

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

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Smith Bagley, Inc.)	
Petition for Designation as an)	
Eligible Telecommunications Carrier for the)	
Navajo Reservation in Utah)	

ORDER

Adopted: February 8, 2007

Released: February 8, 2007

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a petition filed by Smith Bagley, Inc. (SBI) seeking designation as an eligible telecommunications carrier (ETC) on the Navajo Reservation (Reservation) in Utah¹ pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act).² SBI seeks to provide universal service fund supported services to underserved areas of the Reservation in Utah. Because SBI makes a prima facie showing that the Public Service Commission of Utah (Utah Commission) does not have jurisdiction over the SBI request for ETC designation and because the Utah Commission has not asserted jurisdiction in this matter, we conclude that the Commission has jurisdiction to determine whether SBI should be designated an ETC. We further conclude that SBI satisfies the statutory eligibility requirements criteria in section 214(e)(1) of the Act to be designated an ETC on the Navajo Reservation in Utah.³

II. BACKGROUND

A. Jurisdiction to Designate ETCs on Tribal Lands

2. Under section 254(e) of the Act, only a designated ETC is eligible to receive Federal universal service support.⁴ Under section 214(e)(2), state commissions determine whether a carrier meets the requirements for ETC designation.⁵

¹ Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah, CC Docket No. 96-45, (filed May 24, 2002) (SBI Petition or Petition).

² 47 U.S.C. § 214(e)(6).

³ 47 U.S.C. § 214(e)(1).

⁴ 47 U.S.C. § 254(e).

⁵ 47 U.S.C. § 214(e)(2).

3. When first enacted, the statute did not address who would perform the designation analysis for carriers not subject to state commission jurisdiction. Such carriers -- most notably, carriers owned or controlled by Native Americans -- therefore, did not have access to a forum in which to request designation.⁶ As a result, these existing carriers would have become ineligible for universal service support on January 1, 1998, when the eligibility requirements of the Act became effective, and new carriers would not have a forum to request designation. To correct this, Congress amended the Act by adding section 214(e)(6) to provide that the Commission will perform the designation analysis for carriers not subject to state commission jurisdiction.⁷

4. The Act is silent, however, on how to determine whether a state commission lacks jurisdiction, who makes the jurisdictional determination, and what to do if two entities -- for example, a state and a tribe -- both assert jurisdiction over the same telecommunications carrier. Therefore, in the *Twelfth Report and Order*, the Commission established that carriers serving tribal lands may first petition the Commission for a determination on whether the state has jurisdiction over the carrier.⁸ In this step, the carrier bears a strict burden of proof. It must detail the basis for its assertion, including any statements by the tribal authority.⁹ If the Commission finds that the state commission lacks jurisdiction, the Commission will then consider the merits of the carrier's request for ETC designation. This two-step process is intended to avoid what may ultimately be unnecessary costs and delays of a state designation proceeding and possible related court appeal of the threshold issue of jurisdiction, yet "preserv[e] the state commissions' jurisdiction consistent with federal, tribal, and state law."¹⁰ The Wireline Competition Bureau (Bureau) has delegated authority to perform ETC designations.¹¹

B. Commission Requirements for ETC Designation

5. An ETC petition must contain the following: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission; (2) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to section 254(c) of the Act; (3) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefore using media of general distribution;" and (5) if the petitioner meets the definition of a "rural telephone company" pursuant to section 3(37) of the Act, an identification of the petitioner's study area, or, if the petitioner is not a rural telephone company, a

⁶ 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Rep. Bliley).

⁷ 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

⁸ *Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas, Smith Bagley, Inc., Cheyenne River Sioux Tribe Telephone Authority, Western Wireless Corporation, Wyoming, Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc., Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12265, paras. 115-27 (2000) (*Twelfth Report and Order*); *aff'd by Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twenty-fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10958, 10964, n.28 (2003) (*Tribal Recon. Order*).

⁹ *Twelfth Report and Order*, 15 FCC Rcd at 12266-67, paras. 120-22.

¹⁰ *Id.* at 12265, para. 115.

