Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
High Cost Universal Service Support	)	WC Docket No. 05-337
Universal Service Contribution Methodology	)	WC Docket No. 06-122
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF VERIZON AND VERIZON WIRELESS

Michael E. Glover,
Of Counsel

Karen Zacharia
Christopher M. Miller
VERIZON
1320 North Courthouse Road – 9th Floor
Arlington, VA 22201-2909
(703) 351-3071

Colin Stretch
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W. – Suite 400
Washington, D.C. 20036
(202) 326-7968

John T. Scott, III
Tamara L. Preiss
VERIZON WIRELESS
1300 I Street, NW – Suite 400 West
Washington, D.C. 20005
(202) 589-3760

Counsel for Verizon and Verizon Wireless

October 28, 2009

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. THE USF CONTRIBUTION ISSUES RAISED IN THE USAC LETTERS HIGHLIGHT THE NEED FOR REFORM OF THE USF FUNDING REGIME 4

III. WHERE ACTUAL RETAIL PREPAID CALLING CARD REVENUE DATA ARE UNAVAILABLE, CARRIERS SHOULD TAKE REASONABLE STEPS TO APPROXIMATE THE RETAIL SALES PRICE 7

IV. SERVICES ARE TO BE ASSESSED BASED ON THEIR STATUTORY CLASSIFICATION, NOT ON WHETHER THEY INCLUDE "ATM" AND/OR "FRAME RELAY" TECHNOLOGIES OR CAN BE LABELED A "VPN" 9

V. RETROACTIVELY IMPLEMENTING THE ALLTEL ETC CAP WOULD CONTRADICT THE INDUSTRY CETC CAP ORDER, UNLAWFULLY PUNISH VERIZON WIRELESS, AND CONFLICT WITH THE HIGH-COST SUPPORT MECHANISM 17

A. Background 18

B. The Commission Intended for the Industry-Wide Cap to be Implemented Instead of the Company-Specific Cap 19

C. It Would be Punitive and Inconsistent with Fundamental Universal Service Principles to Rescind Support That Alltel Has Already Spent on Providing Supported Services 25

D. At a Minimum the Commission Should Waive Implementation of the Alltel Cap 27

VI. ETCS ARE NOT REQUIRED TO SEPARATELY ADVERTISE EACH SUPPORTED SERVICE AND FUNCTIONALITY ENUMERATED IN 47 C.F.R. § 54.101 29

VII. CONCLUSION 31

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
High Cost Universal Service Support	)	WC Docket No. 05-337
Universal Service Contribution Methodology	)	WC Docket No. 06-122
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF VERIZON[1] AND VERIZON WIRELESS

I. INTRODUCTION AND SUMMARY

USAC's requests for guidance on several issues related to the administration of the current revenue-based universal service fund ("USF") contribution system[2] highlight the urgent need to replace the current regime – and the confusion and uncertainty that is inherent in that regime – with a numbers-based system that would provide predictability and stability and position the fund to succeed in the broadband era. Pending such reform, the Commission should respond to USAC's requests by advising USAC that (1) carriers should take reasonable steps to approximate the retail revenue associated with prepaid calling cards where the retail sales price is not known; (2) whether a given service is assessable for USF purposes turns, not on whether it incorporates "ATM" or "Frame Relay" technology or can be labeled a "Virtual Private Network (VPN)," but rather on the basis of the capabilities it offers customers and whether the offering

[1] In addition to Verizon Wireless, the Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] *See* Letter from Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company ("USAC"), to Julie Veach, Acting Chief, Wireline Competition Bureau, FCC (Aug. 19, 2009) ("USAC Aug. 19 Letter"); Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, Wireline Competition Bureau, FCC (Aug. 21, 2009) ("USAC Aug. 21 Letter") (collectively the "USAC letters").

meets the statutory definition of a "telecommunications service"; (3) company-specific high-cost caps adopted prior to the industry-wide interim cap on competitive high-cost support were expressly superseded by that rule and should not be retroactively implemented; and (4) the advertising requirement in 47 C.F.R. § 54.201(d) does not require eligible telecommunications carriers ("ETCs") to separately advertise specific services and functionalities.

First, USAC's need for guidance on USF contribution questions highlights the confusion and uncertainty that is inherent in the current regime and underscores the need to replace that regime with a new system that brings objectivity, predictability, and stability to universal service funding. As Verizon has explained previously and reiterates below, by far the best alternative is a USF-funding plan based on a small charge on each working phone number. A numbers-based contribution system would not only address the specific contribution questions on which the Commission seeks comment here, but also limit if not eliminate such questions in the future, by putting in place a simple, easy-to-understand and easy-to-administer system of USF funding. The current revenue-based contribution system is not sustainable. The system depends on arbitrary and increasingly untenable distinctions between interstate and intrastate services and between telecommunications and information services. Beyond that, the assessable interstate revenue base is shrinking as services migrate to converged, enhanced product offerings, which, when coupled with growing demand for universal service subsidies, has resulted in all-time high USF contribution factors that will only continue to rise absent fundamental reform. In view of these trends and the adverse effects they are having on investment and competition in the industry, the Commission can no longer use band-aids to extend the life of the current regime. Rather, fundamental reform – in the form of a numbers-based USF funding plan – is needed.

Second, in the interim – but without in any way minimizing the urgency of fundamental universal service reforms – the Commission should promptly provide guidance on the questions raised in the USAC letters. First, the industry and USAC would benefit from guidance setting a reasonable standard or "safe harbor" for carriers to estimate retail revenues associated with prepaid calling cards sold through third-party distributors. The current rule requiring contributions on retail prepaid calling card revenues even when the retail sales price is unknown to a contributing wholesale card provider has long been the source of confusion. Second, the Commission should reiterate that revenue is assessed for universal service purposes based on the classification of services, not on the technologies used in the provision of, or the labels attached to, such services. "ATM" and "Frame Relay" are best understood as technologies, not services (even though the Commission and carriers themselves do sometimes describe and offer particular services using these terms), and the services into which these technologies are incorporated may or may not be assessable, depending on the capabilities they offer to the end user. Services using ATM and Frame Relay technology may be "telecommunications services" when offered only as a transmission service without additional characteristics of an enhanced service such as a net protocol conversion, or such services may be "information services" when offered on an integrated basis with features recognized by the Commission as enhanced. The same is true of "VPN," a term that refers to a wide range of services that can include a wide range of capabilities and cannot be classified on a uniform basis. Third, there is no basis to retroactively implement the 2007 high-cost funding caps limiting support to the former Alltel (now part of Verizon Wireless). The later industry-wide interim cap on competitive high-cost support expressly superseded that company-specific cap. Finally, the regulatory text and existing Commission precedent make clear that ETCs need not separately advertise each of the supported services and functionalities listed in 47 C.F.R. § 54.101. There is simply no such requirement today, and any such requirement in the future would only confuse consumers.

