner.¹

However, because the NNTRC proposes a special *public interest rate structure* for PIO and NAO carriers, affected carriers may view that the NNTRC is inexorably tying regulation to a type of technology.² For example, it may be relatively uncomplicated to balance regulation of a “last mile” landline carrier with the benefits derived from a special *public interest rate structure*, but it will be hugely difficult to balance PIO or NAO levels of regulation with any public interest rate structure of a carrier that can provide services to the Navajo Nation from facilities that are mainly off tribal lands. In other words, the added cost of regulation may not be offset by a consequential reduction in land use authorization costs for such carriers. In such cases, where much of a carrier’s network facilities are located off of Navajo lands, the NNTRC’s proposed *public interest rate structure* should not be portrayed as a trade-off to regulation, but as an inducement to build further infrastructure on Navajo lands.

In that the current Navajo Nation and Bureau of Indian Affairs (BIA) land use processes function as a serious impediment to serving the Navajo people, a substantial *public interest rate structure* is just one step to building a significant inducement to serve the Navajo people. The second step, just as importantly, is of course, to vastly improve the land use authorization processes, including the 164 SAS process.

The better distinguishing criterion in the formulation of NNTRC regulation can and should be one that is based on whether or not a telecommunications carrier primarily or majorly serves the Navajo people. SWC agrees that the service categories proposed in the four tiers (less than or more than 50 customers served; less than or more than \$100,000 gross revenues) satisfy the need

¹ See *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. § 609 et. seq.) (stating that the Act seeks to in part “encourage the rapid deployment of new telecommunications technologies”) and *New Mexico Telecommunications Act*, N.M. STAT. § 63-9A-2 (1978).

² SWC understands that the Navajo Nation has the sovereign right to exclude non-Indians from its reservation under the Treaty of 1868. The overriding interest of the Navajo Nation in this CCN process is to set conditions for entry by telecommunications companies, and that the NNTRC is exercising this regulatory authority through the CCN process properly. However, there should be understood a needed balance involving the sovereign rights of the Navajo Nation, the personal and professional developmental needs of the Navajo people, and the business drivers of any interested telecommunications companies.

to distinguish carriers that serve the Navajo people as part of their mission from those who reach fewer Navajo customers merely as incidental to their main business.

As just one example of the importance of the above, the distinction of serving the Navajo people was never made in either the BIA or the Navajo Nation Land Department's consideration of SWC's petition to install a fiber optic cable in the Upper Fruitland area which would have served no more than 500 Navajo households. SWC has spent over \$480,000 in following both governmental entities' processes and still is unable to install that facility unless it pays tens of thousands of dollars more for an easement fee to the Navajo Nation and the BIA. The monies SWC has already spent on that project far exceed what is practical and reasonable for capital expenditures on any customers who would subscribe to basic telephone and broadband services. Such expenditures and timely processes on tribal lands have already prompted the New Mexico Public Regulation Commission to penalize SWC, claiming that SWC's investments on Navajo lands are "imprudent."³

While a special *public interest rate structure* for SWC's future facilities on Navajo lands will be greatly helpful and appreciated, how can the rate structure compensate for a land use authorization process that is already too lengthy and expensive to warrant further growth?

Recommendation: The NNTRC must do all possible, working with the Navajo Nation Office of the President & Vice President, the Navajo Nation Tribal Council, and the BIA, to improve the land use authorization processes that hinder telecommunications development on tribal lands.

2. Filings of Public Interest Operator (PIO)

SWC qualifies as a PIO and would be required to file an annual service plan and report, as also pursuant to the FCC's USF/CAF Order,⁴ SWC has no objection to filing an annual report and wishes to make available all information that will be helpful to the NNTRC in meeting its public interest objectives.

SWC, however, seeks modification of, or direction from the NNTRC on facilities-specific data it is requesting. It is the one item listed in Section II.A.3 of the NNTRC Report and Order that SWC finds extremely difficult to provide on a system-wide basis.

³ *In the Matter of the Application of Sacred Wind Communications, Inc. for Approval of Initial Rates, Terms, and Conditions of Service and for support from the New Mexico Rural Universal Service Fund And Petition for Variance from Commission Rules*, Case No. 10-00315-UT, Amended and Restated Final Order Partially Adopting Certification of Stipulation (N.M.P.R.C. issued July 26, 2012).

⁴ *In the Matter of Connect America Fund*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 637 (2011).

All Eligible Telecommunications Carriers (ETCs) operating on Navajo lands will have some of their facilities that provide capacity or other functions supporting the greater network that do not directly serve a specific community of customers. Most of those ETCs will have also facilities in this category *off* of Navajo lands that serve Navajo customers. It is doubtful that any ETC organizes its customer accounts by a given facility beyond the Central Office (at which point telecommunications account numbers are assigned), and it would therefore incur an expensive and time consuming amount of work to identify and track customers served from a single outside plant facility. Measuring the amount of revenue generated from each telecommunications facility on Navajo lands would be nearly impossible. Keeping separate books and records for Navajo facilities as would be required by the CCN would be equally difficult.

The one exception to this facilities-specific data gathering may be single wireless communications sites that act as a segment of the “last mile,” which can be isolated to measure the number of customers that can be, or are served from that wireless site. In that much of SWC’s fixed wireless tower infrastructure is located off of tribal lands, measuring the amount of traffic or revenue on segments of its network that *are* located on tribal lands may not be helpful to the NNTRC. For example, the larger towers atop Gibson Peak and Mt. Powell, the only backhaul towers located on tribal lands of SWC’s backhaul tower network, provide capacity to many Navajo customers in multiple wire centers and some nontribal customers in nearby ranch or other unincorporated communities who are distinguished on our accounts only by their tribal or state tax code. That capacity is then transmitted to broadband loop carrier cabinets that are equally hard to track by customer account.

