

**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
)	

**COMMENTS OF
THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES
SUPPORTING A CAP ON THE HIGH-COST UNIVERSAL SERVICE FUND**

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I. INTRODUCTION AND SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ files these comments to support the recommendation of the Federal-State Joint Board on Universal Service (“Joint Board”) that the Federal Communications Commission (“Commission” or “FCC”) take immediate action to impose an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers (“CETCs”) may receive.² This is necessary, in the Joint Board’s words, “to rein in the

¹ NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

² *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, FCC 07J-1 (rel. May 1, 2007) (“Recommended Decision”).

explosive growth in high-cost universal service support disbursements.”³ The Commission seeks comment on the Joint Board’s recommendation.⁴

The NPRM is on an extremely tight timeline.⁵ But that is justified by the “emergency” in which the USF finds itself.⁶ Unfortunately, the emergency is, in part, caused by the failure of the Commission and of the Joint Board to act in a coordinated fashion on many of the issues that have previously been put out for comment.⁷ But that does not alleviate the need for a cap on the high-cost universal service fund (“USF”) like that recommended by the Joint Board.

II. THE JOINT BOARD RECOMMENDATION AND ISSUES FOR COMMENT

The Joint Board recommended that the Commission cap the amount of support that CETCs may receive for each state based on the average level of CETC support distributed in that state in 2006.⁸ The Joint Board further recommended that the interim cap apply until one year from the date that the Joint Board makes its recommendation regarding comprehensive and fundamental high-cost universal service reform.⁹

³ Recommended Decision, ¶ 1.

⁴ Notice of Propose Rulemaking, FCC 07-88 (rel. May 14, 2007) (“NPRM”).

⁵ Comments are due seven days after Federal Register publication, and replies are due fourteen days after publication. See NPRM, ¶ 6.

⁶ Id., ¶ 1; see Recommended Decision, ¶ 4.

⁷ See Comments of the National Association of State Utility Consumer Advocates on “Long-Term, Comprehensive High-Cost Universal Service Reform,” in WC Docket No. 05-337 (May 31, 2007) at 3-5.

⁸ Recommended Decision, ¶¶ 5-13.

⁹ Id., ¶ 8.

The Commission seeks comment on the Joint Board’s recommendations.¹⁰ The Commission asks commenters to “address whether the Commission should control the growth of high-cost support by capping support on CETCs as recommended by the Joint Board.”¹¹ The Commission also asks “parties to address the Joint Board’s recommendation to limit the cap to CETCs only, and whether there are public interest concerns that warrant modifying the application of the recommendation to providers of certain services.”¹²

The Commission also asks for comment on the Joint Board’s recommendations regarding the “operation of any interim cap, including the duration of the cap, its application, and the base period for the cap.”¹³ The Joint Board had recommended that the duration of the cap be one year from the date of any Joint Board recommended decision on comprehensive universal service reform, which the Joint Board committed to issue within six months of May 1, 2007.¹⁴ The Commission also seeks comment “on the Joint Board’s recommendation to impose the cap on a state-by-state basis...”¹⁵ The Joint Board had recommended that the cap be set at the level of support received by CETCs in 2006...”¹⁶

¹⁰ NPRM, ¶ 5.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Recommended Decision, ¶ 8.

¹⁵ NPRM, ¶ 5.

¹⁶ Recommended Decision, ¶ 13.

