

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

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

**PETITION FOR WAIVER**

**Expedited Action Requested**

Smith Bagley, Inc. (“SBI”), by counsel and pursuant to Section 1.3 of the Commission’s Rules,<sup>1</sup> hereby requests a waiver of the interim, emergency cap imposed by the Commission on the amount of high-cost support that competitive eligible telecommunications carriers (“ETCs”) may receive<sup>2</sup> in the limited circumstances described in this Petition.

The purpose of this waiver request is to benefit residents of the Eastern Navajo Agency of the Navajo Nation (“Eastern Navajo Agency” or “Agency”) in the State of New Mexico, by enabling SBI and other competitive ETCs to utilize uncapped high-cost fund mechanism support to provide telecommunications services to such residents. A map of the Navajo Nation, which includes the Eastern Navajo Agency, is attached as Exhibit A.<sup>3</sup>

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<sup>1</sup> 47 C.F.R. § 1.3.

<sup>2</sup> See *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) (“*Interim Cap Order*” or “*Order*”), *appeal docketed*, *RCA v. FCC*, Nos. 08-1284 & 08-1285 (D.C. Cir. Aug. 29, 2008).

<sup>3</sup> The size of the map provided as Exhibit A precludes its being included with this electronically filed Petition. Accordingly, the map is being submitted under separate cover to the Secretary of the Commission.

## I. INTRODUCTORY STATEMENT.

SBI, which is licensed to provide cellular radiotelephone service (“cellular service”) and personal communications service (“PCS”) throughout portions of Arizona, New Mexico, Utah, and Colorado, has substantial experience in bringing wireless telecommunications services to consumers living on Tribal lands. SBI has been designated as an ETC pursuant to Section 214 of the Communications Act of 1934 (“Act”)<sup>4</sup> in Arizona, New Mexico, and Utah, and is engaged in providing telecommunications services throughout the Navajo Nation and also on the Tribal lands of the Hopi Nation, and of the White Mountain Apache, Ramah Navajo, and Pueblo of Zuni tribes.

More specifically, SBI is licensed to provide cellular service and PCS in substantial portions of the Eastern Navajo Agency. SBI has constructed wireless telecommunications infrastructure in the Eastern Navajo Agency and is currently serving consumers who suffer from some of the lowest household telephone penetration levels in the country.

Currently, the Eastern Navajo Agency is not federally recognized reservation land. It has previously been 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.<sup>5</sup> As

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<sup>4</sup> 47 U.S.C. § 214.

<sup>5</sup> See *Smith Bagley, Inc., Petition for Waiver of Section 54.400(e) of the Commission’s Rules*, WC Docket No. 03-109, filed Mar. 19, 2004 (“SBI 2004 Petition”), at 2. SBI sought the waiver to enable eligible residents of the Eastern Navajo Agency to receive enhanced Lifeline and Link Up services pursuant to the Commission’s rules. See 47 C.F.R. §§ 54.405(a)(4), 54.411(a)(3). The Commission granted SBI’s petition. See *Federal-State Joint Board on Universal Service, Smith Bagley, Inc., Petition for Waiver of Section 54.400(e) of the Commission’s Rules*, WC Docket No. 03-109, Memorandum Opinion and Order, 20 FCC Rcd 7701 (2005) (“SBI Waiver Order”).

SBI has observed, these checkerboard land holdings have created complex jurisdictional issues, as well as obstacles for the economic development of the Eastern Navajo Agency.<sup>6</sup>

The Navajo Nation is comprised of five Agencies: Tuba City, Chinle, Fort Defiance, Shiprock, and Eastern Navajo. Although the Eastern Navajo Agency is not federally recognized reservation land, the Eastern Navajo Agency functions in a manner that is identical to the other agencies. Its members have the same voting rights in Navajo affairs, and it is fully represented in the Tribal government, with full rights of participation on all governing councils and committees.<sup>7</sup>

The Commission in the *Interim Cap Order* created a limited exception to the application of the interim cap in the case of competitive ETCs serving “Covered Locations,” which the Commission defined to mean Tribal lands and Alaska Native regions. The Commission specified that:

Covered Locations are tribal lands or Alaska Native regions as those terms are defined in section 54.400(e) of the Commission’s rules. *See* 47 C.F.R. 54.400(e) (tribal lands or Alaska Native regions are “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.”) . . . .<sup>8</sup>

Because of the checkerboard nature of land holdings in the Eastern Navajo Agency, the Agency does not fall within the Commission’s meaning of “Tribal land” (as used in the definition of Covered Locations) because the Agency is not federally recognized reservation land.

