

**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 FURTHER NOTICE

I. Introduction

Smith Bagley, Inc. (“SBI”) files these further comments in response to the Report and Order and Further Notice of Proposed Rulemaking issued in this proceeding on August 27, 2012 (“FNPRM”). SBI faced difficulties in filing further comments within 30 days of the issue date of the FNPRM and respectfully requests that the NNTRC nevertheless accept and consider these late-filed further comments.

SBI also filed comments in the opening round in 2011 and appreciates the careful consideration it is evident that the Commission gave to those comments and the comments of other parties. In the first section of the FNPRM, the Commission’s Report provides extensive responses to and analysis of the comments of SBI and other commenters. The responses are in many instances reasonable and correct in SBI’s view. As the Commission has not requested further comment on the Report findings, SBI will reserve comment for a future date and focus its comments here on the FNPRM, which seeks comments on an innovative “tiered regulatory approach” for carriers operating on the Navajo Nation.

In SBI's view, the tiered regulation proposal has promise, and should be improved so that all carriers can agree that it is both lawful and in the public interest. Accordingly, SBI offers these further comments to assist the Commission as it attempts to refine the tiered proposal and, hopefully, to achieve a consensus among most or all of the stakeholders.

II. Responses to Request for Comments on Tiered Approach

SBI commends the Commission for proposing a creative and novel tiered approach to tribal regulation of telecommunications providers. The Commission has clearly taken the comments to heart and attempts to strike a regulatory balance that provides appropriate protection of the Navajo Nation and people. Properly implemented, the proposal potentially could strengthen the Nation and benefit its people without harming competition or discouraging investment by private enterprise in the infrastructure needed to improve service throughout the Nation. SBI views the tiered approach as a good faith attempt to address the concerns that most commenters had regarding duplicate, burdensome, intrusive, and potentially unnecessary regulation. SBI appreciates the request for further comments on the tier approach because, while it has much promise, additional work is needed to ensure that the ultimate results will be a net benefit to the Navajo Nation.

SBI is unaware of any precedent for a tiered regulatory approach similar to what the Commission has proposed. Without a model for the Commission to follow—or for industry commenters to relate to—it is not surprising that the proposal raises many important questions. As SBI understands the proposal, it has two pillars. First, most carriers can elect one of two regulatory schemes;¹ one of which requires minimal filings and minimal oversight or obligations,

¹ Although there are four tiers in the proposal, the Small Operator and Negotiated Agreement tiers are inapplicable to most carriers, including SBI.

and the other of which requires extensively detailed filings and greater regulatory commitments and oversight. Second, there is an incentive for electing the more burdensome regulatory tier—the promise of more favorable rates for rights-of-way, joint use, collocation permits, and leases. The two pillars of the plan propose a new type of “regulatory bargain.”

There are three issues that SBI sees with the tiered proposal that need more thought, input, and work in order to be resolved. First, while it is clear that a carrier which elects regulation as a General Operator (“GO”) is getting regulatory benefits, it is unclear what the GO is giving up in return by not electing Public Interest Operator (“PIO”) status. In other words, it is impossible at this stage to say whether the proposed regulatory bargain is a *fair trade*. If it is a fair trade then it may well serve the public interest, assuming the details are consistent with applicable Tribal and Federal law. But if it is not a fair trade, then the tiered proposal likely would not be in the public interest.

If the Commission is going to move forward with the tier scheme, and hopes to build consensus or support, it must first—or at least at the same time—identify, define, and *quantify* the benefits to PIOs in rates, terms, and/or access to land and facilities within the Navajo Nation. Additionally, there needs to be much more clarity and definition regarding the ongoing regulatory obligations that would be placed on a PIO. Moreover, there needs to be greater clarity on the obligations before it will be clear that they are consistent with applicable Federal law. *See, e.g., 47 U.S.C. § 332.*

This leads to the second and related issue, which is that absent a full definition of what the incentives and obligations entail and how they will work, it is not possible to know that the information that would be required of PIOs is appropriately tailored to the regulatory goals and

incentives. The Commission presumably is not requiring the submission of extensive proprietary and commercially sensitive information merely for the sake of it. Both to reduce the risk of unfair competitive advantage and to reduce the regulatory burden, highly sensitive information should only be requested from carriers if it is essential to performing related regulatory functions. Accordingly, the proposed long list of items PIO applicants would be required to submit may be putting the cart before the horse, since the regulatory requirements for PIO applicants have yet to be developed.

