

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems)	ET Docket No. 03-104
)	
Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems)	ET Docket No. 04-37
)	

**COMMENTS OF THE CHEYENNE RIVER
SIOUX TRIBE TELEPHONE AUTHORITY**

Pursuant to the Federal Communications Commission's ("Commission") notice released February 23, 2004, the Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") herein comments on the *Notice of Proposed Rule Making, In the Matter of Carrier Current Systems, including Broadband over Power Line Systems; Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, ET Dkt. No. 03-104, ET Dkt. No. 04-37 (adopted Feb. 12, 2004) ("Proposed Rule"). The Telephone Authority timely files these comments by May 1, 2004, 45 days from the date of publication of the Proposed Rule in the Federal Register. Broadband Power Line Systems, 69 Fed. Reg. 12,612 (proposed Mar. 17, 2004) (to be codified at 47 C.F.R. pt. 15).

I. INTRODUCTION

The Proposed Rule seeks to amend part 15 of the Commission's rules to adopt guidelines for a new type of carrier current system that provides access to broadband services using electric utility companies' power lines.¹ The Proposed Rule provides:

[b]ecause power lines reach virtually every home and community in the country, we believe that these new systems, known as Access broadband over power line or Access BPL, could play an important role in providing additional competition in the offering of broadband services to the American home and consumers, and in bringing Internet and high-speed broadband access to rural and underserved areas.

Proposed Rule at 2. While this is certainly a laudable goal, the Telephone Authority is concerned that increased use of Broadband Power Line Systems will adversely affect the ability of Indian tribes and tribal entities to provide telecommunication services to their members and non-members within reservation boundaries in ways which are not addressed in the Proposed Rule. More broadly, the Telephone Authority is concerned about the effect that the Proposed Rule may have on tribal self-determination and economic self-sufficiency. The Commission should recognize that Indian tribes and tribal entities are distinct from other telecommunications services providers, and the Commission has a special relationship with tribes and their governmental entities which it does not have with other providers. The Proposed Rule should acknowledge those differences, as well as the Commission's obligation to protect its special relationship with tribes and tribal entities.

¹Part 15 of the Commission's rules governs low-power, unlicensed equipment that operates on a non-interference basis, including broadband power line equipment. *See* Proposed Rule at 4 (citing 47 C.F.R. §§ 15.3(f), 15.5, 15.31(d), (f), (g), (h), 15.33(b)(2), 15.107(a)-(c), 15.109(a), (b), (e) & (g), 15.201(a), 15.207(c), 15.209(a), 15.221).

As discussed in further detail below, the Telephone Authority is particularly concerned that the combination of increased reliance on Broadband Power Line Systems and Voice over Internet Protocol will reduce the Telephone Authority's revenue to the detriment of the Cheyenne River Sioux Tribe ("Tribe") and the Cheyenne River Indian Reservation ("Reservation") community. *See* Section II, *infra*. Because of this concern, the Telephone Authority urges the Commission to conduct government-to-government consultation with the Tribe, the Telephone Authority and with other Indian tribes that request such consultation. *See* Section III, *infra*. Additionally, the use of Broadband Power Line Systems raises difficult jurisdictional issues for those systems which may eventually cross Indian land. *See* Section IV, *infra*.

II. ECONOMIC IMPACT

At the outset, it is critical that the Commission understand and acknowledge that tribal telecommunications services providers are unlike other providers. The Tribe established the Telephone Authority in 1958 as a governmental entity of the Tribe for the purpose of providing telephone service within the Reservation, pursuant to tribal Ordinance 24 (Sept. 10, 1974). The Telephone Authority is thus vested with the same attributes of the Tribe, including sovereign immunity. *See In the Matter of the Cheyenne River Sioux Tribe Tel. Auth.*, CC Dkt. No. 98-6, FCC 02-222 at 3, 5 n.20 (Aug. 21, 2002); *Cheyenne River Sioux Tribe Tel. Auth. v. S.D. Pub. Util. Comm'n*, 595 N.W.2d 604, 606, 607 (S.D. 1999).

