

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
)	

REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless’s Petition for Reconsideration (“PFR”) asked the Wireline Competition Bureau (“WCB” or “Bureau”), to reverse its April 1, 2011, letter directing the Universal Service Administrative Company (“USAC”) to implement retroactively the Alltel-specific cap on USF support.¹ The PFR explained why the April 1 Letter ignored Verizon Wireless’s demonstration that the Commission decided not to implement the Alltel-specific cap and instead superseded that cap with an industry-wide cap.

Only two parties filed comments on the PFR, and neither opposed the relief it seeks. In addition, the Bureau’s guidance to USAC in December 2008 – which Verizon Wireless just recently obtained pursuant to a FOIA request – confirms Verizon Wireless’s position.² As Verizon Wireless previously explained, “supersede” means “displace” or “repeal” by replacing

¹ Letter from Sharon E. Gillett, Chief, WCB, FCC, to Richard A. Belden, Chief Operating Officer, USAC, 26 FCC Rcd 5034 (WCB 2011) (“April 1 Letter”).

² Subsequent to the filing of the PFR, in response to a request under the Freedom of Information Act (“FOIA”), WCB provided Verizon Wireless with the staff’s 2008 guidance to USAC. WCB Response to FOIA Control No. 2011-344 (June 16, 2011) (the “2008 Bureau Guidance”), attached hereto.

“wholesale,” not merely succeed or modify prospectively.³ When it implemented the industry-wide cap, WCB provided the same interpretation to USAC – that the industry-wide cap replaced the Alltel-specific cap. Specifically, on December 11, 2008, the WCB Chief wrote to the CEO of USAC that it is not “necessary to implement the company-specific caps at this time, as these caps were superseded by an industry-wide cap.” The Bureau further explained, “Since ‘supersede’ means ‘supplant, take the place of, or set aside,’ only the industry-wide cap is relevant (this is not a matter of retroactivity; it is simply a matter of reading the plain language of the order).”⁴ Accordingly, for the reasons set forth in Section I below and in its petition, Verizon Wireless’s PFR should be granted.

Only one set of comments, submitted jointly by five wireless companies (“USCellular *et al.*”), disputed anything in the petition, and that dispute addresses only the possible impact of the April 1 Letter on other competitive eligible telecommunications carriers (“CETCs”).⁵ The USCellular *et al.* comments, however, are based on a misapplication of Commission precedent. In fact, the potential impact on the industry-wide cap is an additional reason to grant Verizon Wireless’s PFR. The USCellular *et al.* comments are discussed below in Section II.

I. THE RECORD AND THE BUREAU’S CONTEMPORANEOUS GUIDANCE TO USAC CONFIRM THE MERITS OF THE PFR.

In its PFR, Verizon Wireless made compelling arguments that the April 1 Letter should be reversed, none of which was opposed by any commenter. In addition, the Bureau’s 2009

³ PFR at 4-7.

⁴ 2008 Bureau Guidance at 1.

⁵ Comments of United States Cellular Corp., *et al.*, WC Dkt. Nos. 05-337, 06-122 (June 3, 2011) (“USCellular *et al.*”).

guidance to USAC, which Verizon Wireless recently received in response to a FOIA request, confirms Verizon Wireless's legal and equitable arguments.

First, the PFR showed that implementing the interim support cap (the "Atlantis cap") specific to Alltel Corporation ("Alltel") that was a condition of its 2007 transaction with Atlantis Holdings, LLC ("Atlantis")⁶ would conflict with, and is precluded by, the industry-wide cap adopted in the 2008 *CETC Cap Order* that "supersede[d]" it.⁷ The *CETC Cap Order* 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*."⁸ The Atlantis cap had never been implemented when the *CETC Cap Order* was released, and Commission staff "direct[ed]" USAC in writing not to implement the superseded company-specific caps.⁹

As Verizon Wireless has previously explained, "Supersede" means "displace" or "repeal" by replacing "wholesale," not merely succeed or modify prospectively.¹⁰ Verizon Wireless has now learned that, contemporaneously with the *CETC Cap Order*, in providing its direction to USAC, WCB interpreted the *CETC Cap Order* precisely this way. Specifically, on December 11, 2008, the WCB Chief wrote to the CEO of USAC that it is not "necessary to implement the company-specific caps at this time, as these caps were superseded by an industry-wide cap."

