

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
High Cost Universal Service Support)	WC Docket No. 05-337
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45

PETITION FOR RECONSIDERATION OF VERIZON WIRELESS

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May 2, 2011

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SUMMARY

The Wireline Competition Bureau (“Bureau”) should reconsider and reverse its April 1 letter directing the Universal Service Administrative Company (“USAC”) to retroactively implement the company-specific cap the Commission imposed in October 2007 on Verizon Wireless’s predecessor in interest, Alltel (the “April 1 Letter”).

The April 1 Letter ignored Verizon Wireless’s demonstration that the Commission did not intend for the Alltel-specific cap to be implemented. It had been the Commission’s intention to apply an *industry-wide* cap, consistent with a May 2007 Joint Board recommendation, and the Commission in fact adopted an industry-wide cap on May 1, 2008. The Alltel-specific cap was never implemented and, in adopting the industry-wide cap, the Commission specifically provided that the broader cap “superseded” the Alltel-specific cap. Commission staff directed USAC in writing not to implement the cap, and informed Verizon Wireless that it would not be implemented. The use of “supersede” to mean “replace” is consistent with legal usage and prior Commission decisions. The April 1 Letter did not even consider the inconsistency between its direction and the Commission’s expressed intent. Thus, it must be reconsidered.

In the intervening period, the Commission and the Bureau have further demonstrated that the industry-wide cap should replace the company-specific cap. In the *Corr Wireless Order*, despite extensively discussing the amount of support due to Verizon Wireless, the Commission did not mention the Atlantis cap and, in reciting the amount of support that Verizon Wireless would be required to give up in connection with the Alltel transaction, assumed that the Alltel-specific cap would not be implemented. The Bureau itself also has shown that it did not expect for the Alltel-specific cap to be implemented. In its effort in 2010 and 2011 to true up the industry-wide cap amount in each state, it did not mention or consider the Alltel-specific cap.

Implementing the Alltel-specific cap now would be inconsistent with the purpose for which it was adopted – reducing the contribution burden on consumers. Because of the subsequent *Corr Wireless Order*'s decision to set foregone universal service support aside for future broadband purposes, consumers will see no benefit if the Alltel-specific cap is implemented now.

The April 1 Letter also illegally requires Verizon Wireless to disgorge significant amounts of universal service support – amounts that Verizon Wireless has already expended, pursuant to legal mandate, on providing the supported services. Forcing Verizon Wireless to pay amounts that had already been spent would directly damage Verizon Wireless and would be unlawfully punitive. The April 1 Letter's brief discussion of Verizon Wireless's reliance on staff guidance ignores the real equitable issues in the case, and also was inadequate even on its own terms.

In addition, if the Atlantis cap is implemented now, this will affect the amount of support that was available to carriers in March 2008 and thus the level of the industry-wide cap. The Bureau incorrectly concluded that the cap need not be adjusted. As the *Corr Wireless Order* shows, the computation of the cap cannot be modified without Commission action. As other competitive eligible telecommunications carriers ("CETCs") argued below, the hardship that would be caused by reducing the industry-wide cap is a further reason not to implement the Atlantis cap now.

The April 1 Letter also ignored Verizon Wireless's request, in the alternative, that the Bureau waive implementation of the company-specific cap on the unique and compelling circumstances presented here.

The Bureau should reconsider its direction to USAC and instead order that the Alltel-specific cap should not be implemented retroactively.

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To: The Chief, Wireline Competition Bureau

PETITION FOR RECONSIDERATION OF VERIZON WIRELESS

Verizon Wireless hereby requests reconsideration, pursuant to Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, of the April 1, 2011 letter from Sharon E. Gillett, Chief, Wireline Competition Bureau (“WCB” or “Bureau”) to Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company (“USAC”).¹ The April 1 Letter directs retroactive implementation of a company-specific support cap imposed on Alltel Corporation (“Alltel”) in connection with its transaction with Atlantis Holdings, LLC (“Atlantis”). Verizon Wireless is the successor in interest to Alltel, a competitive eligible telecommunications carrier (“CETC”), and would be compelled to return CETC funding that already has been spent unless the April 1 Letter is reversed. For the reasons discussed below, Verizon Wireless requests that the Bureau reconsider the April 1 Letter and direct USAC not to implement the company-specific cap.

¹ Letter from Sharon E. Gillett, Chief, WCB, FCC, to Richard A. Belden, Chief Operating Officer, USAC, DA 11-591 (WCB rel. Apr. 1, 2011) (“April 1 Letter”).

I. BACKGROUND

By letter dated August 19, 2009, USAC requested guidance from WCB on six Universal Service Fund (“USF”) matters.² WCB requested public comment on the letter, and Verizon and Verizon Wireless jointly submitted initial and reply comments.³ Item 6 of the USAC Aug. 19 Letter involves the interplay of (1) the two company-specific caps on CETC support adopted in the *ALLTEL-Atlantis Order*⁴ and the *AT&T-Dobson Order*,⁵ and (2) the industry-wide cap on CETC support adopted in the *Industry CETC Cap Order*.⁶

The factual predicate for Item 6 is that, on May 1, 2007, the Federal-State Joint Board on Universal Service recommended an industry-wide CETC cap.⁷ Shortly thereafter, and during the Commission’s consideration of the *Cap Recommendation*, Alltel and Atlantis filed applications for approval of the transfer of control of Alltel’s licenses to Atlantis. On October 26, 2007, the Commission approved the transfer of control, and imposed as a condition of that transaction an

² See Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, WCB, FCC, WC Docket Nos. 05-337, 06-122 (rec. Aug. 24, 2009; dated Aug. 19, 2009) (“USAC Aug. 19 Letter”).

