

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

**COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc. (“Qwest”) hereby respectfully submits its Comments in response to the Federal-State Joint Board on Universal Service’s (“Joint Board”) *Public Notice* reviewing the definition of universal service.¹ In the *Public Notice*, the Joint Board responds to the request of the Federal Communications Commission (“Commission”) to initiate a review of the services that are currently eligible for universal service high cost support.² One of the most significant issues raised in the *Public Notice* is whether advanced services should be added to the list of services eligible for high cost support.

In 1997, based upon the Joint Board’s recommendations, the Commission established the current list of nine “core” services that are eligible for high cost support.³ At that time, the

¹ *Public Notice, Federal-State Joint Board on Universal Service Seeks Comment on Review of the Definition of Universal Service*, CC Docket No. 96-45, FCC 01-J-1, rel. Aug. 21, 2001 (“*Public Notice*”).

² *See In the Matter of Federal-State Joint Board on Universal Service, Order*, 15 FCC Rcd. 25257 (2000).

³ *In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 8807-25 ¶¶ 56-87 (1996), *aff’d in part, rev’d in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *pets. for reh’g and reh’g en banc denied* (Sep. 28, 1999), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (2000), *cert. granted, GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (2000) (“*First Report and Order*”).

Commission declined to include advanced services in that list because those services did not satisfy the criteria in Section 254(c)(1) for identifying supported services.⁴ The Commission concluded that high speed data transmission was not an appropriate goal of universal service high cost policies at that time, because “supporting an overly expansive definition of core services could adversely affect all consumers by increasing the expense of the universal service program and, thus, increasing the basic cost of telecommunications services to all.”⁵ In addition, the Commission found that the record in the proceeding did not demonstrate that higher bandwidth and data transmission capabilities were, at that time, necessary for the public health and safety and that a substantial majority of residential customers currently subscribe to those services.⁶

Four years later, the concerns that motivated the Commission to exclude advanced services from the list of supported services remain. Expanding the definition of core services to include advanced services would dramatically increase the size of the universal service program, and thus increase the cost of telecommunications services for all. It would cost billions of dollars to offer ubiquitous digital subscriber line (“DSL”) services in Qwest’s study areas alone.⁷ Moreover, it is not at all clear that this would be an efficient use of universal service funds. In many rural areas, there may be more economical means of providing advanced services, such as satellite, wireless, or cable modem service, rather than expanding or upgrading an eligible

⁴ 47 C.F.R. § 254(c)(1). See *First Report and Order*, 12 FCC Rcd. at 8811-12 ¶ 64.

⁵ *Id.*

⁶ *Id.*

⁷ Although Qwest has not determined the cost of network upgrades necessary to make such an offering in its entire in-region territory, Qwest’s analysis suggests that it would cost approximately two billion dollars to offer DSL throughout its service areas in Colorado, South Dakota, Washington, and Wyoming.

telecommunications carrier's network to offer DSL services to all end users within the study area.

In a recent speech on broadband deployment, Chairman Powell discussed the limitations and disadvantages of using universal service programs to further this goal.⁸ The Chairman also noted that expanding the universal service program to include broadband services is just one of a number of actions the government could take to further broadband deployment, and that these alternatives, such as tax breaks, public-private partnerships, and the removal of legal barriers, may be more effective.⁹ Qwest recently expressed similar views in comments submitted in response to the Commission's *Third Notice of Inquiry* in the Section 706 proceeding, wherein Qwest described other means of stimulating deployment of advanced services, including eliminating disparity of regulation between DSL and cable modem services and helping dismantle local government barriers to deployment.¹⁰ Qwest has attached a copy of those comments to this filing.¹¹

Finally, the other factors that the Commission cited in excluding advanced services from the list of supported services continue to demonstrate that advanced services should not be eligible for high cost support. Advanced services still are not "subscribed to by a substantial majority of residential customers."¹² Chairman Powell recently noted that only twelve percent of

⁸ Michael K. Powell, Chairman, FCC, Remarks Before the National Summit on Broadband Deployment, Washington, D.C., Oct. 25, 2001 (as prepared for delivery) ("Broadband Deployment Speech").

