

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF NEW CINGULAR WIRELESS PCS, LLC,
A SUBSIDIARY OF AT&T MOBILITY LLC,
FOR DESIGNATION AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER IN
NON-RURAL STUDY AREAS

Docket No. TC11-072

**RESPONSE OF
JAMES VALLEY WIRELESS, LLC
TO STAFF SCHEDULING LETTER
OF NOVEMBER 15, 2011**

James Valley Wireless, LLC ("JVW") hereby submits its response to Staff's November 15, 2011, letter to the Commission concerning scheduling status,¹ as follows:

1. **FCC Order.** The Federal Communications Commission ("FCC") Order adopted October 27, 2011,² by all accounts will significantly revise the current universal service funding and intercarrier compensation mechanisms. In heralding its adoption of the *FCC Order*, the FCC announced that, "[i]n the most significant policy step ever taken to connect all Americans to high-speed Internet, wherever they live, the FCC voted unanimously to comprehensively reform its Universal Service Fund and intercarrier compensation systems. Those systems have been widely viewed as broken, and long overdue for reform."³

2. The actual text of the *FCC Order*, anticipated to be in excess of 500 pages, has not yet been released. In part, it is anticipated the *Order* will address universal service funding and Eligible Telecommunications Carrier ("ETC") designation matters. Some examples of the *Order's* "significant policy steps" are:

- For the first time, the FCC establishes a comprehensive budget for the high-cost programs within the Universal Service Fund ("USF"). The annual funding target is set at no more than \$4.5 billion over the next six years.
- ETCs, for the first time, will be required to offer broadband services. The FCC updates the definition of voice services for universal service purposes, and establishes specific broadband performance requirements for funding recipients.
- The FCC creates the Connect America Fund ("CAF"), which will "help make broadband available to homes, businesses and community anchor institutions in areas that do not, or would not otherwise, have broadband, including mobile voice

¹ Letter from Commission Staff to Patricia Van Gerpen, PUC Executive Director (Nov. 15, 2011) ("Staff Letter").

² FCC, Report and Order and Further Notice of Proposed Rulemaking (FCC 11-161), Docket Nos. 10-90, 09-51, 07-135, 05-337, 01-92, 96-45, 03-109, 10-208 (adopted Oct. 27, 2011) ("*FCC Order*" or "*Order*").

³ *FCC Creates "Connect America Fund" To Help Extend High-Speed Internet to 18 Million Unserved Americans; Creating Jobs & Increased Consumer Benefits*, FCC News Release, Docket Nos. 10-90, 09-51, 07-135, 05-337, 01-92, 96-45, 03-109, 10-208 (Oct. 27, 2011), at 1.

and broadband networks in areas that do not, or would not otherwise, have mobile service"⁴

- The FCC will provide additional funding for price cap carriers to extend broadband to unserved Americans beginning in early 2012. "To enable this deployment, all existing legacy high-cost support to price cap carriers will be frozen, and an additional \$300 million in CAF funding will be made available."⁵
- The FCC creates a CAF Mobility Fund "dedicated to ensuring availability of mobile broadband networks in areas where a private-sector business case is lacking."⁶
- The FCC provides up to \$300 million in one-time support to accelerate immediately deployment of networks for mobile voice and broadband services in unserved areas. This support will be awarded through a nationwide reverse auction, which the FCC anticipates will occur in the third quarter of 2012.
- The FCC eliminates the identical support rule that currently determines the amount of support for mobile competitive ETCs. The FCC also freezes identical support per study area as of yearend 2011, and phases down existing support over a five-year period, beginning on July 1, 2012.
- Although the FCC asserts that it does not disturb the "existing role of states in designating ETCs and in monitoring that ETCs within their jurisdiction are using universal service support for its intended purpose[.]"⁷ the FCC also indicates that it establishes a national framework for certification and reporting requirements for all universal service support recipients to ensure that their public interest obligations are satisfied.

3. Proceeding without giving JWV, Staff, and the Commission an appropriate opportunity to review and address those aspects of the *FCC Order* pertaining to ETC designations, which will very likely, at a minimum, be relevant to applying the public interest standard governing multiple designations in rural service areas would be contrary to due process and prevent a full and fair review of the ETC application filed by New Cingular Wireless PCS, LLC, a subsidiary of AT&T Mobility LLC ("AT&T Mobility").

4. **AT&T/T-Mobile merger.** If the AT&T/T-Mobile merger is approved,⁸ it is reasonable to assume the FCC would address a phase-down of USF funds similar, but not

⁴ FCC, Report and Order and Further Notice of Proposed Rulemaking (FCC 11-161), Executive Summary (rel. Oct. 27, 2011) ("*FCC Executive Summary*"), at 1.

⁵ *Id.* at 2.

⁶ *Id.* at 3.

⁷ *Id.* at 4.