III. CAPPING THE FUND AS AN INTERIM STEP IS NECESSARY.

The Joint Board presents more-than-adequate justification for placing an emergency cap on the fund:

High-cost support has been rapidly increasing in recent years and, without immediate action to restrain growth in competitive ETC funding, the federal universal service fund is in dire jeopardy of becoming unsustainable. Today, the universal service fund provides approximately \$4 billion per year in high-cost support. Yet, in 2001 high-cost support totaled approximately \$2.6 billion. In recent years, this growth has been due to increased support provided to competitive ETCs which receive high-cost support based on the per-line support that the incumbent local exchange carriers (LECs) receive rather than the competitive ETC's own costs. While support to incumbent LECs has been flat or even declined since 2003, by contrast, in the six years from 2001 through 2006, competitive ETC support grew from \$15 million to almost \$1 billion – an annual growth rate of over 100 percent. Based on current estimates, competitive ETC support in 2007 will reach at least \$1.28 billion if the Commission takes no action to curtail this growth. Moreover, if the Commission were now to approve all competitive ETC petitions currently pending before the Commission, high-cost support for competitive ETCs could rise to as much as \$1.56 billion in 2007. High-cost support to competitive ETCs is estimated to grow to almost \$2 billion in 2008 and \$2.5 billion in 2009 even without additional competitive ETC designations in 2008 and 2009.¹⁷

The impact on consumers across the nation of this growth in the fund is substantial. The current USF contribution factor is 11.7%.¹⁸ All other things being equal, if the disbursements to CETCs grew to the cited \$1.56 billion for 2007, the contribution factor would grow to 11.9%.¹⁹ The Joint Board's estimate does not take into account all

¹⁷ Recommended Decision, ¶ 4 (footnotes omitted).

¹⁸ http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-1330A1.pdf.

¹⁹ Adding one-quarter of the \$0.28 billion increase to the fund need for the second quarter of 2007.

of the CETC designations pending in the various states,²⁰ which likely outweigh those pending at the Commission. Consumers cannot be asked to bear this burden.

IV. APPLYING THE CAP ONLY TO CETCS IS REASONABLE.

As quoted above, the Joint Board correctly notes that in recent years the growth in the fund is almost entirely attributable to CETCs: “While support to incumbent LECs has been flat or even declined since 2003, by contrast, in the six years from 2001 through 2006, competitive ETC support grew from \$15 million to almost \$1 billion – an annual growth rate of over 100 percent.”²¹ Therefore, the most direct way to deal with the growth in the fund as an interim measure is to limit the source of growth: CETCs.

We are likely to hear, and we have already heard, from those who would be impacted -- namely wireless carriers -- that capping the fund for CETCs is not competitively neutral.²² We have also heard that capping the fund for CETCs would discourage wireless carriers’ deployment of services in rural areas.²³

With regard to the first point, it should first be recalled that the principle of competitive neutrality is not found in Section 254. It was derived by the Commission based on its ability to adopt “additional principles” pursuant to 47 U.S.C. 254(b)(7).²⁴

²⁰ Recommended Decision, n.15.

²¹ *Id.*, ¶ 4.

²² See <http://www.ctia.org/media/press/body.cfm/prid/1689>.

²³ See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket N. 07-45, Comments of CTIA -- The Wireless Association® (May 16, 2007) at 16-17.

²⁴ See *In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order*, 12 FCC Rcd 8776 (1997), ¶¶ 48-49.

Depending on the context, one principle may be important enough to trump any or all the other principles.²⁵ In this situation, the need for “specific, predictable and sufficient” support²⁶ can override the derived principle of competitive neutrality. As the Joint Board has found, “sufficient” also implies “no more than sufficient.”²⁷ Further, incumbent LECs have had their support from the high-cost loop fund capped since the 1990s. Thus additional support for CETCs can be put temporarily “on hold” without violating the Act.

Likewise, with regard to the second point, while it is likely that the receipt of universal service funds eases wireless carriers’ deployment of services in rural areas, many carriers were and have been deploying wireless facilities **without** such support. The impact of a temporary cap on wireless funding while other USF issues are being resolved is speculative; the impact on consumers of the increased funding that will occur without a cap is definite.

The speculative impact of a cap is reinforced by the fact that the Joint Board recommended that the Commission consider “abandoning or modifying” the so-called identical support or portability rule.²⁸ The Joint Board correctly notes that the rule “seems to be one of the primary causes of the explosive growth in the fund.”²⁹

Further, as the Joint Board has noted:

Fundamental differences exist between the regulatory treatment of competitive ETCs and incumbent LECs. For example, competitive ETCs, unlike incumbent LECs, have no equal access obligations.

