

**Before the  
Navajo Nation Telecommunications Regulatory Commission**

In the Matter of )  
 )  
Application for Certificate of Convenience and ) No. NNTRC-11-001  
Necessity (CCN) )  
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**SACRED WIND COMMUNICATION, INC.’S COMMENTS ON THE NAVAJO  
NATION TELECOMMUNICATIONS REGULATORY COMMISSION’S  
NOTICE OF PROPOSED RULEMAKING**

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 July 28, 2011, 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**

Sacred Wind welcomes the opportunity to address the NNTRC as to the substantive and procedural parameters that will apply to telecommunications companies operating within the Navajo Nation. SWC does not take issue with the NNTRC’s authority to “promulgate rules and regulations” for telecommunications carriers operating within the Navajo Nation, beginning with the NNTRC’s authority to identify all telecommunications carriers operating within the Navajo Nation, but cautions the NNTRC to avoid duplication and conflicting regulation that will inevitably harm its stated goals of ensuring “the universal availability and accessibility” of reliable telecommunications services to the Navajo People.

In order to achieve its most basic regulatory authority, the NNTRC should establish a Certificate of Convenience & Necessity (“CCN”) or some registration procedure for all carriers that operate or intend to operate within the Navajo Nation.

SWC does have strong concerns, however, about the NNTRC’s reaching beyond a proper CCN certification requirement until larger issues are resolved, as described further below. With all due respect, the NNTRC is not correct in stating in its conclusions that all the information it seeks in its NOPR for a CCN process will enable it to: “(1) ensure the universal availability and accessibility of high quality affordable telecommunications services to all ..... on the Navajo Nation; (2) promote the development of effective competition as a means of providing customers with the widest possible choice of services; (3) utilize forms of regulation commensurate with the level of competition .... ; (4) facilitate the efficient development and deployment of a telecommunications infrastructure ...; and (6) ensure that providers of telecommunications services on the Navajo Nation provide high quality customer service and high quality technical service.”

Specifically, the goals described in the NOPR’s conclusion items # 1, 2 and 4 above are far more affected by the land use policies and practices of the Navajo Nation and the federal government than can those goals be achieved by way of NNTRC regulation. These same goals are also set forth by the New Mexico Public Regulation Commission (“NMPRC”), but such goals have less chance of success on Navajo Lands than anywhere else in New Mexico because of the land use policies and practices that reign over telecommunications facilities placement on Navajo Lands.

Equally troubling is the fact that not all telecommunications carriers operating on Navajo Lands follow the same rights of way permitting procedures – some pursuing a lengthy step-by-step process at the Navajo Land Department and others bypassing that process through legislative or political gamesmanship. The Navajo Nation’s failure to establish a workable rights of way program for the development of adequate telecommunications infrastructure, compounded by its failure to properly “police” adherence by all telecommunications carriers to one program’s procedures, undermines any attempt to achieve universal service on Navajo Lands, much less introduce competitive choice.

## **Sacred Wind's Services and Territory**

Sacred Wind operates as a rural telecommunications carrier in the State of New Mexico pursuant to certificates of Financial and Technical Competency, Operating Authority and Public Convenience and Necessity issued to it by the New Mexico Public Regulation Commission on March 21, 2006. Sacred Wind's New Mexico certified service territory encompasses portions of 29 Chapters of the Navajo Nation, including the Tohajiilee (Cañoncito) band over an area of 3,600 square miles. There are approximately 8,300 occupied homes within this service territory.

Sacred Wind operates as the only rural, incumbent carrier certificated by the NMPRC authorized to provide service in its territory. Other carriers operating in the area are mobile wireless providers that not subject to significant regulation by the NMPRC. The proposed Rule suggests that the NNTRC will allow multiple carriers to operate in a single territory, however, this objective is at odds with the requirement, stated under Section C, Exhibit C-6, that a carrier make a statement whether it will provide service to all customer requesting local exchange service within five years of the date of issuance of the CCN. The Commission's intentions related to this showing should be clarified.

Sacred Wind serves its customer with facilities that include copper landline facilities originally installed by Qwest that have been reconfigured to intersect with Sacred Wind's fixed wireless and fiber systems, supported by Broadband Loop Carrier cabinets at critical distribution points. Sacred Wind provides services employing two state-of-the-art IP/TDM switches located at the Company's central offices in Yatahey and Bloomfield.

