

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
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 an 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

APPLICATION FOR REVIEW

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I. Introduction and Summary

United States Cellular Corporation (“U.S. Cellular”) and Eagle Telephone Systems d/b/a Snake River PCS (“Snake River PCS”) (collectively, the “Parties”), pursuant to Section 1.115 of the Rules, hereby file this Application for Review of the Order issued on February 3, 2012 in the above-captioned proceeding.¹ The *Bureau Order* was issued under delegated authority by the Chief, Wireline Competition Bureau and the Chief, Wireless Telecommunications Bureau.

The *Bureau Order* purported to:

clarif[y] that the \$3000 per loop limit is applicable to competitive ETCs at the *incumbent* study area level. For example, if a competitive ETC receives an average of \$2000 per loop per year serving multiple incumbent study areas, but it receives \$3500 per loop per year in one of the study areas, the cap will constrain the competitive ETCs support in that study area.²

To reflect this “clarification”, the *Bureau Order* added the following sentence to the end of Section 54.307(e)(1)(ii) of the Rules:

The \$3,000 per line limit shall be applied to support amounts determined for each *incumbent* study area served by the competitive eligible telecommunications carriers.³

By sharp contrast, the initial rule placed a \$3000 per line cap on any CETC that collected more than \$3000 per line in its, *i.e.* the CETC’s, study area – which is the Study Area Code. As a result, and using the Commission’s example set forth above, if a competitive ETC received an average of \$2000 per loop per year serving multiple incumbent study areas within its Study Area

¹ *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 an 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, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011), 76 Fed. Reg. 73830 (Nov. 29, 2011), 76 Fed. Reg. 78384 (Dec. 16, 2011), 76 Fed. Reg. 81562 (Dec. 28, 2011) (“*USF-ICC Transformation Order*”), *recon.*, FCC 11-189 (rel. Dec. 23, 2011), Order, DA-147, Chief, Wireline Competition Bureau and Chief, Wireless Telecommunications Bureau, rel. Feb. 3, 2012 (“*Bureau Order*”).

² *Bureau Order* at ¶ 15 (emphasis added).

³ 47 C.F.R. § 54.307(e)(1)(ii)(emphasis added).

Code, but it received \$3500 per loop per year in any single ILEC study area, the cap in the initial rule would not have constrained the competitive ETC's support in that ILEC study area.

Each of the Parties has standing to file this Application for Review. The Parties will suffer financial harm if the revised rule is allowed to go into effect. The Parties had no opportunity to comment on the revised rule due to lack of notice that the Bureaus would revise the methodology for applying the cap. U.S. Cellular notes that it participated in response to the Notice of Proposed Rulemaking issued prior to the Commission's adoption of the initial rule.

II. Question Presented for Review

The narrow question presented for review is whether the Bureaus followed the proper administrative procedure in adopting the revised rule. The Parties submit that the Bureaus substantively amended the rule adopted by the full Commission in the *USF/ICC Transformation Order*. The Parties further submit that both the initial rule and the revised rule are substantive – or “legislative” – rules, and therefore are subject to the notice and comment requirements of the Administrative Procedure Act (“APA”).⁴ The initial rule was adopted pursuant to a notice and comment rulemaking. The Parties do not challenge the initial rule. However, the revised rule was adopted without notice, let alone the opportunity for comment. Accordingly, the revised rule was unlawfully adopted.

The action taken by the Bureaus under delegated authority is in conflict with the initial rule and with the APA. The Parties seek the following relief: that the Commission rescind the revised rule. Further, since the revised rule is unlawful, USAC should be directed to retroactively true-up payments to affected CETCs and pay any sums withheld pursuant to the unlawful amendment.

⁴ 5 U.S.C. § 553(b).

III. The Revised Rule Substantively Amended the Initial Rule

The Bureaus, acting under delegated authority, substantively amended the rule adopted by the full Commission in the *USF/ICC Transformation Order*. That rule, set forth in the initial version of Section 54.307(e)(1) of the Rules, provided in relevant part that:

Each competitive eligible telecommunication carrier will have a “baseline support amount” equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines for 2011, whichever is lower.