II. THE USF CONTRIBUTION ISSUES RAISED IN THE USAC LETTERS HIGHLIGHT THE NEED FOR REFORM OF THE USF FUNDING REGIME

As a threshold matter, USAC's requests for guidance on specific questions related to the administration and implementation of the USF underscore the urgent need for USF reform. The contribution issues raised in the USAC letters – how to determine retail revenues associated with prepaid calling cards, and whether certain providers must contribute on "ATM/Frame Relay" and "VPN" revenues – are indicative of the larger problem with the current revenue-based contribution system. That system imposes contribution obligations based on two distinctions – between "telecommunications services" and "information services" and between interstate and intrastate services – that the migration to broadband, IP-based "any distance" services renders increasingly arbitrary and difficult to administer. Replacing the current regime with an objective standard such as a numbers-based contribution system as described in prior Verizon filings would provide a clear, verifiable way to determine who pays into the USF and on what basis, which in turn would bring certainty, predictability, and stability to universal service funding.

The current revenue-based USF contribution system relies on distinctions that are meaningless in a broadband world. As discussed further below, the ATM/Frame Relay and VPN issues in the USAC letters squarely raise the murky distinction between (assessable) "telecommunications services" and (non-assessable) "information services." This distinction is one of the critical underpinnings of the entire revenue-based contribution mechanism. But the distinction is increasingly untenable, as consumers and businesses move away from conventional telecommunications services toward more complex, integrated, and often IP-based broadband services that are not tied to traditional regulatory classifications or even to a physical location.

As a result, competing services and providers pay into the fund today in different ways – if at all – which skews the market and causes significant confusion among consumers who (predictably) do not understand the universal service charges on their bills.

The Commission should act quickly to replace the current, muddled regime with a system that relies on an objective standard for determining who pays into the USF, and how much. As Verizon has previously explained, the best alternative is a numbers-based system that would bring simplicity, ease-of-administration, stability, and competitive neutrality to USF contributions. A numbers-based approach with a small charge on each working phone number would establish a bright-line test for contributions that would limit if not eliminate the questions and uncertainties that have plagued administration of the fund. Such a regime would also ensure that services that compete with one another would pay in on an equal basis, thus ensuring competitive neutrality and facilitating investment.

Under a numbers-based regime – which is broadly supported in the industry[3] – all services, including IP-based services, that provide customers with phone numbers would contribute to the fund in the same way that traditional numbers-based services contribute. Thus, for example, IP-based services such as Google Voice, SkypeIn, ooma, and magicJack that compete with traditional telephone services would contribute based on their assessable phone numbers. It is appropriate that these services contribute because they offer the ability to make and/or receive calls from other telephony networks (PSTN wireline, cellular, VoIP, and so forth) that also make use of phone numbers. Meanwhile, other IP-based services that have a voice

[3] *See* Reply Comments of Verizon at 2, *In re Universal Service Contribution Methodology*, WC Docket No. 06-122 (FCC filed Sept. 8, 2006) (noting that representatives of virtually every industry segment – including wireline telephone companies, cable telephony providers, wireless carriers, equipment manufacturers, VoIP providers, and state regulators – agree that a numbers-based mechanism would be more competitively neutral, rational, and sustainable than the existing approach).

component but do not provide customers with phone numbers – such as Xbox LIVE, Phweet, WalkieTalkie for Facebook, Ribbit, and Skype's computer-to-computer service – would not contribute, ending uncertainty about their status under the existing revenue-based system. A numbers-based contribution mechanism would provide certainty as well with respect to services incorporating "ATM" or "Frame Relay" technologies, or which can be labeled a "VPN": consumers who buy these services would pay into the fund on the numbers-based services (such as VoIP products) that "ride over" them.

In addition to establishing an objective standard for USF funding determinations, a numbers-based regime would also help stabilize the fund. As Verizon and others have explained,[4] the problems with revenue-based contributions have led to the largest ever USF contribution factors and cannot be fixed by tinkering with the existing system. Recent filings by USAC show that the interstate revenue base has continued to decline (falling about $1 billion from last quarter to its lowest level in the modern history of the USF), while the contribution factor is currently above 12 percent and will likely remain above 12 percent next quarter.[5] A numbers-based USF contribution mechanism would stabilize the USF contribution base because

---

[4] *See*, *e.g.*, AT&T Petition for Immediate Commission Action to Reform its Universal Service Contribution Methodology, *Universal Service Contribution Methodology*, WC Docket No. 06-122 (filed July 10, 2009); Direct USF Contribution Methodology, Highlights of a "Direct" Numbers-Based System, *attached to* Ex Parte Letter from Mary L. Henze, AT&T Services, Inc., and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-122, CC Docket No. 96-45 (FCC filed Sept. 11, 2008) ("Numbers Plan, Highlights").

[5] *See* Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Fourth Quarter 2009*, at 7 (Sept. 1, 2009); Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2009*, App. M02 (Sept. 1, 2009); Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Third Quarter 2009*, at 7 (June 1, 2009); Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2009*, App. M02 (June 1, 2009).

growth in the "number of numbers" is expected to continue for the foreseeable future.[6] It would benefit consumers, most of whom would see a decrease in the USF charges they pay each month (Lifeline customers would pay nothing).[7] A flat charge per number, which will not vary month-to-month, is also easier for consumers to understand.[8] And it would assist policymakers, because the system would be easier to administer and audit.[9] Finally, numbers-based contributions are also better for providers because such a system would fairly spread the contribution burden and would make paying into the fund much more transparent.[10]

III. WHERE ACTUAL RETAIL PREPAID CALLING CARD REVENUE DATA ARE UNAVAILABLE, CARRIERS SHOULD TAKE REASONABLE STEPS TO APPROXIMATE THE RETAIL SALES PRICE

At the same time as it initiates contribution reform – but by no means as a substitute for such reform – the Commission should provide guidance on the issues set out in the USAC letters. USAC first seeks guidance as to how wholesale providers of prepaid calling cards should report revenue. USAC notes that the Form 499-A Instructions "require carriers to report as telecommunications revenue the amount the customer paid for the calling card," whereas Form 499-A itself "requires carriers to report the face value of the card as revenue."[11] USAC further observes that, "[i]n cases where carriers sell prepaid calling cards to a third-party distributor or wholesaler not affiliated with the carrier, the selling carrier may not be aware of what the end-

[6] In 2000, carriers reported that roughly 400 million telephone numbers were assigned to end-users. *See* Craig Stroup & Peyton Wynns, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, *Numbering Resource Utilization in the United States*, at 4 (Dec. 2000). By the end of 2008, assigned numbers had increased more than 65 percent, to 667 million. *See* Craig Stroup & Jon Vu, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Numbering Resource Utilization in the United States*, at 6 (Sept. 2009).

[7] *See* Numbers Plan, Highlights at 2-3.

[8] *See id.* at 2.

[9] *See id.* at 4.

