

LUKAS, NACE, GUTIERREZ & SACHS, LLP

8300 GREENSBORO DRIVE, SUITE 1200
MCLEAN, VIRGINIA 22102
703 584 8678 • 703 584 8696 FAX

WWW.FCCLAW.COM

RUSSELL D. LUKAS
DAVID L. NACE
THOMAS GUTIERREZ*
ELIZABETH R. SACHS*
DAVID A. LAFURIA
PAMELA L. GIST
TODD SLAMOWITZ*
BROOKS E. HARLOW*
TODD B. LANTOR*
STEVEN M. CHERNOFF*
KATHERINE PATSAS NEVITT*

CONSULTING ENGINEERS
ALI KUZEHKANANI
LEILA REZANAVAZ
—
OF COUNSEL
GEORGE L. LYON, JR.
LEONARD S. KOLSKY*
JOHN CIMKO*
J. K. HAGE III*
JOHN J. MCAVOY*
HON. GERALD S. MCGOWAN*
TAMARA DAVIS BROWN*
JEFFREY A. MITCHELL*
ROBERT S. KOPPEL*
MARC A. PAUL*
—
*NOT ADMITTED IN VA

David A. LaFuria
(703) 584-8678
dlafuria@fcclaw.com

May 1, 2012

FILED VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: *Ex Parte* Filing, AU Docket No. 12-25

Madam Secretary:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, Smith Bagley, Inc. ("SBI") submits this written *ex parte* communication in response to the written *Ex Parte* Presentation by Commnet Wireless, LLC, *et al.* ("Joint Commenters"), in this docket on April 20, 2012 ("*April 20th ex parte*"). SBI appreciates the Joint Commenters' attempt to shed more light on the methodology they employed in requesting exclusion of tens of thousands of census blocks from the reverse auction. However, ultimately the *April 20th ex parte* raises as many questions as it provides answers.

The bottom line remains that Joint Commenters have failed to clearly identify a single census block centroid in Northeastern Arizona that they currently cover, or will cover pursuant to the BTOP grant, using a reliable coverage projection map and at the required speeds. SBI has studied Joint Commenters' submissions and attempted to project real world coverage based on the data the Joint Commenters submitted. SBI has also used its extensive field knowledge to examine Joint Commenters' current and under construction networks.

If SBI is unable to determine which census blocks are or will be covered using materials submitted to the Commission, as well as extensive extra-record evidence and local knowledge, then there is no way the Commission can have any factual basis to find that the challenged census block centroids have or will have coverage as Joint Commenters assert. Accordingly, the

Commission's default position in this impoverished and underserved area of Navajo and other Tribal lands, must be: "When in doubt, it should not be blocked out."

As the Commission is well aware, contour projections such as those proffered by the Joint Commenters, while useful in some contexts, homogenize the coverage shown. In the real world coverage is not ubiquitous and smooth, but is more like Swiss cheese. In Northeastern Arizona, it is not flat and the areas of many census blocks that Joint Commenters seek to exclude can only be termed "mountainous." In other words, there are always numerous coverage "holes" within a contour map's areas that exist in the real world but are not shown on contour maps. And the discrepancy from the real world becomes more acute where the land is not flat, as contour maps assume. Contour maps do not reveal coverage gaps that become apparent when a real-world map, using a sufficiently large scale, is used to predict real-world coverage.

Under the terms of the *USF/ICC Transformation Order*,¹ a census block is to be designated as "eligible" or "ineligible" for the auction based on the status of coverage at a single point—the centroid. Joint Commenters have not submitted any data to show the existence or lack of coverage at a single centroid within the thousands of census blocks they purportedly cover, or will cover. It is a near certainty that many of the centroid points will be located within coverage holes. Without an accurate map that provides reliable real-world coverage data, it is impossible for anyone to know which census blocks meet the test for exclusion set forth in the *USF/ICC Transformation Order* and which do not.

