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 T-MOBILE USA, INC.

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T-Mobile USA, Inc. ("T-Mobile") has long supported the Commission's efforts to reform the high-cost universal service program and restrain the growth of high-cost subsidies as long as the reforms are administered in a fair and impartial manner and in the public interest. The Commission's current proposal, however, excludes competitive eligible telecommunications carriers ("CETCs") from access to certain high-cost universal service funds ("*CETC Support NPRM*").[1] As such, T-Mobile cannot support this discriminatory proposal.

[1] *High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 23 FCC Rcd 1467, 1477 (2008) ("*CETC Support NPRM*") (73 Fed. Reg. 11580 (Mar. 4, 2008)).

The *CETC Support NPRM* is one of three high-cost universal service fund reform rulemaking proceedings initiated simultaneously. The lead proceeding is *High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 23 FCC Rcd 1531 (2008) ("*Restructure NPRM*"), App. A, Federal-State Joint Board on Universal Service Recommended Decision, 22 FCC Rcd 20477 (JB 2007) ("*Recommended Decision*") (73 Fed. Reg. 11587 (Mar. 4, 2008)), seeking comment on the Joint Board's Recommended Decision to restructure the high-cost funds. The *Restructure NPRM* incorporates and raises overlapping issues with the *CETC Support NPRM* and the third proceeding, *High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) ("*Reverse Auction NPRM*") (73 Fed. Reg. 11591 (Mar. 4, 2008)), proposing to distribute high-cost support through a "reverse auction" mechanism. These comments are filed in all three proceedings on a combined basis, although they primarily address an issue raised only in the *CETC Support NPRM*.

Instead, the Commission should adopt a reverse auction mechanism to distribute high-cost support. Reverse auctions would drive down high-cost support for both incumbent local exchange carriers ("ILECs") and CETCs to efficient levels and encourage competition and broadband deployment in underserved areas.

I. INTRODUCTION AND SUMMARY

Following its recent acquisition of SunCom Wireless Holdings, Inc. ("SunCom"), T-Mobile is now a CETC in the Puerto Rico market.[2] SunCom has been operating in Puerto Rico since June 1999 and is a leading wireless provider there, with a state-of-the-art GSM/GPRS/EDGE network. T-Mobile now has almost 350,000 customers in Puerto Rico, including about 5,000 Lifeline customers, with a growth rate of 20 percent annually. As part of its network upgrade and expansion efforts, it built 22 new cell sites there in 2007.

The Commission's proposal to bar CETCs from almost 60 percent of the high-cost funds available to incumbents -- the interstate access support ("IAS"), interstate common line support ("ICLS") and local switching support ("LSS") funds[3] -- would effectively deny high-cost support to any Puerto Rico CETCs, which now qualify only for ICLS funding.[4] This dramatic change

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[2] *Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc.*, 23 FCC Rcd 2515 (2008).

[3] IAS, ICLS, and LSS make up 59.9 percent of total projected high-cost support for the first quarter of 2008. *See* Universal Service Administrative Company, First Quarter Appendices - 2008, HC01 - High Cost Support Projected by State by Study Area - 1Q2008, *available at* First Quarter Appendices - 2008 - FCC Filings - Governance - About - USAC (last visited Mar. 27, 2008).

[4] *See* Universal Service Administrative Company, First Quarter Appendices - 2008, HC02 - High Cost Support Projected by State - 1Q2008 ("USAC App. HC02"), *available at* First Quarter Appendices - 2008 - FCC Filings - Governance - About - USAC (last visited Mar. 27, 2008).

would protect incumbent wireline providers from wireless competition and undermine the goal of the high-cost program to deploy services to consumers in need. Moreover, given that wireless carriers receive more than 98 percent of CETC high-cost support today,[5] eliminating a large portion of high-cost support only for CETCs would violate the statutory requirements that high-cost universal service support be competitively neutral and fully portable, as well as the requirement of technological neutrality.[6]

