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SUMMARY

Smith Bagley, Inc., demonstrated in its petition for a limited waiver of the cap on high-cost support available to wireless competitive eligible telecommunications carriers, which was imposed by the Commission in the *Interim Cap Order*, that granting its petition would serve the public interest and would be consistent with the criteria followed by the Commission for the waiver of its rules.

SBI showed that the waiver would enable SBI to enhance and expand the services it provides to consumers in the Eastern Agency of the Navajo Nation. Uncapped funding to serve the Eastern Agency currently is not available because, although the Commission preserved uncapped funding for tribal lands in the *Order*, the Eastern Agency does not qualify for this exception to the cap because it does not fit within the definition of a “federally recognized” tribal land.

SBI explained in its petition that a waiver of the cap to enable full high-cost funding for the Eastern Agency is appropriate because the Eastern Agency shares many characteristics with the federally recognized tribal lands of the Navajo Nation, including exceptionally low telephone subscription penetration rates. SBI presented convincing evidence that a grant of its waiver request would facilitate efforts by SBI to bring services to residents of the Eastern Agency, thus advancing the Commission’s policy of improving subscriber penetration rates for Native Americans.

Sacred Wind Communications, Inc., the only party to oppose SBI’s petition, has failed to make a case that the waiver should be denied. It attempts to show that a grant of the waiver would precipitate a return to purportedly excessive levels of high-cost funding to wireless competitive ETCs, and that this supposed threat to the high-cost funding mechanism is sufficient reason in itself to deny the waiver. This line of argument attempts to raise false alarms that the Commission already rejected in the *Interim Cap Order*. The Commission decided in the *Order*

that its general concerns about the need to regulate growth of the high-cost fund did not require the Commission to cut off uncapped funding for the provision of services to consumers on tribal lands. SBI has shown in its petition that a limited waiver to enable uncapped funding for the Eastern Agency would be consistent with the Commission's objectives in creating an exception to the cap for the benefit of people living on tribal lands.

SWC expends considerable effort in its comments attacking the identical support rule used to disburse high-cost funding to competitive ETCs, and insisting that the Commission should require that SBI's support be based on its own costs. SWC, however, ignores the fact that the Commission specifically indicated in the *Interim Cap Order* that competitive carriers receiving uncapped support for use on tribal lands must receive the same per line support amount as incumbent local exchange carriers. SBI's waiver request simply asks the Commission to determine that the legal status and demographic characteristics of the Eastern Navajo Agency dictate its inclusion as a "Covered Location," therefore making it exempt from the interim cap.

Granting SBI's waiver request also would extend the benefits of competitive neutrality to the Eastern Agency, thus providing consumers residing in unserved areas throughout the Eastern Agency with greater access to mobile wireless services.

Another misguided argument offered by SWC is its claim that the limited waiver should be denied because SBI would merely provide complementary services in the Eastern Agency, contrary to the Commission's intentions in establishing the exception to the cap for tribal lands. Because of the fact that SWC's fixed wireless network has just recently been deployed and currently serves very few customers, a grant of the limited waiver would not result in SBI's providing complementary service but instead would enable SBI to compete head-to-head with SWC, on a level playing field, for customers in the Eastern Agency. The attractiveness of mobile wireless

technology, coupled with the fact that more and more consumers are “cutting the cord” and relying exclusively on mobile telephone service, suggests that consumers in the Eastern Agency would welcome this competitive choice. This assumption has been confirmed by the President of the Navajo Nation, who has strongly urged the Commission to lift the cap on high-cost support for the benefit of Navajo citizens living in the Eastern Agency.

Finally, SWC is incorrect in suggesting that the limited waiver should be denied because SBI would engage in minimal deployment of infrastructure to serve the Eastern Agency, would have no incentive to invest in facilities to serve the Eastern Agency, and thus would fail to improve the level of subscriber penetration.

In fact, SBI is prepared to expand and accelerate its deployment of cell sites to serve the Eastern Agency if its limited waiver request is granted—that intention is the basis for the waiver request. In addition, it is not credible for SWC to claim that SBI would have no incentive to invest. SBI’s receipt of high-cost support is dependent upon its winning customers in the Eastern Agency, so it has a strong incentive to invest in infrastructure needed to serve customers. SBI’s long track record of delivering services on Navajo lands is a convincing indication that it will invest uncapped high-cost support, together with its own funds, for the benefit of people residing in the Eastern Agency if its waiver request is granted.

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

In the Matter of)
)
High-Cost Universal Service Support) WC Docket No. 05-337
)
)

REPLY COMMENTS OF SMITH BAGLEY, INC.

Smith Bagley, Inc. (“SBI”), by counsel, hereby submits reply comments in the above-captioned proceeding, in which SBI is seeking a limited waiver¹ of the interim cap on universal service high-cost support for competitive eligible telecommunications carriers (“ETCs”).²

I. INTRODUCTION.

SBI’s Petition requests a limited waiver of the *Interim Cap Order* so that SBI and other competitive ETCs will be able to receive uncapped high-cost support for their use in providing or expanding telecommunications services to consumers residing in the Eastern Navajo Agency of the Navajo Nation (“Eastern Navajo Agency” or “Eastern Agency”) in the State of New Mexico.³ The *Order* includes a limited exception to the cap on wireless ETC high-cost funding, pur-

¹ SBI, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Petition for Waiver, WC Docket No. 05-337 (filed Dec. 14, 2009) (“Petition”).