The language of the rule, combined with the explanation of the rule in the text of the *USF/ICC Transformation Order*, makes clear that baseline support for competitive ETCs would be calculated by applying the \$3,000 per line cap to the CETCs “study area” – which is the Study Area Code reflecting the CETCs designated service area in any given state.⁵ Simply put, the initial rule placed a \$3000 per line cap on any CETC that collected more than \$3000 per line in its study area. There is no reference in the initial rule to the “incumbent’s” study area. The reference to the “incumbent’s study area” appears only in the revised rule.

Moreover, the language of the initial rule states that “[e]ach [CETC] will have a “baseline support amount” equal to its total 2011 support in a given study area”⁶ The reference is to a single “baseline support amount”. Had the Commission sought to apply the per line cap to each ILEC study area, the language in the initial rule would have needed to reference multiple baseline support amounts. A CETC only has one “baseline support amount” for a study area –

⁵ The term “study area” is commonly used by the FCC and USAC to refer both to an incumbent LEC’s study area and to a CETC’s designated ETC area within a state. *Contrast* USAC 4Q2011 Fund Size Projections at 10 (“Appendix HC01 provides projected High Cost support with capped CETC support by state, by study area, for 4Q2011.”) *with id.* at 15 (“Appendix HC18 provides CETC lines reported for HCL Support by incumbent study area.”) *See also*, 2010 Monitoring Report at 3-12 (“CETC study areas listed in the *USAC Filing for the Fourth Quarter of 2010* as being ineligible for support . . . have been excluded from these tables.”); *id.* at Table 3.22 (listing “High Cost Loop Support Payments by Study Area” for both ILEC and CETC study areas). For reference, attached as Appendix A is USAC’s table of “2010 High Cost Study Areas By Category,” viewed on March 5, 2012, at <http://www.usac.org/about/universal-service/fund-facts-charts/hc-study-areas-category.pdf>.

⁶ 47 C.F.R. 54.307(e)(1).

the support amount for its Study Area Code. Finally, the alternative clause in the initial rule -- which defined the cap calculation -- refers only to the total number of the CETC's reported lines, again with no reference whatsoever to the incumbent's study area.

Apart from the obvious and substantively different language in the revised rule, the vastly different impact of the revised rule compared to the initial rule unequivocally establishes that a substantive change was made by the *Bureau Order*. As the Commission noted in the text of *USF/ICC Transformation Order*, this cap was intended to apply to 18 incumbent local exchange carriers (ILECs) and only *one* competitive ETC based on 2011 levels of support.⁷ The revised rule is quite different: it would place a \$3000 per line cap on any CETC that collected more than \$3000 per line within an ILEC study area. Because the ILEC study area is often smaller (and never larger) than the CETC's Study Area Code, the revised rule impacts many more CETCs than the initial rule. For example, based on USAC projections for the fourth quarter of 2011, only two CETCs would have been impacted by the initial rule, while at least 10 CETCs, including both of the Parties, are impacted by the revised rule.⁸ Clearly, by stating that only one CETC received more than \$3000 per line annually in 2011, the Commission intended exactly what it stated in the initial rule, which was to apply the cap on the basis of the CETC's Study Area Code, and not on the basis of the individual ILEC study areas in which the CETCs operate.

⁷ *USF/ICC Transformation Order* at ¶ 277 (emphasis added). *See also id.* at ¶ 273 (\$3,000 per line cap would have applied to 20 ILECs and two CETCs based on 2010 levels of support).

⁸ The USAC projections for the fourth quarter of 2011 were publicly available as of August, 2011. Further, the underlying data used by the Commission to calculate that only one (or two) CETCs would be impacted by the initial rule is the same data that was used by the Parties to calculate that ten CETCs would be impacted by the revised rule. In calculating the number of CETCs impacted by the revised rule, the Parties first calculated the total per-line support in all categories for the ILECs with the highest per-line High Cost Loop Support. Then the Parties determined capped per-line support pursuant to the statewide cap factor listed in Appendix HC01, and narrowed the list to those with greater than \$250 per month in capped support. The list of CETCs serving these ILEC study areas was compiled based on Appendix HC18, CETC Reported Lines by Incumbent Study Area – High Cost Loop Support.