⁹ *Id.*

¹⁰ Comments of Qwest Communications International Inc., CC Docket No. 98-146, filed Sep. 24, 2001.

¹¹ *See* Attachment A.

¹² 47 C.F.R. § 254(c)(1)(B).

households are subscribing to broadband services, such as DSL and cable modem service.¹³

There has also been no change in the Commission's earlier finding that advanced services are not essential to education, public health, or public safety.¹⁴

For the foregoing reasons, Qwest respectfully urges that advanced services continue to be excluded from the list of services eligible for universal service high cost support.

Respectfully submitted,

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¹³ See Broadband Deployment Speech at 2.

¹⁴ See *First Report and Order*, 12 FCC Rcd. at 8811-12 ¶ 64.

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reasonable) CC Docket No. 98-146
and Timely Fashion, and Possible Steps)
to Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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September 24, 2001

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Telecommunications Act of 1996)

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”), by its attorneys, hereby files these comments in response to the Federal Communications Commission’s (“Commission”) *Third Notice of Inquiry* in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

Qwest fully supports the Commission’s efforts in this *Notice* to re-examine the marketplace in order to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely manner pursuant to Section 706.² Moreover, Qwest supports the Commission’s original articulation of its objectives as outlined in its 1999 Report:

¹ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Notice of Inquiry*, FCC 01-223, rel. Aug. 10, 2001 (“*Notice*”).

² *See* Section 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

Congress has instructed us to assess the availability of advanced telecommunications capability to all Americans, including in particular elementary and secondary schools and classrooms; and to take “immediate action” if we find that such capability is not being deployed to all Americans in a reasonable and timely manner. We are committed to following this instruction while also promoting the deregulatory and procompetitive goals of the 1996 Act. Our role is not to pick winners and losers, or to select the best technology to meet consumer demand. We intend to rely as much as possible on free markets and private enterprise.³

Specifically, Qwest’s comments and proposals, set forth below, are consistent with principles of maximum reliance on free markets and private enterprise, competitive and technological neutrality, and the dismantling of barriers to deployment of advanced and other services.

The Commission’s third inquiry into the reasonable and timely deployment of advanced telecommunications capability comes at a particularly critical point in the industry. Since the Commission’s last inquiry into this subject, the previously bullish and robust economy, which both fueled demand and generated the capital to meet it, has stalled, leaving a markedly different landscape for incumbent local exchange carriers (“ILEC”), competitive local exchange carriers (“CLEC”), interexchange carriers (“IXC”), cable operators and multi-divisional companies like Qwest.⁴ During this same period, the

³ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report*, 14 FCC Rcd. 2398, 2401-02 ¶ 5 (1999) (“*Report*”).

⁴ Qwest operates in almost every sector of the telecommunications industry. Having merged with U S WEST, it is the nation’s fourth largest ILEC. Besides being one of the country’s largest IXCs, Qwest is also a facilities-based CLEC that competes for the customers of other ILECs, and to that end it will have deployed fiber rings in more than two dozen out-of-region cities by year’s end. Qwest is one of the nation’s largest providers of Internet backbone services and of various other services based on Internet protocol. As a provider of digital subscriber line (“DSL”) services, both as an ILEC and as a CLEC, Qwest is a premier provider of the “advanced telecommunications capability” that is the focus of this *Notice*.

deployment of cable modem service, which is wholly unhampered by regulation, has steadily increased. In contrast, the deployment of functionally equivalent DSL service, the providers of which are encumbered by detailed regulation, is but a fraction of that for cable modem service.

