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October 20, 2017

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: WC Docket No. 11-42
GN Docket No. 17-199

Dear Ms. Dortch:

On October 18, 2017, undersigned counsel, on behalf of Smith Bagley, Inc., met with Trent Harkrader, Jodie Griffin, Allison Baker, and Nathan Eagan in the Wireline Competition Bureau. On October 19, 2017, we met with Jay Schwarz in Chairman Pai's office, Claude Aiken in Commissioner Clyburn's office, Amy Bender in Commissioner O'Rielly's office, and Jamie Susskind in Commissioner Carr's office.

At each meeting, we discussed the FCC's Lifeline program, specifically resellers' continuing ability to access enhanced Lifeline support in Tribal areas. We provided excerpts from the FCC's *Tribal Lifeline Order*¹ (copy enclosed), in which the FCC found that an important reason for adopting Tier 4 enhanced Lifeline support was to create an incentive for facilities-based carriers to build telecommunications infrastructure on unserved and underserved Tribal lands. *See id.* at 12,235-6. That decision, adopted some five years before resellers were permitted to participate in the Lifeline program, recognized the extraordinarily low telephone penetration rates on many Tribal lands, due largely to the absence of modern telecommunications infrastructure.

In SBI's service area, enhanced Lifeline has been vital to its ability to construct a network with over 200 cell sites and to upgrade its network several times over the past 17 years. On information and belief, it has also been an important reason why other facilities-based carriers

¹ Federal-State Joint Board on Universal Service, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking* 15 FCC Rcd 12,208 (2000) ("*Tribal Lifeline Order*").

have entered Tribal lands in Arizona and New Mexico to build facilities and provide competitive service. Entry by facilities-based carriers improves services and choices for people on Tribal lands because such carriers must construct and deploy facilities to gain Lifeline support. Those infrastructure investments create economic multiplier effects that inure to the benefit of citizens living on Tribal lands.

Resellers have no facilities to invest in. When a reseller accesses enhanced Lifeline in a Tribal area, the reseller does not build facilities that compete with incumbents, or build out to unserved areas. Allowing carriers with no facilities to access enhanced Lifeline support discourages investment in new and upgraded infrastructure, contravening the Commission's express intent in its *Tribal Lifeline Order* that enhanced Lifeline is intended to, "create financial incentives for eligible telecommunications carriers to serve, and deploy telecommunications facilities in, areas that previously may have been regarded as high risk and unprofitable."²

Accordingly, SBI recommends limiting eligibility for enhanced Lifeline support to those carriers that can meet the definitions of facilities-based carriers in the instructions for FCC Form 477, or a similar definition.

We also noted Chairman Pai's Dissenting Statement in the Commission's *Second Further Notice*, in which he suggested limiting enhanced Lifeline to only areas with less than 15 people per square mile.³ Although Tribal lands served by SBI have population densities as low as 1 person per square mile, depending on how the Commission measures it, 15 people per square mile could be too low. For example, Sandoval County, New Mexico has a population density of 35.5 people per square mile (see enclosed map), but it borders Bernalillo and Albuquerque, two densely populated metropolitan areas. Rural parts of the county house a number of Tribal lands that have population densities of under 100 but above 15, including the Navajo Nation, Zia Pueblo and Pueblo of Santa Ana. The Kewa Pueblo (formerly Santo Domingo Pueblo), which SBI is not licensed to serve, has a population of approximately 2,500, 99% of whom are Native Americans, but a population density of 1,274, with very difficult demographics. The Kewa people should not be denied enhanced Lifeline due solely to its population density.

² *Tribal Lifeline Order*, *supra*, 15 FCC Rcd at 12,213. Any suggestion that Lifeline support cannot be used to invest in infrastructure is misguided. Lifeline support is provided to a carrier in exchange for the carrier providing an equivalent customer discount on qualifying services. As long as the appropriate customer discount is provided, a carrier is free to use Lifeline support for any legal purpose, including investing and improving its network, and the *Tribal Lifeline Order* seeks to encourage it.