[10] *See id.*

[11] USAC Aug. 19 Letter at 1.

user customer paid," and it also notes that in some cases a prepaid card "does not have a face value," and in others the customer may pay "less than face value because of discounting."[12]

As a threshold matter, it is clear that, where the prepaid calling card provider *does* know how much the end-user paid for a calling card, it should use that amount – even if it differs from the face value of the card – in calculating its contribution base.[13] As USAC notes, the ambiguity here arises only "when . . . the amount paid by the customer is not known by the original selling carrier."[14] In that circumstance, the Bureau should clarify what steps carriers are expected to take to estimate the end-user purchase price of prepaid calling cards. One reasonable approach would be to assume a 35 percent markup by the retail provider – *i.e.*, that the retail price of the card is 135 percent of the wholesale price. That assumption could operate as a safe harbor for prepaid calling card contributions when retail prices are unknown. This approach tracks IRS regulations for calculating the applicable communications excise tax on prepaid cards. In that context, the IRS permitted wholesale providers to determine the "face amount" of prepaid cards with reference to, *inter alia*, "actual retail sales" or, alternatively, "by reference to the price at which the [card] is sold to the transferee seller," plus a markup of 35 percent to "correspond . . .

---

[12] *Id*.

[13] Regardless of any purported discrepancy between the Form 499-A itself and its Instructions, neither the Commission nor the Bureau on delegated authority can impose substantive requirements through changes to the form itself or its instructions, without adhering to the requirements of the Administrative Procedures Act ("APA"). *See* 5 U.S.C. § 553; *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (a rule that "substantively changes a preexisting legislative rule. . . . can be valid only if it satisfies the notice-and-comment requirements of the APA"); Comments of Verizon and Verizon Wireless at 2-3, CC Docket No. 96-45, USAC Audit Report No. CR2005CP007 (FCC filed Oct. 1, 2009) ("Verizon/Verizon Wireless Comments on Global Crossing Bandwidth Request for Review"). As Verizon has explained, to avoid the confusion and uncertainty that results when the Bureau alters the Form 499-A or its Instructions in a manner that appears to alter substantive contribution requirements, the Commission should annually identify any proposed changes to the form and/or instructions in a "tracked changes" format, and it should publish those proposed changes for comment before they take effect. *See* Verizon/Verizon Wireless Comments on Global Crossing Bandwidth Request for Review at 3-4.

[14] USAC Aug. 19 Letter at 1.

to markups in the retail sector generally."[15] Particularly because the aim of the IRS regulations was the same as the object here – *i.e.*, to determine a reasonable method for estimating the retail price of a card where the provider is not able to ascertain the actual selling price – the Commission should validate this approach as a safe harbor in this context.

IV. SERVICES ARE TO BE ASSESSED BASED ON THEIR STATUTORY CLASSIFICATION, NOT ON WHETHER THEY INCLUDE "ATM" AND/OR "FRAME RELAY" TECHNOLOGIES OR CAN BE LABELED A "VPN"

USAC next seeks guidance on whether to include "ATM/Frame Relay revenue" within carriers' USF contribution bases, as well as on "the proper classification of 'Virtual Private Network' (VPN)."[16] "ATM" and "Frame Relay" are best understood as transmission technologies (even though the Commission and carriers themselves do sometimes describe particular service offerings using these terms) that are incorporated into a range of service offerings, and "VPN" is a label that can similarly be used to characterize a wide range of services. Whether a *particular* service that employs ATM or Frame Relay technology – or that can be characterized as a VPN – is assessable for USF purposes depends on whether that *particular* service offered to customers meets the statutory definition of a "telecommunications service."

As an initial matter, USF contribution requirements are assessed based on classification of the *service* offered to customers. Revenue from a service that meets the statutory definition of a "telecommunications service" is subject to assessment; a service that meets the mutually

[15] T.D. 8855, 2000-4 I.R.B. 374 (Jan. 24, 2000). The Federal Excise Tax (FET) regulation addressed how to compute the FET on prepaid calling cards. It was later determined that the IRS cannot tax prepaid calling cards. *See* Internal Revenue Service Notice 2006-50, § 4(a), at 6, http://www.irs.gov/pub/irs-drop/n-06-50.pdf.

[16] USAC Aug. 19 Letter at 2.

exclusive statutory definition of "information service" is by definition not a "telecommunications service," and it is therefore not included within a carrier's contribution base.[17]

Furthermore, whether a particular service meets the statutory definition of "telecommunications service" depends on the *specific* capabilities that the *specific* service in question "offers" to the end user. The 1996 Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received,"[18] and a "telecommunications service," in turn, as "the offering" of such pure transmission "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[19] The 1996 Act defines an "information service," by contrast, as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[20] As the Commission has held[21] – and as the Supreme Court expressly affirmed in *Brand X* – whether

[17] *See* 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the . . . mechanisms established by the Commission to preserve and advance universal service."); Report to Congress, *Federal-State Board on Universal Service*, 13 FCC Rcd 11501, ¶ 115 (1998) ("*Report to Congress*") ("only common carriers should be considered statutorily mandated contributors to universal service support mechanisms"); *id.* ¶ 130 ("In instances where telecommunications carriers derive revenues from certain activities that fall outside the definition of 'telecommunications services,' the Commission . . . has simply excluded those revenues from the contribution base."). *See also id.* ¶ 46 (reaffirming that the "information services" and "telecommunications services" definitions are mutually exclusive).

[18] 47 U.S.C. § 153(43).

[19] *Id.* § 153(46).

[20] *Id.* § 153(20). Similarly, under the Commission's rules, an "enhanced" service is a "service[] . . . which employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

[21] *See, e.g.*, Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, FCC 06-79, ¶ 15 (rel. June 30, 2006).

a particular service falls into one category or the other depends on the capabilities the service offers the customer.[22]

These principles compel the conclusion that the questions on which USAC seeks guidance – again, whether revenue from a service employing ATM and/or Frame Relay or which can be labeled a VPN is assessable – depends on the *particular* service offered to customers. Although the Commission has referred to "ATM" and "Frame Relay" as services[23] – and carriers themselves sometimes do describe particular services using these terms – the terms "ATM" and "Frame Relay" are best understood as transmission technologies used in a range of services. ATM and Frame Relay may or may not be integrated into "information service" offerings. Likewise, the term "Virtual Private Network" is not a recognized term with an established meaning, but refers generally to a range of networking solutions that permit enterprises to connect locations without purchasing dedicated private lines to run between and among each location and that may or may not be integrated into information services offered to customers.[24]

Particularly in view of the breadth of the terms at issue here, it is clear that the capabilities of the specific service offered to the customer is what matters for purposes of determining whether the associated revenue is assessable. As the Supreme Court stated in affirming the Commission's approach, "[i]t is common usage to describe what a company

---

[22] *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005).

[23] *See*, *e.g.*, Memorandum Opinion and Order, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services*, 23 FCC Rcd 12260, ¶ 21 (2008) ("These types of services are high-speed, high-volume services that enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data among multiple locations. For example, Frame Relay service allows local area networks to be connected across a public network to carry customized data applications. ATM service . . . is currently a widely-used carrier backbone technology, and can guarantee different service quality levels to meet customer needs.").