³ *Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company*, Public Notice, 24 FCC Rcd 12093 (WCB 2009). Verizon Wireless, jointly with Verizon, filed initial and reply comments. Comments of Verizon and Verizon Wireless, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45 (filed Oct. 28, 2009) (“Verizon and Verizon Wireless Initial Comments”); Reply Comments of Verizon and Verizon Wireless, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45 (filed Nov. 12, 2009).

⁴ *Applications of ALLTEL Corp., Transferor, and Atlantis Holdings, LLC, Transferee, for Consent to Transfer Control of Licenses, Leases and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 19517, 19521 ¶ 9 (2007) (“*ALLTEL-Atlantis Order*”).

⁵ See *Applications of AT&T Inc. and Dobson Communications Corp. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 22 FCC Rcd 20295, 20329-30 ¶¶ 71-72 (2007) (“*AT&T-Dobson Order*”).

⁶ *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008) (“*Industry CETC Cap Order*”).

⁷ See *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd 8998 (Jt. Bd. 2007) (“*Cap Recommendation*”).

interim cap on the high-cost support that Alltel was eligible to receive, set at the support Alltel received as of June 2007 (the “Alltel-specific cap” or the “Atlantis cap”).⁸ The Commission imposed a similar cap in approving a merger of AT&T and Dobson Communications (collectively, the “company-specific caps”).⁹

On May 1, 2008, the Commission established an industry-wide interim cap on CETC support, and stated that the “interim cap adopted in this Order *supersedes* the interim caps on high-cost CETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*.”¹⁰ Prior to the adoption of the *Industry CETC Cap Order*, USAC had not implemented the company-specific caps.¹¹ By June 2008, USAC was prepared to implement the company-specific caps but, consistent with the *Industry CETC Cap Order*, it did not proceed to implement the then-superseded caps “[a]t the written direction of Commission staff.”¹² Separately, Alltel contacted Commission staff to confirm that, in light of the new, comprehensive cap, the Atlantis cap would not be implemented, so that it could commit the funds it was receiving from USAC to provide the supported services, as required by law. Consistent with the staff’s direction to USAC, the staff also advised Alltel that the company-specific caps would not be implemented.

In the April 1 Letter, WCB now takes the opposite position – three years after the staff’s direction to USAC not to implement the company-specific caps and long after Alltel has invested the universal service funds it received.

⁸ See *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19521 ¶ 9.

⁹ See *AT&T-Dobson Order*, 22 FCC Rcd at 20329-30 ¶¶ 71-72.

¹⁰ *Industry CETC Cap Order*, 23 FCC Rcd at 8837 ¶ 5 n.21 (emphasis added).

¹¹ USAC Aug. 19 Letter at 5.

¹² *Id.*

II. IMPLEMENTING THE ATLANTIS CAP CONFLICTS WITH THE COMMISSION’S CONCLUSION THAT THE INDUSTRY-WIDE CAP “SUPERSEDED” IT

In its August 19 letter, USAC stated that it “believes that it is required to implement the ... AT&T and Alltel company-specific caps for the time period each respective order was in effect until the date it was superseded by [the *Industry CETC Cap Order*], because the CETC industry-wide cap was effective prospectively and did not state that it superseded the company-specific caps retroactively,”¹³ and the April 1 Letter agreed. Apparently (because the April 1 Letter includes no specific language directing USAC to take any particular action), the Bureau intends for USAC now to implement the Atlantis cap retroactively for the period between the closing of the transaction (November 16, 2007) and the implementation of the industry-wide cap (August 1, 2008). This direction, however, is inconsistent with the Commission’s conclusion that the industry-wide cap “superseded” – replaced – the company-specific caps. It therefore should be reconsidered.

A. The Bureau Ignored Verizon Wireless’s Demonstration That “Supersede” Means “Replace”

As discussed in Verizon and Verizon Wireless’s comments on the USAC Aug. 19 Letter, the word “supersede” means to “annul, make void, or repeal by taking the place of.”¹⁴ Thus, it inherently includes the concept of annulling and making void the requirement or obligation that has been superseded. By using this term, the Commission intended for USAC to implement the industry cap instead of the Alltel-specific cap, to the extent the latter had not yet been implemented – not to begin to implement the company-specific cap retroactively.

¹³ *Id.*

¹⁴ Black’s Law Dictionary 1576 (9th ed. 2009), *quoted in* Verizon and Verizon Wireless Initial Comments at 20.

The Commission’s use of “supersede” in the *Industry CETC Cap Order* was also consistent with usage of the word in legal contexts. For example, Black’s Law Dictionary defines a writ of “supersedeas” as “a prohibition emanating from court of appeal against execution of writ.”¹⁵ In other words, a writ of supersedeas is a court order that prevents the enforcement of a judgment previously issued by a lower court. “Originally it was a writ directed at an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands.”¹⁶ The joint comments explained that, in this case, the *Industry CETC Cap Order* should be read as “‘a writ directed [to USAC], commanding [it] to desist from enforcing the execution’ of the previously-issued cap in the *ALLTEL-Atlantis Order* that USAC was ‘about to execute.’”¹⁷

The April 1 Letter also fails to address the Commission precedent that Verizon Wireless cited in support of an interpretation of the term “supersede” in the *Industry CETC Cap Order* to mean that the industry cap was to be implemented in lieu of the company-specific cap.¹⁸ For example, in 2004, the Wireless Telecommunications Bureau proposed to delete a channel from a private land mobile radio station license in upstate New York based on an allegation that the station was causing interference to operations in Canada. After the Bureau later determined that it had initially failed to provide the licensee with the statutorily required notice and opportunity to respond, the Bureau issued a second order stating that its new order “*supercedes* a prior Order . . . in this proceeding”¹⁹ The Bureau treated its first order in the proceeding as a legal

¹⁵ Black’s Law Dictionary 1437 (6th ed. 1990), *quoted in* Verizon and Verizon Wireless Initial Comments at 20.

