**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 |

**Reply Comments of**
**SouthernLINC Wireless and the**
**Universal Service for America Coalition**

Southern Communications Services, Inc. d/b/a SouthernLINC Wireless and the Universal Service for America Coalition (jointly, the "Commenters"), by their attorneys, hereby submit these reply comments in the above-captioned proceeding.[1] The initial comments filed in the proceeding demonstrate that the Commission's proposal to amend section 54.709(b) of the Commission's rules and to reduce the level of the "interim" cap in order to establish a pool of funds to be used for an unspecified purpose at an undetermined point in the future would lead to protracted litigation and regulatory uncertainty without fostering broadband deployment. For this reason, the Commenters have repeatedly urged the Commission instead to address fundamental questions regarding the Commission's authority to implement key provisions of the *National Broadband Plan* rather than unnecessarily rushing headlong down an uncertain path.[2] Specifically, the Commission should first resolve significant questions regarding the scope of its statutory authority before developing reform proposals that are fully consistent with the

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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*, 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 & NPRM*").

2 *See, e.g.,* USA Coalition Comments, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51 (July 12, 2010); USA Coalition Reply Comments, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51 (Aug. 11, 2010).

requirements of the Act as it stands *today* (rather than as it ideally should be, as some would prefer it to be, or as Congress indicates it might be at some point in the future).

The comments reflect widespread agreement with the Commenters' Petition for Partial Reconsideration filed in this proceeding,[3] which demonstrated that the Commission lacks the authority to "reserve" universal service funds for unspecified uses at an undetermined point in the future. Since the Commission lacks the authority to "reserve" universal service funds, there is no reason to amend section 54.709(b) of the Commission's rules, particularly since the current rule is part of the safeguard which ensures that mandatory universal service contributions constitute permissible fees rather than illegal taxes.[4] The overwhelming majority of commenters agree that the Commission instead should focus on building a strong legal foundation for universal service reform rather than rushing to meet the self-imposed target deadlines set forth in the *National Broadband Plan*. In any event, the record demonstrates that the proposals about which the Commission requested comment here are inconsistent with the Act.

## I. THE RECORD DEMONSTRATES THAT THE FCC LACKS THE AUTHORITY TO RESERVE THE RECOVERED MERGER COMMITMENT FUNDS FOR UNSPECIFIED FUTURE USES

The record in this proceeding reflects widespread agreement among the commenting parties that the Commission lacks the authority under the Act to reserve recovered merger commitment funds for undefined future uses.[5] Indeed, none of the commenting parties explicitly

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[3] *Petition for Partial Reconsideration of SouthernLINC Wireless and the Universal Service for America Coalition,* WC Docket No. 05-337, CC Docket No. 96-45 (Sep. 29, 2010) ("Coalition Petition for Reconsideration").

[4] *Id.*

[5] *Id.*; *accord* Comments of Rural Independent Competitive Alliance at 5; Comments of Rural Telecommunications Group, Inc. at 4; Comments of New Mexico Public Regulation Commission at 2-3; Comments of United States Telecom Association at 4; *see also Allied Wireless Petition for Reconsideration*, WC Docket No. 05-337, CC Docket No. 96-45 (Oct. 4, 2010) at 20-21 ("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.").

challenged the conclusion that the proposed "reserve" mechanism exceeds the scope of the Commission's authority.

A broad range of parties -- including consumer advocates, state regulatory authorities, ILECs, CLECs and wireless carriers -- agree that the Commission must address its lack of authority to establish a "reserve" of universal service funds at the outset of the reform effort.[6] As the Rural Telecommunications Group explained, the Commission should not continue to pursue a strategy that is based upon a reserve mechanism that "a court would likely find ... to be unconstitutional."[7] Similarly, Free Press correctly observed that the Commission's uncertain authority regarding universal service reform "could result in substantial delay or abandonment of the USF transition plans[.]"[8] Accordingly, regardless of whether the Commission believes the proposed rules are desirable from a policy perspective, the Commission should not pursue any proposal that it lacks the authority under the Act to adopt.

Even if Congress were to authorize the Commission to implement the *National Broadband Plan* by amending the Act, the Commission should not adopt the proposals set forth in the NPRM. Any "reserved" universal service funds would remain unspent and unproductive[9] at a time when, in the words of Commissioner Copps, "those funds could and should be distributed immediately for services in areas that urgently need them."[10] It is possible that some, if not many, of the unserved areas would be served today if the Commission had not imposed the

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6 *See*, respectively, Comments of USTelecom at 4; Comments of Free Press at 4; Comments of Verizon and Verizon Wireless at 4-5, Comments of Rural Telecommunications Group, Inc. at 4; Comments of Rural Independent Competitive Alliance at 5; Comments of New Mexico Public Regulation Commission at 2-3.

