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March 13, 2009

VIA ECFS

Michael J. Copps
Acting Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Interim Cap for Competitive ETC High Cost Support:
CC Docket No. 96-45; WC Docket No. 05-337

Dear Acting Chairman Copps:

I am writing on behalf of the Universal Service For America Coalition ("USA Coalition") to request that the Federal Communications Commission ("Commission") provide guidance to the Universal Service Administrative Company ("USAC") regarding the calculation of the interim cap the Commission imposed on high cost support for competitive eligible telecommunications carriers ("ETCs").[1] Specifically, the USA Coalition requests the Commission to clarify for USAC that the *Interim Cap Order* issued on May 1, 2008 established a static, interim funding cap for each state, the level of which is not affected by the number of ETCs receiving support in that state.

The Commission set the interim cap at the amount of support all competitive ETCs received in a given state in March 2008, on an annualized basis.[2] The plain language of the *Interim Cap Order* confirms that the cap is static:

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1 *See High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (rel. May 1, 2008) ("*Interim Cap Order*").

2 *Id.*, ¶ 5.

> "[A]nnual support for competitive ETCs in each state will be capped at the level of support that competitive ETCs in that state were eligible to receive during March 2008, on an annualized basis."[3]

The *Interim Cap Order* further set forth the manner in which support must be calculated:

> Under the state-based cap, support will be calculated using a two-step approach. First, on a quarterly basis, the Universal Service Administrative Company (USAC) will calculate the support each competitive ETC would have received under the existing (uncapped) per-line identical support rule, and sum these amounts by state. Second, USAC will calculate a state reduction factor to reduce this amount to the competitive ETC cap amount. Specifically, USAC will 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 will divide the state cap support amount by the total state uncapped amount to yield the state reduction factor. USAC will then apply the state-specific reduction factor to the uncapped amount for each competitive ETC within the state to arrive at the capped level of high-cost support. Where the state uncapped support is less than the available state capped support amount, no reduction will be required.[4]

Under this two-step approach of calculating support, the entry or exit of any specific ETC in any given state has no effect on the available state cap support amount. Indeed, the number of ETCs in a given state is only relevant to the extent it increases or decreases the state uncapped support amount.

The Commission explicitly confirmed in the *Interim Cap Order* that the number of ETCs has no effect on the cap level:

> Although the interim cap that we adopt today applies only to the amount of support available to competitive ETCs, it does not restrict the number of competitive ETCs that may receive support. In fact, as part of this Order, we grant, to the extent described in

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3 *Id.*

4 *Id.*, ¶ 27.

> Appendix B, numerous applications for ETC designation currently pending before the Commission. . . . These designations, however, do not affect the amount of support available to competitive ETCs, which is limited by the interim cap we adopt in this Order.[5]

As the Commission explained, additional ETC designations, and thus withdrawal of certain ETCs from the market, have no impact on the available state cap support amount.

Despite the Commission's clear statement, USAC has created ambiguity regarding the interim cap by misinterpreting the *Verizon Wireless-Alltel Merger Order*,[6] which was adopted in a wholly unrelated proceeding. In this order, the Commission adopted, as a merger condition, Verizon Wireless's voluntary commitment to phase out its support incrementally by twenty percent annually over five years.[7] While summarizing commenters' positions on the merger condition, the Commission paraphrased the "understanding" Verizon Wireless expressed in an ex parte filing that the reduction in its support would not result in an increase in support to other competitive ETCs.[8] The Commission, however, did not adopt Verizon Wireless's misinterpretation of the interim cap, nor could the agency have modified the interim cap in an unrelated merger proceeding.

Certain members of the USA Coalition recently have received letters from USAC containing USAC's incorrect interpretation of the *Interim Cap Order* and the *Verizon Wireless-Alltel Merger Order*.[9] For example, one letter incorrectly stated that:

> All Verizon Wireless and Alltel High Cost support payments subject to the reduction provisions included in the Verizon Wireless and Alltel Merger Order are effectively removed from the

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5 *Id.*, ¶ 39.

6 *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 08-95, FCC 08-258, (rel. Nov. 10, 2008) ("*Verizon Wireless-Alltel Merger Order*").

7 *Id.*, ¶ 197.

8 *Id.*, ¶ 196.

9 *See, e.g.*, Letter from Karen Majcher, USAC, to Mr. Donald Evans, Fletcher, Heald & Hildreth, P.L.C. dated February 25, 2009 (attached hereto) (citing *Verizon Wireless-Alltel Merger Order*, ¶ 196).

> CETC interim cap and do not "free up" additional dollars for other CETCs in any jurisdiction.[10]

This statement is fundamentally inconsistent with the explicit and clear requirements of the *Interim Cap Order* set forth above. Moreover, the Commission has no authority to amend the two-step approach of calculating support established in the *Interim Cap Order*, WC Docket No. 05-337 and CC Docket No. 96-45, in an unrelated proceeding, WT Docket No. 08-95, to consider the merger application of two individual companies.[11] Even if both orders were in the same proceeding such that the Commission potentially had the authority to amend the previous Order, it is well established that the Commission declines to address in merger proceedings matters in which the public interest would be better served through consideration and resolution in broader proceedings of general applicability.[12] Accordingly, contrary to the suggestions of USAC, the Commission could not have modified a generally applicable rule on universal service support by adopting *sub silentio* a carrier's own interpretation of Commission policy submitted through an ex parte letter filed in a merger proceeding.[13]

For the reasons set forth in this letter, the USA Coalition requests the Commission to clarify for USAC that the Interim Cap Order issued on May 1, 2008 established a static, interim funding cap for each state, the level of which is not affected by the number of ETCs receiving support in that state. For your convenience, I have attached a draft letter to USAC. Please contact me if you have any questions or need additional information.

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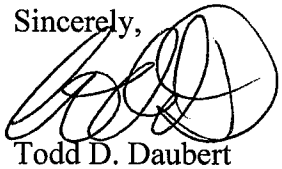
10 *Id.* at 1-2.

11 The unrelated docket numbers illustrate that any attempt to modify the *Interim Cap Order* in the *Verizon Wireless-Alltel Merger Order* would be fatally flawed due to lack of notice and opportunity to comment, among other issues.

12 *See AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5758 (2007) ("The Commission previously has declined to address in merger proceedings matters in which the public interest would be better served through consideration and resolution in broader proceedings of general applicability.").

13 *See Verizon Wireless-Alltel Merger Order*, ¶ 196.

Sincerely,



Todd D. Daubert
Counsel to the USA Coalition

cc Jonathan S. Adelstein, Commissioner
Robert M. McDowell, Commissioner
Jennifer McKee

Attachment