

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

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| In re Request of |) | |
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| CORR WIRELESS COMMUNICATIONS, LLC |) | WC Docket No. 05-337 |
| |) | |
| For Review of a Competitive Eligible |) | CC Docket No. 96-45 |
| Telecommunications Carrier High-Cost |) | |
| Support Decision of the Universal Service |) | |
| Administrative Company |) | |

JOINT COMMENTS OF THE CELLCOM COMPANIES
IN SUPPORT OF REQUEST FOR REVIEW

Wisconsin RSA #4 Limited Partnership, Wausau Cellular Telephone Limited Partnership, Nsighttel Wireless, LLC, Brown County MSA Cellular Limited Partnership, and Wisconsin RSA #10 Limited Partnership (the “Cellcom Companies”),¹ by their attorneys and pursuant to the Commission’s Public Notice, DA 09-805, released April 9, 2009, hereby jointly submit their comments in support of the request of Corr Wireless Communications, LLC (“Corr”) for review of a decision of the Universal Service Administrative Company (“USAC”) misinterpreting the Commission’s decisions in *High-Cost Universal Support*, 23 FCC Rcd 8834 (2008) (“*Interim Cap Order*”) and *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444 (2008) (“*VZW-ALLTEL Order*”).² The Cellcom Companies submit that USAC erred (and exceeded its authority) when it decided not to include universal service high-cost support funds disclaimed by Cellco Partnership d/b/a Verizon Wireless (“VZW”) and ALLTEL Corporation (“ALLTEL”) in connection with their merger from the pool

¹ All of the Cellcom Companies have been operating as competitive ETCs in Wisconsin since 2003.

² See Appeal from Decision of Administrator of High Cost Universal Service Fund, CC Docket No. 96-45 (Mar. 25, 2009).

of funds available for distribution to competitive eligible telecommunications carriers (“CETC”) under the *Interim Cap Order*. Because Corr’s request for review presents novel issues of law and policy, it must be referred to the full Commission for consideration. See 47 C.F.R. § 54.722(a).

ARGUMENT

I. USAC EXCEEDED ITS AUTHORITY AND ACTED UNLAWFULLY WHEN IT EXCLUDED THE VZW/ALLTEL FUNDS FROM THOSE AVAILABLE FOR DISBURSEMENT UNDER *INTERIM CAP ORDER*

The Commission was not authorized by Congress to delegate decision-making authority to USAC. *Changes to the Bd. of Directors of NECA*, 13 FCC Rcd 25058, 25131 (1998) (“*NECA Changes*”). (dissenting statement of Com’r Furchtgott-Roth).³ Accordingly, when it designated USAC to be the sole administrator of the universal service support mechanisms, the Commission emphasized that USAC’s function would be “exclusively administrative.” *Id.* at 25067. The Commission provided:

USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed. Furthermore, USAC may advocate positions before the Commission and the Commission staff only on administrative matters relating to the universal support mechanisms.⁴

USAC clearly overstepped its authority when it decided to exclude the VZW/ALLTEL funds from the March 2008 cap baseline. Under the *Interim Cap Order*, the amount of high-cost

³ The Commission relied on § 2005(b) of S. 1768, a supplemental appropriations bill adopted by the Senate in 1998. See *NECA Changes*, 13 FCC Rcd at 25062 n.14, 25066 nn.40, 41, 25067 n.45. However, § 2005(b) was not included in H.R. 3579, the emergency supplemental appropriation bill that was passed by Congress, having been eliminated in conference committee. See *id.* at 25062 n.14. The Conference Report expressly stated that its action should not be considered as expressing the approval of Congress of the Commission’s action in establishing one or more corporations to administer § 254(h) of the Act. See H.R. Rep. No. 105-504, at 87 (1998).

