

**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
)	
Request for Review of Decision of Universal)	
Service Administrator by Corr Wireless)	
Communications, LLC)	

JOINT PETITION FOR RECONSIDERATION

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SUMMARY

In its *Corr Wireless Order* the Commission has made clear its desire to re-direct funds generated by the phase-down of universal service high-cost support imposed on Verizon Wireless and Sprint Nextel Corporation in the Verizon Wireless-Alltel and Sprint-Clearwire merger proceedings into the Commission's yet to be adopted programs for promoting the deployment of broadband services.

While the Petitioners understand the Commission's desire to pursue its broadband goals, and look forward to the opportunity to participate in the rulemaking proceedings that will further define and implement these goals, the Petitioners also demonstrate in this Joint Petition for Reconsideration that the Commission skipped steps and strained credulity in the *Order*, in its rush to shore up the funding for its broadband initiatives.

The Petition focuses on three fundamental defects in the *Corr Wireless Order* that warrant reconsideration by the Commission and rescission of some of the findings made and actions taken in the *Order*.

▪ **Option B.**—The Commission adopted two options that Verizon and Sprint may select in connection with the implementation of the required five-year phase-down of their high-cost support. (Sprint has since selected Option A, while Verizon has elected Option B.) Option B acts as a floating baseline, providing that Verizon's support will be recalculated each quarter based on current data relating to the number of the carrier's eligible service lines.

Although the Commission claims in the *Order* that Option B will not have any adverse impact on other competitive eligible telecommunications carriers, the fact is that increased line counts for Verizon in several states will enable Verizon to capture a higher portion of the capped support available for these states, with a resulting dollar-for-dollar reduction in support available

for other competitive ETCs. The Petition includes data that illustrates the effect of Option B in reducing the level of available high-cost support to other carriers.

The Commission adopted Option B without providing any notice and opportunity for comment, in violation of the Administrative Procedure Act. The Public Notice issued by the Commission, seeking comment on Corr Wireless Communications' request for review of a Universal Service Administrative Company decision refusing to redistribute to other competitive ETCs funds surrendered by Verizon and Sprint, made no mention that the Commission was even considering adoption of a baseline methodology, let alone a proposal to adopt Option B. This failure to provide proper notice wrongfully deprived other competitive ETCs, who will be harmed by the implementation of Option B, of an opportunity to express their views in the Corr Wireless proceeding.

■ **The Redistribution of Surrendered Support.**—Corr Wireless argued in its request for review of the USAC decision that high-cost support relinquished by Verizon and Sprint should be redistributed to other competitive ETCs because, when a participant in the high-cost fund mechanism leaves the pool, the share of high-cost funds available to remaining participants should increase.

The Commission rejected this argument, reasoning that, even though Verizon and Sprint were “voluntarily” giving up their high-cost support, they were not actually leaving the high-cost pool. Since Verizon and Sprint, under the Commission’s formulation, remained “eligible” for high-cost support—even after they agreed to give up all their support—the Commission concluded that the cap mechanism established in the *Interim Cap Order* does not require redistribution of the funds.

The problem with the Commission’s conclusion is that there is no reasonable basis for its view that Verizon and Sprint somehow should be treated as retaining their eligible status even as they surrender all their high-cost support. The Commission’s ascribing this ongoing eligible status to the two carriers is no more than a fiction that enables the Commission to avoid redistributing the surrendered funds to other competitive ETCs.

■ **The Broadband “Down Payment.”**—The Commission’s decision to reserve high-cost funds relinquished by Verizon and Sprint, as a down payment for the Commission’s proposed broadband reforms, suffers from the same deficiency that requires the rescission of Option B. The Commission’s decision regarding the disposition of the surrendered funds amounts to a “rule” for APA purposes, triggering notice and comment requirements that the Commission did not follow in the proceeding leading to its adoption of the *Corr Wireless Order*.

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Allied Wireless Communications Corp., Cellular South Licenses, Inc., Commnet Wireless, LLC, Corr Wireless Communications, L.L.C., East Kentucky Network, LLC d/b/a Appalachian Wireless, Leaco Rural Telephone Cooperative, Inc., MTPCS, LLC d/b/a Cellular One, N.E. Colorado Cellular, Inc., PR Wireless, Inc., Union Telephone Company d/b/a Union Wireless, and United States Cellular Corporation (“U.S. Cellular”) (jointly, the “Petitioners”), by counsel and pursuant to Section 405(a) of the Communications Act of 1934 (“Act”), and Section 1.106 of the Commission’s Rules (“Rules”), hereby jointly petition the Commission to reconsider its order released on September 3, 2010, in the above-captioned proceeding.¹

¹ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, 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*” or “*Order*”), *recon. pending*.

The *Corr Wireless Order* makes findings and takes actions that are not supported by any record evidence, in part as a result of the fact that the Public Notice² purporting to seek public comment was not sufficient in providing interested parties with notice of the findings and actions being contemplated by the Commission in the proceeding.

Pursuant to Section 1.106(d)(1) of the Commission's Rules,³ the Petitioners request the Commission to grant this Joint Petition for Reconsideration ("Petition") and to take various corrective actions regarding the *Order* as specified in this Petition. These actions include:

(1) Rescinding Option B as a basis for determining the baseline of universal service support for Verizon Wireless ("Verizon") and Sprint Nextel Corporation ("Sprint").

(2) Making the funds "voluntarily" disclaimed by Verizon and Sprint available to other competitive eligible telecommunications carriers ("ETCs") pursuant to the *Interim Cap Order*.⁴

(3) Rescinding the decision to hold high-cost funds surrendered by Verizon and Sprint in reserve as a "down payment" for future universal service initiatives.

Each of the Petitioners has standing to file this Petition pursuant to Section 1.106(b)(1) of the Commission's Rules,⁵ because (1) in the case of Corr Wireless Communications, L.L.C., the

² *Comment Sought on Corr Wireless Communications, L.L.C., Request for Review of a Competitive Eligible Telecommunications Carrier High-Cost Support Decision of the Universal Service Administrative Company*, WC Docket No. 05-337, CC Docket No. 96-45, Public Notice, 24 FCC Rcd 4177 (Wireline Comp. Bur. 2009) ("Public Notice").

³ 47 C.F.R. § 1.106(d)(1).

⁴ *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

⁵ 47 C.F.R. § 1.106(b)(1).

Petitioner is a party to the proceeding; and (2) as demonstrated in this Petition, the interests of each Petitioner are adversely affected by actions taken in the *Corr Wireless Order*.⁶

BACKGROUND

A. The Interim Cap on Wireless ETC High-Cost Support.

In the *Interim Cap Order*, the Commission capped the high-cost support that competitive ETCs in each state may receive at the annualized level of support in that state for the month of March 2008.⁷ The cap is to remain in place only until the Commission acts in its rulemaking on comprehensive high-cost universal service support recommendations, although it should be noted that the “interim” cap has now remained in effect for nearly two and a half years.⁸

The Commission instructed the Universal Service Administrative Company (“USAC”) to calculate support under the state-based cap using a two-step approach: first, calculate the support each competitive ETC would receive under the per-line identical support rule and calculate the total of these amounts for each state; and second, calculate a “state reduction factor” to reduce the uncapped support amount.⁹

⁶ In the case of Petitioners who were not previously parties to this proceeding, these Petitioners elected not to participate in the proceeding because they could not reasonably have anticipated various actions taken by the Commission in the *Order* that adversely affect their interests, but that were not the subject of any prior notice provided by the Commission.

⁷ *Interim Cap Order*, 23 FCC Rcd at 8850. Under the Commission’s “identical support rule,” a competitive ETC is entitled to receive, for every subscriber line that it serves in the service area of an incumbent local exchange carrier (“LEC”), “the full amount of the universal service support that the [incumbent LEC] would have received for that customer.” 47 C.F.R. § 54.307(a)(3).

⁸ *See id.* at 8850. It is important to note that, in addition to the reductions in competitive ETC support that result from the *Corr Wireless Order* and that are discussed in this Petition, the *Interim Cap Order* itself is having the continuing effect of making it difficult for competitive ETCs to cope with the rising costs of deploying and providing services in rural areas and to meet state commission build-out requirements imposed on these competitive ETCs in connection with their being designated as ETCs by the state commissions.

⁹ *Id.* at 8846.

The Commission indicated that, in order to calculate the state reduction factor, USAC would “compare the total amount of uncapped support to the cap amount for each state.”¹⁰ If the total state uncapped support exceeds the state cap support amount, USAC divides the state cap support amount by the total state uncapped amount to yield the state reduction factor. USAC is then required to apply the state-specific reduction factor to arrive at the capped level of high-cost support for each competitive ETC. If the state uncapped support is less than the state capped support amount, no reduction is required.¹¹

B. The Merger Adjudications.

On November 4, 2008, the Commission approved the transfer of control of licenses and other authorizations held by Alltel entities from Atlantis Holdings LLC to Verizon, and also approved the transfer of licenses and other authorizations held by Sprint and Clearwire Corporation to a new entity (New Clearwire Corporation) majority owned by Sprint.¹² The Commission imposed various conditions in both proceedings, including a condition that Verizon and Sprint voluntarily commit to forgo their high-cost support in equal 20 percent increments during the five-year period following the closing date of the merger transactions.¹³

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) (“*Verizon Merger Order*”); *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570 (2008) (“*Sprint Merger Order*”) (collectively, the “*Merger Orders*”).

¹³ *Verizon Merger Order*, 23 FCC Rcd at 17529-32; *Sprint Merger Order*, 23 FCC Rcd at 17611-12.

The voluntary commitments to phase down the receipt of high-cost support had their genesis in a Verizon *ex parte* letter submitted on November 3, 2008, purportedly in response to a question from the Commission.¹⁴ Verizon addressed in the letter the contested issue of whether it should be required to forgo receiving high-cost support by making a “voluntary commitment” to accept a phase down of its high-cost support.¹⁵ Notwithstanding the fixed amount of support available to be shared by competitive ETCs under *the Interim Cap Order*, Verizon stated its “understanding” that the reduction in its support payments “will not result in an increase in high cost payments to other CETCs.”¹⁶ Sprint also made an *ex parte* submission on November 3, 2008, offering a “voluntary condition” that was substantively identical to Verizon’s commitment.¹⁷ Sprint, however, did not express the view that its support reductions would be unavailable to other competitive ETCs.

The Commission, in the *Verizon Merger Order*, did not confirm Verizon’s understanding that the high-cost support the carrier declined would not increase support for other carriers.¹⁸ The agency also did not address whether the phase down of Verizon’s support would modify the calculation of the state-specific reduction factor under the *Interim Cap Order*.¹⁹

C. The USAC Decision.

In a letter sent to Corr Wireless on February 25, 2009, USAC claimed that the *Verizon Merger Order* “specifically” stated that the reduction in payments to Verizon and Alltel would

¹⁴ *Ex Parte* Letter from John T. Scott, III, Vice President and Deputy General Counsel Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC (Nov. 3, 2008) (“Verizon Letter”).

¹⁵ *See Verizon Merger Order*, 23 FCC Rcd at 17531-32.

¹⁶ Verizon Letter at 1.

¹⁷ *See* Letter from Lawrence R. Krevor to Marlene H. Dortch, WT Docket No. 08-94 (Nov. 3, 2008), at 1.

¹⁸ *See Verizon Merger Order*, 23 FCC Rcd at 17532; *Corr Wireless Order* at para. 4.

¹⁹ *See Verizon Merger Order*, 23 FCC Rcd at 17532; *Sprint Merger Order*, 23 FCC Rcd at 17612.

not result in an increase in high-cost support to other competitive ETCs.²⁰ USAC indicated that the funds not disbursed to Verizon and Alltel “are effectively removed from the CETC interim cap and do not ‘free up’ additional dollars for other CETCs in any jurisdiction.”²¹

D. The Corr Wireless Order.

Corr Wireless asked the Commission to repudiate the position taken in the USAC Letter, and to direct USAC to include amounts received by Verizon and Sprint in the interim cap amount and redistribute this funding to other competitive ETCs.²² In the *Corr Wireless Order*, the Commission rejected the approach taken by USAC, finding that any implementation of the phase-down of high-cost support received by Verizon and Sprint must be consistent with the *Interim Cap Order*, and that the changes to the interim cap baselines proposed by USAC would revise the total support calculated for each state in a manner inconsistent with the *Interim Cap Order*.²³

The Commission explained that any such amendment to the *Interim Cap Order* could be undertaken only through a notice and comment proceeding²⁴ because the interim cap is a Commission “rule” for purposes of the Administrative Procedure Act (“APA”). The Commission further concluded that the *Merger Orders* could not provide a basis for USAC’s approach, because the Commission did not intend to modify the interim cap in the *Merger Orders*, and, in any

²⁰ Letter from Karen Majcher, USAC, to Donald J. Evans (Feb. 25, 2009) (“USAC Letter”), at 1.

²¹ *Id.*

²² Request for Review by Corr Wireless Communications, LLC, of Decision of Universal Service Administrator, CC Docket No. 96-45, WC Docket No. 05-337 (filed Mar. 11, 2009) (“Corr Wireless Appeal” or “Appeal”), at 6.

²³ *Corr Wireless Order* at para. 9.

²⁴ *Id.*

event, the *Merger Orders* “could not have properly modified the interim cap rule”²⁵ because the interim cap was adopted by a notice-and-comment rulemaking while the *Merger Orders* “were adjudicatory-type orders rather than rulemaking proceedings”²⁶

Turning to the redistribution issue, the Commission concluded that the *Interim Cap Order* does not require that high-cost support reclaimed from Verizon and Sprint must be redistributed to other competitive ETCs, because, as long as Verizon and Sprint remain eligible for support, it is appropriate to include the support in USAC’s calculations of proportional payments to competitive ETCs under the interim cap. This is true, according to the Commission, even though Verizon and Sprint agreed to surrender their support, and even though they may not actually receive any support.²⁷

Having taken the position that the *Interim Cap Order* does not require any redistribution, the Commission concluded that “the public interest will be better served by distributing support to other competitive ETCs in the same manner that it would have been distributed in the absence of the merger commitments.”²⁸ The agency then noted that the *Merger Orders* failed to provide guidance regarding how USAC, Verizon, and Sprint should implement the USF provisions of the *Merger Orders*,²⁹ and indicated it would cure this deficiency, in two respects.

²⁵ *Id.* at para. 8.

²⁶ *Id.* (footnote omitted).

²⁷ *Id.* at para. 10.

²⁸ *Id.* The Commission evidently meant that, since it was deciding that Verizon and Sprint remained eligible for high-cost support, it could also conclude that no funds were being freed up for redistribution to other competitive ETCs (even though Verizon and Sprint were “voluntarily” giving up their support).

²⁹ *Id.* at para. 14.

First, the Commission provided Verizon and Sprint with options for electing a baseline for measuring the phase-out of their support,³⁰ concluding that, “[r]egardless of the option they choose, implementation of these options will not have an impact on other competitive ETCs.”³¹ Under Option A, the baseline is the carrier’s 2008 high-cost support.³² Under Option B, the support is recalculated each quarter based on current data, including the general reduction factor applied to all competitive ETCs under the interim cap.³³

Second, the Commission directed USAC “to reserve any reclaimed funds as a fiscally responsible down payment on proposed broadband universal service reforms”³⁴ The Commission expressed the view that this “down payment” would help the agency pursue its goal of supporting broadband Internet services for all Americans.

ARGUMENT

I. BASELINE OPTION B ADVERSELY AFFECTS OTHER COMPETITIVE ETCs, AND THUS, IT IS INCONSISTENT WITH THE COMMISSION’S OWN FINDINGS AND IS PROCEDURALLY DEFECTIVE FOR FAILURE TO GIVE NOTICE AND OPPORTUNITY FOR COMMENT.

A. Option B Adversely Affects Other ETCs.

As described above, in its *Order*, the Commission gave Verizon and Sprint two options from which to elect to determine the “baseline” for the calculation of their voluntary commitments to phase out their high-cost support over the five-year period prescribed in the *Merger Or-*

³⁰ *Id.*

³¹ *Id.* (emphasis added).

³² The 2008 baseline would apply for Sprint, but, for administrative reasons, the baseline for Verizon would use the amount of support received in January 2009, annualized. *See id.* at para. 16 & n.38. Sprint has selected Option A. *See Ex Parte* Letter from Norina Moy, Director, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC (Oct. 1, 2010).

³³ *Id.* at para. 17. Verizon has selected Option B. *See Ex Parte* Letter from Tamara Preiss, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC (Sept. 28, 2010).

³⁴ *Id.* at para. 20.

ders. “Option A” caps the total annual high-cost support based on 2008 high-cost support for Sprint or January 2009 (annualized) high-cost support for Verizon. Either carrier would then collect 80 percent of this fixed baseline in 2009, 60 percent in 2010, 40 percent in 2011, 20 percent in 2012, and no support in 2013. Further, the Commission clarified that in the event of line loss, relinquishment of ETC status, or other circumstances that would reduce the amount of support for which Verizon and Sprint are eligible, Verizon and Sprint would still collect the same amount—but USAC would adjust the reduction factor to get to that result.³⁵ Thus, even in the event of significant line loss, Verizon and Sprint face no downside risk under “Option A” since the baseline level of support is fixed as of the baseline period.

“Option B,” a floating baseline, permits Verizon and Sprint to calculate the phase down of support based on support levels that are recalculated each quarter using current data for that quarter. In the event Verizon and Sprint increase their line count in any given state, they will receive a greater portion of the capped high-cost support for that state. Since the *Interim Cap Order* prohibits the overall level of support available to all competitive ETCs in each state from increasing, any increase in support to either Verizon or Sprint will directly result in a corresponding dollar-for-dollar reduction of support available to other ETCs in that state.³⁶ Further, under

³⁵ *Id.* at para. 16 n.39. In the event of significant line loss, such that high-cost support would be less than the phase-out amount, the carrier would be entitled to the lesser amount. *Id.*

³⁶ This effect of Option B—the bestowal of a benefit on Verizon with the concomitant reduction in high-cost support available to other competitive ETCs—is made even more problematic by the fact that Verizon holds a commanding position in the wireless marketplace, making it increasingly difficult for small rural wireless carriers to secure the investment capital necessary to deploy services, including advanced broadband services, in unserved rural areas. For example, The Commission has found that concentration in the wireless industry has increased by 32 percent since 2003, and that AT&T and Verizon continue to increase their market share, with 12.3 million net additions in 2008. See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, FCC 10-81 (rel. May 20, 2010) at para. 4. The U.S. Government Accountability Office has determined that “[t]he primary change in the wireless industry since 2000 has been the

the terms of the *Corr Wireless Order*, any increase in support for Verizon and Sprint will result in a higher level of support being withheld by USAC, and not available to other ETCs, in all subsequent years—even beyond the five-year phase-out if the *Interim Cap Order* is still in effect at that time. Importantly, Verizon’s selection of “Option B,” for the reasons set forth above, will result in a reduction in the size of the high-cost fund available to many states.

The bottom line is that the selection of “Option B” by Verizon will adversely affect all other competitive ETCs.³⁷ Thus, the Commission is incorrect in asserting that “[r]egardless of the option [Verizon and Sprint] choose, implementation of these options will not have an impact on other competitive ETCs.”³⁸ As set forth above, since the *Interim Cap Order* prohibits the overall level of support available to all competitive ETCs in each state from increasing, any increase in support to Verizon will directly result in a corresponding dollar-for-dollar reduction of support available to the state and, by extension, other ETCs in that state. The Petitioners demonstrate in Exhibit A the material adverse impact that selection of “Option B” has had on other competitive ETCs (as well as the impact of the phase-down and Option A).³⁹

consolidation of wireless carriers.” U.S. Government Accountability Office, Report to Congressional Requesters, *TELECOMMUNICATIONS: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, July 2010, at 10-11 (publicly released Aug. 27, 2010).

³⁷ Theoretically, under Option B, Verizon could have its baseline reduced if it were to suffer a loss of eligible subscribers. However, this is highly unlikely to occur. If Verizon has experienced or anticipates a loss of eligible subscribers, then it would surely have chosen Option A to lock in its January 2009 subscriber levels. Verizon and Sprint have the substantial benefit of being able to make their election using actual data on the number of eligible subscribers in all of 2009 and more than half of 2010, since the *Order* is retroactive to (1) February 1, 2009, for Verizon (the first day of the first month after consummation of its merger; and (2) December 28, 2008, for Sprint (30 days after the November 28, 2008, consummation of its merger).

³⁸ *Corr Wireless Order* at para. 14.

³⁹ The Petitioners note that the estimates reflected in Exhibit A are based on limited data made available by USAC. USAC has refused numerous requests for data relating to Verizon and Alltel in various states. The Petitioners intend to supplement the record if USAC makes available more detailed information regarding those carriers’ eligible support levels for the relevant time periods.

Further, since it voluntarily committed to phase down its USF support, Verizon has taken steps to add its existing customer base to the line count that it acquired from Alltel in the merger transaction. The Commission recently granted Verizon's petitions for *pro forma* transfer of Alltel's ETC designations to Cellco Partnership d/b/a Verizon Wireless in Virginia, Alabama, and North Carolina.⁴⁰ Verizon also has similar applications pending in several states, including Georgia, Kansas, Nevada, and South Dakota.⁴¹ In each of these applications, Verizon Wireless has made it clear that it "will seek federal high-cost universal service support throughout the Designated Area for all eligible lines served by Verizon Wireless and its subsidiaries"⁴² Grant of these applications would allow Verizon, not previously a designated ETC in any of these states, to "bootstrap" its existing customer base onto Alltel's pre-existing ETC status. As a result, Verizon will be able to increase significantly its eligible line count without adding a single new customer. Now that Verizon has selected Option B, it will be able to leverage this increased line count into increased high-cost support—to the direct detriment of other competitive ETCs.⁴³

See Exhibit A, Charts 1 and 2.

⁴⁰ *Petitions for Pro Forma Amendment of Eligible Telecommunications Carrier Designations in the Commonwealth of Virginia and the States of Alabama and North Carolina*, Order, WC Docket No. 09-197 (WCB 2010).

⁴¹ Application of Cellco Partnership and its Subsidiaries and Affiliates to Amend and Consolidate ETC Designations in the State of Georgia, filed Aug. 17, 2010, Docket No. 10396; Docket No. 10-076-U; Petition of Cellco Partnership d/b/a Verizon Wireless and Its Subsidiaries and Affiliates to Amend Eligible Telecommunications Carrier Designation in the State of Kansas, filed Aug. 27, 2010, Docket No. 1-CELZ-176-ETC ("Kansas Application"); Petition of Cellco Partnership d/b/a Verizon Wireless and Its Subsidiaries and Affiliates to Amend Eligible Telecommunications Carrier Designation in the State of Nevada, filed Sept. 10, 2010, Docket No. 10-09007; Petition of Cellco Partnership d/b/a Verizon Wireless and Its Subsidiaries and Affiliates to Amend Eligible Telecommunications Carrier Designation in the State of South Dakota, filed Sept. 3, 2010, Docket No. TC 10-067.

⁴² See, e.g., Kansas Application at para. 5.

⁴³ In light of the unreasonableness of this result, the Petitioners request that, if the Commission decides to retain Option B, then it should clarify that legacy Verizon lines should not be added to the Alltel line counts absent specific state or federal authority to do so.

B. The Commission Failed to Give Any Notice to Interested Parties That It Was Considering Option B.

Rather than adhering to principles of openness and transparency in its decision-making processes,⁴⁴ the Commission, in adopting “Option B,” violated the Petitioners’ due process rights. It is fundamental that due process is required whenever a government actor seeks to affect a party’s rights. Due process requires both adequate notice and an opportunity to be heard.⁴⁵ These due process rights are embodied in the APA⁴⁶ and are designed to safeguard against a lack of fair notice. In general, “a person cannot be deprived of his legal rights in a proceeding to which he is not a party.”⁴⁷ Although the Commission may have discretion to proceed by rule-making or by adjudication in making policy decisions,⁴⁸ that discretion does not permit the Commission to ignore parties’ fundamental right to notice and comment.⁴⁹ It is well-settled that

⁴⁴ See, e.g., *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of the Commission’s Organization*, GC Docket No. 10-44, Notice of Proposed Rulemaking, 25 FCC Rcd 2430, 2449 (2010) (Statement of Commissioner Michael J. Copps) (noting that “we must always strive to improve our lines of communication, enhance the level of transparency in our work and bring to our daily decisions the kind of openness that gives true credibility to everything we do”). In fact, the Commission’s handling of issues associated with the phase-down of Verizon’s and Sprint’s USF support has been plagued by a pattern of practices that contradicts the principles of openness and transparency. The Commission adopted the phase-down in the *Verizon Merger Order*, without public comment, within 24 hours after receiving the Verizon Letter, in which Verizon made its “voluntary” commitment to phase down support and expressed its view that the phase-down would not result in high cost payments to other competitive ETCs.

⁴⁵ See, e.g. *Tarver v. Smith*, 402 U.S. 1000, 1003 (1971) (rights cannot be “reduced or terminated without notice and an opportunity to be heard”) (internal citations omitted); *Memphis Light, Gas & Water Div. v. Craft*, 98 S.Ct. 1554, 1562 (1978).

⁴⁶ See, e.g., 5 U.S.C. §§ 554(b), 554(c) (requiring notice and an opportunity to be heard in adjudications required to be determined on the record after a hearing); 5 U.S.C. §§ 553(b), 553(c) (requiring notice and comment prior to adoption of rules).

⁴⁷ *Martin v. Wilks*, 490 U.S. 755, 758 (1989) (superseded by statute on other grounds).

⁴⁸ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

⁴⁹ See *Florida Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989) (“Due process . . . guarantees that parties who will be affected by the general rule be given an opportunity to challenge the agency’s action. When the rule is established through formal rulemaking, public notice and hearing provide the

the APA's rulemaking requirements "may not be avoided by the process of making rules in the course of adjudicatory proceedings."⁵⁰

Neither the public, the states, nor other competitive ETCs were given notice that the Commission was even considering adopting a baseline methodology in this proceeding, let alone afforded an opportunity to comment on specific baseline methodology proposals. The Public Notice is only one paragraph, and it states as follows:

On March 11, 2009, Corr Wireless Communications, LLC (Corr) filed a request for review of a decision by the Universal Service Administrative Corporation (USAC). 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 Verizon-Alltel merger is not to go back into the competitive ETC capped pool.⁵¹

The Public Notice accurately reflects the very specific relief sought in the Corr Wireless Appeal. However, neither the Public Notice nor the Appeal mentions, let alone squarely raises, the question of what methodology the Commission will apply to calculate the baseline support amounts for Verizon and Sprint. Certainly, there is no mention that the Commission was considering a methodology that would have a material adverse impact on other competitive ETCs by allowing Verizon and Sprint to recalculate support before phasing it down. As a result, the Petitioners were not afforded a meaningful opportunity to participate in the process by which the

necessary protection. But where, as here, the rule is established in individual adjudications, due process requires that the affected parties be allowed to challenge the basis of the rule.").

⁵⁰ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion).

⁵¹ Public Notice at 1 (footnotes omitted).

Commission has now issued a decision that will impact all other competitive ETCs in each state in which Verizon and Sprint are eligible for high-cost support.

Verizon, Sprint, and the Commission clearly contemplated that the phase-down would be based on a fixed baseline. Verizon committed “to a five year transition during which Verizon’s competitive ETC high cost support would be phased out in *equal* increments.”⁵² The *Verizon Merger Order* simply recites the language of the Verizon Letter, that “[s]upport would be reduced in equal 20 percent increments.”⁵³ Tellingly, in defending the USAC Letter, Verizon asserted the following:

Moreover, Corr fails to recognize that it is in no way harmed by the *Merger Order*. It does not lose any high cost funding as a result of the commitment by Verizon Wireless to forego funds to which it would otherwise be entitled. To the contrary, *Corr and other CETCs stand to increase their pro rata shares of high cost funds because their shares will no longer be diluted by any line growth Verizon Wireless (or Sprint) may experience.*⁵⁴

Similarly, Verizon has advocated the fixed baseline approach in filings before at least one state commission.⁵⁵

C. Adoption of Option B Is Arbitrary and Capricious.

The Commission’s decision to permit Verizon and Sprint to select Option B is arbitrary and capricious. As explained in detail above, selection of Option B by Verizon will directly and

⁵² Verizon Letter at 1 (emphasis added).

⁵³ *Verizon Merger Order*, 23 FCC Rcd at 17531.

⁵⁴ Opposition of Verizon Wireless to Request for Review by Corr Wireless Communications, LLC, of Decision of Universal Service Administrator, WC Docket No. 05-337, May 11, 2009, at 8 (emphasis added).

⁵⁵ *See, e.g.*, Affidavit of Alltel Communications, LLC, Regarding Use of Federal High-Cost Support Funds (filed with Wisconsin PSC on Aug. 28, 2009) (“The FCC Order approving Verizon Wireless’ acquisition of Alltel requires a phase down of high-cost support for any properties that Verizon Wireless retains over a five-year period following the closing of the transaction Therefore, Alltel will use twelve times the January 2009 payment less 20% to develop the anticipated receipts from the universal service fund for calendar year 2009.”).

adversely affect all other competitive ETCs. Thus, the Commission’s assertion that “[r]egardless of the option [Verizon and Sprint] choose, implementation of these options will not have an impact on other competitive ETCs”⁵⁶ runs directly counter to the facts. The Supreme Court has stated that “[n]ormally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency.”⁵⁷

D. The Commission Should Eliminate Option B.

The Petitioners therefore urge the Commission to eliminate “Option B.” The Petitioners do not object to “Option A,” which fixes the level of support at a date certain, and then appropriately phases out this support as contemplated by the *Merger Orders*. The selection of “Option A” will have no material adverse impact on other competitive ETCs. As a result, the Commission can adopt “Option A” without providing further notice.

II. THE COMMISSION’S DECISION NOT TO MAKE SUPPORT SURRENDERED BY VERIZON WIRELESS AND SPRINT AVAILABLE TO OTHER COMPETITIVE ETCs IS ARBITRARY AND CAPRICIOUS.

The Commission should reconsider and reverse its decision not to redistribute funds reclaimed from Verizon and Sprint to other competitive ETCs, because the decision is not based on supportable analysis or conclusions and is therefore arbitrary and capricious.⁵⁸ Specifically, the

⁵⁶ *Corr Wireless Order* at para. 14.

⁵⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted). In this case, it might be more precise to say that no party submitted specific evidence of the adverse impact on other ETCs because no party had notice that the Commission was considering such a proposal. Nonetheless, the Commission should have been able to ascertain, on its own, that Option B would have a direct and material adverse impact on other ETCs.

⁵⁸ The Commission has recognized that there must be a rational connection between its decision and the relevant facts before it. *See Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497, 1508 (1999) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983)). The Commission’s reliance here on the purported ongoing eligible status of Verizon and Sprint fails this test.

Commission’s decision that the *Interim Cap Order* does not require redistribution of the reclaimed support hinges on the agency’s determination that Verizon and Sprint would remain “eligible” to receive support even as this support is being surrendered by Verizon and Sprint.⁵⁹ This determination is problematic for several reasons.⁶⁰

First, the Commission’s theory that Verizon and Sprint remain “eligible” for high-cost support in fact serves as a convenient device for the Commission’s misapplying the *Interim Cap Order*. If the imposed phase-down requirement is construed—as it should be—as having the effect of a relinquishment of ETC eligibility, then “the total amount of support available to competitive ETCs in [the service areas involved] under the *Interim Cap Order* would remain the same.”⁶¹ This in turn would mean that, by the operation of the terms of the *Interim Cap Order*, the size of the interim cap would not be affected, but, because Verizon and Sprint would be treated as having left the pool, “the number of participants goes down and each [remaining] par-

⁵⁹ See *Corr Wireless Order* at para. 10.

⁶⁰ The Commission also claims that, by declining to redistribute to other competitive ETCs high-cost support surrendered by Verizon and Sprint it is “reining in the high-cost support mechanism without modifying support provided to other competitive ETCs.” *Id.* at para. 11. It supports this “appropriate balance” by arguing that additional support provided by redistribution “would not necessarily result in the expansion of service to currently unserved territories.” *Id.* The Petitioners disagree with the Commission’s unsupported conclusion that redistributed high-cost support would “not necessarily” be used by competitive ETCs to bring services to unserved areas. There is ample evidence that competitive ETCs do in fact utilize high-cost support to expand service into unserved areas. See, e.g., *Ex Parte* Letter from David A. LaFuria, Counsel for United States Cellular, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 05-337 (Aug. 30, 2010) (depicting the expansion of U.S. Cellular’s network coverage in West Virginia); *Ex Parte* Letter from David A. LaFuria, Counsel for N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 05-337 (Oct. 1, 2010). In addition, it is appropriate for ETCs to use high-cost funding to improve the quality of service in underserved areas, and it is therefore arbitrary for the Commission to exclude this appropriate use of funding from its analysis of whether it would be advisable and in the public interest to redistribute to other competitive ETCs the high-cost support surrendered by Verizon and Sprint. Finally, many of the Petitioners (as well as many competitive ETCs generally) have been operating as ETCs for a number of years and have been recertified annually by state commissions based in part on their showing that high-cost funds have been and will continue to be used to deploy networks and services in unserved areas.

⁶¹ *Id.* at para. 12.

participant's share should go up.”⁶² The Commission has attempted to circumvent this result by engaging in the fiction that Verizon and Sprint continue to be “eligible” carriers.

The Commission concedes in the *Corr Wireless Order* that nothing in the *Interim Cap Order* requires redistribution of the reclaimed support, only so long as Verizon and Sprint remain eligible for support.⁶³ Thus, the Commission acknowledges that, if Verizon and Sprint are not eligible for support, then the *Interim Cap Order* does require an increased apportionment of support to remaining competitive ETCs. The Commission, seeking to avoid this requirement, has been forced to manufacture an improbable argument that Verizon and Sprint should be treated as remaining “eligible” for support. Surely, when a carrier relinquishes 20 percent of its support, it is no longer “eligible” for that which was relinquished.

