

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

**COMMENTS OF SMITH BAGLEY, INC.**

Smith Bagley, Inc. (“SBI”), by counsel, hereby submits these Comments, pursuant to the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup> SBI operates a commercial mobile wireless network in Arizona, New Mexico, Utah and Colorado. SBI has extensive wireless coverage throughout Native American lands, providing service to over 88,000 people, 55,000 of which live in low-

---

<sup>1</sup> *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 2011 WL 466775 (rel. Feb. 9, 2011) (“*Notice*”). The deadline for filing comments regarding sections of the *Notice* addressed in these Comments is April 18, 2011. See *Comment and Reply Comment Dates Established for Comprehensive Universal Service Fund and Intercarrier Compensation Reform Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 01-92, WC Docket Nos. 03-109, 05-337, 07-135, 10-90, and GN Docket No. 09-51, Public Notice, DA 11-411 (rel. Mar. 2, 2011) at 1.

income households, on the Navajo, Hopi, White Mountain Apache, Zuni and Ramah Navajo Tribal lands.

SBI appreciates the opportunity to provide the Commission with comments in this proceeding.

## **I. INTRODUCTION.**

As a general matter, according to the National Congress of American Indians (“NCAI”), “the reality is that Indian reservations have . . . the highest poverty rate of any ethnic grouping in America. . . . [T]he vast majority of tribes continue to be mired in a severe economic depression caused by decades of marginalization.”<sup>2</sup> Moreover, according to estimates for 2005-2007, “approximately 39 percent of the people in Navajo Nation lived below the poverty level. Approximately 46 percent of children were below the poverty line. Among those aged 65 and older, 43 percent lived below the poverty line.”<sup>3</sup>

With respect to telephone subscribership, SBI has previously observed that, according to 2000 Census figures, even the more populous Indian reservations had telephone subscribership levels significantly below the national average. Based on the 2000 census:

Nine of [the] 25 [most populous] tribal lands, representing about 44 percent of Native American households on tribal lands in the lower 48 states, had

---

<sup>2</sup> NCAI, Economic Development, accessed at [http://www.ncai.org/Economic\\_Development.45.0.html](http://www.ncai.org/Economic_Development.45.0.html) , cited in SBI, Petition for Rulemaking Regarding the Expansion of Support Available Pursuant to the Fourth Tier of the Universal Service Lifeline Program, RM-11529, filed Mar. 27, 2009 (“SBI Petition”). President Obama recently described Native Americans as a “marginalized community” and has called upon every cabinet agency to produce a plan to improve the relationship between the federal government and tribal communities. Ben Feller, “Obama: US Must Reverse Course with Indians,” Associated Press, Nov. 5, 2009, accessed at

<http://www.google.com/hostednews/ap/article/ALeqM5hr0j0YL8Xrnq47TgF24NEX3dRliQD9BPL4V00> . President Obama has committed “to make sure that the first Americans get the best possible chances in life in a way that’s consistent with [their] extraordinary traditions and culture and values.” President Barack Obama, Remarks at the Closing of the Tribal Nations Conference (Nov. 5, 2009), accessed at <http://www.whitehouse.gov/the-press-office/remarks-president-closing-tribal-nations-conference> .

<sup>3</sup> U.S. Census, 2005-2007 American Community Survey 3-Year Estimates, Table S1703, “Selected Characteristics of People at Specified Levels of Poverty in the Past 12 Months.”

telephone subscribership rates at a level below 78 percent—which is about what the national rate was *over 40 years ago* when the 1960 decennial census was taken. *The subscribership rate for the most populous tribal land—the Navajo—was only 38 percent.*<sup>4</sup>

Low population density is a large factor making telephone service expensive to build.

