Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

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REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") hereby submits its Reply Comments in response to the Federal Communications Commission's ("Commission" or "FCC") *Further Notice of Proposed Rulemaking* ("*Further Notice*") in this proceeding.

I. INTRODUCTION AND SUMMARY

In the *Further Notice*, the Commission seeks comment on a proposal to compute universal service contributions based on the number and capacity of connections to the network, rather than on interstate end-user telecommunications revenues, as is done today. Many parties to this proceeding recognize that, if implemented correctly, a connection-based approach would in many ways be an improvement over the current contribution methodology. In particular, assessing contributions on the basis of connections would avoid the difficulty of determining what portion of revenues should be treated as interstate telecommunications revenues for bundled services, such as wireless or broadband Internet access services. Just as important, this modification would enable the Commission to simplify the recovery of contributions from end-user customers by requiring carriers to recover the same contribution amount from an end user as they contribute for the services provided to that end user, plus a reasonable mark-up for administrative expenses and uncollectible revenue. Thus, if, for example, a carrier contributes $1.00 per month to universal service for a service provided to a particular customer, that customer would receive a universal service charge of $1.00 plus a reasonable mark-up.

Qwest has carefully studied the proposals on the record from the perspective of its major business units – broadband, Internet service provider ("ISP"), out-of-region long distance, wireless, competitive local exchange carrier ("CLEC"), and incumbent local exchange carrier ("ILEC"). As a significant provider of each of these services, Qwest in the first instance seeks a universal service contribution methodology that is competitively neutral and equitable. In other words, the burden of contributing to universal service should fall equally on all providers of interstate telecommunications, regardless of the services they provide or the technologies used to provide those services, and relative contribution requirements should have no impact on customers' purchasing decisions.

While the proposal outlined in the *Further Notice* is a promising start in this direction, it has a fatal flaw. Namely, the proposal would violate section 254(d) by failing to require any contributions for the provision of interstate long distance services, even though these services account for nearly two-thirds of interstate revenues today. This approach is plainly inconsistent with section 254(d)'s directive that all providers of interstate telecommunications contribute to universal service on an equitable and nondiscriminatory basis. Through the guise of the Coalition for Sustainable Universal Service ("Coalition"), AT&T and WorldCom attempt to contort the statutory language to exempt contributions for long distance services, but the statute simply cannot be stretched that far. As a result, the Commission should eliminate from its consideration any proposal that fails to assess contributions for interstate long distance services.

Fortunately, there is a connection-based proposal on the record that avoids this legal failing and establishes a basic framework that can be used, with some adjustments, to create a competitively-neutral contribution regime. SBC and BellSouth have proposed a contribution methodology ("Joint Proposal") that would assess universal service contributions on all providers of interstate telecommunications, regardless of the type of service provided and the technology platform used by the service provider. The level of a provider's contribution would be based on the number and capacity of Qualifying Service Connections ("QSCs") for access and interstate transport services provided to end users, as well as a percentage of revenues from "occasional use" of interstate services. This framework would provide a sufficient fund and long-term stability for the universal service mechanism, be more competitively and technologically neutral than the current methodology, and would allow the Commission to establish a uniform contribution and recovery mechanism to help minimize end users' confusion regarding universal service charges. Moreover, unlike the proposal outlined in the *Further Notice* and originally proposed by WorldCom, the Joint Proposal would assess contributions for multi-line business switched access connections in the same manner as residential, single-line business, and, most importantly, mobile connections. Such uniformity is essential to avoid unfairly disadvantaging small business customers and improperly conferring a competitive advantage on commercial mobile radio service ("CMRS") providers competing for large business customers. Given these strengths, the Commission should adopt the Joint Proposal as the basic framework for a connection-based contribution methodology.

Nevertheless, Qwest believes that two important refinements to the Joint Proposal are necessary before the proposal can be implemented. *First*, the Commission needs to ensure that ISPs contribute to universal service in an equitable manner. While Qwest agrees with SBC's goal of ensuring that all ISPs contribute to universal service, it is unclear whether there is a legal basis for assessing contributions on ISPs that provide Internet access, but do not own the transmission facilities used to provide those services. Moreover, as explained below, it is not necessary to address this issue, because the Joint Proposal can be can modified to ensure that facilities-based ISPs contribute to universal service directly to the fund and non-facilities-based ISPs continue to contribute indirectly through charges paid to underlying transmission providers, which generally should be sufficient to ensure competitive neutrality.[1]

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[1] To the extent any ISP (*i.e.*, facilities-based or non-facilities-based) provides telephony, however, it should be subject to the same direct contribution requirements as any other telephony provider, based on its provision of interstate telecommunications. In

Second, further work is necessary to determine the appropriate levels of contribution for high-capacity connections, such as private line services. It is not clear that the capacity ratios proposed in the Joint Proposal, or those originally proposed by WorldCom, are in fact rational, equitable or competitively neutral. In particular, both proposals would apply the same contribution requirement to all connections providing bandwidth equal to or greater than a DS-3, even though the higher capacity services are subject to higher contribution requirements today. The Commission should consider whether alternative methodologies would ensure a more equitable contribution requirement for these high-capacity connections.

