

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

COMMENTS OF RURAL CELLULAR ASSOCIATION

Rural Cellular Association (“RCA”),¹ by counsel, hereby replies to comments filed in response to the FCC’s Public Notice announcing the request by the Universal Service Administrative Company (“USAC”) for guidance on certain issues relating to the Universal Service Fund (“USF”).²

I. INTRODUCTION

RCA commends the FCC and USAC for moving to bring clarity and certainty to several important items relating to the USF. RCA agrees with the dominant theme running through the filed comments: that regulatory actions must be undertaken on a going-forward basis, and that retroactive application of new requirements would violate fundamental tenets of administrative law and basic concepts of fairness. RCA joins with the vast majority of commenters, who sensibly argue that the FCC’s high-cost and low-income USF document retention requirements

¹ RCA is an association representing the interests of nearly 100 regional and rural wireless licensees providing commercial services to subscribers throughout the nation and licensed to serve more than 80 percent of the country. Most of RCA’s members serve fewer than 500,000 customers. Several of RCA’s members have received eligible telecommunications carrier (“ETC”) status and are currently receiving high-cost support in numerous states, including Wisconsin, Nebraska, Oklahoma, Illinois, North Carolina, Wyoming, Montana, Texas, Iowa, Missouri, Kansas, Mississippi, Alabama, and Kentucky.

² See *Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company*, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, FCC Public Notice, DA 09-2117 (rel. Sept. 28, 2009).

must not be applied to documentation that was created or collected before the existence of the new rule. RCA also concurs with the virtually unanimous opinion of commenters that the USF rules do not require carriers to list separately each support service and functionality, and that any decision to require such advertising should not be applied retroactively. Finally, RCA supports the position taken by the majority of commenters in opposition to the retroactive application of the AT&T and ALLTEL caps.

II. DISCUSSION

A. **The Commission Should Clarify That the High-Cost USF Document Retention Rules Apply Only to Documentation Created or Collected Subsequent to the Effective Date of the Rules.**

RCA agrees with the overwhelming majority of commenters that the Commission's document retention rules for high-cost support found in 47 C.F.R. Section 54.202(e) ("Document Retention Rules") apply only on a going-forward basis.³ As several commenters correctly pointed out, the Administrative Procedure Act generally disfavors retroactive application of rules absent express statutory authority, and there was no such authority here.⁴ Nor were the Document Retention Rules simply the application or clarification of existing rules to particular facts; rather, they were an entirely new set of requirements, as evidenced by the Commission's statement that "We *will* require..."⁵ Retroactive application of the rules would also violate

³ See, e.g., National Telecommunications Cooperative Association ("NTCA") comments at p. 6; AT&T Inc. ("AT&T") comments at pp. 23-25; Rural Telecommunications Group ("RTG") comments at pp. 3-4; Independent Telephone and Telecommunications Alliance ("ITTA") comments at pp. 4-8; Nebraska Rural Independent Companies ("NRIC") comments at pp. 5-6; Sprint Nextel comments at pp. 3-4; TCA comments at p. 5; National Exchange Carrier Association ("NECA") comments at p. 8; OPASTCO comments at p. 4.

⁴ See, e.g., NRIC comments at p. 6; ITTA comments at pp. 4-5; AT&T comments at p. 25; NECA comments at pp. 4-5; Sprint Nextel comments at pp. 2-3.

⁵ *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight* (WC Docket No. 05-195); *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45); *Schools and Libraries Universal Service Support Mechanism* (CC Docket No. 02-6); *Rural Health Care Support Mechanism* (WC Docket No. 02-60); *Lifeline and Link-Up* (WC Docket No. 03-109); *Changes to the Board of Directors for the National Exchange Carrier Association, Inc.* (CC Docket No. 97-21); *Report and Order*, FCC 07-150, at para. 24 (2007).

settled expectations, unfairly punishing carriers for being out of compliance with requirements that did not exist at the time the relevant documents were created or collected.⁶

Therefore, RCA urges the Commission to clarify that the Document Retention Rules apply on a going-forward basis only – that is, only to documents created or collected by carriers on or after the effective date of those rules. The Commission should also vacate any audit findings that are grounded in the application of those rules to documentation created or collection prior to that date.⁷

B. The Commission Should Clarify That the USF Rules Do Not Require Carriers to List Each Supported Service and Functionality.

RCA agrees with those commenters pointing out that the statute and the FCC’s rules do not require advertisements to set forth an itemized list of the supported services.⁸ Both require that carriers “advertise the availability of such services and the charges therefor using media of general distribution.”⁹ Neither the statute nor the rules state that each service must be advertised separately. RCA is unaware of any carrier that has done so. Indeed, in response to a request by undersigned counsel in connection with a USF audit, USAC was unable to produce any examples of advertisements by any ETC, incumbent or competitive, that itemized the supported services and functionalities and lists a charge for each.