² *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*”), *aff’d*, *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009) (“*RCA*”). See *Comment Sought on the Petition of Smith Bagley, Inc., for a Limited Waiver of the Interim Cap on Universal High-Cost Support for Competitive Eligible Telecommunications Carriers*, Public Notice, WC Docket No. 05-337, DA 10-48 (rel. Jan. 12, 2010). Reply comments are due on or before February 26, 2010. *Id.* at 1.

³ Petition at 1, 4.

suant to which competitive ETCs serving “Covered Locations” (*i.e.*, federally recognized tribal lands and Alaska Native regions) may receive uncapped high-cost funding.⁴

SBI’s Petition, seeking a limited waiver of the cap, is prompted by the fact that the *Interim Cap Order* caps high-cost funding for services provided in the Eastern Navajo Agency because the Eastern Agency does not qualify as a “Covered Location” due to the fact that the Eastern Agency is a “checkerboard” area of land holdings owned by individual Navajos, the Federal Government, the State of New Mexico, and private landowners.⁵ SBI’s Petition demonstrated that a limited waiver of the cap would be consistent with the policy established by the Commission’s Covered Location exception in part because the Eastern Agency is indistinguishable from other tribal lands that are covered by the exception.⁶

Only one party, Sacred Wind Communications, Inc. (“SWC”), filed comments in opposition to SBI’s Petition.⁷ For the reasons discussed below, SBI believes that SWC has not presented any facts or arguments persuasively contradicting SBI’s showing in its Petition that a grant of its waiver will advance the Commission’s policies and serve the public interest.

II. DISCUSSION.

In the following sections SBI demonstrates that there is no basis for SWC’s claim that a grant of the limited waiver of the interim cap sought by the Petition would be inconsistent with the Commission’s policies designed to curb what the agency deemed to be excessive levels of

⁴ *Interim Cap Order*, 23 FCC Rcd at 8848 (para. 32). The Commission specified that Covered Locations are tribal lands and or Alaska Native regions, which the agency defined to mean “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.” *Id.* at 8848 (para. 32 n.95).

⁵ Petition at 2.

⁶ *Id.* at 9-10.

⁷ Comments of Sacred Wind Communications, Inc., in Opposition to Petition for Waiver (dated Feb. 11, 2010) (“SWC Comments”).

high-cost support disbursed to competitive ETCs. SWC's arguments fail to give sufficient weight to the interplay between the Commission's efforts to curb high-cost fund growth and the agency's decision—reflected in the Covered Location exception—that the cap should not be applied on tribal lands.

SBI also shows that, contrary to SWC's claims, grant of the requested waiver would be entirely consistent with the core policy of the Covered Location exception. Finally, SBI explains that SWC is incorrect in its speculation that grant of the waiver would not result in significant infrastructure deployment to provide services in the Eastern Navajo Agency and would not improve subscriber penetration rates in the Eastern Agency.

A. SWC's Concerns That a Grant of the Waiver Would Not Be Consistent with Commission Policies To Control High-Cost Fund Growth Are Misplaced and Unpersuasive.

In arguing that SBI's waiver request is inconsistent with the Commission's policy in the *Interim Cap Order* to curb high-cost fund growth, SWC overlooks the fact that the Commission's Covered Location exception reflects a decision by the Commission *not* to apply the cap to carriers providing service on tribal lands, because of the Commission's interest in promoting efforts to increase the level of subscriber penetration in tribal communities. In addition, various arguments advanced by SWC claiming that a limited waiver of the cap would provide a windfall to SBI, and that uncapped funding would not be used to invest in infrastructure to serve the Eastern Navajo Agency, are unfounded and unpersuasive.

1. The Focus of the Commission’s Analysis in Reviewing SBI’s Petition Should Be Whether the Eastern Navajo Agency Will Receive the Benefit of the Covered Location Exception.

A large part of SWC’s argument⁸ in opposition to the Petition consists of an attempt to invoke the general findings of the *Interim Cap Order* as grounds for denying SBI’s waiver. SWC contends that granting the waiver would not be consistent with the purpose of the *Interim Cap Order* to rein in excessive levels of high-cost support disbursed to competitive ETCs.⁹

Although SBI will demonstrate in the following sections that these SWC contentions are deficient on the merits,¹⁰ it is important to note at the outset that this entire line of argument offered by SWC misses the point. SWC apparently believes that SBI’s request for a limited waiver of the interim cap should be summarily denied because the waiver would conflict with the Commission’s policy of avoiding excessive levels of high-cost funding.¹¹

The point, however, is that the Commission has already established the policy—in the *Interim Cap Order* itself—that the cap will be set aside in tribal areas to enable competitive ETCs to use uncapped high-cost funding to “help remedy the low penetration rates and poor telecommunications services in these areas.”¹² The Commission thus has already decided that the policies that led the agency to impose the cap will not be compromised or contradicted by uncapping the high-cost fund to facilitate competitive ETCs’ deployment of infrastructure and provision of services on tribal lands.

⁸ See SWC Comments at 8-11.

⁹ See *id.* at 9.

¹⁰ See Sections II.A.2., II.A.3., *infra*.

