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

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

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF SOUTHERNLINC WIRELESS AND THE UNIVERSAL SERVICE FOR AMERICA COALITION

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Pursuant to Section 1.429 of the Federal Communication Commission's (the "Commission") rules,[1] Southern Communications Services, Inc. d/b/a SouthernLINC Wireless and the Universal Service for America Coalition[2] (jointly, the "Petitioners") respectfully submit this Petition for Partial Reconsideration of the Commission's Order in the above-captioned proceeding reserving universal service contributions for use at an unspecified future date for unspecified purposes.[3]

In its well-intentioned zeal to implement the *National Broadband Plan*, the Commission has put the cart before the horse and strayed from the requirements of the Communications Act of 1934, as amended (the "Act"). In so doing, the Commission risks undermining its efforts to implement sustainable universal service reform and inciting years of litigation that would slow broadband deployment by creating regulatory uncertainty. For this reason, the Petitioners respectfully urge the Commission both (1) to reconsider the portion of the *Corr Wireless Order*

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1 47 C.F.R. §1.429.

2 The USA Coalition consists of three of the nation's leading rural providers of wireless services, and is dedicated to advancing regulatory policies that will enable Americans to enjoy the full promise and potential of wireless communications, regardless of where they live and work. The members of the USA Coalition include Mobi PCS d/b/a Coral Wireless LLC, SouthernLINC Wireless, and Thumb Cellular LLC.

3 *In the Matter of High Cost Universal Service Support; Federal-State Joint Board on Universal Service; Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, FCC 10-155 (rel. Sept. 3, 2010) ("*Corr Wireless Order*").

that raises revenue for unspecified uses at an unspecified time and (2) to establish a firm legal foundation for universal service reform rather than rushing ahead merely to meet arbitrary and non-binding deadlines set forth in the *National Broadband Plan*.

Rather than continuing to rush headlong down an uncertain path, the Commission first should focus on determining the jurisdictional theory upon which it will base comprehensive universal service reform and adopt any reclassification measures it deems necessary. After the Commission has settled the significant questions regarding the scope of its statutory authority, the agency should develop reform proposals that are fully consistent with the requirements of the Act as it stands *today* (rather than as it ideally should be or as Congress indicates it might be at some point in the future), and then the Commission should provide the public with notice and opportunity to comment on these proposals. Finally, the Commission should determine the appropriate transition measures, which can only be done after the Commission has determined the replacement distribution and contribution mechanisms.

With respect to the *Corr Wireless Order* itself, the Petitioners respectfully request that the Commission rescind its decision: (1) to establish a pool of funds to be used for an unspecified purpose at an undetermined point in the future; (2) to waive section 54.709(b) of the Commission's rules on an interim basis; and (3) to issue an NPRM requesting comment on making the interim waiver of section 54.709(b) of the Commission's rules a permanent amendment. Rescinding the decision would mean that each CETC will be entitled to the full amount of support determined by the identical support rule, reduced only as necessary to ensure that the overall amount of support distributed in any State does not exceed the level of support that CETCs in the State were eligible to receive during March 2008, on an annualized basis, as required by the Interim Cap. On reconsideration, the Commission should grant the *Corr Wireless Request for Review* in its entirety.

I. INTRODUCTION AND SUMMARY

In the *Corr Wireless Order*, the Commission directed the Universal Service Administrative Company ("USAC") to reserve universal service support funds forfeited by Verizon and Sprint Nextel in connection with their voluntary merger commitments as a "*potential* down payment on *proposed* broadband universal service reforms."[4] The Commission also directed USAC to continue to calculate competitive eligible telecommunication carrier ("CETC") universal service support under legacy rules, independent of the merger commitments, and then to reserve the recaptured funds in order to support potential future Commission proposals that have yet to be defined.[5] Taken together, the effect of the *Corr Wireless Order* is to use existing universal service assessments to establish a pool of funds for an unspecified use to be determined at an undefined point in the future.