The four most important tribal counties that SBI serves have population densities per square mile that are extraordinarily low.<sup>5</sup> The population density of the Navajo Nation overall is only six people per square mile. In addition, poverty on reservation lands is an enormous challenge. The per capita income on Navajo as of the 2000 Census was \$7200.<sup>6</sup> In 2000, the U.S. per capita income was over \$30,000.<sup>7</sup>

Senator Udall of New Mexico has expressed concerns in a letter to Chairman Genachowski regarding telephone subscribership levels on Tribal lands, pointing out that statistics reflecting low levels of subscribership are troubling, and that these statistics:

still do not adequately convey the hardships created by this lack of telephone service. In addition to the daily inconveniences, not having a landline or cell phone reception can mean the difference between life and death. Imagine not being able to call an ambulance when you or your loved one is in medical danger. Or consider the heartbreak of a man outside Gallup, New Mexico, who missed two opportunities for a life-saving kidney transplant because he lacked telephone service at home and could not be contacted in time.<sup>8</sup>

---

<sup>4</sup> GAO, Report to Congressional Requesters, “Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands,” GAO-06-189, rel. Jan. 2006 at 13 (emphasis added), *cited in* SBI Petition at 9-10. While SBI expressed the belief that subscribership on Navajo lands has substantially increased since the 2000 Census (in part because of SBI’s efforts to enroll Lifeline-eligible subscribers), it noted that Navajo subscribership likely remains well below the national average of 94.6 percent reflected in the most recent American Community Survey figures. New data from the 2010 Census should be available in the near future.

<sup>5</sup> Arizona: Navajo (10/sq. mi.); Apache (6/sq. mi.); San Juan, NM (8/sq.mi.); and McKinley, NM (14/sq. mi.).

<sup>6</sup> Source: <http://www.navajobusinessdevelopment.com/information/navajo-nation-demographics.html>

<sup>7</sup> Source: <http://bber.unm.edu/econ/us-pci.htm> .

<sup>8</sup> Letter from Senator Tom Udall, to Julius Genachowski, Chairman, FCC, October 30, 2009, at 1.

Starting from scratch nearly twenty years ago, SBI has grown to employ over 175 people, almost all of them drawn from local communities. With the help of federal high-cost support, SBI has constructed 149 cell sites throughout its network in rural Arizona, New Mexico, Utah and Colorado. Most of SBI's cell sites on rural Tribal lands would not have been built without federal high-cost support, and many could not remain operational but for ongoing federal high-cost support to cover high operations expenses and lower revenues from consumers with less disposable income for both basic and vertical services than the general population.

Almost all of the tribal communities SBI now serves had no wireless service before it constructed facilities. Many had no telephone service of any kind. On portions of the Hopi Nation, SBI has in the past been called upon to be the de facto Public Safety Answering Point, as it was the only telephone service provider capable of delivering emergency telephone calls to the appropriate recipient. SBI has also used funding from the Rural Utilities Service to build a wireless broadband connection to a Navajo chapter house near Aneth, Utah, where six personal computers connect this remote community to the world.

The Commission's decision in 2000 to create Tier 4 Lifeline support completely changed the face of telephone service on Tribal lands. At that time, SBI provided limited service in the largest towns and along major roads. Today, SBI's network reaches throughout most of the Tribal lands it serves, providing voice and data services. SBI offers 600 minutes of service for \$1.00, along with free calls to dozens of community facilities, including hospitals, schools, government offices, and social service organizations.

Tier 4 Lifeline has helped SBI provide service to thousands of households that never before had telephone service. The 2010 census should reveal significant improvement in household telephone penetration throughout the Tribal lands that SBI serves, although SBI is certain that there remain remote locations where SBI's service has not yet reached.

SBI offers the following comments on the CAF NPRM, focusing on proposed modifications to tribal lands.

**II. Tribal Lands Represent a Special Case; Universal Service Mechanisms Must Ensure that Tribal Lands Have Access to Basic Telecommunications Services.**

Federal high-cost support has enabled SBI to extend and maintain essential voice services on tribal lands. Support has been used to build towers, microwave backbone facilities, switching equipment, hardware and software needed to operate a modern telecommunications network. Put simply, there is no business plan that supports a stand-alone wireless network throughout the majority of tribal land area that SBI serves. There are no towns larger than about 8,000 people on the Navajo reservation. Income levels do not permit the purchase of substantial amounts of vertical services. Without high-cost support, SBI would not be able to build facilities on Tribal lands, and without low-income support, many Tribal citizens would not be able to afford telephone service. The best evidence of this is the rapid rise of low-income households receiving support. Today, over 55,000 low-income households receive Lifeline service, many of which never had a telephone before SBI began offering Lifeline service in 2001.