¹⁶ *Id.*

¹⁷ Verizon and Verizon Wireless Initial Comments at 20-21.

¹⁸ *Id.* at 23-24.

¹⁹ *Terry L. Pfeiffer*, Order of Modification, 19 FCC Rcd 24422, 24422 ¶ 1 n.1 (WTB 2004).

nullity because of the Bureau's neglect of the statutory notice requirement. Thus, the second order could not have succeeded the first order prospectively, as of its effective date, because the first order was *never* valid. Rather, the Bureau used "supersede" to refer to a rule that succeeded an earlier ruling that would *never* be implemented, just as the Commission did in the *Industry CETC Cap Order*.

Another example arose in the Commission's examination of the obligations of satellite video providers to carry the digital high-definition and multicast signals of local broadcasters in Alaska and Hawaii. The Commission reasoned as follows:

We also find unconvincing DIRECTV's reliance on section 338(j)'s general directive that the Commission prescribe requirements on satellite carriers that are "comparable" to the must carry requirements imposed on cable operators.... Under principles of statutory construction, section 338(a)(4)'s specific mandate requiring carriage of "the signals originating as digital signals" in Alaska and Hawaii *supercedes* the general comparability directive set forth in § 338(j).²⁰

There is no indication that the Commission tied its analysis to the temporal order in which sections 338(a)(4) and 338(j) took effect. Rather, the Commission's point was simply that, because the specific trumps the general, section 338(a)(4) controlled the case. Here, too, the Commission used "supersede" to describe a situation in which one requirement would be applied and the other requirement would not.

²⁰ *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, Report and Order, 20 FCC Rcd 14242, 14251 ¶ 16 (2005) (emphasis added; internal citations omitted). In this excerpt and others, the Commission's original spelling of "supersede" (with a "c") has been retained.

The D.C. Circuit, also, has confirmed that, when the Commission says one order is “[s]uperseded by” another it “means ‘to displace in favor of another.’”²¹ In that case, the question was whether an earlier merger condition, which was “subject to” future rulemaking proceedings, was modified by a future rulemaking order that did not mention the condition. The court found that it was not – but precisely because “subject to” is not as strong a phrase as “superseded by.”²² The court found that, if the Commission had said that the subsequent rulemaking order “superseded” the merger condition, the rulemaking order would have “replac[ed the merger condition] wholesale.”²³ Here, of course, the *Industry CETC Cap Order* explicitly superseded the Atlantis-specific cap.

The April 1 Letter, however, did not address Verizon Wireless’s arguments about the meaning of “superseding” at all. Instead, without analysis or evidence, it simply made the bald assertion that “[the *Industry CETC Cap Order*] superseded the company-specific orders; it did not, however, have any retroactive effect or nullify the prior orders.”²⁴ Indeed, it is now the Bureau’s change of course from the staff’s 2008 direction to USAC not to implement the cap that is retroactive and unlawful. USAC is, in effect, seeking untimely reconsideration of the *Industry CETC Cap Order*.

²¹ *SBC Communications Inc. v. FCC*, 373 F.3d 140, 149 (D.C. Cir. 2004) (quoting Merriam Webster’s Collegiate Dictionary 1183 (10th ed. 1995)).

²² *Id.*

²³ *Id.*

²⁴ April 1 Letter at 2 (citation omitted). In footnote 7, WCB argues that nothing in the prior orders indicated that the Atlantis cap should apply from any date other than the date the transaction was consummated. This is irrelevant because the *Industry CETC Cap Order* subsequently nullified the carrier-specific cap in its entirety prior to its implementation.

B. The Bureau Ignored Significant Evidence That the Commission Meant “Supersede” to Mean “Replace” in the *Industry CETC Cap Order*

There is no indication in the *Industry CETC Cap Order* that the Commission intended for USAC to implement the company-specific caps. In fact, there is ample evidence, which the April 1 Letter did not address, demonstrating that the *Industry CETC Cap Order* nullified the prior condition stated in the company-specific orders. With the industry-wide CETC cap in place, there was no need for the company-specific caps adopted as partial measures while the Commission was considering a more comprehensive cap as previously recommended by the Joint Board in 2007.²⁵ Moreover – and significantly – USAC had never implemented the company-specific caps.²⁶ Under the circumstances, there was no longer any need for the half-a-loaf solutions presented by the company-specific caps, which had never been implemented in any event.

The Commission specifically provided that the industry-wide “cap adopted in this Order *supersedes* the interim caps on high-cost, CETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*.”²⁷ In this context, the Commission intended for USAC to implement the industry-wide cap *instead of* the then-still-unimplemented company-specific cap, not to *begin* retroactive implementation of the company-specific cap.

The Commission’s intent in this regard is clear. On May 14, 2007, the Commission released a Notice of Proposed Rulemaking seeking comment on the Joint Board’s *Cap*

²⁵ *Cap Recommendation*, 22 FCC Rcd at 8999-12.

²⁶ See USAC Aug. 19 Letter at 5. See also *infra* Section II.D (addressing why this did not constitute retroactive rulemaking).

