

**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 |) | CC Docket No. 96-45 |
| Universal Service |) | |
| |) | |

To: The Commission

Comments of the Rural Telecommunications Group, Inc.

The Rural Telecommunications Group, Inc. (“RTG”),¹ by its attorneys, hereby submits its comments in response to the Public Notice in the above-captioned proceedings.² RTG supports the position of Corr Wireless Communications, LLC (“Corr”) opposing the Universal Service Administrative Company’s (“USAC”) arbitrary and unjustified conclusion to remove ALLTEL/Verizon support from the pool of capped support that competitive eligible telecommunications carriers (“ETCs”) may receive. RTG urges the Federal Communications Commission (“FCC” or “Commission”) to move quickly to instruct USAC to include

¹ RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG’s members have joined together to speed delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG’s members are small, rural businesses serving or seeking to serve secondary, tertiary, and rural markets. RTG’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. Many of RTG’s members are competitive eligible telecommunications carriers adversely affected by the Commission’s interim cap on high-cost support.

² *Comment Sought on Corr Wireless Communications, LLC Request for Review of a Competitive Eligible Telecommunications Carrier High-Cost Support Decision of the Universal Service Administrative Company*, WC Docket No. 05-337, CC Docket No. 96-45, DA 09-805 (April 9, 2009).

ALLTEL/Verizon support, and the support of any other merging carriers losing support, in its March 2008 “snapshot” of support available to competitive ETCs.

I. Background

On May 1, 2008, the FCC adopted its “emergency” *Interim Cap Order*, limiting competitive ETCs to capped support in each state.³ State support for competitive ETCs was capped at March 2008 levels, on an annualized basis, and the cap went into effect in August of 2008, although the exact results of the cap were not released until December 2008. In some states, as new competitive ETCs entered the field, support awarded to individual competitive ETCs in those states has been reduced on a pro rata basis. On its one-year anniversary, the arbitrary and devastating effects of this so-called “interim” cap on small, rural carriers have been well-documented by the Rural Cellular Association (“RCA”).⁴

When the Commission granted the ALLTEL/Verizon merger last year, it made the decision to phase out Verizon’s high-cost support over a five-year period.⁵ Thus, in states where ALLTEL received high-cost support, Verizon will lose twenty percent of that support a year. Most competitive ETCs where ALLTEL formerly operated and Verizon will continue to operate,

³ *In re High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, ALLTEL Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers, RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, Order, WC Docket No. 05-337, CC Docket No. 96-45, 23 FCC Rcd 8834 (2008) (“*Interim Cap Order*”).

⁴ *See, e.g., Letter from the Rural Cellular Association to Acting FCC Chairman, Michael J. Copps*, WC Docket No. 05-337, CC Docket No. 96-45 (May 1, 2009) (noting, among other effects, that seven states are ineligible for any high-cost funding and that certain states have seen carrier funding shrink to below 50 and even 70 percent).

⁵ *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 and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) (“*Verizon-ALLTEL Merger Order*”).

including RTG members, expected that ALLTEL's support would be "freed up" and redistributed to cover the high costs associated with providing service to subscribers in these high cost areas. In a curt letter containing no justification and little explanation of its decision, USAC has informed Corr and possibly other carriers⁶ that this is not the case and that Verizon's support will be removed from cap calculations. USAC has explained that its policy decision was based on the *Verizon-ALLTEL Merger Order*, an Order that contains absolutely no instructions to USAC to remove such support from the pool of capped support. It would seem that USAC made this agency decision on its own.

II. USAC's Interpretation Is Arbitrary and Unjustified

USAC has gamed the capped support mechanism to ensure that new entrants into any states' capped high-cost funding pool decreases support for all competitive ETCs, but any competitive ETC that exits the pool does not increase the amount of high-cost support available to the remaining competitive ETCs. This "having it both ways" ruling appears nowhere in the *Interim Cap Order* or the *Verizon-ALLTEL Merger Order*. Corr contends that USAC's decision not to include universal service high-cost support funds disclaimed by ALLTEL and Verizon in connection with their merger last year in the pool of funds available for distribution under the competitive ETC interim cap is incorrect. RTG agrees that USAC's surprising decision to

