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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

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

**JOINT PETITION FOR RECONSIDERATION**

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August 1, 2008

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## SUMMARY

In May 2007 the Federal-State Joint Board on Universal Service (“Joint Board”), faced with what it mistakenly perceived to be an emergency confronting the Universal Service Fund (“USF”) high-cost program, recommended to the Commission that it impose an emergency cap on high-cost support provided to competitive eligible telecommunications carriers (“CETCs”).

The Joint Board insisted that immediate action had to be taken to stem what it viewed as a dramatic growth in high-cost support. The Joint Board predicted that, if allowed to continue to grow at an annual growth rate of over 100 percent, CETC high-cost support would reach at least \$1.28 billion and could rise to as much as \$1.56 billion in 2007. Despite the Joint Board’s plea for immediate action, the Commission waited a full year (the maximum statutory period permissible) before taking up the Joint Board’s recommendation that an emergency cap be imposed on CETC high-cost support. In the interim, the Joint Board’s predictions as to the growth of CETC high cost support had not come true. CETC high-cost support had experienced a growth rate of only 20 percent in 2007 and CETCs had received \$1,178,503,000 in high-cost support that year.

Without explaining how the Joint Board could have been off between \$100 million and \$380 million, the Commission simply found that high-cost support to CETCs had reached \$1.18 billion in 2007. Moreover, the Commission repeated the Joint Board’s error and assumed that CETC high-cost support would continue to grow at an average annual growth rate of over 100 percent. Based on that false assumption, the Commission found that it had to halt the rapid growth of high-cost support before it reached an unsustainable level. It ultimately found that an emergency cap on CETC high-cost had to be imposed to avert a crisis that could cripple the USF. However, the Commission elected to impose on an interim basis until it adopts comprehensive

high-cost reform. The interim cap is expected to be in effect a mere five months.

The Rural Cellular Association and a group of small wireless CETC seek reconsideration of the interim cap on CETC high-cost support on the grounds that there is no empirical evidence to suggest that the imposition of the cap was necessary to avert a crisis that would cripple the USF. Inasmuch as the Joint Board's dire predictions have been proven wrong, and the record is devoid of evidence that the USF is in imminent danger of collapsing, the Commission is obligated to reconsider and rescind the imposition of the interim, emergency interim cap on CETC high-cost support.

If it is to go forward with its interim cap, the dictates of reasoned decisionmaking require the Commission to supply a rational analysis of the relevant data that shows that: (1) unless capped by August 1, 2008, high-cost support to CETCs will push the USF to an unsustainable level by January 1, 2009; but (2) with the cap in place on August 1, 2008, the sustainability of the USF will be preserved until January 1, 2009.

If the interim cap on CETC high-cost support goes into effect on August 1, 2008, and stays in effect for five months, the cap will produce estimated savings to the USF in 2008 of approximately \$52,924,000 out of an estimated \$7,761,016,000 in disbursements. If it is to supply a reasoned explanation for the imposition of a five-month cap, the Commission must proffer some empirical evidence that a less-than-one-percent (0.68 percent) savings in USF disbursements over a five-month period in 2008 will halt the growth of high-cost support, thereby directly alleviating a threat to the sustainability of the USF.

Regrettably, the Commission's decision to impose an interim cap on CETC high-cost support: (1) was manifestly not based on any of the statutory universal service principles; (2) plainly violates the decade-old, Commission-adopted principle of competitive neutrality; and (3)

flouts the local competition mandate of the Telecommunications Act of 1996. As a result, the Commission's interim cap cannot stand since it is based entirely on an impermissible construction of the statute.

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**JOINT PETITION FOR RECONSIDERATION**

Rural Cellular Association (“RCA”), Cellular South Licenses, Inc. (“Cellular South”), N.E. Colorado Cellular, Inc. (“NECC”), the Cellcom Companies (“Cellcom”), Smith Bagley, Inc. (“Smith Bagley”), Carolina West Wireless, Inc. (“Carolina West”), Bluegrass Cellular, Inc. (“Bluegrass Cellular”), MTPCS, LLC (“MTPCS”), and Leaco Rural Telephone Cooperative (“Leaco”) (collectively “Joint Petitioners”), by their attorneys and pursuant to § 405(a) of the Communications act of 1934, as amended (“Act”), and § 1.429(d) of the Commission’s Rules (“Rules”), hereby jointly petition the Commission to reconsider the order it released on May 1, 2008 in the above-captioned rulemaking proceedings. *See High-Cost Universal Service Support, FCC 08-122 (May 1, 2008) (“Interim Cap Order”).* In particular, Joint Petitioners request the Commission to rescind the “interim, emergency cap” it imposed on the amount of high-cost support that competitive eligible telecommunications carriers (“CETCs”) can receive from the universal service fund (“USF”). *Id.* at 1 (¶ 1). In support thereof, the following is respectfully submitted:

**BACKGROUND**

The growth of the high-cost universal service support mechanisms has been the subject of referrals to, and recommendations from, the Federal-State Joint Board on Universal Service

("Joint Board" or "Board") since late 2000, when its Rural Task Force ("RTF") alerted the Commission to the need to prevent excessive growth in high-cost support.<sup>1</sup> In May 2001, the Commission rejected the RTF's proposal to freeze high-cost support upon competitive entry in rural carrier study areas, but it initiated a rulemaking to address alternative measures that could be taken to prevent excessive fund growth.<sup>2</sup> But five months later, the Commission noted that CETCs received approximately \$14 million out of \$803 million high-cost support disbursed in the third quarter 2002, or 1.8 percent of total high-cost support, as compared to \$2 million out of \$638 million, or 0.4 percent of total high-cost support, disbursed in the first quarter of 2001.<sup>3</sup> That prompted it to refer the RTF's concerns regarding excessive growth of the fund to the Joint Board for recommendations.<sup>4</sup>

For the next six and one-half years, the Joint Board sat back and watched high-cost support grow from approximately \$2.6 billion in 2001 to almost \$4.1 billion in 2006.<sup>5</sup> At some point in early 2007, the Board apparently experienced an epiphany: it suddenly discovered that the "explosive growth" in high-cost support had placed the USF in "dire jeopardy of becoming unsustainable."<sup>6</sup> Contending that an annual growth rate of high-cost support to CETCs of "over 100 percent" had placed the USF in jeopardy,<sup>7</sup> the Board recommended that the Commission impose an interim, emergency cap on CETC high-cost support. *See Interim Cap Recommendation*, 22 FCC Rcd at 9002.

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<sup>1</sup> *See Federal-State Joint Bd. on Universal Service*, 16 FCC Rcd 11244, 11244 n.1 (2001).

<sup>2</sup> *See id.*, at 11325.

