

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

In the Matter of )
Federal-State Joint Board on Universal Service )
Smith Bagley, Inc. ) CC Docket No. 96-45
Petition for Waiver of Section 54.809(c) of the )
Commission's Rules and Regulations )

Order

Adopted: August 14, 2001

Released: August 15, 2001

By the Deputy Chief, Common Carrier Bureau:

1. In this Order, we grant the petition of Smith Bagley, Inc. (SBI) for a limited waiver of section 54.809 of the Commission's rules. Specifically, we grant SBI's request to waive the June 30th annual filing deadline for carrier certification of the use of interstate access support, and we accept its late-filed certification. This waiver will permit SBI to continue to receive such support uninterrupted. We find that this waiver will ensure that consumers in SBI's service area, which includes three Indian reservations in Arizona, are not harmed by SBI's failure to timely file the required certification with the Commission.

I. BACKGROUND

2. In the Interstate Access Support Order, the Commission implemented certain interstate access charge reforms for price cap carriers, and converted implicit subsidies in interstate access charges to explicit, portable universal service support. Among other things, the Interstate Access Support Order

1 Smith Bagley, Inc. Petition For Waiver of FCC Rule Section 54.809(c) - Expedited Action Requested, CC Docket No. 96-45, filed July 16, 2001 (Petition).

2 47 C.F.R. § 54.809(c).

3 In this Order, the term "Indian" refers to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . Eskimos and other aboriginal peoples of Alaska. . . ." 25 U.S.C. § 479. See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12211 para. 1 n. 1 (2000) (Twelfth Report and Order), stayed in part by Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Order and Further Notice of Proposed Rulemaking, FCC 00-322 (rel. Aug. 31, 2000), as corrected by Errata, CC Docket No. 96-45, DA 00-2128 (Com. Car. Bur. rel. Sep. 20, 2000).

4 Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, Low-Volume Long-Distance Users, CC Docket No. 99-249, Report and Order,

set forth specific certification requirements to ensure that carriers receiving interstate access universal service support use it in a manner consistent with section 254 of the Communications Act of 1934, as amended (the Act).<sup>5</sup> In order for a price cap local exchange carrier or eligible telecommunications carrier serving lines in the service area of a price cap local exchange carrier to receive such support, the carrier must file an annual certification stating that all interstate access universal service support received by the carrier will be used “only for the provision, maintenance, and upgrading of facilities and service for which the support is intended.”<sup>6</sup> Carriers must file such certifications on the date the carrier first files its line count data information with the Universal Service Administrative Company (USAC) pursuant to section 54.802 of the Commission’s rules,<sup>7</sup> and thereafter on June 30<sup>th</sup> of each year.<sup>8</sup> Absent the timely submission of such a certification, a carrier will not receive support.<sup>9</sup>

3. SBI seeks a waiver of the June 30<sup>th</sup> deadline for the submission of its 2001 certification for the receipt of interstate access universal service support. SBI states that it recently obtained eligible telecommunications carrier status in Arizona qualifying it to receive universal service support for services provided to subscribers on certain Indian reservations.<sup>10</sup> SBI states further that it filed its first interstate access certification with the Commission on March 30, 2001, the day it reported its first interstate access line count data to USAC as required under the rules, but failed to later submit a certification on June 30, 2001, as also required.<sup>11</sup> Upon discovery of its failure, SBI immediately submitted a proper certification to the Commission.<sup>12</sup> SBI asserts that the interstate access universal support it receives assists SBI in providing universal service to the underserved Indian communities it serves in Arizona.<sup>13</sup> SBI further maintains that, absent the requested waiver, its receipt of this support will be interrupted, which may result in the delay of planned system construction and upgrades necessary to provide service to these communities.<sup>14</sup>

## II. DISCUSSION

4. We find that SBI has demonstrated that good cause exists to waive the June 30<sup>th</sup> annual filing deadline for carrier certification of the use of interstate access universal service support under

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*Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (*Interstate Access Support Order*), *pets. for review pending*, *Texas Office of Public Util. Counsel et al. v. FCC*, 5<sup>th</sup> Cir. No. 00-60434 (and consolidated cases) (2000).

