

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C.

RECEIVED

APR 19 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-45

In the Matter of)
)
Federal-State Joint Board)
on Universal Service)
)
Petition of Smith Bagley, Inc.)
to redefine Local Exchange Carrier)
Service Area Definitions of)
Century Tel of the Southwest, Inc.)
Within the State of New Mexico)
as Set Forth in Part 36 of the)
Commission's Rules)

To: Chief, Common Carrier Bureau

MOTION TO ACCEPT LATE FILED REPLY COMMENTS

Smith Bagley, Inc. ("SBI"), by counsel, hereby submits this Motion to Accept Late Filed Reply Comments in the above-captioned proceeding.

In a *Public Notice* dated March 13, 2002, DA 02-602, the Commission established that Comments were due in the above-captioned proceeding on or before April 4, 2002 and that Reply Comments were due on or before April 15, 2002.

Comments in the above-captioned proceeding were filed by the New Mexico Exchange Carrier Group ("NMECG") and CenturyTel of the Southwest, Inc. ("CenturyTel") on April 4, 2002. NMECG and CenturyTel did not serve counsel for SBI with a copy of their comments and SBI did not learn that such comments had been filed until the afternoon of April 16th.

A grant of this request will ensure the Commission is provided with adequate information to make a decision that will serve the public interest. No other party will be prejudiced by a grant

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of this request, since the FCC has designated the proceeding as “permit but disclose”. SBI is permitted to present its views to the agency on this matter at any time during its consideration.

Respectfully submitted,

SMITH BAGLEY, INC.

By: 

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REPLY COMMENTS OF SMITH BAGLEY, INC.

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TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
I. Background	2
II. SBI's Will Offer Service Throughout its Designated ETC Service Area	5
III. The PRC Determined That SBI Will Not Engage in Cream Skimming	6
IV. Concerns About Mobility Are Not Properly Before This Commission, But In any Event Must Be Rejected	7
V. The Commuters' Remaining Claims Can Be Dealt With Summarily	9
VI. Conclusion	13

Summary

Smith Bagley, Inc. (“SBI”) sees little that is new, and nothing that has merit, in the comments submitted by the New Mexico Exchange Carrier Group and CenturyTel, Inc., in this proceeding. By raising numerous issues that are clearly outside the scope of this proceeding, the commenters are continuing their strategy of seeking additional delays to prevent consumers from experiencing the benefits of competition.

First, commenters claim, incorrectly, that SBI is not required to provide service throughout its designated ETC service area. Not only is this not true, but SBI also has committed to try to serve additional areas outside of its ETC service area. Second, commenters raise “cream skimming” even though this issue was removed in the stipulation adopted in the New Mexico proceeding. Finally, the commenters’ remaining claims - concerning mobility, customer billing address, local usage requirements, coverage gaps, corresponding public benefits, and study area disaggregation - are without merit and, in any event, are outside the scope of this proceeding.

As demonstrated herein, there is no issue of importance for which a proceeding in this matter should be opened. Accordingly, the Commission should decline to open a proceeding and permit the service area definitions recommended by the PRC to become effective without further action.

**Before the
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Washington, D.C.**

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To: Chief, Common Carrier Bureau

Reply Comments of Smith Bagley, Inc.

Smith Bagley, Inc. ("SBI"), by counsel, hereby submits the following Reply Comments pursuant to the Commission's Public Notice in the above captioned proceeding.¹ The New Mexico Exchange Carrier Group ("NMECG") and CenturyTel, Inc. ("CenturyTel") filed comments. The Commission is required to determine, from SBI's application and the comments submitted herein, whether a proceeding should be opened to determine whether the service area of CenturyTel as proposed by the New Mexico Public Regulatory Commission ("PRC") should be adopted.

As amply demonstrated by the comments submitted by NMECG and CenturyTel, and as set forth below, there is no issue of importance for which a proceeding in this matter should be opened. The Commission should concur with the PRC's proposed service area definition without further action.

¹ Smith Bagley, Inc. Petitions to Redefine the "service area" of CenturyTel for the Southwest, Inc. in the State of New Mexico, *Public Notice*, DA 02-602 (Mar. 13, 2002).

I. Background

In April of 1999, SBI filed an application for Eligible Telecommunications Carrier (“ETC”) status with the PRC, which was granted in February of 2002. SBI proposed to serve the Zuni and Ramah reservations, with good reason. SBI understands that Native Americans in Arizona and New Mexico have long been neglected by incumbent LECs, and that telephone penetration on the reservations is at roughly 50%, far below the national average. The opportunity for a competitive carrier to drive telephone penetration and infrastructure development in this area seemed obvious.