The proposed exclusion also threatens both wireless build-out in rural areas and intermodal competition by maintaining full support to rural ILECs ("RLECs") while severely reducing wireless CETC support -- to zero in Puerto Rico and other states.[7] Without CETCs, many markets will not have competition to keep prices in check. Moreover, the ultimate result of adoption of the proposal would be a reduction in consumer choice. Consumers are opting for wireless carriers over their wireline counterparts more and more often because of the attractiveness of innovative service models, the flexibility that mobility offers, and the increased network coverage that reaches more customers in the high-cost areas receiving support.[8] The

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[5] *See* Universal Service Administrative Company, Universal Service Fund Facts - High Cost Quarterly Program Statistics ("USAC Statistics"), High Cost Program Support Distribution by Wireline & Wireless ETCs -- 1999 - 4Q2007 ("W&W USAC Statistics"), http://www.usac.org/about/universal-service/fund-facts/fund-facts-high-cost-quarterly-program-statistics.aspx (last visited Mar. 27, 2008).

[6] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615-16, 620, 622 (5th Cir, 2001) ("*Alenco*"); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801 (1997) ("*First USF Order*") (subsequent history omitted).

[7] For example, carriers in Connecticut, Delaware, and Rhode Island receive only IAS and/or ICLS. *See* USAC App. HC02.

[8] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twelfth Report, 23 FCC Rcd 2241 (2008) ("*Twelfth CMRS Report*").

public interest would not be served by reducing high-cost support solely for the services most desired by consumers.

II. THE COMMISSION'S PROPOSAL TO ELIMINATE CETC ACCESS TO MOST HIGH-COST SUPPORT EXCEEDS ITS STATUTORY AUTHORITY.

A. Competitive Neutrality and Portability Are Statutory Requirements for Universal Service Support.

Congress, the courts, and the Commission have affirmed repeatedly that the distribution of universal service support must be competitively neutral. Relying on the directive in Section 214(e) of the Communications Act ("the Act") that "all 'eligible telecommunications carriers . . . shall be eligible to receive universal service support,'" the U.S. Court of Appeals for the Fifth Circuit held in *Alenco* that the principle that the universal service program "*must treat all market participants equally* . . . . *is made necessary* not only by the economic realities of competitive markets but also *by statute*."[9] In addition, the Commission previously concluded that "universal service support mechanisms and rules" should "neither unfairly advantage nor disadvantage one provider over another. . . . [C]ompetitive neutrality in the collection and distribution of funds . . . is consistent with congressional intent and necessary to promote 'a pro-competitive, de-regulatory national policy framework.'"[10]

Eliminating support from most high-cost funding only for CETCs would directly violate the statutory requirement of "competitively-neutral funding."[11] ILECs already receive more than

[9] *Alenco*, 201 F.3d at 616 (emphasis added) (quoting 47 U.S.C. § 214(e)(1)).

[10] *First USF Order*, 12 FCC Rcd at 8801-02 (quoting Joint Explanatory Statement of the Committee of the Conference, H.R. Rep. No. 458, 104th Cong., 2d Sess. at 113 ("Joint Statement")).

[11] *Alenco*, 201 F.3d at 620 (high-cost funding must be "sufficient and competitively-neutral").

70 percent of total high-cost support under existing rules.[12] If the Commission's proposal is adopted, fund participants would be treated differently, and the result would be a lopsided support regime that undermines the "'pro-competitive, de-regulatory national policy framework'" that Section 254 was intended to implement.[13]

The *Alenco* court also held that "*portability . . . is dictated by* principles of competitive neutrality and the *statutory command* [of Section 254(e) of the Act]."[14] Similarly, the Commission has determined that "[i]n order not to discourage competition in high cost areas, we . . . make carriers' support payments portable to other [ETCs]. . . ."[15] Making a substantial portion of total high-cost funding off limits to CETCs would undercut the portability mandate, particularly in those states that receive little or no high-cost loop support ("HCLS") or high-cost model support ("HCMS"). CETCs in those states would be cut off from high-cost funds, no matter how many customers they win from ILECs. Only full portability can meet the Section 214(e)(1) requirement that the high-cost program "treat all market participants equally . . . so that

[12] In 2007, ILECs received 72.51 percent of total high-cost support. *See* USAC Statistics, High Cost Program Support Distribution by CETCs & ILECs -- 1998 - 4Q2007, http://www.usac.org/about/universal-service/fund-facts/fund-facts-high-cost-quarterly-program-statistics.aspx (last visited Mar. 27, 2008).

