

**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)	
)	

To: Wireline Competition Bureau

Petition for Waiver – Expedited Action Requested

Smith Bagley, Inc. (“SBI”), by counsel and pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. Section 1.3, hereby requests a waiver of Section 54.400(e) of the Commission’s rules, 47 C.F.R. Section 54.400(e). For the reasons set forth below, SBI requests that the Commission make Tier 4 Lifeline and Link-up benefits available to residents of the Eastern Navajo Agency of the Navajo Nation (“Eastern Navajo Agency”) in the state of New Mexico. A map of the Navajo Nation, which includes the Eastern Navajo Agency, is attached hereto as Exhibit A.¹

I. Introductory Statement.

SBI is licensed to provide cellular radio telephone service in substantial portions of the Eastern Navajo Agency. As of this writing, SBI is an eligible telecommunications carrier (“ETC”) on the Zuni and Ramah reservations in New Mexico and it has a pending petition for ETC status in portions of San Juan, McKinley and Sandoval counties, all of which are within the

¹ The map provided as Exhibit A is too large to include with this electronically filed Petition; accordingly, the exhibit is being submitted under separate cover to the Secretary’s office and FCC staff.

Eastern Navajo Agency.² SBI is also an ETC in Arizona on the Navajo, Hopi, and White Mountain Apache reservations. SBI has constructed wireless telecommunications infrastructure on reservations to reach out to consumers who suffer from some of the lowest household telephone penetration levels in this country. These same conditions exist on the Eastern Navajo Agency.

The Navajo Nation is comprised of five Agencies. They are the Tuba City, Chinle, Fort Defiance, Shiprock, and Eastern Navajo Agency. On information and belief, the Eastern Navajo Agency functions in an identical fashion to the other agencies. Its members have the same voting rights in tribal affairs. It is fully represented in the tribal government, with full rights of participation on all governing councils and committees.

Currently, the Eastern Navajo Agency is not federally recognized reservation land. It is best described as a "checkerboard" area of land holdings owned by individual Navajos, the federal government, the state of New Mexico, and private landowners, all located in an area occupied almost exclusively by Navajo people from the Civil War to the present time. The nature of the checkerboard land holdings has created a jurisdictional nightmare, as well as obstacles for economic development opportunities.

Upon information and belief, residents of the Eastern Navajo Agency are eligible to participate in all federal programs providing support to low-income individuals with one exception: Tier 4 Lifeline and Link-up. Residents of the Eastern Navajo Agency cannot obtain Tier 4 benefits through the "near reservation" program because the FCC's definition of "Near Reservation" contained in Section 54.400(e) of the rules has been stayed for nearly four years.³

² Case No. 03-00246-UT; A hearing has been held and briefs have been filed in the case. The Administrative Law Judge is expected to issue a recommended decision shortly.

³ *Federal-State Joint Board on Universal Service, Twelfth Report and Order, Memorandum Opinion and*

Moreover, the definition adopted in the *Twelfth Report & Order* would not include most of the Eastern Navajo Agency. Recently, the FCC listed the communities which are recognized by the BIA as "near reservation lands" to include Farmington, Aztec, Bloomfield, Magdalena, Cuba, Kirtland, Grants, Milan, Socorro, and Gallup.⁴

While these communities may not enjoy the kinds of choices in telecommunications services that urban consumers have, they are not unserved, nor are they underserved. Wireless carriers have constructed facilities in most of these communities. However, many areas in the Eastern Navajo Agency, such as Torreon, Lake Valley, Mariano Lake, and White Horse, are remote and have been almost uniformly neglected by telephone carriers of all technologies. Yet they are not officially designated, or proposed to be designated, as "near reservation".

Because of the unique and extraordinary circumstances facing consumers on the Eastern Navajo Agency, as described below, a waiver of Section 54.400(e), declaring that Tier 4 benefits will be available to residents throughout the Eastern Navajo Agency, is warranted to provide all carriers serving an incentive to reach out to those consumers. In support of this request, the following is respectfully shown.

II. Waiver Standard.

The Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. Section 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969) ("*WAIT Radio*"). As further explained in *WAIT Radio*, the

Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12,208 (2000) ("*Twelfth Report & Order*"); *stayed in part, Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 17,112 (2000).