<sup>3</sup> *See Federal-State Joint Bd. on Universal Service*, 17 FCC Rcd 22642, 22643-44 (2002).

<sup>4</sup> *See id.*, at 22646.

<sup>5</sup> *See High-Cost Universal Service Support*, 22 FCC Rcd 8998, 9000 (Jt. Bd. 2007) ("*Interim Cap Recommendation*").

<sup>6</sup> *Id.*, at 8998, 9000.

<sup>7</sup> *Id.*, at 9000.

The Joint Board stopped working on two “major referrals” to issue its *Interim Cap Recommendation*<sup>8</sup> because it believed that “immediate action” had to be taken “to stem the dramatic growth in high-cost support.”<sup>9</sup> Unless the Commission took action to curtail this growth, the Board warned that CETC support “will reach at least \$1.28 billion” and “could rise to as much as \$1.56 billion” in 2007.<sup>10</sup> *Id.* But the Commission took no action in 2007 and CETC support only reached \$1.18 billion.<sup>11</sup>

Despite the Joint Board’s plea for immediate action, the Commission exhibited no sense of urgency in acting on the *Interim Cap Recommendation*. It waited a year after the Board issued its dire warning and incorrect projections before it agreed that the rapid growth in high-cost support had placed the USF in “dire jeopardy.”<sup>12</sup> During that year, the quarterly universal service contribution factor dropped from 11.7 percent to 11.3 percent.<sup>13</sup> Nonetheless, the Commission found that the continued growth of the USF “is not sustainable and would require excessive (and ever growing) contributions from consumers to pay for this fund growth.”<sup>14</sup> The Commission “immediately” imposed the interim cap on CETC high-cost support to preserve the sustainability and sufficiency of the USF.<sup>15</sup>

On the same day its *Interim Cap Recommendation* was released, the Joint Board did what it neglected to do before it considered capping CETC high-cost support: it issued a public notice

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<sup>8</sup> *Interim Cap Recommendation*, 22 FCC Rcd at 9021 (Commissioner Copps, dissenting).

<sup>9</sup> *Id.*, at 9000.

<sup>10</sup> *Id.*

<sup>11</sup> See *Interim Cap Order*, at 4-5 (¶ 6). According to the Universal Service Administrative Company (“USAC”), \$1,178,503,000 was disbursed to CETCs in 2007. See USAC, *2007 Annual Report: Helping Keep Americans Connected for a Decade* at 45.

<sup>12</sup> *Id.*, at 4 (¶ 6).

<sup>13</sup> See *id.*, at 5 n.27.

<sup>14</sup> *Id.*, at 5 (¶ 6).

<sup>15</sup> *Id.*, at 5 (¶ 7).

asking for comments on various proposals to effect comprehensive high-cost distribution reform.<sup>16</sup> The Board committed to making its comprehensive recommendations within six months and it urged the Commission to act on those recommendations within one year.<sup>17</sup>

The Joint Board met its self-imposed deadline. It issued its recommendations for comprehensive high-cost USF reform on November 19, 2007, *see High-Cost Universal Service Support*, 22 FCC Rcd 20477 (Jt. Bd. 2007) (“*Comprehensive Recommendation*”), which makes November 19, 2008 the Commission’s statutory deadline for putting comprehensive reforms in place.<sup>18</sup> However, the Board anticipates that the Commission will not wait until its one-year deadline to address comprehensive reform, but will “act promptly” on the matter.<sup>19</sup>

Because the Commission dallied by taking two months to publish its *Interim Cap Order* in the Federal Register,<sup>20</sup> the interim cap will go into effect on August 1, 2008. If the *Interim Cap Order* is not stayed, the cap on CETC high-cost support will remain in place only until the Commission adopts comprehensive high-cost reform, which it is prepared to do “in an expeditious manner” or “as quickly as possible.”<sup>21</sup> If the Commission fulfills its commitment, the interim cap on CETC high-cost support will be in effect a mere five months.<sup>22</sup>

#### STANDING

The purposes of § 405 of the Act are to afford the Commission both the initial

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<sup>16</sup> *See Joint Bd. Seeks Comment on Long Term, Comprehensive High-Cost Universal Service Reform*, 22 FCC Rcd 9023 (Jt. Bd. 2007).

<sup>17</sup> *See Interim Cap Recommendation*, 22 FCC Rcd at 8998.

<sup>18</sup> *Interim Cap Order*, at 1 n.2 (¶ 1).

<sup>19</sup> *See Interim Cap Recommendation*, 22 FCC Rcd at 9002.

<sup>20</sup> *See* 73 Fed. Reg. 37,882 (July 2, 2008).

<sup>21</sup> *Interim Cap Order*, at 1 (¶ 1).

<sup>22</sup> If the Commission issues its comprehensive high-cost reform order on or before November 1, 2008 and the order is published in the Federal Register within thirty days, the Commission’s comprehensive reform measures will go into effect by January 1, 2009.

opportunity to correct errors in its decision, see *Rogers Radio Communications Services v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978), and a fair opportunity to pass on legal or factual arguments before they are presented to a reviewing court. See *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997). In this case, Joint Petitioners are asking the Commission to revisit the groundless and predictably wrong estimates of USF growth that ostensibly provided the justification for the imposition of the short-term, but patently discriminatory, cap on CETC high-cost support disbursements.

As it stands now, the Commission is on record as finding it necessary to cap high-cost disbursements to CETCs in order to sustain the USF for the *five months* it takes to put comprehensive high-cost reform measures in place. To believe that the USF would collapse over a five-month period unless CETC high-cost support is capped would stretch credulity beyond its breaking point. Joint Petitioners ask the Commission to pass on the argument that its decision runs counter to the evidence before it and is so implausible that the decision could not be ascribed to as the product of the Commission's expertise. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Joint Petitioners are appropriate parties to challenge the Commission's interim cap. RCA is uniquely situated as the representative of dozens of wireless CETCs who are likely to be injured by the imposition of the cap.<sup>23</sup> As wireless CETCs, Cellular South, NECC, Cellcom, Smith Bagley, Carolina West, Bluegrass Cellular, MTPCS, and Leaco are members of the class of carriers that have been targeted for injury by the Commission's discriminatory action.<sup>24</sup>

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<sup>23</sup>RCA is an association representing the interests of approximately 80 small and rural wireless licensees providing commercial services to subscribers throughout the nation. RCA's wireless carriers operate in rural markets and in a few small metropolitan areas. No member has as many as 1 million customers, and all but one or two of RCA's members serve fewer than 500,000 customers.

