

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

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

**ORDER**

**Adopted: March 4, 2009**

**Released: March 5, 2009**

By the Commission: Commissioner McDowell issuing a statement.

**I. INTRODUCTION**

1. In this order, we waive, on our own motion, the limitation on the availability of uncapped high-cost universal service support for competitive eligible telecommunications carriers (ETCs) serving tribal lands or Alaska Native regions (Covered Locations).<sup>1</sup> Specifically, for the period in which the interim cap is in effect, we waive the restriction in paragraph 33 of the *Interim Cap Order* limiting the availability of uncapped per line support to competitive ETCs serving Covered Locations “to one payment per each residential account.”<sup>2</sup> We find that there is good cause to waive this requirement. Grant of this waiver addresses the issues raised by Smith Bagley, Inc. (SBI) in its August 1, 2008 petition for declaratory ruling; therefore we dismiss that petition as moot.<sup>3</sup>

**II. BACKGROUND**

2. On May 1, 2008, the Commission adopted the *Interim Cap Order*, which established an emergency interim cap on universal service high-cost support for competitive ETCs.<sup>4</sup> Under the interim cap, total annual competitive ETC high-cost support for each state is limited to the level of support that competitive ETCs in that state were eligible to receive in March 2008 on an annualized basis.<sup>5</sup> The interim cap is to remain in place only until the Commission adopts comprehensive high-cost universal service reform.<sup>6</sup>

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<sup>1</sup> *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8848-49, paras. 32-33 (2008) (*Interim Cap Order*).

<sup>2</sup> *Id.* at 8848-49, para. 33.

<sup>3</sup> Smith Bagley, Inc, Petition for Expedited Declaratory Ruling, WC Docket No. 05-337 and CC Docket No. 96-45, (filed Aug. 1, 2008) (SBI Petition).

<sup>4</sup> *Interim Cap Order*, 23 FCC Rcd at 8834, para. 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

3. The Commission established two limited exceptions to the emergency interim cap on high-cost support for competitive ETCs.<sup>7</sup> First, the Commission adopted an exception to the cap for competitive ETCs that submit their own cost data.<sup>8</sup> Specifically, “a competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.”<sup>9</sup>

4. Second, the Commission adopted an exception for competitive ETCs that serve Covered Locations.<sup>10</sup> Specifically, competitive ETCs serving Covered Locations may “continue to receive uncapped high-cost support for lines served in those Covered Locations” and “[s]upport for competitive ETCs that do opt into the limited exception will continue to be provided pursuant to section 54.307 of the Commission’s rules, except that the uncapped per line support is limited to one payment per each residential account.”<sup>11</sup> The Commission found it necessary to adopt the Covered Locations exception to the interim cap due to the low penetration rates of basic telephone service in these areas.<sup>12</sup> Furthermore, the Commission found that, unlike competitive ETCs in non-Covered Locations, competitive ETCs in these areas are not merely providing complementary services to those already available to consumers.<sup>13</sup> The *Interim Cap Order* became effective August 1, 2008 and competitive ETCs’ high-cost support was subject to the cap as of that date.<sup>14</sup>

5. Following adoption of the *Interim Cap Order*, several carriers and organizations have requested clarification of, or sought relief from the limitation of the uncapped support to one payment per residential account in the Covered Locations exception.<sup>15</sup> Alaska Communications Systems (ACS),

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<sup>7</sup> *Id.* at 8848-49, paras. 31-34.

<sup>8</sup> *Id.* at 8848, para. 31.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 8848-49, paras. 32-34 (citing 47 C.F.R. § 54.400(e) (tribal lands or Alaska Native regions are “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.”); 47 C.F.R. §§ 54.403(a)(4), 54.409(c) (providing for additional Lifeline and Link Up support for eligible residents living in tribal lands or Alaska Native regions)).

<sup>11</sup> *Interim Cap Order*, 23 FCC Rcd at 8848-49, paras. 32-33; 47 C.F.R. § 54.307.

<sup>12</sup> *Interim Cap Order*, 23 FCC Rcd at 8848, para. 32.

<sup>13</sup> *Id.*

<sup>14</sup> *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, 73 Fed. Reg. 37882 (July 2, 2008).