¹¹ *See Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, CC docket No. 96-45, Public Notice, 12 FCC Rcd 22947, 22948 (1997) (*Section 214(e)(6) Public Notice*). The Wireline Competition Bureau was previously named the Common Carrier Bureau.

detailed description of the geographic service area for which it requests an ETC designation from the Commission.¹²

6. In the *ETC Designation Order*, released March 17, 2005, the Commission generally affirmed its earlier holdings and adopted additional requirements for ETC designation proceedings in which the Commission acts pursuant to section 214(e)(6) of the Act.¹³ Specifically, consistent with the recommendation of the Federal-State Joint Board on Universal Service, the Commission found that an ETC applicant must demonstrate: (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area; (2) how it will remain functional in emergency situations; (3) that it will satisfy consumer protection and service quality standards; (4) that it offers local usage comparable to that offered by the incumbent LEC; and (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act.¹⁴ These additional requirements are mandatory for all ETCs designated by the Commission.¹⁵ ETCs already designated by the Commission or ETC applicants that submitted applications prior to the effective date of the *ETC Designation Order* will be required to make such showings when they submit their annual certification filing under section 54.209 of the Commission rules.¹⁶

C. The SBI Petition for ETC Designation on the Navajo Reservation in Utah

7. SBI filed a petition requesting that the Commission grant it ETC designation to provide supported telecommunications service on the Reservation in Utah.¹⁷ SBI is a commercial mobile radio

¹² *Section 214(e)(6) Public Notice*, 12 FCC Rcd at 22948-49; 47 U.S.C. § 3(37).

¹³ *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371 (2005) (*ETC Designation Order*); 70 Fed. Reg. 29960 (May 25, 2005). *See also Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1564, 1565, 1575-76, 1584-85, paras. 1, 4, 27, 28, 46 (2004) (*Virginia Cellular*); *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422, 6438, paras. 1, 33 (2004) (*Highland Cellular*).

¹⁴ *See ETC Designation Order*, 20 FCC Rcd at 6380, para. 20, *citing Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 19 FCC Rcd 4259, para. 5 (2004) (*Recommended Decision*).

¹⁵ 47 C.F.R. § 54.202(a).

¹⁶ *See id.*; 47 C.F.R. § 54.202(c).

¹⁷ SBI Petition. Prior to filing with the Commission, SBI submitted its ETC petition to the Utah Commission in 2002, but withdrew its petition on April 30, 2002. In December 2000, SBI received ETC designation from the Arizona Public Utility Commission for service on the Navajo, Hopi, Pueblo of Zuni, and White Mountain Apache Reservations. *See* SBI Petition at 2, 16. In February 2002, SBI received ETC designation from the New Mexico Public Regulatory Commission for service on Zuni and Ramah reservations. *See id.* at 2-3.

The Commission sought comment on the SBI Petition. *Wireline Competition Bureau Seeks Comment on Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah*, CC Docket No. 96-45, Public Notice, 17 FCC Rcd 11890 (2002) (*WCB Public Notice*). The Independent Telephone and Telecommunications Alliance (ITTA) commented and SBI replied. *See generally* ITTA Comments, CC Docket No. 96-45, filed Aug. 21, 2002; SBI Reply, CC Docket No. 96-45, filed Sept. 5, 2002. SBI filed several supplemental pleadings. *See* SBI Feb. 2006 *Ex Parte*, Exhibit B (list of substantive submissions as of filing date). The Navajo Nation supports the SBI Petition, including the assertion that the Commission has jurisdiction and that the Commission should grant ETC designation for SBI. *See* Letter from Joe Shirley, Navajo Nation President, to Chairman Michael Powell, FCC, CC Docket No. 96-45, filed Apr. 6, 2004 (Navajo Nation Letter); SBI Petition at Exhibit A (Letter from Elmer Milford, Resources Committee, Navajo Nation Council, to Richard Watkins, Smith Bagley, undated) (Navajo Resources Committee Letter); Letter from David LaFuria, Counsel for SBI, to Marlene H.

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service (CMRS) provider licensed to provide personal communications service (PCS) in the Farmington, New Mexico Basic Trading Area, covering territory in Utah, Colorado, and New Mexico.¹⁸ Currently, SBI provides service to Navajo residents on the Reservation in Arizona and New Mexico, but does not provide service to the Utah portion of the Reservation.¹⁹