⁴ *NECA Changes*, 13 FCC Rcd at 25067 (footnotes omitted). See 47 C.F.R. § 54.702(c), (d).

support available to CETCs in a state was set at 12 times the level of support that all CETCS — including VZW and ALLTEL — in the state were eligible to receive in March 2008. *See* 23 FCC Rcd at 8850. Neither the Act nor the Commission’s rules (“Rules”) provide for a reduction in the funds available under *Interim Cap Order*. Neither do they address the situation where a CETC agrees to phase out its high-cost support. Consequently, under § 54.702 of the Rules, USAC was without authority to do more than “seek guidance from the Commission.” 47 C.F.R. § 54.702(c). However, even if USAC informally sought Commission guidance before it acted, that effort would have been futile.

The Commission has not amended or repealed its *Interim Cap Order* to specify that the March 2008 cap amount may be adjusted in connection with the phasing-down of support adopted as a merger condition. Nor has the Commission adopted a rule, or established an enforceable policy, that applies when a CETC declines high-cost support. Under the circumstances, USAC could not simply seek Commission “guidance.” USAC was required to request a formal Commission ruling on how the VZW/ALLTEL funds were to be treated under the *Interim Cap Order*. USAC violated § 54.702(c) of the Rules, and acted unlawfully, when it excluded those funds from the pool of funds available to distribute to the CETCs that remained entitled to high-cost support.

II. THE APA AND DUE PROCESS REQUIRE A NOTICE-AND-COMMENT RULEMAKING TO FURTHER REDUCE CETC HIGH-COST SUPPORT

The Commission imposed the interim cap in April 2008 to “halt the rapid growth of high-cost support,” not to reduce the level of such funding. *Interim Cap Order*, 23 FCC Rcd at 8837. Thus, the interim cap “only applies to the amount of support available to [CETCs].” *Id.* at 8850. Under the *Interim Cap Order* rule, the amount of CETC high-cost support that is available in each state is capped at the total amount of support that all CETCs “were *eligible* to receive in that

state during March 2008, on an annualized basis.” *Interim Cap Order*, 23 FCC Rcd at 8838 (emphasis added). The Commission clearly intended that the amount of CETC high-cost support that would be available would be fixed at the then-current funding level without reduction.⁵

It is significant that the Commission capped CETC support funding at the amount CETCs were eligible to receive during March 2008 on an annualized basis, instead of the amount of CETC support that was “actually distributed in each state.” *See id.* In its *Interim Cap Order*, the Commission claimed that the Act “does not ... require that all ETCs must receive support, but rather only that carriers meeting certain requirements be *eligible* for support.” *Id.* at 8847 (emphasis in original). When the *Interim Cap Order* rule was adopted, VZW and ALLTEL were eligible to receive CETC high-cost support. VZW/ALLTEL remains eligible for high-cost support today, and in fact receives such support. That VZW/ALLTEL agreed to “accept” a phase-down of its support does not change the fact that it remains eligible under § 214(e) of the Act and its state CETC designations. *See VZW-ALLTEL*, 23 FCC Rcd at 17531.⁶

Under the *Interim Cap Order* rule, USAC was to calculate the state reduction factor each quarter by dividing the fixed amount of high-cost support that is available by the total amount of high-cost support that all the CETCs in the state “would have received” under the existing per-line identical support rule. 23 FCC Rcd at 8846. Read in context, the phrase “would have received” is synonymous with “were eligible to receive.” Thus, USAC was to include the

⁵ *See Interim Cap Order*, 23 FCC Rcd at 8850. The Commission emphasized that the interim cap on CETC support was “only an interim measure to slow the current explosion of high-cost universal support while [it] considers further reform.” *Id.* The Commission made its own commitment to issuing a final order on comprehensive reform measures “as quickly as feasible” after the comment cycle was to end on May 19, 2008. *See id.* at 8836, 8850. Because the interim cap was to be of short duration, the Commission intended that the amount of high-cost support available would remain at the same level so long as the cap remained in effect.

⁶ VZW’s attempt to reserve the right to receive CETC high-cost support under the successor mechanism to the interim cap evidences its belief that it remains eligible for support. *See VZW-ALLTEL Order*, 23 FCC Rcd at 17531.

support that all CETCs in the state were eligible to receive, including VZW/ALLTEL and the new Commission-designated CETCs that had not been eligible in March 2008. *See Interim Cap Order*, 23 FCC Rcd at 8850.