Joint Commenters should have used and submitted a real-world coverage projection map that takes into account terrain and other factors to meet the Commission's centroid test. They know how to create one, since they attached just such a projected coverage map as Appendix C to their original filing.² And Appendix C provides a good illustration of the failure of the contour approach to show what must be shown: coverage at the centroids.³ Attached hereto, for illustrative purposes, is an overlay of the Joint Commenters' contour map on their own coverage map.⁴ As can readily be seen, there are many areas with coverage holes that Joint Commenters would have the Commission block out from supposed competitive entry. SBI and the Commission lack specific site data and granular coverage, so it is impossible to make an accurate comparison between coverage and the census block centroids. But the maps illustrate very well the discrepancy between real world coverage in this mountainous region and theoretical contour projections.

¹ See *Report and Order and Further Notice of Proposed Rulemaking*, ¶ 295, *et seq.*, FCC 11-161 (rel. November 18, 2011) ("USF/ICC Transformation Order").

² The legend on Appendix C is internally inconsistent, further confusing the record as to exactly what Joint Commenters will and won't cover. It is described, on the one hand, as "Existing EVDO coverage" and on the other hand as future "Commnet/NTUAW Composite EVDO."

³ Also, Appendix C was submitted as a picture file, making it impossible for SBI to use in conjunction with its mapping software, such as to overlay on a census block map.

⁴ Due to the ambiguities in Joint Commenters' submission, it is not clear what coverage is shown by Appendix C that underlays the contour boundaries. Regardless, it is offered for illustrative purposes—to show the inherent "Swiss Cheese" nature of coverage in this mountainous region. Because Joint Commenters have not used or submitted a real world projection of expected BTOP coverage, it is impossible for the Commission to identify which census block centroids will have coverage and which ones will fall in the holes.

Joint Commenters' alternative, that the Commission can use the census tract list submitted by NTIA⁵ is even more disingenuous. Of course the Joint Commenters are "indifferent" to the use of the NTIA list. It would exclude from auction eligibility an even larger and more arbitrary list of census blocks than their contour map. In fact, the NTIA submission does not even purport to address projected coverage, let alone address census block centroids. It merely lists broad tracts that are considered "funded areas"⁶—not "covered areas." So the NTIA filing is simply irrelevant to the question at hand—which census block centroids will be covered by the Joint Commenters' BTOP build. Hypothetically, the NTIA list could include a tract that only has a single census block within the "funded area," may not result in any coverage of that block or may not cover the centroid, and would leave numerous other census blocks and their centroids un-covered. It is a classic "apples to oranges" comparison and should be disregarded as not probative in any way. For of all the places in the United States that should not be unfairly denied the benefit of new investment, Navajo country is at the top of the list.

It cannot be disputed that the use of contours to determine auction eligibility in this part of the country will result in numerous coverage gaps in the real world, even after Joint Commenters complete their BTOP build. SBI is not, as Joint Commenters suggest, seeking to use auction funds to compete with BTOP subsidized facilities. Rather, had Joint Commenters submitted more accurate coverage data, SBI would have been able to use auction money to "plug the holes."⁷ This is precisely what auction money is intended for, to fill in gaps in remote and high cost areas that cannot support market-based builds.

Given the chronically underserved nature of these remote Tribal areas, SBI urges the Commission, "when in doubt, don't block it out." The Tribal lands in this part of the country are among the most remote and economically challenging to serve in the entire nation. It would be extraordinarily short-sighted public policy to exclude any of these areas from Phase I eligibility,

⁵ Filed herein on March 21, 2012.

⁶ *Id.*

⁷ Indeed, Joint Commenters themselves could bid to fill the holes left in their BTOP-supported network builds and might win the auctions. Either way, the additional subsidies that are essential to building ubiquitous coverage in this challenging and underserved region would be available.

Ms. Marlene H. Dortch

May 1, 2012

Page 4 of 4

based upon representations from one carrier with incentive to block entry by a competitor. Based on the shortcomings of the data submitted by Joint Commenters, no census blocks should be removed from eligible status.

Respectfully submitted,



David A. LaFuria

Brooks E. Harlow

LUKAS, NACE, GUTIERREZ & SACHS, LLP

8300 Greensboro Drive, Suite 1200

McLean, Virginia 22102

(703) 584-8678

Attorneys for Smith Bagley, Inc.

