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
	)	
Smith Bagley, Inc.	)	
	)	
Request for Review of Decision by	)	
Universal Service Administrator	)	

SMITH BAGLEY, INC. REQUEST FOR REVIEW OF DECISION OF UNIVERSAL SERVICE ADMINISTRATOR AND REQUEST FOR DECLARATORY RULING

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Summary

The plain language of the *Interim Cap Order* entitles CETCs to receive uncapped high-cost support for lines qualifying for the Covered Locations exception to the Interim Cap. Yet CETCs serving Covered Locations have continued to receive capped support for their lines qualifying for the exception. Rather than provide uncapped support as directed in the Interim Cap Order, USAC has continued to apply the nationwide cap on Interstate Access Support to CETCs. In neither the *Interim Cap Order* nor the *Covered Location Waiver Order* did the FCC ever state that a CETC serving Covered Locations would be entitled to uncapped high-cost loop, local switching, and interstate common line support, yet have its IAS capped. SBI therefore requests that the Commission direct USAC to provide uncapped support for lines served in Covered Locations.

In addition, it appears that USAC has not implemented the Commission's directive in the *Interim Cap Order* to ensure that the amount of capped IAS available to ILECs is "indexed annually for line growth or loss by incumbent price cap LECs." SBI therefore requests a declaratory ruling that the IAS paid to ILECs must be reduced to reflect the line losses experienced each year by price cap ILECs as set forth in the *Interim Cap Order*.

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Smith Bagley, Inc. ("SBI"),[1] by its undersigned counsel and pursuant to §§ 54.721 and 54.722 of the Commission's rules, 47 C.F.R. §§ 54.721 and 54.722, respectfully requests the Commission to order the Universal Service Administrative Company ("USAC) to follow the Commission's clear directive set forth in its *Interim Cap Order*, to provide uncapped high-cost support to carriers serving Covered Locations. The *Interim Cap Order* and the follow-on *Covered Location Waiver Order*, are crystal clear that carriers serving Covered Locations are to receive support pursuant to Section 54.307 of the Commission's rules, which mandates that Competitive Eligible Telecommunications Carriers ("CETCs") "***will receive the full amount of universal service support that the incumbent LEC would have received for that customer***."

[1] 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. Its ETC designations include portions of New Mexico, Arizona and Utah.

In addition, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, SBI requests a declaratory ruling pursuant to which the Commission would direct USAC to make the necessary adjustments to Interstate Access Support for incumbent local exchange carriers ("ILECs"), as the Commission decided in the *Interim Cap Order*.

I. INTRODUCTION

A. Adoption of the Interim Cap.

In May of 2008, the Commission capped high-cost support provided to CETCs on a state-by-state basis, with each statewide cap set at the level of support CETCs in that state were eligible to receive during March 2008 on an annualized basis ("Capped Support").[2] We note here that "high-cost support" is a term of art that includes by its definition support under the following programs: (1) high-cost loop support, (2) local switching support, (3) interstate access support, and (4) interstate common line support.

The amount that each CETC receives under the cap is calculated by comparing, (a) the total support that all CETCs in each state would have received under the existing rules without the cap ("Uncapped Support"), with (b) the Capped Support for each state. Again, both calculations ***include*** IAS amounts. If the total Uncapped Support in a state exceeds the state's Capped Support, then USAC divides the Capped Support by the total Uncapped Support,

[2] *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, 23 FCC Rcd. 8834, 8850 (para. 38) (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

yielding the state reduction factor. USAC then applies the reduction factor to the uncapped amount for each CETC in the state.[3]

For example, if a state's total Capped Support is $1.00, and the state's total Uncapped Support amount is $2.00, then the reduction factor is 0.5 (1.00 ÷ 2.00 = 0.5). Thus, in that state, if a carrier's Uncapped Support is 20 cents, then its Capped Support is 10 cents (20 cents x .5 = 10 cents). If the state's Uncapped Support amount is less than the Capped Support amount for the state, then no reduction is made.[4]

In addition to capping all categories of CETC support on a state-by-state basis, the Commission also divided the total amount of IAS nationwide into two pools, one for ILECs and one for CETCs. The nationwide cap on IAS for CETCs was set at the amount all CETCs were eligible to receive in March 2008 on an annualized basis. The nationwide IAS cap for ILECs was set at the amount all ILECs were eligible to receive in March 2008 on an annualized basis, but the Commission decided that the total amount available to ILECs would be "indexed annually for line growth or loss by incumbent price cap LECs."[5]

B. Exception to the Interim Cap on High-Cost Support.

The Commission adopted two exceptions to the operation of the cap, one of which is here relevant. Under the relevant exception, CETCs serving tribal lands or Alaska Native regions ("Covered Locations") are permitted to continue to receive ***uncapped high-cost support*** for lines served in those Covered Locations.[6]

