FILED/ACCEPTED

JUL - 6 2010

Federal Communications Commission
Office of the Secretary

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
	)	WC DOCKET No 08-71
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

David A. LaFuria
Steven M. Chernoff
Its Counsel

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8678
dlafuria@fcclaw.com

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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.
REQUEST FOR REVIEW OF DECISION
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AND REQUEST FOR DECLARATORY RULING

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,

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[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-***

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[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

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[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 Telecommunieations 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

[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,

SMITH BAGLEY, INC.

David A. LaFuria
Steven M. Chernoff
Its Counsel

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8678
dlafuria@fcclaw.com

July 6, 2010

REDACTED PUBLIC VERSION

Before the
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	)	WC Docket No 08 71

SUPPLEMENT TO PETITION FOR WAIVER

Expedited Action Requested (Public Version)

Smith Bagley, Inc. ("SBI"), by counsel, hereby supplements the Petition for Waiver, filed December 14, 2009,[1] in the above-captioned proceeding, in response to information requests from Commission staff. The Petition seeks a limited waiver of the interim cap on universal service high-cost support for competitive eligible telecommunications carriers ("ETCs").

Commission staff requested information on SBI's estimate of how much universal service support a grant of the requested waiver would require, and what SBI would do with the support if its Petition were granted.

SBI estimates that if its waiver request is not granted, it will draw approximately $1.5 million per year in support. If its waiver is granted, it will draw approximately $3.5 million per year in federal high-cost support, an increase of $2 million per year. To arrive at these estimates, SBI apportioned line counts in the Eastern Navajo Agency of the Navajo Nation among the wireline carrier support zones, then added up the per-line amounts, to arrive at a total amount of support per month, and then annualized that amount.

[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").

SBI understands fully that any amount of support that increases the whole of the universal service fund also increases the amount that consumers across the country pay into the fund. That said, the additional amount at issue here, approximately $2 million per year, is a truly nominal amount. The amount in real dollars is less than three-tenths of one percent (0.3%) of the total fund. This amount does not move the needle when it comes to calculating what consumers are required to contribute on their monthly telephone bills.

Moreover, the Commission is in the process of recapturing funds from the high-cost support mechanism as a result of large carriers voluntarily relinquishing support. The amount of recapture is estimated to be as much as $3.9 billion over a decade.[2] The stated purpose of recapturing these funds is to make them available for a combination of activities described in the National Broadband Plan.[3] Improving access to advanced telecommunications and information services to rural, unserved and underserved tribal areas is a priority set forth in the National Broadband Plan. A grant of SBI's Petition will accelerate the deployment of network facilities to tribal lands in New Mexico that are in desperate need of improved service.

Having estimated how much incremental funding would be available if its Petition is granted, SBI has developed a preliminary business plan to invest $11 million within the first three years after a grant of the Petition, which represents the projected support to be distributed during the first three years following a grant. Since the amount of additional support that would eventually be distributed may vary significantly, SBI commits to invest whatever the incremental amount may be into its network. SBI would be pleased to provide the Commission with updated construction plans, and progress reports, consistent with the Commission's rules, documenting the use of whatever support amounts are ultimately provided in the Eastern Agency.

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[2] *See* Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) ("National Broadband Plan") at Recommendation 8.6.

[3] *Id.*

SBI has attached to this Supplement, a map depicting [**REDACTED**] new cell sites that would be constructed if the Petition be granted. These sites are located in some of the most remote areas of the Eastern Navajo Agency, and would provide critical mobile wireless telecommunications and advanced information services to tribal communities located in those areas. In addition, SBI's VisionOne® Lifeline servicc will be made available to all low-income consumers living in this area, including Tier 4 Lifeline support. In addition to the new cell sites, SBI will construct backhaul, battery backup, switch and network capacity upgrades, and related infrastructure, to deliver the highest quality service available in fulfillment of the goal set forth in Section 254(b)(3) of the Communications Act of 1934 that rural consumers have access to service that is reasonably comparable to that which is available in urban areas.