When the *Interim Cap Order* rule was adopted, the Commission did not contemplate that any amount of CETC high-cost support funding would be “removed” or that any funds would be “free[d] up” to disburse to any CETC. *See infra* Ex. 2 at 1-2. Nor did it contemplate that the per-line high-cost support to any CETC in any state would be reduced unless the number of CETCs in the state increased. *See Interim Cap Order*, 23 FCC Rcd at 8850. However, if any portion of the amount of the high-cost that VZW/ALLTEL is eligible to receive under the uncapped identical support rule is excluded from the computation of the state reduction factor by USAC, the factor is increased and the high-cost support provided every CETC in the state is reduced. Such a reduction was neither intended by the Commission nor permitted by the *Interim Cap Order* rule.

Assuming that the imposition of the phase-down condition in the *VZW-ALLTEL Order* was lawful, that licensing action could legally bind VZW/ALLTEL to accept less high-cost support than it was eligible to receive. However, it did not establish a rule that would bind non-parties to the VZW-ALLTEL proceeding or deprive any other CETC of its right to receive the share of the available high-cost support to which it was entitled under the *Interim Cap Order* rule. A CETC cannot be deprived of an entitlement under a federal program without being afforded due process of law.⁷ And the process that would be due a CETC would either be a

⁷ *See Board of Regents v. Roth*, 408 U.S. 254, 262 (1970). Contrary to the Commission’s assumption, the interim cap “undermine[d]” the investment decisions that CETCs made when they petitioned to be designated eligible to receive USF support in the provision of service to high-cost areas. *See Interim Cap Order*, 23 F.C.C.R. at 8850. Each had the entirely reasonable investment-backed expectation that it would receive the exact amount of USF support to which it

notice-and-comment rulemaking under § 254(a) of the Act and § 533 of the APA or a suspension or disbarment proceeding under § 54.8(e) of the Rules.

Before it can reduce the amount of per-line high-cost support disbursed to CETCs beyond any reduction called for the *Interim Cap Order* rule, the Commission must conduct an APA rulemaking to amend its existing distribution rules to expressly provide for the further reduction and to authorize USAC to administer the reduction. Therefore, if it wishes to pursue that course of action, the Commission may do so in the context of its ongoing comprehensive reform rulemaking. Of course, a Commission decision to adopt such a rule change must be based on the statutory universal service principles, *see* 47 U.S.C. § 254(b), and not be inconsistent with pro-competitive policies of the Telecommunications Act of 1996. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000) (the Commission “must see that *both* universal service and local competition are realized”).

There is no evidence that the Commission considered the statutory principles, competitive neutrality, or local competition before it imposed its phase-down condition on VZW/ALLTEL. The Commission clearly must do so if it considers a second CETC-only funding reduction, because it will not be able to repeat the claim that the need to stabilize the USF should take priority temporarily over the principle of competitive neutrality. *See Interim Cap Order*, 23 FCC Rcd at 8845.

was entitled under the Commission’s high-cost program and its universal service rules. After the adoption of the *Interim Cap Order* rule, CETCs have the investment-backed expectation that they will receive the exact amount of high-cost support to which they are entitled under the *Interim Cap Order* rule. With such property interests at stake, CETCs have the due process right to be afforded notice and the opportunity to be heard before their support can be reduced beyond the reduction called for by the *Interim Cap Order* rule.

III. USAC’S DECISION TO REMOVE THE PHASED-DOWN VZW/ALLTEL SUPPORT FROM THE CETC CAP AMOUNT VIOLATES THE STATUTORY REQUIREMENT THAT SUPPORT BE PREDICTABLE

By reducing the amount of high-cost support that is available to CETCs in all of the states in which VZW/ALLTEL has been designated a CETC, USAC’s action has violated the *Interim Cap Order* rule and undermined the predictability of CETC high-cost support.