Sacred Wind's wireless network utilizes a mixture of FCC-licensed and unlicensed radio equipment. A fiber optic cable connects Sacred Wind's central offices to Qwest's system and to Sacred Wind's tower infrastructure. Sacred Wind owns 14 communications towers, located on mountain tops and high plateaus, and leases one tower. Sacred Wind has received necessary approvals from Navajo Nation and federal agencies to permit the siting of its towers and infrastructure installations at customer locations.

SWC's main purpose in acquiring its predecessor's (Qwest Corporation) legacy network on Navajo Lands in New Mexico was to deliver to Navajo Lands a level of investment in new infrastructure that was not made previously and to work with the Navajo Nation on a better right of way policy that would benefit the Navajo People by delivering affordable and advanced telecommunications services. It is Sacred Wind's contention that, until the right of way impediments are removed on Navajo Lands, added regulation will not benefit the Navajo People and will only create more disincentives for multiple carriers to develop their telecommunications systems on tribal lands.

Also, because much of the regulation of certain telecommunications providers operating over mobile wireless (cellular or PCS) and satellite systems is preempted by the federal government, goals described in the NOPR conclusion items # 2, 3, 4, and 6 above will not be met if the NNTRC is unable to impose the same requirements and regulations on all carriers competing for the same customers within the Navajo Nation.

### **Federal Programs Benefit Customers Within the Navajo Nation**

Sacred Wind understands the Navajo Tribal Council's adoption of 21 N.N.C. § 502 to incorporate a recognition that some federal laws may preempt the exercise of jurisdiction over telecommunications by the Navajo Nation. This Code provision further recognizes that other federal laws, even those that do not preempt tribal jurisdiction, will continue to be recognized if they "benefit and protect the traditions, customs and desires of the Navajo People and are not otherwise inconsistent with the provisions of this Act." 21 N.N.C. § 502(B). Sacred Wind strongly supports this objective of the Tribal Council and urges the NNTRC to put this principle into practice by recognizing those federal laws, regulations and programs that benefit and protect telecommunications customers within the Navajo Nation.

One example is the Federal Communications Commission's universal service support mechanisms spelled out at 47 U.S.C. Section 254(c). To be eligible to receive that support, something that is vital to providing service to Sacred Wind's customers, Sacred Wind was required to received an "eligible telecommunications carrier" designation from the NMPRC

pursuant to 47 U.S.C. § 214(e)(1). Sacred Wind's eligibility as a federal ETC allows it to participate in the FCC's Tribal Lifeline and Linkup Programs. The majority of Sacred Wind's customers qualify for the support provided by these programs. Through these programs, low-income customers may qualify for discounted telephone service (\$1.00 per month) and discounted service installations. Another example is the National Exchange Carriers Association's (NECA) pool that operates to benefit rural incumbent local exchange carriers as such carriers further develop infrastructure in rural areas of the country. Pricing for certain services that involve the interstate portion of a carrier's local network are determined by NECA, not the local regulatory jurisdiction.

In Sacred Wind's view, it is critically important for the Navajo Nation to obtain clarification of its authority to make designations that will allow telecommunications companies operating within its territory to continue to qualify for these essential programs. In the alternative, the Navajo Nation should recognize the designations that have been, and will be, made by state commissions to fulfill the requirements of federal law to assure continuing eligibility for these programs.

Another important example of federal laws and regulations affecting service within the Navajo Nation are those governing the interconnection between carriers. The United States Congress has declared its intention to occupy the field of regulation of interconnection between telecommunications carriers through the adoption of 47 U.S.C. 251, and 252. A complex set of federal regulations has grown up around the interconnection mandates of federal law. These regulations govern the issues of number portability, dialing parity, access to right-of-way, reciprocal compensation, unbundled access, service resale and collocation. 47 U.S.C. § 251(b); 47 C.F.R. §§ 51.200 and 51.300 series. In the view of Sacred Wind, these federal laws and regulations should be recognized and supported by the Navajo Nation as they reflect a fair, predictable and transparent means to achieve the Navajo Nation's stated objective of facilitating interoperability and interconnectivity. 21 N.N.C. §§ 513(B) & 524.