<sup>24</sup> The Commission "encouraged parties who share positions in various proceedings to file joint comments." *Streamlined Procedures for Rulemaking Proceedings Implementing Telecommunications*

Having submitted comments in the proceeding that resulted in the issuance of the *Interim Cap Order*,<sup>25</sup> RCA, Cellular South, NECC, and Cellcom have standing to seek reconsideration as a matter of right<sup>26</sup> on their way to seeking judicial review, if necessary.<sup>27</sup>

## ARGUMENT

### I. THE COMMISSION VIOLATED THE NOTICE-AND-COMMENT REQUIREMENTS OF THE APA BY FAILING TO PROVIDE REASONED RESPONSES TO SIGNIFICANT COMMENTS

Both § 553(c) of the Administrative Procedure Act (“APA”) and § 1.415(a) of the Rules give interested parties the right to file comments on a proposed legislative rule. *See* 5 U.S.C. § 553(c); 47 C.F.R. § 1.415(a). Subsumed in the right to comment is the expectation that the comment will be considered by the Commission. *See* Charles H. Koch, Jr., *Administrative Law and Practice* § 4.41[3] (2d ed. 1997). Thus, the notice-and-comment rulemaking requirements of the APA and the Rules also obligate the Commission to respond to all significant comments, *see*

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*Act of 1996*, 11 FCC Rcd 5372, 5372 (1996). Accordingly, NECC and Cellcom joined with five other wireless carriers, all represented by the same counsel, to file comments in this proceeding under the name Alliance of Rural CMRS Carriers (“ARC”).

<sup>25</sup>*See* Comments of RCA and the ARC, WC Docket No. 05-337 (June 6, 2007) (“Comments”); Reply Comments of RCA and the ARC, WC Docket No. 05-337 (June 21, 2007) (“Reply Comments”).

<sup>26</sup> Section 405(a) of the Act, as implemented by § 1.429(a) of the Rules, provides that “[a]ny interested person” may petition for reconsideration of a final rulemaking order. 47 C.F.R. § 1.429(a). Thus, a petition for reconsideration may be filed by a person that was not a “party” to the proceeding. *Compare id. with id.* § 1.400. *See Amendment of Procedures for Reconsideration in Notice and Comment Rulemaking Proceedings*, 57 FCC 2d 699 (1975).

<sup>27</sup>Judicial review of the Commission’s rulemaking orders is available under the Hobbs Act. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1). Under the Hobbs Act, any “party aggrieved” by a final rulemaking order “may, within 60 days after its entry, file a petition for review in the court of appeals wherein venue lies.” 28 U.S.C. § 2344. The courts of appeals have consistently interpreted the term “party aggrieved” to refer to an entity that participated in the rulemaking proceeding before the agency. *See, e.g., Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). Because it filed comments on the Commission’s interim cap, RCA would have Hobbs Act standing to appeal.

An association has representational standing to appeal a Commission rulemaking order under Article III of the Constitution if: (1) at least one of its members has standing; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit. *See, e.g., American Library Ass’n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005). Under that test, RCA would have Article III standing to appeal the *Interim Cap Order*.

*American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987), because “the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). A significant comment is one which, if true, would require a change in the proposed rule. *See, e.g., Louisiana Federal Land Bank Ass’n, FLCA v. Farm Credit Adm.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003). A significant comment also requires a reasoned response from the Commission. *See United States Satellite Broadcasting Co., Inc.*, 740 F.2d 1177, 1188 (D.C. Cir. 1984). RCA and ARC (jointly “RCA/ARC”) made significant comments, but they elicited no response from the Commission.

There was good cause for RCA/ARC and others to submit comments challenging the findings of fact that the Joint Board put forward to justify the imposition of an “interim, emergency cap” on CETC high-cost support.<sup>28</sup> For one thing, the Joint Board had not afforded the public the opportunity to comment on the idea of an interim cap before the cap was recommended to the Commission. Consequently, the facts relied on by the Board were not vetted in public before they became the basis of its recommendation.

The Joint Board was required to recommend changes in the universal service rules, only after giving notice and opportunity for public comment. *See* 47 U.S.C. § 254(a). Congress neither empowered the Board to recommend, nor authorized the Commission to adopt, interim measures to be enforced while the Board considered universal service rule changes. And it did not empower the Board to recommend the adoption of interim regulations that were not the product of a prior notice-and-comment proceeding. Yet, that was exactly what the Board did when it recommended the immediate imposition of an emergency cap on CETC high-cost support as a “temporary solution” to the problems that allegedly plague the distribution of high-

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<sup>28</sup> *Interim Cap Recommendation*, 22 FCC Rcd at 8998.

cost support.<sup>29</sup>

RCA/ARC principally argued that the Joint Board provided no evidence demonstrating that the danger to the USF was “so palpable, immediate, and severe” that it could not survive temporarily while the high-cost fund underwent “comprehensive and fundamental” reform.<sup>30</sup>

RCA/ARC made the following points:

- The Board did not explain how the USF could become “unsustainable” and, in particular, why the fund would become unsustainable if CETC high-cost support reached almost \$2 billion in 2008.<sup>31</sup>
- The Board did not disclose the methodology or assumptions it employed to find that high-cost support to CETCs would grow 31 percent to almost \$2 billion in 2008 and 30 percent to \$2.5 billion in 2009 even without additional CETC designations.<sup>32</sup>
- Three-quarters of the 2.0% increase in the contribution factor from 9.7% to 11.7% was as a result of true-up mechanisms within the program (1.5% of 2.0%). Only one-tenth of the 2.0% increase was due to increased high-cost support.
- USAC projections between the fourth quarter of 2006 and the second quarter of 2007 showed high-cost support rising 3.9%. This suggested that the growth rate is slowing.<sup>33</sup>
- The annual growth rates of CETC high-cost support were largely a product of the fact that CETCs are new entrants who started with a baseline of zero support from the fund. As competitive entry has advanced, CETCs’ share of the fund has increased correspondingly.<sup>34</sup>
- The high-cost fund historically has weathered significant growth rates without becoming “unsustainable.” Support to incumbent LECs (“ILECs”) jumped from \$1.7 billion in 1999 to \$3.1 billion in 2003, and continued to increase from 2003 to 2005. Support to ILECs was growing during these periods even though ILEC line counts were decreasing.<sup>35</sup>

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<sup>29</sup> *Interim Cap Recommendation*, 22 FCC Rcd at 9003.

<sup>30</sup> Comments, at 5 (citing *Interim Cap Recommendation*, 22 FCC Rcd at 9002).

<sup>31</sup> *See id.*, at 7.

<sup>32</sup> *See id.*, at 6-7.

<sup>33</sup> *See id.*, at 8-9.

<sup>34</sup> *See id.*, at 9.