The Commission lacks the authority under the Act to establish a pool of funds to be used for unspecified purposes at an undetermined point in the future. Indeed, the Act, which originated in the Senate, could not authorize the Commission to do so without itself violating the Origination and Taxing Clauses of the United States Constitution. The Commission's assurances, no matter how well-intentioned, that the funds eventually will be used for permissible purposes cannot cure this fatal defect. Otherwise, the restrictions imposed by the United States Constitution would be rendered meaningless because every measure that raises revenues or imposes a tax could be justified merely by claiming that the funds eventually will be used for lawful purposes.

The Commission's own assurances highlight the fatal defect in the *Corr Wireless Order.* The "reclaimed funds" are to be reserved as a "*potential* down payment on *proposed* broadband

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4 *Corr Wireless Order*, ¶ 1 (emphasis added); *see also id.*, ¶ 20.

5 *Id.*, ¶ 21.

universal service reforms as recommended by the *National Broadband Plan* . . . ."[6] However, the Commission has yet to request comment on any of these proposed broadband reforms and, as Chairman Genachowski himself has acknowledged, the Commission may well lack statutory authority to adopt the reforms recommended by the *National Broadband Plan.*[7] If history is any indication, years -- even a decade -- could pass before any of the reforms proposed by the *National Broadband Plan* are adopted, particularly in light of the considerable doubt regarding the Commission's authority to adopt the proposals. In the interim, technology and views regarding broadband policy will likely evolve, and many of the customers and companies who contributed to the fund under the current rules to promote universal service of the existing network may no longer be using this network at all.

Indeed, what would happen to the "reserved" funds if the proposals identified in the *Corr Wireless Order* were never adopted? Would the funds be transferred to the general treasury? Would they be refunded to the companies that made the contributions and, if so, could these companies keep the refunds or would they have to pass them through to the customers to whom the contributions were passed through originally (and how could anyone identify these customers)? Alternatively, would the funds be distributed to the companies that had CETC status at the time the funds were "reserved" or, instead, to those that have CETC status at the time the funds eventually are distributed? These legal and administrative complexities illustrate why the Commission must use universal service contributions solely to fund current expenses of specific universal service programs that exist at the time the contributions are made.

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[6] *Id.*, ¶ 1 (emphasis added). The *Corr Wireless Order* would be fatally flawed even if funds were reserved for potential future use by unspecified existing universal service programs.

[7] Letter dated July 26, 2010 from J. Genachowski, Chairman of the FCC, to John Dingell, Chairman Emeritus, House Committee on Energy and Commerce.

The Commission's universal service rules, including section 54.709,[8] were designed both to prevent the types of complexities that the *Corr Wireless Order* creates and, more importantly, to ensure that the mandatory contribution requirement constitutes a lawful fee to fund particular programs rather than an unlawful revenue raising measure or tax, which the Act could not authorize consistent with the Constitution. For example, section 54.709(a) requires the contribution factor to be determined based on the ratio of total projected quarterly ***expenses*** of ***explicitly enumerated support mechanisms and administrative costs*** to the total projected collected revenues, net of projected contributions, while section 54.709(b) requires any excess payments to be carried forward to the following quarter and taken into consideration for the calculation of the contribution factor for that quarter.[9] Unfortunately, the Commission retroactively amended section 54.709(a) in the *Corr Wireless Order* without providing notice or opportunity to comment -- or even acknowledging that it had done so -- by requiring the contribution factor to be determined based not only on the ***expenses*** of ***explicitly enumerated support mechanisms and administrative costs*** but also on the ***newly created pool of "recaptured" funds***, which is neither an expense nor associated with any of the explicitly enumerated support mechanisms. This amendment, as well as the Commission's decision to waive section 54.709(b), lies outside the Commission's authority under the Act and was adopted in violation of the Administrative Procedures Act ("APA").[10] Moreover, neither the amendment nor the creation of a broadband fund pool could have been foreseen by anyone during the notice and comment period on the *Corr Wireless Request for Review* since the *National Broadband Plan* was released nearly a year after the comment cycle closed.

