Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link Up	)	WC Docket No. 03-109
Universal Service Reform -- Mobility Fund	)	WT Docket No. 10-208

PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF VERIZON

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December 29, 2011

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PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF VERIZON[1]

I. INTRODUCTION AND SUMMARY.

Two discrete aspects of the *USF-ICC Transformation Order* require further action.[2] First, the Commission should clarify, or in the alternative reconsider, the interplay between the industry-wide phase-down of competitive eligible telecommunications carrier ("CETC") support in the order and the company-specific phase-down of wireless CETC support that Verizon committed to in connection with the Alltel merger. Second, the Commission should reconsider

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[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc., and Verizon Wireless ("Verizon").

[2] *Connect America Fund, et al.,* WC Docket Nos. 10-90 *et al*., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 at ¶ 520 (rel. Nov. 18, 2011) ("*USF-ICC Transformation Order*"). This Petition is filed pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. § 1.429.

its decision not to allow for technical feasibility or industry standards exceptions to the new "phantom traffic" rules, or at a minimum delay the effective date of those rules.

The Commission briefly addressed what will happen to Verizon's remaining wireless CETC funding in the *USF-ICC Transformation Order*.[3] Based on the explicit terms of the *Alltel Order* and Verizon's 2008 voluntary merger commitment to eliminate its CETC support, the Commission's new rule phasing out legacy support to all CETCs over the next five years must apply equally to Verizon.[4] This means that under the *USF-ICC Transformation Order* Verizon's CETC support must be "frozen" at the 2011 level (which, by operation of the merger condition, is 40 percent of what Verizon otherwise would have received) and that remaining amount should be eliminated over a five-year period like all other CETC support. Any other approach would be untenable and would unlawfully disadvantage Verizon in a unique way. The Commission should clarify that it intends to implement Verizon's merger condition as adopted in the *Alltel Order*. If the Commission intended any other outcome in the *USF-ICC Transformation Order*, this must

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[3] *Id.; Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent With Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) ("*Alltel Order*"). The Commission provided guidance on the implementation of the *Alltel Order* in *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Request for Review of a Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (2010) ("*Corr I*") and *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, Order, 25 FCC Rcd 18146 (2010).

[4] *See Alltel Order*, 23 FCC Rcd at 17531-32 ¶ 196 (addressing Verizon's merger commitment and finding that "[i]f the Commission adopts a different transition mechanism or a successor mechanism to the currently capped equal support rule in a rulemaking of general applicability, then that rule of general applicability would apply instead"), *citing* Letter from John T. Scott, III, V.P. and Dep. Gen. Counsel of Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95), at 1-2 (filed Nov. 3, 2008) ("Verizon Wireless Merger Commitment Letter").

be reconsidered, as it would impermissibly change the terms of the *Alltel Order* and Verizon's merger commitment.

In addition, unlike virtually every proposal on the record over the last several years, the Commission's new "phantom traffic" rules (requiring carriers generally to transmit calling party number and/or charge number information in the call signaling stream) have no exception for technical feasibility or adherence to industry standards.[5] The Commission provided no explanation in the *USF-ICC Transformation Order* for departing from these necessary limitations with its new signaling rules except to say that exceptions have the potential to undermine the rules, and if compliance is a problem then carriers should seek a waiver. It is not even possible for carriers to analyze their myriad call flow scenarios to determine where signaling of calling party number and/or charge number information cannot be done by the effective date of the new rules (*i.e.*, today), if ever, due to technical or practical constraints. The Commission also needs time to review and act on any waiver petitions. For large carriers there are thousands, or more, call patterns to review. The Commission should reconsider the lack of technical feasibility and industry standards exceptions to the new rules. At a minimum, the Commission should delay the effective date of the new rules to give carriers a reasonable amount of time to identify those instances where a waiver may be required.

II. THE COMMISSION SHOULD CLARIFY OR RECONSIDER HOW VERIZON'S REMAINING WIRELESS CETC SUPPORT WILL BE ADDRESSED IN THE NEW USF REGIME.

A. The New General CETC Support Rule Must Apply Instead of Verizon's Merger-Specific Phase-Down.

In connection with its acquisition of Alltel in 2008, Verizon committed to "a phase-down of the [CETC] high-cost support, for any properties which Verizon Wireless retains and controls,

[5] *USF-ICC Transformation Order* at ¶¶ 721-23.

over a five-year period following closing of the transaction."[6] A key element of the merger commitment was the provision that, "[i]f the Commission adopts a different transition mechanism or a successor mechanism to the currently capped equal support rule in a rulemaking of general applicability, then that rule of general applicability would apply instead."[7] In the *Alltel Order*, the Commission recited the merger commitment, including the provision regarding the impact of any later-adopted industry-wide phase-down, and "condition[ed] [its] approval of the proposed transaction on Verizon Wireless' commitment to phase down its [CETC] high cost support over five years, *as discussed herein*."[8] The only discussion of the phase-down commitment "therein" in the *Alltel Order* is the sentence stating that a later-adopted rule of general applicability will apply "instead" of Verizon's phase-down.[9]

