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*EX PARTE*

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April 27, 2006

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW B-204  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286; Federal-State Joint Board on Universal Service, CC Docket No. 96-45*

Dear Ms. Dortch:

In recent months, numerous written ex parte letters have been filed with the Federal Communications Commission ("Commission") addressing the existing separations freeze which went into effect on July 1, 2001 and is scheduled to expire on June 30, 2006.<sup>1</sup> Two of the primary parties filing ex parte letters were the National Association of Regulatory Utility Commissioners ("NARUC") and the United States Telecom Association ("US Telecom"). In addition, the Federal-State Joint Board on Separations recently submitted a letter recommending that the Commission extend the current separations freeze.<sup>2</sup>

The purpose of this letter is to inform the Commission of Qwest Communications International Inc.'s ("Qwest") position on the separations freeze issues facing the Commission and carriers subject to Part 36 rules.<sup>3</sup> Qwest also includes a discussion of some general principles that it believes the Commission should follow in addressing separations reform.

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<sup>1</sup> See *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382 (2001) ("*Separations Freeze Order*") and 47 C.F.R. § 36.3.

<sup>2</sup> See Federal-State Joint Board on Separations letter to Ms. Marlene H. Dortch, Federal Communications Commission, CC Docket No. 80-286, dated Apr. 18, 2006.

<sup>3</sup> While Qwest agrees with much of US Telecom's advocacy, Qwest is not a member of US Telecom.

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Adherence to these general principles would not only serve the interests of all parties that have a direct interest in separations reform (including the Commission, state regulatory agencies, and subject carriers), but would also serve the public interest by eliminating costly, cumbersome and out-dated separations rules.

### The Freeze Should Be Extended

Unquestionably, the current separations freeze should be extended for some “interim” period. Rather than establishing a specific date for the expiration of such an interim freeze, Qwest believes that the freeze should remain in place until the Commission completes its review and reform of existing separations rules. Hopefully, the Commission will be able to complete its rulemaking (and review) in an expeditious manner. But if it takes more rather than less time to promulgate new separations rules, at least the Commission and the industry will avoid a repeat of the situation that we are now facing -- if a date certain is not specified for expiration of the interim freeze.

Qwest disagrees with NARUC’s assertion that the Commission cannot extend the current separations freeze until: 1) it has conducted a notice and comment proceeding and 2) referred the matter to and received a recommendation from the Separations Joint Board.<sup>4</sup> If “good cause” exists, as NARUC acknowledges<sup>5</sup> and Qwest believes this is the case, the Commission can extend the freeze without satisfying either of these requirements. With less than 65 days before the expiration of the separations freeze, it is both “impracticable” and “contrary to the public interest,” to try to conduct a notice and comment proceeding and a Joint Board referral in that short period of time. Furthermore, despite NARUC’s misgivings about the scope of *Mid-Tex Electric Coop. Inc. v. FERC*,<sup>6</sup> Qwest believes that this case provides a strong legal basis for extending the existing separations freeze without a notice and comment rulemaking.<sup>7</sup> As the *Mid-Tex* Court noted the “‘good cause’ inquiry is inevitably fact- or context-dependent.”<sup>8</sup> In the present case, the facts strongly support a finding of “good cause.” First, any extension of the freeze would be interim in nature. Second, carriers subject to the Part 36 rules have relied solely

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<sup>4</sup> See NARUC ex parte letter, CC Docket Nos. 80-286 and 96-45, dated Apr. 6, 2006.

<sup>5</sup> *Id.* at 2-6.

<sup>6</sup> *Mid-Tex Electric Coop. Inc. v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987).

<sup>7</sup> Needless to say, NARUC’s second requirement -- that the matter be referred to a Separations Joint Board -- would not be triggered if the Commission adopted interim rules in the absence of issuing a Notice of Proposed Rulemaking (“NPRM”). See 47 U.S.C. § 410(c).

<sup>8</sup> *Mid-Tex*, 822 F.2d at 1132.