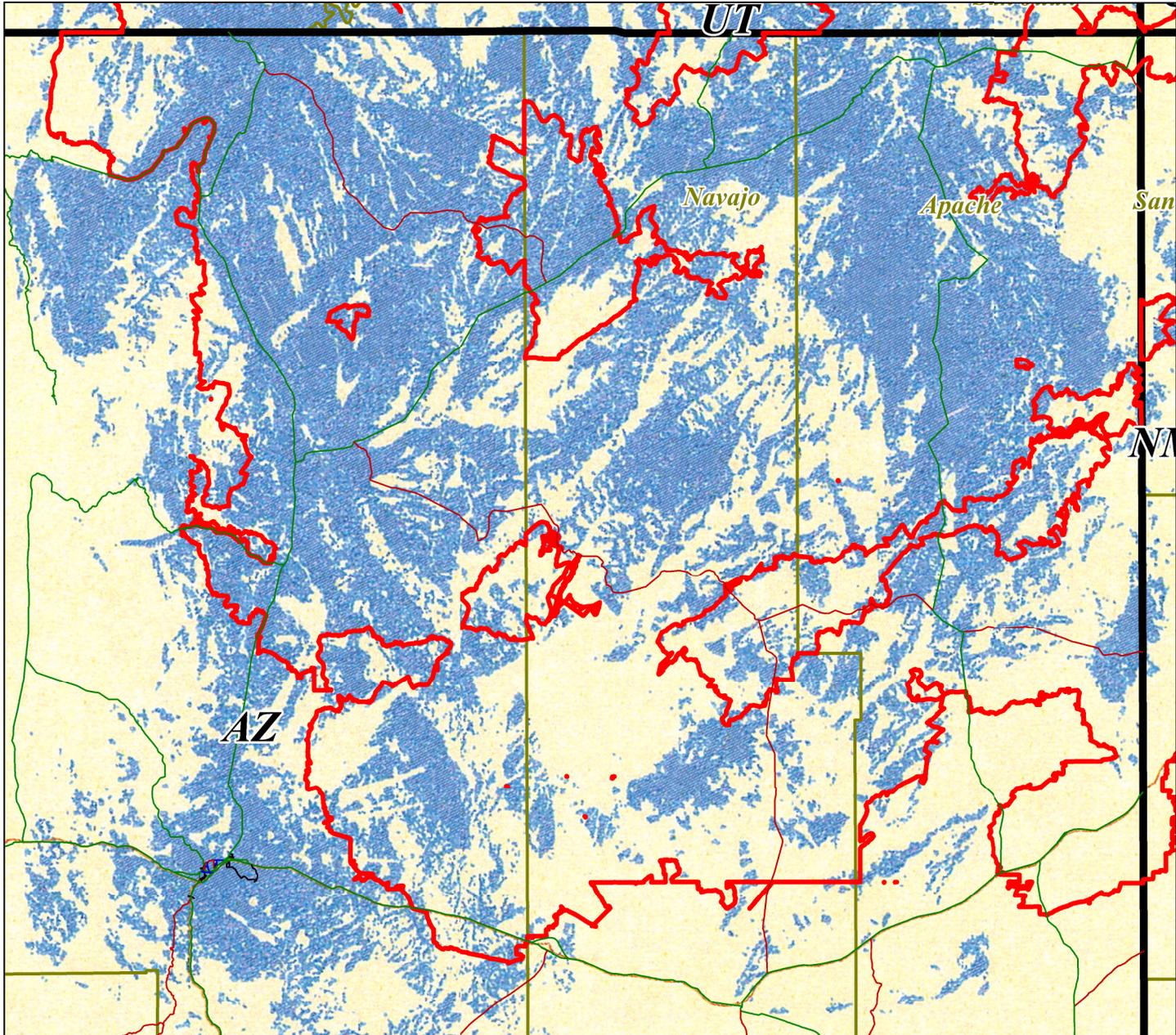
cc (via email):

Richard Kaplan, Esq.

James Schlichting, Esq.

Margaret Wiener, Esq.

Patrick Halley, Esq.



Legend

 State Boundary

 Contour Map adjusted to Census Block Boundaries

 County Boundary

 Claimed Coverage