With respect to Verizon's remaining wireless CETC support, paragraph 520 of the *USF-ICC Transformation Order* first states that Verizon's merger-specific phase-down "will be applied to the revised rules of general applicability we adopt today,"[10] perhaps suggesting that perhaps somehow *both* of the phase-downs would be applied simultaneously. It goes on to state, however, that Verizon in 2012 would "have an 80 percent reduction applied to the support it

[6] Verizon Wireless Merger Commitment Letter at 1.

[7] *Alltel Order*, 23 FCC Rcd at 17531-32 ¶ 196. *See also* Verizon Wireless Merger Commitment Letter at 1-2.

[8] *Alltel Order*, 23 FCC Rcd at 17532 ¶ 197 (emphasis added).

[9] *See also* Reply of Corr Wireless Comms. LLC, WC Docket No. 05-337 at 2 (filed May 22, 2009) ("the 'as discussed herein' language modified only the phase-down commitment and nothing else," and Verizon's "understanding" only relevant in that the FCC "accepted Verizon's voluntary commitment but said nothing about the disposition of the money").

[10] *USF-ICC Transformation Order* at ¶ 520.

would otherwise receive,"[11] suggesting that the merger-specific phase-down alone would apply.[12] Finally, the paragraph states that, "[i]n 2013, neither [Verizon nor Sprint] will receive phase down support, *consistent with the commitments*"[13] – yet under the merger commitment Verizon would, in light of the revised rules, receive support until 2016 like all other CETCs.[14]

Because the Commission adopted a new "rule of general applicability" in the *USF-ICC Transformation Order* governing distribution of CETC support and a five-year phase-down of legacy funding to all CETCs, pursuant to the explicit terms of the *Alltel Order* and Verizon's voluntary merger commitment the only permissible approach is to now apply that new rule to Verizon. Specifically, Verizon's baseline should be established – like that of other CETCs – at its 2011 support level (which, under the merger condition, amounts to 40 percent of the amount of high-cost support to which it would otherwise be entitled).[15] That 2011 baseline amount should then be phased out in five equal steps between 2012 and 2016 – again, consistent with the rule of general applicability that applies to all CETCs.[16]

The element of the merger condition regarding later rules of general applicability recognized that, at the time that Verizon offered the commitment and the Commission accepted it, the Commission plainly was on a path to adopting an industry-wide phase-out of CETC

[11] *Id.*

[12] *Id.* Under the merger commitment and *Corr I*, absent a subsequent rule of general applicability, Verizon Wireless would receive 20 percent of the support to which it was otherwise entitled in 2012 and no support in 2013. *Corr I*, 25 FCC Rcd at 12861 ¶ 17.

[13] *USF-ICC Transformation Order* at ¶ 520 (emphasis added).

[14] As discussed below, under the merger commitment, any rule of general applicability applies "instead" of the merger timetable. *See infra.*

[15] *USF-ICC Transformation Order* at ¶ 515.

[16] *Id.* at ¶ 519.

support. Indeed, the Commission very nearly did so shortly after it adopted the *Alltel Order*, but ultimately released a detailed further notice of proposed rulemaking instead.[17] Though it took longer than either Verizon or the Commission expected, the Commission's industry-wide phase-down was fully contemplated by both entities when Verizon offered the commitment and the Commission accepted it. Thus a plan for addressing Verizon's participation in the industry-wide phase-down was incorporated explicitly into the merger commitment.

B. The *USF-ICC Transformation Order* Did Not Validly Modify the Verizon-Alltel Merger Condition.

As explained above, the Verizon-Alltel merger condition as adopted included the provision that any later-adopted rule of general applicability would apply to Verizon "instead" of the merger-specific phase-down.[18] To reach any other result, the *USF-ICC Transformation Order* would have had to modify the merger condition. It did not validly do so.

The Commission never provided notice under the Administrative Procedure Act that it intended to modify the Verizon merger condition in the current proceeding or in any other proceeding.[19] In fact, in 2010 the Commission sought comment on how "reductions in legacy high-cost support for all competitive ETCs [should] *be coordinated with* implementation of Verizon Wireless's and Sprint's voluntary commitments to phase-out legacy high-cost support over a five year period."[20] This question does not propose to modify Verizon's commitment;

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[17] *See High Cost Universal Service Support, et al.*, WC Docket Nos. 05-337 *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008).

[18] *See supra* Section I.