Since 1974, the Telephone Authority -- the oldest tribal telecommunications services provider -- has served nearly the entire Reservation, spanning a distance of 95 miles. The Telephone Authority provides high quality telephone service with fiber optic long distance service, computerized billing service, cellular telephone services, equal access conversion, free

fire bar service, emergency 911 services, and 100 percent one-party service in buried cable. The Telephone Authority is constantly upgrading its plants, facilities and equipment. The Telephone Authority also is an internet service provider for the Reservation operating as the corporate entity, Lakota Technologies, Inc. In this capacity, the Telephone Authority has made affordable internet access available to all households and businesses lying within the five exchanges it owns and operates.²

With 50 employees, the Telephone Authority also is the largest employer on the Reservation, which has an overall unemployment rate of 80%. Moreover, the Telephone Authority is a significant source of funding for the Tribe's essential governmental services. All the directors who serve on the Telephone Authority's Board of Directors are members of the Tribe and live on the Reservation. The directors, therefore, have a personal interest in the type and quality of telecommunications service provided on the Reservation. As a member of the Reservation community, the Telephone Authority has strong incentive to ensure that all telephone customers on the Reservation receive state-of-the-art service. Clearly, the Telephone Authority is a vital component of the Reservation economy, in addition to providing consumers with state-of-the-art services.

In the Proposed Rule, the Commission takes the position that Broadband Power Line Systems will "enhance the economic, educational and social well-being of all Americans." Proposed Rule at 2. While the Telephone Authority does not dispute the apparent advantages of Broadband Power Line Systems, it is concerned that the widespread use of such systems on the

²The Telephone Authority owns and operates the Dupree, Eagle Butte, South Dupree, Lapland, and Isabel telephone exchanges.

Reservation could cause a significant decrease in revenue for the Telephone Authority, with the resulting ripple effect upon Reservation unemployment levels and tribal revenues for the provision of essential governmental services. The Telephone Authority's concern in this regard is heightened in light of the increased use of Voice over Internet Protocol.³ If the Telephone Authority loses a certain level of revenue, it may be unable to provide necessary telecommunication services, including emergency 911 services, to the members and non-members of the Reservation.

Due to the high start-up costs for the provision of telecommunications services, especially in Indian country which tends to be rural, unchecked competition may not be in the public interest. To the contrary, unlimited competition for an underserved area may have the effect of prohibiting any of the providers from realizing a profit from serving that area since they split only modest returns due to the limited customer base. The expansion of Broadband Power Line Systems and Voice over Internet Protocol may increase competition on the Reservation, however, the Telephone Authority is not confident that this is in the best interest for the Reservation community. As described above, consumers living within the Reservation clearly benefit from the service that the Telephone Authority provides them. Moreover, Indian reservations are different in character than rural areas located outside of Indian lands due to tribal sovereignty concerns. Unlike other rural telecommunication providers, tribal telecommunication

³On March 29, 2004, the Commission issued a notice of proposed rulemaking on issues relating to services and applications utilizing Internet Protocol ("IP"), including but not limited to, Voice over Internet Protocol services. Review of Regulatory Requirements for IP-Enabled Services, 69 Fed. Reg. 16,193 (proposed Mar. 29, 2004) (to be codified at 47 C.F.R. ch. 1). The Commission noted that customers are beginning to substitute IP-enabled services for traditional communications. *Id.* The Tribe will submit comments on this proposed rulemaking, by the due date of May 28, 2004.

providers enhance tribal sovereignty by contributing financially to tribal governments and helping to sustain reservation economies.

For these reasons, the Telephone Authority requests that the Commission undertake government-to-government consultation with the Tribe, the Telephone Authority and any other Indian tribes which are concerned about the impacts of these new technologies. *See* Section III, *infra*.

III. CONSULTATION

Based upon the Telephone Authority's concern that increased utilization of Broadband Power Line Systems and Voice over Internet Protocol will hinder its ability to provide high quality, state-of-the-art telecommunications services, the Telephone Authority urges the Commission to conduct government-to-government consultations with those tribes that have telecommunications interests and request such consultation.

As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. . . . [It is] our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.

Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). In order to carry out this policy, "[t]he United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights." Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998). Therefore, all agencies, including independent agencies, *id.* § 6 ("[i]ndependent regulatory agencies are encouraged to comply with

the provisions of this order.”), should adhere to “principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” *Id.* § 2.⁴

In light of this clear policy, the Commission should consult with the Tribe and the Telephone Authority in order to determine the consequences of increased use of Broadband Power Line Systems and Voice over Internet Protocol on the Tribe and the Reservation. Government-to-government consultation in this instance is critical to determine the effects of new technologies on Indian tribes. Indeed, the tribal determination of the provision of telecommunications and broadband services within a reservation is a critical aspect of tribal self-governance and self-determination, a policy which the federal government has embraced:

It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Indian Financing Act of 1974, 25 U.S.C. § 1451; *see also* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-70, 471, 472, 473, 474, 475, 476-78, 479 (“IRA”); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n; Indian Health

⁴The Telephone Authority, on several occasions, has urged the Commission to consult on a government-to-government basis with Indian tribes on matters which affect them. *See, e.g., Comments of the Cheyenne River Sioux Tribe Tel. Auth., Smith Bagley, Inc. Petition for Designation as an Eligible Telecomms. Carrier Under 47 U.S.C. § 214(e)(6), FCC 97-419 at 3-4 (July 27, 1999); Comments of the Cheyenne River Sioux Tribe Tel. Auth., In the Matter of W. Wireless Corp. Petition for Designation as an Eligible Telecomms. Carrier and for Related Waivers to Provide Universal Serv. to Crow Reservation, Montana at 1-3 (Oct. 28, 1999).*

Care Improvement Act, 25 U.S.C. §§ 1601(a), 1602; *accord Memorandum Opinion and Order, In the Matter of AB Fillins*, 12 F.C.C.R. 11,755, 11,759 (1997). Congress has acknowledged that, “Indians will never surrender their desire to control their relationships both among themselves and with the non-Indian governments, organizations, and persons.” 25 U.S.C. § 2501(3); *accord* 25 U.S.C. § 2502(e) (Congressional commitment to “Federal relations with the Indian Nations.”).

Consultation regarding the provision of broadband services over powerlines must be individualized. Only by consulting with individual tribal governments on a case-by-case basis can the Commission as a practical matter determine whether an Indian reservation is underserved, and also determine the manner in which that tribal government may wish to address the question of availability of broadband internet services within Indian tribal territory. That way, the Commission may ascertain the degree of service and the manner in which the tribe wishes to address any deficiency in internet access. Government-to-government consultation should be the central aspect in the Commission’s examination of the use of powerlines for broadband services.

Significantly, the Commission should not promulgate a rule that works to the detriment of the federal policy promoting tribal self-determination and economic self-sufficiency. As stated above, the combined effect of the Broadband Power Line Systems and Voice over Internet Protocol may be to deprive the Telephone Authority of its telecommunications business altogether. The Telephone Authority does not own or operate the powerlines on the Reservation. If the Commission permits the provision of broadband service over powerlines, that will deprive the Telephone Authority of revenue it would have otherwise received from the provision of data

transmission services using telecommunications technology. Further, the substitution of Voice over Internet Protocol for regular telephone service subscription will likely deprive the Telephone Authority of a significant customer base. If those individuals who choose to use Voice over Internet Protocol instead of telephone service receive their internet services via broadband transmitted over powerlines, that will eliminate the need for the Telephone Authority completely. The end result will be to transfer the business from the Telephone Authority to the power company which, in the case of the Cheyenne River Indian Reservation, is not a tribally owned and operated entity.⁵ The ripple effect on the Reservation economy and governmental budget could be devastating. Certainly, such a result would not be consistent with the federal policy promoting tribal self-determination and economic self-sufficiency.

IV. JURISDICTION

A. TELECOMMUNICATION SERVICES WITHIN INDIAN COUNTRY.

The Proposed Rule does not address jurisdictional issues regarding Broadband Power Line Systems, presumably because it focused on technical amendments to part 15 of the Commission's rules. Nevertheless, jurisdictional issues arise with respect to the use of Broadband Power Line Systems on utility lines that cross Indian land. In part 15 of its rules, the Commission exercises regulatory authority over low-power, unlicensed equipment, such as broadband power line equipment. Outside of Indian country, states have authority over utility services including power lines. Within Indian country, either the state or the tribe has authority

⁵In the case of the Cheyenne River Indian Reservation, electric power is provided by Moreau-Grand Electric Cooperative, Inc., a state-regulated cooperative.

over utility services, as discussed below. Thus, it is not clear under the Proposed Rule which entity or entities would govern Broadband Power Line Systems that cross Indian land.