Second, the Commission persists in the fiction that Verizon and Sprint have made “voluntary commitments” to forgo high-cost support.⁶⁴ In fact, Verizon and Sprint had little choice in the matter. The Commission’s rationale in the *Corr Wireless Order* seems to be that Verizon and Sprint have control of high-cost disbursements, that they have opted (as an exercise of their own discretion) to give these funds back to the high-cost pool, and that this voluntary choice has no effect on their continuing eligibility. The problem with this rationale is that the surrender of support by Verizon and Sprint cannot reasonably be characterized as a voluntary exercise of their discretion. The Commission presumably gave Verizon and Sprint a choice: give up the high-cost support, or give up on timely approval of the proposed mergers. In these circumstances, what the

⁶² *Id.* at para. 6 (summarizing the argument made in the *Corr Wireless Appeal*).

⁶³ *Id.* at para. 10 (stating that “[a]s long as they continue to be competitive ETCs in a particular state, Verizon Wireless and Sprint Nextel remain *eligible* for high-cost support, even though they have agreed to surrender such support”) (emphasis in original).

⁶⁴ *See, e.g., id.* at para. 15.

Commission calls a voluntary commitment is more accurately described as an ultimatum. Since Verizon's and Sprint's commitment cannot be deemed to be voluntary, the Commission's argument for continuing eligibility has no basis.

Given the compulsory nature of the phase-down conditions, the *Corr Wireless Order* has the blatantly obvious effect of shrinking the size of the interim cap. In the *Interim Cap Order*, the Commission decided to “limit[] the annual amount of high-cost support that competitive ETCs can receive . . . for each state to the amount competitive ETCs were eligible to receive in that state during March 2008, on an annualized basis.”⁶⁵ Verizon and Sprint will never receive the support they were required to surrender as a condition of merger approval. Nor will this support ever be received by any other carrier under the cap. Therefore, under the *Corr Wireless Order*, the amount of support competitive ETCs “can receive . . . for each state” will be reduced, in violation of the *Interim Cap Order*.

Third, even if there were a basis for the Commission's theory that Verizon and Sprint voluntarily decided to surrender their control over high-cost support, the theory cannot be squared with the requirements of the Act. Section 254(e) of the Act provides that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁶⁶ Thus, if the Commission's position is that Verizon and Sprint were not compelled to relinquish support, but instead did so of their own free will, then Verizon and Sprint were violat-

⁶⁵ *Interim Cap Order*, 23 FCC Rcd at 8850 (emphasis added).

⁶⁶ 47 U.S.C. § 254(e).

ing the statute. Giving back the support forecloses any means of satisfying the statutory obligation to use the support in the manner specified in the statute.

In addition to violating Section 254(e)—which in itself is a basis for extinguishing Verizon’s and Sprint’s eligibility—Verizon’s and Sprint’s “voluntary” commitment to forgo universal service support would make it impossible for them to sustain their eligible status because they could not meet the requirements imposed by state commissions, or by the Commission, as prerequisites for the grant of eligibility. To take one example, carriers designated as ETCs by the Commission must develop five-year plans committing to use universal service funding to improve and upgrade their networks.⁶⁷ State public utility commissions impose similar requirements.⁶⁸ The failure to meet these and other requirements would lead to the loss of Verizon’s and Sprint’s eligibility. Moreover, the Commission’s treatment of Verizon and Sprint as “eligible” carriers would require the anomalous result that—even though they would not be receiving high-cost support—they would have to comply with various administrative requirements, such as annual recertifications.

Finally, the Commission stated in the *Corr Wireless Order* that its conclusion that Verizon and Sprint “remain eligible for high-cost support”⁶⁹ turns on their “continu[ing] to be competitive ETCs in a particular state”⁷⁰ The Commission, however, did not examine the extent to which either Verizon or Sprint in fact currently meets the requirements applicable to competitive ETCs for all the customer lines for which they are receiving universal service support in

⁶⁷ 47 C.F.R. § 54.202(a)(1)(ii).

⁶⁸ See, e.g., 4 Code of Colo. Reg. ch. 723-2, § 2187(f)(ii)(H) (requiring annual reports showing expenditures made for local exchange infrastructure and “[a]n explanation regarding any network improvement targets that have not been fulfilled”).

⁶⁹ *Corr Wireless Order* at para. 10 (emphasis in original).

⁷⁰ *Id.*

each of the states. Given the Commission’s articulation in the *Order* of the relationship between the eligibility for support and Verizon’s and Sprint’s continuing status as competitive ETCs, it was not sufficient or reasonable for the Commission in the *Order* to merely presume that this status exists in all cases for both Verizon and Sprint.

III. THE COMMISSION’S DECISION TO HOLD RECLAIMED HIGH-COST SUPPORT IN RESERVE IS PROCEDURALLY DEFECTIVE.

The *Corr Wireless Order* directs the high-cost support surrendered by Verizon and Sprint to be reserved as a potential “down payment on proposed broadband universal service reforms, . . . including index[ing] the E-rate funding cap to inflation . . . ; support[ing] a Mobility Fund . . . ; improv[ing] utilization of the Rural Health Care program . . . ; and, in the long term, directly support[ing] broadband Internet services for all Americans.”⁷¹

As explained in detail above, the Public Notice, and the underlying Corr Wireless Appeal, very specifically addressed the matter of whether the reclaimed funds should be included in, or excluded from, the pool of funds available for distribution to all competitive ETCs. The Corr Wireless Appeal, however, did not raise the question of how and when to utilize any such funds, and the Public Notice did not seek comment on this issue.