²⁷ *Industry CETC Cap Order*, 23 FCC Rcd at 8837 ¶ 5 n.21 (emphasis added).

*Recommendation.*²⁸ The Commission was considering an industry-wide cap both prior to and throughout the period that the Alltel transaction was pending. The Joint Board recommended an industry-wide CETC cap on May 1, 2007, shortly before the Alltel-Atlantis applications were filed,²⁹ with Chairman Martin expressing his strong support for the industry-wide cap.³⁰ Commissioner Tate, Chair of the Joint Board, also supported an industry-wide cap,³¹ and stated in early October 2007 that she was “hopeful[]” that the agency would vote on the Joint Board’s proposal in the “very, very near future.”³²

In voting to approve the Alltel transaction, several Commissioners expressed reservations about a company-specific cap and pointed to the pending efforts at broader reform of CETC support. Commissioner McDowell observed that “[C]ETC support is not raised or discussed in the record of this [merger] proceeding” and that the “condition prejudices the Commission’s open docket considering universal service support distribution.”³³ Commissioner Adelstein concurred in part in the Alltel-specific cap order, but stated that his vote “does not prejudice [his] consideration of the broad policy issues regarding whether an interim cap on universal service support is the appropriate vehicle to address the growth of the high-cost fund,” which he called

²⁸ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 22 FCC Rcd 9705 (2007).

²⁹ *See Cap Recommendation*, 22 FCC Rcd at 8998.

³⁰ *See id.* at 9014 (statement of Chairman Kevin J. Martin).

³¹ *See id.* at 9015 (statement of Commissioner Deborah Taylor Tate).

³² Edie Herman, *FCC May Vote Soon on Interim USF Cap Proposal, Says Tate*, COMM. DAILY, Oct. 2, 2007.

³³ *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19530 (statement of Commissioner Robert M. McDowell).

“an issue that should be resolved in the relevant proceeding.”³⁴ Commissioner Copps dissented, objecting to the imposition of the cap on Alltel.³⁵

Just six months later, the Commission took action to adopt the broad reform, imposing a cap that applied to all CETCs, and provided that this cap “superseded” the company-specific caps, thus remedying the very concerns raised when the company-specific caps were adopted. Indeed, the Commission specifically declined to adopt the Joint Board’s recommendation to cap the support available to all CETCs at 2006 levels, and instead determined that the support all CETCs were eligible to receive as of March 2008 (without regard to the unimplemented company-specific caps) would establish a more appropriate and sustainable baseline for CETC support.³⁶

Consistent with the Commission’s expressed intention, Commission staff in June 2008 directed USAC, in writing, not to implement the company-specific caps.³⁷ Commissioner Tate noted the importance of “creating a level playing field”³⁸ – which only an across-the-board cap could achieve. In short, the statements and positions of individual Commissioners are consistent with the language of the *Industry CETC Cap Order* and Commission staff’s contemporaneous interpretation of that Order as expressed in its written direction to USAC and its guidance to Alltel.

³⁴ *Id.* at 19529 (statement of Commissioner Jonathan S. Adelstein, approving in part, concurring in part).

³⁵ *Id.* at 19528 (statement of Commissioner Michael J. Copps, approving in part, dissenting in part).

³⁶ *Industry CETC Cap Order*, 23 FCC Rcd at 8850 ¶ 38.

³⁷ *See* USAC Aug. 19 Letter at 5 (“At the written direction of Commission staff ... USAC did not implement the company-specific caps.”)

³⁸ *Industry CETC Cap Order*, 23 FCC Rcd at 8950 (statement of Commissioner Deborah Taylor Tate).

C. The Commission’s and the Bureau’s Subsequent Actions Demonstrate That the Industry-Wide Cap Replaced the Company-Specific Caps

The Commission’s and the Bureau’s actions since the adoption of the industry-wide cap – and since comments were filed in this proceeding – also demonstrate that the company-specific caps were not to be implemented.

In its subsequent consideration of the level of the CETC cap, the Commission has not even mentioned the company-specific caps, even though they would have been directly relevant to the Commission’s decision if they had been effective. Specifically, the Commission’s September 2010 *Corr Wireless Order* addressed the implementation of universal service-related merger conditions arising out of subsequent transactions, which required Verizon Wireless and Sprint to accept the phase-down of their CETC support over five years.³⁹ The Commission stated that the amount of CETC support that would be phased out as a result of the implementation of the phase-down conditions was roughly \$530 million.⁴⁰ This amount, however, reflects the full measure of uncapped support to which Alltel would have been entitled absent the Atlantis cap.

In other words, the Commission’s recited amount of support would be inaccurate if the Commission had intended for the Atlantis cap to be implemented. The Commission’s calculation of the amount of support available to Verizon Wireless and Sprint prior to the approval of their mergers on November 4, 2008 as unaffected by the earlier Atlantis cap demonstrates that the Commission did not intend for the Atlantis cap to be implemented. Moreover, the Commission’s utter silence in the *Corr Wireless Order* on the impact of the

³⁹ *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, 25 FCC Rcd 12854 (2010) (“*Corr Wireless Order*”).

⁴⁰ *Id.* at 12856 ¶ 4.

