BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF ) Case No. 13-00304-UT
SMITH BAGLEY, INC. FOR EXPANDED )
CONDITIONAL DESIGNATION AS AN )
ELIGIBLE TELECOMMUNICATIONS )
CARRIER )

FINAL ORDER

THIS MATTER comes before the New Mexico Public Regulation Commission ("NMPRC" or "Commission") upon the Application of Smith Bagley, Inc. ("SBI") for Expanded Conditional Designation as an Eligible Telecommunications Carrier ("Application"), filed on September 12, 2013. Having reviewed the record in this case, taking administrative notice of Case Nos. 3026, 03-00246-UT, and 04-00289 UT, and being otherwise duly informed, the Commission finds and concludes:

BACKGROUND

1. The federal Telecommunications Act of 1996\(^1\) (the "Act") emphasizes universal service and promotes the development of competition in the telecommunications industry. Among the universal service principles enunciated by Congress:

   Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably

comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.


2. Through the Act, Congress directed the Federal Communications Commission ("FCC") and State commissions to act jointly to establish support mechanisms to ensure the delivery of basic telecommunications services to all residents. The Act’s stated principles for universal service include: promoting the availability of quality services at just, reasonable and affordable rates; increasing access to advanced telecommunications services throughout the nation; and advancing the availability of such services to all consumers, including those in low income, rural, insular and high cost areas at rates that are reasonably comparable to those charged in urban areas. The Act requires every telecommunications carrier that provides interstate telecommunications services to contribute to the universal service fund ("USF") to preserve and advance universal service.

3. A telecommunications carrier must be designated as an eligible telecommunications carrier ("ETC") to be eligible for federal universal service funding. 47 U.S.C. 214(e)(2) provides:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [47 U.S.C. 214(e)](1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of [47 U.S.C. 214(e)](1). Before designating an additional eligible telecommunications carrier for an area served by a rural

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telephone company, the State commission shall find that the designation is in the public interest. (emphasis added).

4. The Act provides that upon the request of a telecommunications carrier and “consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier.”

5. To be designated as an ETC, a carrier must: (A) be a common carrier; and (B) throughout the service area for which the designation is received, (1) “offer the services that are supported by the Federal universal service support mechanisms under section 254(c)” and (2) “advertise the availability of such services and the charges therefore using media of general distribution.”

6. The FCC established the first Tribal Mobility Fund auction to take place on December 19, 2013. The Tribal Mobility Fund is an integral part of the FCC’s USF/ICC Transformation Order, issued in 2011. The FCC describes the purpose of the Tribal Mobility Fund Phase I Auction (“Auction 902”) as:

Tribal Mobility Fund Phase I will provide one-time support to deploy mobile voice and broadband services to unserved Tribal lands, which have significant

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telecommunications deployment and connectivity challenges. Auction 902 will award high-cost universal service support through reverse competitive bidding, as envisioned by the Commission in the USF/ICC Transformation Order. Auction 902 will award one-time support to carriers that commit to provide 3G or better mobile voice and broadband services on Tribal lands where such services are unavailable, based on the bids that will maximize the population covered by new mobile services without exceeding the budget of $50 million. Because the objective of this auction is to maximize the expansion of advanced services with the available funds, winning bids will generally be those that would achieve the deployment of such services for relatively lower levels of support.

FCC DA 13-323 (March 29, 2013), ¶ 2 (citations omitted) (emphasis added). The unserved areas eligible for Tribal Mobility Fund Phase I are determined as described in Sections II.A.2 and II.A.3 of the FCC’s August 7, 2013 Public Notice, DA-1672.

7. On August 7, 2013, the FCC issued a Public Notice setting out the specific eligibility requirements and prerequisites for participation in Auction 902. To qualify to bid in Auction 902, a carrier must apply to the FCC on or before October 9, 2013 and, unless a non-Tribal entity, be designated as an ETC in the study areas which it proposes to serve.

