

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
) WC Docket No. 06-122
Universal Service Contribution Methodology)

**REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.**

Craig J. Brown
Tiffany West Smink
Suite 950
607 14th Street, N.W.
Washington, DC 20005
303.383.6619

Attorneys for

**QWEST COMMUNICATIONS
INTERNATIONAL INC.**

September 8, 2006

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THE WIRELESS AND VoIP SAFE HARBORS ARE APPROPRIATE AS INTERIM MEASURES TO PROTECT STABILITY OF THE FUND, BUT THEY SHOULD NOT BE PERPETUATED INDEFINITELY	3
III. WHILE THE WIRELESS AND VoIP SAFE HARBORS ARE IN PLACE, THE COMMISSION SHOULD CLARIFY THEIR APPLICATION.....	5
IV. CONCLUSION.....	10

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
) WC Docket No. 06-122
Universal Service Contribution Methodology)

**REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc. (“Qwest”) hereby files these reply comments in response to the Federal Communications Commission’s (“Commission”) *Report and Order and Notice of Proposed Rulemaking* (“Notice” or “Interim Contribution Order” as appropriate)¹ and the opening comments filed by other participants in the above-captioned docket.²

I. INTRODUCTION AND SUMMARY

As Qwest has previously stated in its comments in various proceedings regarding universal service currently pending before this Commission, the universal service program needs comprehensive reform. One component of that reform is to appropriately balance the size of the Universal Service Fund with the burden on contributors to the fund. The Universal Service Fund has been experiencing a declining contribution base and an increasing fund size resulting in a disproportionately increasing burden on those remaining contributors to the fund. Given this situation, Qwest supports the Commission’s action to adopt interim measures to assure the continued viability of the Universal Service Fund, while continuing to push forward with more

¹ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, FCC 06-94, rel. June 27, 2006, *appeal pending sub nom. Vonage Holdings Corporation v. FCC*, No. 06-1276 (D.C. Cir. pet. for rev. filed July 18, 2006).

² Comments were filed Aug. 9, 2006.

comprehensive reform.

In requiring providers of Voice over Internet Protocol (“VoIP”) to contribute to the Universal Service Fund, the Commission’s establishment of a safe harbor as a means to estimate the interstate portion of the services offered by VoIP providers is a reasonable interim approach. In general, however, the use of safe harbors is not appropriate for the long term, and the Commission needs to press ahead with comprehensive reform of the contribution methodology and the entire universal service system. Qwest advocates moving to a long-term contribution methodology that assesses contributions based on unique working telephone numbers for switched telecommunications and telecommunications services, and based on revenues for non-switched telecommunications and telecommunication services.³

Additionally, while the wireless and VoIP safe harbors are in place, Qwest has some concerns regarding application of the safe harbors in light of certain instructions for completing the Form 499-A and Form 499-Q regarding reporting of toll revenues. Qwest shares the concerns expressed by Cingular Wireless LLC (“Cingular”) and CTIA-The Wireless Association® (“CTIA”) in their recently filed Petitions for Declaratory Ruling with respect to application of the wireless safe harbor.⁴ Qwest has additional concerns as to application of the VoIP safe harbor with respect to the instructions and believes the Commission should confirm that interconnected VoIP providers may choose to allocate all of their telecommunications revenues, including toll revenues, using the VoIP safe harbor.

³ Qwest is not repeating that advocacy here, but would refer the Commission to Qwest’s prior March 21 and April 7, 2006 *ex partes* filed in CC Docket No. 96-45 regarding universal service.

⁴ Petition for Declaratory Ruling of Cingular Wireless LLC, file Aug. 8, 2006 (“Cingular Petition”). Petition for Declaratory Ruling of CTIA-The Wireless Association® on Universal Service Contribution Obligations, filed Aug. 1, 2006 (“CTIA Petition”). *And see Public Notice*, DA 06-1615, WC Docket No. 06-122, rel. Aug. 10, 2006.