[19] 5 U.S.C. §§ 553(b)-(c) (Administrative Procedures Act notice and comment requirements).

[20] *Connect America Fund, et al.*, WC Docket No. 10-90, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657, 6682 ¶ 61 (2010) (emphasis added).

rather, it suggests just the opposite.[21] Under these circumstances, it cannot be said that a change to the merger commitment would be a "logical outgrowth" of the proposal such that Verizon "should have anticipated" it.[22]

Moreover, even if the Commission had provided adequate notice of an intention to modify Verizon's merger condition, it still would have had to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[23] Instead, however, the *USF-ICC Transformation Order* states that "Verizon Wireless and Sprint will continue to be subject to the phase-down commitments they made in the November 2008 merger Orders."[24] It is difficult to explain an agency's change in course in situations where an agency does not even acknowledge that a change has occurred. But, as the courts have held, "[a]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so."[25] The *USF-*

[21] The Commission later characterized this question as seeking comment "on a proposal to transition all legacy competitive ETC high-cost support for voice-grade service to new universal service programs for broadband and the impact of such a proposal on the Verizon Wireless and Sprint Nextel merger commitments." *Corr I*, 25 FCC Rcd at 12862 n.44. This footnote appeared in the Order section of *Corr I*, and did not purport to provide independent notice of, or seek comment on, anything.

[22] *See, e.g., Covad Communs. Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) ("Whether the 'logical outgrowth' test is satisfied depends on whether the affected party 'should have anticipated' the agency's final course in light of the initial notice.").

[23] *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (internal quotation omitted); *see also Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009). *See also* 5 U.S.C. § 553(c) (agencies must provide "a concise general statement of [the] basis and purpose" of conclusions reached in rulemaking proceedings).

[24] *USF-ICC Transformation Order* at ¶ 520.

[25] *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001). *See also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (noting that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position") (emphasis in original); *CBS Corp. v. FCC*,

ICC Transformation Order provides no explanation as to why any such departure from the *Alltel Order* and the Verizon Wireless Merger Commitment Letter would be justified. As discussed above, Verizon's participation in any later-adopted industry-wide phase-down was an integral part of the commitment that it made and that the Commission accepted.

III. THE COMMISSION SHOULD RECONSIDER ITS OMISSION OF TECHNICAL FEASIBILITY AND INDUSTRY STANDARDS EXCEPTIONS TO THE PHANTOM TRAFFIC RULES.

Concerns regarding so-called "phantom traffic" issues have been before the Commission for years, and this debate has frequently included proposals for new call signaling procedures permitting LECs to better identify which companies to bill intercarrier compensation charges for traffic they receive. Virtually all such proposals have included important technical feasibility and industry standards limitations on proposed requirements that carriers pass calling party number and/or charge number information in the signaling stream. The heavily negotiated consensus phantom traffic proposal filed by USTelecom in 2008, for example, included these exceptions.[26] Even the Missoula Plan's flawed phantom traffic proposal acknowledged that carriers cannot be required to deploy new technology or modify networks to comply with call signaling rules. The Missoula Plan provided several examples of existing call flows in which transmission of telephone number information is not technically feasible with currently-deployed

No. 06-3575, *slip op.* at 68 (3d Cir. 2011) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310822A1.pdf) (FCC's failure to acknowledge change in policy precludes compliance with *State Farm*).

[26] Letter from Glenn Reynolds, V.P. of Policy, USTelecom, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 (Feb. 12, 2008).

equipment, such as operator-assisted dialed traffic for which the provider uses an operator service platform.[27]

As Verizon and many other commenters pointed out in refreshing the record on this issue in early 2011, the need for technical feasibility and industry standards exceptions to any new signaling rules has only increased as new technologies have emerged and the number of possible call flow routes has exploded. There are situations in which originating carriers or intermediate providers simply cannot pass calling party number and/or charge number in the call signaling stream because it is not technically possible to do so or network equipment was not designed with this functionality based on industry standards in place at the time.[28]

In some cases these limitations include significant call volumes. For example, switches deployed by many traditional wireline companies were not designed to populate a charge number field in the signaling stream on intraLATA calls, consistent with industry standards. Moreover, there are many situations where carriers have never before had arrangements to populate these fields because the data are not needed. "On network" Verizon calls, for instance, often do not include this information. Verizon also has negotiated business-to-business arrangements with other carriers to modify or remove charge number information – not for any deceptive purpose but so that the receiving carrier's switch will be technically capable of accepting the traffic. It is also now possible in the IP space to originate calls that terminate on the PSTN from a unique

[27] *See* Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force on Intercarrier Compensation, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force on Intercarrier Compensation, to Kevin Martin, Chairman, FCC, CC Docket No. 01-92, Attachment at 57-58 (July 24, 2006) (attaching the Missoula Plan).