8. SBI claims that it has satisfied all statutory and regulatory prerequisites for the Commission to designate it as an ETC.²⁰ If designated an ETC, SBI intends to provide supported services, including offering and advertising the required supported services and providing the supported services using its own facilities, to those living on the Reservation in Utah, including non-tribal members if permitted by the designation.²¹ SBI contends that the tribe's interest in its service offering to the residents of the Reservation is "sufficiently compelling" and that its Petition is properly before the Commission.²² SBI contends that the Utah Commission lacks jurisdiction and therefore the Commission should designate SBI as an ETC.²³ Further, SBI contends that the Utah Commission does not regulate certain wireless carriers, such as SBI.²⁴ Significantly, the Utah Commission did not comment on the SBI Petition. SBI also requests that its "service area" be designated as the entire geographic area of the Reservation in Utah.²⁵ Finally, SBI also claims that designation will be in the public interest.²⁶

III. DISCUSSION

A. Jurisdiction

9. We conclude that it is appropriate for the Bureau, acting under delegated authority, to exercise jurisdiction over SBI's Petition for ETC designation because SBI, in conjunction with supporting statements from the Navajo Nation, has made a prima facie showing that the Commission should exercise jurisdiction over the Petition for designation on tribal lands and there has been no opposition to the Petition. The Utah Commission has not challenged or asserted jurisdiction over SBI's Petition.²⁷

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Dortch, Secretary, FCC, CC Docket No. 96-45, filed May 12, 2004 (attaching Resolution of Navajo Utah Commission of the Navajo Nation Council, supporting SBI ETC designation) (Navajo Utah Commission Letter); Letter from B. Alex Montoya, Navajo Nation Telecommunications Regulatory Commission, to Chairman Michael Powell, FCC, CC Docket No. 96-45, filed Jun. 7, 2004 (NNTRC Letter).

¹⁸ See SBI Petition at 1, n.1 and 6. In addition, SBI is authorized to provide cellular and PCS service in Arizona and New Mexico. See *id.*

¹⁹ *Id.* at 3. See SBI Feb. 2006 *Ex Parte* at 2.

²⁰ *Id.* at 6-12.

²¹ *Id.* at 6-12; Letter from David LaFuria, Counsel for SBI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 2, filed Jan. 6, 2005 (SBI Jan. 2005 *Ex Parte*).

²² SBI Petition at 4.

²³ *Id.*; Letter from David LaFuria, Counsel for SBI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 3-5, filed July 15, 2003 (SBI July 2003 *Ex Parte*). See Letter from David LaFuria, Counsel for SBI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 3, filed Feb. 24, 2006 (SBI Feb. 2006 *Ex Parte*) (Utah does not regulate CMRS carriers, citing Utah Code Ann. § 54-2.1(23)(b)).

²⁴ SBI Feb. 2006 *Ex Parte* at 3-4.

²⁵ SBI Petition at 12.

²⁶ *Id.* at 13-14.

²⁷ The determination of whether the Commission has jurisdiction to consider an ETC petition for service on tribal lands is greatly informed by the participation of the tribe and the state commission or other state authorities. *Twelfth Report and Order*, 15 FCC Rcd at 12268, para. 124. We are mindful that some state commissions will not object to the Commission's jurisdiction over designation of carriers serving tribal lands. *Id.* Significantly, the Navajo Nation

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Moreover, because the Utah Commission does not regulate wireless carriers, the record supports our authority to consider ETC designation over non-tribal lands within the portion of the Reservation that lies within Utah. As we explain below, this jurisdiction extends to both tribal and non-tribal persons within the borders of the Reservation in Utah taking service from SBI.

10. We find that SBI has made a prima facie showing that jurisdiction for designation on the Navajo Nation Reservation in Utah lies with the Commission. Under the framework established in the *Twelfth Report and Order*,²⁸ SBI filed its Petition with the Commission and simultaneously served a copy on the Utah Commission.²⁹ SBI and the Navajo Nation assert that the Commission has jurisdiction to consider the ETC designation Petition because the consensual relationship that SBI has with the Navajo Nation serves the Navajo Nation's inherent tribal sovereignty interests.³⁰ In addition, the Utah Code appears to limit the Utah Commission's jurisdiction over wireless carriers.³¹ Significantly, the Utah Commission did not file comments in this proceeding and has not otherwise asserted jurisdiction over SBI. The filings by SBI and the Navajo Nation, the Utah Code provisions, and the silence of the state commission all provide substantial support for the conclusion that the Utah Commission does not have jurisdiction in this matter.