The *Further Notice* also seeks comment on various modifications to the manner in which providers recover universal service contributions from end users. Qwest agrees with proposals to require carriers to "pass through" their universal service contributions to their end users, with a reasonable mark-up for related administrative costs and uncollectible revenues. In other words, providers would recover their contributions from their end-user customers in the same way they are assessed (*i.e.*, on a flat-rated or percentage of revenue basis) for the service provided to the customer, and for the same amount plus a reasonable mark-up. Qwest also supports the Commission's proposal to adopt a safe harbor for mark-up costs, which would generally constrain these costs while still allowing providers with special circumstances to make a case for a higher mark-up.

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particular, if an ISP provides long distance service, it should contribute on the basis of its interstate transport QSCs. If the ISP leases underlying transmission capacity from another carrier, the latter would be exempt from contribution to avoid double counting those connections. At some point in the future, if Internet and/or IP telephony becomes sufficiently widespread, the Commission may need to address whether *all* ISP connections – facilities-based and non-facilities-based – should be subject to direct universal service contributions, based on their capability of being used for telephony.

Adoption of these rules will go a long way toward eliminating the incentive and ability for carriers, and certain customers, to engage in gaming with regard to the recovery of these charges. As a final matter, Qwest notes that its support for a per-connection approach, which may increase its overall contribution burden, is premised on all providers passing through such contributions in a equitable and nondiscriminatory manner, as would occur through a mandated "pass through" mechanism.

II. COMPETITIVE NEUTRALITY MUST GUIDE THE COMMISSION IN CONSIDERING MODIFICATIONS TO THE CURRENT METHOD OF ASSESSING UNIVERSAL SERVICE CONTRIBUTIONS

In evaluating any proposed modification to the current contribution system, section 254(d) requires the Commission to consider whether the modification is consistent with the requirement that all providers of interstate telecommunications services contribute on an "equitable and nondiscriminatory" basis.[2] In particular, the Commission must ensure that competing services are subject to identical contribution requirements. With the onset of intermodal competition, this principle has taken on increased importance. Unlike in the past, it is not sufficient, for example, to ensure that the same contribution requirements are applied to all providers of wireline telephone service. The Commission must also apply these same requirements to competing intermodal alternatives, such as mobile services and IP telephony. Likewise, the Commission must adopt identical contribution requirements for competing broadband services, such as digital subscriber line ("DSL"), cable modem, satellite and fixed wireless services. Failure to follow this principle will create inefficient incentives for customers to choose particular services solely on the basis of regulatory distinctions.

[2] 47 U.S.C. § 254(d).

This concern is most readily apparent with regard to mobile wireless services. In the *CMRS Wireless Report*, the Commission noted that three in ten wireless users would prefer to give up their landline phone, if forced to choose, and that number rises to almost one in two among younger users.[3] Moreover, a recent USA Today/CNN/Gallup poll found that 18 percent of cell phone users "use cell phones as their primary phones."[4] Wireless services compete directly with wireline services, especially in the case of long distance, since many wireless plans do not impose additional charges for long-distance calling. It therefore is essential that an end user pay the same universal service charge for use of a wireline or mobile connection to the network, so that his or her choice is based on the relative price and quality of the services, rather than differences in fees established by regulation. The trend toward bundling of local and long distance services by CMRS providers makes it difficult under a revenue-based system to ensure that CMRS providers are subject to the same contribution requirements as wireline providers. In particular, if the wireless safe harbor is set too low, as many have argued it is today, the current contribution mechanism may confer an advantage to CMRS providers over their wireline competitors.[5] The Commission's proposal to assess the same flat, monthly universal service charge for both types of connections, which would also occur under the Joint Proposal, should eliminate such advantages.

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3 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, *Sixth Report*, FCC 01-192, at 34 (rel. July 17, 2001).

4 M. Kessler, *18% See Cell Phones as Their Main Phones*, USA Today (Jan. 31, 2002).

5 *See* Coalition at 31-34.

For these same reasons, the Commission should reject Sprint's proposal to establish different per-connection assessments for wireline and mobile connections. According to Sprint's own estimates, this proposal would impose an assessment for wireline connections that is more than four times as great as the assessment for mobile connections.[6] There is no basis for discriminating in favor of Sprint and other mobile carriers in this way, particularly given the growing substitution of mobile connections for wireline connections. In addition to violating the Act's nondiscrimination requirement, Sprint's proposal would accelerate the migration from wireline to wireless providers, and ultimately would not produce a sustainable universal service fund.[7]

Competitive neutrality also requires that the same contribution requirements be applied to competing broadband services, such as cable modem, satellite, fixed wireless, DSL, and mobile wireless 3G services as they are deployed. Regardless of whether these services are deemed to be "telecommunications services" or just "telecommunications," the Commission should require universal service contributions for these services in a uniform manner. In the *Cable Modem Order*, the Commission recently found that bundled cable modem/ISP services constitute information services, rather than telecommunication services,[8] and the Commission has proposed the same classification

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[6] *Further Notice* ¶ 60.

[7] Moreover, the fact that the Commission's proposal would increase contributions from CMRS providers does not justify special treatment of those providers. In fact, wireline LECs also would likely see a significant increase in contribution burden under the Commission's proposal.