7 Comments of Rural Telecommunications Group, Inc. at 4.

8 Free Press at 4.

9 Comments of New Mexico Public Regulation Commission at 3; Comments of Free Press at 4.

10 Statement of Commissioner Michael J. Copps, *Corr Wireless Order & NPRM*; *accord* Independent Competitive Alliance at 8.

Interim Cap in the first place, and thus there would have been no need to consider "reserving" funds in order to create the proposed "Mobility Fund." The history of the universal service docket is replete with missed "deadlines" and broken promises about the timing of contemplated reforms. Indeed, the Commission promised when it implemented the so-called "interim" cap that permanent reform would be adopted within six months, and yet the cap has been in place for over two years, and the Commission now is considering amendments to the cap since long-term reform has yet to be put out for comment. In short, the proposals are a bad idea regardless of whether the Commission has the authority to adopt them.

## II. THE COMMISSION SHOULD NOT REDUCE THE INTERIM CAP BY THE AMOUNT OF THE RECLAIMED FUNDS

Since the Commission lacks the authority to hold the "recovered" funds in reserve, the Commission has three choices for moving forward. First, the Commission could directly transfer the recovered funds to a new broadband deployment program, assuming of course that the new program could be adopted before the funds are actually recovered. Second, the Commission could reduce the level of the interim cap to reflect the "recovered" funding in order to temporarily reduce the USF contribution factor. Third, the Commission could leave the interim cap as is, continue to calculate support as required by the rules, and focus solely on developing, and implementing, long-term universal service reform. The record in this proceeding demonstrates that the third option unquestionably is the best course of action.

### A. The Commission Lacks the Authority to Transfer the "Recovered" Funds Directly to Currently Proposed Broadband Programs

Several parties suggest that the recovered merger commitment funds be used to fund an interim broadband deployment program[11] or fund the universal service reform proposals outlined

[11] Comments of CenturyLink at 3.

in the *National Broadband Plan.*[12] However, as noted by a number of parties, substantial legal uncertainty surrounds the Commission's authority to establish any mechanism to provide support for broadband services.[13] Indeed, it could take many months, if not many years, for the Commission to craft sufficiently specific and statutorily sound broadband universal service reforms that would enable the Commission to adopt its ambitious broadband support proposals.[14] As one commenter put it, funding broadband programs before establishing the Commission's authority to do so puts the cart before the horse.[15] Although the Commission's desire to implement the recommendations of the *National Broadband Plan* in an expeditious manner is certainly laudable, there can be no doubt that the failure to address fundamental questions of jurisdiction and authority at the outset would ultimately delay the Commission's ongoing reform efforts.[16] As such, no mechanism is likely to be implemented before the funds are "recaptured."

The alternative proposal to establish an ad hoc, interim broadband deployment program solves none of the fundamental problems associated with the Commission's authority to fund broadband programs under the Act, and would only create additional distraction and delay from the ultimate goal of comprehensive and sound universal service reform.[17] Indeed, as one proponent of this approach -- CenturyLink -- concedes, the "Commission would do better to wait until a revised high-cost USF program is developed and implemented"[18] if an ad hoc, interim

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12 Comments of Verizon at 5.

13 Comments of Rural Independent Competitive Alliance at 7 ("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."); Rural Telecommunications Group, Inc. at 4; Telephone Association of Maine at 2; Comments of Sprint at 4; Comments of Free Press at 4.

14 Comments of Sprint at 4.

15 Comments of Telephone Association of Maine at 2.

16 Comments of Free Press at 4; Comments of Rural Independent Competitive Alliance at 3; *accord* Comments of New Mexico PUC at 3; Sprint at 4; Telephone Association of Maine at 2.

17 *Accord* Comments of Rural Cellular Association at 8.

18 Comments of CenturyLink at 2.

program cannot, for any reason, be implemented before the funds are "recaptured." Therefore, while it is true that redirecting the merger commitment funds towards new broadband programs once they are established and in place "avoids altogether potential legal hurdles with stockpiling universal service funding,"[19] such an approach fails to recognize that the Commission lacks the authority under the Act to adopt its broadband funding proposals in the first place. Moreover, the Commission is not likely to be able to adopt yet another funding mechanism and implement it before funds are "recaptured" from Verizon and Sprint, which makes this option impossible from a practical standpoint even if it were possible from a legal standpoint, which it is not.

### B. The Reclaimed Support Should Not Be Used to Reduce the Level of the Interim Cap

As a justification for waiving section 54.709(b) of the Commission's rules in order to allow for the reclaimed merger commitment funds to be "reserved," the Commission expressed its desire to "minimize unnecessary volatility in the contribution factor."[20] As an initial matter, the Commission should not amend section 54.709(b) because the Commission lacks the authority to "reserve" funds for future uses, particularly since the current rule is part of the safeguard which ensures that mandatory universal service contributions constitute permissible fees rather than illegal taxes. Moreover, the Commenters respectfully submit that the amount of money at issue is not large enough to have a material impact on the contribution factor, and thus the series of drops, spikes and plateaus are not likely to be overly disruptive to consumers.[21] If they were, however, such disruptions would provide a strong justification for option three -- continuing to calculate support the way it is currently calculated until long-term reform is implemented --

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19 Comments of Verizon at 5.

