

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service;)
Promoting Deployment and)
Subscribership in Unserved)
And Underserved Areas, Including)
Tribal and Insular Areas)

To: The Commission

COMMENTS OF SMITH BAGLEY, INC.

Smith Bagley, Inc. (“SBI”) by counsel and pursuant to the FCC’s *Further Notice of Proposed Rulemaking*,¹ hereby submits the following comments in the above-captioned proceeding.

I. Introduction.

SBI is holds FCC licenses in the Cellular Radiotelephone and Personal Communications Service and is currently serving five Native American reservations in Arizona, New Mexico, and Utah. SBI’s licenses also include substantial lands in close proximity to these reservations. In total, SBI’s licensed service area covers roughly 500,000 persons, about half of which are Native Americans. SBI believes that it covers more Native Americans than any other broadband wireless telecommunications carrier in the country.

For over 13 years, SBI has attempted to increase telephone penetration on reservation lands. In response to the FCC’s call for wireless carriers to develop innovative programs to reach

¹ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twenty-Fifth Order on Reconsideration (“Twenty-Fifth Order on Reconsideration”), Report and Order, Order, and Further Notice of Proposed Rulemaking, (“Further Notice”) FCC 03-115, CC Docket No. 96-45 (rel. May 21, 2003).*

out to the Native American communities, SBI applied for ETC status on reservation lands in Arizona and New Mexico in 1999. In December 2000, SBI was awarded ETC status on reservation lands in Arizona and in February 2002 it was awarded ETC status on reservation lands in New Mexico.² In July 2002, the Arizona Corporation Commission (“ACC”) extended SBI’s ETC status on Navajo lands westward into the Flagstaff BTA. In April 2003, the ACC extended SBI’s ETC status to non-reservation lands located adjacent to the Navajo, Hopi, and White Mountain Apache reservations.

In May 2001, SBI rolled out a new universal service called VisionOne™ on portions of three reservations in Arizona, and in June 2002 it inaugurated VisionOne™ service on two reservations in New Mexico. Since then, SBI has acquired additional PCS spectrum and has filed new petitions for ETC status which are today pending before the ACC, the New Mexico Public Regulatory Commission (“NMPRC”), and the FCC. When these petitions are granted, SBI will have completed its footprint on Navajo lands Arizona, New Mexico and Utah.

To date, SBI believes that its service has substantially improved telephone penetration on the reservation lands where it is an ETC. In just over two years, SBI has signed up just over 32,000 Lifeline subscribers, most of whom did not have telephone service in their home when they signed up. SBI’s innovative outreach efforts have brought wireless communications out to remote villages and pueblos. SBI operates a mobile sales office that moves throughout reservation lands, visiting many small towns, often a hundred or more miles from the nearest sales office. SBI uses radio, newspaper, and local media to advertise activation events, which are held over a one or two-day period at a local chapter house, community center or school. The

² Smith Bagley, Inc., Docket No. T-02556A-99-0207 (Az. Corp. Comm. Dec. 15, 2000); Smith Bagley, Inc., Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation (Aug. 14, 2001), *aff’d*, Final Order (N.M. Pub. Reg. Comm. Feb. 19, 2002).

company sets up a complete storefront operation so that customers can learn about telephone service, including how to use a wireless phone, and sign up for telephone service. SBI employs persons fluent in the native language to assist customers who do not speak English.

It is important for the Commission to make Tier 4 Lifeline support to areas that are in proximity to Native American reservations without casting too wide of a net so that areas that are not isolated or underserved are not included. If one travels to northeast Arizona or northwest New Mexico, it is unlikely reservation and non-reservation lands will be distinguishable. The demographics, local economics, living conditions, and overall appearance are functionally the same. SBI has delivered innovative services to a population that is unserved and to many who live in areas that are underserved on reservation lands. There is no question but that consumers living in proximity to reservations located in America's southwest are in need of the same benefits.