[8] *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77 ¶ 39 (rel. Mar. 15, 2002) ("*Cable Modem Order*").

for DSL services bundled with Internet access.[9] Nevertheless, as the Commission has suggested in an analogous circumstance, the Commission has authority to require contributions from these providers based on their provision of interstate telecommunications to themselves.[10] As with all types of services, what is most important is that the Commission apply the same contribution requirements for all competing services.

III. THE CURRENT REVENUE-BASED CONTRIBUTION METHODOLOGY IS NOT SUSTAINABLE

At an earlier stage in this proceeding, Qwest advocated that the Commission continue to assess contributions on the basis of interstate revenues. Based upon further analysis, however, Qwest has concluded that the current contribution is not sustainable given various trends in the industry. Qwest's previous advocacy was based on the presumption that the Commission could develop a reasonable method to measure interstate telecommunications revenues. It is now clear to Qwest that, short of the draconian measure of imposing a jurisdictional separations regime on all providers to identify interstate revenues, it is not possible to devise a competitively neutral revenue-based contribution methodology. In particular, the trend toward bundling of interstate telecommunications with intrastate services, information services, and customer premises equipment makes it difficult to estimate interstate revenues reliably for many services.

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[9] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-33, 95-20, 98-10, *Notice of Proposed Rulemaking*, FCC 02-42 ¶ 17 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*").

Such bundling is prevalent in the wireless industry today, and will likely become increasingly common for certain wireline services as well.[11] In fact, broadband Internet access services are frequently offered as a package of telecommunications and information services for a single price. Moreover, for some technologies, such as mobile wireless services, it may be administratively difficult, or even impossible, to distinguish interstate and intrastate traffic. Notably, none of the parties arguing for retention of the current contribution methodology explain how contributions can be assessed for bundled services in a consistent, competitively neutral manner.[12]

Among telecommunications providers, the strongest opposition to any changes in the current contribution methodology arises from wireless providers. This is not surprising given that CMRS providers currently enjoy a competitive advantage over their wireline competitors, arising from more burdensome contribution requirements applied to wireline carriers. Despite the growing popularity of "free" long distance bundled with wireless service, the current methodology assumes that no more than 15 percent of PCS and cellular revenues are interstate, which many believe understates the true volume of interstate calling by the average wireless customer.[13] By assessing contributions on a per-

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[10] *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11534 ¶ 69 (1998) ("*Report to Congress*").

[11] *See, e.g.*, H. Sanders, *WorldCom Begins Selling Combined Local, Long-Distance Service*, Bloomberg News (Apr. 15, 2002) (announcing availability of flat-rate package in 32 states).

[12] *See, e.g.*, Time Warner Telecom, XO Communications, and Allegiance Telecom at 22; GSA at 6; Verizon at 7; Consumers Union, *et al*.

[13] *In the Matter of Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and*

connection basis for both wireline and wireless services, the Commission can remove this asymmetry.

IV. THE JOINT PROPOSAL IS SUPERIOR TO THE OTHER PROPOSALS ON THE RECORD

In addition to the proposal outlined in the *Further Notice*, SBC and BellSouth, Sprint, and the Coalition have submitted alternative proposals. Of these, the Joint Proposal submitted by SBC and BellSouth is the most sound, because it avoids the lack of competitive neutrality of the other proposals.

A. Section 254(d) Requires that Long Distance Carriers Contribute to Universal Service for Their Interstate Long Distance Services

The Commission must reject any proposal that fails to assess universal service contributions for the provision of interstate long distance services. The statute is clear: "Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable and sufficient mechanisms established by the Commission to preserve and advance universal service."[14] Faced with this unambiguous language, the Coalition essentially argues that the statute does not mean what it says. In particular, the Coalition claims without basis that the modifying phrases "on an equitable and nondiscriminatory basis" and "specific, predictable and sufficient" somehow negate the sentence's clear direction that all providers of interstate telecommunications services must contribute.[15] The first

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the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, *Notice of Proposed Rulemaking*, FCC 01-145, ¶ 12 (rel. May 8, 2001).

[14] 47 U.S.C. § 254(d).

[15] Coalition at 84-87.

phrase – "on an equitable and nondiscriminatory basis" – describes *how* telecommunications carriers should contribute, not *whether* they should contribute, and the second phrase – "specific, predictable, and sufficient" – describes the universal service mechanism to which telecommunications carriers must contribute, again not whether they should contribute. The Commission's only discretion in this regard is to exempt carriers whose contributions would be *de minimis*.[16]

The fact that the largest interexchange carriers ("IXC") generally would contribute based on their provision of other interstate telecommunications services is not sufficient to satisfy section 254(d). The statute states not only that every provider of interstate telecommunications must contribute to universal service, but also that it must do so on an equitable and nondiscriminatory basis. As the predominant providers of interstate telecommunications services, it would hardly be "equitable and nondiscriminatory" for these carriers to contribute nothing for their interstate long distance services.[17] Under the Coalition proposal, an IXC (such as AT&T or WorldCom) providing more than a billion dollars of interstate long distance services would contribute nothing for those services, even though a LEC or wireless carrier would contribute millions of dollars for the same volume of interstate telecommunications services. There is no way in which this is equitable or nondiscriminatory.