While it is essential to accelerate broadband deployment on Tribal lands, the utility of basic wireless voice service is unmatched, especially where citizens live many miles from the grocery store, post office, hospital, school, and place of employment. On substantial portions of Tribal lands, SBI provides the only reliable mobile telephone service, with a network that reaches where most Tribal residents live, work and travel. If high-cost support on the Tribal lands SBI serves is reduced, there is no question but that new construction projects will be curtailed and existing services will be threatened.

It is important to note that SBI is not asking for any special treatment for its business. Under the current rules, when SBI wins a customer, it gets support. When it loses a customer, it loses support. On information and belief, competitors are planning to build networks and offer

discounted telephone service as ETCs on reservation lands that SBI serves. If those carriers take customers from SBI, then SBI will lose support for those customers under the portability rules currently in place.

Accordingly, SBI requests the Commission to confer special status on Tribal lands, and the citizens therein who have been traditionally unserved and underserved for generations, to ensure that they receive high-quality advanced services from the service provider that they choose, consistent with Section 254(b)(3) of the Act. SBI urges the Commission to take no action that would threaten the ability of carriers operating on Tribal lands to continue to provide basic voice services.

### **III. Deployment Schedules Should be More Flexible for Carriers Serving Tribal Lands.**

The Commission asks whether deployment schedules for the use of support to build facilities on tribal lands should be flexible. In SBI's experience on Tribal lands, rights-of-way, permitting, historical preservation, archaeological considerations, and inter-governmental coordination are all matters that increase the time needed to deploy telecommunications facilities. Over the many years, SBI has encountered innumerable issues that have delayed cell site and microwave construction. Recently, an executive from Sacred Wind Communications testified before the Senate Committee on Commerce, Science and Transportation concerning the substantial delays they are encountering in obtaining approvals from the Bureau of Indian Affairs for certain permits needed to deploy fiber on Tribal lands.<sup>9</sup>

Where a carrier is diligently working through the permitting and right-of-way process, the Commission should relax applicable deadlines based on a showing of good cause. In so doing, the FCC will itself demonstrate appropriate respect for Tribal sovereignty and allow itself

---

<sup>9</sup> See Testimony of John Badal at p. 5, accessible at: [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=24bf8511-d9d6-4901-aae4-c914ac90aec1](http://commerce.senate.gov/public/?a=Files.Serve&File_id=24bf8511-d9d6-4901-aae4-c914ac90aec1) .

an opportunity to work with other federal agencies which may be the cause of certain delays.

Moreover, the FCC should play an active role in resolving inter-governmental delays, to assist citizens of Tribal lands in receiving supported services at the earliest possible date.

**IV. Enforcement of ETC Requirements Should Rest With the FCC and the States, With Consultation from Tribal Authorities.**

If an enforcement matter arises over whether a carrier is properly using federal universal service support, a carrier's eligibility to be an ETC is potentially at issue. The federal statute makes clear that eligibility decisions rest with the entity that designated the carrier. Accordingly, if a state designates an ETC under 47 U.S.C. §214(e)(2), then the state should determine whether ETC requirements are being met, including adjudication of enforcement actions. Likewise, if the FCC designates a carrier as an ETC, it should exercise appropriate oversight.

The FCC should encourage participation in any such process by Tribal telecommunications authorities. Tribal authorities can play an important role in assisting the FCC, or state commissions, in determining whether there are structural enforcement issues that should be addressed, as well as specific enforcement cases against ETCs. SBI does not support leaving enforcement matters solely to Tribal authorities, only because the federal statute requires states and the FCC to make eligibility determinations, which are at the core of many, if not most enforcement matters.<sup>10</sup> The Commission should avoid situations where enforcement matters are subject to substantial delays due to disputes over the jurisdiction of tribal authorities to adjudicate enforcement or eligibility claims originating in the federal statute.