¹¹ See SWC Comments at 8-9.

¹² *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 24 FCC Rcd 3369, 3372 (para. 10) (2009).

SWC's apparent view that SBI's limited waiver should be denied simply because allowing SBI to receive uncapped high-cost support would result in "wretched excess"¹³ in effect amounts to nothing more than an argument that the Covered Location exception should be read out of the *Interim Cap Order*. SWC's approach—which apparently is constructed on the proposition that *any* waiver of the cap should be summarily dismissed because such a waiver would *ipso facto* precipitate a return to excessive high-cost fund disbursements—would not only turn the Commission's waiver rules into a nullity, but would also ignore the Commission's decision in the *Order* to provide for an exception to the cap so that competitive ETCs may receive full uncapped support for their use in bringing telecommunications services to unserved tribal lands.

Instead of entertaining SWC's "summary denial"¹⁴ approach to reviewing waivers of the *Interim Cap Order*, the Commission should follow a more reasonable and defensible path. SBI asks the Commission to decide whether there is a sound policy basis for *not* applying the narrow definition of tribal lands in the *Order's* Covered Location exception, in order to allow competitive ETCs to use uncapped funding to serve customers in the Eastern Navajo Agency. Providing a limited waiver of the cap in the specific circumstances described in SBI's Petition would recognize that strict enforcement of the cap would not be consistent with the Commission's policies or the public interest.

While SWC contents itself in its comments with expressing concerns about any waiver of the cap because of the alleged funding excesses that would ensue, it almost completely ignores whether the cap should be waived because consumers in the Eastern Navajo Agency would benefit from additional investment that competitive ETCs would make. It also pays little attention to whether the demographic and economic conditions in the Eastern Agency are such that the area

¹³ *Id.* at 8.

¹⁴ *See id.*

deserves a level of high-cost support commensurate with that received by residents of other tribal lands. As SBI will demonstrate,¹⁵ when SWC does turn to this issue, its cursory contentions fall short of providing any basis for denying SBI's Petition.

2. SWC's Concerns About the Identical Support Rule Are Misplaced.

SWC apparently suggests that the Commission's decision regarding the merits of SBI's request for a limited waiver of the competitive ETC cap should turn in large part on what SWC considers to be the deficiencies of the identical support rule. SWC contends that, under the identical support rule, competitive ETCs received high-cost funding in excess of their actual deployment costs, "an outcome which SBI no doubt seeks here."¹⁶

SWC's speculation regarding the motives involved in SBI's petitioning for a limited waiver of the interim cap is misguided. Implicit in SWC's argument is that the identical support rule somehow enables competitive ETCs to retain as profit that portion of their high-cost disbursements that exceeds their costs for infrastructure deployment and the provision of services. SBI is *not* seeking to use the requested waiver as a means of obtaining high-cost disbursements in excess of its infrastructure deployment costs—any more than SWC's series of Commission waivers in 2006 and 2008¹⁷ were intended to enable SWC to profit from support in excess of its costs. SBI is obligated to account for all the high-cost support it receives, and SBI's intention—as it has made clear in its Petition—is to use uncapped support, if its waiver request is granted, to accelerate deployment of infrastructure (more expeditiously than otherwise could be done) that

¹⁵ See Section II.B., *infra*.

¹⁶ SWC Comments at 9 (footnote omitted).

¹⁷ *See id.* at 8 & n.23.

will be used to bring services to customers in unserved and underserved areas in the Eastern Navajo Agency.¹⁸

SWC also argues that a limited waiver of the cap, and the resulting disbursement of funds to SBI based on the identical support rule, would be particularly problematic because the costs associated with deploying SWC's network are so high that they would not serve as an appropriate surrogate for SBI's high-cost support.¹⁹ SWC would have the Commission believe that SBI's Petition is a result of SBI's having "identified a potential bonanza too good to pass up[,]"²⁰ and that SBI is focusing on the Eastern Navajo Agency because SWC's high per-line costs associated with its provision of service in the Eastern Agency would provide "SBI even more of a windfall than support based on ILEC support from other areas."²¹

As SBI has discussed, SWC's worries about bonanzas and windfalls would be more credible if SBI could take the universal service disbursements resulting from SWC's high per-line costs and put the money in the bank. On the contrary, SBI will have to construct a significant number of cell sites in order to expand service in the Eastern Navajo Agency, and it must report its efforts in that regard to the Public Regulation Commission of New Mexico each year prior to being recertified. With this level of accountability to the state commission, it is not possible under the Commission's rules for there to be any windfall. Whatever increase in support SBI would receive if the waiver is granted would be used to invest in the construction, operation, and maintenance of network facilities. Until such time as SBI has a network that serves all customers in

¹⁸ Petition at 9-10.

¹⁹ SWC Comments at 2, 10 n.30.

²⁰ *Id.* at 11.

²¹ *Id.* at 12.

the Eastern Navajo Agency throughout the areas where they live, work, and travel, the “wind-fall” issue suggested by SWC is nonexistent.

In sum, SWC is simply wrong in suggesting that, because uncapped high-cost funds would be disbursed to SBI pursuant to the identical support rule, this method of disbursement in and of itself provides a basis for denying the waiver request. A case cannot be made that uncapped disbursements to SBI for infrastructure build-out and the provision of service in the Eastern Agency would be used inefficiently (or not used at all).