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<sup>6</sup> SBI 2004 Petition at 2.

<sup>7</sup> SBI has largely relied upon *Chapter Images: 2004*, published by the Navajo Nation’s Division of Community Development.

<sup>8</sup> *Interim Cap Order*, 23 FCC Rcd at 8848 (para. 32, n.95). The Commission also noted that additional Lifeline and Link Up support is available for eligible residents living on Tribal lands or in Alaska Native regions.

Section 54.400(e) of the Commission’s Rules also includes “near reservation” land within its definition of “Tribal land,” and, although SBI believes that the Eastern Navajo Agency qualifies as Tribal land pursuant to this “near reservation” criterion,<sup>9</sup> the Commission stayed the application of this criterion (in the context of enhanced Lifeline and Link Up benefits) nine years ago<sup>10</sup> and the stay remains in effect today. Because the Eastern Navajo Agency is not included within the Commission’s definition of Covered Location in the *Interim Cap Order*, any competitive ETC that provides service to residents in the Eastern Navajo Agency will not receive the full amount of uncapped high-cost support.

Because of the unique and extraordinary circumstances facing consumers residing in the Eastern Navajo Agency, as described below, a waiver of the interim cap imposed in the *Interim Cap Order*, declaring that competitive ETCs providing service in the Eastern Navajo Agency may receive uncapped high-cost support disbursements, is warranted to enable SBI to expand and to continue providing services that are urgently needed by subscribers residing there, and to provide other competitive carriers with an incentive to provide services to consumers in the Agency. In support of this request, the following is respectfully shown.

## **II. WAIVER STANDARD.**

The Commission’s rules provide that the Commission may waive any provision of its rules on its own motion and for good cause shown.<sup>11</sup> The agency may waive a rule if it deter-

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<sup>9</sup> See SBI 2004 Petition at 6-8.

<sup>10</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000), *stayed in part*, Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 17112 (2000).

<sup>11</sup> 47 C.F.R. § 1.3.

mines that the particular facts of the case involved make strict compliance with the rule inconsistent with the public interest.<sup>12</sup>

The Commission may also take into account considerations of hardship, equity, or more effective implementation of its overall policies by acting on an individual basis.<sup>13</sup> A waiver of a rule is appropriate if special circumstances are present that warrant a deviation or departure from the general rule, and the Commission finds that such deviation or departure would better serve the public interest than strict adherence to the general rule.<sup>14</sup>

### **III. A WAIVER OF THE INTERIM CAP IS WARRANTED TO ENHANCE THE PROVISION OF TELECOMMUNICATIONS SERVICES TO RESIDENTS IN THE EASTERN NAVAJO AGENCY.**

The waiver requested by SBI in this Petition should be granted for two reasons: The special circumstances that exist in the Eastern Navajo Agency warrant the reinstatement and continuation of uncapped high-cost support to competitive ETCs that serve or seek to serve residents in the Agency,<sup>15</sup> and grant of the waiver will not in any way compromise the policy pursued by the Commission in limiting the exception to the cap to Covered Locations, thus ensuring that the public interest is served by granting the waiver.

#### **A. The Provision of Uncapped High-Cost Support Is Needed To Accelerate Infrastructure Investment and Increase the Availability of Telephone Service in the Eastern Navajo Agency.**

As noted in the preceding section, a waiver of the Commission's rules may be granted if special circumstances are demonstrated that warrant a deviation from application of the agency's

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<sup>12</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (“*WAIT Radio*”), *decision on remand*, 22 FCC 2d 934 (1970), *recon. denied*, 22 FCC 2d 1016 (1970), *aff'd*, *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972) .

<sup>13</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>14</sup> *Northeast Cellular*, 897 F.2d at 1166.

general rule. The special circumstances in the Eastern Navajo Agency are that consumers do not have sufficient access to telephone service. Many populated areas do not have access to high-quality commercial mobile wireless service. This lack of access exacerbates a host of economic, educational, health care, and other deprivations faced by these residents.

