Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES REGARDING THE JOINT WYOMING PETITION FOR SUPPLEMENTAL FEDERAL UNIVERSAL SERVICE FUNDS FOR CUSTOMERS OF A NON-RURAL CARRIER

I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA")[1] submits these comments on the "Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier" ("Joint Wyoming Petition"), submitted to the Federal Communications Commission ("Commission") on December 21, 2004.[2] The

[1] NASUCA is a voluntary association of 43 advocate offices in 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[2] The Wyoming Office of Consumer Advocate is a member of NASUCA, but did not participate in the drafting of these comments.

Commission sought comment on the Joint Wyoming Petition by Public Notice released on February 14, 2005.[3]

The Joint Wyoming Petition is the first request for supplemental federal high cost support under the process that was created by the October 27, 2003 *Ninth Report Remand Order* in this proceeding.[4] In the *Ninth Report Remand Order*, the Commission decided issues raised by the Tenth Circuit Court of Appeals remand of the Commission's high-cost support mechanism for non-rural telephone companies.[5] The Commission decision followed the Commission's referral of the issues to the Federal-State Joint Board on Universal Service ("Joint Board").[6]

In the *Ninth Report Remand Order*, the Commission adopted, *inter alia*, an "expanded certification process" for non-rural carrier interstate universal service support, in order to better ensure reasonable comparability between rural and urban rates. In this process, each state will "provide information to the Commission regarding the comparability of the rates in rural areas within the state to urban rates nationwide."[7] In order to assess the comparability of non-rural carriers' rural rates, the Commission adopted a benchmark rate that is set at the national urban average plus two standard

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[3] DA 05-412.

[4] *See Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, CC Docket 96-45, 18 FCC Rcd 22559 (2003) ("*Ninth Report Remand Order*"). On February 23, 2005, the United States Court of Appeals for the Tenth Circuit issued its decision in *Qwest Communications International Inc. v. FCC*, No. 03-9617 ("*Qwest II*"), granting in part and denying in part three petitions for review of the *Ninth Report Remand Order*. *Qwest II* upheld the state certification process that underlies the Joint Wyoming Petition (slip. op. at 14), but reversed the Commission on the use of a two standard deviation benchmark, saying that the benchmark would allow rates that are not reasoanbly comparable. Id. at 13.

[5] *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) ("*Qwest I*").

[6] See Joint Board Recommended Decision, FCC 02J-2, 17 FCC Rcd 20716 (2002).

[7] *Ninth Report Remand Order*, ¶ 89.

deviations.[8] Currently, the national average rate is $24.75 and the benchmark rate is $34.16.[9]

In the expanded certification process, if its rural rates fall within the rate benchmark of two standard deviations, a state would so certify and its rates would be presumed "reasonably comparable."[10] States whose rates are above the benchmark would have to provide rate data for rural residential consumers demonstrating the lack of comparability and would have to detail a proposed course of action to address the failure to achieve comparability.[11]

Under the *Ninth Report Remand Order*, all states -- both those currently receiving high-cost funds for their non-rural carriers and those not currently receiving funding -- would be able to request additional federal support. Additional federal support would go, however, only to states able to demonstrate both that their rural rates are not comparable to nationwide urban rates and that "the state has taken all reasonably possible steps to achieve reasonable comparability through state action and existing federal support."[12]

Qwest II invalidated the benchmark, but upheld the state certification process, including the process by which additional federal support is requested.[13] The Tenth Circuit invalidated the two standard deviation benchmark *because that benchmark was*

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[8] Id.; see also id., ¶ 80.

[9] Wireline Competition Bureau, Industry Analysis & Technology Division, Reference Book of Rates, Price Indices and Household Expenditures for Telephone Service (2004), Table 1.13. The benchmark is built into the Joint Wyoming Petition's request for supplemental federal assistance (at 10).

[10] *Ninth Report Remand Order*, ¶ 90.

[11] Id.

[12] Id., ¶ 93.

[13] See footnote 4, supra.

too high, and would not support enough customers' rates.[14] Any support granted Wyoming based on a lower benchmark would likely be greater than that granted under the two standard deviation benchmark, unless radical changes are made to the process.

Thus it makes sense to proceed with addressing the Joint Wyoming Petition, to establish, in this fairly clear instance, standards for addressing future applications under the benchmark ultimately selected. Wyoming has shown that supplemental federal funds are needed to produce rates for Qwest that are reasonably comparable to urban rates, even using the high two standard deviation benchmark. NASUCA supports the grant of supplemental funding to Wyoming under the conditions described herein.