Several commenters correctly note that the supported services and functionalities listed in 47 C.F.R. Section 54.201 comprise what consumers understand to be local telephone service.¹⁰ If the rules did require advertisements to include each supported service and an associated charge for each,

⁶ See, e.g., NTCA comments at p. 6; ITTA comments at p. 8; NECA comments at p. 8.

⁷ See ITTA comments at p. 8.

⁸ See, e.g., AT&T comments at p. 28; NRIC comments at p. 4; Sprint Nextel comments at p. 2.

⁹ 47 U.S.C. Section 214(e)(1)(B); 47 C.F.R. Section 54.201(d)(2).

¹⁰ See, e.g., NRIC comments at p. 4; TCA comments at p. 2; ITTA comments at p. 11; OPASTCO comments at p. 8.

significant customer confusion would result.¹¹ Some of the supported services and functionalities, such as DTMF signaling, are meaningless to most consumers. Moreover, even to the extent they can be understood, listing them separately would mislead consumers by creating the impression that they may be selected individually. Customers viewing such an advertisement might seek to take service “a la carte” believing they can opt out of “services” they do not desire or understand.

Under any reasonable reading of the statute and the rule, a carrier must advertise the availability of telephone service that provides the services that are supported by the program. Should the Commission nonetheless determine that carriers are required to enumerate each supported service and functionality in their advertisements, it should not take action against companies that have not broken out the services in their advertisements to date. Because the statute and rules do not explicitly state that each service and functionality must be listed, enforcement of a separate listing requirement would unfairly punish carriers under a standard of which they could not reasonably have been aware.

C. If the AT&T and ALLTEL Caps are Implemented Retroactively, the March 2008 Interim Cap Amounts Must Not Be Affected.

RCA takes no position on whether the caps adopted as conditions in the orders approving the AT&T and ALLTEL mergers in 2007 should be implemented retroactively. However, if they are, care should be taken to avoid a negative effect on other carriers’ capped support.

As AT&T notes in its comments, it is unclear why the FCC instructed USAC not to implement those carrier-specific caps when it appeared USAC was prepared to do so.¹² Sprint Nextel notes that the caps were adopted as merger conditions and no waiver of those conditions has been granted.¹³ Yet, there is a plausible argument that those caps were superseded by the

¹¹ See, e.g., NTCA comments at p. 5; AT&T comments at p. 29; RTG comments at pp. 2-3; Sprint Nextel comments at p. 2; TCA comments at p. 2.

¹² See AT&T comments at p. 26.

¹³ See Sprint Nextel comments at p. 5.

Commission's adoption of the interim cap on competitive ETC support, which took effect August 1, 2008.¹⁴

If the Commission determines that the carrier-specific caps should be implemented retroactively to the periods preceding the effective date of the industry-wide cap, RCA urges the Commission to do so in a manner that avoids harm to other carriers and their customers. Specifically, absent corrective action by the FCC, retroactive implementation of the carrier-specific caps would significantly reduce the total support available to competitive ETCs in several states in March 2008, which served as the baseline from which capped statewide amounts are calculated under the interim cap. This would have the effect of further reducing the support available to competitive ETCs under the cap, resulting in large negative adjustments to current and prior-period support.

Such a result would be unfair because these support reductions would be visited upon carriers that were not privy to the transactions approved in the AT&T and ALLTEL merger orders. Unlike AT&T and ALLTEL, these carriers did not negotiate the support reductions in exchange for the benefits of merging. As such, they should not be subjected to "collateral damage" from the conditions negotiated by AT&T and ALLTEL, which would significantly affect unrelated carriers' ability to comply with their ETC obligations.

Accordingly, should the Commission determine that the carrier-specific caps should be implemented retroactively, RCA urges the Commission to instruct USAC to do so in a manner that does not change the March 2008 amounts forming the baseline for the industry-wide cap currently in effect. This is consistent with RCA's position, in response to the Corr Wireless

¹⁴ See Verizon Wireless comments at pp. 19-25; RTG comments at p. 4.

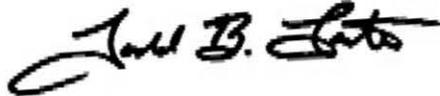
request for review, that the March 2008 cap amounts may not, and should not, be altered by actions taken in unrelated proceedings.¹⁵

III. CONCLUSION

RCA urges the Commission to provide USAC with guidance as set forth above.

Respectfully submitted,

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¹⁵ Request of Corr Wireless Communications, LLC, for Review of a Competitive Eligible Telecommunications Carrier High-Cost Support Decision of the Universal Service Administrative Company, CC Docket No. 96-45, WC Docket No. 05-337, Comments of Rural Cellular Association at pp. 5-6 (filed May 26, 2009).