11. We note that this case is distinguishable from the Commission's earlier *Pine Ridge* decision in which the South Dakota Public Utility Commission asserted state jurisdiction over all persons

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supports Commission jurisdiction over SBI, while the Utah Commission has not challenged such jurisdiction. The Utah Commission was provided notice and an opportunity to comment on this proceeding, but did not. *See infra* n.29. *See also WCB Public Notice*; SBI Reply, Certificate of Service (certifying service of the reply on Sept. 5, 2002, via the U.S. Mail, first-class postage pre-paid, to Julie P. Orchard, Commission Secretary, Utah Commission).

²⁸ In the *Twelfth Report and Order*, the Commission established the framework for the ETC designation process under section 214(e)(6) of the Act for carriers serving tribal lands. *Twelfth Report and Order*, 15 FCC Rcd at 12265-12269, paras. 115-127. The Commission concluded that a carrier seeking ETC designation on tribal lands may petition the Commission without first seeking designation from the state commission. *Id.* The carrier must notify the state commission by providing copies of its petition to the state commission. *Id.* The Commission will place the petition on public notice, establishing a comment and reply period, and will send the public notice to the state commission to ensure the state commission has notice. *Id.* at 120. The Commission determined that the carrier has the burden to prove that it is not subject to the jurisdiction of the state commission. *Id.*

²⁹ SBI Petition, Certificate of Service (certifying service of the Petition on May 24, 2002 via the U.S. Mail, first-class postage pre-paid, to Julie P. Orchard, Commission Secretary, Utah Commission).

³⁰ SBI Petition at 4; Letter from Alex Montoya, Navajo Nation Telecommunications Regulatory Commission, to Chairman Michael Powell, FCC, CC Docket No. 96-45, filed Sept. 27, 2004 (NNTRC Sept. 2004 *Ex Parte* Letter). We note that the carrier's consensual relationship with the Navajo Nation satisfies the first *Montana* exception for finding tribal jurisdiction. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Nevada*, 533 U.S. at 372 (first *Montana* exception applies "to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they ... entered into"). SBI has expressly consented to the Navajo Nation's regulatory authority, and committed to work cooperatively with the Navajo Nation concerning tower siting, business licensing, taxation, and tribal employment regulations. *See* Letter from David LaFuria, Counsel for SBI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 1-2 and Attach. A, filed Jan. 6, 2005 (SBI Jan. 2005 *Ex Parte* Letter); SBI July 2003 *Ex Parte* at 2.

³¹ Utah Code Ann §§ 54-2.1(23)(6), 54-4-1. Because SBI has been issued a covering license by the Commission, the Utah Commission does not, by state statute, appear to have jurisdiction in this case. *See* SBI Jan. 2005 *Ex Parte* at 3-5. The Commission's Universal Licensing System, which contains information about covering licenses, can be accessed at <http://wireless.fcc.gov/uls/>. SBI's call sign is KNLH759. *See Id.*

on the reservation, whether tribal or non-tribal.³² Here, the Utah Commission has not asserted jurisdiction and SBI has made a prima facie showing that it is not subject to the Utah Commission's jurisdiction. Therefore, the Commission must determine SBI's ETC designation, and we have jurisdiction to authorize federal universal service funding for all service provided by SBI throughout the Navajo Reservation in Utah, as discussed below.

12. We designate SBI as an ETC throughout the Navajo Reservation in Utah. Because the Utah Commission does not have jurisdiction in this matter, we find that our jurisdiction over the SBI Petition extends to all people, whether tribal or non-tribal, taking service from SBI within the borders of the Reservation in Utah. Thus, we find that SBI's ETC designation covers the geographic area consisting of the Navajo Reservation in Utah and because the carrier is "not subject to the jurisdiction of a State Commission," section 214(e)(6) permits the Commission to authorize federal universal service funding for SBI for service provided to all residents, whether tribal or non-tribal members.

13. Moreover, the statutory goal of preserving and advancing universal service is furthered by our authorization of federal universal service funding for all service provided by SBI within the designated area.³³ We have found that low penetration rates on tribal lands are at odds with our statutory goal of ensuring access to telecommunications for all consumers.³⁴ Penetration rates on the Reservation in Utah remain low.³⁵ Including non-members in the jurisdictional grant furthers the statutory goal of universal service by increasing the availability of the telecommunications services on the Reservation. In the *Twelfth Report and Order*, the Commission concluded that Enhanced Lifeline/Link-up support should be available to tribal members as well as non-members.³⁶ The reasoning used to support this conclusion applies equally here: (1) increasing the number of people, whether Indian or non-Indian, connected to the network increases the value of the network; (2) increasing the number of people connected to the network will incent ETCs to serve tribal areas; and (3) supporting all eligible people who live on tribal land will be more efficient administratively because the carrier will not have distinguish between Indian and non-Indian eligible subscribers.³⁷