8. As related by the FCC,

On March 29, 2013, the [FCC] Bureaus released the Auction 902 Comment Public Notice, which provided a summary of census blocks potentially eligible for Tribal Mobility Fund Phase I support, announced the availability on the web of the complete list of potentially eligible census blocks, and sought comment on whether census blocks should be added to or removed from the list of potentially eligible blocks on Tribal lands, on the details of auction procedures, and on certain related program requirements for Auction 902.\(^9\)

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\(^8\) *Tribal Mobility Phase I Auction Rescheduled for December 9, 2013; Notice And Filing Requirements And Other Procedures For Auction 902, FCC Public Notice in AU 13-35, DA 13-1672 (rel. Aug. 7, 2013). Pursuant to 1.2.2.35(A) and (D) NMAC, we take administrative notice of the proceedings in FCC Docket AU 13-53 and all other FCC dockets referenced herein.

9. The FCC’s ensuing comment record encompassed 44 separate filings in response to the *Auction 902 Comment Public Notice*, including May 2013 filings by SBI, the Navajo Nation Tribal Utility Authority (“NTUA”), and the Navajo Nation Telecommunications Regulatory Council (“NNTRC”).

10. On September 6, 2013, SBI filed a motion for reconsideration in FCC AU Docket No. 13-53 concerning the inclusion of certain additional census blocks in northwestern New Mexico for Auction 902. On September 9, 2013, the FCC issued a notice inviting comment on SBI’s petition for reconsideration.\(^{10,11}\)

**SBI’S APPLICATION**

11. On September 12, 2013, SBI filed an application with the NMPRC requesting expanded conditional designation as an eligible telecommunications carrier (“ETC”) to enable SBI to participate in Auction 902.\(^{12}\) SBI seeks expanded ETC designation primarily for parts of western Sandoval County, New Mexico as well as those census blocks in other counties listed in SBI’s Exhibit 1 to its Application. SBI states it seeks conditional designation to participate in Auction 902 and future auctions, conditional on SBI being a winning bidder at one or more upcoming FCC auctions.

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\(^{12}\) See, n.8 herein.

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12. SBI’s Application asserts “Auction 902 will commence on December 19, 2013”\textsuperscript{13} and in order to be eligible to participate in Auction 902, SBI must be designated as an ETC on or before October 9, 2013. SBI urges this Commission “to immediately place its application on public notice, to implement a rapid processing cycle and take all necessary steps to move this item to the Commission for consideration at an open meeting advance of October 9.” App., p. 3.

13. SBI correctly points out that this Commission “has found on three different occasions that SBI is qualified to serve as an ETC in New Mexico, and that designating SBI as an ETC serves the public interest.” App., p. 3.

14. In Case No. 3026, In The Matter of the Application of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. 214(e)(2), the Final Order, issued Feb. 19, 2002, granted SBI ETC designation to include the Zuni, Ramah, and Fence Lake wire centers. In addition, SBI’s ETC service area was to be defined consistent with that portion of its existing service contour within the Pine Hill, Vanderwagen, Gallup and Grants wire centers. See, Recommended Decision of the Hearing Examiner and Certification of Stipulation (Aug. 14, 2001), p. 14.\textsuperscript{14}

15. The July 27, 2004 Final Order in Case No. 03-00246-UT, In The Matter of the Application of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier in Additional Service Areas in New Mexico, granted SBI ETC designation to consist of the Navajo Communications Company’s service area within Navajo Reservation lands in New Mexico.

\textsuperscript{13} Footnote 6 of SBI’s Application provides an erroneous date of December 9, 2013. December 19, 2013 is the correct date.

\textsuperscript{14} Pursuant to 1.2.2.35(A) and (D) NMAC, we take administrative notice of the record in prior NMPRC Case Nos. 3026, 03-00246-UT, and 04-00289 UT.
including the eastern portion of the Navajo Reservation located in San Juan and McKinley Counties NCC’s service area as described in the record of the case.

