

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Alltel Communications, Inc., <i>et al.</i>)	
Petitions for Designation as Eligible)	
Telecommunications Carriers)	
)	
RCC Minnesota, Inc. and RCC Atlantic,)	
Inc. New Hampshire ETC Designation)	
Amendment)	

**PETITION FOR EXPEDITED DECLARATORY RULING
OF
SMITH BAGLEY, INC.**

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PETITION FOR EXPEDITED DECLARATORY RULING

Pursuant to Sections 1.2 of the Commission’s Rules, 47 C.F.R. § 1.2, Smith Bagley, Inc. (“SBI”) hereby submits this petition for expedited declaratory ruling to remove uncertainty from the FCC’s Order in the above-captioned proceeding.¹ SBI seeks an expedited declaratory ruling regarding the scope of the limited exception to the interim cap for competitive eligible telecommunications carriers (“CETCs”) that serve tribal lands or Alaska Native regions (the “Covered Locations”). Specifically, SBI requests a declaratory ruling that this limited exception allows one *uncapped* line per household and *capped* support for all other lines in the household. As explained below, SBI believes that the entire purpose of enacting a limited exception is to ensure that carriers serving Covered Locations receive *more* high-cost support than they would under a cap.

¹ See *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Order, WC Docket No. 05-337, CC Docket No. 96-45, FCC 08-122 (rel. May 1, 2008) (“*Cap Order*”).

I. INTRODUCTION

SBI is licensed by the Commission to provide cellular radiotelephone service and personal communications service (“PCS”) throughout portions of Arizona, New Mexico, Utah, and Colorado. SBI furnishes service and has been designated as an eligible telecommunications carrier (“ETC”) throughout the Navajo Nation, as well as Hopi, White Mountain Apache, Ramah Navajo, and Zuni tribal lands.

SBI has constructed wireless telecommunications infrastructure and facilities to extend service to consumers on tribal lands who suffer from some of the lowest household telephone penetration levels in the United States. In June 2001, SBI launched its VisionOne™ service offering as part of its effort to carry out its universal service mandate. The VisionOne™ service permits qualifying subscribers residing on tribal lands to purchase service (including 500 minutes of airtime) for \$1.00 per month. In addition, SBI provides VisionOne™ subscribers with the capability to access “free call” numbers for hospitals, fire and police departments, and other important community organizations, without incurring any toll charges or diminution of monthly airtime use allotments.

Through SBI’s efforts, telephone penetration on tribal lands has increased dramatically. SBI continues to invest in its network, seeking to deliver high-quality advanced telecommunications services throughout SBI’s ETC service area.

II. BACKGROUND

In the *Cap Order*, the Commission establishes two limited exceptions to the operation of the interim cap. The first provides CETCs with a limited exception to the interim cap if the CETC submits its own costs.² The second provides CETCs with a

² *Cap Order*, ¶ 31.

limited exception to the interim cap if the CETC serves tribal lands or Alaska Native regions (the “Covered Locations”).³ It is this second limited exception that is the focus of SBI’s Petition.

In explaining this second limited exception, the Commission states that it “permit[s] competitive ETCs serving Covered Locations to continue to receive uncapped high-cost support for lines served in those Covered Locations.”⁴ In providing its rationale behind this limited exception, the Commission noted:

Because many tribal lands have low penetration rates for basic telephone service, we do not believe that competitive ETCs are merely providing complementary services in most tribal lands, as they do generally.⁵

The Commission goes on to explain that participation in the limited exception to the interim cap is voluntary and will be elected by the CETC on a study area by study area basis.⁶ The Commission explains that any CETC that does not or cannot opt into the limited exception, or that does not or cannot opt into the limited exception for a particular Covered Location, will remain subject to the interim cap.⁷

III. THE ONLY PURPOSE THE COMMISSION COULD HAVE HAD IN ADOPTING THIS LIMITED EXCEPTION IS TO PERMIT QUALIFYING CARRIERS TO RECEIVE MORE HIGH-COST SUPPORT THAN THEY WOULD OTHERWISE RECEIVE UNDER THE CAP

The only possible reason the FCC could have adopted an exception to the cap for tribal lands would be to limit the effects of a cap on consumers living in such areas. By providing *uncapped* support to one line per residential household, and *capped* support to

³ *Id.*, ¶ 32.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*, ¶ 33.

⁷ *Id.*

all remaining lines in the household, carriers serving tribal lands would receive less support than they would in a fully uncapped system, while receiving more than other carriers operating on non-tribal lands.