[24] Harry Newton, Newton's Telecom Dictionary 928 (16th ed. 2000) (the term VPN "tend[s] to mean different things to different vendors," and, to "a customer, a VPN is basically whatever you want to build").

'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product."[25] And it is equally true that, under established Commission precedent, many "integrated finished products" that incorporate ATM and/or Frame Relay transmission technologies, or that can be classified as VPNs, qualify as "enhanced" or "information services," and not as assessable "telecommunications services."

Thus, for example, the Commission has long held that a service that includes protocol processing as an integrated feature constitutes an "enhanced service" and, therefore, an "information service." Although the Commission has created exceptions for various protocol processing functions that involve "'no net' protocol conversion," and that accordingly constitute "capabilities used 'for the management, control, or operation, of a telecommunications system or the management of a telecommunications service,"[26] it has long been established that a service that *does* offer the capability of a "net protocol conversion" *is* "enhanced."[27] As the Commission has put it, a service that enables "an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information" and thus "constitute[s] [an] information service under the 1996 Act."[28]

---

[25] *Brand X*, 545 U.S. at 990.

[26] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 106 (1996) ("*Non-Accounting Safeguards Order*") (subsequent history omitted).

[27] *See id.* ¶ 104.

[28] *Id.* The classification of services performing a "net protocol conversion" as "enhanced" dates back more than 25 years. *See* Memorandum Opinion, Order, and Statement of Principles, *Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, 95 F.C.C.2d 584, ¶¶ 11, 19 (1983) (classifying as "enhanced" a service where "an otherwise basic packet-switched network . . . generate[s] an output to another network in a different protocol than its normal user inputs and outputs"). *See also* Memorandum Opinion and Order, *Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II)*, 100 F.C.C.2d 1057, ¶ 2 (1985) (reaffirming classification of services performing net protocol conversion as "enhanced"); Report and Order, *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, ¶ 71

Depending again on the specific service in question, moreover, that principle could in many cases render the revenue associated with a service that employs ATM and/or Frame Relay – or that can be characterized as a VPN offering – as nonassessable "information service" revenue.[29] Take, for example, a bank that seeks to tie together branch office locations with limited data needs – and which therefore rely on one transmission technology – with a data warehouse that has more robust needs and accordingly employs a different transmission technology. A provider might offer such a customer a service that integrates protocol conversions between ATM and Frame Relay (and perhaps other technologies) – and which might be referred to as a VPN – that permits seamless communication between the branch offices and the data warehouse through an "end-to-end protocol processing service[]"[30] that enables communication notwithstanding the "different data-transmission formats" used by the separate locations.[31] In other words, what the provider offers the bank customer in this example may well be described as a VPN, in part, precisely because of the net protocol conversion capabilities associated with the product, which qualify the product as an information service. In this situation the provider does not offer, and the bank customer does not purchase, a "VPN" (however that term is understood) product merely to ensure that existing customer premises equipment will be compatible with a successor network protocol such as ATM or IP.[32] The

---

(1987) ("any net user-to-user protocol conversion" is "an enhanced service") (subsequent history omitted).

[29] *See generally Report to Congress* ¶ 27 ("the category of enhanced services covered a wide range of different services, each with communications and data processing components. Some might seem to be predominantly communications services; others might seem to be predominantly data processing services").

[30] *Non-Accounting Safeguards Order* ¶ 105.

[31] *Brand X*, 545 U.S. at 977.

[32] *See Non-Accounting Safeguards Order* ¶ 106 (describing the three circumstances in which protocol processing does not constitute an "enhanced" service, which include, *inter alia*, protocol processing "in connection with the introduction of a new basic network technology (which requires

customer is instead offered, in many instances, a fully integrated communications service. That service, which can be a VPN, allows the customer to communicate (in the broad sense through the exchange of voice, data, or other packets) in a secure, real-time environment with any other location using any technology. Thus, the service offered to the customer in many cases necessarily includes an end-to-end net protocol conversion, and potentially other characteristics of an enhanced service. Because such an integrated service offering would constitute an "information service" under Commission precedent, the revenue associated with the service would be excluded from the carrier's universal service contribution base.[33]

This does not, however, mean that revenues from *all* services that employ ATM and/or Frame Relay – or that can be labeled a VPN – are non-assessable. On the contrary, just as such services may constitute "enhanced" or "information services," so too might they constitute "telecommunications services," depending, again, on the capabilities offered to the end user. The Common Carrier Bureau expressly recognized as much in the *Frame Relay Order*. There, the Bureau classified as a "telecommunications service" a service that employed Frame Relay transmission technology, where "the 'core' of [the] service [wa]s the provision of frame transmission in the frame relay format," where the service provided pure transmission of data that entered and exited the network "in frame relay protocol," and where the service "maintain[ed] the [customer's data] across the network in the same sequence in which they were

---

protocol conversion to maintain compatibility with existing CPE)" and "internetworking conversions (conversions taking place solely *within* the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end-user)").

[33] Additional examples of capabilities that might render an enterprise service enhanced, depending on the factual particulars of the service in question, are provided in the Comments of BT Americas Inc. on Behalf of Itself and other BT Entities on Masergy Communications Inc. Petition for Clarification at 3-4, WC Docket No. 06-122 (FCC filed June 8, 2009).

delivered to the network."[34] The same analysis would presumably apply to an ATM-based service, or one that can be labeled a VPN, with each of these same attributes – *i.e.*, a service that enables the transmission of data in the same format across the network, without reordering the data or converting it, on an end-to-end basis, to a different protocol. Similarly, a straightforward ATM- or Frame Relay-based access service that includes no capabilities warranting treatment as an "enhanced" or "information" service would likewise be considered a "telecommunications service."

The point, however, is that it is impossible to say whether, in all or even most cases, revenue from services that employ ATM or Frame Relay – or that can be labeled a VPN – is or is not assessable, because such determinations are service-specific and necessarily depend on the particular services offered to a customer. Under the Commission's existing rules, in some cases a service employing Frame Relay or ATM will be a "telecommunications service," and the revenue derived from it will therefore be assessable. In other cases, a service employing one or both of those technologies will be enhanced and therefore non-assessable. The same is true of services that can be labeled VPN.

Indeed, as a matter of black-letter administrative law, the Commission could not, in this proceeding, dictate uniform contribution rules that would apply to services that use ATM or Frame Relay or that can be labeled a VPN. Pursuant to 47 U.S.C. § 254(d), universal service contributions are necessarily assessed only on "telecommunications services"; "enhanced" (or "information") services are assessed only where the Commission makes specific "public

[34] Memorandum Opinion and Order, *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, 10 FCC Rcd 13717, ¶¶ 9, 10, 20 (CCB 1995) ("*Frame Relay Order*").

interest" findings called for by statute.[35] As explained above, many services that employ ATM and/or Frame Relay are "enhanced" under the Commission's long-standing rules, and the same is true of many services that are properly considered VPNs. The Commission cannot alter those rules here but must do so, if at all, through notice-and-comment rulemaking.[36] Likewise, to the extent the Commission has authority to require contributions on the revenue derived from services that qualify as "enhanced" pursuant to its discretionary authority in § 254(d), it can exercise that authority only after making the "public interest" findings mandated by that section, on a full record and with adequate notice and an opportunity for comment (as it did, for example, in the case of interconnected VoIP[37]). The rules as they exist today thus foreclose a uniform classification of services that employ ATM and/or Frame Relay as "telecommunications" or "information" services, or that are properly considered VPNs, and the Commission may not, in the form of "guidance" to USAC, make such a classification (nor may it direct universal service assessments that rely on such a classification).