<sup>35</sup> *See id.*

- Even if the Board was correct in projecting that CETC support would reach almost \$2 billion in 2008, a wireless consumer with a \$50 monthly bill would experience an FUSF surcharge increase of only \$0.31.<sup>36</sup>
- The Board's claim that the USF is in "dire jeopardy" of becoming unsustainable cannot be squared with the Commission's contemporaneous determination that \$650 million in unused funds had accumulated in the schools and libraries support fund from 2001 through 2004.<sup>37</sup>

If RCA/ARC's points were well-taken, then the Joint Board erred when it found that immediate action was necessary to stem the growth in high-cost support and prevent the USF from becoming unsustainable. Consequently, RCA/ARC's comments were significant and were due a reasoned response from the Commission under APA § 553(c) and § 1.415(a) of its own Rules. Instead of responding to RCA/ARC's points, the Commission simply ignored them and voiced its "agreement" with the Board. *See Interim Cap Order*, at 4 (¶ 6).

The Commission deviated from the Board's "findings" only to correct its woefully incorrect prediction that CETC high-cost support would reach "at least \$1.28 billion" and possibly "as much as \$1.56 billion" in 2007.<sup>38</sup> Without mentioning the Board's prediction, or explaining how the Board could have been off between \$100 million and \$380 million, the Commission simply stated that high-cost support to CETCs had reached \$1.18 billion in 2007. *See id.* Left unaddressed was the issue of whether an emergency, interim cap on CETC high-cost support was still necessary given that the Board's decisive prediction had proven to be wrong.

RCA/ARC was not alone in attacking the Joint Board's claim that CETC high-cost support had experienced an annual growth rate of over 100 percent in the six years from 2001 through 2006. The Montana Public Service Commission ("Montana PSC"), for example, called the Board's prediction of a more than 90 percent annual growth rate for CETC support for 2006

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<sup>36</sup> *See Comments*, at 13.

<sup>37</sup> *Reply Comments*, at 14 & n.47.

<sup>38</sup> *Interim Cap Recommendation*, 22 FCC Rcd at 9000.

to 2007 “suspect” since the percentage of annual growth in CETC support had decreased drastically between 2000 and 2006.<sup>39</sup> Ignoring the comments of RCA/ARC and the Montana PSC, the Commission went beyond the Joint Board to claim that from 2001 through 2007 CETC high-cost support had “an average growth rate of over 100 percent.” *Interim Cap Order*, at 4-5 (¶ 6). And despite making no findings as to the growth rate of the USF, the Commission found that “the continued growth of the *fund* at this rate is not sustainable” *Id.*, at 5 (¶ 6) (emphasis added).<sup>40</sup> The following table sets forth the data that the Commission apparently examined.<sup>41</sup>

**TABLE 1**

Year	Carriers	High-Cost Support (\$)	Delta (%)	Year	Carriers	High-Cost Support (\$)	Delta (%)
1999	ILECs	1,717,400,000		2004	ILECs	3,152,600,000	0.54
	CETCs	500,000			CETCs	315,800,000	152.55
	Total	1,717,900,000			Total	3,468,400,000	6.55
2000	ILECs	2,233,300,000	30.04	2005	ILECs	3,168,600,000	0.51
	CETCs	1,500,000	200.00		CETCs	627,700,000	91.71
	Total	2,234,800,000	30.09		Total	3,796,300,000	9.65
2001	ILECs	2,574,700,000	15.29	2006	ILECs	3,116,400,000	-1.65
	CETCs	16,900,000	1,042.73		CETCs	979,900,000	53.47
	Total	2,591,600,000	16.45		Total	4,096,300,000	7.12
2002	ILECs	2,888,900,000	12.20	2007	ILECs	3,108,200,000	-0.26
	CETCs	46,100,000	178.55		CETCs	1,178,500,000	20.27
	Total	2,935,000,000	14.43		Total	4,286,700,000	4.65
2003	ILECs	3,135,600,000	8.54				
	CETCs	129,600,000	176.21				
	Total	3,265,200,000	9.92				

The annual growth rate in CETC high-cost support decreased every year from 2001 to 2007. *See supra* Table 1. In that seven-year period, during which the Commission found that

<sup>39</sup> *See* Comments of Montana PSC, WC Docket No. 05-337, 4 (June 6, 2007).

<sup>40</sup> The Commission appeared to find that the *USF* would become unsustainable if it continued to grow: (1) at the rate high-cost support grew between 2001 through 2007; or (2) at an average growth rate of over 100 percent. Regardless, there is no correlation between the annual growth rate of USF disbursements and the growth rate of high-cost support disbursements. The USF supports four universal service programs administered by USAC: the low-income, rural health care, schools and libraries, and the high-cost programs. Thus, high-cost support disbursements represent only a portion of the total USF disbursements made in any one year. As we will show, the fact that high-cost support grew over a year does not mean the total USF support grew at the same rate, or grew at all.

<sup>41</sup> *See Interim Cap Order*, at 5 n.26.

high-cost support increased “more than 65 percent,”<sup>42</sup> the annual growth rate of CETC support dropped from 1,043 percent in 2001 to 20 percent in 2007. *See id.* Finally, the data shows that the annual growth rate of high-cost support paid to ILECs and CETCs dropped from 16 percent in 2001 to 10 percent in 2007. *See id.* Insofar as the facts show that the annual growth rate for CETC high-cost support had declined for six straight years, and that the annual rate of growth for all high-cost support had dropped in six of the seven previous years,<sup>43</sup> the Commission was without empirical support for projecting that high-cost support would continue to grow at an average annual rate of over 100 percent, or even at a rate of 65 percent every seven years.

As evidence of the alleged “ever growing” contributions paid by consumers to the USF, the Commission looked to USAC’s quarterly contribution factors.<sup>44</sup> The following table shows the contribution factors applied over the past fifteen quarters.

**TABLE 2**

Quarter	Year	Reference	Factor (%)
First	2005	19 FCC Rcd 24045	10.7
Second	2005	20 FCC Rcd 5239	11.1
Third	2005	20 FCC Rcd 10727	10.2
Fourth	2005	20 FCC Rcd 14683	10.2
First	2006	20 FCC Rcd 19933	10.2
Second	2006	21 FCC Rcd 2379	10.9
Third	2006	21 FCC Rcd 6527	10.5
Fourth	2006	21 FCC Rcd 10120	9.1
First	2007	21 FCC Rcd 14427	9.7
Second	2007	22 FCC Rcd 5074	11.7
Third	2007	22 FCC Rcd 11049	11.3
Fourth	2007	2007 WL 2694455	11.0
First	2008	22 FCC Rcd 21584	10.2
Second	2008	2008 WL 696657	11.3
Third	2008	2008 WL 2366774	11.4

Table 2 shows that the quarterly contribution factor decreased three straight quarters after

<sup>42</sup> *Interim Cap Order*, at 11-12 (¶ 22).

<sup>43</sup> *See supra* Table 1.

<sup>44</sup> *See Interim Cap Order*, at 5 (¶ 6) & n.26.

the Board noted in early 2007 that the contribution factor was at its highest (11.7 percent) and issued its dire warning of USF “unsustainability.”<sup>45</sup> And the current contribution factor of 11.4 percent is still below the level it was when the Board issued its recommendation and not significantly above the level it was in the first quarter of 2005. *See supra* Table 2. If fluctuations in the quarterly contribution factors are probative — as the Commission claims — they are evidence that the USF is not in imminent danger of collapsing.

The Commission should be aware that it must define “key” universal service regulatory terms. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1201 (10th Cir. 2001) (“*Qwest I*”); *Qwest Corp. v. FCC*, 398 F.3d 1222, 1233-34 (10th Cir. 2005) (“*Qwest II*”). If it is going to graft a “sustainability” factor on the statutory principle that universal service mechanisms be “specific, predictable and sufficient,” 47 U.S.C. § 254(b)(5), the Commission must provide a definition of “sustainable” or a standard of “sustainability” that is “rationally related to the goals of the Act.” *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

The Commission came close to recognizing that the USF is “sustainable” until such time as the assessments paid by interstate telecommunications providers, and passed through to their end-user customers, reach a level unacceptable to consumers and ultimately to Congress. *See Interim Cap Order*, at 5 (¶ 6) & n.27. However, the Commission made no effort to predict the level of universal service funding that would require “excessive” (unacceptable or unaffordable) contributions from consumers and thus become politically unsustainable.<sup>46</sup> Absent such an empirical prediction, the Commission’s finding that the current growth rate of the USF is not

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<sup>45</sup> *Interim Cap Recommendation*, 22 FCC Rcd at 8999-9000 & n.11.

<sup>46</sup> Joint Petitioners suggest that consumer surveys could provide a reasonable basis for an empirical prediction of the level of funding that will become politically unsustainable. However, there is no data in the record on which the Commission could predict the level of funding that would be unacceptable to consumers.

sustainable is absolutely baseless and its *Interim Cap Order* is “merely a collection of conclusory comments.” *West Michigan Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968).

Faced with RCA/ARC’s call for an explanation of what it meant by the term “unsustainable,”<sup>47</sup> the Commission erred by putting off the task of articulating a sustainability standard until it adopted comprehensive reform measures. *See Interim Cap Order*, at 6 (¶ 9). As is the case with respect to the other significant comments ignored by the Commission, a reasoned response to RCA/ARC’s request for a standard by which to measure the sustainability of the USF could have compelled the conclusion that no emergency action need be taken to curb the growth of high-cost support. The Commission’s failure to provide any response to RCA/ARC’s significant comments “epitomizes arbitrary and capricious decisionmaking.” *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).

## II. THE COMMISSION MUST RECONSIDER THE INTERIM CAP SINCE IT WAS IMPOSED BASED ON PREDICTIONS THAT PROVED TO BE WRONG

Joint Petitioners recognize that the Commission is accorded some latitude in making decisions based on its predictions, as long as they are reasonable. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981). Thus, even when making predictive judgments, the Commission must engage in reasoned decisionmaking. *See Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998). And it must provide “at least some support for its predictive conclusions.” *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995). If its assumptions and predictions prove to have been erroneous, the Commission has an obligation to reconsider its predictive judgment. *See American Family Ass’n, Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004); *Cellnet*, 149 F.3d at 442; *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991). That

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<sup>47</sup> *See* Comments, at 7.

being the case, the Commission is obliged to reconsider and rescind its interim cap on CETC high-cost support.

Because the Commission jumped the gun and began enforcing an interim cap on CETC high-cost support seven months before it completed its rulemaking and released its *Interim Cap Order*,<sup>48</sup> the relevant predictive judgment was that of the Joint Board. The Board predicted that, if allowed to continue to grow “at an annual growth rate of over 100 percent,” CETC high-cost support would reach “at least \$1.28 billion” and as much as \$1.56 billion in 2007.<sup>49</sup>

Both the Board’s assumption as to the annual growth rate of CETC high-cost support and its prediction that such support would reach at least \$1.28 billion in 2007 were wrong. When the Commission got around to acting on the *Interim Cap Recommendation* in May 2008, CETC high-cost support had experienced a growth rate of only 20 percent in 2007 and CETCs had received \$1,178,503,000 in high-cost support that year. *See supra* Table 1. Nevertheless, the Commission repeated the Board’s error and assumed that CETC high-cost support would continue to grow at “an average annual growth rate of over 100 percent.” *Interim Cap Order*, at 5 (¶ 6). Based on that false assumption, the Commission made its finding that continued growth of the fund “at this rate” is not sustainable. *See id.*

The Commission must have assumed that annual USF disbursements grew at the same annual rate as CETC high-cost support and would continue to do so in the future. Table 3 below compares data from Table 1 with USF disbursement data culled from USAC’s annual reports to demonstrate that the Commission’s assumption is baseless.

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<sup>48</sup> Based on the Board’s recommendation that it take “immediate action to rein in the explosive growth in high-cost universal service support disbursements,” the Commission began enforcing the proposed interim cap on CETC high-cost support in October 2007, in the form of a condition to granting its consent to the merger of wireless telecommunications providers. *See Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee*, 22 FCC Rcd 19517, 1950-51 (2007). *See also Applications of AT&T Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20330 (2007).

<sup>49</sup> *Interim Cap Recommendation*, 22 FCC Rcd at 9000.

**TABLE 3**

Year	CETC High-Cost (\$)	Delta (%)	Total High-Cost (\$)	Delta (%)	USF Disbursements (\$)	Delta (%)
1999	500,000		1,717,900,000		3,556,841,730	
2000	1,500,000	200.00	2,234,800,000	30.09	4,392,054,703	23.48
2001	17,141,000	1,042.73	2,602,457,000	16.45	4,658,608,000	6.07
2002	47,747,000	178.55	2,977,955,000	14.43	5,350,097,000	14.84
2003	131,881,000	176.21	3,273,225,000	9.92	5,633,020,000	5.29
2004	333,062,000	152.55	3,487,572,000	6.55	5,323,784,000	5.49
2005	638,516,000	91.71	3,824,186,000	9.65	6,520,066,000	22.47
2006	979,916,000	53.47	4,096,321,000	7.12	6,626,333,000	1.63
2007	1,178,503,000	20.27	4,286,733,000	4.65	6,954,836,000	4.96

The foregoing shows that there is no discernible correlation between annual growth rates of CETC high-cost support and USF disbursements. For example, high-cost support to CETCs increased by over 1,000 percent in 2001, but the fund only grew at a 6 percent rate. *See supra* Table 3. The annual growth rate of CETC high-cost support dropped in 2005, while the rate of ETC disbursements increased significantly. *See id.* Table 3 also shows that there is little correlation between the growth rates of USF disbursements and the high-cost support provided ILECs and CETCs. Whereas the total high-cost support paid to ILECs and CETCs grew 65 percent from 2001 to 2007, total USF disbursements only increased by 49 percent. *See supra* Table 3. Therefore, the Commission could not base a prediction as to the “continued growth of the fund” on the fact that CETC high-cost support grew 6,775 percent from 2001 to 2007.

The Commission also assumed that the growth of CETC high-cost support necessarily threatens the sustainability of the USF by pushing USF contributions to a level that consumers will be unable to pay. That assumption does not account for the fact that telecommunications services have remained affordable despite increases in USF contribution assessments because those increases have been offset by the declining prices that consumers are paying for the services and by the increasing number of wireless consumers contributing to the USF. Originally presented to the Commission by RCA/ARC as supporting their comments this

proceeding, Table 4 below demonstrates the negligible impact that USF support increases have on a consumer's cost per minute of use ("MOU") for wireless voice services by applying the average annual contribution factors for 1998 to 2006 to the Commission's estimate of the average revenue per MOU of such services for the same years.<sup>50</sup>

**TABLE 4**

Year	Average Revenue Per Voice MOU (\$)	Average Contribution Factor (%)	Cost of Contribution Factor Per MOU (\$)	Total Cost Per MOU (\$)
1998	0.2900	3.1625	0.0092	0.2992
1999	0.2200	3.0143	0.0066	0.2266
2000	0.1800	5.6980	0.0103	0.1903
2001	0.1200	6.8445	0.0082	0.1282
2002	0.1100	7.1625	0.0079	0.1179
2003	0.1000	8.7701	0.0088	0.1088
2004	0.0800	8.8000	0.0079	0.0879
2005	0.0600	10.5500	0.0074	0.0674
2006	0.0600	10.1750	0.0071	0.0671

High-cost support increased every year from 2000 to 2006, *see supra* Table 3, as did the average universal service contribution factor. *See supra* Table 4. But as shown by Table 4, the combined cost to the consumer for a telecommunications service and a contribution to the USF could have declined each year from 2000 to 2006. Moreover, a consumer's contribution to the USF could have decreased in four of the six years. *See id.* Consequently, the Commission should not have assumed that continued growth of high-cost support will result in consumers making ever-growing USF contributions.

The interim cap on CETC high-cost support is scheduled to go into effect on August 1, 2008, a full fifteen months after the Board released its *Interim Cap Recommendation*. On the eve of the effective date, there is absolutely no indication in the record that consumers cannot afford their USF contributions. To the contrary, the quarterly contribution factor has *gone down* from

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<sup>50</sup> For the Commission's estimates of the average wireless voice services revenues per MOU, *see Annual Report with Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 23 FCC Rcd 2241, 2324 (2008).

11.7 percent when the Board made its prediction to its current level of 11.4 percent. *See supra* Table 2. Inasmuch as its two assumptions are probative of nothing, the Board's predictions have been proven wrong, and the record is devoid of evidence that the USF is in imminent danger of collapsing, the Commission is obligated to reconsider and rescind the imposition of the interim, emergency interim cap on CETC high-cost support. *See American Family Ass'n*, 365 F.3d at 1166; *Cellnet*, 149 F.3d at 442; *Bechtel*, 10 F.3d at 880; *Aeronautical Radio*, 928 F.2d at 445. Absent any evidence of an emergency, there is no need for emergency action.

### III. THE INTERIM CAP ON CETC HIGH-COST SUPPORT IS NOT THE PRODUCT OF REASONED DECISIONMAKING

Under the *State Farm* standard of reasoned decisionmaking, the Commission "must examine the relevant data and articulate a satisfactory explanation for its action 'including a rational connection between the facts found and the choice made.'" 463 U.S. at 43 (quoting *Burlington Truck lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). But in this case, the Commission made no rational connection between its findings and its choice to impose an interim cap on CETC high-cost support.

The Commission only made three findings of fact that are undoubtedly true: (1) USF high-cost support increased from \$2.6 billion in 2001 to \$4.3 billion in 2007; (2) high-cost support to CETCs increased from \$17 million in 2001 to \$1.18 billion in 2007; and (3) the quarterly universal service contribution factor decreased from its high of 11.7 percent in the second quarter of 2007 to 11.3 percent in the second quarter of 2008. *See Interim Cap Order*, at 4-5 (¶ 6) & n.27. These three findings were of "proximate" facts that were supposed to bear on the "ultimate" fact found by the Commission:<sup>51</sup> the growth of the fund at its current rate is not

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<sup>51</sup> For the distinction between "proximate" and "ultimate" facts, *see Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985).

sustainable and would require excessive (and ever growing) contributions from consumers. *See Interim Cap Order*, at 5 (¶ 6). Because it made no finding as to the level of high-cost support that would be “unsustainable,” *see id.*, at 12 (¶ 22), the Commission could not form a rational connection between its proximate findings and its ultimate finding that the continued growth of CETC high-cost support is unsustainable at its current rate.

The Commission also cannot articulate a satisfactory explanation for its action that makes a rational connection between its finding that it must “halt the rapid growth of high-cost support” before it reaches an unsustainable level,<sup>52</sup> thus averting a “crisis” that could “cripple” the USF,<sup>53</sup> and its choice to impose a five-month cap on CETC high-cost support. First, to establish such a connection would require the Commission to demonstrate that the threat to the sustainability of the USF is “real, not merely conjectural,” and that the interim cap will in fact alleviate that threat in “a direct and material way.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). If the threat that the Commission sees to the sustainability of the USF is real, and if the threat is so imminent as to warrant a short-term, “emergency cap” on high-cost support, the threat posed by the growth of CETC high-cost support should be susceptible of empirical proof. Thus, if it is to go forward with its interim cap, the Commission must supply a rational analysis of the relevant data that shows that: (1) unless capped by August 1, 2008, high-cost support to CETCs will push the USF to an unsustainable level by January 1, 2009; but (2) with the cap in place on August 1, 2008, the sustainability of the USF will be preserved until January 1, 2009.<sup>54</sup>

If the interim cap on CETC high-cost support goes into effect on August 1, 2008, and

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<sup>52</sup> *Interim Cap Order*, at 4 (¶ 5).

<sup>53</sup> *Id.*, at 10 (¶ 22).