20 *See Corr Wireless Order & NPRM*, ¶ 22.

21 *Id.*, ¶ 22, n. 48; *see also* Comments of Verizon at 5 (noting that "consumers are already (regrettably) accustomed to such quarterly swings"),

rather than reducing the level of the interim cap, which would lead to the very changes in the contribution factor that the Commission seeks to avoid.

### C. The Commission Should Leave the Interim Cap as Is, Continue To Calculate Support as Required by the Rules, and Focus Solely on Developing, and Implementing, Long-Term Universal Service Reform

The Commenters respectfully urge the Commission to leave the interim cap as is, continue to calculate support as required by the rules, and focus solely on developing, and implementing, long-term universal service reform.[22] The measures proposed by the NPRM, and the Mobility Fund as currently proposed, are nothing more than expensive distractions to completing long-term, comprehensive universal service reform. Far from fostering broadband deployment, the proposals would create regulatory uncertainty and spark years of unnecessary litigation. The Commission instead should leave the cap and existing rules alone while it focuses on sustainable long-term reform that is grounded firmly on the requirements of the Act as it currently exists.

Focusing solely on long-term reform, rather than adopting the proposed measures or reducing the interim cap, would be the best way to foster broadband deployment. As noted by Commissioner Copps, the recaptured funds "could and should be distributed immediately for services in areas that urgently need them."[23] As many commenting parties have pointed out, the recaptured support could be quickly put to use to fund projects that would serve to build out the Nation's 2G and 3G networks where such coverage is currently lacking.[24] That is because, in the words of one commenter, "the same infrastructure that is utilized for the provision of essential

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22 Comments of Rural Telecommunications Group, Inc. at 5.

23 *Accord* Rural Independent Communications Alliance at 8.

24 *See* Comments of Rural Cellular Association at 3-5; Comments of New Mexico PUC at 3-4; Comments of Rural Telecommunications Group, Inc. at 5; Comments of Cellular One at 6.

voice and data services today will be needed for broadband tomorrow."[25] These projects could begin to build out the foundation for future mobile broadband deployment under the Commission's existing high-cost programs, without the need to develop and fund additional new programs like the Mobility Fund. For these reasons, the Commission should reject the proposal to adjust a state's interim cap amount if a CETC serving that state relinquishes its ETC status.

The Act also requires the Commission to ensure that the universal service support distribution mechanism is "specific, predictable and sufficient."[26] The Commission has concluded that the current distribution mechanism -- the identical support rule -- is the legal means by which the agency is satisfying this statutory mandate, and it will remain the only means for doing so until the Commission formally adopts a replacement distribution mechanism.[27] Only after the Commission has adopted a specific and predictable replacement distribution mechanism will the agency be able to (1) identify which facts are relevant for determining the necessary level of support to meet the Act's "sufficiency" mandate and (2) analyze the relevant facts on a study area-by-study area basis to determine whether the current level of support needs to be increased or reduced over a rational period of time to meet the level of support that is "sufficient" under the new distribution mechanism. Until the Commission has taken all of these steps, there will be no legal standard or factual basis for concluding that the amount of support determined by the identical support rule is too high.[28] Accordingly, reducing the level of the interim cap would be arbitrary and capricious and otherwise inconsistent with the law to the extent the Commission bases its decision on the foundationless claim that CETCs

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25 Comments of Cellular One at 15.

26 47 U.S.C. § 254(b)(5).

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

28 *Accord* Comments of Rural Cellular Association at 8.

should continue to receive less support than the amount to which it is entitled under the identical support rule, particularly since the Interim Cap was designed to maintain the status quo while reform was implemented rather than to reduce expenditure without legal or factual justification.[29]

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

## III. CONCLUSION

Rather than continuing to rush headlong down an uncertain path, the Commission first should focus on determining the jurisdictional theory upon which it will base comprehensive universal service reform and adopt any reclassification measures it deems necessary. After the Commission has settled the significant questions regarding the scope of its statutory authority, the agency should develop reform proposals that are fully consistent with the requirements of the Act as it stands *today* (rather than as it ideally should be or as Congress indicates it might be at some point in the future), and then the Commission should provide the public with notice and opportunity to comment on these proposals. Finally, the Commission should determine the appropriate transition measures, which can only be done after the Commission has determined the replacement distribution and contribution mechanisms. In the interim, the Commission should not adopt the proposals set forth in the NPRM: the Commission should leave the interim cap as is, continue to calculate support as required by the rules, and focus solely on developing, and implementing, long-term universal service reform.

Respectfully submitted,

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Date: October 21, 2010