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October 7, 2010

Records Clerk
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: In the Matter of High-Cost Universal Service Support, WC Docket No. 05-337 CC Docket No. 96-45; Federal-State Joint Board on Universal Service Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC.

Comments of the New Mexico Public Regulation Commission concerning the Notice of Proposed Rulemaking FCC 10-155

Dear Records Clerk:

Pursuant to the Federal Communications Commission's ("FCC's") Order and Notice of Proposed Rulemaking ("NPRM") released September 3, 2010 in the above docket, requesting filing of initial comments by October 7, 2010, the New Mexico Public Regulation Commission (NMPRC) hereby submits its Comments regarding the FCC's "NPRM" proposal on adjusting the interim state Competitive Eligible Telecommunications Carrier ("CETC") cap when a carrier has relinquished its ETC status, and the FCC's proposal of potentially not redistributing the funds to the remaining CETCs in the State as is practice under the current FCC rule in lieu of other proposed uses for those relinquished monies1.

The FCC's rulemaking proposal is concisely stated in the Federal Register 2:

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1 FCC 10-155 *Order and Notice of Proposed Rulemaking*, September 3, 2010, pp 1-2, par 1.
2 **Federal Register** /Vol. 75, No. 179 /Thursday, September 16, 2010 / Proposed Rules page **56495,**

> "First, we seek comment on amending the interim cap rule so that a state's interim cap amount would be adjusted if a competitive ETC serving the state relinquishes its ETC status. In the *Interim Cap Order,* the Commission capped high-cost support for voice service provided to competitive ETCs serving each state at the level of support such carriers were eligible to receive in March 2008, on an annualized basis...We propose amending the interim cap rule so that, if a competitive ETC relinquishes its ETC status in a state, the cap amount for that state is reduced by the amount of support that the competitive ETC was eligible to receive in its final month of eligibility, annualized."

INTRODUCTION

The Federal Department of Justice and the FCC have required Verizon Wireless to divest assets in certain markets in New Mexico as a condition of the Verizon/AllTel merger. On August 12, 2010 Western Wireless Corporation ("WWC"), a subsidiary of AllTel Wireless, filed an application to relinquish its New Mexico ETC designation (see NMPRC Case 10-00227-UT). According to a letter from Verizon Wireless filed with the NMPRC on August 19, 2010, WWC's ETC designation was not transferred to AT&T when WWC's customers and network assets were transferred to AT&T on June 22, 20103. Verizon Wireless failed to file an annual ETC certification report with the New Mexico Commission for Western Wireless by the filing deadline of August 10, 20104.

The NMPRC is particularly concerned about the application of this proposed rule and the antecedent waiver of section 54.709(b) to those areas in New Mexico divested by Verizon because of the conditions of the Verizon Wireless-Alltel Merger Order. The NMPRC is concerned about the potential for serious impacts on telecommunications infrastructure build-out by CETCs in our state due to the reduction in CETC payments as a result of USAC not redistributing relinquished AllTel support under the FCC's waiver of its rules. The NMPRC believes the divested AllTel monies should remain in New Mexico for distribution to other CETCs for the purpose of expanding and upgrading facilities in unserved and underserved areas.

I. THE TEMPORARY WITHHOLDING OF CETC FUNDS MAY BECOME A PROTRACTED PROCESS DUE TO LITIGATION OR CONGRESSIONAL ACTION, RESULTING IN THE DECLINE IN INVESTMENT IN RURAL WIRELESS INFRASTRUCTURE IN NEW MEXICO.

The impact of the proposed rulemaking on states where CETCs are relinquishing their ETC designation and federal support payments will be particularly harmful if the reform of the Federal USF and adoption of the National Broadband Plan ("NBP") Connect America Fund enters into a period of protracted litigation. As the Petition for Partial Reconsideration of SouthernLINC Wireless and the Universal Service for America Coalition filed September 29, 2010 in FCC 05-337 stated on pages 9-10;

> 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 in the *National Broadband Plan* at this time.[32]...." The

3 NMPRC Case 10-00160-UT, *In the Matter of the Filing of 2010 Annual Reports by Eligible Telecommunications Carriers,* WWC License, LLC., Notice that It Will Not File for Recertification as an ETC for 2011.