⁶ *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*").

⁷ *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008) ("*CETC Cap Order*").

⁸ *Id.* at 8837 ¶ 5 n.21 (emphasis added).

⁹ See Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, WCB, FCC, at 5, WC Docket Nos. 05-337, 06-122 (dated Aug. 19, 2009; rec'd Aug. 24, 2009) ("USAC Aug. 19 Letter").

¹⁰ PFR at 4-7.

The Bureau further explained, “Since ‘supersede’ means ‘supplant, take the place of, or set aside,’ only the industry-wide cap is relevant (this is not a matter of retroactivity; it is simply a matter of reading the plain language of the order).”¹¹ As a result, the WCB Chief gave USAC two options – either not implementing the Atlantis and AT&T-Dobson caps, or implementing them and then nullifying that implementation by truing up support to reflect the industry-wide cap.¹² Either of these options would be consistent with Verizon Wireless’s interpretation. Given that the Bureau itself embraced Verizon Wireless’s interpretation of the word “supersede” in the *CETC Cap Order*, the Bureau erred in subsequently rejecting that interpretation, particularly without even addressing in the April 1 Letter its prior view or Verizon Wireless’s argument.

Moreover, as Verizon Wireless explained, the 2010 *Corr Wireless Order* stated that the amount of CETC support that would be phased out as a result of the merger conditions in two transactions that followed the *CETC Cap Order* – including Verizon Wireless’s November 2008 acquisition of Alltel – was roughly \$530 million, which reflects the full measure of uncapped support to which Alltel was entitled absent the Atlantis cap.¹³ The *Corr Wireless Order* thus

¹¹ 2008 Bureau Guidance at 1. Verizon Wireless was required to file a FOIA request to obtain relevant Commission documents, which it did on April 28, 2011. The Commission itself extended the time to respond to the FOIA request to June 9, 2011, and secured Verizon Wireless’s consent to a further extension until June 16, 2011. Accordingly, Verizon Wireless could not include this information in its PFR.

¹² *Id.* Given that USAC had already received clear guidance from the Bureau in 2008 on how to implement the company-specific caps, there is a real question as to why USAC requested further guidance in 2009. USAC’s request emphasizes the phrase “at this time” in the 2008 Bureau Guidance, but the full text of the 2008 Bureau Guidance makes clear that WCB simply meant “now that the industry-wide cap has been imposed”; there is nothing in the 2008 Bureau Guidance that would be changed by the passage of time.

¹³ *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, 12856 ¶ 4 (2010) (“*Corr Wireless Order*”).

confirms that the 2007 Atlantis cap was entirely voided and supplanted by the *CETC Cap Order*, consistent with the staff's written direction.¹⁴ The Commission is bound by its own finding. The *Corr Wireless Order* stated that “any implementation of Verizon Wireless’s . . . universal service commitments must be consistent with the [*CETC Cap Order*], including the size of each state’s cap.”¹⁵ The *Corr Wireless Order* thus binds the Commission to its confirmation that, as of the *CETC Cap Order*, the Atlantis cap, which had never been implemented, was no longer in effect.

Second, it would be unlawfully punitive to take back high-cost support that Alltel has already spent as required by Section 254(e) of the Act. To require Verizon Wireless (by later acquiring Alltel) to return the support previously distributed to and invested by Alltel would require Verizon Wireless to pay twice for the same assets, without the notice required for such punitive action. The April 1 Letter arbitrarily and capriciously failed to respond to any of these points.¹⁶ The revelation that WCB’s previous guidance to USAC reflected that the Bureau had contemporaneously interpreted the *CETC Cap Order* in precisely the same way as Verizon Wireless – to supplant or replace the company-specific caps – underscores that the equities favor Verizon Wireless’s position. That the Bureau failed to grapple with Verizon Wireless’s equitable arguments in the April 1 Letter only magnifies those equities. The Bureau thus should not retroactively require Verizon to pay back to USAC money that USAC lawfully provided to Verizon Wireless, and that Verizon Wireless lawfully spent.

Third, the Bureau ignored Verizon Wireless’s alternative meritorious request for a waiver of the Atlantis cap. The *CETC Cap Order* changed the circumstances under which the Atlantis

¹⁴ PFR at 11-13.

