

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

**COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.**

Andrew D. Crain
Craig J. Brown
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2799

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

March 11, 2004

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. DARK FIBER IS NOT ELIGIBLE FOR UNIVERSAL SERVICE FUNDING	2
A. Dark Fiber Is a Facility, Rather than a Telecommunications or Internet Access Service, and Therefore Is Not Eligible for Priority One Funding	2
B. Even if Dark Fiber Were Eligible for Priority One Funding, Such Funding Should Be Spread Over At Least Five Years	7
II. THE COMMISSION SHOULD ADOPT A REQUIREMENT THAT SCHOOLS AND LIBRARIES POST AN RFP WHEN THEY SUBMIT A FORM 470 TO USAC	8
III. THE ADMINISTRATOR SHOULD NOT SEEK RECOVERY FROM THE SERVICE PROVIDER OF FUNDS DISBURSED ERRONEOUSLY UNLESS IT BELIEVES THAT THE SERVICE PROVIDER WAS RESPONSIBLE FOR THE ERRONEOUS DISBURSEMENT	9
CONCLUSION	11

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) hereby submits its Comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

In these comments, Qwest focuses on a few key issues related to the proper functioning of the e-rate program. The Commission has properly suspended the Universal Service Administrative Company’s (“USAC”) previous funding of discounts for the deployment of dark fiber to schools and libraries. These fiber deployments should not be eligible for Priority One funding, because dark fiber is neither a telecommunications service nor an Internet access service. Moreover, the funding of these capital-intensive projects threatens the Commission’s goal of distributing e-rate discounts to as many eligible schools and libraries as possible. If the Commission were to allow any funding for dark fiber, which it should not such funding should be spread over at least five years.

The Commission should also take steps to improve the competitive bidding process. In particular, the Commission should require schools and libraries to post a request for proposal

¹ *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-323 (Dec. 23, 2003) (“*Further Notice*” or where applicable “*Third Report and Order*”).

("RFP") at the time it submits a Form 470 to USAC, so that service providers have a meaningful opportunity to participate in the competitive bidding process.

Finally, the Commission should revise its policy for recovering erroneously disbursed funds, to seek recovery from the party or parties responsible for the disbursement, whether that is the service provider, the applicant, or both parties. The Commission's current policy of seeking recovery only from the service provider is inequitable, particularly in those cases where the service provider is not at fault for the erroneous disbursement.

I. DARK FIBER IS NOT ELIGIBLE FOR UNIVERSAL SERVICE FUNDING

In the *Further Notice*, the Commission seeks comment on whether it should permit schools and libraries to obtain universal service funding for dark fiber installations. The simple answer is no. Neither dark fiber, nor the equipment used to light it, is eligible for Priority One funding, because they are not telecommunications or Internet access services.² Furthermore, even if dark fiber were somehow found to be eligible for Priority One funding, such funding should be spread at least over five years.

A. Dark Fiber Is a Facility, Rather than a Telecommunications or Internet Access Service, and Therefore Is Not Eligible for Priority One Funding

In determining whether dark fiber is eligible for Priority One funding, the key issue is whether dark fiber constitutes a telecommunications service or Internet access service.³ That dark fiber is a facility, rather than a telecommunications or Internet access service, comports with

² Qwest presumes that the *Further Notice* is seeking comment on the availability of Priority One funding (for telecommunications services and Internet access), rather than Priority Two funding (for internal connections), since that is the type of funding that USAC was providing prior to 2003. See *Further Notice* ¶ 77 n.156.

³ *In the Matters of: Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45 and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 6033, 6034 ¶ 4 (1999).

the Communications Act of 1934, as amended (“Act”), and the Commission’s rules, as well as common usage.

The Act defines a telecommunications service as a common carrier offering of “the transmission . . . of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴ Information services, which include Internet access services, are defined as offerings of “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications[.]”⁵ Thus, both telecommunications services and Internet access services include the transmission of information in some form. Obviously, the provision of dark fiber does not involve any transmission of information, because the facility is not capable of transmitting anything without the addition of electronics that by definition are not part of the dark fiber offering.

Indeed, the Commission consistently has treated dark fiber as a facility, rather than a service. The Commission’s local competition rules refer to the dark fiber transport element as consisting of “unactivated optical interoffice transmission *facilities*.”⁶ In the *Triennial Review Order*, the Commission characterized dark fiber as “unactivated fiber optic cable, deployed by a carrier, that has not been activated through connections to optronics that light it, and thereby render it capable of carrying communications.”⁷ Dark fiber is “dark,” because it “does not have

⁴ 47 U.S.C. § 153(43), (46).