B. Analysis of SBI's Petition for Designation as an ETC

14. Having determined that we have jurisdiction over the SBI Petition, we now examine whether SBI satisfies the requirements of section 214 of the Act for the requested service area of the Reservation in Utah. As explained below, we find that SBI meets the requirements of sections 214(e)(1) and (e)(6) of the Act. We therefore designate SBI as an ETC for the portions of its licensed service area on the Reservation in Utah. SBI's ETC designation is effective upon release of this Order. As explained in the *ETC Designation Order*, SBI must make the required showings when it submits its annual certification filing, beginning on October 1, 2007.³⁸

³² *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18145, 18148, para. 9 (2001) (*Pine Ridge Jurisdictional Order* or *Pine Ridge*).

³³ 47 U.S.C. § 254(b).

³⁴ *Twelfth Report and Order*, 15 FCC Rcd at 12221, para. 21.

³⁵ Petition at 5. SBI reports that according to 1990 Census data only about 46% of the households on the Reservation in Utah had a telephone.

³⁶ *Twelfth Report and Order*, 15 FCC Rcd at 12225, paras. 28-31.

³⁷ *Id.*

³⁸ See 47 C.F.R. §§ 54.202(c), 54.209; *ETC Designation Order*, 20 FCC Rcd at 6380, para. 20.

1. Offering and Advertising the Supported Services

15. Offering the Services Designated for Support. SBI has demonstrated through the required certifications and related filings that it now offers, or will offer upon obtaining designation as an ETC, the services supported by the federal universal service mechanisms. SBI is authorized to provide CMRS in the service areas of the Reservation for which it seeks ETC designation.³⁹ SBI certifies that it now provides or will provide throughout its designated service area the services and functionalities enumerated in section 54.101(a) of the Commission's rules.⁴⁰ SBI has also certified that, in compliance with rule section 54.405, it will make available and advertise Lifeline service to qualifying low-income consumers.⁴¹ We point out that SBI is required to, and has committed to, offer and advertise enhanced Lifeline and Link-up services on tribal lands.⁴² SBI has also committed to serving unserved or underserved areas.⁴³

16. SBI committed to comply with the commitments set forth in the *Virginia Cellular Order* and the *Highland Cellular Order* and affirmed in the *ETC Designation Order*, including: (1) annual reporting of unfulfilled service requests and complaints per 1,000 handsets; (2) specific commitments to provide service to requesting customers in the area for which it is designated; and (3) specific commitments to improve its network.⁴⁴

17. SBI has also committed to comply with the Cellular Telecommunications and Internet Association (CTIA) Consumer Code for Wireless Service.⁴⁵ The Commission has previously determined that adopting the Consumer Code for Wireless Service signifies part of a commitment to provide quality service.⁴⁶

18. Although the Commission recently imposed a requirement that an ETC service offering must include local usage comparable to that offered by the incumbent LEC, the Commission has not prescribed a specific minimum local usage requirement.⁴⁷ Although ITTA claims that SBI's local usage offering will be insufficient, we are satisfied that SBI's service offering includes adequate local usage.⁴⁸ SBI's offering here is the same as that which SBI offers in Arizona and New Mexico,⁴⁹ jurisdictions

³⁹ SBI Petition at 1, n.1 and 6.

⁴⁰ *Id.* at 7-11.

⁴¹ SBI May 2004 Supplement at 8-9. *See* 47 C.F.R. § 54.405.

⁴² Recognizing the unique needs and characteristics of tribal communities, enhanced Lifeline support, also known as Tier 4 support, provides qualifying low-income individuals living on tribal lands with an additional discount of up to \$25.00 off the monthly cost of telephone service. *See* 47 C.F.R. § 54.400(e), 54.403(a)(4).

⁴³ SBI Petition at 3, 14-15.

⁴⁴ *See* 47 C.F.R. § 54.209; *Virginia Cellular*, 19 FCC Rcd at 1584-85, para. 46. *See also* SBI May 2004 Supplement at 3-8. SBI has provided detailed information on how it will use universal service support to expand its CMRS coverage throughout the requested service area. *See id.* at 7-8. Specifically, SBI provides the location of cell sites it plans to construct, the timeframe for commencement of construction, the populations served by new cell sites, and the estimated cost of its build-out plans. *See id.*

⁴⁵ SBI May 2004 Supplement at 3-4. *See CTIA, Consumer Code for Wireless Service*, available at http://www.wow-com.com/pdf/The_Code.pdf.