Atlantis cap, even as the USAC Aug. 19 Letter remained pending, further demonstrates that the Commission did not intend for the Atlantis cap to be implemented. Indeed, in comprehensively addressing Verizon Wireless's CETC support eligibility, the *Corr Wireless Order* effectively rendered the USAC Aug. 19 Letter moot. The time for reassessing Verizon Wireless's support eligibility as determined in that decision has long past.⁴¹

In addition, in the time since the Industry Cap was implemented – since comments were filed in this proceeding and during the period in which the USAC Aug. 19 Letter has been pending – the Bureau has twice adjusted the level of the CETC cap applicable within each state.⁴² The First True-Up Letter and the Second True-Up Letter together reveal a painstaking effort by the Bureau and USAC to identify the precise level of the industry-wide cap⁴³ – that is, the exact “level of support that [C]ETCs in [each] state were eligible to receive during March 2008.”⁴⁴

As noted above, the Commission imposed the Atlantis cap in an order released on October 26, 2007. If the Bureau believed that the Atlantis cap was to be implemented, certainly it would have considered this issue in its careful forensic process to define the precise level of

⁴¹ See 47 C.F.R. § 1.108.

⁴² See Letter from Sharon Gillett, Chief, WCB, FCC, to Karen Majcher, USAC (Aug. 24, 2010) (unpub.) (“First True-Up Letter”); Letter from Sharon Gillett, Chief, WCB, FCC, to Karen Majcher, USAC, 26 FCC Rcd 1214 (WCB 2011) (“Second True-Up Letter”).

⁴³ The First True-Up Letter accounted for changes in support due to the regular annual true-ups of Interstate Access Support (“IAS”) and Interstate Common Line Support (“ICLS”), as well as “(a) errors in the initial March 2008 calculations identified by CETCs; (b) errors in the initial March 2008 calculations identified by USAC; [and] (c) the impact of waivers granted by the Bureau during 2008 and 2009.” First True-Up Letter at 2. The Second True-Up Letter addressed errors that USAC had discovered in its calculations, and provided more detailed, carrier-specific spreadsheets detailing the calculation of the adjustments. Second True-Up Letter at 1.

⁴⁴ First True-Up Letter at 1 (*quoting Industry CETC Cap Order*, 23 FCC Rcd at 8837, 8850 ¶¶ 5, 38).

the industry-wide cap as of March 2008, particularly in light of its determination in the *Corr Wireless Order* that reclaimed support was to be reserved and not redistributed to other CETCs. That it did not demonstrates that the Bureau itself did not believe that the company-specific caps should be implemented.⁴⁵ In any event, the time for reconsideration or Commission review of this action, too, has long passed.⁴⁶

D. The Industry-Wide Cap Validly Superseded the Company-Specific Caps

Although the *Industry CETC Cap Order* nullified the company-specific caps, this did not constitute impermissible retroactive rulemaking. The Alltel-specific cap had never been implemented and the staff had directed USAC in writing not to implement it. Thus, interpreting the Commission’s decision as precluding USAC from implementing the Alltel-specific caps does not change “the *past* legal consequences of *past* actions,”⁴⁷ since the cap had not yet been implemented. Applying the *Industry CETC Cap Order* in this manner did “not make past behavior *unlawful* or otherwise impose a *penalty* for past actions,”⁴⁸ which is necessary for impermissible retroactive rulemaking. Moreover, the Supreme Court has recognized that “the government should accord grace to private parties disadvantaged by an old rule when it adopts a

⁴⁵ The April 1 Letter states, without explanation, that implementation of the company-specific caps should not affect the level of the industry-wide cap. April 1 Letter at 3. It is entirely unclear, however, why this would be true. Indeed, several commenters before the Bureau argued that the company-specific caps should not be implemented precisely because of the impact it would have on the industry-wide cap. *See infra* note 73 (*citing* Rural Telecommunications Group comments). In fact, the inconsistency between the Bureau’s direction to USAC to implement the company-specific caps, on the one hand, and not to adjust the industry-wide cap, on the other, demonstrates that the direction to implement the company-specific caps was a departure from the Bureau’s own position up until that point.

⁴⁶ *See* 47 C.F.R. §§ 1.106(a), 1.117(a).

⁴⁷ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 219 (1988) (Scalia, J, concurring) (second emphasis added).

⁴⁸ *DirectTV, Inc. v. FCC*, 110 F.3d 816, 825 (D.C. Cir. 1997) (emphasis added).

new and more generous one” by applying the new rule instead of the old.⁴⁹ These considerations, too, support interpreting the *Industry CETC Cap Order* as supplanting the company-specific cap, consistent with the staff’s contemporaneous written direction to USAC.

III. IMPLEMENTING THE ATLANTIS CAP CONFLICTS WITH THE COMMISSION’S STATED INTENTION TO CONTROL THE GROWTH OF THE UNIVERSAL SERVICE FUND AND THEREBY REDUCE THE CONTRIBUTION REQUIREMENTS PASSED THROUGH TO CONSUMERS

At the time it imposed the Atlantis Cap on Alltel, the Commission acted in furtherance of a Joint Board recommendation to impose a cap on the amount of high-cost support that CETCs may receive.⁵⁰ The Commission discussed the Joint Board recommendation in greater detail in the *Industry CETC Cap Order*, noting that continued growth in support to CETCs was not sustainable and would require excessive contributions from consumers to fund the program.⁵¹ The purpose of the company-specific caps imposed on Alltel and AT&T was thus to limit the size of the universal service fund and, thereby, reduce the demand for contributions borne by consumers.⁵²

Implementation of the Atlantis Cap now will not achieve the Commission’s stated goals of controlling the size of the fund and reducing demand for contributions, but will instead result in USAC’s continued over-collection of contributions, and the “repurposing” of such excess support, due to the 18-month waiver of 47 C.F.R. § 54.709(b) adopted in the *Corr Wireless Order*. In the *Corr Wireless Order*, the Commission waived the application of section 54.709(b) for a period of 18 months to allow USAC to accumulate contributions at a rate higher than is

⁴⁹ *Landgraf v. USI Film Products*, 511 U.S. 244, 276 n.30 (1994).

