

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Auction of Advanced Wireless Services) AU Docket No. 14-78
Licenses Scheduled for November 13, 2014)
)

To: Wireless Telecommunications Bureau

**PETITION FOR WAIVER
EXPEDITED ACTION REQUESTED**

Smith Bagley, Inc. ("SBI"), by counsel and pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, hereby requests a waiver of Section 1.2110(f)(3)(i) of the Commission's rules, 47 C.F.R. § 1.2110(f)(3)(i). For the reasons set forth below, SBI requests that the Commission treat the Eastern Navajo Agency in New Mexico as a federally recognized tribal land for purposes of the Tribal Lands bidding credits that have been established for the upcoming auction of Advanced Wireless Services licenses in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands (collectively, the "AWS-3" bands). A map showing the Navajo Nation, including the Eastern Navajo Agency (depicted in orange), is attached as Attachment A (ENA Map).¹

I. INTRODUCTION

Increasing incentives for existing carriers and new entrants to invest in Tribal Lands has been a continuing Commission objective over many years. AWS-3 provides such an opportunity for the Navajo Nation, which continues to exhibit demographic characteristics, including telephone penetration rates, which lag behind most non-tribal lands nationwide.

¹ See Attachment A (http://www.dinehbikeyah.org/Maps/NN_Reservation.jpg).

The Navajo Nation is comprised of five Agencies. They are Tuba City, Chinle, Fort Defiance, Shiprock, and the Eastern Navajo Agency. On information and belief, the Eastern Navajo Agency functions in an identical fashion to the other agencies of the Navajo Nation. Its members have the same voting rights in tribal affairs. It is fully represented in the tribal government, with full rights of participation on all governing councils and committees. As in the other agencies, the Navajo Nation tribal government administers tribal government programs throughout the Eastern Navajo Agency.

Throughout the Four Corners region of the Southwest (Arizona, New Mexico, Colorado and Utah), SBI serves customers in a rural region where most of its service area has less than ten households per square mile. SBI operates the most extensive commercial mobile wireless network serving the Navajo, Zuni, Hopi, White Mountain Apache, and Ramah Navajo in the Southwest United States, an area roughly the size of West Virginia. SBI's network reaches deep into tribal lands, largely as a result of the company's investment to construct, maintain, and upgrade facilities in the region and its long-term commitment to serve tribal residents.

SBI is licensed to provide and has deployed cellular radio telephone service in substantial portions of the Eastern Navajo Agency. As a result, the company has provided important and vital wireless services to many residents of the Eastern Navajo Agency. However, additional significant technical and capital investment is needed for SBI (or any other company) to deliver to the residents of the Eastern Navajo Agency the same mobile broadband services that are being delivered and expanded throughout the country at a breakneck pace.

The relief requested herein is not specific to SBI, but rather it is intended to open the Eastern Navajo Agency to tribal bid credits that any AWS-3 auction bidder may seek. Application of these bid credits should increase the number of bidders at the AWS-3 auction and increase the amount of capital that any winning bidder will have to invest in unserved and

underserved lands that, by any measure, would benefit greatly. Treating the Eastern Navajo Agency as non-tribal threatens to perpetuate the "digital divide in this country, with rural communities, and especially Native Americans, disproportionately on the wrong side, getting bypassed by the Internet revolution."²

II. AWS-3 BIDDING CREDITS FOR TRIBAL LANDS

The upcoming AWS-3 Auction "represents the largest amount of spectrum suitable for mobile broadband that the Commission has made available for auction since . . . 2008."³ As the Commission has observed, access to the AWS-3 spectrum is important as it will "help wireless companies meet growing consumer demand for mobile data by enabling faster wireless speeds and more capacity."⁴ As part of its upcoming AWS-3 Auction, the Commission has established a "Tribal Lands Bidding Credit" to "encourage the growth of wireless services in federally recognized tribal lands. . . ."⁵

Currently, the Eastern Navajo Agency is not federally recognized reservation land. Some of the Eastern Navajo Agency includes area that is held by many different categories of owners, including individual Navajo citizens, the federal government, the state of New Mexico, and private non-tribal landowners, all located in an area occupied almost exclusively by the Navajo people.

² See "New Opportunities in New Mexico's Indian Country," FCC Chairman's Blog (June 30, 2014) (<http://www.fcc.gov/blog/new-opportunities-new-mexico-s-indian-country>).

³ See "FCC Sets State for Auction of 65 MHz of Spectrum for Mobile Broadband; Largest Amount of Spectrum Made Available in Six Years," FCC News Release (rel. March 31, 2014).

⁴ *Id.*

⁵ See *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014*, Public Notice DA 14-1018 at ¶ 94 (rel. July 23, 2014) ("AWS-3 Public Notice").