II. The Commission Should Declare That All Reservation Lands Are Eligible to Receive Tier 4 Lifeline Support.

Seeking to "alleviate the potential for ongoing administrative uncertainty," the Commission decided that any modifications to its definition of "reservation" or "near reservation" would only occur upon specific FCC action.³ SBI understands that near reservation areas as defined by the BIA may create uncertainties and may shift such that the ongoing definitions may be burdensome to track and administer. Moreover, the BIA's introduction of the term "service area" adds further complication to the mix.

Nevertheless, the Commission should not inadvertently abandon federally recognized reservation lands. The Code of Federal Regulations continues to provide a clear definition of

³ See *Twenty-Fifth Order on Reconsideration* at para. 17.

reservation: "any federally recognized Indian tribe's reservation, pueblo, or colony, including Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act."⁴ If the BIA has officially designated an area as a reservation, its residents should receive Tier 4 Lifeline support in addition to the other federally administered tribal benefits. The public is not well served by having persons living on federally recognized tribal lands ineligible to receive Tier 4 Lifeline and supplemental Link-Up benefits.

For example, immediately adjacent to the eastern edge of the Navajo reservation in New Mexico, as that boundary is defined by the FCC, lies the Eastern Agency of the Navajo Nation, which is one of six agencies of the Navajo Nation. The BIA it recognizes it as Navajo reservation land. Tribal benefits are available to all Navajo people living in that area. SBI has surveyed the area and determined that the abject poverty and poor demographics found elsewhere on the Navajo reservation are prevalent there as well. Pursuant to the *Twenty-Fifth Order on Reconsideration*, the FCC does not currently consider this area to be reservation land and, therefore, Tier 4 Lifeline and Link-Up benefits are not available to residents living there.⁵

In order to treat all reservation areas equally, the Commission should declare that reservation lands, as currently designated by the BIA, are eligible for Tier 4 Lifeline and Link-Up benefits. There does not appear to be any reason to discriminate among reservation lands and the administrative burden of obtaining updated information from the BIA is minimal. Consumers on many reservation lands, especially those on the Navajo Nation, suffer from some of the worst poverty in this nation and are deserving of these benefits.

⁴ 25 C.F.R. Section 20.100.

III. The FCC Must Adopt its Own Definition of "Near Reservation" Lands for Purposes of Designating Eligibility for Tier 4 Lifeline Support.

The BIA's current definition of "near reservation" lands is inadequate to address the needs of people living in close proximity to reservation lands. For example, Appendix B of the Commission's *Twenty-Fifth Order on Reconsideration* lists "near reservation" lands designated by the BIA. Flagstaff is designated as a "near reservation" land with respect to the Hopi Tribe. Also included in Navajo country are Holbrook, Winslow, and Page, along with some smaller communities. Flagstaff is not underserved, having multiple facilities-based wireless operators. The other towns are underserved in comparison to urban areas, often having only one wireless provider, but a greater need lies in areas outside of these towns. The problem is that the list does not distinguish between places that legitimately require Tier 4 support and those that do not.

In SBI's experience, many of the poorest residents of Navajo and Apache Counties in Arizona live between the Navajo and White Mountain Apache reservations, but do not live within the towns designated as "Near Reservation" by the BIA. In order to properly extend Tier 4 Lifeline support to areas that suffer from the same demographic and economic problems as reservation lands, the Commission should adopt a definition that encompasses the area in proximity to the reservation and reaches out to the poorest areas and the people who live there.

The charts attached as Exhibit A to these comments demonstrate how closely reservation lands and areas located in proximity to reservation lands share demographic characteristics such as income levels. For Arizona, New Mexico, Washington, South Dakota, and Oregon, the charts depict median household income and per capita income for zip codes found within reservations and for zip codes in areas located near reservation lands. In each state, the average of the median

⁵ See *Twenty-Fifth Order on Reconsideration* at paras. 16-17.

household income and per capita income in zip codes located near reservation lands is far below the nationwide average.