⁵⁰ *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19520-21 ¶¶ 8-9.

⁵¹ *Industry CETC Cap Order*, 23 FCC Rcd at 8837-38 ¶ 6 & n.27.

⁵² *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19520-21 ¶¶ 8-9.

necessary to satisfy the following quarter’s funding requirements.⁵³ Consistent with the granting of this waiver, any funds that are “recaptured” by USAC as a result of the Verizon Wireless and Sprint phase-down requirements, or the relinquishment or revocation of an eligible telecommunications carrier (“ETC”) designation, are to be held in reserve for future universal service purposes.⁵⁴ The Commission’s broad waiver of section 54.709(b) also means that any support recaptured from Verizon Wireless now as a result of implementing the Atlantis Cap would not limit the size of the fund or result in a reduction of the contribution factor, but would instead be reserved for some undefined future universal service purpose. This inconsistent result is not only contrary to the Commission’s stated purpose in establishing the Atlantis Cap, but it also would now render the Commission’s earlier decision to impose the company-specific cap arbitrary and capricious.

IV. THE BUREAU FAILED TO ADDRESS VERIZON WIRELESS’S ARGUMENT THAT IT WOULD BE PUNITIVE AND UNLAWFUL TO CLAW BACK SUPPORT THAT ALLETEL HAS ALREADY SPENT ON PROVIDING SUPPORTED SERVICES

As Verizon Wireless explained in its comments,⁵⁵ Alltel has already expended all of the high-cost support funds it has received – including the payments received for the period between the effective dates of the Alltel-specific cap and the industry-wide cap – “for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” as

⁵³ *Corr Wireless Order*, 25 FCC Rcd at 12862-63 ¶ 22.

⁵⁴ *See id*; *see also High-Cost Universal Service Support*, Order, 25 FCC Rcd 18146, 18148 ¶ 6 n.15 (Dec. 30, 2010) (“Consistent with the *Corr Wireless Order*, until the expiration of the waiver of section 54.709(b) or otherwise directed by the Commission, USAC shall continue to project [C]ETC demand at the full amount of the cap as established by the *Interim Cap Order*, without reflecting any adjustments to the cap due to relinquishment or revocation of ETC status by a [C]ETC.”)

⁵⁵ Verizon and Verizon Wireless Initial Comments at 25-26.

required by law.⁵⁶ In these circumstances, a Bureau decision to retroactively re-impose the Atlantis cap would clearly work a manifest injustice. As demonstrated below, this is not a situation in which an entity relied on a favorable interpretation of unsettled law,⁵⁷ but rather, a situation in which Verizon Wireless justifiably relied on a straightforward (and staff-confirmed) interpretation of the Orders governing its CETC support obligations.

Alltel (and other ETCs) are required to prepare and submit annual compliance filings with the Commission and state commissions demonstrating the uses of universal service support to provide the support services and improve network and service quality.⁵⁸ Commission rules require ETCs to expend the support they receive in the designated areas.⁵⁹ In accordance with those rules, the *Industry CETC Cap Order* and Commission staff's advice, Alltel's October 1, 2008 compliance filings stated that it would spend the full, uncapped amount of funding for 2008. They also provided evidence that Alltel spent the full uncapped amounts during 2007 for the provision, maintenance, and upgrading of the facilities and services for which the support was intended in the designated service areas. Alltel's October 1, 2009 compliance filings demonstrated that, with one exception involving support to one reservation in South Dakota, amounting to only 0.04% of the total support Alltel received, during 2008, Alltel spent the full, uncapped amount of funding in the designated service areas. Alltel has made similar filings with state commissions. To be sure, if the *ALLTEL-Atlantis Order* had been implemented prior to the *Industry CETC Cap Order*, the company would have been able to adjust its use of funds accordingly. But USAC never did so, the staff in fact directed it not to, and USAC did not

⁵⁶ 47 U.S.C. § 254(e).

⁵⁷ See *Qwest Services Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

⁵⁸ See 47 C.F.R. § 54.209(a)(1).

⁵⁹ 47 C.F.R. § 54.7. See also 47 C.F.R. §§ 54.313, 54.314.

publicly dispute or seek clarification of the impact of the *Industry CETC Cap Order* until 15 months after its release.⁶⁰ Alltel accordingly spent the funds it received – as it was required to do.

Verizon Wireless’s previous comments explained that “[i]t would be senselessly punitive now to permit USAC to claw back high-cost support funds retroactively, after the funds have been spent.”⁶¹ The high-cost program is based on the fundamental concept that, in return for support, eligible carriers will use that support in the provisioning of the supported services. While ETCs must expend the support they receive in the designated area, they are not required to spend *more* than the amount they receive. Since Alltel spent all of the high-cost support USAC provided, that money is no longer available to “return” to USAC. Instead, Verizon Wireless, as successor to Alltel, would have to pay that money to USAC and would be directly damaged by having to incur the loss of funds that had long ago been spent. That result would not be consistent with the high-cost program’s requirements or its goals.

Moreover, the purchase price Verizon Wireless paid for Alltel reflected the value of the facilities and operations that had benefited from the investment of this uncapped universal service support. To now require Verizon Wireless to “return” the support previously distributed to, and invested by, Alltel in these facilities and operations would effectively require Verizon Wireless to pay twice for the same assets.