The Commission’s decision to hold the reclaimed funds in reserve for future use must be treated as a “rule” for purposes of the APA because it is “an agency statement of general . . . applicability and future effect designed to implement . . . policy”⁷² Adoption of a rule requires prior notice to the public, which the Commission failed to provide.⁷³ In fact, what the Commis-

⁷¹ *Corr Wireless Order* at paras. 1, 20.

⁷² 5 U.S.C. § 551(4).

⁷³ The Petitioners also agree with the argument that “[t]he 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[,]” and that “the Commission must use universal service contributions solely to fund current expenses of spe-

sion has done here is to adopt an industry-wide rule with broad ramifications without affording appropriate notice and comment, in violation of Section 553 of the APA. Section 553 requires that such notice shall include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁷⁴ Section 553 further provides 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”⁷⁵

These statutory provisions require the Commission to provide “sufficient notice” of a forthcoming rule that “affords interested parties a reasonable opportunity to participate in the rulemaking process.”⁷⁶ Sufficient notice must, at a minimum, provide clear “notice of the scope of the regulations being proposed.”⁷⁷

The Commission’s attempt to promulgate a rule of general applicability in this proceeding is all the more egregious because the Commission is currently in the process of several broad proceedings examining the scope and future of universal service. Clearly, the question of how and when to distribute any reclaimed USF funds belongs in one of those broad proceedings.

cific universal service programs that exist at the time the contributions are made.” *See* Southern Communications Services, Inc. d/b/a SouthernLINC Wireless and the Universal Service for America Coalition, Petition for Partial Reconsideration, filed Sept. 29, 2010, at 3; *see id.* at 7-11. There have been rare instances in which universal service funds have been transferred for uses other than those directly related to supporting programs pursuant to Section 254 of the Act, but these transfers were made by legislation. *See, e.g.,* Consolidated Appropriations Act, 2008, P.L. 110-161, 121 Stat. 1844, 1998 (authorizing the transfer of funds from USF to the Commission’s Office of the Inspector General to conduct USF audits and investigations). In the *Corr Wireless Order*, the Commission has decided to transfer universal service funds into a “down payment” account for future use, instead of permitting the funds to be disbursed through existing support mechanisms in order to support programs specifically established in the Commission’s rules. Such a transfer of funds cannot be undertaken in the absence of legislative authority.

⁷⁴ 5 U.S.C. § 553(b)(3).

⁷⁵ 5 U.S.C. § 553(c).

⁷⁶ *American Radio Relay League, Inc.*, 524 F.3d 227, 242 (D.C. Cir. 2008).

⁷⁷ *Forester v. Cons. Prod. Safety Comm’n*, 559 F.2d 774, 788 (D.C. Cir. 1977).

IV. CONCLUSION.

For the reasons presented in this Petition, the Commission should (1) rescind Option B, as established in the *Corr Wireless Order*; (2) grant the request made by Corr Wireless that the surrendered amounts should be redistributed to other competitive ETCs; and (3) rescind the plan to reserve support surrendered by Verizon and Sprint for future use in funding universal service.

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The Commission should take these actions because there is no reasonable basis for the Commission's refusal to grant Corr Wireless' request for the redistribution of surrendered funds, and because the Commission failed to give proper notice for its adoption of options for defining the Verizon's and Sprint's funding baselines and for its establishment of a funding reserve.

Respectfully submitted,



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October 4, 2010

EXHIBIT A

CHART 1: IMPACT OF THE PHASE-DOWN, OPTION A, AND OPTION B ON ANNUAL HIGH-COST FUNDS AVAILABLE TO OTHER CETCs IN WISCONSIN*

	Year 1	Year 2	Year 3	Year 4	Years 5 and beyond
March 2008 Cap	\$57,905,280	\$57,905,280	\$57,905,280	\$57,905,280	\$57,905,280
Available \$ – Option A	\$33,607,168	\$33,232,476	\$33,232,476	\$33,232,476	\$33,232,476
Available \$ – Option B	\$33,607,168	\$29,432,739	\$29,432,739	\$29,432,739	\$29,432,739
Adverse Impact on other CETCs of Option B Compared with Option A	\$0	\$3,799,738	\$3,799,738	\$3,799,738	\$3,799,738

*Source: USAC Appendix HC01A for the first quarter of 2009. For the increase in Verizon support from Year 1 to Year 2, the source is USAC appendix HC01A for the first quarter of 2010. Chart assumes that the 50% increase in Alltel's line counts resulted from legacy Verizon customers having been added to Alltel's line counts. Chart also assumes no growth in CETC lines other than the one-time assumed increase in Verizon's support.

CHART 2: IMPACT OF THE PHASE-DOWN, OPTION A, AND OPTION B ON ANNUAL HIGH-COST FUNDS AVAILABLE TO OTHER CETCs IN NEVADA*

	Year 1	Year 2	Year 3	Year 4	Years 5 and beyond
March 2008 Cap	\$7,147,572	\$7,147,572	\$7,147,572	\$7,147,572	\$7,147,572
Available \$ – Option A	N/A*	\$4,358,700	\$4,358,700	\$4,358,700	\$4,358,700
Available \$ – Option B	N/A*	\$4,358,700	\$3,647,167	\$3,647,167	\$3,647,167
Adverse Impact on other CETCs of Option B Compared with Option A	N/A*	\$0	\$711,534	\$711,534	\$711,534

*USAC data for Verizon were not broken out into divestiture and non-divestiture areas until 2010. Chart assumes legacy Verizon customers will be added to Alltel's line counts following approval of its *pro forma* ETC designation request. Therefore, the chart reflects a 50% increase similar to that which took place in Wisconsin. Chart also assumes no growth in CETC lines other than the one-time assumed increase in Verizon's support.

Certificate of Service

I, John Cimko, hereby certify that on October 4, 2010, a true and correct copy of the foregoing "Joint Petition for Reconsideration" was sent by first-class U.S. mail, postage prepaid, to the parties listed below:

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