Against this background, the Commission should focus its efforts under Section 706 on three areas. First, consistent with its determination to rely on free markets and private enterprise, the Commission should refrain from mandating ubiquitous or other levels of deployment of advanced services, whether by including them in an expanded definition of universal service or otherwise. Instead, the Commission should explore and pursue other means of encouraging the deployment of advanced services, such as by adopting accelerated accounting treatment or by urging Congress to establish investment tax credits for qualifying investment. Second, principles of competitive and technological neutrality require elimination of the unjustifiable and counterproductive asymmetric regulatory treatment of cable modem services and DSL. Finally, the Commission should dismantle other barriers to deployment, by acting aggressively to curtail attempts by municipalities to impose additional layers of regulation and non-cost-based fees on facilities-based wireline providers, under the guise of management of public rights-of-way. These unlawful actions by some municipalities can and do delay deployment of advanced services, increase the cost of, and delay or foreclose the deployment of advanced services. Congress has affirmatively authorized the Commission to eliminate these barriers to deployment through its rulemaking and preemptive authority under Section 253 of the 1996 Act.

II. THE COMMISSION SHOULD RELY ON FREE MARKETS AND PRIVATE ENTERPRISE FOR DEPLOYMENT OF ADVANCED SERVICES AND REFRAIN FROM MANDATING LEVELS OF DEPLOYMENT

The *Notice* asks whether earlier positive investment trends in advanced services are continuing.⁵ The answer is plainly “no.” The appropriate remedy, however, is not to “mandate” such investment by providers, but to address the economic and other forces that are hindering investment.

Data through the end of 2000 show that the deployment of advanced services was proceeding apace.⁶ However, within the last year, the nation’s economy in general, and investment in the telecommunications sector in particular have deteriorated precipitously. Falling profits, falling expectations, and falling stock values in virtually every sector translate into diminished capital. The telecommunications services industry, which has historically been recession resistant, has not been immune to this downturn. Shortages of capital, and corresponding shrinkage of construction programs, are exerting enormous pressure on the expansion of advanced services, particularly on DSL. DSL growth, reported at 41% in the last quarter of 2000, dropped to 20% in the first quarter of 2001, and to 14% in the second quarter.⁷ In view of these developments, the Commission asks whether additional steps should be taken to accelerate deployment. Because the slowdown in deployment is due to the economy, the Commission should consider the

⁵ *Notice* ¶ 23.

⁶ The Commission points out that the data reported on the Form 477 show a substantial increase in residential and small business advance service lines before this year. Residential penetration for advanced services increased from 1.0% at the end of 1999 to 1.6% on June 30, 2000 to 2.6% for December 31, 2000. *Id.* ¶ 12.

⁷ See “Beware Baby Bells,” by Jane Black, Business Week Online, Aug. 21, 2001, http://www.businessweek.com/bwdaily/dnflash/aug2001/nf20010821_941.htm.

creation or support of economic incentives, not regulatory mandates, to boost deployment of advanced services.

A. Mandated Ubiquity Of Advanced Services Is Not An Appropriate Universal Service Policy At This Time

In the *Notice*, the Commission seeks comment on how it or state commissions should encourage deployment of advanced telecommunications services generally. Simultaneously, the Federal-State Joint Board on Universal Service (“Joint Board”) is seeking comment on its review of the definition of basic service.⁸ The Joint Board invites comment on whether any advanced or high-speed services should be included within the list of core services.⁹ Regardless of the outcome of the Joint Board’s inquiry, the Commission should reject claims to mandate ubiquitous or other levels of deployment of advanced services. To do so would not merely be the very antithesis of relying on free markets and private enterprise, but would impose a massive financial burden on users of telecommunications services if not taxpayers in general. Indeed, the Commission previously concluded that high-speed data transmission is not the appropriate goal of universal service policies because an overly expansive definition of core services could adversely affect all consumers by increasing the expense of the universal service program and, thus, increase the basic cost of telecommunications services for all. The Commission also found that the higher bandwidth services are not necessary for the

⁸ *Federal-State Joint Board on Universal Service Seeks Comment on Review of the Definition of Universal Service*, CC Docket No. 96-45, *Public Notice*, FCC 01-J-1, rel. Aug. 21, 2001.

⁹ *Id.* ¶ 6.

public health and safety.¹⁰ There is no legal or factual basis for the Commission to adopt any other conclusion.