[28] *See, e.g.,* Verizon Comments at 50-54 (Apr. 1, 2011); PAETEC Comments at 8 (Apr. 1, 2011); Earthlink Comments at 22 (Apr. 1, 2011); Comcast Comments at 9-10 (Apr. 1, 2011); Sprint Comments at 26 (Apr. 1, 2011); AT&T Comments at 22 (Apr. 1, 2011); and Alliance for Telecommunications Industry Solutions (ATIS) Comments at 4 (Apr. 1, 2011).

electronic identifier other than a traditional calling party number that is not useful for intercarrier compensation billing purposes, even if this identifier could be passed in the call signaling stream.

The *USF-ICC Transformation Order*, however, stripped the industry phantom traffic proposals of any exceptions for technical feasibility and industry standards and provided no analysis as to how the industry can comply with these new rules without either of these exceptions.[29] Instead, the Commission held in a few short sentences that "exceptions would have the potential to undermine the rules,"[30] and thus the Commission declined to include these exceptions in its final rules requiring carriers to pass calling party number and/or charge number information in the call signaling stream. While Verizon understands the Commission's concern, it does not change the fundamental problem that many providers simply will not be able to comply with the rule. It therefore should be reconsidered.

It is especially inappropriate for the Commission to expect carriers to make significant changes to call signaling practices for intercarrier billing purposes where any investment in the technology and equipment necessary to do so would be wasted after just a few years. The Commission's larger intercarrier compensation goal throughout the *USF-ICC Transformation Order* is to transition to a bill-and-keep regime in which intercarrier compensation payments are eliminated entirely. At that point all data in the call signaling stream used for intercarrier billing purposes will be unnecessary and useless.

The *USF-ICC Transformation Order* also fails to address the fact that carriers have developed adequate work-arounds for gaps in call signaling information. Many carriers file jurisdiction-based usage factors for traffic without call signaling information. And many tariffs

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[29] *USF-ICC Transformation Order* at ¶¶ 721-23.

[30] *Id.*

and interconnection agreements include so-called “incentive arrangements” – *e.g.*, rating traffic without calling party number data at intrastate rates to encourage carriers to populate this field in the call signaling stream where it is technically feasible and cost-effective to do so. If it is not feasible to include this information on a particular call, and if an intermediate carrier is already paying an incentive rate for that call so that the terminating LEC is more than adequately compensated, there is nothing to be gained from strict signaling rules that do not provide exceptions for technical feasibility or compliance with industry standards.

The Commission’s only concession to the significant challenges wrought by the new rules – an acknowledgement that carriers unable to comply are at liberty to seek waivers[31] – is insufficient to save the faulty rules. As the above discussion illustrates, the potential situations in which carriers may be unable to comply with the new rule are myriad, as are the reasons for them. “The very essence of waiver is the assumed validity of the general rule.”[32] The Commission may not avoid its obligation to provide a reasonable explanation as to how compliance with the new phantom traffic rules is possible (without significant, expensive changes to longstanding practices and deployment of new equipment and software) by including a passing reference to the general waiver process. While the availability of a waiver process can constitute “a ‘sign of reasonableness . . .under appropriate circumstances,’”[33] the Commission nevertheless “cannot save an irrational rule by tacking on a waiver procedure.”[34]

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[31] *Id.* at ¶ 723.

[32] *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

[33] *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54 (D.C. Cir. 2011) (quoting *NRDC v. EPA*, 822 F.2d 104, 120 (D.C. Cir. 1987)).

[34] *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).

Moreover, as a practical matter it is not even possible for Verizon and other carriers to analyze the myriad call flows and determine where a waiver of the rules may be necessary – and on what grounds – by the effective date of the new phantom traffic rules. The rules take effect today, less than six weeks after the text of the *USF-ICC Transformation Order* was released and the Commission disclosed, for the first time, that no part of the new signaling rules allows for technical feasibility or industry standards exceptions. Collectively, Verizon employees alone have already spent hundreds of hours attempting to identify those situations in which a waiver may be required. Further analysis necessary to meet the Commission's standard for a waiver in 47 C.F.R. § 1.3, if it is determined that such a request is necessary, will take time and will require a significant investment of additional resources. And once waiver petitions, if necessary, are filed, it will likely take the Commission significant additional time to act on them.

IV. CONCLUSION.

The Commission should clarify, or in the alternative reconsider, the interplay between the industry-wide phase-down of CETC support in the *USF-ICC Transformation Order* and the company-specific phase-down of wireless CETC support that Verizon committed to in the Alltel merger. The Commission should also reconsider its decision not to allow for technical feasibility or industry standards exceptions to the new phantom traffic rules or, at a minimum, delay the effective date of those rules.

Respectfully submitted,

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