In explaining the Covered Locations exception, the Commission stated that the exception "permit[s] competitive ETCs serving Covered Locations to continue to receive ***uncapped high-***

[3] The Commission's explanation of the cap mechanics are set forth in the *Interim Cap Order* at 8846 (para. 27).
[4] *Id.*
[5] *Id.* at 8849 (para. 35).
[6] *Id.* at 8848 (para. 32).

cost support for lines served in those Covered Locations."[7] Specifically, the Commission directed USAC to "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."[8] In other words, the Commission preserved the so-called "identical support" rule for CETCs serving lines in a Covered Location.

Although the exception was initially limited to "one payment per each residential account,"[9] the Commission subsequently waived this limitation, reaffirming that support to CETCs serving Covered Locations would be ***uncapped***.[10] In neither the *Interim Cap Order* nor the *Covered Location Waiver Order* did the FCC ever state that a CETC serving Covered Locations would be entitled to uncapped high-cost loop, local switching, and interstate common line support, yet have its IAS capped.

C. SBI's Election for the Covered Locations Exception.

On June 19, 2009, shortly after the FCC released instructions for carriers seeking to qualify for the Covered Location exception,[11] SBI filed line count revisions for all time periods going back to the inception of the Interim Cap to enable USAC to pay uncapped support to SBI for all qualifying lines. Shortly thereafter, SBI learned that USAC had provided IAS in Covered Locations that remained subject to the nationwide IAS cap, notwithstanding the Commission's directive to ensure that the carrier receive "the same per-line support received by the incumbent LEC for the lines qualifying for the exception." On February 25, 2010, SBI sent a letter ("SBI Letter") requesting that USAC pay support for lines in Covered Locations that is not subject to

[7] *Id.* (emphasis added).
[8] *Id.* at 8849 (para. 34) (emphasis added).
[9] *Id.* at 8849 (para. 33).
[10] *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) ("*Covered Location Waiver Order*").

[11] *See* "Small Entity Compliance Guide: Interim Cap on High-Cost Universal Service Support for Competitive Eligible Telecommunications Carriers," DA 09-1157 (rel. May 27, 2009).

either the statewide caps or the nationwide IAS cap, and that USAC issue a refund of all support withheld based on the application of the nationwide IAS cap to lines in Covered Locations.[12] On May 6, 2010, USAC issued a letter ("USAC Letter") to SBI denying both requests.[13] Copies of these letters are attached hereto.

II. DISCUSSION

The plain language of the *Interim Cap Order* entitles CETCs to receive uncapped high-cost support for lines in Covered Locations. SBI therefore requests that the Commission direct USAC to provide uncapped support for lines served in Covered Locations. In addition, SBI requests a declaratory ruling that the IAS paid to ILECs must be reduced to reflect the line losses experienced each year by price cap ILECs as set forth in the *Interim Cap Order*.

A. The Covered Location Exception Requires USAC to Ensure SBI Receives the Same Per-Line Support Amount as the Incumbent LEC.

Under the Covered Locations exception, the Commission stated that CETCs submitting lines in Covered Locations shall receive uncapped support for all such lines.[14] To date, USAC has made support adjustments making up for the prior application of the statewide caps to support in Covered Locations. However, USAC has made no similar adjustment to restore the amounts deducted by operation of the nationwide IAS cap in those areas. USAC has therefore failed to implement the Covered Locations exception fully.

The Commission has explicitly and consistently stated that lines reported in Covered Locations must receive support that is uncapped. In establishing the exception in the *Interim Cap Order*, the Commission concluded that CETCs serving Covered Locations would "continue

[12] The SBI Letter is attached hereto as Exhibit A.
[13] The USAC letter is attached hereto as Exhibit B.
[14] *Interim Cap Order* 23 FCC Rcd. at 8848 (para. 32); *Covered Location Waiver Order*, 24 FCC Rcd at 3372 (para. 10).

to receive ***uncapped high-cost support*** for lines served in those Covered Locations."[15] In its subsequent order removing the limitation of uncapped support to one line per residential account, the Commission stated:

> [P]ursuant to the Interim Cap Order, competitive ETCs serving Covered Locations who opt into the exception will receive uncapped high-cost support for all lines served in those Covered Locations and support will be provided ***pursuant to section 54.307 of the Commission's rules*** (emphasis added).[16]

By specifying that support for lines in Covered Locations shall be "uncapped," and that such support shall be provided pursuant to Section 54.307 of the rules, the Commission left absolutely no room for USAC to do anything other than provide ***uncapped support***. Section 54.307(a)(3) provides in pertinent (and dispositive) part:

> A competitive eligible telecommunications carrier that provides the supported … ***will receive the full amount of universal service support that the incumbent LEC would have received for that customer*** (emphasis added).