### **Dual Regulation by State Commissions and the NNTRC**

Sacred Wind additionally asks the NNTRC if its intentions to regulate such telecommunications carriers that operate on any Navajo Lands in New Mexico are meant to be exclusive to the NNTRC or is such authority to be shared with the NMPRC and other state commissions? Much of the comments submitted below by SWC revolve around the real and potential conflicts that may arise from splitting regulatory authority between two Commissions or by overlaying NNTRC regulation atop current NMPRC or other state regulation.

If the NNTRC's intentions are to exclusively regulate telecommunications carriers operating within the Navajo Nation, it must consider and resolve the jurisdictional questions that arise from the grant of authority to each State's regulatory commission by the State's constitution and statutory codes.

If the NNTRC's intentions are to overlay its regulation atop the State's or federal government's regulation, then it must consider and resolve the impact that dual regulation will have on carriers operating on Navajo Lands. Were that to occur, it is certain that the cost of providing telecommunications services will be higher on Navajo Lands than in any other area of New Mexico, which will serve as a disincentive – not an incentive – to further expand services to the Navajo People. Such dual regulation could well cause confusion for the telecommunications carriers, especially where the NNTRC's and the State commission's regulation differ one from another.

As a rural, incumbent local exchange carrier, Sacred Wind is subject to rate-of-return regulation by the NMPRC. This translates into detailed oversight of the Company's operations and the rates, terms and conditions of service under which Sacred Wind delivers service to its customers. NMSA 1978, §§ 63-9H-1 to 63-9H-14 (1999, as amended to 2005). Sacred Wind's tariffs are on file with the Commission and any change to those tariffs must be presented and is subject to challenge by the Commission or any interested party. NMSA 1978, § 63-9H-7 (1999, as amended to 2005). Sacred Wind welcomes the opportunity to assist the NNTRC in bringing to fruition meaningful regulation to assure quality telecommunications services throughout the Navajo Nation.

The relationship between the NNTRC's regulation of telephone companies and the states' is a critical issue requiring further comment and discussion. Sacred Wind would strongly recommend that the NNTRC schedule workshops to facilitate the development of regulations to implement the mandates of the Navajo Nation Code and to address the conflicts between those mandates and ongoing regulation of telecommunications companies by state commissions. If it is not the NNTRC's objective to regulate services provided to non-Navajo persons and businesses that are not licensed by the Navajo Nation, it should explicitly express this intention. The requirement that carriers keep "separate books and records for Navajo operations" suggests that the Navajo Nation is not seeking to regulate services provided to non-tribal members. If that is not the Navajo Nation's intention, that is, if the Navajo Nation is seeking to regulate any service provided to any customer within its tribal boundaries, that intention should be stated explicitly.

All stakeholders should be brought together to discuss and make recommendations to the NNTRC related to such critical issues as potential conflicts between state and tribal regulation of tariffing, quality of service, consumer complaints, interconnection between companies, and designation of territories.

### **Comments on Specific Provisions of the Rule**

#### **Tariffs**

Sacred Wind interprets Section B, Exhibit B-1 of the rule to endorse, for the time being, tariffs filed with state commissions. The NNTRC should make clear that this endorsement would include terms and conditions of service that are stated in such tariffs. There is the possibility that certain filed and approved terms and conditions will conflict with other provisions of the NNTRC's rule.

#### **Need for Confidentiality Rules**

Much of the information sought under the CCN rule is highly confidential, commercial information. See, for example, Section C, Financial Capability and Section D, Technical

Capability. The risk posed to a carrier that such information will fall into the hands of its competitors cannot be overstated. Revenue data and business planning information are just some of this type of information. Before requiring disclosure, the NNTRC should adopt specific procedures for the entry of protective orders that will require persons other than Commissioners and Commission Staff, to demonstrate that disclosure to such persons will not pose undue risk to the company that has filed the information.

### **Customer Service Plan**

Under Section F of the Rule, carriers are required to submit “customer service plan[s]” to govern the carrier-customer relationship. In the absence of any NNTRC rules governing such relationships, complying with this requirement will result in carriers adopting different plans. A carrier that operates solely in Arizona may have a plan that differs significantly from the plan of a carrier that operates solely in New Mexico. One notable example of a potential conflict arising from this approach is the manner in which carriers handle customer information. Federal law and regulation govern this area, but states have also adopted regulations dealing with this sensitive issue. See, e.g., 47 U.S. C. § 222 (2996); 17.11.16.9 NMAC (2/01/2006). The Rule partially adopts the requirements of federal law related to disclosure of customer information. See Exhibit G-5. Sacred Wind suggests that the Rule be amended to specifically require compliance with federal laws governing disclosure of customer proprietary network information. Again, it behooves the NNTRC to adopt rules to govern customer relationships as soon as practicable.