II. WYOMING HAS SHOWN THAT SUPPLEMENTAL FEDERAL FUNDS ARE NEEDED TO PRODUCE RATES FOR QWEST THAT ARE REASONABLY COMPARABLE TO URBAN RATES

A. Reasonably comparable rates

As the Joint Wyoming Petition shows, Qwest's rates in rural parts of its territory are not reasonably comparable to the Commission's benchmark rate. The table on page 10 of the Joint Wyoming Petition shows that outside the base rate area in Qwest exchanges the gross rates are $38.60, $48.60 and $69.35. The two standard deviation benchmark rate is $34.16.

Wyoming identifies three reasons for its current rate levels: First, there are the underlying cost characteristics of the state, particularly small population, low population density and "some of the most physically difficult-to-serve territory in the United

[14] Id.

States."[15] Second, there are substantial network upgrades that have occurred over the past five to ten years.[16]

The third reason is more problematic: Wyoming states that "[b]etween 1995 and 1999, Qwest made multiple rate filings … to transform its rates from traditional, implicit subsidy-laden rates to total service long-run incremental cost-based rates…."[17] A key aspect of this "transformation" was "[a]ssigning all the cost of the local loop to basic local service" so that neither optional services (e.g., call waiting, call forwarding) nor usage-based services (e.g., switched access) pay any of those costs.[18]

It is certainly possible to debate the economic or public policy wisdom of these steps. It is also possible to debate the necessity of such actions as a means to prepare local exchange markets for competition,[19] when, for example, the purpose of the 1996 Telecom Act was "[t]o promote competition and reduce regulation in order to secure lower prices … for American telecommunications consumers"[20] **not** to raise prices in order to promote competition. It is also possible to argue that Wyoming's actions go against at least the spirit of 47 U.S.C. § 254(k).[21] After *Qwest II*, however, it should be

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[15] Joint Wyoming Petition at 5-6.

[16] Id. at 6.

[17] Id. at 7.

[18] Id.

[19] See id.

[20] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Act"), preamble.

[21] "[T]he States, with respect to intrastate services, shall establish any necessary cost allocation rules ... to ensure that services included in the definition of unversal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."

clear that **the Act** does not require doing away with intrastate implicit support; instead the Act's directive goes only to interstate implicit support.[22]

Without implicitly or explicitly endorsing Wyoming's actions in relation to local rates, it is clear that as a result of those actions many of Qwest's local rates are not reasonably comparable to the national urban rate benchmark. Therefore, Wyoming has met the first prong of the Commission's test for supplemental assistance.

B. State action and use of current federal support

The Commission requires, as a condition of the receipt of supplemental federal support, "a showing that federal and state action together are not sufficient to achieve reasonable comparability of basic service rates in rural, high-cost areas served by non-rural carriers within the state to urban rates nationwide."[23] Wyoming has made that demonstration.

The demonstration is made in a direct way: To the gross basic service rate (including the zone additive), a "federal USF credit" is applied.[24] Then, a "Wyoming USF credit" is applied.[25] This direct application of USF credits to customers' bills is the most direct way of showing the impact of federal and state action on whether those bills are reasonably comparable. Then, unavoidable surcharges are added, including the subscriber line charge, the federal USF surcharge, telecommunications relay service

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[22] *Qwest II*, slip op. at 9.

[23] *Ninth Report Remand Order*, ¶ 93.

[24] See Joint Wyoming Petition at 10.

[25] Id.

surcharge, Wyoming lifeline surcharge, the E9-1-1 surcharge, and the federal excise tax.[26]

Under Wyoming's calculation, the final bill to the customer in all three zones is $42.28, clearly in excess of the benchmark of $34.16.[27] Thus federal and state action together are not sufficient to achieve reasonable comparability.

It is possible to question whether the state action is adequate. Wyoming's state USF program "is designed so that no customer is required to pay more than 130% of the statewide weighted average local exchange rate, excluding taxes and surcharges, for basic local service."[28] The state fund distributes approximately $3.6 million annually.[29]

Wyoming received a total of $51 million in federal high-cost support in 2004, of which $13.9 million went to Qwest.[30] By contrast, the Wyoming USF provides $3,257,000 to Qwest customers.[31]

Wyoming USF dollars are derived from "an assessment of just under 1.5%" on intrastate telecommunications revenue.[32] Again by contrast, the federal high-cost fund consumes about half of the current federal USF assessment of 10.7% on interstate revenues.[33]

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[26] Id. Wyoming also includes the Wyoming sales tax. Id. This general sales tax, imposed on all retail goods and services, should not be included in the rate comparability calculation. On the other hand, the calculations do not include the Wyoming USF surcharge, which is currently set at 0% because of temporary overfunding of the Wyoming USF.

[27] If the sales tax of $1.55 is eliminated, the total of $40.73 is only slightly less greater than the benchmark.