In fact, the amount of high-cost disbursements (whether capped or uncapped) that SBI may receive is based on the number of SBI’s subscribers in the Eastern Navajo Agency. If SBI invests in new cell sites, but does not gain customers, it will not receive any high-cost support. Thus, SBI has a strong incentive to use its own funds, as well as universal service funds, to deploy infrastructure and compete for the business of citizens living on the Eastern Navajo Agency, since the level of its high-cost support is dependent on the number of its subscribers and its success in the marketplace. From a public policy perspective, this is a proper and effective incentive because it ensures that competitive ETCs such as SBI will use high-cost funds to invest in infrastructure.

In contrast, because the Commission has never required that high-cost funding to rural incumbent local exchange carriers (“LECs”) must be fully portable—*i.e.*, if an incumbent LEC loses a subscriber line it would lose high-cost funding associated with that line—rural incumbent LECs have no incentive to operate efficiently and provide affordable services with features and functionalities that are responsive to consumer demand. In recent years, as rural incumbent LECs have lost more and more subscriber lines to competitors,²² there has been no corresponding re-

²² The percentage decrease in the total access lines served by incumbent LECs from June 2002 through June 2008 was 26.0 percent. *See* Indust. Analysis & Tech. Div, Wireline Comp. Bur., FCC, *Local Tele-*

duction in the level of their high-cost support.²³ This disbursement methodology engenders perverse incentives for rural incumbent LECs.

The inquiry the Commission should follow in reviewing SBI's Petition is whether a grant of the waiver would be consistent with the agency's policy of improving subscriber penetration rates on tribal lands.²⁴ As SBI has explained in its Petition,²⁵ and as it elaborates further in these Reply Comments,²⁶ there are compelling reasons to conclude that grant of the waiver would advance this Commission policy.

SWC also attempts to argue that the agency's imposition of the cap was grounded in its finding that competitive ETCs were receiving subsidies in excess of what is needed to allow them to remain in the market.²⁷ SWC claims that, given this finding, a waiver of the cap would reinstate the "wretched excess" (in the hyperbolic words of the court in *RCA*) of high-cost disbursements to competitive ETCs.²⁸

There are two problems with this argument. First, as SBI explained in the preceding section, the Commission has already decided that making uncapped funding available for tribal lands is not inconsistent with the agency's efforts to curb "excessive" high-cost disbursements. This decision by the Commission undercuts the relevance of SWC's argument that the limited waiver should be denied in order to hold the line on the level of high-cost funding.

phone Competition: Status as of June 30, 2008, Table 4, "Reporting Incumbent Local Exchange Carriers."

²³ In fact, during the period from 2002 through 2008 total high-cost support provided to incumbent LECs increased by 7.1 percent. See Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, CC Docket No. 98-202, 2009, Table 3.2 "High-Cost Support Fund Payment History – ILECs and CETCs."

²⁴ See *Interim Cap Order*, 23 FCC Rcd at 8848 (para. 32).

²⁵ Petition at 9-11.

²⁶ See Sections II.B., II.C., *infra*.

²⁷ SWC Comments at 9 (citing *RCA*, 588 F.3d at 1103).

²⁸ See *id.*

Second, this fixation on “excessive” funding levels has led SWC to ignore a Commission policy that has much greater relevance with respect to the merits of SBI’s waiver request. Specifically, the Commission’s adoption of the Covered Location exception in the *Interim Cap Order* ensures that high-cost funding will continue to be available to all ETCs serving tribal lands on a competitively neutral basis.²⁹ Granting SBI’s waiver would serve the Commission’s policy of competitive neutrality by extending it to the Eastern Navajo Agency. All carriers—not just rural incumbent LECs—would have access to high-cost support in connection with their deploying infrastructure and providing services in the Eastern Agency.

SWC’s plans for the Eastern Navajo Agency give it a stake in trying to avoid the competitively neutral disbursement of high-cost funding for use in the Eastern Agency. As SWC explains in its comments, its service area in New Mexico includes approximately 62 percent of the land area of the Eastern Navajo Agency and approximately 75 percent of the households in the Eastern Agency.³⁰ SWC further indicates that it has completed deployment of fixed wireless facilities that will enable it to serve approximately 95 percent of Eastern Agency households in its service area by the end of 2012.³¹ It should be emphasized that SWC is relying on high-cost support and a Rural Utilities Service loan to accomplish this deployment and operate its network.³²

If SBI’s waiver is not granted, then the competitive windfall given to SWC by the *Interim Cap Order* would remain in place. The efforts of SBI and other competitive ETCs to deploy infrastructure and provide services in the Eastern Agency would be hampered by the cap, while

²⁹ Even though the interim cap itself is not competitively neutral—it applies to wireless competitive ETCs but not to rural incumbent LECs—the Commission did state in the *Interim Cap Order* that it was not “departing from the principle of competitive neutrality” *Order*, 23 FCC Rcd at 8845 (para. 22). This observation is pertinent with respect to the Covered Location exception, since all providers serving Covered Locations are eligible for uncapped support.

³⁰ SWC Comments at 6.

³¹ *Id.* at 8.

³² *See id.* at 7-8.