For example, in New Mexico, the average for the median household income across all zip codes within Native American reservations is \$26,727, while the average for zip codes near reservation lands is \$30,582. Both figures are well below the nationwide median household income figure of \$41,994. In Arizona, the average for per capita income across all zip codes on reservation lands is \$7,228, while the average for near reservation zip codes is \$13,688. Both figures similarly fall far short of the national per capita income figure of \$21,587.

The need for a balanced approach is clear. As is evident from the attached tables, areas surrounding reservations have substantially similar demographic characteristics to those of reservations. The per capita income of people living in proximity to reservations is significantly lower than the national average, and these areas generally have poorly developed telecommunications markets. Cities with higher populations, by contrast, tend to have five to eight wireless carriers, as well as wireline CLEC service, in addition to ILEC service. Therefore, while a definition of “near reservation” must be sufficiently inclusive to provide critical support to eligible consumers in severely disadvantaged areas outside of reservations, it is important that such definition exclude population centers that do not share these characteristics.

IV. Description of SBI’s “50-50” Plan and Proposal for a New “50-50-50” Plan.

In discussion with the Commission staff concerning the shortcomings of the current BIA definition of “near reservation” lands, SBI proposed to the Commission a plan known as “50-50”. Specifically, SBI proposed a two-pronged analysis to be used in determining whether a person qualifies for enhanced Lifeline and Link-Up benefits on “near reservation” lands: First, the person must reside within 50 miles of a recognized Native American reservation. Second, the

county in which the person resides must have a population density of no more than 50 persons per square mile. SBI developed its 50-50 plan by mapping several states to determine how much territory and how many major cities would be encompassed.

SBI attempted to balance the need to cover sufficient area with obvious limitations on Tier 4 funding. SBI studied alternative “100-100” and “25-25” plans and discovered that they yielded either too much area and included major population centers, or excluded significant underserved areas and population. When SBI mapped out its 50-50 plan for Arizona, New Mexico, California, Oregon, and Washington, it discovered that many large cities were removed from eligibility, while rural areas near reservation lands were appropriately included.

SBI understands the Commission’s concern that cities may be located in proximity to reservation lands.⁶ Most cities today are served by at least three wireless carriers and some have as many as eight. These areas are not underserved and consumers there do not lack choices of telecommunications services. The Commission properly notes that SBI’s proposed 50-50 plan would include the city of Flagstaff, which is clearly not underserved.⁷

The Commission requested commenters to tailor initial proposals to exclude areas that do not share the same characteristics of reservation lands.⁸ SBI believes the Commission’s concern can be resolved by excluding any city or census designated place (“CDP”), as defined by the Census Bureau, that has a population of 50,000 or greater. These areas are not typically unserved, or even underserved. SBI is not aware of any city or CDP with a population of 50,000 or greater that has only one wireless provider. Moreover, the relatively developed networks in such areas have permitted more aggressive pricing and unlimited local calling plans that are not

⁶ See *id.* at para. 13.

⁷ See *Further Notice* at para. 35, n.109.

common in remote areas that have less developed wireless networks. The addition of this criteria, when added to SBI's prior proposal, would result in a "50-50-50 Plan" and exclude substantial populations that do not require tier 4 Lifeline support.

Applying the 50-50-50 plan to selected states, SBI's proposal is effective in excluding cities which would have qualified under the 50-50 plan but clearly lacked the economic and demographic characteristics justifying an extension of Tier 4 support. For example, Flagstaff, which would be included under the 50-50 plan in Arizona, would be properly excluded under the 50-50-50 plan. In Oregon, the 50-50-50 plan would exclude Bend, Gresham, Hillsboro, Beaverton, Salem, Springfield and Eugene. In Washington, the 50-50-50 plan would exclude Lakewood and Tacoma.

V. Participating Carriers Should Submit Appropriate Data to the FCC When Applying for Tier 4 Support.

SBI suggests that ETCs should bear the administrative burden of producing maps. The Commission should require new ETCs applying for Tier 4 Lifeline support in "near reservation" areas to submit a map depicting the 50-50-50 plan. Telecommunications carriers have access, either internally or through consulting engineering companies, to MapInfo™ or competing software that can provide maps of sufficient accuracy to ensure that the program's goals are being met. Carriers would have an incentive to submit accurate maps because continued eligibility as an ETC is conditioned upon a carrier's ongoing compliance with Commission rules.

The relative burden in producing a 50-50-50 map is negligible and is not an unreasonable condition to place on a carrier that has, or is seeking ETC status. Carriers can be encouraged to work cooperatively to share the cost of a 50-50-50 map surrounding a reservation, which will also make more likely that maps submitted to the FCC will be consistent. Commission staff can

⁸ *Id.* at para. 35.

review submissions and require carriers to explain any significant inconsistencies among submitted maps.

SBI recommends that the Commission adopt a standardized format for such maps. The Washington Utilities and Transportation Commission ("WUTC") has done so with respect to ILEC service areas and as a result there is now a repository of electronic maps on file with the WUTC, in a consistent format (.shp format), that all carriers may access.⁹ The WUTC stated

The purpose of the .shp maps is to allow competitors to locate customers within one exchange or another and thus enable competitors to make accurate claims for support....Given the responsibilities of USAC, and the rural ILECs and competitors interests in accuracy of the maps, there is no need for the commission to become involved in the map-making process...we believe that those recovering federal universal service support should bear the responsibility of producing accurate maps...".¹⁰

The Commission should follow this very good example to ease the agency's administrative burden.

VI. The Commission Should Affirm Its Prior Decision With Respect to ETC Designations in "Near Reservation" Areas.

SBI believes it is simply too late for the Commission to assert jurisdiction over "near reservation" lands in connection with the ETC designation process, no matter what definition of "near reservation" is ultimately adopted. SBI observes that Tier 4 Lifeline support to people truly in need in these areas is long overdue. Any FCC decision to assert jurisdiction, especially in areas that are not eligible to receive tribal benefits, will undoubtedly be delayed by litigation.

States across the country are now considering ETC designations. Any assertion of jurisdiction would only throw existing proceedings into uncertainty and unnecessarily delay

⁹ In the Matter of Disaggregation of Federal Universal Service Support, Docket Nos. UT-013058 and UT-023020 (effective Aug. 5, 2002).

¹⁰ *Id.* at paras. 37, 39.

pending grants. Moreover, the FCC's current precedent circumscribes FCC jurisdiction over Native Americans living on reservation lands and should not be disturbed.¹¹

The better course is to simply announce that the Commission's existing policy remains in place. If a state makes an affirmative decision to not take jurisdiction over an ETC designation, then a carrier may petition the FCC. Moreover, carriers on reservation lands may petition the FCC to decide ETC designations on reservation lands, following the precedent set in *Pine Ridge*. ETC designation petitions on "near reservation" lands do not fall within the *Pine Ridge* precedent and are properly brought before state commissions unless the state declines jurisdiction. SBI opposes any action that will delay ETC designations across the country, many of which have already taken far too long to be resolved.

VII. Conclusion.

SBI urges the Commission to declare that all BIA-designated Native American reservation lands are eligible for Tier 4 Lifeline and enhanced Link-Up support so that the Commission's rules do not inadvertently and arbitrarily discriminate among persons living on reservation lands.

SBI supports the Commission's efforts in identifying an appropriate means of extending the availability of Tier 4 support to communities that share important demographic characteristics with nearby reservations and similarly lack choices among quality telecommunications services. SBI believes that the 50-50-50 plan proposed above represents a sensible approach that is inclusive enough while appropriately excluding areas that do not share those characteristics. The impact on the size of the fund will be minimized by the newly

¹¹ *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133 (2001) ("*Pine Ridge*").

designed proposal's exclusion of more populated areas. Accordingly, SBI urges the adoption of the 50-50-50 proposal.

