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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED
JUL - 1 2008
Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Request for Review by Qwest Communications International, Inc. of Decision of Universal Service Administrator	)	WC Docket No. 03-109

REPLY COMMENTS
OF QWEST COMMUNICATIONS INTERNATIONAL INC.

In accord with the Federal Communications Commission's ("Commission") Public Notice,[1] Qwest Communications International, Inc., on behalf of its wholly-owned subsidiary, Qwest Corporation ("Qwest"), provides these reply comments regarding its Request for Review of certain findings in three Universal Service Administrative Company ("USAC") audits of federal universal service support Qwest received from the federal low-income universal service program.

Qwest has sought review of three USAC audit findings: (1) Qwest must complete line 9 of FCC Form 497 to report pro-rata Lifeline credit amounts provided to customers who only had Lifeline service for part of the reported month; (2) Qwest is inappropriately seeking tribal Lifeline support for customers that do not reside on tribal lands; and (3) Qwest has failed to retain customer certifications in accord with 47 C.F.R. § 54.417(a). Qwest is seeking reversal of each of these findings such that the Commission determines that (1) Qwest is not obligated to report partial Lifeline credit amounts on FCC Form 497 line 9; (2) Qwest is appropriately seeking tribal Lifeline support for customers who certify that they live on tribal lands; and (3) Qwest is retaining customer certifications in accord with 47 C.F.R. § 54.417(a).

[1] *See* Public Notice, WC Docket No. 03-109, DA 08-1144, rel. May 15, 2008.

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All of the comments filed regarding Qwest's Request for Review support Qwest's position on these issues. As such, the Commission should find that USAC erred in its findings and grant Qwest the relief it seeks on all of the issues raised.

The Commission Should Determine That Qwest Is Not Obligated To Report Partial Lifeline Credit Amounts on FCC Form 497 Line 9. All of the comments filed supported Qwest on this issue. All the commenters agree that eligible telecommunications carriers ("ETCs") are not required to use Line 9 on FCC Form 497 to report prorated amounts of Lifeline credits provided in the reported month to customers who began or ended service during the month.[2] Additionally, AT&T-Texas has raised this issue in its own request for review of the same USAC audit finding, and others have supported AT&T's request for reversal of this USAC finding as well.[3] Commenters in that proceeding were also unanimous in their support of AT&T on this issue.

As AT&T, Qwest and others have stated, for several reasons USAC erred in determining that Qwest and AT&T are required to use FCC Form 497 Line 9 to claim reimbursement for prorated amounts of Lifeline credits provided to customers during the reporting month. First, the plain language of the Form 497 and its instructions make use of Line 9 optional. This is evidenced not only by the use of the word "if", but, as USTelecom has pointed out, the option to

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[2] *See* Comments of AT&T Inc., filed June 16, 2008 at 1-2 ("AT&T"); Comments of the United States Telecom Association, filed June 16, 2008 at 1 ("USTelecom"); Comments of Sprint Nextel Corporation, filed June 16, 2008 at 1 ("Sprint"); Comments of Verizon, filed June 16, 2008 at 1 ("Verizon").

[3] *See* Comments of Embarq Corporation, filed May 14, 2008 at 1; Comments of the United States Telecom Association, filed May 14, 2008 at 1; Comments of Sprint Nextel Corporation, filed May 14, 2008 at 1; Comments of Qwest Communications International Inc., filed May 14, 2008 at 1-4; Comments of the Independent Telephone & Telecommunications Alliance, filed May 14, 2008 at 1-3.

check a box on the form if prorated amounts are being claimed.[4] Apparently, USAC has interpreted that the choice to check or not check the box is tied solely to whether the ETC did or did not have any Lifeline customers who started or stopped Lifeline service during the reported month.[5] According to USAC, if an ETC had customers who started or stopped service during the month, it must check the box and indicate the amount of prorated support claimed. But, this interpretation is belied by the fact that no other portion of the form for calculating reimbursement is set up in this manner. For instance, Tier 4 support provides enhanced Lifeline support and is only available for qualifying customers residing on tribal lands. Certainly, some ETCs may not have any enhanced Lifeline customers. But, there is no box to check if the ETC is not claiming any Tier 4 support. Instead an ETC would indicate that there is no amount being claimed on this line. The more consistent way to manifest USAC's interpretation of Line 9 on the form would be to have no box, and just have the ETC indicate the amount of prorated support claimed.

Second, as AT&T has carefully set out, the history behind the instruction language also compels a finding that USAC has misinterpreted an ETC's obligation to report prorated Lifeline credit amounts. The fact that the Commission previously considered adopting a reporting form that would have required ETCs to report prorated amounts, but has never adopted that form, means that reporting of prorated amounts remains optional, not mandatory.

Finally, the unwarranted burden of requiring Qwest and AT&T to report partial Lifeline credit amounts in the absence of any cognizable harm to the federal universal service fund or the ETCs' Lifeline customers supports the Commission reversing USAC's findings on this issue. As

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[4] USTelecom at 2-3.

[5] *See* Request for Review by Qwest Communications International Inc. of Decision of the Universal Service Administrator, at Attachment 7; Request for Review by AT&T Inc. of Decision of the Universal Service Administrator at 4, citing its attached Appendix A, USAC Management Response, dated July 5, 2007 at 2.

the commenters in both this and AT&T's proceeding have pointed out, requiring ETCs to report prorated credit amounts would result in significant burdens to the ETCs to capture this data. Yet, as commenters have noted, for ETCs choosing not to report prorated credit amounts, the choice is one of administrative necessity, and not based on any intent to profit from receipt of universal service funds.[6] Further, there is no indication that ETCs' consistent reporting of full Lifeline credit amounts is harming the fund at all, and certainly not in any material way.