II. THE WIRELESS AND VoIP SAFE HARBORS ARE APPROPRIATE AS INTERIM MEASURES TO PROTECT STABILITY OF THE FUND, BUT THEY SHOULD NOT BE PERPETUATED INDEFINITELY

Qwest agrees with other commenters that the use of a wireless safe harbor, which was first adopted in 1998 as an interim measure,⁵ and the use of a VoIP safe harbor should not be maintained as long-term solutions for assessing universal service contributions for wireless and VoIP services.⁶ The wireless and VoIP safe harbors are reasonable short-term measures to address the declining universal service contribution base in today's telecommunications marketplace. They are not, however, appropriate long-term solutions as they do not ensure -- as the statute mandates -- that providers of telecommunications services are contributing in an equitable and non-discriminatory manner.⁷ Nor do the safe harbors ensure that the impact of contributions is competitively neutral. Universal service contributions need to be competitively neutral both as to what types of providers are contributing and how they are contributing. Universal service contributions should not influence or drive customer purchasing behavior. It is critical that the Commission move forward with comprehensive reform of not only the contribution methodology for universal service, but the whole universal service program.

The use of safe harbors for wireless telecommunications services and VoIP by the Commission attempts to balance the need to maintain a sufficient contribution base for the Universal Service Fund with the reality that requiring wireless and VoIP providers to separately

⁵ See *In the Matter of Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21253 ¶ 1 (1998).

⁶ Of the parties filing opening comments, the majority advocated that the Commission move ahead with comprehensive reform of the contribution methodology by implementing some form of a numbers-oriented contribution methodology.

⁷ See 47 U.S.C. § 254(d) (requiring that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, *on an equitable and non-discriminatory basis*, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”) (emphasis added).

identify their interstate telecommunications traffic solely for purposes of contributing to the Universal Service Fund may be economically impractical or even technically infeasible. In the years since the interim measure of a safe harbor for enabling wireless providers to contribute to the Universal Service Fund was first enacted, determining revenues generated from interstate telecommunications for telecommunications providers has become more complex. It is harder to separate interstate from intrastate revenues as (1) newer technologies have neither the need nor the ability to monitor the physical end points of the communications they enable, (2) interstate and intrastate services are offered in bundles, and (3) new providers generally are not subject to jurisdictional separations. Additionally, telecommunications revenues are increasingly difficult to separate from non-telecommunications revenues as new services, such as Internet protocol-enabled services, are difficult to classify and as telecommunications and non-telecommunications services are bundled.

Moreover, the need to identify whether traffic is interstate or intrastate solely for purposes of contribution to the Universal Service Fund is increasingly unreasonable. To the extent that distinguishing between interstate and intrastate traffic serves no economic or business purpose, the costs of performing this analysis solely for contribution purposes may negatively impact the development and distribution of new modes of telecommunications.

This reality underscores why safe harbors are not an appropriate long-term solution -- they are at best *estimates* of the interstate revenues from which providers' contributions are derived. Where some providers of interstate telecommunications are contributing to the Universal Service Fund based on estimated amounts and others are contributing based on actual amounts, it cannot be that they are contributing on an equitable basis. Current use of safe harbors may be competitively neutral within a technology, *e.g.*, all wireless providers are subject

to the same safe harbor option of 37.1%, but they are not necessarily competitively neutral across technologies. The Commission needs to move to a methodology that affords a more competitively neutral application of universal service contributions. Safe harbors must give way to comprehensive reform of the contribution methodology if the Commission is going to enable contribution assessments on providers that are equitable, non-discriminatory, and competitively neutral.

Contributions to the Universal Service Fund must move away from estimates of interstate telecommunications traffic and move instead toward known and ascertainable components of the provision of interstate telecommunications services. Section 254(d) requires that providers of interstate telecommunications services contribute in an equitable and non-discriminatory manner.⁸ The statute does not require that providers of interstate telecommunications services contribute based on the *revenues* of their interstate telecommunications services. Thus, the Commission has the authority to move away from requiring contributions solely on a revenue basis. Qwest advocates comprehensive reform to contribution methodology such that contributions would be based on unique working telephone numbers for switched telecommunications and telecommunications services and number-based comparable alternative services, and contributions would also be based on revenues for non-switched telecommunications and telecommunications services.⁹

III. WHILE THE WIRELESS AND VoIP SAFE HARBORS ARE IN PLACE, THE COMMISSION SHOULD CLARIFY THEIR APPLICATION

In its request for comments the Commission asked, *inter alia*, the following questions:

⁸ 47 U.S.C. § 254(d).

⁹ By “unique working telephone number”, Qwest means each North American Numbering Plan number assigned to a specific end user that provides the ability to send and/or receive calls as set out in the document used in Qwest’s March 21, and April 7, 2006 *ex partes* in CC Docket No. 96-45 regarding universal service.

We ask commenters to address whether a safe harbor continues to be appropriate for providers of interconnected VoIP service. Can providers of interconnected VoIP service identify the amount of actual interstate and international, as opposed to intrastate, telecommunications they provide? If so, should we require that these providers report based on actual data?¹⁰

Qwest has already commented that the use of safe harbors generally should be of limited duration. While interim measures are in place, however, Qwest believes that safe harbors are an adequate mechanism for obtaining contributions to universal service based on provision of VoIP services. It appears, however, that some additional clarification of the application of the safe harbor to VoIP services is warranted.

Recently, Cingular and CTIA have filed Petitions for Declaratory Rulings regarding an apparent contradiction between the Commission's Orders regarding use of the safe harbor for contributions on wireless services and certain language in the Form 499-A and Form 499-Q instructions regarding reporting and allocation of "toll revenues."¹¹ Specifically, while the Commission's Orders authorize wireless carriers to allocate all of their telecommunications revenues pursuant to the safe harbor, certain instruction language could be interpreted as prohibiting the use of safe harbors to allocate toll revenues. Qwest would note that this apparent conflict carries over to the VoIP context as well. Qwest submits that in the VoIP context, the apparent conflict should be resolved to permit interconnected VoIP providers to apply the safe harbor to all of their telecommunications revenues.

In the *Interim Contribution Order*, the Commission requires interconnected VoIP providers to report and contribute to the Universal Service Fund on all of their interstate and international end-user telecommunications revenues. Interconnected VoIP providers may fulfill this obligation in one of three ways: (1) use the interim safe harbor of 64.9% established in the

¹⁰ Notice, 21 FCC Rcd 7518 ¶ 69.

¹¹ Cingular Petition at 9-11; CTIA Petition at 8-12.

Order; (2) rely on traffic studies that have been pre-approved by the Commission; or (3) report based on their actual interstate telecommunications revenues.¹²

With respect to the possibility of reporting based on actual interstate telecommunications revenues, the Commission specifically noted that if a VoIP provider could track the jurisdictional confines of customer calls, it would be permitted to calculate its universal service contributions based on its actual percentage of interstate calls.¹³ The Commission cautioned, however, “that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.”¹⁴ The Commission explained that this is because the central rationale for justifying preemption in the *Vonage Order*¹⁵ would no longer be applicable to such an interconnected VoIP provider. In the *Vonage Order*, the Commission granted in part Vonage’s petition seeking that the Commission preempt the Minnesota Public Utilities Commission’s actions in ruling that Vonage’s VoIP service was a “telephone service” under Minnesota law and thus subject to the state requirements for offering such a service. The Commission asserted preemption on the grounds that “the characteristics of DigitalVoice [Vonage’s VoIP service] preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that

¹² *Interim Contribution Order*, 21 FCC Rcd 7518 ¶¶ 53, 57.

¹³ *Id.* ¶ 56.

¹⁴ *Id.*

¹⁵ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *appeal pending sub nom. MN Public Utilities v. FCC*, No. 05-1069, Oral Argument held Jan. 12, 2006 (8th Cir.).

permitting Minnesota’s regulations would thwart federal law and policy.”¹⁶ The Commission held that its preemption of state regulation extended to any service having the same capabilities as Vonage’s VoIP service.¹⁷ It seems unlikely that VoIP providers whose VoIP services are currently free from state regulation due to the *Vonage Order* would be motivated to develop the capabilities to track the jurisdiction of their customer calls for Federal Universal Service Fund contribution purposes.

Nor does the *Interim Contribution Order* require this. Nowhere in the *Order* does the Commission *require* that an interconnected VoIP provider report and allocate based on actual interstate revenues. It is merely one method a VoIP provider may choose.¹⁸ The safe harbor method is clearly available to be used where it is difficult or impossible for interconnected VoIP providers to separate their traffic on a jurisdictional basis.¹⁹

Yet, the permissive language of the *Order* stands in sharp contrast to the language of the instruction regarding reporting and allocating of toll revenues. After identifying safe harbor percentages including the 64.9% for interconnected VoIP telecommunications revenues, the instructions state the following:

These safe harbor percentages may not be applied to universal service pass-through charges, fixed local service revenues, or toll service charges. **All filers must report the actual amount of interstate and international revenues for these services.** For example, toll charges for itemized calls appearing on mobile

¹⁶ *Id.* at 22411-12 ¶ 14.