The Coalition's reliance on the *de minimis* provision of the statute is also misplaced.[18] That provision allows the Commission to exempt carriers that have only

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[16] 47 U.S.C. § 254(d).

[17] NRTA & OPATSCO at 8-12.

[18] Coalition at 90-91.

"limited" telecommunications activities.[19] Although an IXC may provide no or only a small number of end-user connections (as defined in the Coalition proposal), it may nevertheless provide millions of dollars of interstate telecommunications services – which by no means constitutes "limited" telecommunications activities. While the Joint Proposal would preserve the *de minimis* exemption for carriers that truly have only limited interstate telecommunications activities, it would not exempt broad classes of carriers, such as presubscribed and dial-around long distance providers, as would the Coalition proposal.

The fact that "carriers' carriers" currently do not contribute to universal service if they have no end-user telecommunications revenues also does not support the Coalition's proposed exemption.[20] While these carriers clearly provide "telecommunications," they do not provide a "telecommunications service," which would trigger a mandatory contribution requirement. Section 254(d) mandates contributions only from providers of telecommunications services, while giving the Commission discretion to require contributions from other providers of interstate telecommunications if the public interest so requires.[21] In the *Universal Service Order*, the Commission concluded that collecting contributions from carriers' carriers would result in double recovery for those services.[22] Such concerns of double recovery do not arise with regard to IXCs, which clearly are

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[19] 47 U.S.C. § 254(d) ("The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are *limited* to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis") (emphasis supplied).

[20] Coalition at 90.

[21] 47 U.S.C. § 254(d).

[22] *In the Matter of Federal-State Joint Board on Universal Service*, *Report and Order*, 12 FCC Rcd 8776, 9207 ¶¶ 844-47 (1997) ("*Universal Service Order*").

providers of interstate end-user telecommunications *services* subject to mandatory contribution requirements.

This requirement on IXCs cannot be eliminated by ensuring that all “access” providers, such as LECs and wireless providers, are subject to the same contribution requirements. While consistency between “access” providers is essential, it is not sufficient to cure the inequity of exempting IXCs from contributing for their interstate long distance services. Universal service contributions are a burden that all providers would prefer to avoid, because they effectively increase the price of a provider’s services, potentially dampening demand, particularly for more price elastic services and features, such as second lines and vertical features. As a result, the IXCs’ avoidance of universal service contributions under the Coalition proposal could affect the relative demand and profitability of various telecommunications services provided by other carriers. This result is particularly inequitable given the jurisdictional nature of the services provided by IXCs, LECs, and wireless providers: IXCs are the largest providers of interstate services, while LECs and wireless providers provide primarily intrastate services. Given the Fifth Circuit’s ruling that federal universal service contributions can be assessed only on *interstate* telecommunications services,[23] there is no justification for effectively exempting the predominant providers of those services.

The Joint Proposal remedies this problem by requiring all providers to contribute on the basis of their Access and Interstate Transport QSCs. Thus, if a customer obtains local service from a LEC and long distance from an IXC, the LEC would contribute on the basis of the Access QSC provided to the customer, and the IXC would contribute on

[23] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 448 (5th Cir. 1999).

the Interstate Transport QSC. On the other hand, if a LEC, wireless carrier, or IXC provided both local and long distance to the customer, it would contribute for both an Access and Interstate Transport QSC.

Qwest acknowledges the Commission's goal of increasing the efficiency of the contribution methodology by making only one provider responsible for contributing based on a particular connection.[24] However, any proposal that would exempt the long distance services of IXCs from contribution would violate section 254(d). Moreover, given the trend toward bundling of local and long distance services, customers will increasingly buy packages of local and long distance services, resulting in a single universal service charge instead of two separate charges. As discussed in section VI, any concerns about inflated administrative overhead charges are best addressed by establishing a safe harbor to constrain such charges.

B. The Commission Should Apply the Same Connection-Based Charge for All Voice-Grade Wireline and Wireless Connections, Including Multi-Line Business Exchange Access Services

Under the Joint Proposal, all "voice-grade" (*i.e.*, less than or equal to 64 Kbps) connections would be subject to the same flat per-connection assessment, regardless of whether they serve residential, single-line business, multi-line business, or mobile wireless customers. In contrast, the Coalition Proposal would assess higher contributions for multi-line business exchange access connections. Specifically, a multi-line business switched access line would be assessed a contribution of between \$2.50 and \$3.25, as compared to a \$1.00 charge for residential, single-line business, and mobile wireless

[24] *Further Notice* ¶ 72.

connections.[25] There is no principled basis for treating multi-line business switched access connections differently from other switched access connections. As an initial matter, it may not be as easy to distinguish multi-line business connections from single-line business connections as the Coalition and the *Further Notice* suggest. While the Commission's proposal to distinguish connections based on the type of subscriber line charge ("SLC") imposed on the end user may work for ILECs, it could easily be evaded by a CLEC or its end users. The Coalition's assertion that virtually all CLECs charge SLCs *today* misses the point.[26] Given that the Coalition proposal would impose a contribution assessment that is three times higher for multi-business line connections than for single-line business connections, end users, and their carriers, would certainly have incentives to characterize connections as single-line business, rather than multi-line business. Additionally, there is no requirement for carriers other than ILECs to charge SLCs. It would be simple for CLECs to eliminate their SLCs and incorporate those charges into the retail prices of their services.