<sup>15</sup> See e.g., Letter from David A. LaFuria, Counsel for Smith Bagley, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92; WC Docket Nos. 03-109, 04-36, 05-337, 06-122 (filed Dec. 19, 2008) (SBI December 19<sup>th</sup> *Ex Parte* Letter); Letter from Leonard Steinberg, Counsel for Alaska Communications Systems, Tina Pidgeon, Vice President, Federal Regulatory Affairs, General Communication Inc., Greg Berberich, Chief Executive Officer, Matanuska Telephone Association, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45; WC Docket No. 05-337 (filed Nov. 17, 2008); Letter from Leonard Steinberg, General Counsel and Corporate Secretary, Alaska Communications Systems, Tina Pidgeon, Vice President, Federal Regulatory Affairs, General Communication Inc., Greg Berberich, Chief Executive Officer, Matanuska Telephone Association, Inc., to Kevin J. Martin, Chairman, Federal Communications Commission, WC Docket No. 05-337, CC Docket No. 96-45 (filed Oct. 27, 2008) (Alaska Companies October 27<sup>th</sup> *Ex Parte* Letter); Letter from Elisabeth H. Ross, Counsel for Alaska Communications System, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45; WC Docket No. 05-337, (filed June 6, 2008); Letter from Jim Rowe, Executive Director, Alaska Telephone Association, to Dana Shaffer, Chief, Wireline Competition Bureau, Federal Communications Commission, WC Docket No. 05-337 (filed May 29, 2008); Letter from Ben Shelly, Vice President, Navajo Nation, to Kevin Martin, Chairman, Federal

General Communication Inc. (GCI), Matanuska Telephone Association, Inc. (MTA), and SBI all agree that the Commission should remove the clause to ensure uncapped support is available on all lines, including both residential and business lines, served by competitive ETCs in the Covered Locations.<sup>16</sup>

6. GCI further argues that the Commission, in addition to waiving the residential limitation clause, should allow retroactive application of the Covered Locations exception to “reinstate funding previously reduced under the operation of the cap.”<sup>17</sup> GCI argues that uncapped support for all lines will alleviate low levels of telephone subscribership in the Covered Locations.<sup>18</sup> Specifically, GCI explains that high-cost support to competitive ETCs is resulting in statewide wireless deployment throughout Alaska to regions previously devoid of wireless infrastructure, thus confirming the Commission’s conclusion in the *Interim Cap Order* that competitive ETCs are not merely providing complementary services in Covered Locations.<sup>19</sup> GCI also asserts that allowing uncapped support for all competitive ETC lines in Covered Locations would have a *de minimis* impact on the universal service fund.<sup>20</sup>

### III. DISCUSSION

7. Pursuant to section 1.3 of the Commission’s rules, we find that there is good cause to waive, on our own motion, the requirement that “uncapped per line support is limited to one payment per each residential account” for competitive ETCs that opt into the Covered Locations exception to the interim cap on high-cost support for competitive ETCs.<sup>21</sup> Accordingly, pursuant to the *Interim Cap Order*, competitive ETCs serving Covered Locations who opt into the exception will receive uncapped high-cost support for all lines served in those Covered Locations and support will be provided pursuant to section 54.307 of the Commission’s rules.<sup>22</sup> We grant this waiver *nunc pro tunc*, effective as of August 1, 2008 (the effective date of the *Interim Cap Order*), for the interim period during which the cap on competitive ETC high-cost support remains in effect.

8. We find special circumstances warrant waiver of the limitation of the interim cap Covered Locations exception so that competitive ETCs may receive uncapped high-cost support for all lines within Covered Locations. The Commission has recognized that Covered Locations have the lowest

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Communications Commission, WC Docket No. 05-337 (filed July 16, 2008) (Navajo Nation July 16<sup>th</sup> *Ex Parte* Letter).

<sup>16</sup> Alaska Companies October 27<sup>th</sup> *Ex Parte* Letter at 2; SBI December 19<sup>th</sup> *Ex Parte* Letter at 2.

<sup>17</sup> Letter from Tina Pidgeon, Vice President, Federal Regulatory Affairs, General Communication Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45; WC Docket No. 05-337, (filed Feb. 10, 2008) (GCI February 10<sup>th</sup> *Ex Parte* Letter).

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* (citing *Interim Cap Order*, 23 FCC Rcd at 8848, para. 32).

<sup>20</sup> GCI February 10<sup>th</sup> *Ex Parte* Letter at 2-3.