⁸ AT&T has recently indicated that it anticipates closing the T-Mobile merger transaction "in the first half of 2012." AT&T Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Note 7 (filed Nov. 3, 2011), accessed at EDGAR Online, <http://xrl.us/bmh3sr>.

necessarily identical, to the actions taken in connection with Verizon's acquisition of ALLTEL,⁹ and Sprint's acquisition of Clearwire.¹⁰ In the event of a phase-down or relinquishment, pursuant to the FCC's *Corr Wireless Order* and *Corr Wireless II Order*,¹¹ USF funds would be reclaimed by the FCC and not necessarily remain available in their entirety for use in South Dakota.

5. JWV notes that the General Counsel of the FCC has recently opined that the *FCC Order* confirms the fact that funds relinquished pursuant to the *Corr Wireless Orders* will be used for universal service purposes (and not for other purposes unrelated to universal service), specifically to support CAF, "a new mechanism for distributing support under the FCC's existing high-cost universal service program."¹² Nonetheless, the Commission should be cognizant of the fact that disbursement of relinquished support through the new CAF mechanism could result in draining USF support out of South Dakota and redistributing it to other jurisdictions. For this reason, JWV respectfully suggests it would be prudent to delay the hearing dates in this proceeding so there is a sufficient opportunity to review and weigh the consequences of the impact of the AT&T/T-Mobile merger, the likely relinquishment of USF support as a result of the merger, and the operation of the new CAF support mechanism established in the *FCC Order*, on the level of high-cost support available to AT&T Mobility and other competitive ETCs in South Dakota.

6. **Potential impact of *FCC Order*.** It is useful to note at the outset that a lot is at stake in this proceeding for rural consumers and for telecommunications and broadband competition in South Dakota. The current level of capped high-cost USF support available annually for disbursement to competitive ETCs in the State exceeds \$36 million.¹³ Although the level of support that AT&T Mobility anticipates receiving if its ETC application is granted by the Commission has been provided by AT&T Mobility on a confidential basis,¹⁴ it is reasonable to assume that AT&T Mobility would be eligible for a significant portion of the \$36 million available to all competitive ETCs in the State.

⁹ See *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17532 (para. 197) (2008), *recon. denied*, 26 FCC Rcd 11763 (2011).

¹⁰ *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570 (2008).

¹¹ *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (2010) ("*Corr Wireless Order*"); *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 25 FCC Rcd 18146 (2010) ("*Corr Wireless II Order*") (collectively, "*Corr Wireless Orders*").

¹² *Rural Cellular Ass'n v. FCC*, No. 11-1094 (D.C. Cir.), Supplemental Brief for Respondent FCC (filed Nov. 10, 2011), at 5.

¹³ Letter from Sharon Gillett, Chief, Wireline Comp. Bur., FCC, to Karen Majcher, Vice President, High-Cost and Low Income Division, USAC (Feb. 8, 2011), Attach. A, Interim Cap Adjustments by State, accessed at <http://www.usac.org/hc/tools/latest-news/default.aspx#020911> (showing a revised monthly baseline of \$3,006,842 for South Dakota).

¹⁴ See AT&T Mobility, Application for Designation as an Eligible Telecommunications Carrier, Docket Nos. TC11-071 and TC11-072 (filed June 13, 2011) ("AT&T Mobility Application" or "Application") at 11 & Confidential Exhibit E.

7. In these circumstances, JVW respectfully suggests it would be prudent for the Commission to arm itself with as much information as possible regarding the potential effects of the *FCC Order* as it evaluates the merits of the AT&T Mobility Application and deliberates whether granting the Application would serve the public interest and the interests of South Dakota consumers. This is especially true in light of AT&T Mobility's acknowledgment that:

there are a number of matters currently pending before the FCC that, if adopted, could greatly impact the amount of funding available for CETCs and/or AT&T Mobility. If the federal high cost support that AT&T Mobility receives is less than it currently anticipates, AT&T Mobility may reduce or eliminate some projects included in its attached report.¹⁵

Since the most far-reaching of these matters—the *FCC Order*—has now been adopted by the FCC, the hearing dates should be delayed so the impact of the *Order* can be measured with precision before the Commission makes any determination regarding the merits of the AT&T Mobility Application, or the need for AT&T Mobility to recast its project commitments.

8. JVW agrees with the Staff that the *FCC Order* "potentially complicates the Commission's decision-making process[,]"¹⁶ but respectfully disagrees with the Staff's assessment that the hearing dates should not be delayed because concerns regarding the impact of the *FCC Order* are outweighed by concerns relating to AT&T's due process rights. Several examples from the *FCC Executive Summary* illustrate the basis for JVW's view that a delay in the hearing dates is a prudent step the Commission should take.