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8 47 C.F.R. § 54.709.

9 *See id.*, § 54.709(a)-(b).

10 5 U.S.C. § 500 *et seq.*

The Act also requires the Commission to ensure that the universal service support distribution mechanism is "specific, predictable and sufficient."[11] The Commission has concluded that the current distribution mechanism -- the identical support rule -- is the legal means by which the agency is satisfying this statutory mandate, and it will remain the only means for doing so until the Commission formally adopts a replacement distribution mechanism.[12] Only after the Commission has adopted a specific and predictable replacement distribution mechanism will the agency be able to (1) identify which facts are relevant for determining the necessary level of support to meet the Act's "sufficiency" mandate and (2) analyze the relevant facts on a study area-by-study area basis to determine whether the current level of support needs to be increased or reduced over a rational period of time to meet the level of support that is "sufficient" under the new distribution mechanism. Until the Commission has taken all of these steps, there will be no legal standard or factual basis for concluding that the amount of support determined by the identical support rule is too high. Accordingly, the *Corr Wireless Order* is arbitrary and capricious and otherwise inconsistent with the law to the extent the Commission's decision not to redistribute "recaptured" amounts to CETCs results in a CETC receiving less support than the amount to which it is entitled under the identical support rule, as limited only by the Interim Cap.[13]

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11 47 U.S.C. § 254(b)(5).

12 Although the Commission has requested comment on replacing the identical support rule with an alternative distribution mechanism (*e.g.*, reverse auctions), the Commission has yet to eliminate the identical support rule or adopt any replacement mechanism.

13 *See High -Cost Universal Service Support; Federal-State Joint Board on Universal Service*, 23 FCC Rcd 8834 (2008) (imposing the "Interim Cap").

II. THE CORR WIRELESS ORDER IS *ULTRA VIRES* BECAUSE IT ESTABLISHES A POOL OF FUNDS TO BE USED FOR AN UNSPECIFIED PURPOSE AT AN UNDETERMINED POINT IN THE FUTURE.

A. The Act Could Not Authorize the Commission to Establish a Pool of Funds Without Violating the Origination Clause of the United States Constitution

Article I of the United States Constitution provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . . ."[14] Both the Communications Act of 1934 and the Telecommunications Act of 1996 (collectively, the "Act") originated in the Senate, and thus the Act cannot authorize the Commission to raise revenue without violating the Origination Clause.[15]

In *Texas Office of Public Utility Counsel v. FCC*, the United States Court of Appeals for the Fifth Circuit ruled that the universal service provisions of the Act do not violate the Origination Clause because the Act authorizes the Commission to collect universal service contributions solely to fund "***particular program[s]*** supporting the expansion of, and increased access to, the public institutional telecommunications network" from carriers that directly benefit from that network.[16] The Court also concluded that the universal service provisions of the Act must be construed "narrowly to avoid raising these constitutional problems."[17] Accordingly, the Act cannot be liberally interpreted as permitting the Commission to raise revenue that is not designated to fund existing ***particular programs*** and, thus, does not establish a direct connection between the payors and the beneficiaries because there are no defined beneficiaries whatsoever.[18]

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14 U.S. CONST. art. I, § 7, cl. 1.

15 *See generally United States v. Munoz-Florez*, 495 U.S. 385, 397-98 (1990) (explaining the requirements of the Origination Clause); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*") (ruling that the extension of the universal service contribution requirement to paging carriers does not violate the requirements of the Origination Clause).

16 *TOPUC*, 183 F.3d at 427-28.

17 *Id.* at 440.

18 *See Munoz-Flores*, 495 U.S. at 399, 400 n.7.