<sup>21</sup> The Commission may waive any provision of its rules on its own motion for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166.

<sup>22</sup> *Interim Cap Order*, 23 FCC Rcd at 8848-49, paras. 32-34; 47 C.F.R. § 54.307.

reported levels of telephone subscribership in America.<sup>23</sup> In addition, Covered Locations sometimes have no telephone service at all and many tribal communities have income levels at or below the poverty level.<sup>24</sup> The Commission also found that competitive ETCs serving Covered Locations are not merely providing complementary services in most these areas.<sup>25</sup> The Commission adopted the Covered Locations exception specifically for these reasons.<sup>26</sup> Restricting uncapped support to one payment per each residential account for competitive ETCs that opt into the Covered Locations exception therefore may not support the goals for which the exception was adopted.

9. Waiving the restriction on receipt of uncapped high-cost support for competitive ETCs serving Covered Locations will also serve the public interest by advancing the Commission's goal of preserving and advancing universal service and the Commission's 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>27</sup> Providing uncapped high-cost support for all competitive ETC lines in Covered Locations will help remedy the low penetration rates and poor telecommunications services in these areas. Indeed, the Navajo Nation explains that competitive ETCs will be encouraged to invest in the Navajo Nation if uncapped support is available on all lines in the Covered Locations.<sup>28</sup> We therefore find that it is in the public interest to waive the requirement that "uncapped per line support is limited to one payment per each residential account" for competitive ETCs that opt into the Covered Locations exception.

10. In its August 1, 2008 petition, SBI asked the Commission to issue a declaratory ruling stating that, although uncapped support is available for only one line per residential account pursuant to the Covered Locations exception, capped support would be available for all additional lines eligible for the exception.<sup>29</sup> Subsequently, SBI advocated that the Commission should strike the clause limiting that exception to one line per residential account and clarify that competitive ETCs opting to participate in the Covered Locations exception should receive uncapped support for all lines.<sup>30</sup> Pursuant to the waiver that we grant in this order, SBI's petition for declaratory ruling seeking clarification of the Covered Locations exception is rendered moot.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1-4, 214, 254 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 214, 254 and 403,

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<sup>23</sup> See *Interim Cap Order*, 23 FCC Rcd at 8848, para. 32; *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 Report and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12211-12, para. 2 (2000) (concluding that "existing universal service support mechanisms are not adequate to sustain telephone subscribership on tribal lands.") (*Universal Service Twelfth Report and Order*).

<sup>24</sup> See *Sacred Wind Communications, Inc. and Qwest Corporation Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules; Sacred Wind Communications, Inc. Related Waives of Parts 36, 54, and 69 of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 9227, 9237, para. 22 (Wireline Comp. Bur. 2006).

<sup>25</sup> *Interim Cap Order*, 23 FCC Rcd at 8848, para. 32.

<sup>26</sup> *Id.*

<sup>27</sup> 47 U.S.C. § 254(b)(3).

<sup>28</sup> Navajo Nation July 16<sup>th</sup> *Ex Parte* Letter at 1.

<sup>29</sup> SBI Petition at 1.

<sup>30</sup> SBI December 19<sup>th</sup> *Ex Parte* Letter at 2.

and pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the restriction on the receipt of uncapped support by competitive ETCs serving Covered Locations during the pendency of the interim cap IS WAIVED to the extent provided herein.

12. IT IS FURTHER ORDERED that Smith Bagley, Inc.'s Petition for Expedited Declaratory Ruling IS DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED that, pursuant to sections 1.103(a) and 1.4(b)(2) of the Commission's rules, 47 C.F.R. §§ 1.103(a) and 1.4(b)(2), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

*Re: High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45.*

I felt it critical when the Commission adopted the cap on competitive eligible telecommunications carrier (CETC) support in May 2008, to include an exception for all of the providers serving tribal lands across the country, and Alaska Native lands – some of the most under-served parts of America. This limited exception was designed to ensure that companies operating in these remote areas will continue to receive high-cost support to provide their services while we move toward a permanent reform of the Universal Service system.

My colleagues and I pledged last year to resolve questions regarding the implementation of this exception. I am pleased that with this order we have fulfilled our commitment. I look forward to working with my colleagues to resolve other questions and, more importantly, to continuing our work towards fundamental reform of the intercarrier compensation and Universal Service systems.