<sup>54</sup> The Commission cannot continue to rely on unsupported assertions and unsubstantiated assumptions, because its “conclusory statements cannot substitute for the reasoned explanation that is wanting” in this rulemaking. *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001) (quoting *ARCO Oil & Gas Co. v. FERC*, 935 F.2d 1321, 1324 (D.C. Cir. 1991)).

stays in effect for five months, Joint Petitioners estimate that the cap will produce savings to the USF in 2008 of approximately \$52,924,000<sup>55</sup> out of an estimated \$7,761,016,000 in disbursements.<sup>56</sup> If it is to supply a reasoned explanation for the imposition of a five-month cap, the Commission must proffer some empirical evidence that a less-than-one-percent (0.68 percent) savings in USF disbursements over a five-month period in 2008 will halt the growth of high-cost support, thereby directly alleviating a threat to the sustainability of the USF.

The Commission's decision to cap CETC high-cost support marks a clear break with prior policies, particularly those guided by the principle of competitive neutrality. The Commission abandoned that principle in favor of "temporarily prioritizing" the alleged need to immediately stabilize high-cost support. *See Interim Cap Order*, at 12 (¶ 22). Nevertheless, when it reversed its course, the Commission was obliged by the dictates of reasoned decisionmaking to consider "reasonably obvious alternatives" to the imposition of the cap and to provide a reasoned explanation of why it rejected those alternatives. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2d Cir. 2007) (quoting *N.Y. Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir. 1985)). That is especially so when the alternative is patently obvious and "less drastic" than capping universal support to only one segment of the telecommunications industry. *See Yakima Valley Cablevision, Inc. v. FCC*, 794

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<sup>55</sup>To arrive at an estimate of the savings that will be realized from the interim cap on CETC high-cost support in August and September 2008, the total high-cost support received by CETCs nationwide in March 2008 (\$115,493,884) was subtracted from the total projected support for CETCs nationwide as listed in USAC's third quarter 2008 projections (\$122,406,419) to arrive at an estimated monthly savings of \$6,912,535. To calculate the savings for October, November and December 2008, the March 2008 high-cost support benchmark was subtracted from uncapped high-cost support (\$128,526,740) estimated at five percent more than USAC projected for the third quarter 2008, which produced an estimated monthly savings in the fourth quarter 2008 of \$13,032,856. The total estimated savings for the five-month period was calculated as follows:  $2 \times \$6,912,535 + 3 \times \$13,825,070 = \$52,923,637$ .

<sup>56</sup> USAC's projections of USF disbursements in the first three quarters of 2008 total \$5,810,480,000. Joint Petitioners estimate the USF disbursements will increase 5 percent in the fourth quarter of 2008 to \$1,950,535,915. Thus, they estimate that USF disbursements will total \$7,761,015,915 in 2008.

F.2d 737, 746 (D.C. Cir. 1986).

When it chose to impose a temporary cap on CETC high-cost support, the Commission turned its back on a less-drastic option that had been in its face for months: it could have simply declined the Board's *Interim Cap Recommendation* opting instead to commit its energies over the following six months to completing the ongoing rulemaking process to put comprehensive universal service reforms in place. That common sense choice could have been reasonably explained as an expression of the Commission's preference, both as a matter of policy and practicality, for the development of long-term, comprehensive reform measures to ensure that rural consumers receive the benefits of the USF. The Commission must now explain why it rejected that approach in favor of a short-term stopgap measure designed only to "slow" the growth of high-cost support for a five-month period,<sup>57</sup> and consequently promises to be as ineffectual as it will be unlawful.

#### IV. THE INTERIM CAP ON CETC HIGH-COST SUPPORT IS UNPRINCIPLED AND INCONSISTENT WITH THE ACT

The Commission's authority to implement the universal service provisions of the Telecommunications Act of 1996 ("1996 Act") was carefully circumscribed by Congress. The plain text of § 254 of the Act mandates that the Commission "shall" base its universal service policies on the seven principles listed in § 254(b)(1)-(7). *See, e.g., Qwest II*, 398 F.3d at 1234. Although the Commission must base its policies on the statutory principles, "any particular principle can be trumped in the appropriate case." *Qwest I*, 258 F.3d at 1200. It may "balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal." *Id.* Nor can it ignore all but one principle enumerated in § 254(b). *Qwest II*, 398 F.3d at 1234.

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<sup>57</sup> *Interim Cap Order*, at 17 (¶ 37).

Alongside of the universal service mandate of the 1996 Act is the statutory directive that local telecommunications markets be opened to competition. *See Alenco Communications, Inc.*, 201 F.3d 608, 615 (5th Cir. 2000). The Commission “must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other.” *Id.*

The Commission has conducted this proceeding as if it is unbridled by any congressional directives or statutory restrictions. Regrettably, its decision to impose an interim cap on CETC high-cost support: (1) was manifestly not based on any of the statutory universal service principles; (2) plainly violates the decade-old, Commission-adopted principle of competitive neutrality;<sup>58</sup> and (3) flouts the local competition mandate of the 1996 Act.

A. An Interim Cap on CETC High-Cost Support Cannot Be Imposed That Is Based Exclusively On The Principle That Funding Must Be “Sustainable”

In lieu of demonstrating that its decision is squarely founded on some or all of the § 254(b) principles, the Commission’s decisionmaking has focused on defending (unpersuasively) the interim cap on CETC high-cost support against charges that it violates the Act<sup>59</sup> or will inhibit broadband deployment.<sup>60</sup> Such issues must be addressed, but only after the Commission supplies a reasoned explanation that affirmatively establishes the requisite connection between the interim cap and one or more of the statutory universal service principles.

The Commission never established a connection sufficient to show that the interim cap was formulated to achieve one of the congressional goals enumerated in § 254(b). *See Qwest I*, 258 F.3d at 1200. Instead, the Commission struggled to show that an interim cap would comport with *dicta* found in *Alenco* that suggests that “excessive funding *may* itself violate the sufficiency

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<sup>58</sup> *See Federal-State Joint Bd. on Universal Service*, 12 FCC Rcd 8776, 8800-06 (1997).

<sup>59</sup> *See Interim Cap Order*, at 7-12 (¶¶ 12-23). In particular, the Commission claims that the interim cap does not violate §§ 254(b)(3), *see id.*, at 7-8 (¶ 13), and 254(b)(5). *See id.*, at 8 (¶ 14).

<sup>60</sup> *See id.*, at 12 (¶¶ 24 & 25).

requirements” of § 254(b)(5). *Interim Cap Order*, at 9 (¶ 18) (quoting *Alenco*, 201 F.3d at 620) (emphasis added).