As an alternative, SWC can, however, provide some detail on its facilities and associated revenues on some wireless sites where there is a clear “last mile” linkage of a tribally located facility to a set group of customers. For example, revenue calculations can be made for an aggregation site (relay tower) at Tohajiilee that specifically serves a HUD community. *Such information, though, would be highly proprietary and confidential and could never be shared with any party beyond the NNTRC.* Such telecommunications facilities that are directly identified with a specific grouping of Navajo customers represent only a small portion of SWC’s total network.

It would be far more beneficial for the NNTRC to annually require a total Navajo customer count and total network revenues from Navajo customers rather than a breakdown by facility. The only practical way of establishing a linkage between a telecommunications facility and revenues generated from that facility would be by way of an estimation from the company *at* the time of its seeking rights-of-way, colocation or easement authorization when that facility has yet to be integrated with the rest of the network. But, even so, an estimation of revenues generated from a facility that is not specifically and clearly a component of the “last mile” would be virtually impossible. Additionally, to track customer numbers and revenues by each facility on an

ongoing basis would require an expensive and time consuming reorganization of an ETC's engineering, service ordering, billing, and accounting systems.

Recommendation: A far better structure for regulation of PIOs and NAOs, and structure of the *public interest rate*, would be based on whether or not the carrier and its facilities will primarily or majorly serve Navajo customers and whether or not such facility would function as a "middle mile" or "last mile" facility, or other determination that differentiates a rights-of-way price based on the volume of customers to be served.

3. Clarification of General Operator filing

As an ETC and regulated Incumbent Local Exchange Carrier ("ILEC"), SWC provides regulated telecommunications services on Tribal and some nontribal lands. Accordingly, SWC fits the description of a PIO in the NNTRC's Report and Order. SW Telesolutions ("Telesolutions") is affiliated with SWC, both operating under one holding company, and provides unregulated services, mainly Internet and long distance, to its customers. Telesolutions actually purchases broadband capacity from SWC and then provides services that are subject to minimal regulation by state or federal jurisdictions. On a cursory review of the report and Order's Section II.A.2, Telesolutions would appear to fit the description of a General Operator ("GO"), but actually fails to meet two principal criteria: it does not build its own outside plant facilities and it does not and cannot provide E-911 service, which is a regulated service. SWC must conclude, therefore, that the NNTRC does not intend to include Internet service providers in its tiered regulatory approach.

Recommendation: Because SWC believes that the NNTRC would be ill-served if denied broadband-related information from the telecommunications carriers that operate on Navajo lands, SWC recommends that broadband-related information be either included in the ETC's annual report and service plan, *or in a separate, nonregulatory and easily processed vehicle required of the Internet service provider*. That information would include the customer and network expansion information that would help the Navajo Nation determine its standing in terms of broadband availability, subscription, and future planning.

SWC offers to include such broadband-related information as an attachment to its PIO annual report and service plan only if it is understood that its holding company's or affiliate's unregulated services remain unregulated and that such information would be treated as highly proprietary and confidential as well.

4. Other issues:

Though not included in the request for further comment, a few other items already discussed in the NNTRC's Report and Order merit further consideration:

- a) Commenting on the NNTRC's responses in Section I.B. 6 & 7, SWC agrees with the NNTRC's findings in paragraph 6 and its comments in paragraph 7, but seeks specific direction from the NNTRC as to how it intends to deal with customer complaint procedures that ETCs are currently subjected to by their state regulatory commissions. SWC's chief concern in this regard is driven by its desire to avoid customer confusion if it is required both by the New Mexico Public Regulation Commission ("NMPRC")⁵ and the NNTRC to have included in our billing statements information regarding both Commissions' customer complaint offices. SWC certainly wants to avoid situations that may appear on their surface racially segregated if a Navajo customer were inadvertently to call the NMPRC and not the NNTRC.

Recommendation: SWC recommends to the NNTRC that ETCs include only their state commission's customer complaint information in their monthly billing statements (since that remains a legal requirement of them) until such time as the NNTRC arranges with the state commission to assume for itself that responsibility and so remove from state commission's rules the current requirement that the ETCs must comply with the state's customer complaint provisions in *all* areas of their service territories.

- b) With respect to the information sought by the NNTRC for its CCN filing and in the required annual report and service plans, SWC respectfully asks the NNTRC what is its timelines for submission of such information?
- c) With respect to the information sought by the NNTRC for its CCN filing and in the required annual report and service plans, SWC also asks the NNTRC when does it intend to complete its process and standards for receipt, review and safeguard of highly proprietary and confidential information that ETCs will be required to provide?

SWC is ready to file its CCN documents and is working toward satisfying the NNTRC's annual report and service plan requirements, but must wait until adequate provisions are made and assurances are given to safeguard such proprietary and confidential information.

Recommendation: SWC realizes that the NNTRC is currently working on its schedules for CCN filings and for establishment of various regulatory procedures and can certainly wait for those to be completed. It urges the NNTRC, though, to establish and enforce the most stringent safeguards for carriers' proprietary and confidential information, lest it lose credibility in the early stages of its new regulatory life.

⁵ 17.11.8.11 NMAC (July 1, 1999).

We appreciate the NNRTC's work in developing the structure and processes for this CCN filing and thank it for the opportunity to provide these comments. We look forward to working with the NNTRC further on this.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'J. Badal', with a long horizontal line extending to the right.

John Badal, CEO
Sacred Wind Communications, Inc.