The Commission determined four years ago, in the *SBI Waiver Order*, that telephone penetration in the Eastern Navajo Agency was approximately 33% (compared to 94% nationwide and 68% on Tribal lands).<sup>16</sup> The Commission also found that, while per capita income nationwide was \$21,587 and per capita income on Tribal lands was \$12,452, the per capita income in the Eastern Navajo Agency was only \$6,979.<sup>17</sup>

Data gathered for the 2000 Decennial Census also showed that the telephone subscriber-ship rate in Navajo Nation was approximately 38%.<sup>18</sup> While telephone penetration and per capita income data have not been updated for the Eastern Navajo Agency since the 2000 Decennial Census, more recent survey information indicates that, overall, approximately 39% of the people in Navajo Nation live below the poverty level.<sup>19</sup>

As a result of the Commission's action in the *SBI Waiver Order*, and SBI's subsequent efforts to enroll residents of the Eastern Navajo Agency in the Lifeline support program, SBI be-

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<sup>15</sup> As stated in Section IV, *infra*, SBI requests that relief should be granted as of the effective date of the *Interim Cap Order*.

<sup>16</sup> *SBI Waiver Order*, 20 FCC Rcd at 7705 (para. 11) (citing figures prepared by the Industry Analysis Division of the Wireline Competition Bureau based upon 2000 Decennial Census data).

<sup>17</sup> *Id.* (citing 2000 Decennial Census figures).

<sup>18</sup> See GAO, Report to Congressional Requesters, "Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands," GAO-06-189, rel. Jan. 2006 at 13, *cited in* SBI, Petition for Rulemaking Regarding the Expansion of Support Available Pursuant to the Fourth Tier of the Universal Service Lifeline Program, RM-11529, filed Mar. 27, 2009 ("SBI Tier 4 Waiver Petition"), at 10.

<sup>19</sup> U.S. Census, 2005-2007 American Community Survey 3-Year Estimates, Table S1703, "Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months," *cited in* SBI Tier 4 Waiver Petition at 12.

believes that subscribership levels in the Agency have improved during the last four years. The fact remains, however, that there is no evidence suggesting that telephone penetration levels in the Eastern Navajo Agency are approaching the levels for Tribal lands generally—let alone the national level of telephone penetration—and low telephone penetration rates among residents of the Agency continue to be a pressing problem. A big reason for low penetration rates is the lack of access to commercial mobile wireless services that can only be remedied by the construction of new cell sites.

The level of poverty that plagues the people living in the Eastern Navajo Agency adversely affects the ability of these residents to obtain housing, to pursue educational opportunities, and to take advantage of health care benefits and facilities. These residents' lack of sufficient access to telephone service can work to compound these problems in a variety of ways, *e.g.*, by making it more difficult to pursue economic opportunities, hindering their access to public safety services, interfering with their obtaining medical care, and curtailing their opportunity to utilize the benefits and resources of the Internet. In short, as SBI observed with respect to the Eastern Navajo Agency four years ago, “there are few, if any, other areas in the country that suffer from these types of conditions.”<sup>20</sup>

Allowing competitive ETCs to receive uncapped support will accelerate infrastructure investment in the Eastern Agency. SBI currently has plans to construct new cell sites in many areas, including at least four sites in the near term that will serve areas in the Eastern Navajo

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<sup>20</sup> SBI 2004 Petition at 5.

Agency.<sup>21</sup> Uncapping support to these areas will enable SBI to accelerate construction of new cell sites to these and other areas.

SBI believes that the special circumstances present in the Eastern Navajo Agency that have been described in the preceding paragraphs demonstrate that a grant of SBI's Petition will serve the public interest. Permitting SBI to receive uncapped high-cost support for lines served in the Agency (and extending uncapped support to any competitive ETCs choosing to deploy facilities and provide service to subscribers in the Agency) will contribute to increasing the level of telephone penetration because it will assist carriers in extending service to areas in the Agency that currently are unserved, and in improving and enhancing service in currently underserved areas. This deployment of facilities will also increase access to broadband services for people living in the Agency as all of SBI's new cell sites are 3G-ready on day one.