²⁵ Id., ¶ 52.

²⁶ 47 U.S.C. 254(b)(5).

²⁷ See Recommended Decision, FCC 02J-2, 17 FCC Rcd 20716 (2002), ¶¶ 14, 16.

²⁸ Recommended Decision, ¶ 12.

²⁹ Id.

Competitive ETCs also are not subject to rate regulation. In addition, competitive ETCs may not have the same carrier of last resort obligations that incumbent LECs have. Furthermore, under the identical support rule, both incumbent rural LECs and competitive ETCs receive support based on the incumbent rural LECs' costs. Therefore, incumbent rural LECs' support is cost-based, while competitive ETCs' support is not.³⁰

For all of these reasons, limiting the cap to CETCs makes sense and is within the Commission's discretion.³¹

The D.C. Circuit has recently reaffirmed that, with regard to the Commission's interpretation of Section 254, where Congress has not spoken directly to an issue (as it has not here), the ultimate test is whether the Commission's ruling is reasonable under the circumstances.³² Imposing a temporary cap on CETC funding is, under these circumstances, eminently reasonable.

V. THE PROPOSED PERIOD FOR THE CAP IS REASONABLE.

The Joint Board recommends that "the cap expire one year from the date of any Joint Board recommended decision on comprehensive and fundamental universal service reform."³³ To place a definite outer limit on when the cap will end, the Joint Board "commit[s] to adoption of a further recommended decision addressing fundamental high cost reforms within six months of today's Recommended Decision."³⁴ Taken together,

³⁰ Id., ¶ 6.

³¹ If the Commission decides not to limit the cap to CETCs, a cap on the entire high-cost fund could be imposed. This is discussed later in these comments.

³² *Vonage Holding Corp. v. FCC*, ___ F.3d. ___, Case 06-1276 (D.C. Cir. 2007), slip op. (June 1, 2007) at 12, citing *Am. Fed'n of Gov't Employees, Local 446 v. Nicholson*, 475 F.3d 341, 355 (D.C. Cir. 2007).

³³ Id., ¶ 8.

³⁴ Id.

this means that the cap will expire within 18 months of May 1, 2007, the day the Recommended Decision was released, in other words November 1, 2008.

The entire premise behind the cap is that it is to be interim, “until such measures can be adopted that will ensure that the fund will be sustainable for future years” and “while the Joint Board and the Commission consider fundamental reforms to address issues related to the distribution of support.”³⁵ It appears that another 18 months to resolve issues, some of which have been pending since the passage of the ’96 Act, is sufficient (and probably not more than sufficient).³⁶ Clearly, though, the Commission should attempt to resolve these issues even more expeditiously, after giving the stakeholders an adequate opportunity to present their views.

VI. THE CAP SHOULD APPLY ON A STATE-BY-STATE BASIS.

The Joint Board “recommend[s] that the Commission immediately impose a cap on competitive ETC support for each state.”³⁷ The Joint Board further notes “that a competitive ETC cap applied at a state level effectively curbs growth....”³⁸ NASUCA agrees. **A state-by-state cap means that no state will receive less support for CETCs than it currently receives, no matter what happens in other states.**

³⁵ Id., ¶ 5.

³⁶ The issues at issue should not be just those that were identified in the May 1, 2007 Public Notice (FCC 07J-2). See NASUCA’s comments filed May 31, 2007 in response to that Public Notice.

³⁷ Id., ¶ 9.

³⁸ Id. The Joint Board also states that this “allows states some flexibility to direct competitive ETC support to the areas in the state that are most in need of support.” Id. It appears that this “flexibility” would be limited to authorizing new ETCs in some areas; states would not (and should not) have the ability to reallocate support among currently authorized ETCs.