Furthermore, over time, this approach may raise competitive neutrality concerns between wireline and wireless providers. Under the Coalition proposal, a CMRS provider would contribute the same $1 charge per handset for both single-line business and multi-line business connections, which would arbitrarily confer an advantage on CMRS providers in competing with LECs for large business customers. In addition, this proposal would discriminate against small businesses that purchase multiple switched lines, but do not have sufficient need to justify the purchase of a high-capacity

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[25] AT&T has estimated that the base charge for a Tier 1 (*i.e.*, less than 1.544 Mb/s) multi-line business connection would be between $2.50 and $3.25. Letter from Patrick Merrick, AT&T, to Magalie Roman-Salas, FCC (dated Dec. 4, 2001).

connection, which is subject to a lower assessment rate per voice grade channel. There is no rationale for assessing larger universal service contributions for multi-line business connections than residential, single-line business, and mobile connections, which are used for the same purpose of providing access to the public switched network. For example, it is not clear why a small business with two switched multi-line business connections should contribute significantly more to universal service (indirectly through line-item charges or higher service rates) than a residential customer with two residential connections. Although the Commission has in the past singled out multi-line business lines for purposes of assigning SLCs, this distinction makes little sense today as regulators move to eliminate subsidies by rationalizing rates for all services consistent with the requirements of section 254.

V. THE COMMISSION MUST REFINE THE JOINT PROPOSAL TO ENSURE THAT CONTRIBUTIONS FOR INTERNET ACCESS AND HIGH-CAPACITY SERVICES ARE EQUITABLE AND COMPETITIVELY NEUTRAL

While the Joint Proposal provides a solid framework for a per-connection methodology, two key issues require further refinement. Specifically, the Commission must ensure that all providers of Internet access, whether broadband or dial-up, contribute on an equitable and nondiscriminatory basis. The Commission should also consider whether the capacity ratios for high-capacity connections are competitively neutral.

A. Section 254 Requires that All Providers of Broadband Internet Access Contribute to Support Universal Service

In the *Cable Modem Order*, the Commission determined that bundled cable modem/Internet access services are properly classified as information services, rather

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[26] Coalition at 55.

than telecommunications services.[27] This decision relied on a similar analysis for dial-up ISP services in the 1998 *Report to Congress*. In the *Wireline Broadband NPRM*, the Commission has tentatively concluded that wireline broadband Internet access should be classified as an information service.[28] That *NPRM* also asks the fundamental question whether facilities-based broadband Internet access providers should be required to contribute to support universal service. Obviously, that question is closely linked to and should be answered in tandem with the resolution of the issues raised in this proceeding.

Regardless of how the Commission classifies particular broadband Internet access services, the Commission must ensure that the same contribution burdens apply to all competing providers of Internet access services. Current disparities in contribution requirements for Internet access providers are unlawful and contradict both the nondiscrimination principle of section 254 and the Commission's own policy of encouraging the deployment of broadband services. Thus, if the Commission decides in this proceeding or the *Wireline Broadband* proceeding that DSL providers should continue to contribute to universal service, it should also require contributions from all competing providers of broadband Internet access. Conversely, if the Commission determines that the public interest does not require contributions from cable modem providers, it should exempt all competing providers. Given the growing substitution of Internet-based communications for traditional wireline communications, the Commission should in fact require contributions from all providers of broadband Internet access in order to maintain a sustainable contribution mechanism.

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[27] *Cable Modem Order* ¶ 39.

1. The Commission Must Apply the Same Contribution Requirements to All Providers of Broadband Internet Access

Over the past several months, the Commission has initiated a number of related proceedings to examine its regulation of broadband services. In each of these proceedings, the Commission has stressed the need to adopt competitively neutral rules that create incentives for all carriers to deploy broadband services.[29] As the Commission acknowledged in the *Wireline Broadband NPRM*, those same concerns extend to the Commission's rules regarding the collection of contributions to support universal service.[30]

Under the Commission's current rules, however, broadband Internet access providers that are in direct competition face very different contribution burdens, depending on the transmission medium over which they provide Internet access, and whether they use their own transmission facilities. For example, while LECs continue to contribute to universal service for DSL services, so far the Commission has not required such contributions from cable modem providers, even though these carriers compete for the same customers. Similarly, the Commission currently does not require any contributions from ISPs providing facilities-based broadband Internet access, even though *non*-facilities-based ISPs contribute to universal service indirectly through

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28 *Wireline Broadband NPRM* ¶ 17.

29 *Id.* ¶ 4; *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Services*, *Notice of Proposed Rulemaking*, 16 FCC Rcd 22745 ¶ 7 (2001); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, *Notice of Proposed Rulemaking*, 16 FCC Rcd 22781 ¶¶ 22-30 (2001).

30 *Wireline Broadband NPRM* ¶ 80.

universal service charges paid to providers of the underlying telecommunications services.