B. The Commission Should Explore Other Means Of Encouraging The Deployment Of Advanced Services

Instead of mandating levels of deployment, the Commission should support incentives to spur investment by private enterprise. One of the most direct ways to stimulate investment is through accelerated accounting. For example, the Commission could allow the investment to be expensed, at the option of the carrier, in the year of deployment, for rate purposes. The Commission could support favorable tax treatment to stimulate investment in advanced services deployment. Specifically, Qwest supports the establishment of investment tax credits, and urges the Commission to use its expertise and position to press this issue with Congress.

As the economy worsens, the need for economic incentives has become more acute. An investment tax credit that has realistically achievable criteria for qualifying investment would meet that need. Realistically achievable criteria must include the throughput speeds of the DSL technology that LECs are deploying today. Careful thought must be given to whether to limit the credits to investments made only in low income and rural areas. At this time, there is a need for investment stimulus all across the land. A graduated system of credits increasing from low, in metropolitan areas, to high, in rural areas, is one way to address this problem.

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 8811-12 ¶ 64, 8822-23 ¶ 83 (1997), *aff'd in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *pets. for reh'g and reh'g en banc denied* (Sep. 28, 1999), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. granted, GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (June 5, 2000), *cert.*

Qwest also notes that LECs engaged in making the costly types of investment that qualify for the credits may not have current income tax liability. Investment credits do not provide meaningful incentives unless those credits can be carried forward for a reasonable number of years.

Qwest believes that the information this Commission gains in this *Notice* and through its ongoing data gathering¹¹ can very usefully be employed in an effort to update Congress of the current state of investment. Qwest is certain this data will provide ample reason for the Commission to express its support in Congress for the provision of appropriate investment credits incentives.

III. PRINCIPLES OF COMPETITIVE AND TECHNOLOGICAL NEUTRALITY REQUIRE THE PROMPT AND COMPLETE ELIMINATION OF THE GROSS DISPARITY OF REGULATION BETWEEN DSL AND CABLE MODEM SERVICES

In its *Report* in the first Section 706 Inquiry, the Commission stated, “our role is not to pick winners and losers, or to select the best technology to meet consumer demand.”¹² This statement correctly recognizes that disparate regulation of functionally equivalent services is not merely unjustified, but inhibits competition between them. Yet despite the Commission’s stated commitment to competitive and technological neutrality, the current asymmetry of regulation between DSL and cable modem services has continued unabated. It is therefore not surprising that, as the media has recently observed, “the cable television industry is clobbering the telephone companies in the race

denied, AT&T Corp. v. Cincinnati Bell Tel. Co., 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (Nov. 2, 2000).

¹¹ Data gathered via the Form 477 pursuant to the *Data Gathering Order, In the Matter of Local Competition and Broadband Reporting, Report and Order*, 15 FCC Rcd. 7717 (2000).

¹² See note 3, *supra*.

to bring high-speed Internet connection to American homes.”¹³ Cable modem service is widening its lead over DSL service.

A. The Weight Of Asymmetric Regulation Is Slowing DSL Deployment

The *Notice* states that the leading technology, cable modem service, grew to 3.3 million on December 31, 2000. ADSL showed fewer total subscribers, at 1.6 million, but the Commission states¹⁴ that it was growing faster. Data for subsequent periods are not yet available, but the trends noted in the *Notice* are stale, and, by current estimates, no longer correct. According to the New York Times, which cites studies by the research firm Yankee Group, there are some 7 million cable modem users in the United States, compared with 3.3 million DSL subscribers.¹⁵ By current accounts, cable modem service will continue to outpace DSL into the foreseeable future. Barron’s financial weekly has declared, “GAME OVER. In the race to bring truly interactive games, shopping, movies and music into America’s homes, cable companies will beat the phone giants hands down.”¹⁶ Certain analysts are now forecasting that cable will keep its lead through the middle of this decade.¹⁷

¹³ Barron’s The Dow Jones Business and Financial Weekly, dated Aug. 20, 2001 at 23. “Get Wired – Why cable will beat the Bells in the race to wire your home”, by Jonathan R. Laing (“Barron’s Article”).

¹⁴ *Notice* ¶ 16.

¹⁵ “In Capitol, AT&T and Bells Fight to Control Access,” New York Times, Aug. 29, 2001.

¹⁶ Barron’s Article, Cover Page.

¹⁷ The Yankee Group forecasts that in 2005 DSL will have 10.5 million subscribers compared to 15.7 for cable modem service. “Cable Modem Providers Continue to Lead the High-Speed Internet Charge: The Yankee Group’s Predictions on Consumer Broadband Services,” Volume 18, Issue 11, Aug. 22, 2001.

See also, Barron’s Article, *supra* note 13.

The reason that cable modem service has achieved greater market penetration than DSL service is not the superiority of the former, but is the result of the disparate regulatory treatment accorded these services. The current scheme of regulation imposes substantial costs on DSL providers and sharply reduces their incentives to invest in additional deployment. In contrast, cable modem providers, who have achieved substantially greater market penetration than DSL providers, incur none of the costs of regulation, and are not required to share the fruits of their investment. In short, current regulation is doing exactly what the Commission has foresworn: picking winners and losers.

B. There Is Simply No Legitimate Economic Or Other Rational Basis To Maintain The Current Regulatory Scheme

A year has elapsed since the Commission issued a *Notice of Inquiry* concerning high-speed access to the Internet over cable and other facilities.¹⁸ In that proceeding, the Commission posed questions and sought comments on how to classify cable modem service for regulatory purposes; how to define “open access” to cable modem service; whether open access is a desirable policy goal, and if it is a desirable policy goal, what are the most appropriate means of achieving that objective.

It would serve no great purpose to recite in detail the questions raised in the *Cable Modem NOI*, and the comments of the parties responding. However, the Commission’s questions, and many of the answers, regarding how cable modem service can be fit into the growing regulatory infrastructure generated by the 1996 Act, overlook two

Kinetic Strategies estimates that cable modem service added 76% more subscribers than DSL providers added in the first quarter of 2001. Business Editors, High-Tech Writers, Business Wire, dated June 1, 2001.

fundamental facts: (1) that the local wireline transport portion of cable modem service is functionally identical in all material respects to the local transport portion of DSL service; and (2) that cable modem service and DSL services provided by ILECs and CLECs are direct competitors, serving identical markets and competing for the same customers. No regulatory structure can make sense if it ignores the fact that neither cable modem service nor DSL service operates in a vacuum; indeed, each is the other's most significant competition.

C. A Regulatory Course That Fosters Fundamental, Sustainable Competition, Would Focus First, But Not Exclusively, On That Competition Which Exists Between Competing Technologies

Despite the Commission's avowed goal of relying on competition between competing providers and technologies, current regulation has substantially handicapped the contest between DSL and cable modem service (and wireless and satellite data services). DSL alone is subject to unbundling and other regulatory obligations. These regulations impose costs on DSL providers that are not borne by cable modem providers, thereby placing the DSL providers at a competitive disadvantage and hindering the deployment of DSL. In the *Notice* the Commission reviews its *Second Report*, in which it looked at various technologies capable of providing advanced services, and determined that competition among providers *within certain technologies* is emerging.¹⁹ While this may be accurate, the Commission misses the fundamental economic reality. The more obvious competition then and now is the competition between the two leading

¹⁸ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry*, 15 FCC Rcd. 19287 (2000) ("Cable Modem NOP").

¹⁹ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to*

technologies for providing advanced services, DSL and cable modem. Perversely, the federal regulatory scheme has focused exclusively on competition solely between and among DSL providers. A regulatory course that would have been more calculated to foster fundamental, sustainable competition, would focus first, but not exclusively, on that competition which exists between competing technologies.²⁰

Right now, competition in advanced services to the consumer and small business markets is primarily a two entrant contest -- DSL and cable modem. If the Commission wants to refrain from picking winners and losers, it must put an end to the disparate regulation between these two.