Some of SBI's construction plans involve placing cell sites along rural roads between communities where mobile service is needed. In addition, SBI's construction plans include new cell sites that would provide new or improved mobile services to the following communities:

Community Name	Population to be Covered	Community Name	Population to be Covered
[REDACTED]	1159	[REDACTED]	823
[REDACTED]	422	[REDACTED]	439
[REDACTED]	575	[REDACTED]	297
[REDACTED]	897	[REDACTED]	272
[REDACTED]	477	[REDACTED]	685
[REDACTED]	157	[REDACTED]	778
[REDACTED]	378	[REDACTED]	17
[REDACTED]	1144	[REDACTED]	258

SBI's request is consistent with the Chairman's latest thinking on accelerating investment in rural areas, including possible adjustments to the interim cap. Just two days ago, Chairman Genachowski released responses to questions from the Senate Commerce Committee, reaffirming the agency's commitment to improving telecommunications and information services on tribal lands. 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. [4]

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***.[5]

SBI's petition represents precisely the kind of action the Commission should be taking to accelerate investment on rural tribal lands, and a grant would be consistent with the sentiments expressed in the Chairman's responses.

We are constrained to note in passing the submissions of Sacred Wind Communications, Inc., in this proceeding,[6] which reflect that company's continuing efforts to pursue anti-competitive objectives. Sacred Wind, a fixed service provider, is incapable of providing mobile services, and it has an aspirational goal to reach 95% of households within its proposed ETC service area by 2012. Had the FCC granted SBI's petition soon after it was filed, SBI would

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[4] *See, Letter form Chairman Julius Genachowski to Hon. John D. Rockefeller,* June 15, 2010 (released July 6, 2010) at p. 54 (emphasis added).
[5] *Id.* at p. 41 (emphasis added).
[6] *See* Letter from Martin L. Stern, Counsel for Sacred Wind Communications, Inc., to Marlene H. Dortch, Secretary, FCC, Ex Parte Presentation in WC Docket No. 05-337, filed Apr. 15, 2010; Comments of Sacred Wind Communications, Inc., in Opposition to Petition for Waiver, filed Feb. 11, 2010.

likely have matched or exceeded that figure in about the same time, ***and*** brought mobile wireless coverage to extensive areas where the Navajo people live, work and travel.

Sacred Wind, a venture led by former Qwest executives, has developed facility deployment plans that fail to consider the fact that many Navajo continue to adhere to a nomadic lifestyle that is deeply rooted in the Navajo culture. Some tribal members move within the large expanse of the reservation with the seasons. As a practical matter, a fixed telecommunications service, such as that contemplated by Sacred Wind, is of little use to them. Moreover, a fixed service to a household provides little benefit to a person with a broken down car on a remote desert road.

By virtue of the cap's exception,[7] a grant of SBI's proposal would not take a single dollar out of Sacred Wind's pocket. Yet their management is apparently fearful that the Navajo people would prefer mobile wireless voice services. Delaying or denying SBI's petition is simply a means to deny Navajo consumers access to basic telecommunications services, which is anathema to the Telecommunications Act and the FCC's universal service mechanism.

Based on the commitments made above, Sacred Wind cannot credibly maintain that any additional support received by SBI as a result of a grant of the Petition would not be used exclusively and directly for the benefit of tribal communities in the Eastern Agency, or that tribal consumers would not reap substantial benefits.

Sacred Wind's conjecture that SBI's service would be complementary and is not a replacement for Sacred Wind's service cuts in favor of granting SBI's petition. If Sacred Wind is correct, that Navajo consumers need both fixed and wireless telecommunications services, and if a grant would not deprive Sacred Wind of support, then there is no need to oppose SBI's

[7] Competitive ETCs serving tribal lands or Alaska Native regions may continue to receive uncapped high-cost support. *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, 8848 (para. 32) (2008), *aff'd, Rural Cellular Ass'n v. FCC,* 588 F.3d 1095 (D.C. Cir. 2009).

application. On the other hand, if SBI poses the level of threat that Sacred Wind's pleadings seem to imply, then Sacred Wind should just come out and admit that its business would not survive a high-quality mobile wireless deployment throughout the Eastern Agency.

Sacred Wind has the benefit of a favorable regulatory system that provides "cost plus" support for any investment it makes, no matter how many customers it serves (or loses). Yet, SBI has not opposed Sacred Wind's entrance into rural New Mexico. In fact, SBI welcomes the Sacred Wind investment because if its business succeeds in the market, that's good for the Navajo people, and it should be applauded.

That said, Sacred Wind's motives must not be mistaken. Sacred Wind wants to dominate the area, keep out competition, prevent rural citizens from accessing a high-quality mobile wireless network, and make a profit. There's nothing wrong with those private business goals, provided the Commission does not facilitate them at the expense of the pro-competitive goals set forth in the governing statute.

In sum, SBI reiterates its request for expedited action on its petition, so that it can commence construction of high-quality mobile wireless networks at the earliest possible date.