9. *First*, the *FCC Order* will provide for the phase-out of existing competitive ETC funding, commencing in July 2012.¹⁷ The Commission would benefit from an opportunity to evaluate the precise manner in which the FCC's rules will implement this phase-out, and both AT&T Mobility and JVW should have an opportunity to review and comment on the extent to which this phase-out of existing funding could affect the ability of AT&T Mobility to comply with infrastructure deployment and other projections and commitments made in its ETC application.

10. *Second*, as noted in paragraph 2, *supra*, the FCC creates a mandate to provide broadband services. Although AT&T Mobility avers that it "has built a broadband wireless network in South Dakota[,]"¹⁸ a delay in the hearing dates would enable both AT&T Mobility and JVW to evaluate and comment on whether the capabilities and operations of this network conform to requirements established in the *FCC Order* pertaining to eligibility for the receipt of support from the CAF and the Mobility Fund.

11. *Third*, beginning in 2013, the FCC expects to implement a right of first refusal ("ROFR") mechanism that will likely have a significant impact on the level of CAF funding

¹⁵ *Id.* at 12.

¹⁶ Staff Letter at 1.

¹⁷ *FCC Executive Summary* at 4.

¹⁸ AT&T Mobility Application at 16.

available to competitive ETCs.¹⁹ The ROFR mechanism will provide price cap incumbent carriers in each state with an opportunity to elect to become the *sole recipients* of CAF support in their service territories over a five-year period. On the face of it, the ROFR mechanism could have a substantial effect on the level of funding available to competitive ETCs in South Dakota and could undercut AT&T Mobility's ability to meet the project commitments presented in its Application. This potential impact of the ROFR mechanism provides an additional sufficient basis for delaying the hearing dates so the particulars of the ROFR rule can be examined in conjunction with the Commission's review of the Application.

12. And, *fourth*, the *FCC Executive Summary* explains that "[t]he CAF will not provide support in areas where unsubsidized competitors are providing broadband" ²⁰ It is not clear what impact this new limitation may have on the project commitments AT&T Mobility has made in its Application, which makes it reasonable for the Commission to delay the hearing dates in order to study the details of this limitation in the *FCC Order*, as well as its potential impact.

13. **Timeline.** The following is the current timeline of this Docket:

June 13, 2011	AT&T Mobility Application filed
July 29, 2011	Order granting motions to intervene by JVW and SDTA
October 26, 2011	Order granting motion for protective order
November 10, 2011	Intervenors' (JVW and SDTA) Joint Interrogatories and Requests for Production of Documents served on AT&T Mobility

14. Considerable time was spent negotiating with AT&T Mobility to obtain its confidentially filed information (which, as party, the Intervenors were entitled to) and, once AT&T Mobility agreed to provide it, there were considerable negotiations with AT&T Mobility concerning the language in the protective order.

15. Upon the entry of the protective order and receipt of confidential information, the Intervenors (JVW and SDTA) timely filed their Joint Interrogatories and Requests for Production of Documents, neither of which could be effectively drafted and served prior to receipt of the confidential information and entry of the protective order. Therefore, Intervenors have not been dilatory with respect to this Docket. By way of comparison, the last contested ETC proceeding was TC10-090 in the Matter of the Petition of Cellco Partnership. That Docket was opened on September 5, 2010, and closed on September 15, 2011.

16. **Due process argument.** Staff argues that AT&T Mobility has a right to "a timely hearing" and that delay beyond the Staff's proposed January 4, 2012, hearing date would affect "AT&T's due process rights." However, due process is not a one-way street. JVW is entitled to full and fair discovery, and an opportunity to present the Commission with legal and factual

¹⁹ *FCC Executive Summary* at 2-3.

²⁰ *Id.* at 2.

arguments in support of its opposition to the Application. Rushing this hearing, without giving JVW an opportunity to evaluate and present arguments related to the applicability of the *FCC Order* and the AT&T/T-Mobile merger, would not afford JVW with the process it is due. In addition, awaiting release of the *FCC Order* before imposing prefiled testimony deadlines will not in itself result in any unreasonable or significant delay, given that the *Order* has already been adopted by the FCC and is expected to be released soon.

17. **Proposed Schedule.** For the foregoing reasons, JVW proposes the following schedule:

Intervenors' prefiled testimony	Due 30 days after release of <i>FCC Order</i> or final resolution of any discovery disputes, whichever is later. (Intervenors served comprehensive discovery requests on AT&T Mobility and Intervenors anticipate AT&T Mobility will object to some or all of those discovery requests, which will require Commission action to resolve.)
AT&T Mobility prefiled testimony	Due 30 days after Intervenors' prefiled testimony.
Hearing date	March 2012 – Exact date to be determined based on the Commission's schedule.

Wherefore, JVW requests the Commission to adopt its Proposed Schedule.

Dated this 18th day of November 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 18th day of November 2011 upon the following:

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