³ Lifeline and Linkup Reform and Modernization, *Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order*, 30 FCC Rcd 7818 (2015) ("Second Further Notice").

Accordingly, SBI asks the Commission to carefully calibrate any limitation on enhanced Lifeline that relates to population density so as to not exclude Tribal lands whose residents are in difficult circumstances and otherwise deserving of enhanced Lifeline support.

We noted the extraordinary differences between Tribal lands in rural areas and America's urban and suburban areas, most of which have multiple facilities-based mobile wireless carriers providing ample competition and options for all consumers without universal service support of any kind. In such areas, resellers play an important role in increasing affordability and service options for low-income populations.

Lastly, we reaffirmed to the Wireline Competition Bureau SBI's recent filings in the Section 706 proceeding stating that broadband is not being deployed on Tribal lands sufficient to meet the Section 706 standard and urging the Commission to take prompt action to promote deployment of broadband facilities.

Should you have any questions, please contact undersigned counsel directly.

Sincerely,



David A. LaFuria
Steven M. Chernoff
Counsel for Smith Bagley, Inc.

Enclosures

cc: Jay Schwarz
Amy Bender
Claude Aiken
Amy Susskind
Trent Harkrader
Allison Baker
Jodie Griffin
Nathan Eagan

C

Federal Communications Commission (F.C.C.)

Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of
Proposed Rulemaking

IN THE MATTERS OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE;
PROMOTING DEPLOYMENT AND SUBSCRIBERSHIP IN UNSERVED AND UNDERSERVED AREAS,
INCLUDING TRIBAL AND INSULAR AREAS

WESTERN WIRELESS CORPORATION, CROW RESERVATION IN MONTANA

SMITH BAGLEY, INC.

CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY

WESTERN WIRELESS CORPORATION, WYOMING

CELLCO PARTNERSHIP D/B/A BELL ATLANTIC MOBILE, INC.

Petitions for Designation as an Eligible Telecommunications Carrier and for
Related Waivers to Provide Universal Service
CC Docket No. 96-45

FCC 00-208
Adopted: June 8, 2000
Released: June 30, 2000

Comments Due: August 7, 2000

Reply Comments Due: August 28, 2000

***12208** By the Commission: Commissioners Ness and Tristani issuing separate statements;
Commissioner Powell approving in part, dissenting in part, and issuing a statement.

***12211** I. INTRODUCTION

1. In this Order, we adopt measures to: (1) promote telecommunications subscribership and infrastructure deployment within American Indian and Alaska Native tribal communities; [FN1] (2) establish a framework for the resolution of eligible telecommunications carrier designation requests under section 214(e)(6) [FN2] of the Communications Act of 1934, as amended (the Act); [FN3] and (3) apply the framework to pending petitions for designation as eligible telecommunications carriers filed by Cellco Partnership d/b/a Bell Atlantic Mobile, Inc., Western Wireless Corporation, Smith Bagley, Inc., and the Cheyenne River Sioux Tribe Telephone Authority.

2. An important goal of the Telecommunications Act of 1996 is to preserve and advance universal service. The 1996 Act provides that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high[-]cost areas, should have access to telecommunications and information services...." [FN4] In the Further Notice of this proceeding, we sought to identify the impediments to increased telecommunications deployment and subscribership in unserved and underserved regions of our Nation, including tribal lands and insular areas, and proposed particular changes

to our universal service rules to overcome these impediments. [FN5] Although approximately 94 percent of all households in the United States have telephone service today, penetration levels among particular areas and populations are significantly below the national average. [FN6] For example, only 76.7 percent of rural households earning less than \$5,000 have a telephone, [FN7] and only 47 percent of Indian *12212 tribal households on reservations and other tribal lands have a telephone. [FN8] These statistics demonstrate, most notably, that existing universal service support mechanisms are not adequate to sustain telephone subscribership on tribal lands.