III. GRANT OF A WAIVER IS APPROPRIATE TO APPLY TRIBAL LAND BIDDING CREDITS TO THE EASTERN NAVAJO AGENCY

Because of the unique and extraordinary circumstances facing tribal residents in the Eastern Navajo Agency, as described below, a waiver of Section 1.2110(f)(3)(i) of the Commission's rules, 47 C.F.R. § 1.2110(f)(3)(i), is warranted in order to apply AWS-3 Tribal Land bidding credits to the Eastern Navajo Agency. Doing so will create an incentive for wireless carriers and new entrants to deploy AWS-3 spectrum to tribal residents throughout the Eastern Navajo Agency -- a result that is in the public interest and consistent with the Commission's stated goal to improve the deployment of telecommunications and broadband infrastructure to tribal communities.

The Commission has authority to waive its rules if there is "good cause" to do so.⁶ The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.⁷ That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. In fact, the Commission's right to waive its rules is not unlike an obligation in that it is a *sine quo non* to its ability to promulgate otherwise rigid rules. It is the necessary "safety valve" that makes the system work.⁸ As the Commission has acknowledged, it "may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis."⁹

⁶ See 47 C.F.R. § 1.3.

⁷ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), *cert. denied*, 409 U.S. 1027 (1972).

⁸ See *WAIT Radio*, 418 F.2d at 1157, 1159.

⁹ See *In the Matter of Federal-State Joint Board on Universal Service; Smith Bagley, Inc. Petition for Waiver of Section 54.400(e) of the Commission's Rules*, FCC 05-77 at ¶ 9 (rel. March 30, 2005).

Under 47 C.F.R. § 1.2107, winning auction bidders for the AWS-3 auction can seek a bidding credit to serve a "qualifying tribal land" as defined in § 1.2110(f)(3)(i) of the Commission's Rules, 47 C.F.R. § 1.2110(f)(3)(i).¹⁰ As set forth in 47 C.F.R. § 1.2110(f)(3)(i),

[a] qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data.

Section 1.2110(f)(3)(i) of the Commission's Rules should be waived to allow the Eastern Navajo Agency to be recognized as a "qualifying tribal land" for purposes of the AWS-3 auction.

A waiver of Section 1.2110(f)(3)(i) would be consistent with the original intent behind the creation of tribal land bidding credits which were developed out of a recognition by the Commission that tribal communities were subject to "[b]y virtually any measure, . . . less access to telecommunications services than any other segment of the population."¹¹ Even when compared to low-income communities generally, the Commission recognized that tribal communities have less access to communications services.¹² According to the Commission, the lack of access to "basic telecommunications services puts affected tribal communities at a tremendous social and economic disadvantage."¹³

¹⁰ See *AWS-3 Public Notice* at ¶ 236 ("A winning bidder that intends to use its license(s) to deploy facilities and provide services to federally recognized tribal lands that are unserved by any telecommunications carrier or that have a wireline penetration rate equal to or below 85 percent is eligible to receive a tribal lands bidding credit as set forth in sections 1.2107 and 1.2110(f) of the Commission's rules.").

¹¹ See *Extending Wireless Telecommunications Services to Tribal Lands*, FCC 00-209 at ¶ 8 (rel. June 30, 2000) ("*Bidding Credits First R&O*").

¹² *Id.*

¹³ *Id.*

Recognizing that tribal communities are for the most part geographically isolated, the Commission acknowledged when creating the tribal land bidding credits that terrestrial wireless technology would be critical in bringing telephone service to tribal communities at a lower cost. Accordingly, the Commission implemented the bidding credits as a way to incentivize wireless carriers to serve tribal communities.¹⁴

While the lands making up the Eastern Navajo Agency have not been included in the original definition of a tribal "reservation," by any measure, the Eastern Navajo Agency is a tribal community and shares the same demographics as tribal communities across the country. The overwhelming majority of Eastern Navajo Agency residents are Navajo Nation tribal members who have complete citizenship rights in Navajo affairs, including most importantly, voting. Census data shows that the telephone penetration rate for the American Indian population on a national basis is approximately 94.3% and per capita income is \$16,542.¹⁵ By comparison, telephone penetration and per capita income for the Navajo Nation in New Mexico (which includes the Eastern Navajo Agency) is significantly less (74.1% and \$10,978 respectively).¹⁶ There remain areas within the Eastern Navajo Agency where no telephone service is available. Census data also show that nearly 36% of the Navajo Nation residents in New Mexico subsist at or below the federal poverty level, compared to nearly 30% of American Indian residents nationally.¹⁷ There are few, if any, other areas in the country where American Indian residents suffer from the types of conditions in New Mexico and in the Eastern Navajo Agency.

¹⁴ *Id.* at ¶ 14.

¹⁵ *See* U.S. Census Bureau, 2010-2012 American Community Survey 3-Year Estimates (S0201, American Indian and Alaska Native alone).

¹⁶ *See* U.S. Census Bureau, 2010-2012 American Community Survey 3-Year Estimates (S0201, Navajo Nation tribal grouping/New Mexico).