16. The December 7, 2004 Final Order in 04-00289 UT, In the Matter of the Application of Smith Bagley, Inc. for Extension of its Designation as an Eligible Telecommunications Carrier in the State of New Mexico, granted SBI ETC designation to include SBI’s licensed service area in the Gallup, New Mexico Basic Trading Area (“BTA”) 162, and the Farmington, New Mexico BTA 139.

17. The FCC has established that an ETC must offer each service set forth in 47 CFR § 54.101(a) (supported services for rural, insular and high cost areas) to receive federal universal service support. 47 CFR §54.101(b). Each of the Commission’s prior final orders designating or expanding the designation of SBI as an ETC has found that SBI has the ability to satisfy the criteria set forth in 47 CFR § 54.101(a).

18. The fundamentals of these federal ETC criteria continue in force today and apply to SBI’s pending Application. 47 CFR § 54.101 has been amended since the issuance of our prior ETC orders regarding SBI to establish a more general set of criteria. The NMPRC’s prior determinations that SBI satisfies the requisite federal ETC criteria are based on complete and full records and remain subject to the Commission’s continuing jurisdiction to maintain oversight and require compliance.

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15 76 FR 73870, Nov. 29, 2011, as amended at 77 FR 12966, Mar. 2, 2012. The nine specific requirements formerly enumerated at 47 CFR § 54.101(a)(1)-(9) have been condensed into a single requirement having several elements that encompass former 47 CFR § 54.101(a)(1), (2), (5) and (9).
19. The NMPRC’s original grant of ETC designation to SBI expressly reserved the right to maintain oversight over the services to be provided by SBI in connection with universal service funding and require periodic reports to ensure that SBI is using such funding for its intended purpose and that SBI is otherwise in compliance with applicable Commission rules and regulations. Case No. 3026 Final Order, Ordering ¶ C. Since its original New Mexico ETC designation, SBI has routinely submitted its ETC annual reports, which the NMPRC requires of all ETCs and required specifically of SBI in prior final orders granting and expanding SBI’s ETC designation.

20. SBI currently seeks only conditional designation to participate in Auction 902 and future auctions, conditional on SBI being a winning bidder at one or more upcoming FCC auctions. The FCC requires:

Under the competitive bidding rules adopted in the USF/ICC Transformation Order, bidders selected by the auction process to receive USF support have a binding obligation to file a post-auction long-form application . . . and failure to do so constitutes an auction default. In addition, a performance default occurs when a winning bidder that the Commission has authorized to receive support fails to meet its minimum coverage requirement or adequately comply with quality of service or any other requirements upon which support was granted. 16

21. The FCC also requires, “As provided by … 47 C.F.R. §§ 54.1005(b) and 54.1008(a) . . . each party that becomes a winning bidder in the auction must file an application for support. Only after review of the application to confirm compliance with all the applicable requirements will a winning bidder become authorized to receive support.” FCC DA 13-323 (March 29, 2013), ¶ 2, n.2.

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ANALYSIS AND DISCUSSION

22. The conditional aspect of the ETC designation requested by SBI confines the scope of this proceeding to a very narrow inquiry, especially since the Commission has previously designated SBI as an ETC on three occasions. After reviewing the federal policies that underlie the ETC designation process and the implications of our prior ETC designations of SBI in the present context, we balance the public interest against potential countervailing interests in deciding whether to grant the requested ETC designation to SBI for Auction 902.

23. 47 U.S.C. §214(e)(2) provides that consistent with the public interest, convenience, and necessity, a State commission must designate more than one common carrier as an eligible telecommunications carrier for a designated service area, so long as each additional requesting carrier meets the requirements of 47 U.S.C. 214(e)(1).\(^\text{17}\) Accordingly, the Act both emphasizes universal service and promotes the development of competition in the telecommunications industry. Its stated principles for universal service include increasing access to advanced telecommunications services throughout the nation and advancing the availability of such services to all consumers, including those in low income, rural, insular and high cost areas at rates that are reasonably comparable to those charged in urban areas.\(^\text{18}\)

24. The FCC’s stated purpose for Auction 902 is to provide one-time support to deploy mobile voice and broadband services to unserved Tribal lands. Auction 902 will award one-time support to carriers that commit to provide 3G or better mobile voice and broadband

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\(^{17}\) Except in the case of an area served by a rural telephone company, in which case such designation is discretionary.