⁴ *Federal-State Joint Board on Universal Service, Twenty-Fifth Order On Reconsideration, Report And Order, Order, And Further Notice Of Proposed Rulemaking*, 18 FCC Rcd 10958 (2003) at Appendix B.

Commission is charged with administration of its responsibilities consistent with the "public interest."

That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. In fact, the Commission's right to waive its rules is not unlike an obligation in that it is a *sine quo non* to its ability to promulgate otherwise rigid rules. It is the necessary "safety valve" that makes the system work. See, *WAIT Radio* at 1157, 1159.

III. A Waiver of Section 54.400(e) is Needed to Bring Vital Basic Telecommunications Service to the Eastern Navajo Agency.

Under Section 54.400(e), Tier 4 Lifeline and Link-up benefits are available to eligible residents of Tribal Lands, which is defined as follows:

(e) *Eligible resident of Tribal lands.* An "eligible resident of Tribal lands" is a "qualifying low-income consumer," as defined in paragraph (a) of this section, living on or near a reservation. A "reservation" is defined as any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments. "Near reservation" is defined as those areas or communities adjacent or contiguous to reservations which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation, and administrative feasibility of providing an adequate level of services to the area.

NOTE TO PARAGRAPH (e): The Commission stayed implementation of paragraph (e) as applied to qualifying low-income consumers living “near reservations” on August 31, 2000 (15 FCC Rcd 17112).

As the note advises, the Commission has stayed eligibility in “near reservation” lands pending further action to redefine the term "near reservation." That stay has been in place for nearly four years now and as a result, consumers in the Eastern Navajo Agency do not have access to Tier 4 benefits from any carrier, including rural incumbent local exchange carriers.

Today, the situation on the Eastern Navajo Agency is largely as it was decades ago, except the population there has continued to grow. There are approximately 37,400 persons living within the Eastern Navajo Agency boundaries.⁵ Roughly 45% of the households subsist at or below the federal poverty level, with median household income at \$18,737.⁶ 38% of households lack plumbing.⁷ Unemployment stands at 31%. Roughly 52% of households rely on wood for heat.⁸ Most important for purposes of this waiver, **67% of occupied housing units do not have telephone service.**⁹ There are significant areas within the Eastern Navajo Agency where no telephone service is available.

In sum, there are few, if any, other areas in the country that suffer from these types of conditions. No telephone company is eligible to extend Tier 4 benefits to residents in this area and as a result no significant telephone penetration gains have been recorded since the Commission adopted Tier 4 in 2000.

⁵ Source: U.S. Census 2000.

⁶ Source: U.S. Census 2000.

⁷ Source: U.S. Census 2000.

⁸ Source: U.S. Census 2000.

In the nearly three years that it has been an ETC, SBI has added over 27,000 new Tier 4-eligible subscribers in the other four Navajo Agencies. Household telephone penetration on Navajo lands in the other Agencies has significantly increased as a result of all ETCs having the ability to offer and advertise Tier 4 benefits. These facts support a finding that the dire situation on the Eastern Navajo Agency can be significantly improved through the provision of Tier 4 benefits. Moreover, these facts point to an urgent need for this Commission to act.

Under the currently stayed definition of “near reservation” lands, the Commission looks to several factors to determine whether a particular locale is “appropriate for the extension of financial assistance and/or social services.” SBI respectfully suggests that a waiver of the “near reservation” definition to permit carriers to offer Tier 4 benefits in the Eastern Navajo Agency is appropriate. The Commission can easily find, based on available information, that the general criteria which the Bureau of Indian Affairs considers to be relevant are met.

A. Social, Cultural and Economic Affiliation.

The first factor in determining whether an area should be considered “near reservation” is whether members of the tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation. In the Eastern Navajo Agency, 92% of the residents are Navajo.¹⁰ They vote as members of the Navajo Nation and are elected to offices in the same fashion as members of the other five Agencies. There are 32 chapters within the Eastern Navajo Agency which serve as local governmental units. Navajo residents in the Eastern Navajo Agency are full members of the Navajo Nation and many believe, perhaps properly so, that since the Eastern Navajo Agency represents ancestral lands

⁹ Source: U.S. Census 2000.

¹⁰ Source: U.S. Census 2000.

that have been occupied by the Navajo people since before the Civil War, it is thus a part of the Navajo Nation.