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on the use of frozen separations factors and relationships over the last five years to satisfy their obligations to assign costs between jurisdictions in anticipation of broad separations reform.<sup>9</sup>

Additionally, the Commission should take into account the fact that it is unlikely that any of the carriers subject to the Part 36 rules could begin complying with these rules on a monthly basis immediately after June 30, 2006 if the freeze is not extended for some interim period.<sup>10</sup> While NARUC and US Telecom have spent considerable time in their ex partes addressing the Commission's authority to extend the existing freeze, this issue of potential compliance remains largely unaddressed in discussions associated with the separations freeze. Clearly, without an extension of the freeze, it is unlikely that any incumbent local exchange carrier ("LEC") could do

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<sup>9</sup> Qwest believes that this reliance was justified given the Commission's announcement and expectation that it would complete reform of its Part 36 separations rules during the five-year freeze period. *See Separations Freeze Order*, 16 FCC Rcd at 11387-88 ¶ 9. Furthermore, the Commission has indicated in the *Separations Freeze Order* that comprehensive reform of the separations process was required and implied that the separations process of the future would differ significantly from the Part 36 rules in place prior to the freeze. "Today we take a significant step towards reforming outdated regulatory mechanisms that are out of step with today's rapidly-evolving telecommunications marketplace. Specifically, we take action to freeze, on an interim basis, the Part 36 jurisdictional separations rules, in order to stabilize and simplify the separations process while we continue to work on more comprehensive separations reform. The current Part 36 separations regime, which has been largely unmodified for the past several decades, was developed when local telephone service was provided largely through circuit-switched networks operated by companies with monopoly power in the local market, with clear delineation between interstate and intrastate services. Since the enactment of the Telecommunications Act of 1996, however, and the growing presence of new, high-bandwidth technologies and services in the local market, including the Internet, the telecommunications landscape has changed significantly, and lines between interstate and intrastate services are becoming increasingly blurred. In addition, with the emergence of some competitive local exchange providers, we need to reexamine regulatory structures that apply only to incumbent local exchange carriers." *Id.* at 11383 ¶ 1.

<sup>10</sup> In its recent response to NARUC, US Telecom stated that the industry has relied on the separations freeze and noted that: "Over the five years the freeze has been in place, the personnel responsible for compliance with the old rules have been reassigned or have retired, and the relevant back-office systems have not been maintained. The old rules required hundreds of separate studies, and one carrier alone devoted at least 60 employees and 11 major computer systems to maintaining the separations data bases and performing calculations. [Reference omitted.] That infrastructure cannot be resurrected on short notice, making it imperative that the Commission extend the freeze as quickly as possible." *See US Telecom ex parte*, CC Docket Nos. 80-286 and 96-45, dated Mar. 13, 2006 at 3.

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so.<sup>11</sup> Regardless of any other facts, this fact should constitute sufficient grounds for finding that there is “good cause” under Section 553(b)(3)(b) of the Administrative Procedures Act (“APA”) to adopt an interim rule extending the existing separations freeze.<sup>12</sup>

Finally, NARUC asserts that large carriers, like Qwest, have not been complying with the requirements of the Commission’s *Separations Freeze Order* because they have not been making “annual direct assignments.” NARUC is mistaken. While it is true that Qwest has not been making annual direct assignments, it is not required to do so by the Commission’s *Separations Freeze Order*.<sup>13</sup> In fact, Part 36.3(b) prohibits LECs subject to price cap regulation from directly assigning costs during the freeze period.<sup>14</sup> Qwest has been complying with the requirements of the separations freeze by using the separations factors and category relationships that existed on June 30, 2001 and should be allowed to continue to do so if the freeze is extended for some interim period. As such, the Commission should extend the separations freeze in its current form.