4 The only penalty ever imposed by the NMPRC for not filing an ETC report was to not certify a carrier to the FCC (see VCI, 2009 Commission annual certifications, Case No. 09-00187-UT).

footnote cites "Letter dated July 26, 2010 from Chairman Genachowski to Rep. Dingell."

Given the number of proposals which the FCC has enumerated in its rulemaking, and the potential level of controversy which may surround those proposals, it is not unlikely the implementation of the overall reform of the Federal Universal Service Fund will take time, during which those CETC funds held by the FCC will remain unspent.

II. CETC HIGH COST SUPPORT IS PROVIDING FOR EXPANSION, NETWORK UPGRADE AND SUPPORT OF RURAL TELEPHONE SERVICES IN NATIVE AMERICAN AREAS INCLUDING AREAS THAT ARE NOT COVERED LOCATIONS.

The FCC justifies its proposal by saying the proposal "also reduces payments that support potentially duplicative legacy voice services and stabilizes consumer contributions to the universal service fund."5
The FCC's use of the term "duplicative legacy voice services" is a mischaracterization of the provisioning of these services in many rural areas of New Mexico where cell towers are opening up wireless service for the first time. A service is not a duplicative legacy voice service if there are no services available in the area where it is being deployed. (See attachment 1,"Blessing Ceremony" for new Cellular Site at Tiis Tsoh Sikaad Chapter Burnham N.M).

New Mexico has large areas with extremely low telephone penetration rates. There are CETCs in New Mexico such as Smith Bagley, Plateau Wireless, and Leaco Wireless that rely on federal funding which would be impacted by the non redistribution of the relinquished support to the State's CETCs limiting their ability to build out facilities and serve tribal members in rural areas. Smith Bagley's Petition to the FCC requesting Tribal support on the Eastern Navajo Agency areas in New Mexico provides examples of CETC deployment in Native American areas in New Mexico:

FCC DA 10-48 Released January 12, 2010 (WC Docket No. 05-337) states:

> "On December 14, 2009, Smith Bagley, Inc. (SBI) filed a petition for a limited waiver of the interim cap that the Commission imposed on the amount of universal service high-cost support that competitive eligible telecommunications carriers (ETCs) may receive.1 Specifically, SBI requests the limited waiver to enable SBI and other competitive ETCs to obtain uncapped high-cost support to provider expand telecommunications services to residents of the Eastern Navajo Agency of the Navajo Nation in the state of New Mexico.2"

The Smith Bagley Petition for Waiver - Expedited Action filed December 15, 2009 in WC Docket No. 05-337, page 6, describes the penetration and poverty levels found in the Eastern Navajo Agency "Checkerboard" lands:

> "The Commission determined four years ago, in the *SBI Waiver Order,* that telephone penetration in the Eastern Navajo Agency was approximately 33% (compared to 94% nationwide and 68% on Tribal lands). The Commission also found that, while per capita income nationwide was $21,587.00

5 FCC ORDER and NPRM 10-155, paragraph 1, page 1.

and per capita income on Tribal lands was $12,452.00 the per capita income in the Eastern Navajo Agency was only $6,979.

Data gathered for the 2000 Decennial Census also showed that the telephone subscribership rate in Navajo Nation was approximately 38%. While telephone penetration and per capita income data have not been updated for the Eastern Navajo Agency since the 2000 Decennial Census, more recent survey information indicates that, overall, approximately 39% of the people in Navajo Nation live below the poverty level.

Smith-Bagley's explains on page 2 of its Petition that a substantial Native American population in New Mexico is in fact not exempt from the interim CAP;

> "Currently, the Eastern Navajo Agency is not federally recognized reservation land. It has previously been described as a "checkerboard" area of land holdings owned by individual Navajos, the federal government, the state of New Mexico, and private landowners, all located in an area occupied almost exclusively by Navajo people from the Civil War to the present time."
>
> "Because of the checkerboard nature of land holdings in the Eastern Navajo Agency, the Agency does not fall within the Commission's meaning of "Tribal land" (as used in the definition of Covered Locations) because the Agency is not federally recognized reservation land."