⁵ 47 U.S.C. § 153(20).

⁶ 47 C.F.R. § 51.319(e)(3) (emphasis supplied).

⁷ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17213-14 ¶ 381 (2003) (“*Triennial Review Order*”), *vacated in part and remanded in part, sub nom. United States Telecom Association v. FCC*, D.C. Cir. No. 00-1012 (March 2, 2004).

electronics on either end of the dark fiber segment to energize it to transmit a telecommunications service.”⁸ The treatment of dark fiber as a facility, rather than a telecommunications service, also is consistent with common usage. Newton’s defines dark fiber as “[o]ptical fiber through which no light is transmitted and which, therefore, no signal is being carried.”⁹ Finally, in the context of universal service, the Commission has classified dark fiber as “transmission equipment” that is tracked separately from telecommunications services for reporting purposes.¹⁰

The Commission’s holdings in the *Collocation Remand Order* did not disturb the Commission’s longstanding treatment of dark fiber as a facility, rather than a telecommunications service. In the *Collocation Remand Order*, the Commission required incumbent LECs to provide dark fiber cross connects between collocated carriers on a common

⁸ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3843-44 ¶ 325 (1999) (“*UNE Remand Order*”), *reversed in part and remanded in part, sub nom. United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass’n*, 123 S.Ct. 1571 (2003) (“Thus, dark fiber is fiber which has not been activated through connection to the electronics that ‘light’ it and render it capable of carrying telecommunications services.”), *id.*

⁹ Newton’s Telecom Dictionary at 189.

¹⁰ *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 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; Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, NSD File No. L-00-72, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 25039 (2002) (Appendix C, Revised Form 499-Q and Instructions) (“Line (117) should include the sale or lease of transmission equipment, such as dark fiber, that is not provided as part of a telecommunications service.”).

carrier basis.¹¹ The Commission's analysis focused on whether the Commission had authority under Title II of the Act to require dark fiber to be offered on a common carrier basis in this limited circumstance.¹² The Commission had no need to address the issue of whether dark fiber is a telecommunications service, because it had found several years earlier that dark fiber constitutes "wire communication" subject to Title II of the Act.¹³ While the definition of "wire communication service" is similar to the definition of "telecommunications service," it is actually much broader because it includes the facilities used for transmission, as well as the transmission itself.¹⁴ Thus, the Commission's findings in the *Collocation Remand Order* do not undermine the conclusion that dark fiber is a facility, rather than a telecommunications service.

Even if dark fiber were treated as a telecommunications or Internet access service, the equipment used to light the fiber would not be eligible for Priority One funding. Applying the analysis adopted in the *Tennessee Order*, which was affirmed and clarified in the *Third Report*

¹¹ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435, 15473-74 ¶¶ 74-75 (2001) ("*Collocation Remand Order*").

¹² *Id.* at 15473 n.189. The Commission concluded that it possessed such authority under the second prong of *NARUC I*. *Id.* at 15473-74 ¶ 75 and 15471-72 ¶ 70 n.179 (under the second prong of *NARUC I*, a communications service will be considered a common carrier service if the Commission finds that it is "necessary or desirable in the public interest" for the service to be provided on a common carrier basis) (citing *NARUC v. FCC*, 525 F.2d 630, 641, 644 n.76 (D.C. Cir. 1976) ("*NARUC P*")).

¹³ *In the Matter of Southwestern Bell Telephone Company; US West Communications; Bell Atlantic Telephone Companies; BellSouth Telephone Companies, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670, W-P-D-364, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2593 ¶ 17 (1993), *remanded on other grounds, Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

¹⁴ The term "wire communication service" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, *including all instrumentalities, facilities, apparatus and services . . . incidental to such transmission.*" 47 U.S.C. § 153(52) (formerly 47 U.S.C. § 153(a)) (emphasis supplied).

and Order, any equipment used to terminate dark fiber constitutes an internal connection, rather than a component of a Priority One service. In the *Tennessee Order*, the Commission established a presumption that facilities located on an applicant's premises should be presumed to be internal connections, rather than part of a Priority One service.¹⁵ The Commission also identified certain factors that need to be considered to determine whether this presumption has been rebutted.