IV. THE COMMISSION MUST ASSIST IN DISMANTLING LOCAL GOVERNMENT BARRIERS TO DEPLOYMENT

A. Municipal Regulation Threatens To Obstruct Or Prevent The Distribution Of Advanced Services

Qwest has observed two principal areas in which municipal regulation threatens to obstruct or prevent the distribution of advanced telecommunications services. First, municipalities continue to attempt to use rights-of-way management to attempt to recapture the broad regulatory authority explicitly forbidden by the 1996 Act. Second, municipalities are making arbitrary and capricious rights-of-way management decisions, that prohibit, or have the effect of, erecting barriers to entry for advanced telecommunications services.

Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Report, 15 FCC Rcd. 20913, 20991 ¶ 203 (2000).

²⁰ An analogous concept from antitrust law may be found in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and the many cases that follow from it, concerning the rule of reason analysis of the legality of non-price vertical restraints. These cases shift the focus from the effects that vertical restraints may have within the narrower intrabrand

B. Local Governments Are Attempting To Impose Additional Layers Of Regulation And Non-Cost-Based Fees Under The Guise Of Rights-Of-Way Management

Excessive municipal regulation threatens to delay or prevent distribution of advanced telecommunications services, particularly landline services, which typically require new facilities to be placed within the rights-of-way. First, to the extent that the municipality increases the cost of providing services, either by charging a direct fee to telecommunications providers or by imposing excessive regulations, that cost will discourage entry into the market by providers and discourage use by consumers upon whom those costs must eventually fall. In addition, such costs threaten the concept of technological neutrality. Specifically, by imposing unreasonable regulations and excessive costs upon landline providers, the municipalities increase costs of those services relative to services that do not require use of rights-of-way, such as wireless and satellite. This disparity distorts the true costs of those services to the consumers and threatens to result in an inefficient distribution of services and, therefore, to stunt the amount of services ultimately provided.

1. Unreasonable Conditions

Qwest has experienced numerous problems with municipalities imposing unreasonable conditions on grants of rights-of-way licenses.²¹ Principally, municipalities have attempted to leverage their limited authority over their rights-of-way either to: (1) extract revenue from telecommunications carriers that exceed any actual costs incurred as a result of the carrier's activities; or (2) recapture the broad police powers

product area to effects with the larger interbrand market. Interbrand competition is the primary concern of antitrust law. *Id.* at footnote 19.

explicitly forbidden by the 1996 Act.²² For example, the City of Auburn, Washington refused to grant use of municipal rights-of-way unless carriers such as Qwest agreed to pay Auburn a portion of their gross receipts and submit to extensive non-rights-of-way management conditions. Similarly, in *TCG New York, Inc. v. City of White Plains*, Nos. 01-7255 (XAP), 01-7213 (L) (2d Cir., appeal filed Mar. 8, 2001), the Commission appeared as *amicus curiae* in opposition to an attempt by the City of White Plains to use its authority over the rights-of-way to charge apparently discriminatory gross receipts charges in favor of the incumbent telecommunications carrier. While the majority of courts appear to conclude that gross receipts fees or “third-tier” regulation exceed a municipality’s authority over rights-of-way management under the 1996 Act, there is some confusion in the courts regarding this issue, as shown by cases such as the district court opinion in *White Plains*, 125 F. Supp.2d 81 (F.D.N.Y. 2000). Qwest commends the Commission’s active participation in cases like *White Plains*. Again, it would be extremely helpful for the Commission to take the steps below in order to further clarify to the municipalities and the courts the appropriate limits of their authority under the Act.