Respectfully submitted,

SMITH BAGLEY, INC.

David A. LaFuria
Its Counsel

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8678
dlafuria@fcclaw.com

July 8, 2010

USAC
Universal Service Administrative Company

Administrator's Decision on Request for Payment/Refund of High Cost Support

Via Certified Mail

May 6, 2010

Ms. Gayle L. Gouker
Chief Financial Officer
Smith Bagley, Inc.
1500 S. White Mountain Road, Suite 103
Show Low, AZ 85901

Re: Interstate Access Support Payments in Covered Locations

Dear Ms. Gouker:

Your letter of February 25, 2010 requests, on behalf of Smith Bagley, Inc. (SBI), a refund of support for lines in covered locations (CL) study area codes (SACs): 459001, 499009 and 509002 that had been deducted by operation of the nationwide cap on Interstate Access Support (IAS) paid to competitive eligible telecommunications carriers (CETCs).

On May 1, 2008, the Federal Communications Commission (FCC or Commission) released an order capping the level of High Cost Program support CETCs in each state are eligible to receive at the March 2008 level of support available in the state, on an annualized basis.[1] Your letter cites to paragraph 32 of the *Interim Cap Order*, which states, "[w]e permit competitive ETCs serving Covered Locations to continue to receive uncapped high-cost support for lines served in those Covered Locations." Your letter also cites to paragraph 33, which states: "If a competitive ETC serves lines in both [CLs] and [non-CLs] (or only [CLs]), [USAC] 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." (footnote omitted). You conclude that based on the language from these two paragraphs, that SBI is entitled to high cost support in Covered Locations that is "free of both the statewide cap and the nationwide IAS cap."

However, the exception to the interim cap on CETC high cost support that is discussed in your letter applies to the statewide cap on CETC high cost support that is adopted at paragraph 26 of the *Interim Cap Order*. The FCC explains that "we adopt an interim, emergency cap on the amount of high-cost support that competitive [ETCs] may receive. Specifically . . . total annual competitive ETC support for each state will be capped at the

[1] *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for designation as Eligible Telecommunications Carriers, RCC Minn., Inc. & RCC Atlantic, Inc. N.H. ETC Designation Amendment*, Order, WC Docket No. 05-337, CC Docket No. 96-45, FCC 08-122, ¶¶ 1, 26 (2008) (hereinafter *Interim Cap Order*).

level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis . . . . [W]e adopt a limited exception [to this cap] for [CETCs] serving in [CLs]." *Interim Cap Order* at ¶ 1. The CL limited exception was adopted by the FCC at paragraph 32 in the *Interim Cap Order*, as noted in your letter.

This limited CL exception, however, is not applicable to the nationwide cap on IAS that was also established by the FCC at paragraph 35 in the *Interim Cap Order*. Paragraph 35 of the *Interim Cap Order*, states: "...we find it necessary to adjust the calculation of IAS for both incumbent and competitive ETCs. . . . The annual amount of IAS available for competitive ETCs shall be set at the amount of IAS that competitive ETCs were eligible to receive in March 2008 on an annual basis." Thus, both incumbent LECs, as well as CETCs, are subject to the nationwide IAS cap set at paragraph 35 in the *Interim Cap Order*. Further, unlike the interim cap adopted at paragraph 26 of the *Interim Cap Order*, the Commission did not provide any exceptions to the operation of the nationwide IAS cap. Thus, the language of the *Interim Cap Order* does not support your argument that the limited CL exception to the statewide cap on CETC high-cost support also applies to the nationwide IAS cap that was set at paragraph 35.

The Commission, at paragraph 35 of the *Interim Cap Order*, also directed: "...USAC to calculate and distribute IAS for each pool to eligible carriers consistent with existing IAS rules." *Id.* at ¶ 35. Accordingly, USAC calculates IAS and total CETC High Cost support pursuant to the *Interim Cap Order* as follows:

1. Total IAS uncapped demand is determined nationwide for all incumbent LECs and CETCs. As noted in paragraph 35 of the *Interim Cap Order*, there are two pools of capped IAS, one for incumbent LECs and one for CETCs.

2. Then, the nationwide IAS cap amount for CETCs is applied against total CETC IAS demand to produce a reduction factor to ensure all CETC IAS remains under the nationwide IAS cap.

3. The reduction factor is then applied to each CETC's IAS uncapped demand to produce the eligible amount of IAS that is available to each CETC.

4. USAC takes the amount of reduced IAS and adds each CETC's other uncapped CETC High Cost Program component demand to produce an aggregate of High Cost Program demand for each CETC. This calculation is done on a state by state basis to determine the statewide CETC demand for the High Cost Program.

5. The total state uncapped CETC High Cost Program demand is compared to the state's baseline for CETC High Cost support, annualized based on the amount of High Cost support CETCs were eligible to receive in March 2008. A statewide

reduction factor is calculated to ensure all CETC High Cost support remains under the interim cap established in paragraph 26 of the *Interim Cap Order*.

6. Each CETC in the state then has its High Cost support reduced by the computed statewide reduction factor. However, if the CL limited exception set forth in paragraph 31 of the *Interim Cap Order* applies, then, as set forth in paragraph 33 of the *Interim Cap Order*, USAC will "determine the amount of additional support –after the application of the interim cap– necessary to ensure [the CETC] receives the same per-line support amount as the incumbent LEC for lines qualifying for the exception."

7. If the CL exception applies, USAC will add back the amount of CETC High Cost support that was reduced by the interim cap adopted at paragraph 26 of the *Interim Cap Order*. However, because incumbent LECs and CETCs are both subject to the nationwide cap on IAS established at paragraph 35 of the *Interim Cap Order*, that amount of IAS is not added back pursuant to the CL exception for the interim cap. As noted above, the Commission did not provide any exceptions for the operation of the nationwide IAS cap.

Consistent with the requirements of the *Interim Cap Order*, USAC applies the nationwide IAS cap on CETC support regardless of the CL exception set forth in paragraphs 32-33 of the *Interim Cap Order*. As explained above, the CL exception applies to the CETC interim cap, but not to the nationwide IAS cap. USAC calculates CETC IAS for CLs in accordance with existing IAS rules, as directed by the Commission. USAC has and will continue to pay IAS for CETCs serving CLs in accordance with the *Interim Cap Order*.

With regard to the SACs identified above, USAC properly calculated Smith Bagley's November 2009 IAS for lines in CLs and no refund/payment of support beyond what was paid is due.

If you wish to appeal this decision, you may file an appeal with the FCC. Detailed instructions for filing appeals are available at:

http://www.usac.org/hc/about/filing-appeals.aspx.

Sincerely,

//s//
Karen Majcher
Vice President, High Cost & Low Income Division

Smith Bagley, Inc.

February 25, 2010

David Capozzi
Acting General Counsel
Universal Service Administrative Company
2000 L Street, NW, Suite 200
Washington, DC 20036

Dear Mr. Capozzi:

Smith Bagley, Inc. (SAC 459001, 499009, and 509002) hereby requests a refund of support for lines in Covered Locations (CL) that had been deducted by operation of the nationwide cap on Interstate Access Support (IAS) paid to Competitive Eligible Telecommunications Carriers (CETCs).

According to USAC's recent breakdown of the November 2009 prior period adjustments (PPAs) relating to the payment of uncapped support under the CL exception, no payment of support previously deducted under the nationwide IAS cap was made.

Smith Bagley, Inc. believes that the plain language of the Cap Order (FCC 08-122) entitles its CL SACs to the support previously deducted under the nationwide IAS cap. Specifically, the FCC stated:

"We permit competitive ETCs serving Covered Locations to continue to receive uncapped high-cost support for lines served in those Covered Locations." (para. 32)

The FCC further stated:

"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 <u>the same per-line support amount as the incumbent LEC</u> for the lines qualifying for the exception." (para. 33) (emphasis added).

In addition to the amounts deducted under the statewide cap in New Mexico, Smith Bagley, Inc. experienced reductions to its IAS in New Mexico, Arizona, and Utah as a result of the nationwide IAS cap. Nonetheless, Smith Bagley, Inc. has only received PPAs representing the amounts previously deducted under the statewide cap. This does not represent the "amount of additional support ... necessary to ensure that [it] receives the same per-line support amount as the incumbent LEC[.]"

Smith Bagley, Inc. requests that USAC pay support on Smith Bagley, Inc.'s lines in Covered Locations free of both the statewide cap and the nationwide IAS cap, and make all necessary prior period adjustments to restore the support to the same level of per-line support received by the incumbent LECs in those areas. If USAC does not intend to make such payments, please provide written confirmation of this decision as well as an explanation of the reasons.

Thank you for your assistance in this matter.

Sincerely,

Gayle L. Gouker, CFO

1500 S. White Mountain Road, Ste 103 • Show Low, AZ 85901 • Phone: 928-537-0690 • Fax: 928-537-2998