Smith-Bagley (dba Cellularone in Arizona) discusses its successes on page 10-11.

> "Over the past several years, SBI's efforts to construct new cell sites and conduct outreach efforts through the Commission's Lifeline and Link Up programs have resulted in approximately 2,000 households in the Eastern Navajo Agency receiving telephone service. Clearly, there is more work to be done. The Eastern Navajo Agency's nearly 40,000 citizens, spread across 5,255 square miles, require significant new investment in telecommunications infrastructure, and wireless technology offers the best chance of improving their lives"

As of September, 2010, the NMPRC estimates Alltel's (Western Wireless) relinquished support made up one-quarter to one-third of the CETC support in New Mexico. If the FCC proposed rulemaking applies to all CETCs relinquishing ETC status, it would make the current tasks of expanding telephone coverage more difficult by not allowing redistribution of between a 1/4 and 1/3 of the entire interim CAP in New Mexico. There is a prospective CETC that also may be impacted by the FCC's decision to not redistribute the support relinquished to New Mexico CETCS instead of permitting USAC to reallocate the support to other state ETCs as originally intended under the interim CAP Order6.

III. SUBSTANTIAL BROADBAND GRANTS ARE BEING AWARDED BY OTHER FEDERAL AGENCIES AND A GRADUAL APPROACH TO MIGRATING FEDERAL SUPPORT MAYBE BENEFICAL TO PRESERVE VITAL INFRASTRUCTURE INVESTMENT IN NEW MEXICO.

Since several federal executive branch agencies (primarily the Departments of Agriculture and Commerce)

6 Petition of CommNet Wireless, LLC for Designation as an Eligible Telecommunications Carrier, Case No. 08-00386-UT.

are making major awards and loans available for broadband currently authorized by Congress, the sense of urgency on the part of the FCC in freezing the relinquished CETC monies until the current rulemaking is completed may be misplaced considering the public safety concerns in pockets in the state of New Mexico not well covered by wireline or wireless service. The NMPRC is concerned that the FCC will sacrifice the build-out of wireless networks in unserved areas in favor of delayed investment in broadband service where telephone service is already in place. The NMPRC believes that the FCC can encourage both the deployment of broadband through the grant process and eventually through the federal universal service fund eligibility process, but that it should not be done at the expense of the provisioning of telephone service in unserved areas at the current time.

Alaska Communications Systems, Inc., shared similar concerns with the potential withdrawal of CETC support 7;

"ACS Wireless noted that if the FCC were to withdraw support that currently helps to
keep mobile services available at affordable rates, the company likely would be compelled to reduce its wireless footprint in rural parts of the state."

To note, Smith Bagley's Petition also points out that wireless high cost loop support is not antithetical to broadband expansion on page 8 where it states: "This deployment of facilities will also increase access to broadband services for people living in the Agency as all of SBI's new cell sites are 3G-ready on day one."

IV. THE FCC'S RULE MAKING PROCESS AS APPLIED TO THE VERIZON – SPRINT DIVESTED PROPERTIES RELINQUISHING CETC STATUS APPEARS TO BE A 100% FLASHCUT IN CONTRAST TO THE VERIZON-SPRINT 20% STEP-DOWN PROCESS IN ITS NON-DIVESTED AREAS.

Those states such as New Mexico where AllTel was designated as an ETC and divested exchanges were not party to or a beneficiary of the merger agreements where the companies also agreed to reduce their "continuing" flow of CETC high cost funding, presumably providing continuing, but diminishing uses of the support in providing the supported services in other areas.