---

<sup>10</sup> Likewise, the federal statute confers jurisdiction on states and the FCC to designate ETCs. It would appear to be an impermissible extension of the statute were the FCC to require carriers to seek permission from tribal authorities to apply for ETC status. The better course is to make tribal authorities a party to the case, to ensure that they have an opportunity to submit testimony and advocate with respect to any ETC application.

V. **Tribal Lands Should Not Be Subject to A Cap on Federal Universal Service Funds.**

At a time when the objective is to accelerate infrastructure deployment on Tribal lands which lag well behind all national averages in the quantity and quality of available telecommunications and information services, the Commission should not be artificially constraining support to carriers attempting to close the gap with other parts of the country. Tribal lands represent a special case, with special challenges. This is not to say there should not be appropriate accountability measures, indeed there must be.

To cite one example, SBI has submitted to the FCC an appeal of a USAC decision concerning how the interim cap on high-cost support is being applied on Tribal lands.<sup>11</sup> Because the interim cap is being incorrectly applied, approximately \$900,000 in support each year is being withheld on Tribal lands that SBI serves. In so doing, USAC is denying SBI the ability to construct three additional towers on tribal lands each year, which would be constructed if such funding were available. By simply granting SBI's appeal, these additional funds will be available for all carriers to accelerate construction of critically needed infrastructure.

Because SBI's network is relatively developed in the larger tribal communities, all of these incremental cell sites affect areas that are in dire need. For example, SBI recently commissioned a new cell site at Burnham, New Mexico on Navajo, which will provide coverage to, at most, 800 citizens. Artificially constraining the size of the fund to save pennies on the dollar has enormous and detrimental effects for the very people that should be prioritized under the federal universal service mechanism.

The Commission can always revisit later the need to reduce funding in Tribal lands. That day will come when there is some statistical agreement that the job of providing *basic* telecommunications and information services has been completed.

---

<sup>11</sup> See, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020514917> .

One way to ensure that funding on Tribal lands is sufficient to meet the needs of Tribal citizens is to temporarily retain the identical support rule, while increasing accountability and reporting requirements for participating carriers. It is not difficult for the Commission to establish reporting requirements that would enable carriers to demonstrate measurable progress toward the establishment of ubiquitous mobile broadband networks.

In this regard, it almost goes without saying that SBI supports GCI's proposal that existing high-cost support to CETCs should not be phased down on Tribal lands. Instead, the Commission should establish appropriate reporting requirements to ensure that funds are used properly and to ensure that Tribal citizens are seeing the benefits that the Telecommunications Act intends to deliver.

**VI. The Commission Should Adopt Rules that Encourage Carriers Serving Tribal Lands to Invest in Broadband Services.**

In order to accelerate services to Tribal lands, the FCC should allow all carriers to use existing support to deliver broadband services. If jurisdictional issues arise, the Commission should broadly interpret its prior policy, that carriers may use support to build "dual-purpose" facilities that provide both voice and broadband services, to ensure that carriers deploy telecommunications networks on Tribal lands as soon as possible, and to the greatest extent possible.<sup>12</sup> Clear and forceful guidelines in this area will spur investment by competitive carriers.

---

<sup>12</sup> See, Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, 16 FCC Rcd. 11244, 11322 (2001).

**VII. Mandating a Single Supported Carrier on Tribal Lands is Counterproductive.**

At a time when the needs of Tribal citizens are so great, the FCC should adopt policies that ensure that infrastructure development is accelerated and that providers of mobile broadband service can quickly deliver vitally needed services. The demographic challenges faced by citizens on the five Tribal lands where SBI serves have been well documented and need not be repeated here. Suffice it to say that full portability of support that is in place under the current rules for competitive carriers will ensure that there is a de facto cap on available support to Tribal lands, so that any carrier who believes it can build and sustain a successful business will have an opportunity to enter the marketplace and win customers, free from the forces of a single subsidized service provider that skew the market and harm consumers.

Appropriate accountability measures, which enable the Commission to see how high-cost support is being invested in Tribal communities, will ensure that these communities see the benefits that Congress intended to deliver.

Respectfully submitted,

SMITH BAGLEY, INC.



By: \_\_\_\_\_

David A. LaFuria

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

April 18, 2011