¹⁵ *Corr Wireless Order*, 25 FCC Rcd at 12858 ¶ 9 (emphasis added).

¹⁶ *Id.* at 15-21.

cap was imposed and obviates any need for that cap.¹⁷ The Bureau’s failure to address this request alone renders its decision unlawful.

No party disputed any of these arguments, any one of which would justify reconsideration of the direction in the April 1 Letter to implement the Atlantis cap.¹⁸ The Bureau accordingly should grant Verizon Wireless’s unopposed PFR or, in the alternative, should waive the Atlantis cap to the extent it concludes that the cap still applies.

II. THE IMPACT ON THE INDUSTRY-WIDE CAP IS AN ADDITIONAL REASON TO GRANT THE PFR.

USCellular *et al.* argue that, “[a]bsent a rulemaking, the Interim Cap may be adjusted only if there is a change in the amount of support for which CETCs in the state were ‘eligible’ as of March 2008.”¹⁹ They rely on the *Corr Wireless Order* to assert that “carrier-specific support reductions adopted as merger conditions do not result in changes to the Interim Cap”²⁰ and that implementation of the Atlantis cap would not reduce the amount of support Alltel was “eligible to receive,” but, rather, only the support “paid to” Alltel “derived from” the eligible amount.²¹ USCellular *et al.* read the *Corr Wireless Order* incorrectly. In fact, if the Atlantis cap is implemented, the *Corr Wireless Order* requires that the industry-wide cap be reduced.

¹⁷ *Id.* at 22-23.

¹⁸ USCellular *et al.* at 3, states that the parties “take no position on the broader theme of whether the carrier-specific caps should apply retroactively or whether they were nullified altogether by the Interim Cap.” The only other commenting party, AT&T Inc., states that it “do[es] not express an opinion on the merits of Verizon Wireless’s Petition, other than stating our support for Verizon Wireless’s assertion that, in its April 1 letter to USAC, the Bureau should have considered and discussed all of the arguments in the record.” Comments of AT&T at 3, WC Dkt. Nos. 05-337, 06-122 (June 3, 2011).

¹⁹ USCellular *et al.* at 4.

²⁰ *Id.* at 5.

²¹ *Id.*

The Commission's analysis in the *Corr Wireless Order* was premised on the Commission's conclusion that the Alltel-Verizon Wireless and Sprint Nextel-Clearwire phase-down commitments were constrained by the *CETC Cap Order*, which had been adopted prior to those company-specific commitments. Specifically, the Commission held that "any implementation of Verizon Wireless's and Sprint Nextel's universal service commitments must be consistent with the interim cap rule" because "allowing USAC to change the methodology for calculating each state's interim cap amount from the one established in the [*CETC*] *Cap Order* would constitute an amendment of the Commission's rules without the opportunity for notice and comment."²² Thus, the Commission was forced to interpret the subsequent Alltel-Verizon Wireless phase-down commitment in a specific way to avoid violating the Administrative Procedure Act.²³

USCellular *et al.* misapply that rationale to the Atlantis cap. In fact, application of the same principle requires that the industry-wide cap be reduced if the Atlantis cap is implemented. The Atlantis cap (like the AT&T-Dobson cap) was adopted by the full Commission in 2007, before the industry-wide cap was imposed in 2008 in the *CETC Cap Order*. The April 1 Letter purports to implement the 2007 Atlantis cap, thereby reducing the amount of support that Alltel should have received. The theory of the April 1 Letter is that the Atlantis cap should be implemented "for the time period from the consummation of [the Alltel/Atlantis] merger until the industry-wide cap went into effect."²⁴ If that is the case, implementation of the Atlantis cap,

²² *Corr Wireless Order*, 25 FCC Rcd at 12858 ¶ 9.

²³ *Id.* at 12857 ¶ 8.

²⁴ April 1 Letter at 1.

which “took effect” on November 16, 2007, would have reduced the amount Alltel was “eligible to receive during March 2008,”²⁵ the base period specified in the *CETC Cap Order*.