SWC would continue to benefit from uncapped funding, completely untethered to SWC's progress in obtaining customers. This arrangement would serve SWC's interests, but would short change customers residing in the Eastern Navajo Agency.³³ Such a result would not only conflict with the Commission's policy in adopting the Covered Location exception,³⁴ but, as the *RCA* court teaches, would also be at odds with the universal service statute³⁵ because "[t]he purpose of universal service is to benefit the customer, not the carrier."³⁶ On the other hand, granting the waiver would have the effect of allowing competitive entry on a level playing field, giving consumers in the Eastern Agency the opportunity to select the service that is most affordable and best suited to their needs.

³³ The President of the Navajo Nation has underscored the importance of lifting the interim cap for the benefit of residents of the Eastern Agency:

I wish to emphasize that *all* of the Navajo Nation needs infrastructure investment, including that made possible by telecommunications carriers. The Eastern Agency is no exception. The FCC has previously made enhanced Lifeline support available to our citizens living in the Eastern Agency, and that has been instrumental in increasing telephone penetration rates. Now, we ask the Commission to lift the cap on high-cost support, so that all carriers have access to this vital funding, which can be invested for the benefit of our citizenry.

Letter from Dr. Joe Shirley, Jr., President, The Navajo Nation, to Julius Genachowski, Chairman, FCC, WC Docket No. 05-337, Jan. 25, 2010 ("Shirley Letter"), at 2 (emphasis in original). A copy of the Shirley Letter is attached to these Reply Comments.

³⁴ This policy is to ensure that the full extent of universal service resources is available to competitive ETCs seeking to provide services on tribal lands.

³⁵ See Section 254 of the Communications Act of 1934, 47 U.S.C. § 254 ("Act"), as added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³⁶ *RCA*, 588 F.3d at 1104 (quoting *Alenco Comm. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)) (internal quotation marks omitted). The court in *Alenco* also:

noted that nondiscriminatory access to high-cost support, by incumbent and competitor alike "is made necessary not only by the economic realities of competitive markets but also by the statute" and that "[t]he FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other."

Steve G. Parsons & James Bixby, *Universal Service in the United States: A Focus on Mobile Communications*, 62 FED. COMM. L.J. 119, 141 (2010) (quoting *Alenco*, 201 F.3d at 615, 616) (emphasis in original).

3. There Is No Rational Basis for SWC’s Suggestion That SBI Should Be Required To File Cost Data or To Demonstrate the Insufficiency of Its Capped Levels of Support.

SWC argues that, before the Commission entertains SBI’s request for a limited waiver of the interim cap, the agency should “put SBI to its proof” by requiring SBI to show that its capped support would be insufficient to expand its services into unserved areas in the Eastern Agency and to demonstrate the “appropriate level of support”³⁷

This effort by SWC to deflect the discussion away from the merits of SBI’s Petition, by attempting to introduce issues regarding the sufficiency of capped support, amounts to still another smokescreen. The burden faced by SBI in this proceeding is to show good cause for its

³⁷ SWC Comments at 10. SWC goes so far as to claim that there is no need for a waiver, since the *Interim Cap Order* provides a mechanism under which SBI could receive uncapped funds by showing its own costs, for review by the Commission, and receiving high-cost disbursements based on these costs. *Id.* There are two problems with SWC’s suggestion. First, given the fact that the nature and generation of wireline and wireless carriers’ costs differ (*e.g.*, because of differences in the technologies used and the manner in which services are provided) the conventional cost accounting mechanisms upon which the Commission relies for evaluating wireline carrier costs are not directly applicable to costs related to wireless carriers’ facilities and services. Moreover, since mobile wireless carriers are competitive carriers, they are not subject to regulatory mechanisms that provide a structure for the accounting of their costs for regulatory purposes (nor did the Commission establish any such mechanism in the *Order*). Because of this, any attempt by SBI to submit “cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC[.]” *Order*, 23 FCC Rcd at 8848 (para. 31), would likely be a cumbersome, time-consuming, costly, and contentious process.

Second, in establishing the Covered Location exception, the Commission recognized the importance of encouraging entry and the provision of service by competitive ETCs on tribal lands, and it did so by making clear that competitive entrants will receive the same level of per-line support as incumbents:

If a competitive ETC serves lines in both Covered Locations and non-Covered Locations (or only Covered Locations), the universal service administrator shall determine the amount of additional support—after application of the interim cap—necessary to *ensure that a competitive ETC receives the same per-line support amount as the incumbent LEC* for the lines qualifying for the exception.

Id. at 8849 (para. 33) (emphasis added) (footnote omitted). Thus, a waiver is necessary to ensure that this Commission policy with respect to the level of support available to competitive ETCs serving Covered Locations will also apply to the Eastern Navajo Agency. This is an appropriate outcome because, as SBI has demonstrated, customers in the Eastern Agency and on other tribal lands are similarly situated. *See* Petition at 9-10; Shirley Letter at 1 (noting that “Navajo citizens living in the Eastern Agency are vested with full rights and privileges accorded every other citizen living in the four other [Navajo Nation] agencies” and that “[t]he Eastern Agency suffers some of our nation’s most difficult demographic, social, and economic challenges”).