B. The Act Could Not Authorize the Commission to Establish a Pool of Funds Without Violating the Taxing Clause of the United States Constitution

The Constitution prohibits Congress from abdicating or transferring to others, including the Commission, "the essential legislative functions with which it is thus vested."[19] Accordingly, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[20] These restrictions apply with particular force in the context of laws delegating the power to tax. The Taxing Clause of the United States Constitution provides that only Congress has "the Power To lay and collect Taxes."[21] Accordingly, Congress can authorize an agency to assess "fees," but Congress cannot delegate the authority to impose a "tax."[22] Moreover, an administrative agency may not unilaterally institute measures to raise revenue or impose taxes.[23] Therefore, the Commission may not interpret the Act, even if ambiguous, to confer the power to raise revenue or tax.[24]

The question of whether an agency action constitutes a "tax" or a "fee" depends upon the use of the collected funds.[25] The classic "tax" raises money that is contributed to a "general fund" and spent for the general benefit of the entire community.[26] The classic "fee," on the other hand, is incident to a voluntary act whereby a party voluntarily contributes funds in exchange for a grant that benefits the party paying the fee in a way "not shared by other members of society,"

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19 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (discussing Article I, section I of the United States Constitution).

20 *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 294, 409 (1928)) (emphasis in original).

21 U.S. CONST. art. I, § 8, cl. 1.

22 *See National Cable Television Ass'n, Inc. v. United States,* 415 U.S. 336, 340-41 (1976) ("*NCTA*").

23 *See id.* at 340-42; *Seafarers Int'l Union of N. America v. United States Coast Guard*, 81 F.3d 179, 183-86 (D.C. Cir. 1996).

24 *See NCTA*, 415 U.S. at 340-43.

25 *See id.* at 340.

26 *San Juan Cellular Tel. Co. v. Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992); *NCTA*, 415 U.S. at 340-341.

and the charges collected compensate the governmental agency for the expenses it incurs to provide those benefits.[27] Thus, courts differentiating "taxes" from "fees" in Taxing Clause jurisprudence "emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation."[28]

As it ruled with respect to the Origination Clause, the United States Court of Appeals for the Fifth Circuit has ruled that the universal service provisions of the Act must be construed "narrowly to avoid raising . . . constitutional problems" with the Taxing Clause.[29] Accordingly, the Act cannot be liberally interpreted as permitting the Commission to collect money for unspecified programs and unspecified uses because this type of fund pool cannot ensure that the parties who contribute to the pool will benefit from programs funded by the pool in a way "not shared by other members of society" because the beneficiaries have yet to be designated.[30]

C. The *Corr Wireless Order* Establishes A Pool Of Funds To Be Used For Unspecified Purposes At An Undetermined Point In The Future

The *Corr Wireless Order* establishes a pool of funds to be used for an unspecified purposes at an undetermined point in the future, explaining that the "reclaimed funds" are to be reserved as a "*potential* down payment on *proposed* broadband universal service reforms as recommended by the *National Broadband Plan* . . . ."[31] The Commission has yet to request comment on any of these proposed broadband reforms and, as Chairman Genachowski himself has acknowledged, the Commission may well lack statutory authority to adopt the reforms

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27 *NCTA*, 415 U.S. at 341; *see also Emerson College v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984).

28 *San Juan Cellular*, 967 F.2d at 685.

29 *TOPUC*, 183 F.3d at 440.

30 *NCTA*, 415 U.S. at 341; *see also Emerson College*, 462 N.E.2d at 1105.