In stating that “Verizon Wireless . . . remain[s] eligible for a given level of support -- regardless of whether [it] actually receive[s] that support,” the *Corr Wireless Order* was not, as USCellular *et al.* argue, articulating a general rule regarding the application of any carrier-specific high-cost cap. Rather, it was applying the “rule” established in the *CETC Cap Order* to a subsequent carrier-specific limitation. No such “rule” existed in 2007, however, when the Atlantis cap was established, and that cap, if implemented in 2007, would have reduced the amount of support for which Alltel was “eligible to receive during March 2008.”²⁶ The *Corr Wireless Order* held that the phase-down conditions agreed to in the merger transactions adopted after the *CETC Cap Order* must be consistent with that prior order, “including the size of each state’s cap,”²⁷ which had been established in the *CETC Cap Order* as a “rule . . . of . . . future effect.”²⁸ As a result, the amount of support that the *CETC Cap Order* acted upon is what the *Corr Wireless Order* referred to as the “level of support” for which a carrier is “eligible . . . under the interim cap.”²⁹ That amount, in turn, necessarily reflected all preceding events affecting CETCs’ levels of support “during March 2008,” and establishes the “interim cap baselines” for all subsequent events affecting support levels, including the subsequent phase-

²⁵ *Id.* at 2; *Corr Wireless Order*, 25 FCC Rcd at 12855, ¶ 3.

²⁶ *Corr Wireless Order*, 25 FCC Rcd at 12855, ¶ 3.

²⁷ *Id.* at 12858, ¶ 9.

²⁸ *Id.* at 12857 ¶ 8.

²⁹ *Id.* at 12858, ¶ 10.

down orders.³⁰ As a result, USCellular *et al.*'s assertion that a rulemaking would be necessary to adjust the interim cap is exactly backwards in this case,³¹ rather, a rulemaking would be necessary to prevent implementation of the Atlantis cap from affecting the industry-wide cap.

The April 1 Letter itself states that “the company-specific interim caps were in effect – even if USAC had not at the time implemented them – until the effective date of the *[CETC] Cap Order*, after which the industry-wide interim cap went into effect.”³² As a result, by the terms of the April 1 Letter, the company-specific caps were in force during March 2008, the “base period” for the industry-wide cap established in the *CETC Cap Order*. The fundamental principle established in the *Corr Wireless Order* is that the *CETC Cap Order* cannot be modified without a rulemaking.³³ Thus, if Verizon Wireless's support for March 2008 is reduced, the level of the industry-wide cap also must be reduced.

Verizon Wireless believes that the Bureau's interpretation is incorrect, and the Commission did not intend for the Atlantis cap to be implemented. But in any event the Bureau cannot have it both ways. If the Atlantis cap must be implemented, then the industry-wide cap must be recalculated and support must be reduced. As Verizon Wireless explained in the PFR, this is another reason why the Atlantis cap should not be implemented.

III. CONCLUSION

The Bureau should grant Verizon Wireless's unopposed PFR and reconsider the April 1 Letter by directing USAC not to implement the Atlantis cap, consistent with the staff's original

³⁰ *Id.* at 12858, ¶ 9.

³¹ USCellular *et al.* at 4.

³² April 1 Letter at 2 (emphasis added).

³³ *Corr Wireless Order*, 25 FCC Rcd at 12858 ¶ 9.

direction. If not, the industry-wide cap must be recalculated, and this is an additional reason why the PFR should be granted.

Respectfully submitted,

By:

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a horizontal line underneath the name.

John T. Scott, III
Vice President and Deputy General
Counsel—Regulatory Law

VERIZON WIRELESS

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June 20, 2011

FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

June 16, 2011

VIA EMAIL AND U.S. MAIL

Mr. David H. Solomon
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2300 N Street, NW
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Washington, DC 20037
dsolomon@wbklaw.com

RE: FOIA Control No. 2011-344

Dear Mr. Solomon:

This letter responds to the Freedom of Information Act (FOIA) request you filed on behalf of your client, Verizon Wireless.¹ The Commission's FOIA Office received the FOIA Request on April 28, 2011, assigned it FCC FOIA Control No. 2011-344 and referred it to the Wireline Competition Bureau (WCB) for handling. The time for responding to your request was extended to June 16, 2011.² We are granting your client's FOIA Request as discussed below.