The *Cap Order* states that “[s]upport for competitive ETCs that do opt into the limited exception will continue to be provided pursuant to section 54.307 of the Commission’s rules, except that the ***uncapped*** per line support is limited to one payment per each residential account.”⁸ The Commission also sets forth a calculation explaining that if capped support is reduced from \$10 per line to \$8 per line, then the exception would provide an extra \$2 per line to qualifying lines.⁹

Under Section 54.307(a)(1) of the rules, CETCs “shall receive support for each line it serves in a particular service area.”¹⁰ Nothing in the *Cap Order* changes this rule. When read together, the Commission’s clear intent was to provide one *uncapped* line of support for each residential household, and ***capped*** support to all remaining lines. Nowhere does the *Cap Order* state that other lines in a household would become “ineligible” for support.

The Commission had good reasons to establish this limited exception – *e.g.*, ensuring that CETCs serving these Covered Locations have adequate support to continue providing service to these historically underserved areas, facilitating greater telephone penetration in these historically underserved areas.¹¹ The intent to provide relief to

⁸ *Cap Order*, ¶ 33 (*emphasis added*).

⁹ *Cap Order*, ¶ 33, n. 98.

¹⁰ 47 C.F.R. § 54.307(a)(1).

¹¹ In addition, as the *Cap Order* properly notes, carriers serving tribal lands do not typically offer services that complement existing wireline service. *Cap Order*, ¶ 33. By way of example, SBI’s VisionOne®

carriers serving tribal lands through the exception is clearly evidenced in the following separate statements that accompanied the *Cap Order* from multiple FCC commissioners:

Separate Statement of Commissioner Adelstein:

I am also pleased that the Commission recognizes the unique nature of Tribal lands and Alaskan Native Regions, many of which face devastatingly low telephone penetration rates and high barriers to deploying advanced communications. A limited exemption should help maintain incentives for carriers to bring services to these hard-to-serve areas.

Separate Statement of Commissioner Copps:

While I strongly disagree with the overall decision taken today, I am encouraged the majority added to their CETC cap two caveats that I have long deemed important. The Order excludes from the cap high cost support for CETCs serving tribal lands or Native Alaskan Regions. These areas are among the most underserved when it comes to telecommunications—both basic phone service and broadband. The Commission must continue to focus on ways to bring affordable services to these areas as their residents are equally deserving of the benefits that technology affords.

Separate Statement of Commissioner McDowell:

Additionally, I support an exception for all of the providers serving tribal lands across the country, and Alaska Native lands – some of the most under-served parts of America. *This limited exception will ensure that companies operating in these remote areas will continue to receive high-cost support to provide their services while we move toward a permanent solution. Furthermore, these terms do not favor any specific provider (emphasis added).*

Commissioner McDowell’s statement that the limited exception does “not favor any specific provider” is further evidence of the Commission’s general intent to ensure that all CETCs that “opt-in” to the limited exception are not disadvantaged by making the

Lifeline offering represents the only telephone service available for tens of thousands of Native Americans living on five tribal lands within SBI’s ETC service area.

voluntary election, as would be the case for wireless CETCs that choose to “opt-in” and are limited to uncapped support for only one line.

General Communication, Inc. (“GCI”) has argued in *ex parte* communications for an interpretation of the limited exception that would provide one uncapped line per household and no support for any other line in the household.¹² GCI’s interpretation clearly favors landline technologies and contradicts the limited exception’s very purpose. There is no question that SBI will receive substantially less support under GCI’s interpretation of the exception than it would under the cap.¹³ Less high-cost support to these tribal lands means less investment in facilities that are being constructed and upgraded to provide high-quality advanced services to consumers living on tribal lands.

Lastly, limiting support to one line per household appears to violate Congress’ directive prohibiting the Commission from enacting a “primary line restriction” on universal service support.¹⁴ Under GCI’s apparent reading of the *Cap Order*, a carrier must either choose to be capped, or subject to a primary line restriction for all residential households. Presenting affected wireless carriers with the illusory “choice” between being capped and being subject to a primary line restriction (an option providing even

¹² See, e.g., GCI *Ex Parte* Letter, WT Docket 05-337 and CC Docket No. 96-45 (filed July 30, 2008); GCI *Ex Parte* Letter, WT Docket 05-337 and CC Docket No. 96-45 (filed May 20, 2008).

¹³ Attached as Exhibit A is an example of how the cap works under SBI’s interpretation and under GCI’s.

¹⁴ Congress has repeatedly prohibited the Commission from implementing a primary line restriction. On December 8, 2004, Congress passed the 2005 Consolidated Appropriations Act, which prohibited the Commission from utilizing appropriated funds to “modify, amend, or change its rules or regulations for Universal Service support payments to implement the February 27, 2004 recommendations of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal service payments.” Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 634, 118 Stat. 2809 (2004); Science, State, Justice, Commerce and Related Agencies Appropriations Act 2006, Pub. L. No. 109-108, § 622, 119 Stat. 2342 (2005) (extending prohibition until September 30, 2006); Revised Continuing Appropriations Resolution 2007, Pub. L. No. 110-5, § 105, 121 Stat. 9 (2007) (extending prohibition until September 30, 2007); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 511, 121 Stat. 1998 (2007) (extending prohibition until September 30, 2008).

less support than what is available under the capped option) does not change what the exception is – a primary line restriction. In that regard, Navajo Nation Vice-President Ben Shelly wrote to the Commission just last week opposing any interpretation of the cap that amounts to a primary line restriction.¹⁵

IV. CONCLUSION

The only possible purpose in adopting an “exception” to the cap would be to permit carriers serving Covered Locations to receive *more* high-cost support than they would under a cap. However, under GCI’s alternative interpretation, wireless CETCs that choose to “opt-in” will have their high-cost support significantly reduced, hampering their ability to construct new cell sites, undermining outreach efforts and, in the case of SBI, harming the public health and safety of every tribal member who depends on SBI’s service.