⁶ See *Letter from the USA Coalition to Acting FCC Chairman, Michael J. Copps*, WC Docket No. 05-337, CC Docket No. 96-45 (March 13, 2009) (indicating that "certain members of the USA Coalition have received letters from USAC containing USAC's incorrect interpretation of the *Interim Cap Order* and the *Verizon Wireless-ALLTEL Merger Order*"). According to a December 2008 filing by the USA Coalition, its members include Carolina West Wireless, Cellular One, Cellular South, Corr Wireless Communications, Mobi PCS, SouthernLINC Wireless, Thumb Cellular LLC and US Cellular. See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Reply Comments of the USA Coalition & RCA, n. 1 (December 22, 2008).

inform competitive ETCs affected by the interim cap that ALLTEL/Verizon support has been removed from its March 2008 “snapshot” of capped support lacks any legal justification.

Corr correctly argues that the Commission’s actions in the *Verizon-ALLTEL Merger Order* and the *Interim Cap Order* do not indicate that the funding disclaimed by the merger is not to go back into the competitive ETC capped pool. USAC’s “oblique” reference to Verizon and ALLTEL losing support in their letter to competitive ETCs provides no justification for USAC to reduce high-cost support for competitive ETCs remaining in the pool. RTG agrees with Corr that the FCC should require USAC to include Verizon/ALLTEL funds, as well as any Sprint/Nextel funds (another large carrier losing support),⁷ in its support calculations. USAC is incorrect to use the unrelated merger Order to modify the *Interim Cap Order*. These two Orders are under separate FCC docket numbers, are separate proceedings, and even if they were related, there was no notice and comment on how the ALLTEL-Verizon merger should affect the cap.

USAC’s decision to reduce capped support available to competitive ETCs further exacerbates the already deleterious effects of the interim cap. As Corr notes, the Commission adopted its interim, emergency cap on the amount of high-cost support that competitive ETCs could receive at the same time it granted numerous applications for competitive ETC designations. These designations created a significant shortfall for many competitive ETCs because in many states it suddenly increased the number of carriers among which the frozen high-cost pool would be divided. For example, Tennessee is staring at an over 70 percent reduction in support for its pool of competitive ETCs.⁸ USAC’s removal of ALLTEL’s support

⁷ *Sprint Nextel Corporation and Clearwire Corporation, Applications For Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Order (rel. May 1, 2008).

⁸ See USAC High Cost Disbursement Data, available at <http://www.universalservice.org/about/governance/fcc-filings/2009/Q3/HC01%20Capped%20->

worsens an already dire situation and is contrary to the public interest as small, rural carriers are left with little support for their network upgrade and expansion plans in underserved and unserved rural regions which means rural subscribers and those traveling to rural America are not afforded the same level of service as their urban counterparts.

USAC is out on a limb with its unilateral, arbitrary interpretation. Further, USAC does not have the jurisdiction to make such an agency determination. In fact, even if the Commission were to determine that it approves of USAC's *ad hoc* rogue agency interpretation and that it meant for USAC to implement the *Interim Cap Order* in such a fashion, it is unlikely any judge would uphold such a *post hoc* Commission rationalization in the absence of any notice or comment and nary an instruction in the *Verizon-ALLTEL Merger Order* directing USAC to implement the *Interim Cap Order* in such a fashion.⁹

[%20High%20Cost%20Support%20Projected%20by%20State%20by%20Study%20Area%20-%20203Q2009.xls](#).

⁹ See *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (1962), quoting *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U. S. 194, 196 (1947) (“The courts may not accept appellate counsel’s post hoc rationalizations for agency action; *Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself: “[A] simple but fundamental rule of administrative law... is... that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action...”).

III. Conclusion

For the foregoing reasons, RTG respectfully requests that the Commission instruct USAC to include in its high-cost support calculations the total amount of support of *all* carriers that were eligible to receive high-cost support when USAC took its support snapshot in March 2008 rather than resort to making up its own rules without any legal support or administrative law due process.

Respectfully submitted,

RURAL TELECOMMUNICATIONS GROUP, INC.

By: _____ /s/

Caressa D. Bennet
Kenneth C. Johnson
Bennet & Bennet, PLLC
4350 East West Highway
Suite 201
Bethesda, MD 20814
(202) 371-1500

Its Attorneys

Date: May 11, 2009