Verizon Wireless seeks a copy of "'written direction of the Commission staff' to the Universal Service Administrative Company ("USAC") that directed USAC not to implement the company-specific caps on high cost universal service support set forth in FCC 07-196 (rel. Nov. 19, 2007) and FCC 07-185 (rel. Oct. 26, 2007) . . ." as referenced in an August 19, 2009 letter to the Wireline Competition Bureau from the Chief Operating Officer of USAC.³

We are providing you with four pages of email correspondence. We are withholding portions of these records based on our determination that the information withheld does not fall within the scope of your FOIA Request.⁴

Pursuant to our rules your client is designated as a "commercial" requester.⁵ Requesters who fall into this category are billed for all search and review time plus the cost of duplication.⁶ You stated that Verizon Wireless would pay up to \$1,000.00 in search fees associated with the FOIA Request.⁷ Fees

¹ Verizon Wireless FOIA request submitted by David Solomon, Wilkinson Barker Knauer, LLP, to FOIA Officer, Federal Communications Commission, April 28, 2011. (FOIA Request).

² The Commission extended the time to respond to the FOIA Request by ten working days, resulting in a deadline of June 9, 2011. Letter from Nakesha Woodward, FCC, to David Solomon, Wilkinson, Barker, Knauer, LLP, dated May 25, 2011. In response to the Bureau's request, you subsequently consented to extending the deadline for responding to the FOIA Request to June 16, 2011. Letter from Trent Harkrader, FCC, to David Solomon, Wilkinson Barker Knauer, LLP, dated June 9, 2011.

³ FOIA Request.

⁴ See *Michael Ravnitzky*, 16 FCC Rcd 21745, 21747 & n.21 (2001), citing *Public Employees for Environmental Responsibility, Rocky Mountain Chapter v. U.S. Environmental Protection Agency*, 978 F. Supp. 955, 965 (D. Colo. 1997) (records not responsive to a FOIA request need not be disclosed).

⁵ See 47 C.F.R. § 0.466(a)(4).

⁶ See 47 C.F.R. § 0.470(a)(1).

⁷ FOIA Request at 2.

totaling \$465.08 have been accrued in the processing of this FOIA Request.⁸ The Commission's Financial Management Division will send you a bill for these charges under separate cover.

Pursuant Section 0.461(j) of the Commission's rules, Verizon Wireless may file an application for review of our decision with the Office of General Counsel within 30 days of the date of this letter.⁹ Any such application must contain "Review of Freedom of Information Act Action" in its caption and on the transmitting envelope,¹⁰ and should refer to FOIA Control No. 2011-344.

Sincerely,



Kirk S. Burgee
Chief of Staff
Wireline Competition Bureau
Federal Communications Commission

cc: FOIA Officer, FCC
Royce Bancroft, USAC

⁸ See 47 C.F.R. § 0.467(a) - (c); http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-97A1.pdf (current fee schedule). The breakdown of the fee is as follows: 1 hour of search time by a USAC employee at an hourly rate of \$83.65 (\$83.65), 1 hour of search time by a USAC employee at an hourly rate of \$84.33 (\$84.33), 1 hour of search time by a USAC employee at an hourly rate of \$94.57 (\$94.57), 0.5 hours of review by a USAC employee at an hourly rate of \$94.57 (\$47.28), 0.5 hour of review by a GS-15 employee at an hourly rate of \$80.65 (\$40.32), 1 hour of review by a GS-15 employee at an hourly rate of \$80.65 (\$80.65) and 0.5 hours of review by a GS-14 employee at an hourly rate of \$68.56 (\$34.28), totaling \$465.08.

⁹ 47 C.F.R. § 0.461(j).

¹⁰ *Id.*

2008 12 11 from Dana re guidance on specific cap implementation.txt
From: Dana Shaffer [dana.shaffer@fcc.gov]
Sent: Thursday, December 11, 2008 11:13 AM
To: Richard Belden
Cc: Jennifer McKee; Alexander Minard; Amy Bender; Scott Barash; David Capozzi; Karen Maicher
Subject: [REDACTED] Non Responsive

[REDACTED] Non Responsive

Richard, I also owe you the guidance you requested on the company-specific caps we previously discussed. Here you go -- let me know what else you need.