In its letter denying SBI's request, USAC erroneously stated that the Covered Locations exception "is not applicable to" the nationwide IAS cap, and that "the Commission did not provide any exceptions to the operation of the nationwide IAS cap." These statements flatly contradict and frustrate the Commission's clear statement that carriers providing service in Covered Locations receive "the same per-line support amount as the incumbent LEC for the lines qualifying for the exception."[17] Neither the *Interim Cap Order* nor the *Covered Locations Waiver Order* authorized USAC to interpret the FCC's decision to mean that CETC support would be ***less*** per-line than the ILEC.

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[15] *Interim Cap Order* at 8848 (para. 32) (emphasis added).
[16] *Covered Location Waiver Order*, 24 FCC Rcd at 3371 (para. 7).
[17] *Interim Cap Order*, 23 FCC Rcd. at 8849 (para. 33).

Moreover, by USAC's own admission, it has failed to ensure that the CETC's support is brought up to the same per-line level as the ILEC "***after*** application of the interim cap" in accordance with the directives of *Interim Cap Order*.[18] In the seven-step process described in the USAC Letter, the IAS cap factor is calculated and, in Step 3, "applied to each CETC's IAS uncapped demand to produce the eligible amount of IAS that is available to each CETC."[19] Then, in Step 6 of the process, "[e]ach CETC in the state then has its High Cost support reduced by the computed statewide reduction factor."[20]

Pursuant to this rather convoluted process, therefore, USAC applies the nationwide IAS cap ***before*** it applies the statewide cap. Under the *Interim Cap Order*, once the statewide cap is applied, USAC is then required to ensure that the CETC's support for lines in Covered Locations is the same per-line amount as that received by the ILEC. By failing to restore SBI's per-line support to ILEC levels after applying the statewide caps, USAC directly contradicted the *Interim Cap Order*.[21]

B. Granting SBI's Requested Relief Would Be Consistent With Recent Pronouncements Regarding the FCC's Sensitivity to Tribal Concerns.

SBI objects to the creation of a seven-step process that appears to be oriented toward restricting support to competitors rather than fulfilling the Commission's directives in the *Interim Cap Order*. On tribal lands throughout the country, support to wireless carriers drives critical infrastructure investment that provides many areas with basic telephone service.

Just today, Chairman Genachowski released responses to questions from the Senate Commerce Committee, reaffirming the agency's commitment to improving access to

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[18] *Id.* (emphasis added).
[19] USAC Letter at p. 2.
[20] *Id.* at p. 3.
[21] SBI also objects to the manner in which the seven-step process was developed. Nothing in any FCC order or directive proscribes such a procedure and its implementation was accomplished without a public process.

telecommunications and information services on tribal lands. In response to a question from New Mexico Senator Tom Udall, expressing concern about the fact that many tribal lands have not achieved basic connectivity, the Chairman stated:

> Throughout the Commission's activities implementing the National Broadband Plan, I intend to keep a watchful eye on how our actions benefit the most remote and unserved regions. I look forward to expanded and enhanced coordination with tribal governments, and full participation from tribal representatives and stakeholders in this major effort***, so we can be assured of addressing the disparity in communications services that has existed on many tribal lands***.[22]

In response to a question from Alaska Senator Mark Begich, expressing similar concerns about tribal lands that lack basic telephone service, the Chairman stated:

> As we move forward with universal service reform, ***including possible changes to the interim cap on competitive eligible telecommunications carrier support***, the Commission intends to consider unique circumstances present on tribal lands, including Alaska Native regions.[23]

The Interim Cap was implemented on a 3-2 partisan vote, over dissents from Commissioners Copps and Adelstein. The Interim Cap has cost rural consumers millions of dollars in advanced infrastructure investment already. SBI estimates that its support on tribal lands is being reduced by approximately $900,000 per year – roughly 26% of its total support in tribal areas – by operation of the nationwide IAS cap, which has caused it to delay construction of at least three new cell sites in remote areas that need coverage. Accordingly, the relief requested herein will benefit tribal lands immediately.