Respectfully submitted,

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Exhibit A

Arizona

<u>ZIP Codes Within Reservation</u>	<u>Median Household Income (\$)</u>	<u>Per Capita Income (\$)</u>
85530	17,719	4,962
85542	30,250	7,369
85550	15,483	4,813
86030	10,625	5,102
86033	22,911	7,940
86034	23,281	9,259
86035	17,279	6,900
86039	13,487	6,833
86040	42,794	16,146
86042	17,963	7,275
86043	21,964	6,261
86044	19,728	6,982
86045	36,192	10,122
86053	27,548	7,446
86054	21,184	9,075
86503	21,201	7,399
86505	20,449	7,761
86507	9,808	3,703
86510	13,797	5,406
86514	12,979	5,645
86535	12,222	5,137
86538	25,675	8,181
86556	16,250	6,426
	Average: 20,469	Average: 7,228

<u>ZIP Codes Near Reservation</u>	<u>Median Household Income (\$)</u>	<u>Per Capita Income (\$)</u>
85924	23,839	13,074
85925	38,897	15,853
85928	29,154	11,836
85936	34,250	12,800
85937	34,705	14,062
85938	31,085	14,398
86025	32,123	13,796
	Average: 32,436	Average: 13,688

National Average: 41,994	National Average: 21,587
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New Mexico

<u>ZIP Codes Within Reservation</u>	<u>Median Household Income (\$)</u>	<u>Per Capita Income (\$)</u>
87027	43,646	18,583
87041	23,854	15,073
87042	39,375	15,021
87052	25,664	5,713
87310	30,139	7,728
87320	25,125	8,877
87325	19,811	8,562
87327	21,010	6,975
87328	14,922	5,467
87420	23,724	7,976
	Average: 26,727	Average: 9,998

<u>ZIP Codes Near Reservation</u>	<u>Median Household Income (\$)</u>	<u>Per Capita Income (\$)</u>
87005	28,235	9,743
87013	16,456	7,861
87014	27,386	9,745
87017	20,938	10,434
87020	29,728	13,715
87029	27,857	15,155
87323	23,496	8,253
87410	37,439	15,537
87413	35,725	14,512
87417	44,455	14,358
87418	50,278	18,094
87419	45,673	28,820
87510	32,024	19,230
87530	32,279	14,032
87539	28,750	15,337
87575	27,917	11,377
87581	11,250	8,906
	Average: 30,582	Average: 13,830

National Average: 41,994	National Average: 21,587
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Washington

ZIP Codes Within Reservation

98526
98587
98619
98933
98948
98951
98952
99040
99116
99138
99140

Median Household Income (\$)

29,500
26,172
39,583
42,708
28,218
30,417
33,700
27,798
34,471
23,625
24,464

Average: 30,969

Per Capita Income (\$)

12,771
10,182
18,086
13,972
9,949
10,842
9,745
9,278
17,707
13,036
9,560

Average: 12,284

ZIP Codes Near Reservation

98377
98552
98562
98563
98571
98575
98602
98648
98650
98672
98812
98813
98830
98841
98901
98902
98908
98936
98937
98953
99103
99117
99131
99133
99137
99167
99322

Median Household Income (\$)

31,116
31,364
19,375
41,743
29,722
47,778
25,917
35,256
36,181
37,769
26,625
26,833
35,125
30,492
27,878
30,694
48,007
41,084
36,860
36,438
31,406
30,526
46,250
31,118
22,143
29,048
42,031

Average: 33,692

Per Capita Income (\$)

15,181
13,796
16,648
19,053
14,145
23,051
12,792
17,438
18,476
17,784
12,071
10,484
18,529
13,873
13,425
16,139
24,587
15,704
17,838
15,211
15,009
15,729
18,322
15,972
9,759
12,544
19,181