[13] *First USF Order*, 12 FCC Rcd at 8801-02 (quoting Joint Statement at 113).

[14] *Alenco*, 201 F.3d at 622 (emphasis added).

[15] *First USF Order*, 12 FCC Rcd at 8932. *See also Federal-State Joint Board on Universal Service*, 17 FCC Rcd 22642, 22642-43 (2002). As the Commission has explained, "[b]ecause . . . a mechanism that offers non-portable support may give ILECs a substantial unfair price advantage in competing for customers, it is difficult to see how such a program could be considered competitively neutral." *Western Wireless Corp.*, 15 FCC Rcd 16227, 16232 (2000).

the market, and not . . . regulators, determines who shall compete for and deliver services to customers."[16]

Under the statutory competitive neutrality and portability requirements confirmed by *Alenco*, any fund that is not available to all CETCs by definition cannot be treated as a universal service fund under Section 254. Moreover, the Commission has no authority other than Section 254(d) to require carriers to contribute to these mechanisms. Not surprisingly, the *CETC Support NPRM* cites no authority permitting the Commission to levy assessments on all carriers for a fund that supports only ILEC access replacement or other ILEC revenue requirements. Unless IAS, ICLS, or LSS funding is permitted for all ETCs, the Commission's proposal exceeds its statutory authority.

In addition to violating the competitive neutrality and portability directives, the proposal violates the Commission's nondiscrimination policy. In the *First USF Order*, the Commission directed that "universal service support mechanisms and rules" should "neither unfairly favor nor disfavor one technology or another."[17] More than 98 percent of all CETC high-cost support goes to wireless carriers.[18] All incumbents, on the other hand, are wireline carriers. Thus, if adopted, the *CETC Support NPRM* proposal would exclude wireless carriers (and the consumers that choose them), from a large portion of high-cost funding, but only a very few wireline carriers would be adversely affected by the order. Such asymmetry is wholly inconsistent with the requirement of technological neutrality.

[16] *Alenco*, 201 F.3d at 616.

[17] *First USF Order*, 12 FCC Rcd at 8801.

[18] *See* W&W USAC Statistics.

B. The Commission Cannot Override These Statutory Requirements Based on CETCs' Different Cost Recovery Mechanisms.

As high-cost universal service funds, IAS, ICLS, and LSS are intended "to benefit the customer, not the carrier."[19] Accordingly, the Commission's assumption that CETCs do not "need" to charge for access because CETCs have more discretion to charge their end users misses the mark. Those high-cost funds are justified by - and, according to the Commission, are needed to cover - the cost of serving high-cost *customers*, irrespective of which *carrier* provides the service.[20] And, in any event, the orders that created the IAS and ICLS mechanisms and expressly designated them as "*portable*" funds cannot serve now as a basis to reach exactly the opposite conclusion.[21]

Unless the Commission eliminates the funds altogether or somehow finds that they legally could be converted back into intercarrier charges, it cannot escape the statutory

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[19] *Alenco*, 201 F.3d at 621.

[20] *See, e.g., Access Charge Reform,* Sixth Report and Order, 15 FCC Rcd 12962 13039-49 (2000) ("*CALLS Order*"), *aff'd in part, rev'd in part and remanded in part, Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *on remand*, 18 FCC Rcd 14976 (2003) (discussing IAS).

[21] *See CETC Support NPRM*, 23 FCC Rcd at 1477 (citing *CALLS Order*, 15 FCC Rcd at 13053 (IAS is fully "portable among all eligible telecommunications carriers serving a supported customer, regardless of whether they are incumbents or competitors and regardless of the technology they use"); and *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19678 (2001) (subsequent history omitted) (ICLS portable)).

Similarly, the Commission first spelled out the portability of universal service support in the *First USF Order*, with no exception for the LSS fund created in that order. *First USF Order*, 12 FCC Rcd at 8932, 8940-42. It would be equally arbitrary and capricious to point to the rationale for LSS in the *First USF Order* (*see CETC Support NPRM*, 23 FCC Rcd at 1477) as a basis for the nonportability of LSS. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("prior policies and standards" may not be "casually ignored").

requirements under which they must operate.[22] As long as they remain universal service funds, they must be made available to all CETCs.

III. THE PROPOSED EXCLUSION OF CETCs FROM MOST HIGH-COST UNIVERSAL SERVICE FUNDING IS ANTICOMPETITIVE AND CONTRARY TO CONSUMERS' STRONG INTEREST IN WIRELESS AND BROADBAND BUILD-OUT.

T-Mobile opposes the funneling of most of the universal service funds to its competitors. The proposal to eliminate the bulk of CETC high-cost universal service support would allow the ILECs to continue to subsidize their services through support that is disproportionately funded by wireless competitors' customers.[23] Barring competitors from IAS, ICLS, and LSS funding would force them to subsidize ILECs' continued support and undermine the pro-competitive goals of those funds,[24] resulting in "protection [of the ILECs] from competition, the very antithesis of the Act."[25]

Making these funds unavailable to CETCs also would discourage wireless and other competitors from offering or expanding service in areas of the country in which the provision of telecommunications is largely dependent on high-cost universal service support. Specifically,

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[22] *See Alenco*, 201 F.3d at 616, 620, 622-23; *Comsat Corp. v. FCC*, 250 F.3d 931, 938-40 (5th Cir. 2001) (Section 254(e) prohibits all implicit subsidies).

[23] *See* Statement of Richard Massey, Executive Vice President, Corporate Secretary and General Counsel, Alltel Wireless to the U.S. Senate Committee on Commerce, Science & Transportation, *The Present and Future of the Universal Service Fund* at 5 (Mar. 1, 2007) (wireless providers contribute twice as much universal service support as they receive overall), attached to Letter from David L. Sieradzki, Counsel, Alltel Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337 (Mar. 6, 2007).

[24] *See, e.g., CALLS Order*, 15 FCC Rcd at 13039-40, 13053.

[25] *Alenco*, 201 F.3d at 622.

because ICLS is the only available high-cost funding in Puerto Rico,[26] T-Mobile's Puerto Rico subsidiary, SunCom, and other wireless competitors would be forced to operate with no high-cost support whatsoever, while the incumbents would continue to collect all of their support, regardless of their loss of customers.

High-cost support has been vital to SunCom's build-out efforts in Puerto Rico. SunCom's ICLS funding in 2007 was nearly $13 million, which was close to its total network investment of $12.96 million that year.[27] Exclusion of SunCom and all other CETCs from any high-cost support in Puerto Rico would deprive Puerto Rican consumers of continued competitive choices and the advanced services that otherwise would have been available.

The Commission has recognized previously that "the network is an integrated facility that may be used to provide both supported and non-supported services,"[28] and it has committed to "ensuring that appropriate policies are in place to encourage the successful deployment of infrastructure capable of delivering advanced and high-speed services."[29] Cutting off universal service support for underlying competitive networks and infrastructure, therefore, would ultimately degrade and delay broadband deployment in many markets. As the Commission has pointed out, "wireless broadband will play a critical role in ensuring that broadband reaches rural

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[26] *See* USAC App. HC02.

[27] SunCom's total universal service funding for Puerto Rico of $13 million in 2007 includes both ICLS and low-income Lifeline funding, but the vast majority of support is accounted for by the ICLS portion.

[28] *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 15090, 15096 (2003).

[29] *Id.* at 15095.

and underserved areas, where it may be the most efficient means of delivering these services."[30] In fact, mobile wireless service remains the fastest growing mode of broadband deployment and now leads all other high-speed segments, accounting for 35 percent of all high-speed lines as of mid-2007. [31]

Moreover, eliminating or dramatically reducing wireless CETC access to high-cost support in Puerto Rico and other jurisdictions would undermine the Commission's public safety goals, particularly in rural areas where 911 access is available only or largely through wireless services. Because wireless service has become the sole means by which many people reach an emergency line,[32] decreasing support for CETCs would result in fewer customers being able to call for help when they need it most.

T-Mobile can only support a proposal that treats all providers equally. One potential approach to satisfy this objective would be to implement full portability by reducing incumbents' support when they lose lines. CETC high-cost support growth simply reflects the recent surge in consumer demand for wireless services, particularly in areas that lack alternatives, and wireless carriers' late start in receiving support.[33] The high-cost fund is growing in part because RLECs

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[30] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5908 (2007).

[31] Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2007* at 6, Table 1 (Mar. 2008). T-Mobile is at a critical juncture in its broadband deployment, having only recently acquired spectrum in the AWS auction for this purpose, and because we are actively working to clear the spectrum now of government users. T-Mobile is optimistic that it will be able to begin rollout of broadband services in many markets in the second half of 2008.

[32] *Twelfth CMRS Report*, 23 FCC Rcd at 2341 (in second half of 2006, 12.8 percent of all households relied solely on wireless service).

[33] Comments of CTIA - The Wireless Association® at 3-5, 10, *High-Cost Universal Service Support*, WC Docket No. 05-337 (June 6, 2007).

do not lose support when they lose customers, which increases their support per access line and reduces incentives for improved efficiency. In contrast, CETCs receive support only for access lines that they win.[34] As Chinook Wireless points out, if total ILEC high-cost support had declined commensurately with ILEC line counts from 2001 to 2007, the high-cost fund savings would have far exceeded the *entire amount of high-cost support* received by CETCs in the same period.[35]

IV. REVERSE AUCTIONS ARE A BETTER ALTERNATIVE FOR ENCOURAGING WIRELESS AND BROADBAND BUILD-OUT IN HIGH-COST AREAS.

As T-Mobile explained in its *Reverse Auction* Reply Comments and *High-Cost Reform* Comments, reverse auctions offer great promise in reforming the distribution of high-cost support by driving the level of support down to the forward-looking costs of the most efficient technology in each area.[36] Properly structured reverse auctions will preserve the high-cost funds while supporting competition and technological neutrality in underserved high-cost areas. T-Mobile refers the Commission to those comments for a more detailed discussion of the public interest benefits of a reverse auction mechanism.

[34] *Compare* 47 C.F.R. § 36.603 (RLEC HCLS) *with* 47 C.F.R. § 54.307 (CETC high-cost support).

[35] *Implementing Portability for ILECs Will Save Far More USF Support Than Any CETC Cap Could Accomplish*, at 3, attached to Letter from Julia Tanner, General Counsel, MTPCS, LLC d/b/a Chinook Wireless, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337 (Feb. 28, 2008).

[36] Reply Comments of T-Mobile USA, Inc., *Federal-State Joint Board on Universal Service Seeks Comment on the Merits of Using Auctions to Determine High-Cost Universal Service Support*, WC Docket No. 05-337 (Nov. 8, 2006) ("*Reverse Auction* Reply Comments"); Comments of T-Mobile USA, Inc. at 3-7, *High-Cost Universal Service Support*, WC Docket No. 05-337 (May 31, 2007) ("*High-Cost Reform* Comments").

Because reverse auctions determine the level as well as the recipient(s) of high-cost support, the use of auctions would avoid the need for any CETC cost analysis. Accordingly, utilizing reverse auctions to distribute existing high-cost funds would moot the *CETC Support NPRM*, including the proposal to bar CETCs from IAS, ICLS, and LSS funding. Reverse auctions also would provide the public benefit of enormous administrative and regulatory savings as well as cost efficiency.

V. CONCLUSION

The Commission should reject the *CETC Support NPRM* proposal to bar CETCs from IAS, ICLS, and LSS funding. If implemented, this exclusion would be unlawful, anticompetitive and contrary to the Commission's long-standing universal service policies. Requiring CETCs to continue paying for ILEC support from funds no longer available to CETCs also would discourage competition and retard wireless and broadband build-out in high-cost underserved areas. Instead, the Commission could avoid CETC cost support disputes by implementing a reverse auction regime to distribute high-cost funds. A properly designed reverse auction system would preserve the high-cost funds far more effectively than discriminatory reductions in CETC support and would result in a fairer and more efficient distribution of funds.

Respectfully submitted,

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