In general, jurisdiction within Indian reservation boundaries is a complex issue that depends in large measure upon the nature of the regulated activity, as well as the state's and tribe's interests in the regulated activity. *See Montana v. United States*, 450 U.S. 544, 566 (1981). The issue of jurisdiction is further complicated by the checkerboard land ownership on many reservations, including the Cheyenne River Indian Reservation, in which trust land is interspersed with fee land frequently owned by non-members and non-Indians.

The sovereign powers of an Indian tribe do not generally extend to regulation of activities of non-members of the tribe. *Montana*, 450 U.S. at 565. Nevertheless,

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted).⁶

⁶In *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997), the Supreme Court held that a tribal court lacked jurisdiction over a civil action between non-members arising out of a motor vehicle accident on a state highway which traversed the reservation. The Supreme Court determined that the highway was equivalent to non-Indian fee land for the purpose of assessing the limits of the tribe's jurisdiction. *Id.* Power lines are analogous to the state highway crossing the reservation in *Strate*. However, it is not clear how much weight the status of land as trust or non-trust should be given in the application of the *Montana* analysis following *Nevada v. Hicks*, 533 U.S. 353 (2001). In *Hicks*, the Supreme Court held:

Irrespective of whether power lines which cross reservations are considered trust or non-trust land, tribes have authority over utility providers who enter into consensual relationships with them.⁷ Furthermore, the provision of utility services arguably satisfies the second *Montana* exception because the provision of such services directly affects the political integrity, economic security, and the health and welfare of a tribe. *See Montana*, 450 U.S. at 566. Certainly, the provision of 911 emergency services goes to the issue of the Tribe's health and welfare.⁸

The ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.' It may sometimes be a dispositive factor. . . . But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.

Id. at 360. The jurisdiction scheme governing powerlines is, as a result, anything but clear.

⁷In *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000), the Ninth Circuit held that an electric company's voluntary provision of electrical services on a reservation created a consensual relationship. However, the presence of the first *Montana* exception did not give the tribe unlimited jurisdiction over the electric company, but rather, limited its jurisdiction to "the activities of nonmembers who enter [into] consensual relationships." *Id.* (quoting *Montana*, 450 U.S. at 565) (alteration in original). Because the ad valorem tax on the value of the electric company's property imposed by the tribe was not a tax of the *activities* of a non-member, the Ninth Circuit held that the tax did not come within *Montana*'s first exception. *Big Horn*, 219 F.3d at 951.

Similarly, the court in *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D. N.D. Aug. 26, 2003), held that the rights-of-way obtained by telecommunication providers to offer services on the reservation did not equal a consensual relationship with the tribe. Federal law required the providers to obtain the rights-of-way and provided a statutory mechanism for their acquisition. *Id.*; see Section IV.B., *infra* (discussing rights-of-way statutes and regulations). However, neither of these holdings prohibit tribes from seeking other means of establishing a consensual relationship with non-Indian service providers.

⁸The courts in both *Big Horn* and *Henry* held that the provision of telecommunications services does not implicate the political integrity, the economic security, or the health or welfare of the tribe and, therefore, does not come within the second *Montana* exception to state jurisdiction. *Big Horn*, 219 F.3d at 951; *Henry*, 278 F. Supp. 2d at 1024. Neither court considered the provision of 911 emergency services.

Regardless, if at least one of the two *Montana* exceptions exists, the tribal government properly has jurisdiction over non-member utility providers and, thus, may presumably regulate Broadband Power Line Systems which cross the reservation.