¹⁷ *See* U.S. Census Bureau, 2010-2012 American Community Survey 3-Year Estimates (S0201, American Indian and Alaska Native alone); U.S. Census Bureau, 2010-2012 American Community Survey 3-Year Estimates (S0201, Navajo Nation tribal grouping/New Mexico).

The concentration of tribal residents living there, combined with the low telephone penetration rate, makes the Eastern Navajo Agency exactly the kind of area that the Commission's bidding credits were intended to incentivize carriers to serve. Given the high cost to serve an area like the Eastern Navajo Agency, a decision not to extend AWS-3 tribal land bidding credits to that area will result in another missed opportunity to increase mobile broadband services to tribal residents -- a result that is not in the public interest. Rather than frustrating the public interest through strict application of the Commission's Rules, the rules should be waived in order to further the Commission's stated goal to increase telephone penetration and distribute the benefits of mobile broadband to tribal communities.

Waiver of the Commission's Rules in order to treat the Eastern Navajo Agency as a qualified tribal land is firmly grounded in Commission precedent. In 2005, the Commission waived its rules to enable eligible residents of the Eastern Navajo Agency to receive Tier 4 Lifeline and Link-Up support.¹⁸ As with the AWS-3 tribal lands bidding credits, Tier 4 Lifeline and Link-Up support is limited to eligible residents of federally recognized Tribal Lands. Given the similarities of the telephone penetration rate and demographics of the Eastern Navajo Agency when compared to federally recognized Tribal Lands, SBI sought and obtained a waiver from the Commission to allow for Tier 4 Lifeline and Link-Up support in the Eastern Navajo Agency.¹⁹

In granting the waiver, the Commission recognized the "special circumstances in the Eastern Navajo Agency" that has led to the "same impediments to subscribership and infrastructure development as those existing on Tribal lands."²⁰ According to the Commission, a waiver was justified because it would further the "Commission's goal of increasing the

¹⁸ See *In the Matter of Federal-State Joint Board on Universal Service; Smith Bagley, Inc. Petition for Waiver of Section 54.400(e) of the Commission's Rules*, FCC 05-77 (rel. March 30, 2005).

¹⁹ *Id.* at ¶ 1 ("We find that a waiver is in the public interest and warranted by the unique and compelling circumstances of low-income consumers residing in the Eastern Navajo Agency.").

²⁰ *Id.* at ¶ 10.

deployment of telecommunications facilities in unserved and underserved regions of the Nation, especially among Native American populations."²¹

The same can be said by the Commission with regard to circumstances surrounding this Petition. The Eastern Navajo Agency and its tribal residents continue to suffer from the same impediments to wireless infrastructure development that exist on federally recognized Tribal Lands. Grant of a waiver to allow for AWS-3 tribal land bidding credits in the Eastern Navajo Agency will encourage carriers to deploy wireless facilities in that area and bring to tribal residents the same mobile broadband services that are being deployed throughout the nation.

IV. ACTION ON THIS PETITION IS NEEDED PRIOR TO THE AWS-3 AUCTION

Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, was designed precisely for this situation -- one in which immediate action is necessary to ensure that consumers are not denied critical benefits by a strict reading of the Commission's Rules. SBI recognizes that the *AWS-3 Public Notice* requires winning bidders to apply for a tribal lands bidding credit after the auction, at the time when the long-form application is filed.²² However, similarly waiting to resolve this Petition until after the auction would be problematic.

Whether a bidding credit applies will directly affect what a carrier is likely to bid for any license in the AWS-3 auction. If a carrier knows that a tribal bidding credit will apply to a particular area, that carrier will figure in that bidding credit to its bidding and capital investment strategy for that area. Accordingly, it is not reasonable to expect a carrier to bid in the AWS-3 auction for a license in the Eastern Navajo Agency without understanding up front whether a tribal bidding credit will apply. This is particularly true on the Navajo Nation, because the current situation is likely to cause bidders to focus on those portions of the Nation located in Arizona and Utah, where tribal bid credits are available.

²¹ *Id.* at ¶ 15.

²² *AWS-3 Public Notice* at ¶ 94.

Moreover, while larger carriers may have extra capital available to cover a shortfall if a particular bidding credit is not granted, smaller carriers, like SBI, must plan their infrastructure investments more carefully. Knowing prior to the November 2014 AWS-3 auction whether the bidding credit will apply for the Eastern Navajo Agency may very well determine whether any carrier seeks an AWS-3 license to cover that area at all. Alternatively, carriers will bid for license in the region, but focus their build-outs on more heavily populated towns such as Gallup and Farmington, leaving sparsely populated and demographically challenging areas behind.

V. CONCLUSION

For the reasons set forth above, SBI respectfully requests that the Commission grant this Petition prior to the September 12, 2014 short form filing deadline, or at the latest, in advance of the October 15, 2014 up-front payment deadline, and waive its rules so that tribal land bidding credits for the AWS-3 auction will apply for licenses to serve the Eastern Navajo Agency.

Respectfully submitted,

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