A third issue is whether the proposed advantages that would be given to PIO applicants are reasonable and appropriately measured so that they are not unduly discriminatory and do not tend to foreclose competitive entry by non-PIO carriers. When Congress passed the Telecommunications Act of 1996, it intended to remove barriers to entry and promote competition in telecommunications markets throughout the country.² The Act has helped create an explosion of new, innovative, lower cost, and diverse services, including broadband data and a rapidly evolving offering of mobile and wireless services. While these innovations have been slower in coming to Tribal areas, the reason is due to economics, not due to any flaw in the competitive model established at the federal level.

When a government picks the “winners” and “losers” there are dangers, such as making the wrong pick or removing incentives from the “winner” to continue to innovate and reduce rates and cost due to its protection from competition. It is difficult to ascertain without greater detail whether PIO and GO tiers will harm competition and competitive incentives to the extent

² See generally, P.L. 104-104 (“Act”). Section 253 of the Act specifically addresses the rights of state and local governments to manage their rights of way provided the rates charged are “reasonable” and “nondiscriminatory.” Applicability of Section 253 to Tribal governments is unclear, but at a minimum, the principles of reasonableness and non-discrimination provide sound guidance.

that it will limit choices for Tribal members. Thus, SBI asks the Commission to give this issue careful consideration, both from a legal and market perspective.

III. SBI Suggestions to Improve the Process and Tier Proposal

SBI has a few suggestions to improve both the proposal and the process. First, SBI urges the Commission to create a “second path” to PIO status for ETCs, through the required FCC tribal engagement process.³ ETCs already have heightened regulatory and service obligations wherever they are designated. And under the FCC’s *Transformation Order* ETCs serving the Navajo Nation will be required to engage the Tribe meaningfully on many of the same issues that the PIO regulatory tier seems directed to. Both the Commission and the ETC could greatly benefit by having a single regulatory process. And since both the Tribe and the carrier are already going to be participating in the FCC engagement process, it only makes sense to allow the process to serve a dual purpose.

Not every ETC that engages with the Tribe will necessarily do so at a level that would justify designation as a PIO. But if an ETC with a long or extensive service history on the Navajo Nation demonstrates a commitment to engage at a deep and meaningful level on the matters listed in the FCC’s *Transformation Order*; such as needs assessment, deployment planning sustainability planning, marketing, rights of way processes, and cultural preservation; the carrier will have effectively addressed the core reason for creating the PIO category. The Commission should explore whether additional examination of an existing ETC that is meaningfully engaged over a significant period of time, beyond the aspirational engagement goals expressed by the FCC, is a good use of the Commission’s scarce resources. Moreover, the

³ See, e.g., *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 637 (2011) (“*Transformation Order*”), *pets. for review pending*, *Direct Commc’ns Cedar Valley, LLC v FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011)(and consolidated cases).

prospect of a path to PIO status would give ETCs greater incentives to pursue the FCC's process to mutually beneficial substantive goals.

Second, carriers should have a clear and easy path to change between GO and PIO status. This is especially critical for a system that has never been used before. Carriers need the ability to adapt both to the constantly changing business environment and to the Commission's experience with and development of the new regulatory scheme.

Third, SBI renews its suggestion to convene one or more public workshops, including the Commission, industry stakeholders, and other interested persons who can contribute to refining the Commission's proposals. The Commission should do everything it can to ensure a full exchange of ideas and information to reach the best possible result. The FCC and state commissions have used workshops for years to craft regulations, make them more efficient, reduce oversight burdens on regulators, provide incentives for carriers to do the right thing, and focus on how regulations help consumers.

IV. Summary and Conclusion

At this early stage of the proceeding, SBI must reserve judgment whether it would support the tiered approach. SBI is open to the concept and sees promise in it. SBI recommends that the Commission first do more work on developing the details of the burdens and benefits that are contemplated for PIOs. SBI again suggests a public workshop of the Commission, industry stakeholders, and interested persons. Regardless of how the Commission proceeds, SBI plans to continue to work with the Commission proactively to help it achieve the proper regulatory balance that it seems to be seeking. Thank you again for this opportunity to present comments in this important proceeding.

Dated this 8th day of October, 2012.

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