The appropriateness of a state-by-state cap is best seen by comparison to other possibilities. The Joint Board states that it:

considered, but declined to recommend, capping competitive ETC support nationwide or by study area. A nationwide cap amount would maintain incentives for states to designate additional competitive ETCs to increase their share of competitive ETC capped support and would result in competitive ETC support shifting to those states that aggressively designate competitive ETCs during the period of the interim cap.^{39]} A cap by study area would foreclose the possibility of support for the duration of the cap for those study areas that currently have no competitive ETCs and would be administratively burdensome.⁴⁰

NASUCA agrees with the Joint Board’s assessment of the problems with using a national cap and with using a study area (or smaller) area.⁴¹ Placing the cap per state also keeps the responsibility with state commissions, which under the Act have primary responsibility for designation of ETCs.⁴²

VII. THE CAP SHOULD BE AT THE LEVEL OF SUPPORT AWARDED IN 2006.

The Joint Board “recommend[s] that the Commission cap competitive ETC support for each state at the level of competitive ETC support actually distributed in that

³⁹ Just as some states have designated multiple ETCs under the current system. See *id.*, ¶ 5, n. 17 and Appendix B.

⁴⁰ *Id.*

⁴¹ USAC’s latest quarterly filings show 2,274 study areas nationwide. Although not all of those study areas receive high-cost support, and although not all of those study areas have CETCs authorized, the burden on the states and on the Commission would be a distraction from the fundamental purpose here, which is to develop long-term reforms for the high-cost support mechanism.

⁴² 47 U.S.C. 214(e)(2). Under 47 U.S.C. 214(e)(6), the Commission has this authority when a state commission cannot designate ETCs. The Joint Board recommendation does not explain the interaction of federal and state authority to utilize the “flexibility” under the cap, but one would hope that the Commission would exercise the same restraint that the Joint Board expects of the states.

state in 2006.”⁴³ The Joint Board correctly points out that “using 2006 data allows the Commission to use actual support amounts, rather than relying on USAC projections to set the cap amounts.”⁴⁴ NASUCA agrees with this approach.

If the Commission orders a cap as expeditiously as appears may happen,⁴⁵ more recent data -- for 2007 -- will be limited to the first, second and possibly (but hopefully not) third quarters of the year. That data will not be representative: As the Joint Board points out, there are “seasonal or one-time fluctuations that may be reflected in any single quarter.”⁴⁶ Using actual data for the year 2006 will “smooth out” these fluctuations.⁴⁷

Using the 2006 data does not capture the increases in CETC support that have occurred in the past year. But that increase is part of the problem, of course: Comparing USAC’s HC01 appendices for the second quarter of 2007 to the second quarter of 2006 shows an increase of 24% in total CETC support just in that one year.⁴⁸ And comparing the first quarter of 2007 to the first quarter of 2006 shows an increase of 37% in total CETC support.⁴⁹ The composite increase (comparing both quarters in 2006 to both quarters in 2007) is almost 30%. If there is a compulsion to “true up” the 2006 numbers, an increase of 30% could be applied. Truth be told, any cap is better than no cap; consumers will suffer if the increases in the high-cost fund are allowed to continue.

⁴³ Recommended Decision, ¶ 13.

⁴⁴ Id.

⁴⁵ See NPRM, ¶ 6.

⁴⁶ Recommended Decision, ¶ 13, citing the fact that, for example, the annual true-up of interstate common line support (“ICLS”) occurs in the third and fourth quarters, but not in the first and second quarters.

⁴⁷ Id.

⁴⁸ From the 2Q06 figure of \$259 million to the 2Q07 figure of \$321 million.

⁴⁹ From the 1Q06 figure of \$219 million to the 1Q07 figure of \$299 million.