Average: 16,057

National Average: 41,994

National Average: 21,587

South Dakota

<u>ZIP Codes Within Reservation</u>	<u>Median Household Income (\$)</u>	<u>Per Capita Income (\$)</u>
57224	34,375	19,015
57255	33,542	16,735
57256	46,875	22,646
57262	27,936	12,733
57266	26,838	12,154
57270	21,167	11,974
57329	30,833	14,721
57339	7,941	3,982
57380	23,628	10,687
57547	23,750	12,944
57555	22,737	8,828
57566	12,576	5,243
57572	19,420	6,429
57577	13,750	5,274
57622	9,625	3,432
57623	26,932	10,308
57628	28,333	13,007
57633	22,083	13,069
57634	41,875	31,749
57641	25,795	13,946
57642	20,389	7,644
57645	20,208	8,390
57656	28,261	10,508
57657	15,804	9,736
57658	14,792	4,992
57660	41,250	9,952
57716	7,096	8,232
57752	23,945	7,353
57756	13,466	5,631
57770	20,796	6,028
57772	23,021	7,892
57794	12,650	2,936
	Average: 23,178	Average: 10,568

<u>ZIP Codes Near Reservation</u>	<u>Median Household Income (\$)</u>	<u>Per Capita Income (\$)</u>
57062	32,875	12,189
57227	35,833	20,464
57239	20,469	13,045
57251	28,125	14,057
57274	33,429	16,822
57315	28,047	14,762
57328	28,913	14,166
57344	30,000	12,969
57366	31,063	15,796
57369	30,625	14,711
57430	32,224	16,586
57442	31,181	17,007
57454	30,438	19,776
57472	31,477	16,012
57501	43,531	20,991
57521	22,500	11,755
57531	28,000	15,174
57543	25,352	13,217
57552	28,333	15,022
57553	27,917	13,563

South Dakota (cont'd)

<u>ZIP Codes Near Reservation</u>	<u>Median Household Income</u>	<u>Per Capita Income</u>
57559	30,966	16,453
57562	26,875	13,640
57564	35,208	17,851
57568	30,288	15,843
57601	26,065	14,861
57626	23,875	12,211
57638	28,458	15,930
57644	19,712	10,990
57646	35,000	14,381
57648	27,500	14,263
57653	17,813	9,383
57722	29,853	14,724
57738	27,250	18,489
57744	35,380	14,617
57748	20,789	8,539
57750	29,464	13,441
57763	29,500	16,016
57766	29,500	15,671
57780	31,750	14,998
57790	36,184	20,176
	Average: 29,294	Average: 15,037

National Average: 41,994	National Average: 21,587
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Oregon

ZIP Codes Within Reservation*

97037
97761
97801
97810

Median Household Income (\$)

29,698
31,410
37,905
42,250
National Average: 35,336

Per Capita Income (\$)

15,687
9,129
17,419
17,882
Average: 15,029

ZIP Codes Near Reservation

97001
97021
97028
97029
97041
97063
97342
97350
97730
97734
97741
97813
97826
97827
97835
97836
97838
97843
97844
97850
97800
97875
97876
97886

Median Household Income (\$)

34,464
38,472
57,857
28,750
36,515
31,354
31,471
35,625
51,875
38,095
34,744
37,955
35,789
32,560
43,750
36,111
38,187
42,417
36,600
33,621
36,094
36,132
42,308
36,422
Average: 37,799

Per Capita Income (\$)

19,410
17,523
41,670
15,010
15,971
16,382
15,237
14,205
25,826
16,689
15,686
15,946
19,072
15,645
14,427
19,694
17,598
18,364
14,351
17,217
15,755
14,375
21,037
14,373
Average: 17,078

National Average: 41,994

National Average: 21,587

* Note: No ZIPs available completely within Reservation Boundary.
Four ZIPs identified mostly covering reservation region.