The Commission itself has recognized that a rulemaking proceeding would be necessary to supplement or modify the rules that apply to enterprise networking services, including services that employ ATM and/or Frame Relay or can be labeled VPNs, that offer the customer protocol

[35] 47 U.S.C. § 254(d); *see* Order, *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, FCC 08-160, ¶ 2 (rel. June 30, 2008).

[36] *See, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine . . . APA requirements"). *See also* Report and Order, *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms* 14 FCC Rcd 16602, ¶ 40 (1999) ("Bureau has the authority to 'modify' . . . reporting requirements as a matter of clarification," but that "delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.").

[37] *See* Report and Order and NPRM, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006).

processing. The Commission has long emphasized that "the issue of the regulatory treatment of protocol processing is a difficult one."[38] Fully two decades ago, the Commission explained that the uncertainty surrounding this issue "suggest[ed] the need for a different approach to treating [the] problem of protocol conversion," and it stated that it "would be remiss if [the agency] did not use the record compiled here as a base to minimize or eliminate uncertainty for the future."[39] The Commission's own recognition of the complications that arise when seeking to classify services in this area further confirms that the Commission may not, in this more narrow proceeding, make any uniform classification determinations that would apply across a broad class of services.

V. RETROACTIVELY IMPLEMENTING THE ALLTEL ETC CAP WOULD CONTRADICT THE INDUSTRY CETC CAP ORDER, UNLAWFULLY PUNISH VERIZON WIRELESS, AND CONFLICT WITH THE HIGH-COST SUPPORT MECHANISM

USAC requests direction on whether to implement two company-specific caps on USF high-cost support (imposed on Alltel and AT&T) that were adopted in 2007 but superseded by the Commission's adoption in 2008 of a cap on funding to all competitive ETCs ("CETCs"). USAC states that, "[a]t the written direction of Commission staff . . . USAC did not implement the company-specific caps."[40] Nonetheless, it now asks whether it should, more than two years later, do just that, and claw back funds that had been spent by Alltel in fulfillment of its CETC obligations.

Verizon Wireless, as successor to Alltel, opposes any rescission of high-cost support payments to Alltel during the period between adoption of its specific cap and the adoption of the

[38] *Report to Congress* ¶ 51.

[39] Memorandum Opinion and Order, *Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II)*, 100 F.C.C. 2d 1057, ¶ 10 (1985).

[40] USAC Aug. 19 Letter at 5, Item 6.

CETC cap. First, the 2008 CETC cap expressly superseded the company-specific caps, thereby nullifying them as a matter of law. Commission staff advice to Alltel that the interim cap would not be implemented was consistent with staff's "direction" to USAC not to implement the company-specific caps.[41] Second, to reverse course now and determine that the company-specific caps *should* be implemented would unfairly and unlawfully punish Verizon Wireless. Alltel spent nearly all of the funds that USAC disbursed to it during the period at issue. To demand repayment of those funds now, after they were spent, would not leave Verizon Wireless (as the successor to Alltel) whole but would make it worse off. Moreover, it would be punitive and in conflict with the USF program to rescind high-cost funding that Alltel has already spent on providing the supported services. Thus, the company-specific cap should *not* be implemented retroactively for the period prior to the implementation of the industry-wide cap. At a minimum, the Commission should waive the application of the company-specific cap to recoup payments made to Alltel.

A. Background

USAC's request for guidance on Item 6 of its August 19 Letter involves the interplay of (1) the two company-specific caps on CETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*, and (2) the industry-wide cap on CETC support adopted in the *Industry CETC Cap Order*. On May 1, 2007, the Federal-State Joint Board on Universal Service recommended an industry-wide CETC cap.[42] Shortly thereafter, Alltel and Atlantis Holdings, LLC filed applications for approval of the transfer of control of Alltel's licenses to Atlantis. On October 26, 2007, the Commission approved the transfer of control, and imposed as a condition

---

[41] *Id.*

[42] *See* Recommended Decision, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, 22 FCC Rcd 8998 (Jt. Bd. 2007) *("Cap Recommendation").*

of that transaction an interim cap on the high-cost support that Alltel was permitted to receive, set at the support Alltel was receiving as of June 2007.[43] The Commission's grant order stated that the Alltel-specific interim cap was to "apply until fundamental comprehensive reforms are adopted to address issues related to the distribution of support."[44]

On May 1, 2008, the Commission imposed the industry-wide interim cap on CETC support, and stated that the "interim cap adopted in this Order *supersedes* the interim caps on high-cost competitive ETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*."[45] USAC then received written guidance from Commission staff not to implement the company-specific caps.[46] Separately, Alltel contacted Commission staff to confirm that, in light of the new, comprehensive cap, the Alltel-specific cap would not be implemented, so that it could commit the funds it was receiving from USAC to provide the supported services. Alltel received the same advice – that USAC had been directed not to reduce Alltel's support, but instead to implement the new CETC cap.

B. The Commission Intended for the Industry-Wide Cap to be Implemented Instead of the Company-Specific Cap

USAC states that it "believes that it is required to implement the AT&T and Alltel company-specific caps for the time period each respective order was in effect until the date it

---

[43] *See* Memorandum Opinion and Order, *Applications of ALLTEL Corp., Transferor, and Atlantis Holdings, LLC, Transferee, for Consent to Transfer Control of Licenses, Leases and Authorizations,* 22 FCC Rcd 19517, ¶ 9 (2007) ("*ALLTEL-Atlantis Order*"). The Commission imposed a similar cap in approving a merger of AT&T and Dobson Communications. *See Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations,* 22 FCC Rcd 20295, ¶¶ 71-72 (2007) ("*AT&T-Dobson Order*").

[44] *ALLTEL-Atlantis Order* ¶ 9.

[45] Order, *High-Cost Universal Service Support,* 23 FCC Rcd 8834, ¶ 5 n.21 (2008) ("*Industry CETC Cap Order*") (emphasis added).

[46] *See* USAC Aug. 19 Letter at 5. USAC states at one point in its Letter that it failed to implement the company-specific caps "for administrative reasons only." *Id.* It does not explain what those reasons may have been. In fact, however, as USAC also states, Commission staff explicitly directed USAC *not* to implement the individual caps. *See id.*

was superseded by the *Industry CETC Cap Order*, because the CETC industry-wide cap was effective prospectively and did not state that it superseded the company-specific caps retroactively."[47] USAC ignores the language of the order, which indicates that the Commission was substituting the industry-wide cap for the company-specific caps. Conversely there is no indication in the *Industry CETC Cap Order* that the Commission nonetheless intended that USAC should still implement the company-specific caps.