Section 254 requires the Commission to rectify these inequitable and discriminatory contribution requirements immediately. Under that provision, every telecommunications carrier that provides interstate telecommunications services must contribute on an equitable and nondiscriminatory basis to support universal service; in addition, the Commission may require other providers of interstate telecommunications to contribute to universal service "if the public interest so requires."[31] In exercising this permissive authority, the Commission has recognized the need to apply the same contribution requirements to competing providers.[32] In the *Universal Service Order*, the Commission found that principles of competitive neutrality require imposing contribution obligations on both payphone service aggregators and "private carriers" that offer their services to others for a fee, because their "telecommunications carrier" competitors were already required to contribute.[33] The Commission noted that, absent such requirements, the Commission's contribution obligations could inefficiently shape business decisions and discourage carriers from continuing to offer common carrier services.[34]

By applying different contribution requirements to direct competitors, the Commission is giving cable modem and other broadband providers a competitive edge over DSL providers – an edge that the cable companies scarcely need considering their

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[31] 47 U.S.C. § 254(d).

[32] *Wireline Broadband NPRM* ¶ 80; *Universal Service Order*, 12 FCC Rcd at 9183-84 ¶ 795 (striving to "reduce the possibility that carriers with universal service obligations will compete directly with carriers without such obligations.").

[33] *Universal Service Order*, 12 FCC Rcd at 9183-84 ¶ 795.

[34] *Id.*

large market share. In effect, the Commission's inequitable contribution requirements leave DSL providers with two unattractive choices. First, a DSL provider can pass through its universal service contributions to its end users, causing its services to appear more expensive than competing cable modem services that do not include these charges. Alternatively, the DSL provider can choose not to pass through these charges or to lower its price to offset these charges, both of which will decrease the profitability of these services and the incentives to deploy additional broadband facilities.

Under these circumstances, the public interest clearly requires the Commission to apply the same contribution requirements to DSL providers, cable modem providers, satellite broadband providers, and all other competing providers of broadband Internet access. And the Commission has ample statutory authority to do so. In particular, the Commission's precedents leave no room for doubt that cable modem providers are "provider[s] of interstate telecommunications" for purposes of section 254(d). No less than ILECs, cable operators provide "telecommunications" to themselves in selling "information services" (which, indeed, are *defined* as offered "via telecommunications") to their end users.[35] Alternatively, if the Commission were to conclude for some reason that cable modem providers should not contribute, competitive neutrality requires the Commission also to exempt providers of DSL and other broadband Internet access. As the Commission has observed, "the public interest requires that, to the extent possible, carriers with universal service contribution obligations should not be at a competitive

[35] 47 U.S.C. § 153(20); *see Cable Modem Order* ¶ 39; *Report to Congress*, 13 FCC Rcd 11501, 11534 ¶ 69 and n.138.

disadvantage in relation to [other] providers on the basis that they do not have such obligations."[36]

This principle applies as well to facilities-based ISPs. The current exemption of facilities-based ISPs from contribution provides them a competitive advantage over other ISPs, and may potentially shape providers' business decisions regarding the way in which they structure their service offerings. When considering modifications to the current contribution methodology in this proceeding, the Commission must ensure that all providers of Internet access share the same contribution burden whether through direct contributions to the universal service fund, or indirect contributions in the form of charges paid to transmission providers.

Besides advantaging particular competitors, the current inequitable contribution requirements also conflict with the statute's core objective of preserving and advancing universal service. If two economically substitutable services are subject to vastly different contribution obligations, customers ultimately will migrate from the services subject to more onerous contribution requirements, thereby undermining the very foundation of the universal service contribution mechanism, as well as competition. By adopting uniform contribution requirements for Internet access, the Commission will address this significant concern.

2. All Providers of Internet Access Should Be <u>Required to Contribute to Support Universal Service</u>

While the Commission could ensure competitive neutrality among Internet access providers by exempting them all from contribution, that course would violate the

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[36] *Report to Congress*, 13 FCC Rcd 11501, 11565 ¶ 133. *See also Universal Service Order*, 12 FCC Rcd at 8801 ¶ 47 ("universal service support mechanisms and rules

Commission's separate statutory duty to preserve and advance universal service support mechanisms. Given the continuing migration of telecommunications to broadband and Internet-based platforms, the Commission can satisfy that separate duty only by requiring contributions from all providers of broadband Internet access services. The past several years have seen tremendous growth in the provision of broadband services.[37] And, if anything, this growth will accelerate in the future with the development of applications taking advantage of increases in last-mile bandwidth. Broadband availability is expanding at an even greater pace, and there is no reason to believe that this growth will abate over the long term.[38] Moreover, Internet-based services such as e-mail and instant messaging increasingly serve as substitutes for traditional voice service. As a result, failure to require contributions from providers of broadband Internet access would cause the contribution base to shrink over time, necessitating ever larger contributions for the services provided over the traditional public switched telephone network ("PSTN").

SBC proposes to assess contributions on ISPs to the extent they provide interstate telecommunications to end users, asserting that even though an ISP may purchase telecommunications services from another carrier, it also provides telecommunications to its end users.[39] Although Qwest agrees with SBC's goal of adopting consistent contribution requirements for all competing providers, it is not clear whether the

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[should] neither unfairly advantage nor disadvantage one provider over another[.]").

[37] *See* John Yaukey, Broadband Users Pass Dial-Up Time on Net, *Chicago Sun-Times*, Apr. 2, 2002, at 44 (citing Nielsen survey which measured a 67 percent increase in broadband households and a 64 percent increase in logged broadband minutes from January 2001 to January 2002).

[38] *See* Brad Grimes, Ditch Your Dial-Up, *PC World*, Feb. 1, 2002, at 68 (citing IDC survey estimating growth in U.S. broadband accounts from 11.5 million in 2001 to 43.4 million in 2005).

Commission's precedents in this area provide a basis for requiring direct contributions from ISPs that do not own their own transmission facilities. Moreover, the Commission can reach a similar result by ensuring that all ISPs are subject to the same contribution burden, either through direct contributions to universal service or indirect contributions paid to the carriers providing the transmission capacity underlying the ISPs' Internet access services.

In the *Report to Congress*, the Commission determined that "Internet access services are appropriately classed as information, rather than telecommunications, services."[40] Because these categories of service are mutually exclusive, ISPs do not separately provide telecommunications services to their end users.[41] The Commission recently reaffirmed these conclusions for bundled cable modem/ISP services in the *Cable Modem Order*,[42] and has tentatively adopted the same reasoning for bundled DSL/ISP services in the *Wireline Broadband* proceeding.[43] As a result, section 254(d) does not provide a basis for direct contributions from ISPs that lease the underlying transmission capacity for their information services from other providers, because such ISPs do not provide interstate telecommunications. However, just as it does today, the Commission should require ISPs to make indirect contributions through the charges paid to the carriers providing the underlying transmission capacity for their Internet access services.

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39 SBC at 8-9.

40 *See Report to Congress*, 13 FCC Rcd at 11536 ¶ 73.

41 *Report to Congress*, 13 FCC Rcd at 11520 ¶ 39.

42 *Cable Modem Declaratory Order* ¶ 39.

43 In its initial comments in that proceeding, Qwest strongly supported the Commission's analysis in this regard. *See* Comments of Qwest Communications International Inc. at 4-5 (filed May 3, 2002).

For those ISPs that own their own transmission facilities, the Commission has ample statutory authority to require direct contributions to universal service. Such facilities-based ISPs provide "telecommunications" to themselves in providing "information services" to their end users.[44] In the *Report to Congress*, the Commission recognized this authority, but declined to impose contributions on facilities-based ISPs because of perceived operational difficulties associated with determining the amount of and enforcing such contributions.[45] With the proposed shift to a connection-based contribution methodology, this concern would disappear. Under the framework of the Joint Proposal, facilities-based ISPs that do not provide end-user access to a network, should contribute based only on the number of Interstate Transmission QSCs they provide to themselves in offering Internet access. ISPs that provide end-user access should contribute based both on their Access QSCs and Interstate Transmission QSCs.

B. The Commission Must Adopt Competitively Neutral Contribution Rules for All High-Capacity Connections

Both the proposal submitted by the Coalition and the Joint Proposal would assign "capacity units" to high-capacity connections depending on the bandwidth of those connections. For both proposals, all connections greater than or equal to 45 Mbps (*i.e.*, DS-3 and above) would be assessed the same contribution. Qwest believes that these proposals could dramatically reduce contributions for very high-capacity connections, such as OC-3s and above. Moreover, from a policy standpoint, it is not clear, for example, why the same contribution requirement should be applied for a DS-3 and OC-48, given that the latter provides 48 times more bandwidth and is priced significantly

[44] 47 U.S.C. § 153(20); *see Cable Modem Declaratory Ruling* at ¶ 39; *Report to Congress*, 13 FCC Rcd at 11534 ¶ 69 and n.138.

higher. Clearly, an OC-48 provides more "value" and presumably should be assessed a higher contribution. If the 40:5 capacity ratio proposed by the Coalition is based on the cross-over point between a DS-1 and DS-3,[46] as the Coalition asserts, it should be possible to compute analogous ratios for connections with bandwidth greater than a DS-3. Before implementing any proposal, the Commission must ensure that the capacity ratios employed are in fact competitively neutral.

Another complication with assessing contributions for high-capacity connections is determining the capacity of the interstate transport component of a private line service. In order to maintain consistency under the Joint Proposal, a private line service should be treated as two (or more) Access QSCs (*i.e.*, one on each end) and an Interstate Transport QSC in the middle. While the capacity of the Access QSCs should be known, the capacity of the interstate transport component may not be known or may vary between the end points, due to multiplexing. As a result, it probably makes sense to assess contributions for the Interstate Transport portion of a private line service based in some way on the capacity of the Access QSCs for that service.

Regardless of how the Commission assesses contributions for high-capacity connections, it is important that it apply the same methodology for high-capacity connections to "private" networks used to provide interstate telecommunications services.[47] As the Commission has previously found, competitive neutrality demands that private service providers contribute in the same manner as providers of competing services over the PSTN. If the Commission exempts such carriers, it will create dramatic

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45 *Report to Congress*, 13 FCC Rcd at 11534 ¶ 69.