### **Customer Complaints**

By requiring carriers to include a bill message pointing customers to the NNTRC to file complaints, the rule would require carriers to respond to the NNTRC as well as any state commission that has consumer protection regulations. There is a substantial likelihood that a conflict may arise in how such complaints are handled. In this regard, the NNTRC is at something of a disadvantage as it has not yet adopted consumer protection rules. In the interim, the NNTRC should consider deferring to state commission complaint procedures until such time as it has adopted its own regulations. Sacred Wind welcomes the opportunity to work with the NNTRC to adopt rules to protect consumers.

### **Funding of viable regulation**

Notwithstanding the comments listed above regarding various rules that the NNTRC should put into place before requiring much of the information requested in the NOPR's Exhibits, no rules will achieve their intended purposes unless the NNTRC is adequately staffed and funded to become an enforcement agency. Customer complaint management, quality of service regulations, review of a company's earnings and rates, development of tariffs, review of a company's network design – all require a regulatory authority adequately staffed by individuals with finance and engineering backgrounds. In short, the step from CCN registration to actual regulation of utilities is an immense one. Some of the complexity of regulation can be read into the brief comments below to the itemized list proposed rules included in the NOPR's Exhibits.

### **Itemized list of proposed rulemaking**

Sacred Wind has the following comments on the information requested in the NNTRC's proposed application:

- a. **Section A – Applicant Information** - For all items in Section A, the requests are appropriate.
- b. **Section B – Proposed Scope of Service** - SWC supports provision of a “brief description of the services”, Service Area and the information about Operations in Other Jurisdictions. However in B-1, the request for tariff information would be burdensome and create additional regulatory costs as SWC already provides this information to the NMPRC.
- c. **Section C – Financial Capability:**
  1. **C-1 Financial Statements** – An annual financial report is already provided to the NMPRC once a year. This is considered public information and available through the NMPRC's online website. SWC feels that it is not necessary to provide this information in a different format to a second regulatory agency. The NNTRC's request to receive quarterly statements and reports to stockholders is burdensome and should not be part of the NNTRC CCN application.
  2. **C-2 Tax Returns** –The request for tax returns and documents is burdensome and not necessary for a CCN process.

3. **C-3 Revenue Earned in Other Jurisdictions** – This request for information for revenues and access charges from other jurisdictions is burdensome and not within the scope of a CCN process. Additionally, it is unclear what information is being requested. It appears that this request may be more relevant for competitive long distance carriers or cellular carriers than local exchange companies.
4. **C-4 Projected Number of Subscriptions and Related Data** – Initial subscriber projections are typically provided to the NMPRC during a certification proceeding, and additional projections would be burdensome and duplicative and should not be part of the NNTRC CCN application process. Furthermore, for a telecommunications carrier with physical facilities on Navajo Lands, these projections are influenced by many factors, most notably the length of time required for rights-of-way approvals, environmental approvals, and Navajo Nation, BIA and other governmental approvals. As a result, it is not productive or a good use of resources to develop additional detailed projections.
5. **C-5 Separate Books and Records** – SWC would respond “No” to this CCN application question, and further states that it would be extremely difficult, burdensome and expensive for any telecommunications carrier to separate its books by Navajo operations vs. non-Navajo operations.
6. **C-6 Timing of Provision of Local Service** – See response in paragraph 15.c.4 above.
7. **C-7 Prior Provision of Service – Revenues accrued** – SWC feels that it is relevant to provide to the NNTRC the date that service began, however, the request to provide accrued revenues is not appropriate. See responses in paragraphs 15.c.4 and 15.c.5 above.
8. **C-8 Required Insurance** – The request for this information is not within the scope of a CCN process. A telecommunications carrier will obtain whatever insurance is necessary to comply with industry standards and state and federal requirements.
- d. **Section D – Technical Capability** –Section D in the CCN application requests information that a New Mexico telecommunications carrier is required to provide to the NMPRC during a certification proceeding. Duplicating this process with another regulatory agency is unnecessary and burdensome. Furthermore, sections D-2 and D-4 request specific information regarding facilities on the Navajo Nation. It would be difficult to separate facilities information in cases where a certain facility or piece of equipment is used to provide services both on and off the Navajo Nation.