In addition, implementing the Atlantis cap at this late date would be contrary to the Commission’s decision in the *Corr Wireless Order* that the phase-down of universal service support to Verizon Wireless does not apply to those operations that were operated by a

⁶⁰ Cf. *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001) (no manifest injustice when relied-upon legal interpretation was timely disputed and subject to litigation).

⁶¹ Verizon and Verizon Wireless Initial Comments at 26-27.

management trustee prior to divestiture because it would improperly extend Verizon Wireless's merger commitment to acquiring parties.⁶² Yet that is exactly the result that would occur if Alltel's Atlantis merger commitment is implemented now such that Verizon Wireless would be required to "return" the universal service support previously distributed to, and invested by, Alltel.

For all these reasons, implementing the Atlantis cap now would be senselessly punitive, and the D.C. Circuit has held that the "Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.' The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation."⁶³ Here, the Commission never gave fair notice that it intended to implement the Atlantis cap retroactively. Indeed, the Commission staff informed Alltel and USAC (the latter in writing) that the Atlantis cap was *not* to be enforced. This case is very different from other universal service decisions where the Commission has viewed the recovery of funds as distinct from a penalty because, here, Verizon Wireless did nothing wrong.⁶⁴ Because federal law required Alltel and Verizon Wireless to spend the money, such that it cannot now be paid back, requiring USAC now to implement the

⁶² *Corr Wireless Order*, 25 FCC Rcd at 12859 ¶ 11 n.33.

⁶³ *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

⁶⁴ By contrast, for example, in USF contribution cases, the Commission requires parties to make up unpaid contributions because the parties violated the Commission's rules by failing to file revenue reports or pay their contributions. *See, e.g., ADMA Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 838, 852 ¶ 32 (2009). Similarly, the D.C. Circuit does not treat disgorgement as a penalty only if the disgorgement is related to specific wrongdoing. *See, e.g., Riordan v. SEC*, 627 F.3d 1230, 1234 (D. C. Cir. 2010).

Atlantis cap retroactively is simply an arbitrary and capricious penalty.⁶⁵ In light of the *Industry CETC Cap Order*'s conclusion that the Atlantis cap was "superseded," and the staff's clear direction that it not be implemented, Verizon Wireless could not have known with "ascertainable certainty" that the cap applied and that it subsequently would be required to repay the funds.⁶⁶

Verizon Wireless's prior comments also observed that directing USAC to rescind support for the interim period also would violate the principle that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another."⁶⁷ In adopting this principle, the Commission sought "to minimize departures from competitive neutrality" – a policy promoted by the staff's instructions not to implement the Atlantis cap. The company-specific caps singled out only two CETCs for unfavorable treatment. Thus, the reinstatement of the company-specific caps would place Alltel at a competitive disadvantage relative to other CETCs that were not capped during that period. As discussed above, there is every indication that the Commission, when it adopted the industry cap, intended to avoid this result. And there is no reason today to impose such a senselessly punitive, retroactive outcome. That result would also conflict with Congress's direction that universal service support flows be "specific [and] predictable,"⁶⁸ given that it would arbitrarily, suddenly, and retroactively reduce support flows after the funds have already been expended.

The April 1 Letter did not respond to any of the arguments above that had been presented to WCB. This failure is inconsistent with judicial precedent requiring an agency decision to be

⁶⁵ 47 U.S.C. § 254(e); 47 C.F.R. §§ 54.313 and 54.314; *see Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("*Trinity Broadcasting*").

⁶⁶ *See Trinity Broadcasting*, 211 F.3d at 628.

⁶⁷ Verizon and Verizon Wireless Initial Comments at 26-27 (*quoting Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8801 ¶ 47 (1997) (subsequent history omitted); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000)).

⁶⁸ 47 U.S.C. § 254(b)(5).

based on “a consideration of relevant factors”⁶⁹ and requiring an agency to “demonstrate the rationality of its decision[-]making process by responding to those comments that are relevant and significant.”⁷⁰

Instead of addressing the inequities of allowing USAC to claw back funds that already have been spent in furtherance of the supported services, footnote 9 responds to a completely separate issue: Verizon Wireless’s reliance on informal advice from Commission staff (which the April 1 Letter does not contest) indicating both to USAC (in writing) and to Alltel that the Alltel-specific cap would not be implemented. By focusing on Verizon Wireless’s reliance on the staff’s advice, the April 1 Letter utterly ignored the other, significant equitable issues discussed above, which itself is sufficient to warrant reconsideration of the April 1 Letter.

Even the Bureau’s discussion of the reliance issue, however, was erroneous. The cases that the Bureau cites regarding reliance on staff guidance are factually distinguishable in that they involved oral statements made to or regarding parties other than the petitioner and under circumstances that made reliance patently unreasonable.⁷¹ Crucially, in contrast to the

⁶⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁷⁰ *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (quoting *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998)). See also *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998) (court remands decision where FCC failed to connect premise with reasoning and made declarations without explanation).