¹⁷ *Id.* at 22432 ¶ 46.

¹⁸ *See Interim Contribution Order*, 21 FCC Rcd 7518 ¶¶ 52-57 (interconnected VoIP providers have three options for reporting and contributing to the Universal Service Fund (*id.* ¶ 52); VoIP providers are “encouraged” -- but not required -- to explore the more precise avenues of actual revenues or traffic studies for determining the jurisdictional nature of their revenues (*id.* ¶ 54); “to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it *may* calculate its universal service contributions based on its actual percentage of interstate calls” (*id.* ¶ 56 (emphasis added)).

¹⁹ *Id.* ¶ 53.

telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.²⁰

This language could be interpreted to require that all filers, including interconnected VoIP providers, must separately track and report their actual interstate, international, and intrastate toll revenues. This language is problematic in the VoIP context for at least three reasons.

First, as already noted, the instruction is inconsistent with the language of the *Order* which allows VoIP providers to elect to allocate their revenues based on the safe harbor and does not require any allocation based on actual revenues.

Second, it is inconsistent with the current reality as reflected in the Commission's *Order*, and some parties' opening comments that at least some (and perhaps many) interconnected VoIP providers cannot determine the jurisdictional nature of their customers' calls.²¹ As the Commission recognized, this inability was a critical basis of the Commission's preemption of the *Vonage Order*.²² Requiring VoIP providers to report actual interstate toll revenues, when they do not have the mechanisms or any business need to do so, and when the Commission has expressly recognized this situation, seems incongruous.

²⁰ *Id.* at page 21, App. C (Form 499-A instructions attached to corrected *Interim Contribution Order*; emphasis in original).

²¹ *See id.* ¶ 56 (“we recognize that some interconnected VoIP providers do not currently have the ability to identify whether customer calls are interstate and therefore subject to the section 254(d) contribution requirement.”); Comments of the American Cable Association at Section II (explaining that most, if not all, of ACA’s members providing VoIP service cannot determine their actual amount of interstate and international usage); Comments of IDT Telecom, Inc. at 11 (“as the Commission has acknowledged, it is not clear whether all interconnected VoIP providers can determine the jurisdiction of their subscribers’ calls”); *see also* Comments of the Information Technology Industry Council at 8-10 (identifying problems associated with attempting to apply geography-based jurisdictional distinctions on VoIP and other IP-enabled services).

²² *See Interim Contribution Order*, 21 FCC Rcd 7518 ¶ 56 (“a fundamental premise of our decision to preempt Minnesota’s regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries.”).

Third, it seems that any filer -- which according to the instruction would be all filers -- who followed the plain language of the instructions would lose the protection from state regulation that the *Vonage Order* preemption ruling affords. This would be in accord with the Commission's caution that "an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation."²³ Given the permissive language of the *Interim Contribution Order* and the three "options" for interconnected VoIP providers to report and contribute to the Universal Service Fund, it is hard to believe that the Commission intended that result. In requiring interconnected VoIP providers to contribute to the Universal Service Fund, the Commission could not have intended that the preemptive effect of the *Vonage Order* would be eliminated for all contributing VoIP providers such that they would all now be subject to full state regulation of their services. Had this been the intent, Qwest hopes that the Commission would have been more straightforward regarding this result.

In light of these issues, Qwest believes the Commission should clarify the application of this instruction in the VoIP context, as well as in the wireless context as already raised by Cingular and CTIA. In the VoIP context, Qwest submits that this conflict should be resolved by confirming that interconnected VoIP providers may choose to allocate all of their VoIP revenues, including their toll revenues, based on the VoIP safe harbor, until such time as the Commission moves to a different contribution methodology.