requested limited waiver. The Commission has established the waiver process as a means of avoiding strict adherence to a general rule in cases where doing so would not be in the public interest. SBI has met this burden in its Petition. Waiving the cap for the limited purpose of enabling competitive carriers to receive uncapped support for use in providing service to customers in the Eastern Navajo Agency will advance the Commission's policy of promoting the provision of service by competitive ETCs in order to improve levels of subscriber penetration on tribal areas that chronically suffer from low subscriber penetration rates.³⁸

In addition, although SBI disagrees with SWC's claim that a showing of the insufficiency of capped funds available to SBI (for purposes of its provision of services in the Eastern Navajo Agency) must somehow be a prerequisite to, or an element of, the Commission's review of SBI's Petition, the fact remains that, if SBI does not have access to uncapped support for its use in the Eastern Agency, then less infrastructure will be deployed and this deployment will occur more slowly. Such a result may suit SWC's purposes, but it would not serve the interests of the people living in the Eastern Agency.

SBI lauds the Commission's longstanding efforts to address the insufficiency of telecommunications services available to Native Americans. The *Interim Cap Order* reflects a commitment to continue these efforts. As SBI has discussed, the Commission decided in the *Order* that the best way to improve subscriber penetration levels in tribal areas is to give competitive ETCs the same level of per-line high-cost support that is available to incumbents. Grant of the waiver will apply this policy to the Eastern Agency.

³⁸ *Interim Cap Order*, 23 FCC Rcd at 8848 (para. 32).

B. SBI Has Convincingly Demonstrated That the Requested Waiver Is Consistent with the Commission's Policies in the Interim Cap Order, Including the Covered Location Exception.

SWC points out that the Commission assumed that competitive ETCs are not providing services on tribal lands that are merely complementary to services already being provided. In attempting to show that the Petition should be denied, SWC asserts that complementary services are in fact the only services that SBI is seeking to provide.³⁹

Thus, SWC argues that since the basis for the Covered Location exception is the Commission's assumption that competitive ETCs are not merely providing complementary services on tribal lands, strict adherence to the Commission's rule (*i.e.*, refraining from extending the exception to cover the Eastern Navajo Agency) serves the public interest because SBI would do nothing more than provide complementary services in the Eastern Agency.

SWC is wrong. SBI does not seek to provide complementary services in the Eastern Navajo Agency. SBI provides service to roughly 70,000 Native Americans on tribal lands and for the vast majority its service is the sole or primary telephone service in the household. SWC's canned arguments made in other proceedings in other parts of the country do not apply to the Navajo Nation, and most certainly not to the Eastern Navajo Agency. SBI will compete with SWC, head-to-head, to be the exclusive service provider for customers residing in the Eastern Agency, and to serve areas in the Eastern Agency that will not be served by SWC.

Based on its record to date in acquiring and keeping customers, there is every reason to believe that SBI will enjoy considerable success in competing against SWC. Moreover, studies have shown a growing trend toward a preference by consumers to use wireless telephones as

³⁹ SWC Comments at 11.

their exclusive telephone service.⁴⁰ Many consumers are reaching the conclusion that, for reasons of work responsibilities, personal safety, and convenience, it is more desirable and cost effective to rely exclusively on mobile wireless carriers for the provision of telephone service.⁴¹ Granting SBI's Petition would provide customers in the Eastern Agency with the option to make this choice.

Given the fact that the Eastern Agency (like many other tribal lands) currently is largely unserved or underserved,⁴² SBI believes it is reasonable to conclude that the selection of mobile wireless as a customer's exclusive telephone service will be even more pronounced.

As SWC proceeds with deploying its fixed wireless infrastructure (most of the cost of which, as SBI has noted, is being underwritten by federal loans and subsidies),⁴³ it would likely desire to avoid having to contend with competitors, especially those that have been successful in serving tribal lands. The Commission, however, has decided to promote the competitive provision of telephone service on tribal lands—by creating an exception to imposition of the cap—as a means of maximizing the use of high-cost funds to improve subscriber penetration rates in

⁴⁰ For example, a government study has shown that more and more consumers are “cutting the cord” and relying upon mobile wireless technology as their exclusive source for telecommunications services. According to a National Health Interview Survey (“NHIS”) conducted by the National Center for Health Statistics, 20.2 percent of all households in the United States are using wireless phones exclusively, a 2.7 percent increase from the most recent survey previously conducted. This is the largest increase since NHIS began collecting data on wireless-only households in 2003. See Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, CDC, *Wireless Substitution: Early Release Estimates from the National Health Interview Survey, July-December 2008*, at 1 (May 6, 2009).

⁴¹ It also should be emphasized that, as SBI constructs new cell sites, SBI will be able to utilize these cell sites not only to deliver mobile telephone service, but also to provide wireless E-911 capabilities, advanced data services, and, in the future, broadband services.

⁴² SWC indicates that it only recently “has added its first fixed wireless subscribers from a single communications tower located at its headquarters site[,]” and that it plans to serve approximately 1,000 households in the Eastern Navajo Agency by the end of 2010. SWC Comments at 8. If that projection were to be realized, SWC would be serving 11.9 percent of Eastern Agency households in its service area, and 8.6 percent of all Eastern Agency households, by the end of this year. See *id.* at 6.

⁴³ See *id.* at 7-8.

these areas. Grant of SBI's Petition will advance this policy, as well as the Commission's policy of competitive neutrality, by enabling SBI to compete against SWC on a level playing field. Consumers residing in the Eastern Navajo Agency will be the beneficiaries of this competition.