31 *Corr Wireless Order*, ¶ 1 (ordering that "surrendered support be reserved as a *potential* down payment on *proposed* programs") (emphasis added); *see also id.*, ¶ 20.

recommended in the *National Broadband Plan* at this time.[32] In light of the significant questions about the Commission's authority to adopt the reforms recommended in the *National Broadband Plan*, the reforms may never be adopted.[33]

Setting revenues aside for "proposed" or "expected" purposes, as the Commission has done in the *Corr Wireless Order,* falls squarely within the definition of a "revenue raising" measure because the Commission has not yet adopted, or even formally proposed, the programs for which the revenues would be used. Similarly, the Commission cannot characterize the fund pool as a fee, rather than a tax, because there are no defined beneficiaries for the funds that the Commission is collecting.[34] A pool of funds to be used for an unspecified purpose at an undetermined point in the future, by definition, establishes no limits that a reviewing court could compare with the "intelligible principle" to which the Commission is directed to conform by the universal service provisions of the Act.[35]

The Commission's stated intent to use the funds for "lawful" purposes to be determined at a future date cannot cure these fatal defects. Otherwise, an agency could always offer the same justification for any revenue raising measure or tax without restriction by the Origination and Taxing Clauses, even though the agency could subsequently change its intentions or otherwise fail to use the funds for those stated purposes. Congress cannot even escape the

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32 Letter dated July 26, 2010 from Chairman Genachowski to Rep. Dingell, *supra* n.7.

33 *See, e.g., id.* ("As you are aware, I have a concern that the recent decision of the United States Court of Appeals for the D.C. Circuit, in *Comcast v. FCC*, has cast doubt on the legal framework that the Commission chose for broadband Internet services about a decade ago to achieve core broadband policies. These policies include reforming USF [and other Commission objectives].").

34 *NCTA*, 415 U.S. at 341.

35 *Whitman*, 531 U.S. at 472 ("[W]hen Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 294, 409 (1928)) (emphasis in original).

requirements of the Origination and Taxing Clauses by claiming that the funds eventually will be used for lawful purposes.[36] As the Fifth Circuit explained in *TOPUC*,

> an assessment on one group for the benefit of a completely unrelated group is how courts have distinguished taxes raised for general federal outlays from fees raised for specific programs. Otherwise, Congress could *always* avoid the Origination Clause requirement because, in theory, all revenue is raised to fund some 'particular program.'[37]

Without a particular existing program being funded, the courts cannot determine whether there is any connection between the group being assessed and the group benefiting from the assessment. Accordingly, not even Congress could authorize an agency to create a pool of funds for unspecified uses at an unspecified future date without running afoul of the Origination Clause and the Taxing Clause, and the Act does not do so. Therefore, the Commission lacks the authority under the Act to order that the "surrendered support be reserved as a *potential* down payment on *proposed* programs,"[38] and the *Corr Wireless Order* is unlawful, *ultra vires*, and in excess of the authority conferred on the Commission by the Act.

III. THE *CORR WIRELESS ORDER* RETROACTIVELY AMENDS THE COMMISSION'S RULES WITHOUT PROVIDING NOTICE AND OPPORTUNITY TO COMMENT

The *Corr Wireless Order* constitutes an abrupt change from past universal service rules and policies without the requisite notice and comment opportunity mandated by the APA.[39] Under the APA, federal agencies must publish "either the terms or substance of the proposed rule

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36 Just as no agency could cure an unconstitutional delegation of power by declining to exercise some of that power, no agency could cure an *ultra vires* order establishing a potential revenue raising or taxing mechanism merely by declining to use the mechanism to the full extent possible. *Cf. Whitman*, 531 U.S. at 473 ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. . . . Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

37 *TOPUC*, 183 F.3d at 428 n.56 (emphasis in original).

38 *Corr Wireless Order*, ¶ 1.

39 5 U.S.C. § 500 *et seq.* There is no dispute that the amendments at issue here "work substantive changes in prior regulations" and, thus, are "subject to the APA's procedures. *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). *See also Corr Wireless Order*, ¶ 8.

or a description of the subjects and issues involved."[40] The APA further requires that "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[41]

In interpreting these provisions, courts have held that if the substance of an agency's final rule strays too far from the description contained in the initial notice, the agency may have deprived interested persons of their statutory right to an opportunity to participate in the rulemaking.[42] The principles governing judicial review of notice-and-comment rulemaking are well established. As the Court of Appeals for the District of Columbia Circuit has explained:

> [n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. While an agency may promulgate final rules that differ from the proposed rule, a final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. The 'logical outgrowth' doctrine does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing, nor does it apply where interested parties would have had to divine the Agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.[43]

Here, the substance of the *Corr Wireless Order* strays too far from the issues raised by the *Corr Wireless Request for Review* and the description contained in the Commission's initial notice requesting comment on the *Corr Wireless Request for Review*.