Most of the *Tennessee Order* factors support a finding that the equipment used to terminate and light dark fiber constitute internal connections: the equipment is owned by the school or library, rather than the dark fiber provider; the equipment is for the exclusive use of the school or library; and the school or library, rather than the dark fiber provider, would be responsible for the maintenance of the equipment.¹⁶ While the Commission held that the *Tennessee Order* approach does not preclude support for basic termination equipment, it limited that holding to the *lease* of a single basic terminating component. Where an applicant leases multiple components, only one component would be deemed eligible for Priority One funding, with the rest eligible for Priority Two funding. If the applicant purchased one or more basic terminating components, those components would at most be eligible for a discount as Priority Two internal connections.¹⁷ In the case of dark fiber, the applicant generally will need multiple

¹⁵ *In the Matter of Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator; Request for Review by Integrated Systems and Internet Solutions, Inc. of the Decision of the Universal Service Administrator; Request for Review by Education Networks of America of the Decision of the Universal Service Administrator; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Application No. 18132, CC Docket Nos. 96-45, 97-21, Order, 14 FCC Rcd 13734, 13753-54 ¶¶ 37-38 (1999) ("*Tennessee Order*").

¹⁶ *Third Report and Order* ¶ 46.

¹⁷ *Id.* n.91. The modulating equipment used to light the fiber is currently not an eligible Priority Two service, and Qwest believes that it was never the Commission's intent to fund the

pieces of equipment to light and terminate the fiber,¹⁸ and none of those components would be leased from the service provider. Thus, this equipment would not be eligible for Priority One funding.

B. Even if Dark Fiber Were Eligible for Priority One Funding, Such Funding Should Be Spread Over At Least Five Years

In the *Further Notice*, the Commission proposes a rule that discounts for capital investment by a service provider of \$500,000 or more must be prorated over a period of at least five years.¹⁹ This is a sound approach, particularly when applied to large capital expenditures such as the deployment of dark fiber.

Providing funding for dark fiber over a period of less than five years would be irresponsible. As the Commission found in the *Brooklyn Order*, “authorizing unrestricted up-front payments for multiple years of telecommunications service when there is significant infrastructure build-out . . . could create a critical drain upon the universal service fund, and reach the annual spending caps relatively quickly. In this respect, therefore, large up-front payments could result in fewer overall schools receiving universal service funding, which . . . is contrary to the goals of section 254.”²⁰ Failure to spread support for dark fiber over multiple years also would improperly subsidize service providers’ installation of their backbone

purchase of a basic network component with discounts from the schools and libraries universal service support mechanism.

¹⁸ When purchasing dark fiber, the customer generally provides all optical and electronic equipment required to make the fiber pairs usable, which may include terminating equipment, protection switching equipment, multiplexers, alarm and performance monitoring equipment and other similar equipment.

¹⁹ *Further Notice* ¶ 75.

²⁰ *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Brooklyn Public Library, Brooklyn, New York; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier*

infrastructure, which may be used to serve other customers beyond schools and libraries.²¹

Notably, certain large potential applicants recommend that cost recovery for large capital expenditures be spread over five years.²²

II. THE COMMISSION SHOULD ADOPT A REQUIREMENT THAT SCHOOLS AND LIBRARIES POST AN RFP WHEN THEY SUBMIT A FORM 470 TO USAC

In the *Further Notice*, the Commission seeks comments on ways to make the schools and libraries universal service support mechanism more cost effective, so that support can be distributed more broadly to schools and libraries.²³ One way to accomplish this goal is to improve the competitive bidding process. When the Commission adopted the competitive bidding process, it found that such a process would effectuate Congress' intent that schools and libraries avail themselves of the growing competitive marketplace for telecommunications and information services.²⁴ However, applicants have acknowledged that the current process rarely results in competitive bids.²⁵

In Qwest's experience, the competitive bidding process could be improved by requiring schools and libraries to disclose -- preferably on their website -- an RFP with the specific requirements that must be met by potential bidders. While the Commission's rules require schools and libraries to submit a Form 470 for posting to USAC, the rules encourage, but do not

Association, Inc., CC Docket Nos. 96-45, 97-21, Order, 15 FCC Rcd 18598, 18606 ¶ 19 (2000) ("*Brooklyn Order*").

²¹ *Tennessee Order*, 14 FCC Rcd at 13755 ¶ 42 ("When we started this program, we did not envision providing support to fund significantly the backbone of a provider's network.").

²² *Further Notice* n.153. If the Commission adopts this five-year limitation, it would be reasonable to consider grandfathering existing contracts that allow recovery over a shorter period of time.