3. Central to the issues addressed in the Further Notice is the notion that basic telecommunications services are a fundamental necessity in modern society. [FN9] As our society increasingly relies on telecommunications technology for employment and access to public services, such telecommunications services have become a practical necessity. The absence of telecommunications services within a home places its occupants at a disadvantage when seeking to contact, or be contacted by, employers and potential employers. The inability to contact police, fire departments, and medical service providers in an emergency situation may have, and in some areas routinely does have, life-threatening consequences. [FN10] In geographically remote areas, access to telecommunications services can minimize health and safety risks associated with geographic isolation by providing people access to critical information and services they may need. Basic telecommunications services also may provide a source of access to more advanced services. For example, voice telephone is currently the most common means of household access to the Internet, and the same copper loop used to provide ordinary voice telephone service also may be used for broadband services. [FN11] Thus, as use of advanced services among the general population increases, those without basic telecommunications services may find themselves falling further behind in a number of ways. [FN12] In its Falling Through the Net report, the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) found that, while "[o]verall ... the number of Americans connected to the nation's information infrastructure is soaring," the benefits of even basic telecommunications services have not reached certain segments of our population. [FN13]

4. This Order, along with a companion Report and Order and Further Notice of Proposed *12213 Rulemaking [FN14] and Policy Statement [FN15] that we adopt, represents the culmination of an ongoing examination of the issues involved in providing access to telephone service for Indians on reservations. This process began when the Commission convened two meetings in April and July of 1998, which brought Indian tribal leaders and senior representatives from other federal agencies to the Commission to meet with FCC Commissioners and Commission staff. [FN16] The Commission then organized formal field hearings in January 1999 at the Indian Pueblo Cultural Center in Albuquerque, New Mexico, and in March 1999 at the Gila River Indian Community in Chandler, Arizona, at which Indian tribal leaders, telecommunications service providers, local public officials, and consumer advocates testified on numerous issues, including subscribership levels and the cost of delivering telecommunications services to Indians on tribal lands, as well as jurisdictional and sovereignty issues associated with the provision of telecommunications services on tribal lands. [FN17] Based on information and analysis provided during these proceedings, the Commission initiated two rulemakings: one proposing changes to our universal service rules to promote deployment of telecommunications infrastructure and subscribership on tribal lands, [FN18] and the other proposing changes to our wireless service rules to encourage the deployment of wireless service on tribal lands. [FN19]

5. In this Order, we take the first in a series of steps to address the causes of low subscribership within certain segments of our population. The extent to which telephone penetration levels fall below the national average on tribal lands underscores the need for immediate Commission action to promote the deployment of telecommunications facilities in tribal areas and to provide the support necessary to increase

subscribership in these areas. We adopt measures at this time to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands, [FN20] based on the fact that American Indian and Alaska Native communities, on average, have the lowest reported telephone subscribership levels in the country. Toward this end, we adopt amendments to our universal service rules and provide additional, targeted support under the Commission's low-income programs to create financial incentives for eligible telecommunications carriers to serve, and deploy telecommunications facilities in, areas that previously may have been regarded as high risk and unprofitable. By enhancing tribal communities' access to telecommunications services, the measures we adopt are consistent with our obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes *12214 to encourage tribal sovereignty and self-governance. Specifically, by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase their access to education, commerce, government, and public services. Furthermore, by helping to bridge the physical distances between low-income consumers on tribal lands and the emergency, medical, employment, and other services that they may need, our actions ensure a standard of livability for tribal communities. To ensure their effectiveness in addressing the low subscribership levels on tribal lands, we intend to monitor the impact of the enhanced federal support measures and to adjust the measures as appropriate.