⁴⁶ *Virginia Cellular*, 19 FCC Rcd at 1576-77, para. 30.

⁴⁷ *See* 47 C.F.R. § 54.209(a)(7). *See also ETC Designation Order*, 20 FCC Rcd at 6385, para. 32.

⁴⁸ ITTA Comments at 3-5.

⁴⁹ SBI Petition at 3.

where SBI previously obtained ETC designation.⁵⁰ In fact, SBI reports that within its first year as an ETC on the Navajo Reservation in the Arizona over 17,000 people have subscribed to the same service offering.⁵¹

19. Offering the Supported Services Using a Carrier's Own Facilities. SBI has demonstrated that it satisfies the requirement of section 214(e)(1)(A) of the Act that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services.⁵² SBI states that it intends to provide the supported services using its existing network infrastructure, which includes "the same antenna, cell-site, tower, trunking, mobile switching, and interconnection facilities used by the company to serve its existing customers."⁵³

20. Advertising Supported Services. SBI has demonstrated that it satisfies the requirement of section 214(e)(1)(B) of the Act to advertise the availability of the supported services and related charges using media of general distribution, including television, radio, newspaper, and billboard advertising.⁵⁴ In addition to its current advertising, SBI has committed to specific methods to publicize the availability of Lifeline and Link-up service, such as advertising in local unemployment, social security, and welfare offices to provide information to those people most likely to qualify for Lifeline and Link-Up benefits.⁵⁵

2. Public Interest Analysis

21. As explained below, we conclude that it is consistent with the public interest, convenience, and necessity to designate SBI as an ETC for the requested service area that is served by the rural telephone company, Navajo Communications Company (Navajo Communications). In determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant to show that its universal service offering in relevant areas will provide benefits to rural consumers.⁵⁶ SBI has satisfied this requirement.

22. Prior to designating an ETC pursuant to section 214(e)(6) of the Act, the Commission determines whether such designation is in the public interest.⁵⁷ In the *ETC Designation Order*, the Commission adopted one set of criteria for evaluating the public interest for ETC designations for rural and non-rural areas.⁵⁸ The Commission, however, noted that the same factors may be analyzed differently or may warrant a different outcome depending on the specifics of the proposed service area and whether it is rural or non-rural.⁵⁹ In determining the public interest, the benefits of increased consumer choice and the unique advantages and disadvantages of the applicant's service offering are

⁵⁰ See *supra* n.17.

⁵¹ SBI Petition at 2-3.

⁵² See *id.* at 11-12.

⁵³ *Id.*

⁵⁴ SBI Petition at 12; 47 C.F.R. § 214(e)(1)(B).

⁵⁵ SBI May 2004 Supplement at 8-9.

⁵⁶ See *Virginia Cellular*, 19 FCC Rcd at 1574-75, para. 26; *Highland Cellular*, 19 FCC Rcd at 6431, para. 20.

⁵⁷ 47 U.S.C. § 214(e)(6); 47 C.F.R. § 54.202(c). See *ETC Designation Order*, 20 FCC Rcd at 6388-6396, paras. 40-57; *Virginia Cellular Order*, 19 FCC Rcd at 1575, para. 27; *Highland Cellular Order*, 19 FCC Rcd at 6431-32, para. 21. In determining whether the public interest is served in an ETC petition, the Commission also places the burden on the ETC applicant. *ETC Designation Order*, 20 FCC Rcd at 6390, para. 44.

⁵⁸ *ETC Designation Order*, 20 FCC Rcd at 6389-90, paras. 42-43.