If the FCC's proposed rule is applied to the Verizon-Alltel exchanges where CETC designation has been relinquished, the 100% reduction in support is immediately experienced as a flash cut of support for the affected state (WWC in New Mexico) due to a combination the rule waiver and the FCC rulemaking proposal. Therefore non-merging CETCs and more importantly the ratepayers of New Mexico are penalized by "the anti-competitive" concerns of the FCC vis-a-vis the larger carriers engaging in the merger.
The effect seems to be a one-two punch to ensure the surrendered support in the divested areas need not be redistributed to other competitive ETCs in **any** case.

V. THE FISCAL IMPACT OF THE ALLTEL DIVESTITURE IN NEW MEXICO

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7 Alaska Communications Systems, Inc "Connect America Fund, National Broadband Plan, High-Cost Universal Service – Notice of *Ex Parte* Communications in Dockets 10-90, 09-51, and 05-337 September 17, 2010 page 2.

Alltel, d/b/a WWC, which is divesting properties in New Mexico to AT&T, has about 50% of New Mexico rural CETC lines. The NMPRC estimates between $3.7 and $4.7 million per year in Federal USF CETC funding would be made available to the remaining New Mexico CETCs, if the FCC does not reduce the New Mexico CETC CAP, as the result of WWC relinquishing ETC status in New Mexico.
Considering the total CETC funding Cap for New Mexico annualized is $ 14,415,588, the relinquishment of AllTel support constitutes between a quarter and a third of the New Mexico State CETC CAP.

This table below shows the weight of WWC funding in the New Mexico State CETC CAP determinations: Rural High Cost Loop Lines (USAC HC18) and the source of the erosion in the per line payment due to line growth and additional study area designations (now about 35% of the uncapped costs):

High Cost Loop	Name	SAC	lines in CAP at date set Mar-08	4rd qtr 2010 USAC Projected	4rd qtr 2010 USAC Projected %
NM	Leaco Rural Telephone Coop., Inc.	499002	613	4,252	4.5%
NM	Plateau RSA 2	499006	2,681	2,875	3.1%
NM	Plateau RSA 4	499007	7,355	8,901	9.5%
NM	Plateau RSA 6	499010	-	8,879	9.4%
NM	Smith Bagley	499001	10,376	22,454	23.8%
NM	Western Wireless	499003	34,613	46,786	49.7%
	total CETCS		55,638	94,147	

CONCLUSION

On September 30, 2010, the NMPRC certified to the FCC that to the best of the Commission's knowledge the federal Universal Service fund monies are being used "only for the provision, maintenance and upgrading of facilities and services for which the support is intended." by New Mexico ETCs.8 Ironically, the broadband funding that FCC is proposing as justification to withdraw the relinquished funds from redistribution to eligible ETCs by changing the rules is not one of those eligible services today, though the FCC has signaled its intent to expand federal universal service funding in that area.9

8 Letter from Hon. David King, Chairman NMPRC to Marlene H. Dortch dated September 30, 2010 Certification of Support.
9 FCC 03-170 CC Docket 96-45 released 7/14/03 includes the following on page 4.: Advanced or High-Speed Services

Because of the overall low telephone penetration rates in some low density rural areas of New Mexico (outside of 2 or 3 urban areas), and the situation in Native American lands including the Eastern Navajo Agency of the Navajo Nation "checkerboard area", our recommendation is that the FCC not adjust the interim cap when a carrier has relinquished its ETC status, and that these funds continue to be distributed until such time as the comprehensive reform of the USF is undertaken and any needed clarification or modification to the temporary 18 month waiver is completed. We urge any preliminary steps taken in the accompanying Order to temporary "freeze" the fund mechanism for 18 months be rescinded. We think all Non-Sprint, Non-Verizon Wireless ETC designations relinquished through divestiture or other reasons should be specifically excluded from the rule in line with the argument that non-merging parties should be held harmless, see Par. 12, page 6.of the FCC ORDER AND NPRM FCC 10-155:

> "The operating entities for these services areas were managed by a trust separate from Verizon Wireless pending their final sale, and all high-cost support they received since the closing of the Verizon Wireless ALLTEL transaction primarily benefited the trust. Because the service areas have now been divested, depriving these entities of high-cost universal service support would effectively extend Verizon Wirelesses' merger commitments to the acquiring parties, who were not parties to the merger order commitments."