IV. The FCC Cannot Substantively Amend the Initial Rule Without Undertaking a Notice and Comment Rulemaking Proceeding

The APA imposes notice and comment requirements that must be followed by an agency before a rule may be issued.⁹ Likewise, the courts have repeatedly held that substantive changes to existing rules are subject to the APA's notice and comment requirement. For example, in *U.S. Telecom Ass'n v. FCC.*, the Court noted that “new rules *that work substantive changes* to prior regulations are subject to the APA's procedures.”¹⁰ The Supreme Court has said that if an agency adopts “a new position *inconsistent with*” an existing regulation, or effects “a *substantive change* in the regulation,” notice and comment are required.¹¹ The notice and comment requirements apply to substantive rules, also known as “legislative rules.” The rule in question here, Section 54.307(e) is clearly a legislative rule. The initial rule and the revised rule were both issued by the FCC pursuant to statutory authority, and the rules have the force and effect of law.¹² In addition, the FCC has already published the initial rule in the Code of Federal Regulations.¹³ The courts have held that “an agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations.”¹⁴

The APA provides that the notice and comment procedural requirements do not apply to “interpretative rules.”¹⁵ The revised rule, however, is not an interpretative rule. The courts have ruled that the FCC “may not bypass [the APA's notice and comment] procedure by rewriting its

⁹ See 5 U.S.C. § 553(b).

¹⁰ *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Circuit 2005), citing *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Circuit 2003) at 34 (emphasis in original).

¹¹ *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100, 115 S.Ct. 1232 (1995), cited in *U.S. Telecom Ass'n v. FCC*, 400 F.3d at 35 (emphasis added by D.C. Circuit).

¹² See *American Min. Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Circuit 1993).

¹³ See . <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=39a75f1ff5baf3a4e58aebb8231ffa5c&rgn=div8&view=text&node=47:3.0.1.1.7.4.4.5&idno=47>, last visited on March 2, 2012.

¹⁴ *American Min. Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Circuit 1993).

¹⁵ See 5 U.S.C. § 553(b). The Courts generally refer to the category of rules to which the notice and comment requirements apply as “legislative rules.” See *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Circuit 2005) at 34.

rules under the rubric of “interpretation.”¹⁶ The FCC cannot avoid the APA requirements simply by characterizing the revised rule as a “clarification.” The revised rule is anything but a clarification. Instead, it is a substantive change of the initial rule, which will have an adverse impact on the Parties. The courts have repeatedly held that:

[i]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first, and of course, an amendment to a legislative rule must itself be legislative.¹⁷

The revised rule is irreconcilable with the initial rule. Thus, the FCC was required by the APA to provide a notice and comment process prior to adopting the revised rule. The FCC did not do so. Therefore, the revised rule is unlawful, and must be rescinded.

V. Rescinding the Revised Rule Will Have a *De Minimis* Impact on Overall High-Cost Support

The Parties requested relief is that the Commission rescind the revised rule and restore the initial rule. Further, since the revised rule is unlawful, USAC should be directed to retroactively true-up payments to affected CETCs and pay any sums withheld pursuant to the unlawful amendment. Such relief will eliminate the adverse financial impact of the revised rule on the Parties. At the same time, however, such relief will have very little impact on overall high-cost support. The Parties estimate that reverting to the initial rule will increase overall frozen monthly high-cost support by approximately \$2.88 million, or 1.66%.

¹⁶ *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Circuit 1997), as cited in *U.S. Telecom Ass’n v. FCC*, 400 F.3rd at 35.

¹⁷ *National Family Planning & Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Circuit 1992), as cited in *American Min. Congress v. MSHA* at 1109.

VI. Conclusion

For the reasons set forth herein, the Parties respectfully request that the Commission grant this Application for Review, and revert to the initial rule regarding the manner in which the per line cap will be imposed on competitive ETCs.

Respectfully submitted,



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APPENDIX A

2010 HIGH COST STUDY AREAS BY CATEGORY

	Incumbent Study Areas				Competitive Study Areas*	Total Study Areas	
	Rate-of-Return			Price Cap			
	Cost Companies	Average Schedule	Total				
Rural	715	448	1,163	192	1,355	321	1,676
Non-Rural	1	1	2	82	84	286	370
TOTAL	716	449	1,165	274	1,439	607	2,046

*Competitor count reflects some CETCs that serve in both Rural and Non-Rural Study Areas and are counted separately in each category.