6. In response to the requests of Indian tribal leaders, we have adopted a statement of policy that recognizes the principles of tribal sovereignty and self-government inherent in the relationships between federally-recognized Indian tribes and the federal government. [FN21] In conjunction with our efforts to adopt policies that further tribal sovereignty and tribal self-determination, we note the Commission's upcoming Indian Telecom Training Initiative, in which the Commission will bring together experts on telecommunications law and technologies to provide information to tribal leaders and other interested parties to promote telecommunications deployment and subscribership on tribal lands. [FN22]

7. In this Order, we also offer guidance on those circumstances in which the Commission will exercise its authority to designate eligible telecommunications carriers under section 214(e)(6) of the Act. [FN23] We conclude that, consistent with the Act and the legislative history of section 214(e), state commissions have the primary responsibility for the designation of eligible telecommunications carriers under section 214(e)(2). We direct carriers seeking designation as an eligible telecommunications carrier for service provided on non-tribal lands to first consult with the state commission, even if the carrier asserts that the state commission lacks jurisdiction. We will act on a section 214(e)(6) designation request from a carrier providing service on non-tribal lands only in those situations where the carrier can provide the Commission with an affirmative statement from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction.

8. We recognize, however, that a determination as to whether a state commission lacks jurisdiction over carriers serving tribal lands involves a legally complex and fact-specific inquiry, informed by principles of tribal sovereignty, treaties, federal Indian law, and state law. Such jurisdictional ambiguities may unnecessarily delay the designation of carriers on tribal lands. In light of the unique federal trust relationship between the federal government and Indian tribes and the low subscribership levels on tribal lands, we establish a framework designed to streamline the eligibility designation of carriers providing service on tribal lands. [FN24] Under this framework, carriers seeking a designation of eligibility for service provided on tribal lands may petition the Commission for designation under section 214(e)(6). The Commission will proceed to a determination on the merits of such a petition if the Commission determines that the carrier is not subject to the jurisdiction of a state commission. We apply the framework

tribal members in Alaska live, in our view, would unfairly penalize tribal members who live in tribal communities, but for historic or other reasons, do not live on an Indian reservation.

19. We believe that using the BIA regulations to define and identify the geographic areas to which our rule amendments will apply offers significant advantages in the ease of its administration. Specifically, the BIA definitions of "reservation" and "near reservation" [FN40] provide a widely used and readily verifiable standard by which tribes may establish and carriers may verify the eligibility of individuals who qualify for the targeted assistance made available by this Order. [FN41] We note that the classification "on or near a reservation" is used by BIA in administration of its financial assistance and social services programs for Indian tribes. [FN42] If BIA or Congress should modify these definitions in the future, we intend such modifications to apply in equal measure to the classifications adopted in this Order without further action on our part. We believe that this action is consistent with our goal of using a widely used and readily verifiable standard for defining these terms.

C. Bases for Commission Action to Increase Subscribership on Tribal Lands

1. Authority to Take Action to Improve Access to Telecommunications Services and Subscribership on Tribal Lands

20. Section 254(b) of the Act sets forth the principles that guide the Commission in establishing policies for the preservation and advancement of universal service. [FN43] Included among these is the principle that "quality services should be available at just, reasonable, and affordable rates." [FN44] Our authority to take action to remedy the disproportionately lower levels of infrastructure deployment and subscribership prevalent among tribal communities derives from sections 1, 4(i), 201, 205, as well as 254 *12220 of the Act. [FN45] As discussed more fully below, the record before us suggests that the disproportionately lower-than-average subscribership levels on tribal lands are largely due to the lack of access to and/or affordability of telecommunications services in these areas (as compared with cultural or individual preferences that cause individuals to choose not to subscribe). Along with depressed economic conditions and low per capita incomes, [FN46] commenters have identified the following factors as the primary impediments to subscribership on tribal lands: (1) the cost of basic service in certain areas (as high as \$38 per month in some areas); [FN47] (2) the cost of intrastate toll service (limited local calling areas); [FN48] (3) inadequate telecommunications infrastructure and the cost of line extensions and facilities deployment in remote, sparsely populated areas; [FN49] and (4) the lack of competitive service providers offering alternative technologies. [FN50] We note that no tribal representative in this proceeding has suggested that cultural or personal preference accounts for low subscribership levels within or among particular tribes. Based on the substantial Indian tribal participation in this proceeding and in the Commission's proceedings in WT Docket No. 99-266 and BO Docket No. 99-11, we do not have any evidence to conclude that cultural or personal factors generally explain low subscribership levels on tribal lands. [FN51]