²³ *Id.* ¶ 87.

²⁴ *Universal Service Order*, 12 FCC Rcd at 9078-79 ¶ 575.

²⁵ *Further Notice* ¶ 63 n.125.

require, applicants to post an RFP. Often the Form 470 lacks sufficient detail for a vendor to submit a meaningful bid, despite the Commission's requirement that the application "describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids."²⁶ For example, a Form 470 for Centrex services might not identify what types of features the school or library desires. In other cases, a Form 470 generally omits necessary details regarding network requirements, equipment specifications, traffic configuration, and pricing options. Without such information, it is virtually impossible for a service provider to compete in the bidding process, particularly if the school or library has shared an RFP with a competing bidder. While it is possible for a potential bidder to request an RFP from the applicant, this results in the loss of valuable time that is necessary to design a solution that will meet the applicant's needs and prepare and submit the bid within the time frame established by the Commission's rules.

This is not what the Commission could have intended when it established the requirement for competitive bidding. In order to make that process meaningful, and thereby realize the benefits of the competitive marketplace, the Commission should require applicants to post an RFP on their website when they submit their Form 470 to USAC.

III. **THE ADMINISTRATOR SHOULD NOT SEEK RECOVERY FROM THE SERVICE PROVIDER OF FUNDS DISBURSED ERRONEOUSLY UNLESS IT BELIEVES THAT THE SERVICE PROVIDER WAS RESPONSIBLE FOR THE ERRONEOUS DISBURSEMENT**

In the *Further Notice*, the Commission seeks comment on the process for recovering erroneously disbursed funds, including whether it should continue its policy of seeking recovery of such funds solely from the service provider, rather than the school or library. The

²⁶ *Universal Service Order*, 12 FCC Rcd at 9078-79 ¶ 575.

Commission should revise this policy to seek recovery from the party or parties that were responsible for the erroneous disbursement.

As an initial matter, the Commission should consider whether it makes sense to pursue recovery of funds that were disbursed years ago, when the funds were disbursed in violation of programmatic rules or procedures (as opposed to statutory requirements). At this point, those funds have been expended and it will be difficult for USAC -- or a service provider -- to recover those funds from an applicant. As a result, USAC's resources are better dedicated to ensuring compliance with rules and procedures on a going-forward basis.

In any case, the Commission's fund recovery efforts should be directed at the party that was responsible for the erroneous disbursement. It is simply inequitable to seek recovery of funds from a service provider when the erroneous disbursement was caused solely by the school or library. For example, a service provider has little ability to monitor whether an applicant will use its discounted services in a way that is consistent with eligibility requirements. Where the service provider bears no fault for the erroneous disbursement, it should not be saddled with the burden of trying to collect the disbursement from the applicant, or potentially bearing the loss of the disbursement amount if it is not able to obtain recovery from the applicant.

On at least one occasion, Qwest received a Commitment Adjustment Letter for a school that could not justify the pre-discount cost of the services on its initial application for funds. The school subsequently modified its request to USAC to lower the amount requested. In the meantime, BEAR payments were made to the school based on the pre-discount amount initially authorized by USAC. USAC then sought recovery but it was unclear from the Commitment Adjustment Letter whether the service provider or the applicant should make the repayment. The applicant eventually made the repayment directly to USAC. This ambiguity needs to be

QWEST COMMUNICATIONS INTERNATIONAL INC.
March 11, 2004

eliminated from the process. In this instance, USAC should have gone directly to the applicant for the recovery of funds.²⁷ A rule that recovers wrongly-disbursed funds only from service providers creates no incentive for schools and libraries to ensure compliance with statutory and programmatic requirements.

CONCLUSION

For the reasons discussed above, the Commission should adopt the proposals outlined herein.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: Craig J. Brown
Andrew D. Crain
Craig J. Brown
Qwest Communications
International Inc.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 672-2799

March 11, 2004

Its Attorneys

²⁷ Whatever rules or policies the Commission adopts in this area, USAC should specify clearly in a Commitment Adjustment Letter which party is required to reimburse USAC.

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, 2) served, via email on Ms. Sheryl Todd of the Telecommunications Access Policy Division, Wireline Competition Bureau at sheryl.todd@fcc.gov, and 3) served, via email on the FCC's duplicating contractor Qualex International, Inc. at qualexint@aol.com

Richard Grozier
Richard Grozier

March 11, 2004