B. Geographic Proximity.

The second factor is whether the area to be designated is in geographic proximity to the reservation. The Eastern Navajo Agency is immediately adjacent to the Fort Defiance and Shiprock Agencies and, with the exception of the Canoncito and Alamo chapters, forms a contiguous land area with the remainder of the Navajo Nation (See Exhibit A). There is no question but that the Eastern Navajo Agency shares geographic proximity to the remainder of the Navajo Reservation.

C. Administrative Feasibility of Providing an Adequate Level of Services.

The third factor is the administrative feasibility of providing an adequate level of services to the near reservation lands. It scarcely bears mention that the Eastern Navajo Agency currently ranks at the bottom, or very close to the bottom, of any geographic area in the United States in terms of household telephone penetration. Under any definition, household telephone penetration of 33% is abysmal and a clear indication that it is not feasible for carriers to deliver universal service to the area.

SBI's experience on Navajo lands in Arizona is instructive here. There were many areas on the Navajo Reservation in Arizona where rural ILECs had not extended wireline telephone plant – and to this day have no apparent intention of doing so. Consumers who desired telephone service simply could not get it. The sparse population and distances between existing plant and requesting customers made extending facilities challenging. The socio-economic conditions of potential subscribers made it impossible for rural ILECs to justify it because there was no likelihood that their investment would be recovered.

When the Arizona and New Mexico commissions designated SBI as an ETC on Navajo lands in Arizona and Ramah Navajo lands in New Mexico, these grants opened the door to a more efficient technology to deliver infrastructure that could reach subscribers. When the FCC ruled that residents of tribal lands would receive Tier 4 benefits, it made possible, for the first time, a price point that enabled consumers with less than \$5,000 of per capita income to afford basic telephone service.

The results have been dramatic. SBI has rapidly constructed facilities to reach these communities in both Arizona and New Mexico. Its outreach efforts have resulted in significant and likely permanent improvement in telephone penetration rates. There is absolutely no reason why these same results cannot be achieved in the Eastern Navajo Agency. The conditions are similar. The geography is similar. Low-income consumers there suffer from the same challenges as their neighbors in Arizona.

In its pending petition for ETC status in New Mexico, which proposes to serve a portion of the Eastern Navajo Agency, SBI has proposed to construct ten new cell sites on the reservation following its designation, many or most of which, absent a grant of ETC status, would not be constructed any time soon, if ever. These sites will begin the same process it started in Arizona over two years ago – extending vital wireless infrastructure to remote tribal areas. Rural ILECs that serve the Eastern Navajo Agency may immediately offer Tier 4 Lifeline and Link-up support to these areas to the benefit of their customers. Any ETC may participate to improve the situation in these areas.

IV. Request for Relief.

SBI requests the following relief:

1. Partially lift the stay of Section 54.400(e) pertaining to near reservation lands so that SBI's proposal to define the Eastern Navajo Agency as near reservation land can be granted; and
2. Waive Section 54.400(e) which defines near reservation lands as "...those areas or communities adjacent or contiguous to reservations which are designated by the Department of Interior's Commission of Indian Affairs..."
3. Grant of the waiver would permit the FCC to define, in this unique circumstance, the entirety of the Eastern Navajo Agency as "near reservation land."

V. Request for Expedited Action and Conclusion.

There is good cause for the Commission to waive Section 54.400(e) to permit all carriers to offer Tier 4 Lifeline and Link-up benefits to the Eastern Navajo Agency. While the rest of Navajo has seen dramatic improvements over the past two years, the situation on the Eastern Navajo Agency remains intolerable. Absent immediate action on the FCC's "near reservation" definition, this waiver is vital to providing vital health and safety benefits to a population that deserved them years ago.

There is an ample record upon which to conclude that an expedited grant of this petition is necessary to resolve serious and unique problems that must not be left for resolution through the ordinary administrative process. Section 1.3 was designed precisely for this situation – one in which immediate action is necessary to assist consumers who are denied critical benefits by a strict reading of the Commission's rules.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 19th day of March, 2004, placed in the United States mail, first-class postage, prepaid, a copy of the foregoing PETITION FOR WAIVER – EXPEDITED ACTION REQUESTED filed today to the following:

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*Via E-mail