- e. **Section E - Managerial Capability** – All of Section E in the CCN application requests information that a New Mexico telecommunications carrier is required to provide to the NMPRC during a certification proceeding. Duplicating this process with another regulatory agency is unnecessary and burdensome.
- f. **Section F - Customer Service:**
  - 1. **F-1 (Customer Service Plan) and F-2 (Affirmative Customer Selection Procedures):** A request for this type of information should not be part of the NNTRC CCN application. Some of these categories are governed by existing state or federal tariffs and rules, and some of the categories are considered part of a company's internal operating procedures, which traditionally have not been tariffed to allow a company the flexibility to modify those procedures as appropriate.
  - 2. **F-3 Customer Complaint Data** – This information is already provided to the NMPRC and it would be duplicative and burdensome to replicate the process.
  - 3. **F-4 Sample Contract** – A request for this information should not be part of the NNTRC CCN application.
  - 4. **F-5 Sample Bill** – A request for this information should not be part of the NNTRC CCN application.
  - 5. **F-6 Customer Inquiries and Complaints** – A toll free number for SWC's customers has already been established and is provided on customer bills.
  - 6. **F-7 Bill Message** – There is already an NMPRC department (Consumer Relations Division) which handles customer complaints. The NMPRC has directed telecommunications carriers to provide the telephone number of the Consumer Relations Division to customers and SWC has complied by showing this contact information on customer bills. It would be confusing to customers and onerous to the telecommunication carriers to establish a duplicative second process with the NNTRC. The establishment of a duplicative customer complaint process could also create contradictory results that would interfere with resolving customer issues.
- g. **Section G – Public Policy:**
  - 1. **G-1 Public Interest** – This section in the NNTRC's CCN application requests information that a New Mexico telecommunications carrier is required to provide to the NMPRC during a certification proceeding. Duplicating this process with another regulatory agency is unnecessary and burdensome, and could result in conflicting jurisdictional requirements. For the

telecommunications carriers who have already received a CCN from the NMPRC, a CCN was already determined to be in the public interest. Section G-1 also addresses the development of effective competition, alternative forms of regulation, and the interconnection of telecommunications facilities. Federal and state rules address these matters in great detail and place certain requirements upon telecommunications carriers. Duplicating or modifying this process with another regulatory agency would prove burdensome and could result in conflicting jurisdictional requirements.

2. **G-2 Regulation and Navajo Nation Law** - It would be difficult for a telecommunications carrier to consent to the full territorial, regulatory and adjudicatory jurisdiction of the Navajo Nation in a blanket statement. Telecommunication carriers are already fully regulated by state and federal agencies and specific circumstances may result in conflicting jurisdictional requirements.
3. **G-3 Navajo Nation Taxes and Fees** – This is an appropriate request in an NNTRC CCN application.
4. **G-4 Emergency Cooperation** – A request for this type of information should not be part of the NNTRC CCN application. Existing state and federal laws describe how a telecommunication carrier must respond in the case of an emergency and the establishment of a separate procedure could result in conflicting jurisdictional requirements.
5. **G-5 Requirement for Customer Release** – A request for this information should not be part of the NNTRC CCN application. The federal government has already implemented rules concerning the protection of customer data (Customer Proprietary Network Information, known as “CPNI”). The establishment of a separate NNTRC process would result in conflicting jurisdictional requirements.
- h. **Section H - Other Information or Motions** – This section is appropriate for the NNTRC CCN application.

### **Conclusion**

In conclusion, Sacred Wind recognizes the need for the NNTRC to impose some form of registration and regulation on telecommunications carriers operating within Navajo Lands; however, it respectfully requests the NNTRC to consider the extent of that regulation to avoid

duplication and conflicting jurisdictional requirements that could undermine the goal of providing reliable telecommunications services to the Navajo People. Sacred Wind also requests that the NNTRC place an emphasis on developing a solution to the single major impediment to providing these telecommunications services in a timely manner – land use policies.

Respectfully Submitted,

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

John Badal, CEO  
Sacred Wind Communications, Inc.