The word "supersede" means to "annul, make void, or repeal by taking the place of."[48] Thus, it inherently includes the concept of annulling and making void the requirement or obligation that has been superseded. By using this term, the Commission intended for USAC to implement the industry cap instead of the Alltel cap, not to begin to implement retroactively that company-specific cap.

The Commission's use of "supersede" in the *Industry CETC Cap Order* was also consistent with more general use of the word. For example, Black's Law Dictionary defines a writ of "supersedeas" as "a prohibition emanating from court of appeal against execution of writ."[49] In other words, a writ of supersedeas is a court order that prevents the enforcement of a judgment previously issued by a lower court. "Originally it was a writ directed at an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands."[50] In this case, the *Industry CETC Cap Order* should be read as "a writ directed [to USAC], commanding [it] to desist from enforcing the

---

[47] *Id.*

[48] Black's Law Dictionary 1576 (9th ed. 2009).

[49] Black's Law Dictionary 1437 (6th ed. 1990). *See also* Fed. R. Civ. P. 62(d).

[50] Black's Law Dictionary 1437.

execution" of the previously-issued cap in the *ALLTEL-Atlantis Order* that USAC was "about to execute."

With the industry-wide CETC cap in place, there was no need for the company-specific caps adopted as partial measures while the Commission was considering a more comprehensive cap. Moreover – and significantly – USAC had never implemented the company-specific caps.[51] Under the circumstances, there was no longer any need for the half-a-loaf solutions offered by the company-specific caps, which had never been implemented in any event. Thus, the Commission specifically provided that the industry-wide "cap adopted in this Order *supersedes* the interim caps on high-cost, competitive ETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*."[52] In this context, the Commission's intention was for USAC to implement the industry-wide cap *instead of* the then-still-unimplemented company-specific cap, not to *begin* retroactive implementation of the company-specific cap.

The Commission's course of conduct supports this interpretation. The Commission was considering an industry-wide cap throughout the period that the Alltel transaction was pending. The Joint Board recommended an industry-wide CETC cap on May 1, 2007, shortly before the Alltel-Atlantis applications were filed,[53] with Chairman Martin expressing his strong support for the industry-wide cap.[54] Commissioner Tate, Chair of the Joint Board, also supported an

[51] *See* USAC Aug. 19 Letter at 5.

[52] *Industry CETC Cap Order* ¶ 5 n.21 (emphasis added).

[53] *See Cap Recommendation*, 22 FCC Rcd 8998.

[54] *See id.* at 9014 (statement of Chairman Kevin J. Martin).

industry-wide cap,[55] and stated in early October 2007 that she was "hopeful" that the agency would vote on the Joint Board's proposal in the "very, very near future."[56]

In voting to approve the Alltel transaction, several Commissioners expressed reservations about a company-specific cap and pointed to the pending efforts at broader reform of CETC support. Commissioner McDowell observed that "[C]ETC support is not raised or discussed in the record of this [merger] proceeding" and that the "condition prejudices the Commission's open docket considering universal service support distribution."[57] Commissioner Adelstein concurred in part in the Alltel-specific cap order, but stated that his vote "does not prejudge my consideration of the broad policy issues regarding whether an interim cap on universal service support is the appropriate vehicle to address the growth of the high-cost fund," which he called "an issue that should be resolved in the relevant proceeding."[58] Commissioner Copps dissented, objecting to the adoption of the cap on Alltel.[59]

Six months later, the Commission adopted broad reform, imposing a cap that applied to all CETCs. Chairman Martin had long expressed support for an industry-wide CETC cap,[60] and, consistent with that position, Commission staff then directed USAC, in writing, not to implement the company-specific caps once the industry cap was adopted.[61] Commissioner Tate noted the

[55] *See id.* at 9015 (statement of Commissioner Deborah Taylor Tate).

[56] *FCC May Vote Soon on Interim USF Cap Proposal, Says Tate*, Communications Daily, Oct. 2, 2007.

[57] *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19530 (statement of Commissioner Robert M. McDowell).

[58] *Id.* at 19529 (statement of Commissioner Jonathan S. Adelstein, approving in part, concurring in part).

[59] *Id.* at 19528 (statement of Commissioner Michael J. Copps, approving in part, dissenting in part).

[60] *See Cap Recommendation*, 22 FCC Rcd at 9014.

[61] *See* USAC Aug. 19 Letter at 5 ("At the written direction of Commission staff … USAC did not implement the company-specific caps.")

importance of "creating a level playing field"[62] – which only an across-the-board cap could achieve. In short, the statements and positions of individual Commissioners are consistent with the language of the *Industry CETC Cap Order* and Commission staff's interpretation of that Order as expressed both to USAC and to Alltel. The Commissioners' statements provide no indication that they intended USAC to implement the specific cap on Alltel.

The interpretation of the term "supersede" in the *Industry CETC Cap Order* to mean that the industry cap was to be implemented in lieu of the company-specific cap is also consistent with Commission precedent. In 2004, the Wireless Telecommunications Bureau proposed to delete a channel from a private land mobile radio station license in upstate New York based on an allegation that the station was causing interference to operations in Canada. After the Bureau later determined that it had initially failed to provide the licensee with the statutorily required notice and opportunity to respond, the Bureau issued a second order stating that its new order "*supercedes* a prior Order . . . in this proceeding . . . . "[63] By the Bureau's own admission, its first order in the proceeding was a legal nullity because of the Bureau's neglect of the statutory notice requirement. Thus, the second order could not have succeeded the first order prospectively, as of its effective date, because the first order was *never* valid. Rather, the Bureau used "supersede" to refer to a rule that succeeded an earlier ruling that would *never* be implemented, just as the Commission did in the *Industry CETC Cap Order*.

Another example arose in the Commission's examination of the obligations of satellite video providers to carry the digital high-definition ("HD") and multicast signals of local broadcasters in Alaska and Hawaii. The Commission reasoned as follows:

---

[62] *Industry CETC Cap Order*, 23 FCC Rcd at 8950 (statement of Commissioner Deborah Taylor Tate).

[63] Order of Modification, *Terry L. Pfeiffer, Licensee of Industrial/Business Private Land Mobile Radio Station WPWH301, Malone, New York*, 19 FCC Rcd 24422, ¶ 1 n.1 (WTB 2004).

> We also find unconvincing DIRECTV's reliance on section 338(j)'s general directive that the Commission prescribe requirements on satellite carriers that are "comparable" to the must carry requirements imposed on cable operators. . . . Under principles of statutory construction, section 338(a)(4)'s specific mandate requiring carriage of "the signals originating as digital signals" in Alaska and Hawaii *supercedes* the general comparability directive set forth in § 338(j).[64]

There is no indication that the Commission's analysis was tied to the temporal order in which sections 338(a)(4) and 338(j) took effect. Rather, the Commission's point was simply that, because the specific trumps the general, section 338(a)(4) controlled the case. Here, too, the Commission used "supersede" to describe a situation where one requirement would be applied and the other requirement would not, even though they were both valid requirements.