Based upon the language in the *Cap Order* and Commissioner McDowell’s separate statement, the Commission could not have intended to provide carriers with an “exception” to the cap that reduces support and favors one class of carrier – the alternative reading offered by GCI. GCI’s interpretation of this limited exception is self-serving, inherently favors landline CETCs over wireless CETCs, would confer zero benefit to citizens of tribal lands living in the continental United States,¹⁶ and amounts to a “primary line restriction” in violation of the federal law.

¹⁵ See Exhibit B (attached).

¹⁶ On information and belief, SBI believes that all, or substantially all, of the CETCs serving tribal lands in the continental United States use wireless technology.

Because of the uncertainty associated with this limited exception, SBI requests an expedited declaratory ruling that this limited exception allows one *uncapped* line per household and *capped* support for all other lines in the household.

Respectfully submitted,

SMITH BAGLEY, INC.



By: _____
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EXHIBIT A

OPERATION OF THE CAP

Assume that before operation of the cap, Carrier has 100 lines on a tribal land and of those, 50 are separate residential accounts and 50 are “second lines”, all of which receive \$10 per line per month. Carrier receives \$1000 in uncapped support (100 x \$10).

Assume that as a result of the cap, the capped amount for the state results in a reduction to \$8.00 per line. Under the cap, Carrier would receive \$800 (100 x \$8).

SBI Interpretation:

If Carrier opts in to the tribal exception, it would receive uncapped support for the 50 qualifying residential lines (50 x \$10 = \$500) and capped support for the remaining 50 lines (50 x \$8 = \$400). For a total of \$900. This exception provides more than capped support, but less than uncapped support.

GCI Interpretation:

If Carrier opts in to the exception, it would receive uncapped support for 50 qualifying lines (50 x \$10 = \$500). This exception provides less support than would be received under the cap.

EXHIBIT B

**LETTER FROM NAVAJO NATION
VICE PRESIDENT BEN SHELLY**



DR. JOE SHIRLEY, JR.
President

BEN SHELLY
Vice President

July 11, 2008

The Honorable Kevin J. Martin, Chairman
Federal CommunicationS Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Martin,

Thank you for your leadership on universal service and for the Joint Board's work to ensure that Americans living on tribal lands and other rural areas have access to modern telecommunications facilities. Modern wireless and broadband telecommunications services is the backbone to our ability to participate in the US and world economies.

The growth of the Navajo Nation depends upon the provision of broadband and wireless services throughout the 27,000 square miles of tribal lands located in Arizona, New Mexico and Utah. Our schools, libraries, and health care facilities depend on the universal service mechanism to get and remain connected so as to deliver vital services to our people. Moreover, the vast majority of cellular and satellite services provided on the Navajo Nation depend upon federal universal service funding.

We have been fortunate to have several companies willing to use the universal service program to extend services to our people. The efforts of these companies have dramatically increased telephone penetration on our lands. There is however, much work to be done.

As you know, the Navajo Nation wrote to you on May 24, 2007, urging you to reject a cap on support to competitive carriers, especially those operating on tribal lands. It is our understanding the FCC has voted to cap federal universal service support to wireless carriers, but has also included an exemption that would allow those carriers operating on tribal lands to continue to receive funding without being capped. This is a significant and positive outcome for tribal lands, especially ours, where funding is critical to accelerate new cell site construction and the delivery of new services to our people.

We also understand that the FCC's recent order could be interpreted to mean that wireless carriers operating on tribal lands would be subject to what could be fairly characterized as a "primary line" restriction. The result of this interpretation would be that a wireless carrier would get *less* support to invest on tribal lands, than if it were subject to the cap.

This result could not have been the FCC's intent, and we strongly urge you to reject any such interpretation. If tribal land is exempt from the cap, then it should receive more support, not less. Of all the places in this great nation where federal universal service support can improve the lives of Americans, the Navajo Nation is perhaps the most in need of additional support.

Again, we thank you for your service and ask your assistance in clarifying this very important matter for the benefit of our citizens.

Sincerely,


Ben Shelly, Vice President
THE NAVAJO NATION

cc: Hon. Michael Copps
Hon. Jonathan Adelstein
Hon. Deborah Taylor Tate
Hon. Robert McDowell