2. Arbitrary and Capricious Decisions Regarding Rights-of-Way Management Amount to Barriers to Deployment of Advanced Services

In a number of cities, Qwest has had difficulty placing remote DSL cabinets in public rights-of-way because of a lack of a principled permitting process. In various municipalities, regulators have opposed the placement of cabinets for aesthetic reasons and have informed Qwest that it either must comply with unannounced siting and

²¹ See, Ex Parte of Qwest Communications Corporation, FCC Presentation Regarding Access to Public Rights-of-Way and Franchise Issues, dated Mar. 9, 2001.

landscaping conditions, may not use public rights-of-way at all for DSL cabinets, or may place cabinets only if Qwest obtains approval from all nearby landowners, effectively granting every landowner a veto over Qwest's cabinet placement.²³

The lack of public standards, or, worse, the delegation of the city's rights-of-way decisions to nearby landowners has severely delayed Qwest's attempts to establish DSL services in Colorado and elsewhere and has increased the expense of doing so. In some cases, Qwest is unable to obtain municipal approval to place DSL facilities within the public rights-of-way under any conditions, forcing Qwest to attempt to seek private easement or to delay or cancel distribution of DSL services altogether.²⁴

Excessive municipal discretion to permit or deny use of rights-of-way prohibit or have the effect of prohibiting the ability to provide telecommunications services,²⁵ and should be preempted when brought to the Commission's attention.

²² See, e.g., *City of Auburn v. Qwest Corp.*, Nos. 99-36173, 99-362, 2001 WL 766166 (9th Cir. July 10, 2001).

²³ The City of Colorado Springs, Colorado, recently refused to grant a permit for placement of a remote DSLAM cabinet in public right-of-way when a neighboring citizen objected. Similarly, the City of Boulder, Colorado recently has refused to issue a permit for a remote VDSL cabinet in a public right-of-way when a neighboring citizen objected. Neither city has advised Qwest what standards it will apply to issue permits in these cases.

²⁴ For example, the City of Cottage Grove, Minnesota, has refused to issue permits for the placement of any remote DSLAM cabinets on public rights-of-way.

²⁵ See, e.g., *City of Auburn*, note 22, *supra*; *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp.2d 805, 814 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000); *Peco Energy Co. v. Township of Haverford*, No. Civ. A 99-4766, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999).

C. The Commission Should Take The Following Actions To Restrain Improper Municipal Behavior

The Commission can take a number of actions to clarify to the municipalities and to the courts the proper extent of municipal regulation of rights-of-way. Qwest recommends for example, that the Commission:

- Issue a report in connection with this docket and its pending *Notice of Inquiry* regarding rights-of-way regulation.²⁶
- Act promptly when presented with Section 253 preemption requests.
- File as amicus or otherwise participate in district court and appellate cases involving interpretation of the scope of municipal authority under the 1996 Act, similar to the Commission’s amicus filing in *White Plains*.
- Issue appropriate statements clarifying the scope of municipal authority and clarifying that fees of any kind exceeding actual costs, including gross receipts fees, fall beyond municipal authority under the 1996 Act.
- Stress that “third-tier regulations” (e.g., restrictions permitting municipalities to inspect corporate governance, unrelated technical qualifications, or restrictions permitting municipalities to impose unreasonable contract conditions in return for use of the rights-of-way) are also beyond the municipalities’ authority under the 1996 Act.

In all events, the Commission should work with municipalities and other interested parties to harmonize the legitimate interests of local governments in managing their rights-of-way with the national interest in increasing deployment of broadband and other telecommunications services.

V. CONCLUSION

For the foregoing reasons, Qwest respectfully urges the Commission to pursue economic incentives, not regulatory mandates, to boost deployment of advanced services.

²⁶ See *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd. 12673, 12712-19 ¶¶ 70-85 (1999).

Pursuant to statute and the Commission's decisions against favoring any particular technology or competitor, the Commission should support the prompt elimination of disparate regulation between DSL and cable modem service. Finally, the Commission should dismantle barriers to deployment of advanced services being erected by local governments. These determinations and actions by the Commission will remove barriers to investment and encourage deployment of advanced telecommunications capability in accordance with Section 706.

Respectfully submitted,

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September 24, 2001

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, and 2) served, as indicated, on the parties listed on the attached service list.

Richard Grozier
Richard Grozier

September 24, 2001

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Comment Filing System.

Richard Grozier
Richard Grozier

November 5, 2001