USAC apparently believes that it must implement the company-specific caps for the interim periods because the *Industry CETC Cap Order*, as a rulemaking decision, can operate prospectively only.[65] That statement, however, is not dispositive here. The Alltel-specific cap had never been implemented and USAC was told not to implement it. Interpreting the Commission's decision to preclude USAC from implementing the Alltel-specific caps thus does not constitute impermissible retroactive rulemaking. Such an interpretation does not change "the past legal consequences of *past* actions,"[66] since the cap had not yet been implemented. It does

---

[64] Report and Order, *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd 14242, ¶ 16 (2005) (emphasis added; internal citations omitted). In this excerpt and others, the Commission's original spelling of "supersede" (with a "c") has been retained.

[65] *See* USAC Aug. 19 Letter at 5 ("USAC believes that it is required to implement the orders for AT&T and Alltel company-specific caps for the time period each respective order was in effect until the date it was superseded by FCC 08-122, because the CETC industry-wide cap was effective prospectively and did not state that it superseded the company-specific caps retroactively.").

[66] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 219 (1988) (Scalia, J, concurring) (emphasis added).

not "make past behavior *unlawful* or otherwise impose a *penalty* for past actions,"[67] which is necessary for retroactive rulemaking. Moreover, the Supreme Court has recognized that "the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one" by applying the new rule instead of the old.[68] These considerations support interpreting the industry cap as barring USAC from implementing the company-specific cap once it was superseded by the industry cap.

C. It Would be Punitive and Inconsistent with Fundamental Universal Service Principles to Rescind Support That Alltel Has Already Spent on Providing Supported Services

In formulating its guidance to USAC, the Commission also must consider fundamental fairness and basic universal service principles. Alltel has already expended nearly all of the high-cost support funds it has received – including the payments received for the period between the effective dates of the Alltel-specific cap and the industry-wide cap – "for the provision, maintenance, and upgrading of facilities and services for which the support is intended," as required by law.[69] Alltel (and other ETCs) are required to prepare and file annual compliance plans with the Commission and state commissions for using universal service support to improve network and service quality.[70] Commission rules require ETCs to expend the support they receive in the designated areas. In accordance with those rules, the *Industry CETC Cap Order* and Commission staff's advice, Alltel's October 1, 2008, compliance filings stated that it would spend the full, uncapped amount of funding for 2008. They also provided evidence that Alltel spent the full uncapped amounts during 2007 for the provision, maintenance, and upgrading of

[67] *DirectTV, Inc. v. FCC,* 110 F.3d 816, 825 (D.C. Cir. 1997) (emphasis added; internal quotation marks omitted).

[68] *Landgraf v. USI Film Products,* 511 U.S. 244, 276 n.30 (1994).

[69] 47 U.S.C. § 254(e).

[70] *See* 47 C.F.R. § 54.209(a)(1).

the facilities and services for which the support was intended in the designated service areas. Alltel's October 1, 2009, compliance filings demonstrated that, with one exception involving support to one reservation in South Dakota, amounting to only 0.04% of the total support Alltel received, during 2008 Alltel spent the full, uncapped amount of funding in the designated service areas. Alltel has made similar filings with and commitments to state commissions. To be sure, if the *ALLTEL-Atlantis Order* had been implemented prior to the *Industry CETC Cap Order*, the company might have been able to adjust its use of funds accordingly. But USAC never did so – and was in fact directed not to. Alltel accordingly spent the funds it received – as it was required to do.

It would be senselessly punitive now to permit USAC to claw back high-cost support funds retroactively, after the funds have been spent. The high-cost program is based on the fundamental concept that, in return for support, eligible carriers will use that support to provide all of the services the Commission has decided should be supported. While ETCs must expend the support they receive in the designated area, they are not required to spend <u>more</u> than the amount they receive. USAC's request would, however, have that effect. Since Alltel spent nearly all of the high-cost support USAC provided, that money is no longer available to "return" to USAC. Instead, Verizon Wireless, as successor to Alltel, would have to pay that money to USAC, leaving it materially worse off than if it had never applied for the money in the first place. Far from being made whole, Verizon Wireless would be directly damaged by having to incur the loss of funds that had long ago been spent. That result would not be consistent with the high-cost program's requirements or its goals.

Directing USAC to rescind support for the interim period also would be violate the principle that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another."[71] The company-specific caps singled out only two CETCs for unfavorable treatment. Thus, the implementation of the company-specific caps would place Alltel at a competitive disadvantage relative to other CETCs that were not capped during that period. There is every indication that the Commission, when it adopted the industry cap, intended to avoid this result.[72] And there is no reason today to impose such a senselessly punitive, retroactive outcome. That result would also conflict with Congress's direction that universal service support flows be "specific and predictable,"[73] given that it would arbitrarily and suddenly reduce support flows.

By confirming that, by "superseding" the company-specific caps, the Commission withdrew USAC's authority to implement the company-specific caps, the Commission can avoid an outcome that is both needlessly and retroactively punitive, as well as contrary to fundamental universal service principles. It should therefore provide direction to USAC that is both consistent with the Commission's intentions and the most equitable outcome.

D. At a Minimum the Commission Should Waive Implementation of the Alltel Cap

If the Commission nonetheless concludes that the *Industry CETC Cap Order* did not supersede the industry-specific caps for the period at issue, it should waive the application of the company-specific cap *nunc pro tunc*. The Commission may waive a requirement for "good cause shown."[74] A waiver is appropriate "if special circumstances warrant a deviation from the

[71] First Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 47 (1997) (subsequent history omitted); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000).

[72] *See supra* Section V.B.

[73] 47 U.S.C. § 254(b)(5).

[74] 47 C.F.R. § 1.3.

general rule and such deviation will serve the public interest."[75] In considering waiver requests, the Commission may "take into account considerations of hardship, equity, or more effective implementation of overall policy."[76]

The Commission has in the past eliminated merger conditions in light of changed circumstances[77] or in cases where the merger conditions were no longer warranted.[78] Here, the circumstances substantially changed since the adoption (and before the implementation) of the Alltel-specific cap – specifically, the Commission imposed an industry-wide CETC cap, which better serves the goal that the Alltel-specific cap was intended to advance. Moreover, the imposition of the industry-wide cap obviates any need for the Alltel-specific cap. The Commission has achieved its objective in controlling growth of the high-cost fund far more comprehensively by imposing a limit on the total support paid to CETCs. Finally, considerations of hardship and inequity support relieving Alltel of post-hoc implementation of the Alltel-specific cap which would, as discussed above, result in forced disgorgement of universal service

---

[75] *Northeast Cellular Tel. v. FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[76] *See WAIT Radio v. FCC,* 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[77] *See, e.g.,* Order, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, 20 FCC Rcd 19795 (2005) (eliminating a divestiture condition in light of new evidence that no other provider was available to serve the subject customers).