⁷¹ In *Malken FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991), the petitioner/applicant acknowledged that it did not actually rely on the “slip” of a Commission staff employee at an industry seminar; and in any event the court found that the Commission conveyed explicit information about application requirements adequate to inform prospective applicants. *Id.* at 1317 n.3 and 1319. In *Kojo Worldwide Corp. San Diego, California*, Memorandum Opinion and Order, 24 FCC Rcd 14890 (2009), the Commission found that any reliance by the respondents on alleged staff representations was unreasonable because the alleged representations were made years before the unauthorized operations at issue, to parties other than the respondents, and under circumstances that had ceased to exist during the period at issue. *Id.* at 14895 ¶ 10. In *Applications of Hinton Tel. Co.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625 (1995), the FCC did not credit petitioners’ claims of reliance because the alleged staff statements were made to a different party and because the staff

petitioners in the cited cases, Alltel relied on the language of a Commission order (“supersedes”), the intent of which was confirmed in June 2008 by *written* guidance to USAC, in addition to contemporaneous staff advice directed at Alltel regarding this precise legal question.⁷² In any event, it is not Verizon Wireless’s position that the Bureau is legally estopped by prior staff guidance, but that the Bureau should consider the fact that staff provided such guidance in considering the equities of this case. It was improper for the Bureau to fail to do so on these compelling facts.

V. IMPLEMENTATION OF THE ATLANTIS CAP WOULD REQUIRE RECALCULATION OF THE INDUSTRY CAP

As other parties pointed out in comments to the Bureau, post-hoc implementation of the company-specific caps would require recalculation of the industry-wide cap.⁷³ The April 1 Letter states without explanation – and incorrectly – that the retroactive implementation of the company-specific caps will not affect the level of the industry-wide cap. Yet the industry-wide cap – including its baseline amount – was adopted as a Commission rule and cannot be waived or modified without formal Commission action.⁷⁴ Consistent with this interpretation, as noted above, the Bureau has trued up the industry-wide cap as a result of other modifications in the

advice to immediately file a new application was not followed by the petitioners. *Id.* at 11637 ¶ 41.

⁷² Indeed, under the Bureau’s analysis of the cases it cites in footnote 9, Verizon Wireless apparently would not be entitled to rely on the April 1 Letter itself – which, like WCB’s earlier direction to USAC not to implement the cap, is nothing more than a letter from the Bureau.

⁷³ *See* Comments of the Rural Telecommunications Group, Inc., WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, at 5 (Oct. 28, 2009) (“[A]ny decision to retroactively enforce the AT&T and Alltel caps will further reduce [C]ETC support. As USAC notes, if ‘USAC were to implement the company specific caps for AT&T and Alltel, *significant amounts of funding* previously disbursed would be recovered from each carrier.’”).

⁷⁴ *Corr Wireless Order*, 25 FCC Rcd at 12857-58 ¶ 8-9.

amount of support due to carriers as of the baseline date.⁷⁵ The Bureau does not explain the inherent inconsistency in its conclusion that the implementation of the Atlantis cap now will not affect the level of the industry-wide cap, nor why it believes it has the authority to modify the cap baseline as determined by the Commission. Thus, if the company-specific Alltel and AT&T caps are now implemented, the industry-wide cap must be recalculated on a state-by-state basis for a third time to reflect the reduced amount of universal service support that Alltel and AT&T were eligible to receive as of March 2008. As the April 1 Letter implicitly acknowledges, this would impose an undue hardship on other CETCs. Thus, the Bureau's desire not to affect the level of the industry-wide cap provides further support for reconsidering its direction to implement the Atlantis cap.

VI. THE BUREAU IGNORED VERIZON WIRELESS'S MERITORIOUS REQUEST, IN THE ALTERNATIVE, FOR WAIVER

Even if the Bureau concludes that the *Industry CETC Cap Order* did not supersede the industry-specific caps for the period at issue, it nonetheless should waive the application of the company-specific caps. Verizon Wireless's 2009 comments requested waiver of the company-specific cap in the event the Bureau concluded it should be implemented, but the Bureau failed to consider the request.

As Verizon Wireless's comments showed, there is a strong case for waiver here. The Commission may waive a requirement for "good cause shown."⁷⁶ A waiver is appropriate "if special circumstances warrant a deviation from the general rule and such deviation will serve the

⁷⁵ See, e.g., First True-Up Letter; Second True-Up Letter.

⁷⁶ 47 C.F.R. § 1.3.

public interest.”⁷⁷ In considering waiver requests, the Commission may “take into account considerations of hardship, equity, or more effective implementation of overall policy.”⁷⁸

The Commission has in the past eliminated merger conditions in light of changed circumstances⁷⁹ or in cases where the merger conditions were no longer warranted.⁸⁰ Here, the circumstances substantially changed since the adoption (and before the implementation) of the Alltel-specific cap – specifically, the Commission imposed an industry-wide CETC cap, which better serves the goal that the Alltel-specific cap was intended to advance. Moreover, the imposition of the industry-wide cap obviates any need for the Alltel-specific cap. The Commission has achieved its objective in controlling growth of the high-cost fund far more comprehensively by imposing a limit on the total support paid to CETCs. Finally, considerations of hardship and inequity support relieving Alltel of post-hoc implementation of the Alltel-specific cap which would, as discussed above, result in forced disgorgement of universal service payments that Alltel already spent on the provision of the supported services, and disadvantage Alltel vis-à-vis other CETCs.

⁷⁷ *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁷⁸ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). See also *Request for Review of the Decision of the Universal Service Administrator by Tekoa Academy of Accelerated Studies*, Order, 23 FCC Rcd 15456, 15458 ¶ 5 (WCB 2008).

⁷⁹ See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, Order, 20 FCC Rcd 19795 (2005) (eliminating a divestiture condition in light of new evidence that no other provider was available to serve the subject customers).

⁸⁰ See, e.g., *Section 272(b)(1)'s “Operate Independently” Requirement for Section 272 Affiliates*, Report and Order in WC Docket No. 03-228, Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337, 19 FCC Rcd 5102 (2004); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 18 FCC Rcd 16835 (2003).