CenturyTel, the only incumbent LEC affected by SBI’s application, did not participate in the New Mexico proceeding. The NMECG intervened, but made clear that it did not oppose SBI’s application. NMECG did not present a witness, or introduce any evidence into the record. Its purpose in participating was to purportedly ensure that the PRC considered important issues which could affect its member companies, including CenturyTel.

Following two years of litigation, SBI and the PRC staff agreed to a stipulation as a means of avoiding substantial additional delays. In the stipulation, SBI agreed to undertake a level of monitoring of its subscriber usage that was far more than that which was necessary to accomplish the intended purpose, *i.e.*, to deter subscribers living outside the ETC area from taking service.

SBI also agreed to expand its ETC service area beyond the Zuni and Ramah reservation boundaries. NMECG had alleged, without presenting any evidence, that the reservations were its lowest cost areas. In order to alleviate NMECG’s concerns about cream skimming and to move the process forward, SBI agreed to expand its service area beyond the reservation lands and serve the remaining portions of CenturyTel’s “Western Exchanges” in the region (CenturyTel has a

noncontiguous exchanged named Pecos in the eastern part of the state), which NMECG alleged were its higher cost areas. By extending its service area, SBI satisfied the PRC's concern about cream skimming, especially since CenturyTel would have an opportunity to disaggregate its support by May 15, 2002, which should dissolve the issue. SBI's concessions were substantial - and done with great resistance. Yet in the end, NMECG refused to sign on to the stipulation and the matter went before Hearing Examiner William Herrmann.

After carefully considering the substantial evidence that SBI presented into the record in the proceeding, along with recommendations from the PRC staff that participated, Judge Herrmann wrote a Recommended Decision to the PRC.² For purposes of this proceeding, the most important findings made by the PRC are the service area definitions adopted for SBI and CenturyTel. As stated above, CenturyTel's service area was divided in two. The Western Exchanges are now one service area and the Pecos Exchange is the other service area.

The PRC has defined SBI's service area as follows:

[t]o include the Zuni, Ramah, and Fence Lake wire centers. In addition, SBI's ETC service area shall be defined consistent with that portion of its existing service contour within the Pine Hill, Vanderwagon, Gallup and Grants wire centers.³

In addition, SBI has committed to use commercially reasonable efforts to attempt to arrange with the A-side cellular provider for the provision of wireless communications service in those portions of the Vanderwagon and Pine Hill wire centers which are outside of SBI's service area.

² Smith Bagley, Inc., Utility Case No. 3026, Final Order (Feb. 19, 2002); Recommended Decision of the Hearing Examiner and Certification of Stipulation at pp. 14, 17 (Aug. 14, 2001) ("Recommended Decision").

³ Recommended Decision at 14, 17.

Following months of consideration, the PRC substantially adopted the Recommended Decision, except for the provision that required SBI to conduct detailed monitoring of its subscriber usage to limit mobility. The PRC understood two things. First, that limits on mobility were rejected in another pending application before the PRC. Second, and more important, the proposed monitoring would serve no productive purpose, and would not increase the likelihood that either subscribers or SBI would comply with existing rules. Therefore, it was rejected. NMECG did not appeal the PRC's decision.

With respect to the incumbent's service area definition, Judge Herrmann recommended that CenturyTel's service area be divided into two. The so-called "Western Exchanges", covered by SBI, would comprise one service area, and the Pecos Exchange would be defined as a second service area. Based on substantial evidence, Judge Herrmann concluded:

SBI has not attempted to cream skim CenturyTel's service area and its commitment to cover the great majority of CenturyTel's Western Exchanges satisfies any such concern. SBI is proposing to bring ETC service to as much of CenturyTel's Western Exchanges as possible and it is not targeting only the lowest cost exchanges within CenturyTel's service area.⁴

NMECG's participation in the New Mexico proceeding did accomplish one thing. It successfully forestalled competitive entry for its member company, CenturyTel, by at least two years, at great cost to the citizens of New Mexico that SBI is prepared to serve. NMECG and CenturyTel come now before this Commission in a proceeding limited to service area definition and essentially request reversal of the PRC's entire decision. Put simply, CenturyTel hopes to

⁴ *Id.* at 18.

open a lengthy proceeding to delay the introduction of competitive telephone service to an area that only has 50% penetration.

The commenters have discussed a host of issues which are not properly considered in this proceeding. Most were decided by the PRC and cannot be overturned by this Commission. Others relate to matters on which the Commission has resolved in numerous proceedings over the past several years. While requesting the Commission to ignore matters outside the scope of this proceeding, SBI does provide brief answer to most of the issues which were improperly raised.

II. SBI's Will Offer Service Throughout its Designated ETC Service Area.

At the outset, it is important that the Commission not become confused by NMECG's claim that SBI is not required to provide service throughout its ETC service area.⁵ NMECG incorrectly believes that SBI's ETC service area is identical to the Western Exchanges.

To be clear, and as set forth above, CenturyTel's service area is the Western Exchanges. SBI's service area is an area which includes almost all of the Western Exchanges. SBI is only required to serve its ETC service area. In addition, SBI has committed to try to serve additional areas *outside of its ETC service area* in the Western Exchanges.⁶ NMECG is incorrect that SBI's commitment to use commercially reasonable efforts applies to any area within its authorized ETC service area.

In sum, SBI is in fact required to provide service throughout its ETC service area as required by the Act and the rules.

⁵ NMECG Comments at 6.

⁶ Recommended Decision at 17.

III. The PRC Determined That SBI Will Not Engage in Cream Skimming.

By stipulating that it would serve CenturyTel's Western Exchanges, SBI took the cream skimming argument off the table. Judge Herrmann heard testimony from SBI and PRC staff on the issue, considered multiple rounds of pleadings from the parties, and made findings of fact and conclusions of law on the issue, which were adopted by the PRC. *See supra* n.2. The PRC's Final Decision is now a final unappealable order.

NMECG attempts to reargue here, without citing any authority, that because SBI is cream skimming because its proposed service area does not match exactly that of CenturyTel's. Holding aside that NMECG presented no evidence below, or here, NMECG did allege that the reservation lands on which SBI originally proposed to serve, were its lowest cost areas. By agreeing to serve the allegedly "high cost" portions of the Western Exchanges, SBI removed both the PRC staff and the Hearing Examiner's concerns about cream skimming.

The commenters also quibble that the PRC did not define SBI's authorized ETC service area to match exactly that of CenturyTel's and thus cream skimming may occur. In these remote desert areas outside its ETC service area, SBI has agreed to use commercially reasonable efforts to provide service to the very few people who live there. As a result, Judge Herrmann found:

The PRC is empowered to designate SBI's ETC service area boundary consistent with the public interest and that there is no rule requiring such boundary to match exactly that of the incumbent LEC.⁷

⁷ *Id.*

SBI is not aware of, and commenters do not cite, any law mandating that the service areas of an incumbent and its competitor must be identical to avoid cream skimming. Moreover, the Commission recognized that a competitive carrier need not serve an entire LEC study area when it designated Western Wireless Corporation (“WWC”) for some but not all of the affected incumbent LEC study areas.⁸

Finally, as a practical matter, the areas that NMECG has made issue of are so small and sparsely populated as to have *de minimis* effect on a cream skimming analysis. There is absolutely no legal or practical basis on which to adopt commenters’ unsupported allegations concerning cream skimming.

IV. Concerns About Mobility Are Not Properly Before This Commission, But In Any Event Must Be Rejected.

The commenters raise concerns about mobility which have been decided by a final unappealable order of the PRC. There is nothing in Section 54.207(c) which even remotely provides this Commission with authority to rule on mobility restrictions in the context of redefining LEC service areas. Accordingly, comments on this issue must be ignored.

Because commenters have distorted the issue, SBI is compelled to provide brief reply. After the hearing and after the record was closed, NMECG presented its mobility concerns for the first time in its brief to the Hearing Examiner. The PRC staff picked up on NMECG’s suggestion that mobility be limited, and seven days later recommended mobility restrictions to the Hearing Examiner in its brief. SBI then objected that there was no record evidence in the

⁸ See also, Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168, Order at 6-7 (Texas Pub. Util. Comm’n, rel. Oct., 2000).

proceeding to support such a proposal and that NMECG's attempt to sandbag the proceedings for purpose of delay should be ignored. The Hearing Examiner scheduled supplemental proceedings.

In order to shorten what looked to be interminable delay, SBI agreed to limited mobility restrictions as part of a stipulation, notwithstanding that would serve absolutely no useful purpose.