**B. Granting the Waiver Would Better Serve the Public Interest Than Strict Adherence to the Interim Cap Because Permitting Uncapped High-Cost Funding for the Eastern Navajo Agency Would Be Consistent with the Policy of the Covered Location Exception.**

In weighing whether to adopt a limited exception to the high-cost cap in the *Interim Cap Order*, the Commission decided in favor of the exception because of its finding that there continue to be low telephone penetration rates in many Tribal lands, and that providing uncapped high-cost support to carriers serving Tribal lands would not result in these carriers' merely providing complementary telephone service but instead would enable them to bring telephone service to new subscribers on Tribal lands.<sup>22</sup>

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<sup>21</sup> The exact locations of these sites are confidential and for competitive purposes are withheld here. SBI would be pleased to share its plans in more detail with the Commission if such information is accorded confidential treatment.

<sup>22</sup> See *Interim Cap Order*, 23 FCC Rcd at 8848 (para. 32).

The Commission's rationale for the limited exception in the *Interim Cap Order* provides a compelling basis for the grant of SBI's Petition, for three reasons. First, the demographics and other characteristics of the Eastern Navajo Agency are among the lowest in the Navajo Nation. SBI has previously shown, for example, that, in the Agency, 92% of the residents are Navajo (based on the 2000 Decennial Census), and that residents of the Agency vote as members of the Navajo Nation and are elected to offices in the same fashion as members of the other Agencies of Navajo Nation.<sup>23</sup> Thus, the Commission's decision to provide an exception to the interim cap in the case of Tribal lands argues for inclusion of the Eastern Navajo Agency because of the demographics and other characteristics that the Agency shares with the Navajo Nation and other Tribal lands.

Second, the exception in the *Interim Cap Order* was driven by the Commission's concern regarding low telephone penetration rates on Tribal lands. The presence of these low penetration rates was the explicit reason given by the Commission as the basis for its not imposing the cap on carriers serving lines on Tribal lands. As SBI has discussed, in addition to the fact that the Eastern Navajo Agency has demographics and other characteristics that are similar to those found on Tribal lands, the level of telephone penetration in the Agency is at least as low as the penetration level on Tribal lands.<sup>24</sup>

Third, permitting SBI and other competitive ETCs to receive uncapped high-cost mechanism support for lines served in the Eastern Navajo Agency will enhance the ability of these carriers to provide service to new subscribers in the Agency. As SBI has previously explained, a

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<sup>23</sup> SBI 2004 Petition at 6-7. See *SBI Waiver Order*, 20 FCC Rcd at 7707 (para. 17) (finding that "the [Eastern Navajo Agency] area is almost exclusively populated by Native Americans that suffer from the same conditions present on other federally-recognized Tribal lands") (footnote omitted).

<sup>24</sup> As SBI has indicated, the Commission pointed out in the *SBI Waiver Order* that penetration levels in the Eastern Navajo Agency were less than half of the levels for all Tribal lands.

major part of its business involves deploying wireless facilities and infrastructure on Tribal lands in order to increase subscribership levels:

SBI's deployment of wireless infrastructure on tribal lands and its construction of facilities used in the provision of telecommunications services to tribal communities has played an important role in increasing access to telecommunications services and improving subscribership levels on tribal lands served by SBI. The support available from the USF high-cost and Lifeline programs has helped make it possible for SBI to make substantial investments in pursuit of its commitment to bring wireless services to tribal reservations. SBI's network on tribal lands has grown significantly, now providing high-quality service to most of the areas where SBI is licensed to serve. High-cost support has also enabled SBI to upgrade its analog network to digital.<sup>25</sup>

SBI is currently using high-cost support to construct new facilities throughout the Navajo Reservation, including in the Eastern Navajo Agency. The provision of uncapped support will provide additional funds that can be used to build new cell sites that will benefit rural citizens living on the Eastern Navajo Agency lands.

SBI has included as Exhibit B to this Petition, pages from *Chapter Images: 2004* providing demographic information for each of the chapters within the Eastern Navajo Agency. The Navajo data include educational levels, poverty levels, per capita income, access to plumbing, and access to telephone service. The data represent extraordinary living conditions and poverty levels that we can find nowhere else in the country. In some chapters, more than 90% of households do not have access to a telephone, and household telephone penetration rates are commonly below 50%.