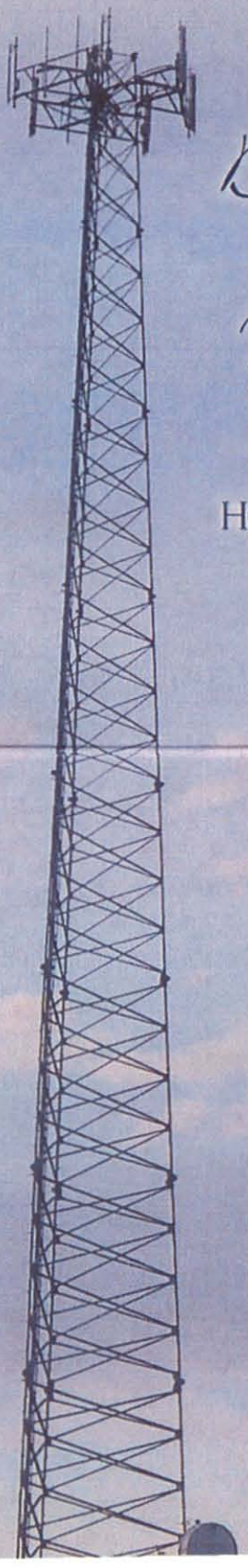
Following this logic, if an ETC status is relinquished, the relinquished funding should revert to the State under the current state CETC Cap in accordance with current federal rules without being penalized by the FCC rulemaking.

Sincerely,

NEW MEXICO PUBLIC REGULATION COMMISSION

Jerome D. Block, Vice-Chairman

"1.Consistent with the Joint Board's *Recommended Decision*, we decline to expand the definition of supported services to include advanced or high-speed services at this time.[1] Although we agree with commenters, such as the National Telecommunications Cooperative (NTCA) and Valor Communications, that broadband services are becoming increasingly important for consumers in all regions of the nation, we also agree with the Joint Board and the vast majority of commenters that high-speed and advanced services currently do not meet the Act's criteria for inclusion on the list of supported services."



PLEASE JOIN NAVAJO NATION
PRESIDENT,

Dr. Joe Shirley, Jr.

AND

Wilson R. Benally,
CHAPTER PRESIDENT

IN A BLESSING CEREMONY
HONORING CELLULARONE'S NEW

Cellular Site

ON OCTOBER 1 ST

LOCATED AT THE

Tiis Tsoh Sikaad
Chapter

IN BURNHAM, NEW MEXICO

THIS DEDICATION WILL BEGIN
AT 11:00 AM
FOLLOWED BY A LUNCHEON

PLEASE RSVP TO JODI SYTH
JSYTH@CELLULARONEAZ.COM
928-537-0375 EXT 2236

Attachment 1

Driving Directions to Burnham Cellular Site
Near Tis Tsoh Sikaad
(Burnham) Chapter House

From Gallup:
1. Heading out of Gallup on the 491 drive north approximately 59.3 miles to the Two Grey Hills Shell gas station.
2. Turn right on to BIA 5 heading East drive approximately 11.8 miles to the Burnham chapter house turnoff. (There should be a sign to Burnham chapter house.)
3. In about 1/2 mile BIA 5 will take a hard right. Follow it around. You will still be on BIA 5.
4. In 4.51 miles there will be a dirt road to the right. This is the turn to the Burnham Cellular Site. You will be able to see the tower at this point. Follow the dirt road back into the site.

From Farmington:
1. From West Murray Drive Turn South onto the 371 heading to Crownpoint.
2. Drive 26.8 Miles south on the 371 to the second Burnham Chapter House turn off.
3. Turn right onto BIA 5080 driving 11.1 miles to the west to the cell site turn off.
4. Take the dirt road to the left. This is the turn to the Burnham Cellular Site. You will be able to see the tower at this point and follow the dirt road back into the site.

GPS coordinates 30.33188 North -108.44149 West
Map on back side