B. SECRETARIAL AUTHORITY TO GRANT RIGHTS-OF-WAY.

Leaving aside the jurisdictional question of who will regulate the provision of Broadband Power Line Systems in Indian country, it is clear that the Secretary of the Interior (“Secretary”) has the authority to grant rights-of-way for telecommunication and other utility services on Indian reservations. *See* 25 U.S.C. § 319 (Secretary has jurisdiction over all “right[s] of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation”);⁹ 25 U.S.C. § 323 (Secretary is “empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across . . . any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations”); 16 U.S.C. § 79 (Secretary may “permit the use of rights of way through the . . . reservations of the United States . . . for electrical plants, poles, and lines for the generation and distribution of electrical power . . . *Provided*, That such permits shall be allowed within or through any said . . . Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such . . . reservation falls and upon a finding by him that the same is not incompatible with the public interest”); 43 U.S.C. § 959

⁹The regulations for granting of rights-of-way over tribal land for telephone lines and other communication facilities are found at 25 C.F.R. § 169.26. The regulations in part 169 do not encompass the Secretary’s granting of rights-of-way on tribal land within a reservation for the purpose of constructing, operating or maintaining transmission lines or other works which fall under the Federal Power Act, 16 U.S.C. §§ 791a-825r. 25 C.F.R. § 169.2(c).

(same); 43 U.S.C. § 961 (“The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power . . . *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest . . .”). In all circumstances, the Secretary must obtain the consent of the Indian tribe before granting a right-of-way across the tribe’s land. 25 U.S.C. § 324.

In addition, many Indian tribes have regulatory codes in place that require utilities providers to obtain a tribal license to operate within reservation boundaries. *See, e.g., Memorandum Opinion and Order, In the Matter of U S WEST Communications and Gila River Telecomms., Inc. Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary of the Commission’s Rules, AAD 91-2, 7 F.C.C.R. 2161 (1992).* The Cheyenne River Sioux Tribe requires that all businesses wishing to operate within the Reservation obtain a business license. Tribal Ordinance 1 (Dec. 13, 1988). Most tribes, including the Cheyenne River Sioux Tribe, also have general jurisdiction to regulate commercial activities on their reservations. Law and Order Code, Cheyenne River Sioux Tribe § 1-4-3 (tribal courts have personal jurisdiction over those who enter the Cheyenne River Indian Reservation); § 1-4-4 (tribal courts have jurisdiction to determine rights to property located within boundaries of Reservation); § 1-4-5 (tribal courts have subject matter jurisdiction over all civil causes of

action and criminal causes of action involving tribal members). The Secretary must implement her authority under 25 U.S.C. §§ 319, 323, 16 U.S.C. § 79, and 43 U.S.C. §§ 959, 961 in a manner consistent with such tribal regulatory codes and in the best interests of the tribes. *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part, dissenting in part), *modified on reh'g*, 782 F.2d 855 (10th Cir.), *modified*, 793 F.2d 1171 (10th Cir.) (adopting concurring/dissenting opinion of Seymour, J.), *cert. denied*, 479 U.S. 970 (1986).

While it is clear that the Secretary may grant rights-of-ways across Indian land with the consent of the tribe, and that tribes have regulatory authority over service providers if one of the *Montana* exceptions exists, neither of these facts diminishes the Commission's responsibility to consult with tribes on issues which affect them, such as the impact of new technologies.

V. CONCLUSION.

Without question, the Telephone Authority supports state-of-the-art telecommunication services in Indian country such as Broadband Power Line Systems. However, the Telephone Authority is concerned about the potential effects this technology and others will have on the Telephone Authority's ability to provide quality telecommunication services to the members and non-members residing on the Reservation, and the resulting effect that might have upon the Tribe's self-determination and economic self-sufficiency. Therefore, the Commission should consult with the Tribe and the Telephone Authority on a government-to-government basis regarding the potential effects of Broadband Power Line Systems and Voice over Internet Protocol on the Tribe and Reservation. Only by engaging in such government-to-government

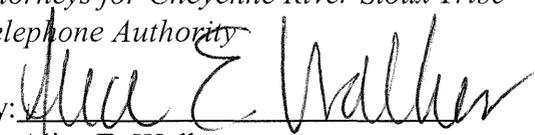
consultation can the Tribe and the Commission fully understand and prepare for the consequences of these new technologies on Indian tribes.

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Respectfully submitted,

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