[78] *See, e.g.,* Report and Order in WC Docket No. 03-228, Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337, *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates; Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger Order*, 19 FCC Rcd 5102 (2004); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee; Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS*, 18 FCC Rcd 16835 (2003).

payments that Alltel already spent on the provision of the supported services, and disadvantage Alltel vis-à-vis other CETCs.[79]

VI. ETCS ARE NOT REQUIRED TO SEPARATELY ADVERTISE EACH SUPPORTED SERVICE AND FUNCTIONALITY ENUMERATED IN 47 C.F.R. § 54.101

Finally, USAC seeks guidance on the meaning of 47 C.F.R. § 54.201(d)(2), which implements 47 U.S.C. § 214(e)(1)(B) and requires ETCs to "[a]dvertise the availability of [supported] services and the charges therefore using media of general distribution."[80] In particular, USAC asks whether ETCs must separately advertise the availability of each of the nine supported "services or functionalities" identified in 47 C.F.R. § 54.101, or whether instead it is sufficient to advertise the availability of local telephone service.[81] There is no requirement to advertise separately the availability of each of the "services" and "functionalities" listed in Rule 54.101. Instead, advertising the availability of local telephone service is amply sufficient to meet the requirements of the rule.

First, a requirement to advertise each specific "service" and "functionality" identified in Rule 54.101 would make no sense. The advertising requirement in the statute and Commission rules was intended to ensure that potential customers of supported services are aware of the options available to them. But Rule 54.101 includes specific services and functionalities that either have no meaning to customers or are necessarily subsumed within the term "local telephone service." It refers, for example, to "dual tone multi-frequency," which is a "method of signaling that facilitates the transportation of signaling through the network, shortening call set-

[79] *See supra* Section V.C.

[80] 47 C.F.R. § 54.201(d)(2); *see* 47 U.S.C. § 214(e)(1)(B).

[81] *See* USAC Aug. 21 Letter at 2.

up time."[82] It discusses "single-party service or its functional equivalent," which means that "users . . . have exclusive use of a wireline subscriber loop or access line for each call placed."[83] It also addresses "access" to "emergency services," "interexchange service," "operator services," "directory assistance," and "toll-limitation."[84] These are all features that are commonly understood to be part of "local telephone service," and requiring ETCs to separately identify all of them would serve only to confuse consumers. Again, the point of the advertising obligation is to *inform* customers. Requiring ETCs to list meaningless terms would limit the effectiveness of their advertising and frustrate the purpose of the requirement.

Second, and in any event, a requirement to list separately each service or functionality identified in Rule 54.101 cannot be gleaned from the text of the relevant rules. Rule 54.201 refers to "the services that are supported by federal universal service support mechanisms," and then states that ETCs must "[a]dvertise the availability of such services and the charges therefore using media of general distribution."[85] Rule 54.101, however, refers not just to supported "services," but to "services *or functionalities*."[86] There is a disjunction – between, on the one hand, Rule 54.201's mandate to advertise supported "services," and, on the other, Rule 54.101's identification of "services" and "functionalities." It follows from this that Rule 54.201 does not by its terms require ETCs to separately identify each specific "service" and "functionality" listed

---

[82] 47 C.F.R. § 54.101(a)(3).

[83] *Id.* § 54.101(a)(4).

[84] *Id.* § 54.101(a)(5)-(9).

[85] *Id.* § 54.201(d)(1)-(2).

[86] *Id.* § 54.101(a) (emphasis added).

in Rule 54.101 in advertising "the availability" of supported services in the service area for which it has been designated.[87]

Finally, there is nothing in Commission precedent to suggest the advertising requirement extends to each service and functionality listed in Rule 54.101. On the contrary, the Commission routinely designates carriers as ETCs in specific service areas – and in so doing specifically finds that they "satisf[y] the requirement of section 214(e)(1)(B) to advertise the availability of the supported services" – without any showing that the carrier intends to (or does) specifically list each of the Rule 54.101 services and functionalities in its advertisements.[88] Consistent with this precedent, the Commission should advise USAC that Commission rules do not require ETCs to specifically advertise each of the services and functionalities listed in Rule 54.101.

VII. CONCLUSION

The Commission should promptly adopt and implement a numbers-based universal service contribution system. A numbers-based system would establish an objective standard for

---

[87] *Cf. Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted, alterations in original).

[88] *Compare, e.g.,* Order, *Virgin Mobile USA, L.P. Petition for Forbearance,* 24 FCC Rcd 3381, ¶ 36 (2009) *with, e.g.,* Petition for Designation as an Eligible Telecommunications Carrier in the State of New York at 12, CC Docket No. 96-45 (FCC filed Dec. 5, 2007) (describing company's practice of "advertis[ing] the availability of its services through newspapers, magazines, radio, the Internet, and billboards"). *Compare also* Order, *Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah*, 22 FCC Rcd 2479, ¶ 20 (2007) ("SBI has demonstrated that it satisfies the requirement of section 214(e)(1)(B) of the Act to advertise the availability of the supported services") *with* Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah at 12, CC Docket No. 96-45 (FCC filed May 24, 2002) ("SBI currently advertises its wireless services through several different media. SBI will use media of general distribution that it currently employs to advertise its universal service offerings throughout the service area designated by the FCC. SBI will comply with all form and content requirements . . . ."). *See also, e.g.,* Order, *Virginia PCS Alliance, L.C. and Richmond 20 MHz LLC d/b/a Ntelos*, 20 FCC Rcd 10716, ¶ 14 (2005) (and sources cited therein); Memorandum Opinion and Order, *Designation of Fort Mojave Telecommunications, Inc., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, AAD/USB File No. 98-28, DA 98-392, ¶ 13 (CCB rel. Feb. 27, 1998) (and sources cited therein).

determining who contributes to the USF and how much, thus eliminating the uncertainty that now characterizes USF funding and making the fund sustainable in the broadband era. Pending such reform, the Commission should inform USAC (1) that carriers should take reasonable steps to approximate the retail revenue associated with prepaid calling cards in those instances where they are unable to ascertain the retail purchase price; (2) that services are to be assessed based on whether they meet the statutory definition of "telecommunications service," not on whether they incorporate "Frame Relay" or "ATM" technologies or can be labeled a "VPN"; (3) that company-specific high-cost caps should not be implemented prior to the effective date of the industry-wide interim cap on competitive high-cost support; and (4) that the advertising requirement in 47 C.F.R. 54.201(d) does not require ETCs to separately advertise each of the specific services and functionalities listed in 47 C.F.R. § 54.101.

Respectfully submitted,

/s/ Chris Miller

Michael E. Glover,
Of Counsel

Karen Zacharia
Christopher M. Miller
VERIZON
1320 North Courthouse Road – 9th Floor
Arlington, VA 22201-2909
(703) 351-3071

Colin Stretch
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W. – Suite 400
Washington, D.C. 20036
(202) 326-7968

John T. Scott, III
Tamara L. Preiss
VERIZON WIRELESS
1300 I Street, NW – Suite 400 West
Washington, D.C. 20005
(202) 589-3760

Counsel for Verizon and Verizon Wireless

October 28, 2009