[28] Joint Wyoming Petition at 8.

[29] Id.

[30] Federal-State Joint Board Monitoring Report (October 2004) ("2004 Monitoring Report"), Table 3.29.

[31] Calculated from the table found in the Joint Wyoming Petition at 10.

[32] Id. at 8.

[33] That is, $3.3 billion out of the total $6.2 billion federal program. 2004 Monitoring Report, Table 1.10.

These questions, combined with the fact that, as discussed above, Wyoming's draconian rate rebalancing was not directed by federal law, indicate that the federal supplemental support should not be expected to cover 100% of the so-called "comparability shortfall."[34] Instead, the supplemental support should cover the same percentage of the rate comparability shortfall that the federal non-rural high cost fund pays of the difference between the state's forward-looking cost and the national urban average forward-looking cost that federal non-rural high-cost funds pay, i.e., 76%.[35]

The bottom line is that after deducting the Wyoming sales tax from the comparability comparison,[36] the "comparability shortfall" would be $3.6 million a year.[37] Federal support of 76% of this amount would be $2.7 million a year. This support should be allocated or distributed just as Wyoming distributes its current federal and intrastate support: as a credit on Qwest's customers' bills. Only in this way will the direct assurance of rate comparability be maintained. The specific question presented is how much a state should reasonably be expected to contribute from its own USF before it is eligible for supplemental federal support.

III. FEDERAL SUPPLEMENTAL SUPPORT SHOULD NOT BE PORTABLE

The Joint Wyoming Petition raises the issue of portability of supplemental support and competitive neutrality.[38] NASUCA would respond as follows:

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[34] See Joint Wyoming Petition at 10.

[35] 47 C.F.R. 54.309(a)(4).

[36] Removal of this item would reduce the request by $902,695 ($1.55* 48,532 lines * 12).

[37] $4.7 million - $0.9 million.

[38] Joint Wyoming Petition at 11.

Supplemental support should not be portable among carriers. The supplemental support program established by the *Ninth Report Remand Order* is based on comparability of rates. The fact that Wyoming has rebalanced Qwest's local rates to yield rural wireline basic rates that are not reasonably comparable to urban wireline basic rates -- even after application of $13.9 million of federal and $3.3 million of state support -- provides no information about the comparability of the rates of any competitive eligible telecommunications carrier ("CETC").[39] It is open to significant debate whether CETC support -- specifically wireless CETC support -- should be based on wireline costs in non-rural carrier areas; it is even more open to debate whether CETC support in rural carriers' territory should be based on rural carriers' *embedded* costs. But to give supplemental support to CETCs in Qwest territory because Qwest's rates in its rural areas are not reasonably comparable to urban wireline rates would be even more of a stretch. This is not to say, of course, that if the State of Wyoming were able to show that -- despite combined federal and state efforts -- Western Wireless' rates in rural Qwest territory were not reasonably comparable to national urban wireless rates, the State could also apply for supplemental federal support for Western Wireless.

IV. CONCLUSION

It is important to recognize that only a limited number of states currently receive high-cost funding for non-rural carriers. According to the December 2004 Monitoring Report (Table 3.24), in 2004 non-rural carriers in only thirteen jurisdictions received high

[39] According to the 2004 Monitoring Report (Table 3.24), Western Wireless received $3.5 million in high-cost support in Qwest territory in Wyoming in 2004. Silver Star Telephone received just under $10,000. One wonders whether those carriers' customers receive direct universal service credits like Qwest's customers.

cost support.[40] Of that support, the support received in three jurisdictions is entirely "hold-harmless" support, which is being phased out.[41] This leaves ten states receiving high cost support based exclusively on the high cost model.[42]

Although it would be possible for a state that does not receive federal high-cost support for its non-rural carrier(s) to apply for supplemental federal support, it is difficult to see how such a state could make the showing required by the Commission. Wyoming is, in fact, the exception that proves the rule of the Commission's *Ninth Report Remand Order*. Despite the allegations that were made about huge increases in federal USF funding that would be needed to achieve rate comparability, when the test is actual comparability of actual rates in the most extreme case in the nation, the bill is only at most $4.7 million, and more appropriately $2.7 million.

The Commission should grant the Joint Wyoming Petition, with the modifications and to the extent proposed by NASUCA.

Respectfully submitted,

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[40] Alabama, California, Kentucky, Maine, Mississippi, Montana, Nebraska, North Carolina, Puerto Rico, South Dakota, Vermont, West Virginia and Wyoming.

[41] California, North Carolina, and Puerto Rico.

[42] Alabama, Kentucky, Maine, Mississippi, Montana, Nebraska, South Dakota, Vermont, West Virginia and Wyoming.

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