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40 5 U.S.C. § 553(b)(3).

41 *Id.* § 553(c).

42 *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a logical outgrowth of the rule proposed.' The object, in short, is one of fair notice.") (*quoting National Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986); *citing United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) and *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974)).

43 *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (internal quotation marks, brackets, and citations omitted).

Prior to the *Corr Wireless Order*, the Commission's rules regarding calculation of the contribution factor and the requirement that USAC use all funds within the following quarter served the critical function of ensuring that the universal service fund is consistent with the requirements of the Act and the Origination and Taxing Clauses and the United States Constitution. Specifically, these rules ensured that the mandatory contribution requirement was a fee, rather than a measure to raise revenues or a tax, by (1) explicitly enumerating the expenses for which the contributions are used, (2) ensuring that contributions are no greater than necessary to fund those expenses,[44] and (3) requiring that any excess contributions be used to offset expenses in the following quarter.[45] These rules ensure that the universal service contribution and disbursement mechanisms function as a "pass-through" system, whereby contributions are expressly tied to expenses of particular programs, and any excess funds collected on an incidental basis are used to reduce the next quarter's contributions rather than "held in reserve" for use at some unspecified future time.

The "expenses" upon which the contribution factor is based were explicitly limited to four clearly delineated programs (in addition to administrative expenses): "for high-cost areas,

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[44] *See* 47 C.F.R. § 54.709(a)(2) (providing that "the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly ***expenses*** of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions. The Commission shall approve the Administrator's quarterly projected costs of the universal service support mechanisms, taking into account demand for support and administrative expenses. The total subject revenues shall be compiled by the Administrator based on information contained in the Telecommunications Reporting Worksheets described in §54.711(a).") (emphasis added).

[45] 47 C.F.R. § 54.709(b) (providing in relevant part that "[i]f the contributions received by the Administrator in a quarter exceed the amount of universal service support program contributions and administrative costs for that quarter, the excess payments will be carried forward to the following quarter. The contribution factors for the following quarter will take into consideration the projected costs of the support mechanisms for that quarter and the excess contributions carried over from the previous quarter.").

low-income consumers, schools and libraries, and rural health care providers."[46] There is no flexibility built into the current definition of expense to include a pool of funds reserved for use at an undefined time in the future for undefined purposes.[47] Any modification to section 54.709 of the Commission's rules in order to add new funding programs or different types of expenses constitutes a substantive rule change requiring notice and comment.

In the *Corr Wireless Order*, the Commission changed its rules to require calculation of the contribution factor "independent of the merger commitments and the projected disbursements for individual competitive ETCs" and to reserve any "reclaimed support" for "potential, proposed" programs.[48] Accordingly, the contribution factor must be calculated as if the pool of "reserved funds" that would have been paid to Verizon and Sprint is actually an expense as defined by section 54.709(a)(3) of the Commission's rules.[49] However, funds "reserved" for unspecified uses at unspecified points in the future are neither "expenses" in the general sense of the term nor any of the specific expenses explicitly enumerated in section 54.709(a)(3) of the Commission's rules. Thus, the *Corr Wireless Order* modified the manner in which the

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46 47 C.F.R. § 54.709(a)(3) (providing in relevant part that "***[t]otal projected expenses for the federal universal service support mechanisms*** for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factor and individual contributions. ***For each quarter, the Administrator must submit its projections of demand for the federal universal service support mechanisms for high-cost areas, low-income consumers, schools and libraries, and rural health care providers, respectively, and the basis for those projections,*** to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. For each quarter, the Administrator must submit its projections of ***administrative expenses for the high-cost mechanism, the low-income mechanism, the schools and libraries mechanism and the rural health care mechanism and the basis for those projections*** to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. Based on data submitted to the Administrator on the Telecommunications Reporting Worksheets, the Administrator must submit the total contribution base to the Office of the Managing Director at least thirty (30) days before the start of each quarter.") (emphasis added).