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<sup>11</sup> Prior to the implementation of the freeze on June 30, 2001, Qwest and the other large incumbent LECs separated costs between jurisdictions on a monthly basis even though the Part 36 rules do not specifically require that costs be separated on a monthly basis. There is no possibility that Qwest will be able to reestablish such monthly analyses beginning on July 1, 2006. At best, Qwest might be able to provide some sort of “rough” separation of costs by jurisdiction under the Part 36 rules when it files its annual ARMIS report on April 1, 2007. But even this date would be tenuous, given the loss of trained employees and lack of up-to-date separations systems/infrastructure. Furthermore, it would be an exceedingly expensive and wasteful endeavor since the Commission has already indicated that its Part 36 rules need to be significantly reformed and are based on out-dated regulated mechanisms and technology.

<sup>12</sup> 5 U.S.C. § 553(b)(3)(B). The APA allows rulemaking without notice and comment when an agency “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

<sup>13</sup> The language that NARUC references on the requirement that direct costs be updated annually is contained in 47 C.F.R. § 36.3(a) of the Commission’s separations rules and applies generally to all LECs. 47 C.F.R. § 36.3(b) applies specifically to LECs subject to price cap regulation and requires that all investment categories and sub-categories be frozen. It is impossible both to annually update direct cost assignments and to use frozen factors. Clearly, 47 C.F.R. § 36.3(b) is an exception to the general rule contained in 47 C.F.R. § 36.3(a). Standard statutory construction dictates that when there is a conflict between a general rule and a specific rule, the specific rule controls. Thus, not only do Qwest’s separations practices comply with a reasonable reading of the Commission’s rules, but, as NARUC admits, Commission staff has provided similar advice concerning compliance with the requirements of the separations freeze. *See* NARUC *ex parte* at 10.

<sup>14</sup> 47 C.F.R. § 36.3(b).

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### The Commission Should Issue An *NPRM*

Qwest supports those parties advocating that the Commission issue an *NPRM* on separations reform *but* only after the Commission has adopted an interim rule extending the current separations freeze and after the Commission has determined what course it is going to take with respect to Intercarrier Compensation and Universal Service. There is no question that the separations rules in effect prior to July 1, 2001, are hopelessly out-dated and were developed in an era when rate-of-return regulation was the norm in both federal and state jurisdictions. In developing an *NPRM* on separations the Commission should take a fresh look at the situation unconstrained by past rules that neither reflect today's technological, regulatory or competitive environments. However, the Commission cannot pursue separations reform in isolation -- it must ensure that whatever steps it takes in developing new separations rules do not conflict with the Commission's parallel actions in its Intercarrier Compensation and Universal Service proceedings.<sup>15</sup> For this reason, Qwest believes that the most efficient approach is for the Commission to first adopt Intercarrier Compensation and Universal Service rules and then issue an *NPRM* on separations. In the alternative, if the Commission determines that it should issue an *NPRM* in the near future, Qwest urges the Commission to refrain from "finalizing" its separations rules until it is clear that any Intercarrier Compensation and Universal Service rule changes can be accommodated without unnecessary impacts on separations or further separations rule changes.

### The Commission Should Follow Certain Basic Principles In Developing New Rules

On many occasions Qwest has observed that the Commission's separations rules (*i.e.*, those in effect prior to the freeze) are unnecessarily complicated. Contrary to the claims of some parties, complexity does not result in greater accuracy. If something is by its nature unmeasurable (as is the case with the amount of common costs that should be assigned to a given product), it does not help to use a finer instrument to try to measure it. When one looks at all the detail in the Part 36 rules it is easy to lose sight of this fact. Part 36 gives the impression of accuracy and definiteness when, in actuality, much of Part 36 is devoted to the inherently arbitrary task of allocating common costs between jurisdictions. The Commission should start

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<sup>15</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005); *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308 (2005).

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with “a clean slate” in addressing separations reform. Qwest urges the Commission to keep the following points and principles in mind in developing its *NPRM* on separations reform:

- There is no “correct” answer; all common cost allocators have their shortcomings.
- Complexity and detail do not increase the accuracy of the separations process.
- Keep it simple.
- The costs of administering and complying with separations/cost allocation rules increase exponentially with the amount of detail.
- Detailed separations/cost allocation rules and competition are basically incompatible -- because cost allocation has little or no affect on prices in a competitive environment.
- A cost allocation methodology based on “direct assignment,” while superficially appealing, may result in costs that far exceed any benefits of such an approach.
- Usage-based allocators are much less meaningful (and inherently more arbitrary) in today’s evolving broadband-based digital communications environment.