Over the past several years, SBI's efforts to construct new cell sites and conduct outreach efforts through the Commission's Lifeline and Link Up programs have resulted in approximately 2,000 households in the Eastern Navajo Agency receiving telephone service. Clearly, there is more work to be done. The Eastern Navajo Agency's nearly 40,000 citizens, spread across 5,255

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<sup>25</sup> SBI Tier 4 Waiver Petition at 23.

square miles, require significant new investment in telecommunications infrastructure, and wireless technology offers the best chance of improving their lives.

Given that the purpose of the exception to the cap in the *Interim Cap Order* is to enable competitive ETCs to utilize uncapped high-cost funding to increase investment in facilities and services on Tribal lands, and given that SBI's track record demonstrates that it has utilized its high-cost funding largely for this precise purpose, granting SBI's Petition will best serve the public interest.

If the Petition were to be denied, and the Commission thus continued to adhere to its general rule by capping high-cost funding for lines served in the Eastern Navajo Agency, this adherence would interfere with the Commission's own goal of enabling the use of uncapped high-cost funding to increase investment and subscribership in areas suffering from sub-standard facilities and low telephone penetration rates. Grant of the waiver requested by SBI, on the other hand, will advance the Commission's policy of improving infrastructure and raising telephone penetration rates, thus serving the public interest.

#### **IV. REQUEST FOR RELIEF.**

SBI requests the following relief: Waive the application of the interim, emergency cap established by the *Interim Cap Order* on the disbursement of high-cost mechanism support to competitive ETCs serving the Eastern Navajo Agency, thus allowing such competitive ETCs to receive such support in a manner consistent with the exception established in paragraph 32 of the *Order*.<sup>26</sup> SBI requests that relief be granted as of the effective date of the *Interim Cap Order*, August 1, 2008.

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<sup>26</sup> *Interim Cap Order*, 23 FCC Rcd at 8848 (para. 32).

## **V. REQUEST FOR EXPEDITED ACTION.**

An expedited grant of SBI's Petition is necessary to avoid continuing harm to residents of the Eastern Navajo Agency, whose ability to obtain affordable and sufficient telephone service is being adversely affected by the ongoing application of the interim, emergency cap. Restoration of full, uncapped high-cost mechanism support for lines served in the Eastern Navajo Agency will eliminate this harm, which should not be left for resolution through the Commission's normal administrative processes.

Section 1.3 of the Commission's Rules<sup>27</sup> is designed to address the type of situation presented here, in which immediate action is necessary to provide relief to consumers who are being denied critically important benefits as the result of strict adherence to a Commission rule.

## **VI. CONCLUSION.**

There is good cause for the Commission to waive the interim, emergency cap adopted in the *Interim Cap Order* in the case of telephone lines served in the Eastern Navajo Agency of the Navajo Nation. The Commission in the *Order* adopted the policy that the cap should not apply on Tribal lands, where investment in infrastructure and telephone penetration rates are exceptionally low in comparison to the rest of the country, so that competitive ETCs could utilize uncapped high-cost mechanism funding to invest in infrastructure and increase subscribership levels in these areas.

Although the Eastern Navajo Agency is not a federally recognized reservation and therefore is not a Covered Location under the terms of the *Interim Cap Order*, the Agency is recognized by the Navajo as an integral part of the Navajo Nation and shares with other Navajo agencies demographic and other characteristics (including the extraordinarily low telephone penetra-

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<sup>27</sup> 47 C.F.R. § 1.3.

tion levels in the Agency). Grant of the waiver will therefore serve the public interest, and advance the goals of the exception to the cap adopted in the *Order* with respect to Tribal lands, by enabling SBI and other competitive ETCs to use uncapped high-cost funding to invest in much needed infrastructure and to improve telephone subscription rates in the Agency.

Respectfully submitted,

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**EXHIBIT A**  
**MAP OF EASTERN NAVAJO AGENCY**

**EXHIBIT B**

**DEMOGRAPHIC DATA PROVIDED BY  
NAVAJO NATION DIVISION OF COMMUNITY DEVELOPMENT**