As we discussed, WCB does not deem it necessary to implement the company-specific caps at this time, as those caps were superseded by an industry-wide cap. Since "supersede" means to "supplant, take the place of, or set aside," only the industry-wide cap is relevant (this is not a matter of retroactivity; it is simply a matter of reading the plain language of the order).

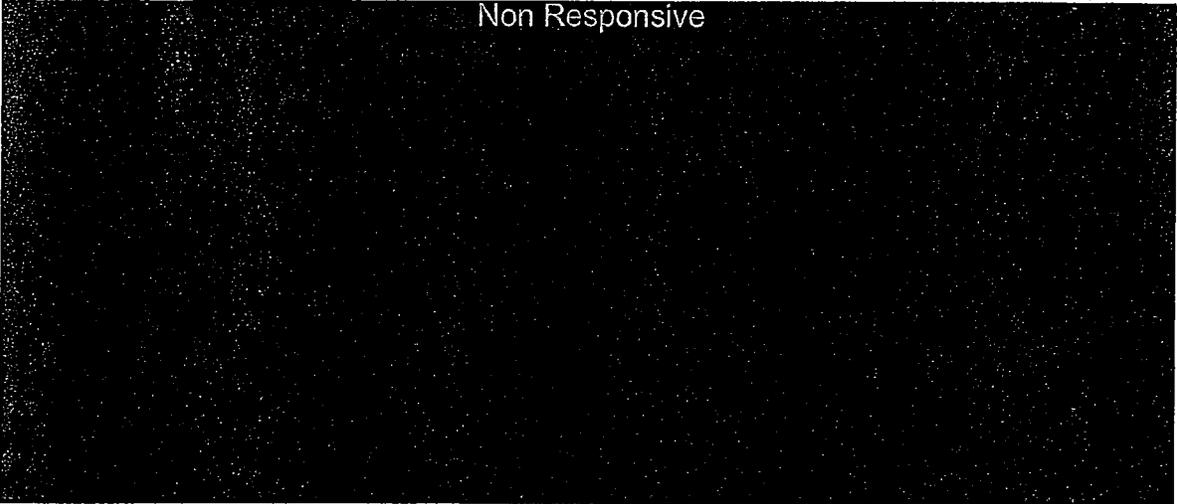
WCB is not, however, instructing USAC to not implement the cap; that is USAC's decision. USAC may either: 1) implement the company specific caps, then, in setting those caps aside and replacing them entirely with the industry-wide caps, true-up any amounts that are inconsistent with the industry-wide caps; or 2) since USAC has not implemented the company-specific caps, and because implementing and then conducting a true-up would leave those companies in the same position as if they had never been subject to the company-specific caps, but, rather, only the industry-wide cap, USAC could simply forego implementation of the company-specific caps.

-----Original Message-----

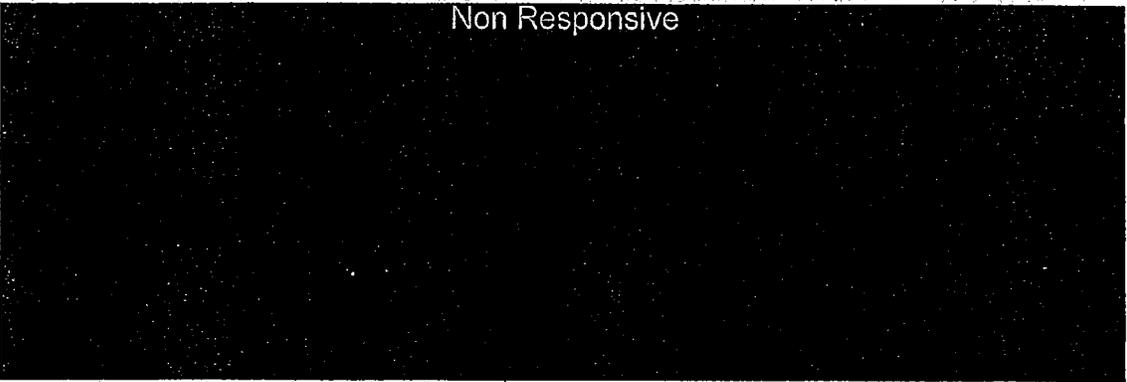
[REDACTED] Non Responsive

[REDACTED] Non Responsive

Non Responsive



Non Responsive



Non Responsive

