

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

In the Matter of)	
)	
Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013)	AU Docket No. 13-53
)	
Improving Communication Services for Native Nations by Promoting Greater Utilization of Spectrum Over Tribal Lands)	WT Docket 11-40
)	
To: The Commission		

**COMMENTS OF THE NAVAJO NATION
TELECOMMUNICATIONS REGULATORY COMMISSION
IN SUPPORT OF THE PETITION FOR RECONSIDERATION
FILED BY SMITH BAGLEY, INC.**

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), through undersigned counsel, respectfully submits these Comments in response to the Petition for Reconsideration filed by Smith Bagley, Inc. (“SBI”) on September 6, 2013.¹ In support of these Comments, NNTRC submits:

I. INTRODUCTION

In its original Comments in this proceeding, the NNTRC pointed out that there appeared to be significant areas of the Navajo Eastern Agency (located in the state of New Mexico), that were not included as eligible areas for the Tribal Mobility Fund Phase I (Auction 902).² In reference to areas that SBI had pointed out to the NNTRC as not currently being served, the NNTRC stated:

¹ By *Public Notice*, DA 13-1876, released September 9, 2013, the Commission sought comment on the SBI Petition, and set the comment period to September 16 2013, and reply comment period to September 23, 2013. These Comments, therefore, are timely filed.

NNTRC is aware that Smith Bagley, Inc. (“SBI”) is filing a drive test study, in which it submits that less than 15% of Navajo Eastern Agency currently is being served with 3G or better service (e.g., above 200 kbps service). Although the NNTRC does not have the technical capabilities to conduct such tests, based on what it knows of the area, the placement of cell towers, and the stories that Navajo citizens have related to NNTRC in terms of lack of service, NNTRC believes that the number submitted by SBI is probably very close to the mark. Moreover, NNTRC is unaware of any carrier who has taken federal, state, or Tribal grant money with a promise to deliver such service to the Navajo Eastern Agency in New Mexico, and NNTRC is unaware of any other public commitment to provide such service, outside of the support contemplated from the Tribal Mobility Fund Phase I Auction.³

Nonetheless, the Commission failed to add in the areas that were the subject of the SBI drive test because it concluded that SBI either “... fail[ed] to provide sufficient information or fail[ed] to provide information that is sufficiently verifiable regarding the basis for [its] assertions.”⁴ The Commission went on to conclude that SBI did “...not demonstrate actual lack of service, as envisioned by the *USF/ICC Transformation Order*, and therefore [did] not provide a basis for [the Bureaus] to depart from [their] initial determination of potentially eligible census blocks.”⁵ Instead, the Commission credited the filings of AT&T and Commnet, finding that they “provided credible and convincing evidence, supported by maps, certifications, and explanations of methodologies for determining coverage, that many of the census blocks identified by SBI as unserved are actually served.”⁶ What the *August 7, 2013 Public Notice* doesn’t say, however, is that neither AT&T nor Commnet conducted drive tests of the Eastern Agency, their “methodologies,” “maps,” and “certifications” were all computer generated based on their own

² See Comments of NNTRC in Docket 13-53, filed May 10, 2013.

³ *Id.*, p. 6.

⁴ See Tribal Mobility Fund Phase I Auction Rescheduled for December 19, 2013; Notice and Filing Requirements and Other Procedures for Auction 902, Public Notice, 2013 WL 4068834, DA 13-1672 (rel. Aug. 7, 2013) (“*August 7, 2013 Public Notice*”), ¶ 25-26.

⁵ *Id.*

⁶ *Id.* at ¶ 26.

theoretical models.

Neither the *USF/ICC Transformation Order*, nor the *March 2013 Public Notice*⁷ announcing the eligible areas for Auction 902 contained any engineering requirements or cited any Commission rule concerning how drive tests should be conducted. Likewise, in the *August 7, 2013 Public Notice* rejecting the SBI drive test, the Commission failed to cite any regulation that SBI had failed to adhere to in conducting its drive test. The Commission merely found that SBI had failed to prove the existence of a negative, that service doesn't exist in the areas of Eastern Agency where SBI conducted its drive test.

In its Petition for Reconsideration, SBI responds to the specific shortcomings the Commission found in the drive test summary it had previously submitted by supplementing its showing, and went further, in an attempt to meet the heretofore unspecified standards of what the Commission "envisioned" a suitable drive test would look like. Hopefully now, the FCC will know a valid drive test when it sees it.⁸

More important, however, is the fact that drive tests, even if not perfect, should always be given greater weight than theoretical calculations of where service should be present. Indian Country has been told far too many times that service *should be* available in areas where it clearly is not. It is not until one puts boots on the ground and sees the rugged terrain of the Navajo Nation that one can understand why the pretty coverage maps created on computers fail to truly depict where service is actually available. It is of little wonder that the Navajo slang

⁷ Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013; Comment Sought on Competitive Bidding Procedures for Auction 902 and Certain Program Requirements, Public Notice, 28 FCC Rcd. 2764 (rel. Mar. 29, 2013).

⁸ See *Jacobellis v. Ohio*, 378 U.S. 184 (1964)(Stewart Concurring Opinion)(wherein Justice Potter Stewart, unable to cite to a specific standard for obscenity, concluded: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.")

word for the cell phone is “Bil Nijoobali,” loosely translating into “one spins around with this,” which is what is necessary on much of Navajo to try and find reception.

The NNTRC applauds and supports the efforts of the FCC to bring better telecommunications services to Indian Country. The Tribal Mobility Fund is one such step, designed to provide funds specifically to entities that can better serve Tribal lands. The FCC must get right, however, the eligible areas for Auction 902 and beyond. Tribal lands census blocks not on the eligible areas but also not receiving usable service will most likely never receive service. The Tribal Mobility Fund is the last chance for places like the Navajo Eastern Agency, with its extremely low population density. NNTRC therefore requests that the FCC grant the Petition for Reconsideration filed by SBI, and designate the census blocks listed therein as eligible for bidding in Auction 902.

Respectfully submitted,

**NAVAJO NATION TELECOMMUNICATIONS
REGULATORY COMMISSION**

By: _____/s/_____
James E. Dunstan
Mobius Legal Group, PLLC
P.O. Box 6104
Springfield, VA 22150
Telephone: (703) 851-2843



Counsel to NNTRC

By: _____/s/_____
Brian Tagaban
Executive Director
P.O. Box 7740
Window Rock, AZ 86515
Telephone: (928) 871-7854

By: _____/s/_____
Kandis Martine
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515
Counsel to NNTRC

Dated: September 16, 2013