47 *Corr Wireless Order*, ¶ 20.

48 *Id.*, ¶ 21.

49 47 C.F.R. § 54.709(a)(3).

contribution factor is calculated and funds are distributed by treating the pool of "reserved" funds as if it were an expense under section 54.709(a) of the Commission's rules.

Moreover, by "reserving" surrendered funds for undefined future uses and changing the manner in which the contribution factor is calculated in order to implement the *National Broadband Plan*, the *Corr Wireless Order* effected significant rule changes that were not reasonably foreseeable when the Commission requested comment on the *Corr Wireless Request for Review* in early 2009. The public notice requesting comment on the *Corr Wireless Request for Review* that the Commission released on April 9, 2009 provided in relevant part as follows:

> Corr contends that USAC's decision not to include universal service high-cost support funds disclaimed by ALLTEL and Verizon in connection with their merger last year in the pool of funds available for distribution under the competitive eligible telecommunications carrier (ETC) interim cap is incorrect. Specifically, Corr argues that the Commission's actions in the Verizon-Alltel Merger Order and the Interim Cap Order do not indicate that the funding disclaimed by the Verizon-Alltel merger is not to go back into the competitive ETC capped pool. . . . Interested parties may file comments on or before May 11, 2009, and reply comments on or before May 26, 2009.[50]

Accordingly, the narrow question before the Commission was whether the Commission's then-existing rules and the Commission's *Verizon-Alltel Merger Order* and *Interim Cap Order* permitted USAC to withhold funds from the CETCs by reducing the level of the Interim Cap.

The Commission did not release the *National Broadband Plan* until March 16, 2010, nearly a year after comment was requested on the *Corr Wireless Request for Review*. Absent a crystal ball, no party could reasonably have foreseen that the Commission might interpret the *Corr Wireless Request for Review* in a manner that reserved funds for some as-yet undisclosed purpose pursuant to a *National Broadband Plan* that had yet to be written. Moreover, no party could reasonably have foreseen that the Commission might reserve funds for purposes that the

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50 "Comment Sought on Corr Wireless, LLC Request for Review of a Competitive Eligible Telecommunications Carrier High-Cost Support Decision of the Universal Service Administrative Company," *FCC Public Notice*, DA 09-805 (rel. Apr. 9, 2009).

Commission itself recognizes it may currently lack the authority to implement.[51] Unmoored from the reality of the existing statutory and regulatory framework, the standard of "reasonable foreseeability" under the APA would be unlimited and, thus, meaningless, because no party should have to foresee changes to the Commission's rules that do not reflect the requirements of the Act as it stands today but rather as the Commission wishes the Act were amended. Therefore, by adopting measures in the *Corr Wireless Order* that parties could not have imagined were possible at the time they commented on the *Corr Wireless Request for Review*, the Commission has violated the notice and comment requirements of the APA.

IV. THE *CORR WIRELESS ORDER* IS ARBITRARY AND CAPRICIOUS AND OTHERWISE INCONSISTENT WITH THE LAW

The Commission based its refusal to distribute the "surrendered" support to CETCs in accordance with the identical support rule upon its claim that "additional support" would not necessarily promote the goals of universal service (*i.e.*, the expansion of service) or otherwise "promote the public interest."[52] The conclusory statements upon which the Commission seeks to justify a significant change in its universal service rules and policies have no basis in law or fact. Accordingly, the rule and policy changes that the Commission adopted in the *Corr Wireless Order* are arbitrary and capricious.