*12221 21. We conclude that the unavailability or unaffordability of telecommunications service on tribal lands is at odds with our statutory goal of ensuring access to such services to "[c]onsumers in all regions of the Nation, including low-income consumers." [FN52] In addition, the lack of access to affordable telecommunications services on tribal lands is inconsistent with our statutory directive "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient Nationwide ... wire and radio communication service, with adequate facilities at reasonable

likely to be disconnected; [FN141] (3) beneficiaries of enhanced support must be income eligible; and (4) qualifying individuals can use only as much support as is needed to cover the cost of the individuals' basic service rate less \$1, we are persuaded that the level of support provided here does not exceed that required to preserve and advance universal service.

52. We also believe that our adoption of enhanced Lifeline support will encourage: (1) eligible telecommunications carriers to construct telecommunications facilities on tribal lands that currently lack such facilities; (2) new entrants offering alternative technologies to seek eligible telecommunications carrier status to serve tribal lands; and (3) tribes, eligible telecommunications carriers, and states to address impediments to increased penetration that are caused by limited local calling areas. We discuss each of these in greater detail below.

53. Infrastructure Development. By providing carriers with a predictable and secure revenue source, the enhanced Lifeline support just discussed, in conjunction with the expanded support that we provide under the Link Up program, [FN142] is designed to create incentives for eligible telecommunications carriers to deploy telecommunications facilities in areas that previously may have been regarded as high risk and unprofitable. We note that, unlike in urban areas where there may be a greater concentration of both residential and business customers, carriers may need additional incentives to serve tribal lands that, due to their extreme geographic remoteness, are sparsely populated and have few businesses. In addition, given that the financial resources available to many tribal communities may *12236 be insufficient to support the development of telecommunications infrastructure, [FN143] we anticipate that the enhanced Lifeline and expanded Link Up support will encourage such development by carriers. In particular, the additional support may enhance the ability of eligible telecommunications carriers to attract financing to support facilities construction in unserved tribal areas. Similarly, it may encourage the deployment of such infrastructure by helping carriers to achieve economies of scale by aggregating demand for, and use of, a common telecommunications infrastructure by qualifying low-income individuals living on tribal lands.

54. The enhanced Lifeline and Link Up support adopted here also may help to foster principles of tribal sovereignty and tribal self-determination in two respects. First, the availability of enhanced federal support may provide additional incentives for tribes that wish to establish tribally-owned carriers to do so by diminishing the financial risk associated with providing service to low-income customers on tribal lands. Second, to the extent that tribal leaders can aggregate service requests of large numbers of qualifying individuals eligible for enhanced support, they may have more control in choosing the carriers serving their communities and increased bargaining power in their negotiations with carriers seeking to provide universal service on tribal lands.

55. To the extent that the cost to extend facilities, due to the geographic remoteness of a location or other geographic characteristics, is extraordinarily high, [FN144] we recognize that the level of support provided here, in combination with existing levels of universal service high-cost support, may not always be sufficient to attract the necessary facilities investment. Accordingly, although we anticipate that the measures adopted in this Order will address a significant number of the obstacles to subscribership on tribal lands identified on the record before us, we anticipate that additional regulatory steps may be necessary to encourage the deployment of facilities in areas where the cost of deployment is extraordinarily high. We will address these issues, in consultation with the Joint Board, when we consider reform of the rural high cost mechanism, and implementation of section 214(e)(3) of the Act. [FN145] For this reason, we do not adopt additional measures at this time to address the problem of inadequate *12237 facilities deployment in the most geographically remote tribal areas. [FN146]

Sandoval County, NM
Pop Density 35.5 (2010 Census)