C. The IAS Cap for ILECs Has Not Been Indexed for Line Loss As Required.

To date, USAC has not implemented the Commission's directive in the *Interim Cap Order* to ensure that the amount of capped IAS available to ILECs is "indexed annually for line

[22] *See, Letter form Chairman Julius Genachowski to Hon. John D. Rockefeller,* June 15, 2010 (released July 6, 2010) at p. 41 (emphasis added).
[23] *Id.* at p. 54 (emphasis added).

growth or loss by incumbent price cap LECs."[24] Based on its review of USAC data, SBI believes that USAC has not reduced IAS paid to ILECs in a manner corresponding to the reductions in their lines each year. According to USAC projections, price cap ILEC lines decreased by approximately 22 percent from the first quarter of 2008 (the base cap period) to the third quarter of 2010.[25] Over the same time period, total projected IAS for ILECs fell only by approximately 7 percent.[26]

By requiring ILECs' IAS support to be "indexed annually for line growth or loss," the plain language of the *Interim Cap Order* appears to require that IAS for ILECs be increased or decreased at the same rate of line loss or growth by ILECs receiving such support. Indexation is a commonly used economic term meaning simply that one number is adjusted to reflect changes in another figure.[27] For example, if an employer provides annual wage increases that are indexed to the cost of living, then a 5% increase in the cost of living results in a 5% wage increase in order to avoid the problem of climbing to a higher tax bracket without a rise in purchasing power.[28] In other words, indexation ties one figure directly to another figure so that the former rises or falls in direct proportion to the latter.

In the *Interim Cap Order*, by deciding that IAS must be indexed annually for line growth or loss, the Commission required USAC to adjust IAS to ILECs upwards or downwards at the same rate of growth or loss in ILEC line counts. This is the approach the Commission took in its *1993 Interim Order* adopting the Joint Board's recommendation to impose an "indexed cap" on total universal service support.[29] The Joint Board's proposal, the Commission explained,

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[24] *Id.* at 8849 (para. 35).
[25] *See* USAC High Cost Appendix HC12 at http://www.usac.org/about/governance/fcc-filings/.
[26] *See id.*
[27] David W. Pearce and Robert Shaw, eds., *The MIT Dictionary of Modern Economics* (1992).
[28] Jae K. Shim and Joel G. Siegel, *Dictionary of Economics* (1995).
[29] *In the Matter of Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Report and Order, 9 FCC Rcd 303 (1993) ("*1993 Interim Order*").

involved "indexing growth in the USF to growth in the total number of working loops[.]"[30] The resulting rule made it clear that "indexing" means that the changes in the cap are directly proportional to the changes in the number of working loops:

> the annual amount of the total Universal Service Fund shall not exceed the amount of the total Universal Service Fund for the immediately preceding calendar year, increased by a rate equal to the rate of increase in the total number of working loops during the calendar year preceding the June filing.[31]

As with the Commission's 1993 interim cap on total USF support, the cap on IAS support that was adopted in the *Interim Cap Order* involves indexing the cap amount to the rate of change in the number of ILEC loops. Consistent with the Commission's application of the term "indexing" in the closely analogous context of the *1993 Interim Order*, the cap on IAS support for ILECs must similarly be read to require USAC to increase or decrease the IAS cap directly in proportion to the rate of growth or loss in ILEC lines. Because the ILECs' line counts have declined by roughly 22 percent since March 2008, the amount of IAS available to ILECs should have been reduced by the same percentage.

While the plain language of the *Interim Cap Order* suffices on its own, SBI also notes that implementing the ILEC IAS cap as directed will serve important policy objectives. The reduction of IAS to ILECs is fully in keeping with the Commission's goals of controlling the size of the fund and making new support available for new programs implementing the National Broadband Plan. Indeed, in seeking comment on various cost-saving measures to make support available for new programs, the Commission recently proposed capping ILEC per-line support at

[30] *Id.*, 9 FCC Rcd at 304.
[31] 47 C.F.R. § 36.601(c) (1993).

March 2008 or March 2010 levels.[32] Implementing the language of the *Interim Cap Order* by adjusting support downward with ILEC lines would serve this important objective. SBI estimates that indexing ILECs' IAS as directed by the *Interim Cap Order* would free up more than $70 million in excess IAS that has been paid to ILECs. Some of this amount would cover the additional IAS that will go to carriers serving Covered Locations upon a grant of the instant request for review. The remainder will be available for new programs.

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[32] *Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support,* WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, *Notice of Inquiry and Notice of Proposed Rulemaking*, FCC 10-58 (rel. April 21, 2010)("*NPRM*") at ¶ 52.

III. CONCLUSION

SBI requests that the Commission direct USAC to provide Uncapped Support on SBI's lines in Covered Locations, and make all necessary prior period adjustments to restore the support to the same level of per-line support received by the ILECs in those areas. In addition, SBI seeks a declaratory ruling that the IAS under the separate cap applicable to ILECs must be reduced in direct proportion to the line losses experienced each year by price cap ILECs.

Respectfully submitted,

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