VIII. A CAP ON THE ENTIRE HIGH-COST FUND WOULD BE FEASIBLE.

The Joint Board did “not recommend additional caps on support provided to incumbent LECs, because the data show less growth pressure from incumbent LECs.”⁵⁰ This is largely because “incumbent LEC high-cost loop support is already capped and incumbent interstate access support has a targeted limit” while “local switching support and interstate common line support provided to incumbent LECs have been stable in recent years.”⁵¹ As stated above, NASUCA agrees with the limitation of the cap to only CETCs; any lack of competitive neutrality is offset by the benefits to the public interest.

If, however, the Commission insists on maintaining competitive neutrality, then the cap could be applied to the entire high-cost fund.⁵² NASUCA proposed such a cap in an April 6, 2007 *ex parte* letter.

The cap would work just like the CETC cap, but would also cover incumbent LEC ETCs. To paraphrase the description in the Recommended Decision:

First, on a quarterly basis, the Universal Service Administrative Company (“USAC”) would calculate the support each ETC would have received under the existing (uncapped) equal per-line support rule and would sum these amounts by state. Second, USAC would calculate a state reduction factor to reduce this amount to the ETC cap. Specifically, USAC would compare the total amount of uncapped support to the cap amount for each state. Where the total state uncapped support is greater than the available state cap support amount, USAC would divide the state cap support amount by the total state uncapped amount to yield the state reduction factor. USAC would then apply the state-specific reduction factor to the uncapped amount for each ETC within the state to arrive at

⁵⁰ *Id.*, ¶ 5.

⁵¹ *Id.*

⁵² The issues being dealt with here are issues with the high-cost fund. Thus the Commission need not consider, at this juncture, a cap for the other pieces of the USF (schools and libraries, low-income and rural telemedicine).

the capped level of high-cost support. Where the state uncapped support is less than the available state capped support amount, no reduction would be required.⁵³

The example used by the Joint Board also applies:

If in State A, the capped amount is \$90 million and the total uncapped support is \$130 million, the reduction factor would be 69.2 percent ($\$90/\130). In State A, each ETC's support would be multiplied by 69.2 percent to reduce support to the capped amount. If in State B, however, the base period capped amount is \$100 million and the total uncapped support is \$95 million, there would be no reduction factor because the uncapped amount is less than the capped amount. Each quarter, for the duration of the cap, a new reduction factor would be calculated for each state.⁵⁴

A state-by-state cap on all high-cost payments should also have a one-year duration and should also use actual 2006 payments as the amount of the cap.

IX. CONCLUSION

The Commission cannot stand by as consumers continue to pay ever-increasing amounts into the USF while the Commission figures out ways to constrain the growth in the fund.⁵⁵ A cap on payments to CETCs will, for the short term, address the “explosive growth” in high-cost support disbursements.

The proposed cap is reasonable because the known benefits of such a cap far exceed the known costs of failing to do so. Under current rules, there is no assurance that high-cost support for CETCs results in service deployment that would not have been

⁵³ See *id.*, ¶ 10.

⁵⁴ See *id.*, ¶ 11. The Joint Board's example includes the notation that “if in State C the base period capped amount is \$0 (*i.e.*, there were no competitive ETCs receiving support in State C as of when the cap was established), then no competitive ETCs would be eligible to receive support in that state.” *Id.* The only jurisdiction that receives no high-cost support at all is the District of Columbia; under a total cap, no carrier in the District would be able to receive any high-cost support as long as the cap lasts.

⁵⁵ See footnote 33, *supra*.

made without such support. There is also no assurance that the current amount of support (over \$1 billion annually and rapidly growing) is subsidizing investments that will not generate substantial profits in future years. Moreover, under current rules, there is no assurance that the amount of support is reasonable given that it is based on the costs of wireline carriers rather than the costs of wireless carriers. Therefore, until the Commission has an opportunity to reform the current funding mechanism, it would be prudent to adopt the recommended cap as an immediate interim measure, and thereby limit the risk that public support is being converted to private profits through the high-cost support mechanism.

The Commission should expeditiously adopt the proposal of the Joint Board.

Respectfully submitted,

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