#### The Commission Has Wide Latitude In Selecting A Separations Methodology

*Smith v. Illinois*<sup>16</sup> is the legal precedent which laid the foundation for the interstate/intrastate separations process as we know it today. In *Smith v. Illinois* the Supreme Court held that property, revenues and expenses had to be separated or apportioned between interstate and intrastate jurisdictions.<sup>17</sup> However, the Court did not require the use of a specific separations methodology in *Smith v. Illinois*, nor did it require the Interstate Commerce Commission, the Commission’s predecessor, or any other authority to prescribe jurisdictional separations.

Basically, *Smith v. Illinois* stands for the proposition that there must be some sort of “jurisdictional symmetry” between revenues and costs. The decision provides no insight into answering the question of where intrastate costs end and interstate costs begin, or vice versa. “Jurisdictional symmetry” between costs and revenues can be achieved and the requirements of *Smith v. Illinois* satisfied in a number of different ways. Nor does the 1996 Act limit the

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<sup>16</sup> *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).

<sup>17</sup> *Id.* at 148-51.

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Commission in determining where an interstate call begins or ends or which facilities are identified as being used in the provision of interstate service. In fact, as the Commission observed in the past, 47 U.S.C. § 221(c) gives the Commission the authority to determine what property of a carrier is considered to be used in interstate service.<sup>18</sup>

Thus, both *Smith v. Illinois* and Section 221(c) provide the Commission with broad latitude in modifying existing separations rules. The Court previously found that the Commission's decision to freeze jurisdictional cost assignments on subscriber lines (*i.e.*, 25 percent interstate/75 percent intrastate) was consistent with *Smith v. Illinois*.<sup>19</sup> Most recently in its Order freezing Part 36 factors and category relationships, the Commission found that an "interim" freeze was consistent with *Smith v. Illinois*.<sup>20</sup> Likewise; the Commission has not encountered any legal impediments to the use of direct assignment for mixed-use facilities.<sup>21</sup> Thus, as long as the Commission engages in "reasoned decision-making" in adopting new separations rules, the Commission has wide latitude as to how it satisfies the requirement in *Smith v. Illinois* that there be some sort of "jurisdictional symmetry" between revenues and costs.<sup>22</sup>

### Summary

As discussed above, the Commission should extend the current separations freeze for an interim period until it completes its reform of the separations process and adopts new simplified

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<sup>18</sup> See *In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22137 ¶ 35 (1997); see also 47 U.S.C. § 221(c).

<sup>19</sup> See *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141-42 (D.C. Cir. 1984). See also *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1314-15 (D.C. Cir. 1988).

<sup>20</sup> *Separations Freeze Order*, 16 FCC Rcd at 11392-93 ¶ 17. In doing so, the Commission reiterated that "*Smith v. Illinois* does not require absolute precision in the separations cost allocation process." *Id.*

<sup>21</sup> In its *Mixed Use Decision* the Commission revised its separations rules to directly assign the costs of mixed-use special access lines to the interstate jurisdiction if 10 percent or more of the traffic was interstate. See *In the Matter of MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660 (1989).

<sup>22</sup> However, the Commission may not modify its rules governing jurisdictional separation of commonly-used carrier plant and expenses without first referring such matters to a Federal-State Joint Board, as required by Section 410(c) of the Communications Act. 47 U.S.C. § 410(c).

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rules. Qwest urges the Commission to take action at the earliest possible date in order to remove uncertainty associated with the pending expiration of the freeze on June 30, 2006.

Please contact me if you have any questions on Qwest's position.

Sincerely,

Of Counsel,

/s/Timothy M. Boucher

James T. Hannon

cc: Tom Navin  
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