The imposition of the interim cap on CETC high-cost support was purportedly consistent with the statutory principle that the USF should be “specific, predictable, and sufficient ... to preserve and advance universal service.” 47 U.S.C. § 254(b)(5). The Commission determined that the interim cap would make CETC support “more predictable, in that it sets an upper, definitive bound on the amount of support available in a state.” *Interim Cap Order*, 23 FCC Rcd at 8841. However, it also claimed the “requirement of predictability requires only that the rules governing distribution, not the resulting funding amounts, must be predictable.” *Id.* Nevertheless, the Commission chose to use March 2008 as the base period for the cap to “ensure that funding levels will not undermine the expectations underlying [CETC] investment decisions or result in immediate funding reductions.” *Id.* at 8850.

In December 2008, emphasizing the need to “provide certainty regarding the amount of high-cost support available to competitive ETCs under the cap in each state,” the Commission established a deadline of December 31, 2008 for CETCs to file any “corrections” to “the data on

which their March 2008 high-cost support is based.”⁸ The Commission also informed CETCs of the availability of March 2008 baseline cap data on USAC’s website.⁹

USAC’s interpretation of the VZW/ALLTEL phase-down condition totally unhinges the cap from its mechanics under the *Interim Cap Order* rule. By excluding the “phase-down” amounts from the March 2008 cap baseline, USAC is effectively reducing the cap baseline amounts in several states below what CETCs were eligible to receive in March 2008. In Wisconsin, this action has the effect of reducing the flow of funds to CETCs in the state by more than \$400,000 per month in the first year of the phase-down and by more than \$650,000 per month in the fifth year when VZW’s support is phased out altogether.

The Cellcom Companies, along with other CETCs in Wisconsin and in other states similarly affected by the phase-down had a reasonable investment-backed expectation that the cap would operate in accordance with the *Interim Cap Order* rule. *See supra* note 7. In setting their capital budgets and planning their build-out activities, CETCs in the impacted states have relied on the Commission’s detailed explanation of the how the cap would operate. *See Interim Cap Order*, 23 FCC Rcd at 8846-50. Prior to the announcement of USAC’s interpretation of the *VZW-ALLTEL Order*, CETCs believed that anytime the total amount of uncapped support increased in a given states, the reduction factor (if any) would become steeper. Conversely, anytime the uncapped total decreased, any applicable reduction factor would become less steep.

USAC’s interpretation of the VZW phase-down condition has fundamentally uprooted those expectations. In Wisconsin, the total phase-out of VZW/ALLTEL support in the fifth year brings the total statewide uncapped support amount below March 2008 levels, which should

⁸ *March 2008 Capped Universal Service High-Cost Support for CETCs*, DA 08-2684, 2008 WL 5169757, at *1 (Dec. 10, 2008).

⁹ *See id.*

result in a cap factor of 1.0 (no reduction) according to the cap mechanism announced in the *Interim Cap Order*. Yet, USAC's interpretation will result in a roughly 20 percent reduction for all CETCs.

The Cellcom Companies had to adjust their budgets and build-out plans once when the effect of the *Interim Cap Order* became apparent. But the cap, for all its legal infirmities, at least provided CETCs with a fixed baseline from which to calculate their capped support. Now that USAC has announced that the March 2008 baseline is effectively being reduced to accommodate the VZW phase-down, CETCs in those states now must face still more uncertainty in the calculation of their support – and they must yet again make adjustments to their budgets and network build-out plans. Thus, the removal of the phase-down amounts out of the March 2008 cap baseline violates the statutory requirement that support to ETCs must be predictable. 47 U.S.C. § 254(b)(5) (“There should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.”)

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V. CONCLUSION

For all of the reasons set forth above, the Cellcom Companies support Corr's request for review. Considering that CETCs are being denied the high-cost support to which they are entitled under the *Interim Cap Order* rule, the Cellcom Companies respectfully request that the Commission issue a final order granting Corr the relief it requests by June 9, 2009. *See* 47 C.F.R. § 54.724(b).

Respectfully submitted,



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