46 Coalition at 65.

47 *See Further Notice* ¶ 43; Coalition at 50-51.

incentives for carriers and their customers to shift traffic from public to private networks simply to avoid universal service assessments. Thus, the same reasoning that compelled the Commission to require contributions from private service providers under the current system applies to assessments under a connection-based methodology.[48]

VI. THE COMMISSION SHOULD ADOPT RULES IMPLEMENTING A "PASS THROUGH," INCLUDING A REASONABLE MARK-UP, OF UNIVERSAL SERVICE CONTRIBUTIONS

In addition to proposing modifications to its assessment methodology, the *Further Notice* seeks comment on various potential restrictions on providers' recovery of contributions from their customers. Regardless of the reforms that are adopted, it is important that the same recovery rules be applied to all providers, including IXCs, CMRS providers, cable providers, CLECs, ISPs, and private service providers. In addition to being necessary for competitive neutrality, this approach makes sense given that it is primarily the recovery practices of non-incumbent carriers that have been called into question by the Commission.

A diverse group of parties to this proceeding support the adoption of rules requiring that the universal service charge recovered from a customer closely correspond to the contribution that was submitted to USAC based on the service provided to that customer.[49] For example, if the Commission adopted the Joint Proposal, providers would recover universal service contributions in the form of a monthly charge for each connection that is equal to the amount contributed for that connection plus a reasonable

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48 *Universal Service Order*, 12 FCC Rcd at 9184 ¶ 796. In addition, Qwest, and presumably other carriers, cannot easily differentiate between connections to private and public networks.

49 *See, e.g.*, AT&T at 6; California PUC at 12-15; Sprint at 15-16; Consumers Union, *et al.* at 20-26.

mark-up reflecting their administrative costs of paying and recovering their universal service contributions, as well as uncollectible revenues. Similarly, contributions would be recovered from customer provided "occasional use" (*e.g.*, dial-around) services in the form of a percentage of revenue factor that equals the contribution factor plus a reasonable mark-up. It is essential that line-item recovery charges be structured in the same way that they are paid to USAC, so that it is easy for a customer or the Commission to determine the effective mark-up. By adopting clearly defined rules in this area, the Commission can eliminate much of the gaming and potentially inequitable distribution of contribution burden that can occur under the Commission's rules today. Moreover, such rules should significantly eliminate customer confusion about variations in universal service charges among providers.

Qwest endorses a Commission rule that would require a uniform line-item charge and mark-up for all customers. While all carriers should be entitled to recover a reasonable mark-up percentage to cover their administrative costs, other associated expenses related to the contribution and recovery of universal service assessments, and an allowance for uncollectible revenues, it is appropriate for the Commission to ensure the reasonableness of such mark-ups. The adoption of a safe harbor mark-up percentage presents a reasonable balancing of providers' right to recover their administrative expenses with the interest of minimizing the amount recovered from end users. Uncollectible revenue would continue to be a portion of the mark-up percentage. Moreover, in those special circumstances when a particular provider incurs extraordinarily high administrative costs or uncollectible revenue, it could impose a mark-up greater than the safe harbor as long as it could support that number.

The Commission must reject suggestions that carriers be prohibited from marking up their contributions to recover administrative costs or uncollectible revenues. Providers are entitled to recover reasonable expenses related to the collection and payment of universal service contributions, which represent "real" costs to these providers. Adoption of a safe harbor percentage would eliminate concerns of universal service contributions becoming a "profit center" for providers.[50]

Qwest opposes the collect and remit proposals, whereby a provider would be required to remit only those contributions it had collected from its end users. Such a proposal could undermine carriers' incentives to collect universal service contributions from its end-user customers – particularly large business customers – which ultimately would result in other carriers' assuming a larger contribution burden. In addition, this proposal may not be as simple in practice as it is in theory. For example, if a customer makes a partial payment on a bill that includes a universal service recovery charge as well as other charges, it is not clear whether the carrier would be required to remit a universal service contribution for that customer. Finally, a collect and remit proposal is not necessary. Under the Joint Proposal, a carrier's contribution would be based on its number of qualifying connections for the previous month.[51] By eliminating the lag in the current system, any impact of declining market share would be minimized, and thereby should enable full recovery of any contributions through a "pass through" charge plus reasonable mark-up. As stated earlier, a carrier that incurs higher than average uncollectible revenues could increase its mark-up charge as long as it could support that number. For these reasons, the Commission should reject the collect and remit proposals,

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[50] Ad Hoc at 19-23.

and instead adopt a "pass through" methodology whereby the end-user charge is determined by the contribution amount, rather than vice versa.

VII. CONCLUSION

Trends in the demand for and packaging of telecommunications services require the Commission to modify the way in which it currently computes universal service contributions. With certain limited modifications, SBC's proposal to assess contributions on a per-connection basis will satisfy the Commission's objective of adopting a sustainable, competitively neutral contribution system. In combination with these changes, the Commission should also adopt general rules that require providers to "pass through" their universal service contributions plus a reasonable mark-up.

Respectfully submitted,

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[51] SBC at 6.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Comment Filing System, and a copy of the **REPLY COMMENTS** to be served as indicated, via email, facsimile, or First Class United States mail, postage prepaid, on the parties listed below.

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