⁵⁹ *Id.* at 6390, para. 43.

considered.⁶⁰ The creamskimming analysis is limited to designations in rural service areas.⁶¹ Thus, when an ETC applicant seeks designation below the study area of a rural telephone company, a creamskimming analysis is conducted to compare the population density of the wire centers in which the ETC applicant seeks designation against that of the wire centers in the study area in which the ETC applicant does not seek designation.⁶²

23. We find that SBI's universal service offering will provide a variety of benefits to consumers including providing more consumer choice and making available advantageous service offerings. For instance, universal service support will enable SBI to construct facilities that, according to SBI, may not otherwise be built on the Reservation, and thus enable additional wireless services to be available to members of the Navajo Nation in the Reservation in Utah.⁶³

24. In addition, SBI will also use support to offer a basic universal service package to subscribers who are eligible for Lifeline support.⁶⁴ SBI has committed to provide service to any requesting customers within its designated service area.⁶⁵ SBI also offers a larger local calling area than is available from Navajo Communications, the rural incumbent local exchange carrier (LEC).⁶⁶

25. Moreover, the mobility of SBI's wireless service will provide other benefits to consumers. For example, the mobility of telecommunications benefits consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other locations. The availability of a wireless universal service offering also provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.⁶⁷

26. We find ITTA's concern, that the mobility of SBI's wireless service will undermine the fund, without merit.⁶⁸ ITTA advocates that we limit subscriber usage outside the designated service area thereby ensuring that high cost funds are used only in high cost areas.⁶⁹ We find this argument unpersuasive. Rather, as SBI points out, usage outside of its service area will incur roaming charges, which are paid by the subscriber to the carrier providing the roaming.⁷⁰ Roaming is not a supported service and will not impact the fund.⁷¹

27. SBI has also made service quality commitments as required by the *ETC Designation Order*, including compliance with the CTIA Consumer Code for Wireless Service.⁷² Likewise, SBI has

⁶⁰ 47 C.F.R. § 54.202(c).

⁶¹ *ETC Designation Order*, 20 FCC Rcd at 6390, para. 42.

⁶² *Id.* at 6392-95, paras. 48-53.

⁶³ See SBI Petition at 16; SBI May 22, 2004 Supplement at 7-8.

⁶⁴ See SBI May 2004 Supplement at 8.

⁶⁵ See *id.* at 6-7.

⁶⁶ SBI Petition at 15.

⁶⁷ See *ETC Designation Order*, 20 FCC Rcd at 6391, para. 44. See also *Twelfth Report and Order*, 15 FCC Rcd at 12212, para. 3.

⁶⁸ ITTA Comments at 5-7.

⁶⁹ *Id.*

⁷⁰ SBI Reply at 6.

⁷¹ *Id.*

⁷² SBI May 2004 Supplement at 3. See *ETC Designation Order*, 20 FCC Rcd at 6384, para.28. See also *CTIA, Consumer Code for Wireless Service*, available at http://www.wow-com.com/pdf/The_Code.pdf

committed to report annually to the Commission on the number of complaints per 1,000 handsets and how many requests for service from potential customers were unfulfilled for the past year.⁷³ In addition, SBI's commitments to use a combination of various media channels to advertise its service offerings satisfy section 214(e)(1)(B) of the Act.⁷⁴ As the Commission has stated previously, because an ETC receives universal service only to the extent that it serves customers, strong economic incentives exist, in addition to the statutory obligation, for SBI to advertise its universal service offering in its designated area.⁷⁵

28. Finally, because SBI is seeking designation for Navajo Communication's entire study area, we are not concerned about creamskimming. Rural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area.⁷⁶ This is not the case here. Thus, we find that designation of SBI as an ETC on the Navajo Nation's Reservation in Utah is in the public interest.

3. Designated Service Areas

29. Under section 214(e)(1), a carrier designated as an ETC is eligible to receive universal service support throughout the service area for which the designation is received.⁷⁷ We conclude that SBI's "service area" consists of the geographic area within the borders of the Reservation. We therefore designate SBI as an ETC on the Navajo Nation Reservation in Utah in the requested area served by rural telephone company, Navajo Communications.

4. Regulatory Oversight

30. We note that SBI is required under section 254(e) of the Act to use high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended", and must, under sections 54.313 and 54.314 of the Commission's rules, certify annually that it is in compliance with this requirement.⁷⁸ In its Petition, SBI certified to the Commission that, consistent with sections 54.313 and 54.314 of the Commission's rules, all federal high-cost support will be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended" pursuant to section 254(e) of the Act in the area for which SBI is designated as an ETC.⁷⁹ In the *ETC Designation Order*, the Commission stated newly designated ETCs shall be eligible to receive support as of the effective date of its designation as an ETC provided it submits the data required by section 54.307(b) of our rules within 60 days of the effective date.⁸⁰ Therefore if SBI files the required data within the 60 day period, SBI will receive support as of the effective date of its designation.

