

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Rulemaking to Define	)	RM No. 10522
“Captured” and “New” Subscriber Lines	)	
for Purposes of Receiving Universal	)	
Service Support Pursuant to 47 C.F.R.	)	
§ 54.307 et seq.	)	

**COMMENTS OF SMITH BAGLEY, INC.**

Smith Bagley, Inc. (“SBI”), by its counsel and pursuant to the Commission’s *Public Notice and Order*, hereby submits its comments in response to the Petition for Expedited Rulemaking (“Petition”) filed July 26, 2002 by the National Telecommunications Cooperative Association (“NTCA”).<sup>1</sup> For the reasons set forth below, the Petition should be denied.

**I. Introduction.**

SBI is licensed to provide Cellular Radiotelephone Service and Personal Communications Service (“PCS”) in Arizona, New Mexico, Utah and Colorado. The company has served rural Arizona for over twelve years and obtained cellular licenses in New Mexico during the past several years pursuant to the FCC’s unserved area rules. Within the past year, SBI has obtained PCS licenses to serve portions of the Flagstaff, Arizona BTA and the Farmington, New Mexico BTA to increase its coverage on Native American lands. Currently, the company provides service to the following reservations in Arizona and New Mexico: Navajo,

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<sup>1</sup> National Telecommunications Cooperative Association Petition for Expedited Rulemaking (filed July 26, 2002); *see* Public Notice, Report No. 2567 (Cons. & Govt. Aff’s Bur. rel. Aug. 8, 2002). The deadline for filing comments was extended by *Order*, DA 02-2214 (WCB rel. Sept. 9, 2002).

White Mountain Apache, Hopi, Zuni, and Ramah. SBI's licensed area includes over 75,000 Native Americans.

SBI has the largest Native American service territory of any CMRS carrier in the United States, an area of over 25,000 square miles. In response to the Commission's call for wireless carriers to propose innovative solutions for Native American lands, which have been traditionally plagued by low penetration rates, SBI applied for ETC status on Native American reservation lands in Arizona and New Mexico in 1999. In December of 2000, the Arizona Corporations Commission ("ACC") granted ETC status on that portion of the Navajo reservation that SBI serves, along with the Hopi and White Mountain Apache reservations. Following the FCC's service area redefinition proceeding under Section 54.207(b), SBI's ETC grant became final in May 2001, and SBI began offering its new service, called VisionOne™, on reservation lands within its ETC service area.

In fifteen months since the program commenced, SBI has signed up over 23,000 new subscribers, most of whom have never had a telephone. On Navajo lands, where the penetration rate was 27%, SBI has significantly increased the number of households that now have basic communications services.

SBI has received high-cost support for all of its lines within its ETC service area, as contemplated by the FCC's rules. High-cost support has enabled the company to significantly improve its infrastructure on Native American lands in ways that it would not be able to in the absence of support. For example, the company has constructed, or is in the process of constructing, seven new cell sites that it would not have constructed but for the receipt of high-cost support.

The enhanced Lifeline and Link-Up programs, which benefit Native Americans, has enabled the company to provide service at a very low price — which means that usage levels on SBI's network have increased dramatically. Once again, high-cost support has enabled the company to add channel capacity to meet the increased demand.

SBI has purchased a new switching platform which will hasten the advent of digital service on Native American lands where the company provides cellular service. Rolling out digital in cellular service areas will enable the company to improve service to its customers in various ways, *e.g.*, by significantly increasing the number of included minutes in its VisionOne™ plan. In areas where the company offers PCS, digital services are already available and SBI plans to roll out its VisionOne™ rate plan as soon as grants of ETC status are finalized in Utah, New Mexico, and Arizona. In one year, SBI has committed to spend well over \$6.5 million in infrastructure improvements that would not have been spent but for the receipt of high-cost support. This figure is more than double the amount it has received in high-cost support in the first year, and does not come close to representing what SBI believes necessary to invest in the coming years so as to deliver high-quality telecommunications services to Native American lands.

Prior to obtaining ETC status, SBI constructed several cell sites on Native American lands to provide basic coverage. Without high-cost support, there is no question that the demographics and geographic characteristics of these lands would not support additional infrastructure investment. SBI would only be able to increase channel capacity if necessary, but would not be able to add infrastructure to meet the needs of most Native Americans or to offer a

service that is competitive with the ILECs in the region, other than in the lowest-cost areas on the reservation.

## **II. NTCA's Proposed Rule Change is Anticompetitive.**

NTCA's proposed rule change is part of a broad strategy to eliminate competition from competitive ETCs ("CETCs") before they can receive sufficient high-cost support to demonstrate the public benefits of funding competitive networks in high-cost areas, and before CETCs make any significant inroads in ILEC monopolies. NTCA's petition seeks to accomplish three things: (1) cut high-cost support to existing CETCs so severely that no additional facilities could be constructed; (2) completely shut off new carriers from applying for ETC status; and (3) increase pressure on the FCC by portraying it to Congress as not properly administering the universal service support program.

Portability of support is a core mechanism for fulfilling Congress' mandate 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, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>2</sup>

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<sup>2</sup> 47 U.S.C. § 254(b)(3).

Central to achieving portability is the principle that support be distributed in a competitively neutral fashion. The Fifth Circuit could not have been more clear in rejecting ILEC attacks on portability as an attempt to obtain “protection from competition, the very antithesis of the Act....[P]ortability is not only consistent with predictability, but also is dictated by principles of competitive neutrality.”<sup>3</sup> NTCA’s attack on portability must be rejected.

**III. The Rules Proposed by NTCA Contravene Congressional Mandate, the Joint Board’s Recommendation, and the FCC’s Rules.**

NTCA’s proposal would all but eliminate support to CETCs. As explained below, the Commission has adopted ample protections to ensure ILECs will not suffer shortfalls in support during the transition to a more rational, transparent system of universal service subsidies. Drastically cutting high-cost support currently available to SBI, while maintaining these protections for ILECs, would defeat the intent of Congress and the Commission to promote competition and extend basic service to all Americans.

In adopting rules implementing its Congressional mandate, the FCC properly provided inducements for competitive carriers to request ETC status, such as for example, portability of support,<sup>4</sup> payment on all lines in a high-cost area,<sup>5</sup> and disaggregation of support.<sup>6</sup> Section 54.307(a)(1), the key rule on portability of high-cost support, could not be more clear:

A competitive eligible telecommunications carrier serving loops in the service area of a rural incumbent local exchange carrier, as that term is defined in §54.5 of this chapter, shall receive support *for*

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<sup>3</sup> *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000).

<sup>4</sup> *See* 47 C.F.R. § 54.307(a).

<sup>5</sup> *See* 47 C.F.R. § 54.307(a)(1).

<sup>6</sup> *See* 47 C.F.R. § 54.315.

*each line it serves* in a particular service area based on the support the incumbent LEC would receive for each such line. (Emphasis added.)

Moreover, Section 54.307(b) states in pertinent part that “[I]n order to receive support pursuant to this subpart, a competitive eligible telecommunications carrier *must report* to the Administrator the number of working loops it serves in a service area serving a rural LEC service area....” (Emphasis added.) Neither of these very specific rules evidences any uncertainty about how a CETC receives support or what is required to be reported to USAC for the support to be calculated and disbursed.

The FCC has consistently interpreted the rule to require payment of high-cost support on all lines, even second lines. In its *First Report and Order*, the Commission ruled:

We do not adopt, at this time, a rule stating that a wireless carrier may receive support only if the wireless carrier is a customer’s primary carrier and the customer pays unsubsidized rates for its wireline service....[I]n light of our decision above that, under the modified existing high cost mechanism all business and residential connections will be supported, we conclude that such a rule is not necessary at this time.<sup>7</sup>

In October 2001, the Commission reaffirmed, stating:

Although petitioners allege that competition may erode their customer base forcing higher rates to remaining customers, such a result is highly speculative. We have no reason to believe that a significant number of consumers will terminate their wireline service as a result of Western Wireless’ designation as an ETC....In addition, the *federal universal service mechanisms support all lines served by eligible carriers in high-cost and rural areas*. Thus, to the extent that the competitive ETC provides new lines to customers that are currently unserved *or second lines to customers*

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<sup>7</sup> *First Report and Order, supra*, 12 FCC Rcd at 8859.

*that have service*, there will be no reduction in support to the incumbent carrier. (Emphasis added.)<sup>8</sup>

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<sup>8</sup> *Federal-State Joint Board on Universal Service, Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Order on Reconsideration*, 16 FCC Rcd 19144, 19152 (2001).

Far from being a “loophole”, full portability of support to a CETC is central to the Commission’s efforts to drive infrastructure investment in rural areas and ensure competitive choices for consumers, in furtherance of the universal service goals set forth by Congress. The essential advantage that ILECs have in rural areas is their embedded network that serves most of the population and facilitates their monopoly position.<sup>9</sup> That monopoly cannot be broken unless support is provided to a CETC so that sufficient infrastructure can be built so as to provide rural consumers with a legitimate choice of carriers that urban consumers enjoy today.

#### **IV. Adoption of NTCA’s Proposal Would Harm Native Americans Living In Rural Areas.**

Until one visits tribal lands in many rural areas in this country, it is difficult to appreciate the circumstances under which people live and how difficult it is to provide service to communities that are small and dispersed. With only 27% penetration on Navajo lands, it is apparent that rural ILECs have not made satisfactory progress in increasing telephone penetration. Worse, the state of landline infrastructure is in such disrepair that customers often complain that the telephone does not work when telephone lines get wet from rain.

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<sup>9</sup> The Commission’s most recent report on the state of local competition reveals the extent to which rural ILECs dominate their respective markets. The percentage of zip codes having no alternatives to ILEC service is highest in largely rural states such as Arkansas (89%), Montana (96%) and West Virginia (99%), while a dramatically smaller percentage of zip codes lack competition in more urban states such as California (16%), Florida (5%) and Massachusetts (1%). See *Local Competition: Status as of December 31, 2001*, Ind. Analysis Div., Wireline Compet. Bur. (July 2002).

Limiting high-cost support to only those customers who “cut the cord” from an ILEC would harm Native American consumers by greatly reducing the support that carriers serving such lands would be eligible to receive. While many of SBI’s new customers are taking phone service for the first time, or are abandoning ILEC service in favor of competitive wireless calling options, SBI has many subscribers on reservation lands who are not eligible for Lifeline and who have a telephone line in their household. As stated above, the level of support that SBI will require in order to properly construct and maintain a telephone network that provides the type of service that Native American people deserve is far greater than what it is receiving now.

As SBI understands NTCA’s proposal, ILECs would continue to be paid on all lines, they would be paid if a customer takes service from more than one carrier, they would continue to receive implicit support, and — because ILECs receive support based on the modified embedded cost system — they will have no incentive going forward to increase operational efficiencies and otherwise improve service to their subscribers. Such a system is not competitively neutral and does not provide a competitive ETC such as SBI with a level playing field on which to serve Native Americans with competitive offerings at low prices.

SBI believes that if the Commission adopts NTCA’s proposal, it should be prepared to make a clear policy statement that monopoly service is the preferred means of serving rural America, because no competitive carrier will enter the market as SBI has if support is not available to drive infrastructure investment and keep prices down.

Access to 911 is a core component of the universal service program and ILECs can only deliver it from points located at the ends of their lines. Wireless carriers can advance the vital goal of expanding customer access to 911 and other emergency services only if sufficient



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