With respect to the APA's prohibition of arbitrary and capricious agency actions,[53] the Supreme Court has stated that

> [t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the

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51 *See* Letter from Chairman Genachowski to Rep. Dingell, *supra* n.7.

52 *Id.*, ¶¶ 10, 11.

53 The APA, codified at 5 U.S.C. § 500 *et seq.*, provides in relevant part that, on a petition for review of an agency action, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706.

> agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: [w]e may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.[54]

In situations where "an agency has engaged in line-drawing determinations[,] . . . our review is necessarily deferential to agency expertise," but the agency's actions must still "not be 'patently unreasonable' or run counter to the evidence before the agency."[55] In the *Corr Wireless Order*, the Commission failed to articulate a satisfactory explanation for its action or articulate a rational connection between the facts found and the choice made.

The Act requires the Commission to ensure that the universal service support distribution mechanism is "specific, predictable and sufficient."[56] The Commission has concluded that the current distribution mechanism -- the identical support rule -- is the legal means by which the agency is satisfying this statutory mandate.[57] The Commission has yet to adopt a replacement for the identical support rule in order to determine whether support in any given study area is sufficient. Indeed, there is significant disagreement regarding the type of replacement mechanism that should be adopted and even the scope of the Commission's authority to adopt some of the proposed replacements. Until the Commission formally replaces the identical support rule, this is the standard that the Commission must follow, regardless of the policy

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54 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983) (internal quotation marks and citations omitted).

55 *Prometheus Radio Project v. FCC*, 373 F.3d. 372, 390 (3d Cir 2004) (citations omitted).

56 47 U.S.C. § 254(b)(5).

57 *See, e.g.*, 47 C.F.R. § 307.

preferences of any individual Commissioners. In short, the Commission has no legal basis -- or standard -- apart from the identical support rule for defining the level of support that is sufficient.

Only after the Commission has adopted a specific and predictable replacement distribution mechanism will the agency be able to (1) identify which facts are relevant for determining the necessary level of support to meet the Act's "sufficiency" mandate and (2) analyze the relevant facts on a study area-by-study area basis to determine whether the current level of support needs to be increased or reduced over a rational period of time to meet the level of support that is "sufficient" under the new distribution mechanism. Until the Commission has taken all of these steps, there will be no legal standard or factual basis for concluding that it has struck an appropriate balance between "the need for sufficient support against the need for a sustainable high-cost support mechanism."[58] Accordingly, aside from applying the identical support rule, the Commission currently has no way of knowing whether some areas are "sufficiently" funded, over-funded, or under-funded. Therefore, the *Corr Wireless Order* is arbitrary and capricious and otherwise inconsistent with the law to the extent the Commission's decision not to redistribute "recaptured" amounts to CETCs results in a CETC receiving less support than the amount to which it is entitled under the identical support rule.

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[58] *Corr Wireless Order*, ¶ 11. While the Commission does possess a significant degree of latitude to change its policies, it may only undertake such a change "as long as it provides a reasoned explanation for doing so." *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1317 (D.C. Cir. 1995). The Commission has failed to provide a reasoned explanation for changing its rules and policies in the *Corr Wireless Order*.

V. CONCLUSION

For the foregoing reasons, the Commission should rescind its decision: (1) to establish a pool of funds to be used for an unspecified purpose at an undetermined point in the future; (2) to waive section 54.709(b) of the Commission's rules on an interim basis; and (3) to issue an NPRM requesting comment on making the interim waiver of section 54.709(b) of the Commission's rules a permanent amendment. The Act and the APA require the Commission to continue calculating the contribution factor as required by the current rules, which means that each CETC will be entitled to the full amount of support determined by the identical support rule reduced only as necessary to ensure that the overall amount of support distributed in any state does not exceed the level of support that competitive CETCs in the state were eligible to receive during March 2008, on an annualized basis, as required by the Interim Cap. On reconsideration, the Commission should grant the *Corr Wireless Request for Review* in its entirety.

Respectfully submitted,

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