⁷³ SBI May 2004 Supplement at 4. See *ETC Designation Order*, 20 FCC Rcd at 6402, para. 69.

⁷⁴ SBI May 2004 Supplement at 8-9.

⁷⁵ See *Virginia Cellular Order*, 19 FCC Rcd 1574, para. 25.

⁷⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 180, para. 172 (1996). A carrier "creamskims" when it serves only the least expensive customers, thereby undercutting the incumbent LEC's ability to provide service throughout the entire study area. See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8881-2, para. 189 (1997).

⁷⁷ 47 U.S.C. § 214(e)(1).

⁷⁸ 47 U.S.C. § 254(e); 47 C.F.R. §§ 54.313, 54.314.

⁷⁹ See SBI Petition at 16 and Exhibit D.

⁸⁰ 47 C.F.R. § 54.307(d); *ETC Designation Order*, 20 FCC Rcd at 6411, para. 92.

31. SBI committed to submit records and documentation on an annual basis detailing the number of consumer complaints per 1,000 mobile handsets.⁸¹ In addition, SBI will annually submit information detailing how many requests for service from potential customers were unfulfilled for the past year.⁸² These records and documentation must be filed with the Commission and the Universal Service Administrative Company (USAC) on October 1 of each year.⁸³ As noted above, SBI has also committed to become a signatory to CTIA's Consumer Code for Wireless Service.⁸⁴

32. We find that reliance on SBI's commitments is reasonable and consistent with the public interest, the Act, and the Fifth Circuit decision in *Texas Office of Public Utility Counsel v. FCC*.⁸⁵ We conclude that fulfillment of these additional reporting requirements will further the Commission's goal of ensuring that SBI satisfies its obligation under section 214(e) of the Act to provide supported services throughout its designated service area.⁸⁶

33. We note that the Commission may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" in the areas where it is designated as an ETC.⁸⁷ SBI is required to provide such records and documentation to the Commission and USAC upon request. We further emphasize that, if SBI fails to fulfill the requirements of the statute, the Commission's rules, or the terms of this Order after it begins receiving universal service support, the Commission may exercise its authority to revoke SBI's ETC designation.⁸⁸ The Commission also may assess forfeitures for violations of Commission rules and orders.⁸⁹

C. ANTI-DRUG ABUSE ACT CERTIFICATION

34. Under section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits.⁹⁰ SBI has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988.⁹¹ We find that SBI's certification satisfies the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

⁸¹ See SBI May 2004 Supplement at 3-8.

⁸² See *id.*

⁸³ See *ETC Designation Order*, 20 FCC Rcd at 6401-2, paras. 68-69.

⁸⁴ SBI May 2004 Supplement at 3-4.

⁸⁵ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999).

⁸⁶ 47 U.S.C. § 214(e).

⁸⁷ 47 U.S.C. §§ 220, 403; 47 C.F.R. §§ 54.313, 54.314.

⁸⁸ See *Declaratory Ruling*, 15 FCC Rcd at 15174, para. 15. See also 47 U.S.C. § 254(e).

⁸⁹ See 47 U.S.C. § 503(b).

⁹⁰ 21 U.S.C. § 862; 47 C.F.R. § 1.2002(a). Section 1.2002(b) provides that a "party to the application" shall include: "(1) If the applicant is an individual, that individual; (2) If the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting and/or non-voting) of the petitioner; and (3) If the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership." 47 C.F.R. § 1.2002(b). See *Section 214(e)(6) Public Notice*, 12 FCC Rcd at 22949.

⁹¹ See SBI Petition at 17 and Exhibit E.

IV. ORDERING CLAUSES

35. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act of 1934, 47 U.S.C. § 214(e)(6), and pursuant to authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, Smith Bagley, Inc. IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for its licensed service area on the Navajo Nation Reservation in Utah, to the extent described and subject to the conditions stated herein.

36. IT IS FURTHER ORDERED that Smith Bagley, Inc. SHALL SUBMIT additional information pursuant to section 54.209 of the Commission's rules, 47 C.F.R. § 54.209, no later than October 1, 2007, as part of its annual reporting requirements.

37. IT IS FURTHER ORDERED that a copy of this Order SHALL BE transmitted by the Wireline Competition Bureau to the Utah Commission and to the Universal Service Administrative Company.

38. IT IS FURTHER ORDERED that this Order shall be effective upon release, pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau