

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

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| 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 |
| |) | |

**COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

I INTRODUCTION: INTEREST OF RICA

The Rural Independent Competitive Alliance (“RICA”) files its Comments on the Notice of Proposed Rulemaking in this proceeding, released September 3, 2010.¹ RICA is a national organization of rural Competitive Local Exchange Carriers (“CLECs”) that provide telecommunications in low-density, high-cost areas comparable to those served by their affiliated rural ILECs. RICA members overbuilt the rural portions of the service areas of large ILECs in places where rural subscribers have long been neglected by distant management unwilling to invest in upgrading facilities in low-density, high-cost areas.

For many years RICA has advocated fundamental changes in the Commission’s Universal Service rules, including removal of the “identical support rule” and replacement with a system that provides support to Competitive Eligible Telecommunications Carriers (“CETC”) on

¹ *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*, Order and Notice of Proposed Rulemaking, FCC 10-155, 75 Fed Reg. 56494 (Sep.16, 2010). (“Order” and “NPRM”).

the basis of their individual costs.² RICA supported the interim cap on CETC support as a necessary step to achieving such reform “because the effects of the existing rule threaten the economic and political viability of the Universal Service Fund.”³ RICA expressed concern that “interim” could become indefinite and proposed an 18th month sunset, which the Commission did not adopt.⁴ The promise that the freeze would be “interim” has not been fulfilled.⁵ Instead, because the Commission has failed to revoke the identical support rule, even though it has long had an adequate record upon which to do so, RICA members have seen substantial reductions of as much as 50% in their support. Nor has the Commission resolved how USAC is to treat the cost studies, which the Cap Order contemplated as an exception to the cap.⁶ The result of these multiple failures is that what was supposed to be a cap has been a severe reduction. RICA recognizes “cap” means no increase, but neither does it necessarily mean decrease.⁷

² See, e.g. RICA Comments, WC Doc. No. 05-337 and CC Doc. No. 96-45, Mar. 27, 2006

³ RICA Comments, WC Doc. No. 05-337 and CC Doc. No. 96-45, Jun. 8, 2007.

⁴ Commissioner Copps’ separate statement to the Order and NPRM describes the problem succinctly: “Just as dismally, adoption of the cap put real reform of Universal Service on the back-burner when it should have been on the front and on high. So today, even after prolonged Commission deliberations over how to implement the interim cap, we still find ourselves agonizing over related issues, such as the situation addressed in the instant order.”

⁵ RICA advocated an 18-month sunset for the cap. RICA Comments, WCB Doc.No. 05-337, CC Doc. No. 96-45, Jun. 6, 2007 at 2.

⁶ *High Cost Universal Service Support, Federal State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers, RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, Order, 23 FCC Rcd 8834 (2008) para. 31. (“*Interim Cap Order*”).

⁷ In its Comments on the NPRM regarding USF implementation of the National Broadband Plan, RICA noted: “The frozen amount of support available to small carriers that were not involved in these [Verizon and Sprint] mergers should not be reduced as a result of the Verizon/Sprint commitments. RICA Comments, WC Doc. Nos, 10-90, 05-337, GN Doc. No. 09-51, Jul. 12, 2010 at 17.

RICA has also supported the concept of revision of universal service support mechanisms to include broadband service.⁸ In its Comments, RICA has emphasized that the Commission should obtain clear authority to provide such support because Section 254 limits support to telecommunications services while the Commission has characterized broadband Internet access as an information service.⁹ RICA has raised this point in order to encourage the Commission to act in a manner that will begin the flow of support in the shortest possible time. Action inconsistent with the statutory requirements in Sections 254 and 214 will ultimately delay, rather than accelerate the process.

For the same reasons, RICA advocates that the Commission not adopt the proposed change to Section 54.709(b).¹⁰ As explained below, the Commission does not have legal authority to pretend that Verizon and Sprint continue to draw USF support when they have made a binding commitment that they will not do so. Instead, the savings should first be used to restore support to the remaining companies. To the extent funds remain, or restoration is not possible, then the savings should be used to provide an immediate benefit to consumers by reducing the contribution factor.

⁸ RICA Comments, WC Doc. No. 10-90, GN Doc. No. 09-51, WC Doc. No. 05-337, July 12, 2010.

⁹ RICA Comments, GN Doc. No. 09-51, Jun. 8, 2009 at 11-12.

¹⁰ Even assuming *arguendo*, that contributions can lawfully be collected for services not yet designated as supported services, the proposed rule goes far beyond that and gives the Commission *carte blanche* to order USAC to do anything with the funds, thus rendering Section 54.709 a non-rule.

II SUPPORT SURRENDERED BY VERIZON AND SPRINT SHOULD NOT BE RESERVED FOR FUTURE BROADBAND PROGRAMS

The Order apparently adopts the arguments of Corr Wireless and its supporters that USAC's interpretation of the *Verizon Wireless Merger Order* was, in effect, unauthorized.¹¹ Specifically, the Order states the implementation of the merger orders must be consistent with the *Interim Cap Order*¹², including the size of each states' cap.¹³ The Order, however, never comes to grips with the central fact which Corr Wireless and most of its supporters have ignored: the *Interim Cap Order* was, as its name implies, a "cap" not a "freeze."¹⁴

The Joint Board Recommendation's discussion of the Operation of the Cap explained and provided an example of how the cap would operate:

Where the state uncapped support is less than the available state capped amount, no reduction would be required....If in State B... the base period capped amount is \$100 million and the total uncapped support is \$95 million there would be no reduction factor because the uncapped amount is less than the capped amount.¹⁵

The Commission's order adopted the Joint Board's words virtually *verbatim*.¹⁶

The logical meaning of the phrase "no reduction would be required" is that if the total claims from CETCs for support in a given state in a given quarter are below the cap, then all claims otherwise valid will be paid. There are any number of reasons, besides the agreements of Verizon and Sprint to reduce their entitlements, why USF claims by CETCs in a state might

¹¹ Order at paras 7-10.

¹² *High-Cost Universal Service Support; Federal State Joint Board on Universal Service, Order*, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*").

¹³ It is uncontestable that USAC cannot deviate from the terms of a Commission Rule, or for that matter that the Commission itself cannot change a rule without embarking on a further rule making.

¹⁴ RCA appears to recognize this fact. RCA Reply Comments, May 26, 2009 at 6: "... 'cap' is defined as 'a maximum limit'...."

¹⁵ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service, Recommended Decision*, 22 FCC Rcd 8998 (Fed-State Jt. Bd. 2007) paras. 10-11 ("*Recommended Decision*")

¹⁶ *Interim Cap Order* at paras. 27-28.

decline. For example large numbers of customers might change their service to non-CETC carriers. While the Commission could perhaps have made this point more specific, it cannot be said that there is any indication that the intent was to freeze support state-by-state, rather than cap it.¹⁷ The Order now finds it convenient to reject both USAC's analysis and Corr's solution by concluding in effect that interstate ratepayers should continue to pay into the fund *as if* Verizon and Sprint were still drawing their full amount of support. The funds not paid to CETCs will be set aside for the day when they are needed for the new broadband support mechanisms described in the National Broadband Plan.¹⁸

The SouthernLINC Petition raises the argument that even if the Commission waives Section 54.709(b), it lacks authority to require the collection of contributions for a potential universal service support mechanism.¹⁹ The point appears well taken. Section 254(b)(4) establishes the principle that all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service. Section 254(d) makes it mandatory for telecommunications carriers to contribute to the specific, predictable and sufficient mechanisms established (*not to be* established) by the Commission to preserve and advance Universal Service. Because the Commission has not established a Broadband support mechanism, it has no authority to require carriers (and thereby their customers) to contribute to a non-existent mechanism.

¹⁷ RICA recognizes that the time for Petitions for Reconsideration has passed. These points are raised as necessary context to RICA's timely comments on the NPRM, and as a comment in partial agreement with Petition for Partial Reconsideration of SouthernLINC Wireless and the Universal Service for America Coalition, filed Sep. 29, 2010 in these dockets. ("SouthernLINC Petition") and the Joint Petition for Reconsideration of Allied Wireless Communications Corp., et al, filed October 4, 2010.

¹⁸ Order at paras 20, 21.

¹⁹ See note 17, *supra*

III THE SAVINGS FROM THE SURRENDER OF SUPPORT BY VERIZON WIRELESS AND SPRINT SHOULD BE USED TO RESTORE SUPPORT TO THE CAP LEVELS, AND FAILING THAT, TO REDUCE THE CONTRIBUTION FACTOR AT LEAST UNTIL ANY BROADBAND SUPPORT MECHANISMS BECOME EFFECTIVE

The NPRM states that the purpose of the proposed rule is to “better enable the Commission to reclaim certain high-cost support, and to help fund broadband universal service programs,....” In context “reclaim” might be taken to refer to the support “voluntarily” foregone by Verizon and Sprint, and any similar cases. The Initial Regulatory Flexibility Act analysis, however is more candid: “...the purpose of the proposed rule is to reduce the amount of high-cost universal service support received by competitive ETCs.”²⁰

Although, the Commission is without authority to collect contributions to support services that have not been designated supported services, RICA member CETCs and other CETCs, wireline and wireless, do provide supported services consistent with the applicable rules and could provide more if their funds were not reduced.²¹ Because the Commission has failed to act within a reasonable time, the cap is no longer “interim” and its justification has expired. Instead, the result has been severe reductions in support to CETCs providing service in high cost rural areas.²² Therefore, rather than adopt the proposed amendment to section 54.709(b), the Commission should amend the Interim Cap “rule” to provide that savings from withdraw of CETCs should be utilized by USAC to restore carriers to the support levels they were at on the

²⁰ NPRM, App. C, Initial Regulatory Flexibility Act Analysis, at para. 30. As explained in these Comments, RICA does not agree with the conclusion that a significant alternative cannot be chosen, at least if the purpose is to find an appropriate means of recognizing the USF payments saved as a result of the Verizon and Sprint merger conditions.

²¹ See, Wireless Telecommunications Bureau Memorandum, Notice of *Ex Parte* with Mid-Rivers Wireless—GN Docket No. 09-51 and WC Docket No. 10-90, Oct. 6, 2010.

²² The Montana State Cap factor based on the USAC website is .659088. Tennessee and North Carolina are the lowest states at .264

effective date of the Cap Order.²³ The savings should be spread over the entire nation, rather than benefiting only those states where the merger parties operated.

To the extent funds remain after returning CETCs to their original status on imposition of the caps, any remainder should be applied to reduce the contribution factor. In the face of warnings from many different interests, as well as its own expression of concern about the burden on subscribers, the quarterly contribution factor has bounced up to 12.9%.²⁴ The NPRM surprisingly states that somehow consumers are better off having to pay for undesignated services they don't get rather than experience fluctuations in the contribution factor.²⁵ The Commission is thus telling consumers: "we could reduce your costs this quarter and several more after it, but they will eventually go back up. You are better off not having to cope with fluctuation than keeping the money in your own pocket."

At the same time, it is not at all clear when, or even if, the Commission will be able to establish a mechanism to provide support for broadband services. First, as RICA has repeatedly pointed out in comments, Section 254 only authorizes support for telecommunications services and the Commission has classified broadband as an information service. Whether or not it can revise that category is certainly an open question. It is clear that any Congressional clarification is very unlikely to occur this year. Second, the Comments on the first NPRM to implement aspects of the NBP raised a multiplicity of serious questions challenging the assumptions and proposals that will require substantial time and effort to resolve.²⁶

²³ To the extent the present NPRM does not provide sufficient notice of this result, a new NPRM should be issued promptly in these dockets.

²⁴ FCC Public Notice, Sep. 10, 2010, DA 10-1716.

²⁵ NPRM at 10, n. 48.

²⁶ RICA Comments, WC Doc. No. 10-90, GN Doc. No. 09-51, WC Doc. No. 05-337, July 12, 2010,

Given the highly questionable legal authority to require contributions to support possible future supported broadband services, the legal questions involving the Commission's authority to even make broadband services supported services, the inevitable long delay before such rules could become effective, and the current continued economic pressure on American consumers, the most prudent course for the Commission is to ensure that contributions are only made for legal purposes. The Act limits carriers' use of USF support to "the provision, maintenance and upgrading of facilities or services for which support is intended."²⁷ Since carriers cannot use support for services not designated supported services, it follows that the Commission cannot require contributions for such services. The alternatives available are to redistribute the savings to carriers that do provide supported services or simply allow the fund to reduce in size and thereby reduce the contribution factors. Such action would provide an immediate benefit to consumers in either better service or lower cost and was apparently the purpose of imposing the conditions in the first place.

In addition, reduction in the contribution factor would spread the benefits of the Verizon and Sprint merger conditions nationwide instead of simply changing the calculations in the states where Verizon Wireless and Sprint are not claiming USF support.

IV CONCLUSION: THE PROPOSED RULE SHOULD BE REJECTED

Although supporting the proposal, in his separate statement Commission Copps noted the issue of retaining customer contributions when they are not being used to provide service:

I genuinely dislike holding on to ratepayers' contributions when those funds could and should be distributed immediately for services in areas that urgently need them. I understand we are boxed in because of the circumstances outlined above, but this predicament shows us once again the costs we pay for previous wrong-headed decisions and delay.

²⁷ 47 U.S.C. 254(e).

There is a way out of the box, even at this late date. First, the Commission should grant the Petitions for Reconsiderations of the Corr Wireless Order to the extent it directs USAC to reserve the funds that would have been paid to Verizon and Sprint. The waiver of Section 54.709(b) would accordingly be reversed. Second, the Commission should amend the Cap Order to provide that to the extent the savings from the Verizon, Sprint and any other foregone support are available, support levels for CETCs should be returned to their March 2008 level, thus restoring the original purpose of the cap. Funds available in excess of that amount should be used to reduce the contribution factor. If necessary to provide notice, a new NPRM should be issued promptly. The Commission should simultaneously adopt rule changes repealing the identical support rule and directing USAC to accept properly supported cost studies of CETCs.

Finally, the Commission should explain to the public why the reductions in USF payments to Verizon and Sprint it negotiated in early 2008 have yet to be of any benefit to the public.

Respectfully submitted

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