<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934. 47 U.S.C. §§ 151, *et seq.* (Communications Act or Act). References to section 254 in this Order refer to the universal service provisions of the 1996 Act, which are codified at 47 U.S.C. § 254 of the Act.

<sup>6</sup> 47 U.S.C. § 254(e). *See* § 47 C.F.R. 54.809(a).

<sup>7</sup> *See* 47 C.F.R. § 54.802.

<sup>8</sup> *See* 47 C.F.R. §54.809(c).

<sup>9</sup> *See* 47 C.F.R. §54.809(a).

<sup>10</sup> Petition at 2.

<sup>11</sup> *Id.* at 1. *See* Letter from Richard Watkins, CellularOne, submitted on behalf of Smith Bagley, Inc. to Magalie Roman Salas, FCC, dated March 30, 2001.

<sup>12</sup> *Id.* at 3. *See* Letter from Richard Watkins, CellularOne, submitted on behalf of Smith Bagley, Inc. to Magalie Roman Salas, FCC, dated July 11, 2001.

<sup>13</sup> Petition at 2.

<sup>14</sup> *Id.* at 3.

section 54.809(c) of the Commission's rules. Accordingly, we accept SBI's late-filed annual certification stating that all interstate access universal service support received by SBI will be used "only for the provision, maintenance, and upgrading of facilities and service for which the support is intended."

5. Generally, Commission rules may be waived for good cause shown.<sup>15</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>16</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>17</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>18</sup> Waiver of the Commission's rules therefore is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.

6. We find that there are special circumstances to justify granting a limited waiver of section 54.809 of our rules as requested by SBI. First, we note that SBI, as newly eligible to receive support, submitted a certification on March 30, 2001, just three months prior to the June 30<sup>th</sup> deadline, attesting to the use of support in a manner consistent with section 254 as required by the Commission's rules. Second, upon discovery, SBI immediately remedied its omission by filing a certification on July 11, 2001, less than two weeks after the deadline. Third, SBI represents that it continues to comply with the commitments made in its March 30, 2001 certification.<sup>19</sup>

7. Moreover, we conclude that it would be consistent with the public interest to waive the June 30<sup>th</sup> filing deadline and accept SBI's late filed certification. SBI is currently providing supported service to subscribers on three Indian reservations.<sup>20</sup> Strict application of the filing deadline in this instance may jeopardize the provision of service and delay system construction and upgrades in these areas.<sup>21</sup> Waiver of the filing deadline will permit SBI to receive interstate access universal service support uninterrupted, and continue its efforts to increase access to telecommunications services in these areas consistent with our statutory goal of preserving and advancing universal service, pursuant to section 254 of the Act.<sup>22</sup> Such a waiver is also consistent with our mandate to ensure that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, have access to telecommunications and information services.<sup>23</sup>

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<sup>15</sup> 47 C.F.R. § 1.3.

<sup>16</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>17</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>18</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>19</sup> Petition at 2.

<sup>20</sup> SBI provides service on the Navajo, Hopi, and Fort Apache Reservations in Arizona. The Commission has recognized that generally, Indian reservations have low penetration rates. See *Twelfth Report and Order*, 15 FCC Rcd at 12,222-225, paras. 24-28.

<sup>21</sup> See Petition at 3.

<sup>22</sup> 47 U.S.C. § 254(b).

<sup>23</sup> *Id.*

**III. ORDERING CLAUSE**

8. Accordingly, IT IS ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 U.S.C. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 54.809(c) of the Commission's rules, 47 C.F.R. § 54.809(c), filed by Smith Bagley, Inc. on July 16, 2001, IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey  
Deputy Chief, Common Carrier Bureau