In one important respect, SWC's filing makes the case for SBI's request. A significant number of households in the Eastern Agency would remain unserved even after SWC completes the deployment of its network by the end of 2012. SWC argues that it would have the capability to serve approximately 75 percent of all households in the Eastern Agency when it completes its network deployment, it suggests that this level of subscriber penetration is higher than the low penetration rates presumed by the Commission in establishing the Covered Location exception, and it concludes that SBI therefore would merely provide complementary service or "cherry pick" SWC's customers⁴⁴ (as if the customers somehow "belong" to SWC).

Even assuming that all households in the Eastern Navajo Agency with access to SWC's service actually subscribe to its service by the end of 2012, there is no reason to conclude that the Commission should treat a subscriber penetration rate of 75 percent as a "high" penetration rate for purposes of its universal service policies. Such a rate does not qualify as "universal" service, which is the goal of the Act,⁴⁵ nor can it be considered "high" in comparison with the overall national household subscribership rate, which was 95.7 percent as of November 2009.⁴⁶ In contrast, based on 2000 Census data, the telephone subscribership rate for Native American households on tribal lands in the lower 48 states was 68.6 percent ten years ago, while for Alaska Native Vil-

⁴⁴ *See id.* at 3.

⁴⁵ Section 1 of the Act establishes the goal of making communications services available "to all the people of the United States" 47 U.S.C. § 151.

⁴⁶ Alexander Belinfante, Indust. Analysis & Tech. Div, Wireline Comp. Bur., FCC, *Telephone Subscribership in the United States* (rel. Feb. 2010) at 7, Table 1 ("Household Telephone Subscribership in the United States").

lages it was 87 percent.⁴⁷ In its Petition, SBI submitted data demonstrating household penetration rates in various parts of the Eastern Agency well below 50 percent.⁴⁸

Given this comparison between overall national subscribership rates, and the subscribership rates on tribal lands, it must be concluded that a subscribership penetration rate in the Eastern Agency of 75 percent by year-end 2012 (with lower penetration rates this year and next year) should be treated as a low penetration rate for purposes of the Covered Location exception, requiring immediate action to accelerate infrastructure development. Thus, grant of SBI's Petition would create an opportunity for a significant number of households to receive service in areas with low subscriber penetration rates.

C. SWC Is Wrong in Speculating that Consumers in the Eastern Navajo Agency Would Not Benefit from a Grant of the Waiver.

SWC argues that, if SBI's waiver request is granted, SBI will deploy only four new cell sites to serve the Eastern Navajo Agency, which would not make any appreciable improvement in the level of subscriber penetration in the Eastern Agency,⁴⁹ and that it would be reasonable to expect that the facilities that SBI would deploy would not be located in interior locations in the Eastern Agency.⁵⁰

SBI's plan to construct four cell sites to serve the Eastern Navajo Agency, however, is based, not surprisingly, on its currently scheduled receipt of *capped* high-cost support. The purpose of SBI's Petition is to increase its level of support for use in serving customers in the East-

⁴⁷ GAO, Report to Congressional Requesters, "Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands," GAO-06-189, rel. Jan. 2006, at 11.

⁴⁸ See SBI Petition, Exhibit B, "Demographic Data Provided by Navajo Nation Division of Community Development" (showing that 88.1 percent of households in Casamero Lake, 64.0 percent of households in Chichiltah, 54.7 percent of households in Church Rock, and 97.2 percent of households in Counselor have no telephone service).

⁴⁹ SWC Comments at 12-13.

⁵⁰ *Id.* at 13.

ern Agency, which will enable SBI to accelerate its construction of additional cell sites that will be used to extend service to currently unserved areas in the Eastern Agency. SBI pledges to the agency that its build plan will be adjusted commensurate with the level of support it receives as a result of a grant of its Petition.

It is also important to recognize that even the addition of four cell sites, which would be accomplished on an accelerated basis by SBI if its Petition is granted, would likely exceed SWC's service plans for this year. SWC's fixed wireless system is scheduled to serve approximately 1,000 households in the Eastern Agency by the end of 2010.⁵¹ SBI's deployment of just four cell sites will likely provide the capability of reaching that level of service in the Eastern Agency more quickly than the schedule planned by SWC.

SBI cannot develop any detailed estimates of the extent to which infrastructure deployment could be increased and accelerated if its Petition is granted, because no accurate calculation presently can be made of the level of increased support that would result from removal of the cap. If the level of increased uncapped funding is significant, then the level of SBI's cell site deployment will be expanded and accelerated accordingly.

In this regard, SWC expresses concern that, if the cap is removed pursuant to SBI's limited waiver request, SBI will have no incentive to invest in the deployment of facilities to serve the less densely populated regions of the Eastern Navajo Agency.⁵² There is no basis for this concern. As SBI has explained in these Reply Comments, its receipt of high-cost support is based upon its service provided to customers. Because of this, SBI has every incentive to use un-

⁵¹ *Id.* at 8.

⁵² *Id.* The Commission should be more concerned about the effect that the cap has on investment in the Eastern Agency. *See* Shirley Letter at 1 (stating that “[a] cap on high-cost support in the Eastern Agency constrains investment, which visits a great prejudice on Navajo citizens living there”).

capped support to expand its services into currently unserved areas in the Eastern Agency. Doing so will increase the number of SBI's customers, which in turn increases its level of support.