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services on Tribal lands where such services are unavailable and will be conducted utilizing the
FCC’s specific competitive bidding rules for universal service support.19

25. In light of the expressed policy of encouraging competition for the provision of
universal service, the public interest is best served by full participation in the auction process by
a multiplicity of qualified bidders, rather than permitting potential competitors to prevent such
participation through prolonged administrative challenges, especially given the very narrow
timeframe provided by the FCC for qualifying a carrier as an ETC for Auction 902.

26. In deciding whether to grant additional ETC designation to SBI for Auction 902,
we must balance the overall public interest against the potential countervailing interests. As we
observed previously when designating SBI as an ETC,

[I]n Case No. 3111, we adopted a flexible approach to ETC designation that
allows scope for consideration of each ETC petition on its own merits. We
continue to believe that a flexible, case-by-case approach to ETC designation
— particularly where the public interest is concerned — is the best approach.


27. In taking administrative notice of our prior decisions relating to SBI, we find
substantial evidence in the record of those cases to support the current requested additional
authorization. In three prior cases, Nos. 3026, 03-00246-UT, and 04-00289 UT, based upon a
complete and full record, we found SBI is qualified to serve as an ETC in New Mexico and that
designating SBI as an ETC serves the public interest. The main federal ETC criteria by which
SBI’s prior applications were tested continue in force and are equally applicable to the instant
application. (See ¶ 18 of this Order.) Moreover, since its original New Mexico ETC designation,
SBI has complied with its reporting requirements.


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28. In balancing the limited timeframe available for consideration of SBI’s Application against the public interest in universal service for the area to be served by Auction 902, we find the importance of bringing better telecommunications service to unserved and underserved areas in New Mexico requires a variance from our normal procedural rules to the extent reasonable and necessary to expedite the approval of SBI’s Application within the timeframe afforded. This result favors the public interest by enabling us to implement the important public policies so clearly enunciated by Congress and subject to ongoing implementation through the joint efforts of the FCC and State commissions. Under such circumstances, the notice provided by the Commission’s public internet docketing system and meeting agenda noticed in accord with the Open Public Meetings Act is consistent with the policy, purpose and timing of the FCC’s auction format.
IT IS THEREFORE ORDERED:

A. SBI’s Application is granted for the reasons stated above and on the conditional basis sought.

B. This Order is issued solely for the purposes indicated herein and shall have no precedential effect in any other NMPRC proceeding not involving SBI.

C. This Order is effective immediately.

D. A copy of this Order shall be served on all persons listed on the attached Certificate of Service, which shall consist of the Commission’s most current telecommunications service list.

E. This Docket is closed.
ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 18th day of September, 2013.

NEW MEXICO PUBLIC REGULATION COMMISSION

BEN L. HALL, CHAIRMAN

VALERIE ESPINOZA, VICE CHAIR

KAREN L. MONTÓYA, COMMISSIONER

Telephonically Approved

PATRICK H. LYONS, COMMISSIONER

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF SMITH BAGLEY, INC. FOR EXPANDED CONDITIONAL DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

Case No. 13-00304-UT

CERTIFICATE OF SERVICE

I CERTIFY that true and correct copies of the Final Order of September 18, 2013, were sent by electronic mail on September 25, 2013, to the individuals and telecommunication companies listed below.

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Jeffrey Albright
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Brian Gilbert
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DATED this 25th day of September, 2013.

NEW MEXICO PUBLIC REGULATION COMMISSION

Ana C. Kippenbruck, Paralegal