Apparently Judge Herrmann agreed, because in his Recommended Decision he stated:

The plan to limit mobility as detailed in the Stipulation may not serve the public interest. This issue is presently before the Commission in NMPRC Case No. 2921. In that case, a Recommended Decision found that restrictions on mobility were not in the public interest... The Commission may, as a matter of policy, find that restrictions on mobility should not be imposed.⁹

Judge Herrmann's then quoted from the Recommended Decision in Case No. 2921, in which the Hearing Examiner concluded:

The mere possibility that a customer might use Western Wireless' service in an inappropriate or potentially unlawful manner does not outweigh the potential anti-competitive effects that placing limits on the service could have.¹⁰

SBI agreed to mobility restrictions in the stipulation, and was constrained to not oppose it before the Hearing Examiner, despite its obvious prior objection. The PRC found mobility restrictions to not serve the public interest and rejected that portion of the stipulation.

CenturyTel's concern about mobility completely ignore SBI's obvious economic incentive to ensure that its customers use phones within the ETC service area, since high cost support must be used within that area. SBI is harmed if substantial supported minutes are used in areas where high cost support cannot be spent to construct additional facilities. If new channels need to be

⁹ Recommended Decision at 19.

¹⁰ *Id.*

added in an unsupported area as a result of improper usage, SBI must cover that cost on its own. Thus, SBI has every incentive to ensure that usage is substantially confined to the ETC area.

SBI is not aware of any state commission that has placed mobility restrictions on a competitive ETC. Indeed, mobility is a core element of a CMRS carrier's competitive offering. Holding aside that consideration of this matter is well outside the scope of this proceeding, SBI can imagine few actions that this Commission could take which would do greater harm to competition for customers between wireless and wireline carriers more than imposing a mobility restriction.

V. The Commenters' Remaining Claims Can be Dealt With Summarily.

The commenters raise a variety of issues which do not warrant more than a passing reply. Once again, SBI is constrained to note that these issues are outside the scope of this proceeding and should never have been raised.

A. *Billing Address.* NMECG is concerned that SBI could somehow receive a windfall because there is no requirement that a customer's billing address be located in the service area in which service is primarily used.¹¹ The law is quite clear on this point. Section 54.307(b) of the FCC's rules mandates that it is the billing address which determines a customer's location. CenturyTel's suggestion that SBI is going to "divert funds" was rejected below and seems to suggest that SBI intends to intentionally break the law.

B. *Local Usage.* CenturyTel objects to the fact that SBI's basic service offering does not offer unlimited minutes. SBI is at a loss to understand why CenturyTel thinks SBI would

¹¹ Again, SBI is constrained to note that this issue is outside the scope of this proceeding.

propose a usage plan which nobody would want, or would cause existing customers to drop SBI's service and return to CenturyTel. In fact, SBI's proposed local usage offering is competitive with CenturyTel's and offers customers a meaningful choice of services.

For example, a customer using SBI's service can make toll-free calls throughout SBI's network. CenturyTel's so-called "unlimited" plans provide toll free calling to a very small area. Thus, customers are forced to pay intra- and inter-LATA toll for many calls which are included in SBI's offering. SBI also offers a substantial list of health, safety, educational, and community organizations which can be called toll- and airtime-free. So a customer may decide that the combination of mobility, larger calling area, minutes offered, and the ability to make an emergency call when a landline phone is not nearby may make SBI's service worth choosing.

CenturyTel's reference to Western Wireless' offering on the Pine Ridge reservation is misplaced. Western has chosen to offer an unlimited calling plan with a local calling area that generally mimics the ILEC. A customer choosing Western Wireless' unlimited plan will pretty much get what the ILEC is already offering. Western's customers may choose a different plan from Western Wireless, one that includes mobility, but not unlimited minutes. SBI has decided not to offer a plan that duplicates LEC service. Its experience over many years is that customers don't want it. If customers clamor for fixed wireless service with unlimited minutes, SBI may well provide it. The commenters want SBI to mimic its service so as to limit customer choice and dampen SBI's competitive advantage.