SWC's argument about the lack of investment incentives also ignores the fact that, as SBI also has discussed in these Reply Comments, SBI is obligated to use its high-cost fund support to invest in infrastructure and to operate its network. In addition, SBI is the only carrier that has consistently made substantial investment in facilities used to expand service coverage on tribal lands in the region where the Eastern Agency is located. This record of investment is reflective of SBI's commitment to bring service to unserved areas, and it lends credibility to SBI's expressed intention to use uncapped high-cost funding to expand these efforts.⁵³

SWC also reaches the wrong conclusion in its discussion of the infrastructure deployment SBI has already accomplished in New Mexico. SWC claims that, since SBI's deployments have occurred primarily along major highways and major population centers, the same type of deployments would occur if SBI is permitted to receive uncapped funding for use in providing service in the Eastern Agency.⁵⁴ The opposite is true. Given the deployments that have already occurred, uncapped high-cost funding will provide SBI with the resources necessary to expand its facilities and operations in a manner that will bring service to the more sparsely populated areas in the Eastern Agency.

⁵³ See Shirley Letter at 1:

For nearly 20 years, SBI has operated a wireless telecommunications system on Navajo lands, and since its designation as a carrier eligible to receive federal universal service funding, it has made great strides in expanding service to Navajo citizens and increasing telephone penetration throughout the Navajo Nation. Their efforts, and those of other carriers willing to invest in the Eastern Agency, should not be constrained by the interim cap.

⁵⁴ SWC Comments at 13 & n.37.

III. CONCLUSION.

SBI has demonstrated in its Petition that grant of its request for a limited waiver of the interim cap on high-cost disbursements would not be inconsistent with the policies established by the Commission in the *Interim Cap Order*, especially those policies related to ensuring that uncapped high-cost funding is made available to benefit consumers residing on tribal lands. SWC's comments have failed to present any information or plausible arguments to support its assertion that grant of the waiver would not be in the public interest. Accordingly, for all the reasons presented in these Reply Comments, SBI respectfully requests the Commission to grant its Petition.

Respectfully submitted,

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Dated: February 26, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-sixth day of February, 2010, a copy of these Reply Comments of Smith Bagley, Inc., WC Docket No. 05-337, was served via First Class Mail, postage prepaid, on each of the individuals listed in the following Service List.

/s/ Donna L. Brown

Donna L. Brown

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ATTACHMENT



The Navajo Nation

DR. JOE SHIRLEY, JR.
President

BEN SHELLY
Vice President

January 25, 2010

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Petition of Smith Bagley, Inc. for Limited Waiver of Interim Cap
on Universal Service High-Cost Support
WC Docket No. 05-337

Dear Chairman Genachowski:

On behalf of the Navajo Nation, I write to discuss a very important issue that has come to my attention relating to the ability of wireless carriers to invest in advanced telecommunications infrastructure on the Navajo Nation.

Recently, Smith Bagley, Inc. ("SBI") filed a petition for waiver with the FCC seeking relief for the Navajo Nation's Eastern Agency from the interim cap on high-cost support to all competitive carriers.

As you may know, the Eastern Agency is one of five agencies within the Navajo Nation. Navajo citizens living in the Eastern Agency are vested with full rights and privileges accorded every other citizen living in the other four agencies. The Eastern Agency suffers some of our nation's most difficult demographic, social, and economic challenges.

As I understand it, the federal government views the Eastern Agency as non-tribal land. In this case, that legal designation harms our citizens. A cap on high-cost support in the Eastern Agency constrains investment, which visits a great prejudice on Navajo citizens living there. It is not an understatement to say that the federal government would have a difficult time finding tribal land within the United States that is more challenging to serve, and which is more deserving of new investment, than the Eastern Agency.

For nearly 20 years, SBI has operated a wireless telecommunications system on Navajo lands, and since its designation as a carrier eligible to receive federal universal service funding, it has made great strides in expanding service to Navajo citizens and increasing telephone penetration throughout the Navajo Nation. Their efforts, and those of other carriers willing to invest in the Eastern Agency, should not be constrained by the interim cap.

As I understand the FCC's order that lifted the interim cap on tribal lands throughout the country, the Commission's concern is that tribal citizens be afforded the full benefits of investments made

with high-cost support and that wireless carrier investments should continue. In fact, the Commission cited a letter from our Vice-President in support of its decision.

I wish to emphasize that *all* of the Navajo Nation needs infrastructure investment, including that made possible by telecommunications carriers. The Eastern Agency is no exception. The FCC has previously made enhanced Lifeline support available to our citizens living in the Eastern Agency, and that has been instrumental in increasing telephone penetration rates. Now, we ask the Commission to lift the cap on high-cost support, so that all carriers have access to this vital funding, which can be invested for the benefit of our citizenry.

I hope that you will give this matter your personal attention and that a decision can be made in the very near future.

Sincerely,



Dr. Joe Shirley, Jr., President
THE NAVAJO NATION

cc: Hon. Michael Copps
Hon. Robert McDowell
Hon. Meredith Attwell Baker
Hon. Mignon Clyburn