The statute cannot be read to permit the Commission to base a universal service policy decision exclusively on judicial *dicta* of dubious applicability. An interim cap on CETC high-cost support can be imposed lawfully for the sake of “sufficiency” only if it is based on achieving the goal set by § 254(b)(5) or if the Commission formally adopts the *Alenco dicta* as a core universal service principle in accordance with § 254(b)(7). However, the interim cap is not intended to ensure that the USF is “sufficient ... to preserve and advance universal service,” 47 U.S.C. § 254(b)(5), and the Commission has not adopted the goal of preventing “excessive” USF funding as a universal service principle. *See Qwest I*, 258 F.3d at 1200 n.7.

The Commission’s articulation of the “sufficiency” principle cannot be squared with what Congress stated explicitly in § 254(b)(5). The Commission has interpreted the principle of “sufficiency” as prohibitory: it “proscribes support in excess of what is necessary to achieve the Act’s universal service goals.” *Interim Cap Order*, at 6 (¶ 8). Because § 254(b)(5) contains no such proscription, the Commission was forced to construe the provision to contain three words that Congress did not see fit to include. Hence, the Commission reads § 254(b)(5) to provide that USF support should be “sufficient, *but not excessive*,” to preserve and advance universal service. *Id.*, at 6 (¶ 9) (emphasis added). That construction limits the statutory term “sufficient” and materially changes the meaning of § 254(b)(5). However, it is for Congress, not the Commission, to revise the statute.

The *Alenco* court defined “sufficient” in terms of the “customer’s right to adequate [telecommunications] service.” 201 F.3d at 621. Therefore, USF funding is “sufficient” if it preserves and advances the right of consumers to obtain adequate service. Under *Alenco*, §

254(b)(5) has as its goal the provision of “sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services.” *Id.*, at 620. The Commission departs from *Alenco* and the plain meaning of § 254(b)(5) by defining “sufficient” in terms of protecting consumers from paying “excessive” USF contributions, as opposed to protecting their right to adequate service. *See Interim Cap Order*, at 5 (¶ 6).

If the Commission has its way, the goal of § 254(b)(5) will change from providing “sufficient” funding to preserve and advance universal service to providing “sustainable” funding that will preserve the USF. The Commission will have prioritized the protection of the “specificity, predictability, and *sustainability* of the fund” itself,<sup>61</sup> over achieving the statutory goal of providing “specific, predictable and *sufficient*” funding to preserve and advance universal service. 47 U.S.C. § 254(b)(5).<sup>62</sup> As a result, the Commission’s interim cap cannot stand since it is based entirely on an impermissible construction of § 254(b)(5).

B. The Interim Cap on CETC High-Cost Support Obviously Violates The Core Principle Of Competitive Neutrality

Simply stated, the Commission’s principle of competitive neutrality means that “universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over

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<sup>61</sup> *Interim Cap Order*, at 6 (¶ 9).

<sup>62</sup> The Commission cannot substitute its term “sustainable” for the statutory term “sufficient” or treat the two as synonymous, particularly in light of its inability to define the statutory term in a manner that will withstand judicial scrutiny. *See Qwest II*, 398 F.3d at 1233-34. The terms have different meanings as they relate to the universal service goals of the Act. The word “sufficient” as used in § 254(b)(5) means “adequate for the purpose[s]” of preserving and advancing universal service. *Random House Webster’s Unabridged Dictionary* 1901 (2d ed. 2001). As the Commission uses it, the word “sustainable” refers to the ability “to provide for” the USF “by furnishing means or funds.” *Id.*, at 1917. Congress directed the Commission to ensure that funding is adequate to make a basic level of service universally available. In contrast, the Commission is bent on limiting the level of funding even if the limit prevents service from being universally available. Again, it is for Congress, not the Commission, to limit the expenditures for universal service.

another.”<sup>63</sup> Because it targets only the high-cost support to CETCs, thereby putting CETCs at an unfair disadvantage, the Commission’s interim cap facially violates competitive neutrality. Effectively conceding that the interim cap is indefensible as competitively neutral, the Commission rationalized that it was not really departing from the principle of competitive neutrality, but “temporarily prioritizing the immediate need to stabilize high-cost universal service support [to] ensure a specific, predictable, and sufficient fund.” *Interim Cap Order*, at 12 (¶ 22). That rationalization dooms the cap.

As it explained its decisionmaking process that led to its adoption of the CETC-only cap on high-cost support, the Commission balanced the principle of competitive neutrality against its “sustainability” of the USF principle, and decided that the sustainability of the USF took priority over competitive neutrality. By trumping the principle of competitive neutrality in this case, the Commission exceeded its authority by departing from the statutory universal service principles altogether “to achieve some goal.” *Qwest I*, 258 F.3d at 1200. The principle of sustainability is not among the statutory principles codified in § 254(b); it is not the second universal service principle that the Commission adopted pursuant to § 254(b)(7); and it is inconsistent with the § 254(b)(5) principle that funding be sufficient to preserve and advance universal service. *See supra* pp. 22-24. Consequently, the principle cannot trump competitive neutrality nor provide a legal basis for the imposition of the interim cap on CETC high-cost support. *See Qwest I*, 258 F.3d at 1200.

C. The Interim Cap Conflicts With The 1996 Act’s Local Competition Mandate

The imposition of the cap will erect a barrier to competitive entry. For example, in March 2008, the State of Ohio was scheduled to receive zero dollars (\$0.00) in CETC high-cost

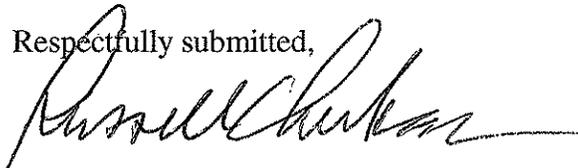
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<sup>63</sup> *Federal-State Joint Bd. on Universal Service*, 12 FCC Rcd at 8801.

support. As long as the interim cap is in place, any CETC contemplating entry to serve the rural areas of southern Ohio in competition with ILECs must consider whether it can be competitive without high-cost support. In this scenario, which will also play out in many other states with low March 2008 support levels, the interim cap “may prohibit or have the effect of prohibiting” the ability of an CETC to provide a telecommunications service. 47 U.S.C. § 253(a). If any state or local authority adopted a regulation that had such an effect, the regulation could be challenged as an unlawful barrier to market entry under § 253(a) and be subjected to preemption by the Commission under the 1996 Act. *See id.* § 253(d). Because the interim cap can work as a barrier to market entry, the imposition of the cap conflicts with the local competition mandate of the 1996 Act. Consequently, the interim cap cannot pass muster under *Alenco*, because of the Commission’s misguided decision to sacrifice local competition in favor of the “sustainability” of the USF. *See* 201 F.3d at 615.

For all the foregoing reasons, the Commission should reconsider and rescind its *Interim Cap Order*.

Respectfully submitted,



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