C. *Coverage Gaps.* CenturyTel's complaint about coverage gaps ignores several fundamental facts.

- Without high cost support, there is no business plan which supports filling many coverage gaps. Indeed, it is likely that even today CenturyTel would not have initiated service to a substantial part of the Western Exchanges without high cost support.
- Since SBI is required by law to use support for the provision, maintenance and upgrading of facilities, there is every incentive for the company to fill gaps so as to ensure that every customer perceives SBI's service as superior.
- SBI is not required to currently cover the entire service area - it is the high cost support to be provided which will enable SBI to provide competitive service.
- CenturyTel was not required to have complete coverage of its service area when it began receiving support - indeed it was high cost support which enabled CenturyTel to construct service to the roughly 50% of Zuni residents that subscribe today.
- By its very nature a landline service has far more gaps than a mobile service. A mobile phone can be used in substantially all of a cell site's coverage area. A landline phone can only be used at the end of the company's lines. For a residential customer, service is only offered at a single point (or series of points within a residential dwelling. Virtually every other spot within a landline carrier's service area is "gap" unless a customer incurs additional charges at a pay phone, or switches to a mobile offering.

Fundamentally, CenturyTel misunderstands the issue.

D. *Corresponding Public Benefit.* CenturyTel is concerned that SBI's designation could increase demands on the federal high cost universal service fund without any corresponding public benefits.¹² CenturyTel implies that SBI will burden the fund, while ignoring the fact that payments to competitive ETCs are not within the cap and do not affect support paid to incumbent carriers.¹³

¹² CenturyTel Comments at p.5.

¹³ LECs may disaggregate their study areas to reallocate high-cost support payments pursuant to the FCC's *Fourteenth Report and Order* and its recent *MAG Order*. See *Fourteenth Report and Order*, 16 FCC Rcd 11244, 11302 (2001); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers Federal-State Joint Board on Universal Service, Second Report and Order*

As stated above, if SBI cannot gain customers, or keep them, then it seems unlikely that its proposed offerings will increase demands on the high cost fund.

To CenturyTel's point, however, SBI has amply demonstrated the public benefits of its proposed service offering, branded VisionOne™, which has now been offered to subscribers in Arizona for approximately ten months. In that time, over 15,000 new subscribers have taken SBI's service, which is identical to that SBI proposes to bring to New Mexico. Most of SBI's new subscribers have never had a telephone.

In compliance with its obligation to advertise the availability of service, SBI has made outreach efforts never before seen in this area. The company has invested in a mobile sales office which travels to customers in remote areas and provides them with a full-service facility in places that cannot support a storefront operation. People who would never be able to travel long distances to a telephone company's office find that the company comes to them.

SBI's success in Arizona has already resulted in numerous instances of people reporting benefits they have never before experienced. Within the Zuni Nation, telephone subscribership remains below 50%, suggesting that perhaps the question of what public benefits CenturyTel has brought to the area should be examined. Notwithstanding that it has to build a network, enter as a new competitor, deal with the incumbent's nearly two year head start in receiving enhanced Lifeline benefits, and overcome other operational obstacles, SBI is committed to bring service to this underserved area of New Mexico. The company's record of keeping its promises in Arizona

and Further Notice of Proposed Rulemaking, 25 CR 1 (¶ 143) (rel. Nov. 8, 2001).

is compelling evidence of the public benefit that can be achieved once SBI's service rolls out this summer.

E. *Disaggregation.* CenturyTel seems to be asking for an extension of time to get its plan of disaggregation approved, again a request that is well beyond this proceeding. CenturyTel presents no argument as to why it should receive special treatment. Other competitive ETCs have been permitted to commence their ETC service offerings without waiting for an incumbent's plan of disaggregation to be approved. CenturyTel speaks of how carefully the issue must be considered - yet it has had nearly a year to do so. Nothing in this proceeding will deprive CenturyTel of the "full period" which it seeks. CenturyTel's request is nothing more than another attempt to delay competition and should be summarily rejected.

VI. Conclusion

CenturyTel's passive-aggressive posture throughout the proceeding below, has enabled it to enjoy over 18 months of exclusive access to the FCC's enhanced Lifeline benefits, within which it can offer subscribers telephone service at greatly reduced rates. That's quite a head start, and if SBI is not successful at gaining customers, then it will certainly not receive substantial high cost support for its three-year effort at obtaining ETC status.

SBI is prepared to offer competitive service to the citizens of New Mexico. The company is very excited about the opportunity to repeat its successful VisionOne™ program on the Zuni and Ramah reservations.

For the reasons set forth above, SBI respectfully requests the Commission to not open a proceeding in this matter and permit the service area definitions recommended by the PRC to become effective without further action.

Respectfully submitted,

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