IV. CONCLUSION

Consequently, while safe harbors for wireless and VoIP services are a reasonable interim approach, they are not appropriate as a long-term solution. The Commission must move forward

²³ *Id.*

with its intended comprehensive overhaul of the universal service contribution methodology. In the interim, the Commission should clarify the application of the instruction regarding reporting and allocation of toll revenues with respect to the wireless and VoIP safe harbors.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: Tiffany West Smink
Craig J. Brown
Tiffany West Smink
Suite 950
607 14th Street, N.W.
Washington, DC 20005
303.383.6619

Its Attorneys

September 8, 2006

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed via ECFS with the Office of the Secretary of the FCC; 2) served via email on Ms. Antoinette Stevens, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, at Antoinette.Stevens@fcc.gov; 3) served via email on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpweb.com; and 4) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

/s/ Richard Grozier
Richard Grozier

September 8, 2006

Jeanne M. Fox
Frederick F. Butler
Connie O. Hughes
Jack Alter
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Nigel Alexander
Multi-Link Telecom, LLC
Suite 380-C
2460 West 26th Avenue
Denver, CO 80211

Thomas M. Sullivan
Eric E. Menge
Office of Advocacy
U.S. Small Business Administration
Suite 7800
409 3rd Street, S.W.
Washington, DC 20416

Robert J. Irving, Jr.
Leap Wireless
10307 Pacific Center Court
San Diego, CA 92121

Brian Peters
Information Technology Industry Council
Suite 200
1250 Eye Street, N.W.
Washington, DC 20005

Douglas E. Hart.....Cincinnati Bell Wireless
Frost Brown Todd LLC
220 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Michael F. Altschul
Christopher Guttman-McCabe
Paul W. Garnett
CTIA-The Wireless Association®
Suite 600
1400 17th Street, N.W.
Washington, DC 20036

Matthew M. Polka
American Cable Organization
Suite 212
One Parkway Center
Pittsburgh, PA 15220

Christopher C. Cinnamon
Nicole E. Paolini-Subramanya
Cinnamon Mueller
American Cable Association
Suite 1020
307 Michigan Avenue
Chicago, IL 60601

J.R. Carbonell
Carol L. Tacker
M. Robert Sutherland
Cingular Wireless LLC
Suite 1700
5565 Glenridge Connector
Atlanta, GA 30342

Staci L. Pies
The VON Coalition
5512 Amesfield Court
Rockville, MD 20853

Daniel Mitchell
Karlen J. Reed
National Telecommunications
Cooperative Association
10th Floor
4121 Wilson Boulevard
Arlington, VA 22203

Marc J. Lawrence-Apfelbaum
Julie Y. Patterson
Time Warner Cable
290 Harbor Drive
Stamford, CT 06902

Tekedra M. Jefferson
AOL LLC
22000 AOL Way
Dulles, VA 20166

Steven N. Teplitz
Susan A. Mort
Time Warner Inc.
Suite 800
800 Connecticut Avenue, N.W.
Washington, DC 20006

Daniel L. Brenner
Michael S. Schooler
Steven F. Morris
National Cable & Telecommunications
Association
1724 Massachusetts Avenue, N.W.
Washington, DC 20036-1903

Linda K. Gardner
Embarq Corporation
5454 West 110th Street
Overland Park, KS 66211

Cathy Carpino
Gary Phillips
Paul K. Mancini
AT&T Inc.
Suite 1000
1120 20th Street, N.W.
Washington, DC 20036

Carl Wolf Billek
IDT Telecom, Inc.
520 Broad Street
Newark, NJ 07102-3111

James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
United States Telecom Association
Suite 400
607 14th Street, N.W.
Washington, DC 20005-2164

Richard M. Sbaratta
Angela N. Brown
BellSouth Corporation
675 West Peachtree Street, N.E.
Atlanta, GA 30375-0001

Mitchell F. BrecherTracfone
Debra McGuire Mercer
Greenberg Traurig, LLP
Suite 500
800 Connecticut Avenue, N.W.
Washington, DC 20006

Joshua H. SeidemannNebraska Rural Independent
Woods & Aitken, LLP
Suite 200
2154 Wisconsin Avenue, N.W.
Washington, DC 20007

Mark A. GrannisVonage
Brita D. Strandberg
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036

David L. NaceRural Cellular
B. Lynn F. Ratnavale
Lukas, Nace, Gutierrez & Sachs, Chartered
Suite 1500
1650 Tysons Boulevard
McLean, VA 22102

Alexicon Telecommunications Consulting
Suite 200
2055 Anglo Drive
Colorado Springs, CO 80918

Jeffrey S. LinderVerizon
Bradley K. Gillen
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006

Edward Shakin
Christopher M. Miller
Verizon
Suite 500
1515 North Court House Road
Arlington, VA 22201

John Ridgway
Michael Balch
Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319

Ari Q. FitzgeraldOnStar Corp
David Sieradzki
Hogan & Hartson, LLP
555 Thirteenth Street, N.W.
Washington, DC 20004