Thus, Qwest reasserts its request that the Commission reverse USAC's finding for each study area that Qwest is obligated to use Line 9 to report partial Lifeline support amounts. The plain language of the Form 497 instructions does not require it; the Commission has previously considered, but not altered the form language or the instructions to require it; and any perceived benefit from requiring reporting of partial amounts is outweighed by the harm of requiring Qwest to implement significant system changes to comply with such a requirement.

The Commission Should Find That Qwest Is Appropriately Seeking Tribal Lifeline Support for Customers Who Certify That They Live on Tribal Lands. Two commenters specifically supported Qwest on this issue and the other two commenters did not address this issue. Before providing enhanced Lifeline support to qualifying consumers, Qwest obtains a signed certification from each customer that includes the customer identifying under penalty of perjury on what tribal reservation he or she lives. But, USAC interprets that Qwest's reliance on the customer's certification is not sufficient for ascertaining the customer's tribal lands residency. For several reasons the Commission should reverse USAC's finding on this issue.

First, the Commission has not identified nor established any process other than obtaining a customer's self-certification of tribal lands residency that ETCs should use to ascertain that

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[6] *See* Verizon at 3-4; USTelecom at 4-5; Sprint at 2.

tribal lands residency. And, in fact, the Commission has specifically identified at least one circumstance in which such a certification is apparently sufficient to establish tribal lands residency. As AT&T notes, in 47 C.F.R. § 54.409(c), the Commission addresses how a consumer that lives on or near a reservation, but does not meet Lifeline qualifications in states that mandate Lifeline support or meet the Lifeline qualifications through the federal income test or participation in certain identified federal assistance programs can still qualify for enhanced Lifeline support if they participate in certain other federal assistance programs.[7] In this situation, in order to obtain enhanced Lifeline support the ETC "must obtain the consumer's signature on a document certifying under penalty of perjury that the consumer receives benefits from at least one of the programs mentioned in this paragraph or paragraph (b) of this section, and lives on or near a reservation, as defined in §54.400(e)."[8] Given this language and the absence of any other guidance on this issue, it is difficult to understand how Qwest's actions in relying on a customer's certification under penalty of perjury that he or she lives on a specific reservation is not compliant conduct. Further, as USTelecom points out, requiring ETCs to further verify tribal lands residency in some manner could put ETCs in the untenable position that they would need to refuse enhanced Lifeline support to a customer in contravention of a facially valid self-certification.[9] Nowhere has the Commission indicated such a role for ETCs.

Additionally, given this rule language, it is doubtful that USAC's reliance on language in the Final Regulatory Flexibility Analysis of the Procedural Matters section of the Commission's *Tribal Lifeline Order* to interpret that Qwest needs to establish additional controls to verify that a customer's address is on tribal lands prior to providing tribal Lifeline support is appropriate. Not

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[7] *See* AT&T at 2 & n.7.

[8] 47 C.F.R. § 54.409(c).

[9] USTelecom at 8.

only is this language in a non-substantive portion of the Order, but nowhere in the substantive portions of the *Tribal Lifeline Order* does the Commission set out what a carrier must do to determine whether a customer is a resident of tribal lands, and the Commission has rule language requiring ETCs to obtain a self-certification of tribal lands residency from customers to establish enhanced Lifeline service in some instances.

Finally, to the extent that it is not clear how a provider should confirm tribal residency, USAC's finding cannot be sustained. USAC has authority to apply existing Commission rules, but here there is no rule requiring anything beyond self-certifications of tribal residency to be applied. In this case, USAC should seek guidance from the Commission before making any determination as to whether Qwest's conduct is or is not compliant conduct.[10] Further, any interpretive rule by the Commission should be prospective so that Qwest and other ETCs have notice of the rule and an opportunity to conform their conduct to the rule.[11] USAC's application of its new interpretive rule to Qwest's past conduct must be reversed as it is not only beyond the scope of USAC's authority but is also prohibited retroactive rulemaking.

Thus, the Commission should determine that Qwest's process of obtaining a signed certification from the customer that he or she resides on a reservation satisfies the carrier's obligation to ascertain tribal residency of a tribal Lifeline customer. The Commission should reverse USAC's findings for Qwest in Colorado and Idaho on this issue and USAC's intended recovery actions on this issue. Alternatively, if the Commission views that additional steps for

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[10] *See* 47 C.F.R. § 54.702(c) (stating that [t]he Administrator may not make policy, interpret unclear provisions of the statute or rules or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").

[11] *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (stating that "the presumption against retroactive legislation is deeply rooted in our jurisprudence . . . [e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . .").

ascertaining tribal residency may be warranted, the Commission should initiate a rulemaking to consider and solicit comment on what additional steps might be appropriate and feasible for carriers and state agencies involved in eligibility determinations to implement. In either case, USAC's findings on this issue should not stand.

The Commission Should Find That Qwest Is Retaining Customer Certifications In Accord With 47 C.F.R. § 54.417(a). The requirement to maintain customer self-certifications of eligibility for the low-income program under Commission Rule 54.417(a) became effective on May 12, 2005.[12] Prior to this time, Qwest placed a permanent note on the customer's account at the time Lifeline was added after a signed self-certification had been received to document the consumer's eligibility for Lifeline, but did not have procedures in place to retain the actual certification. Thus, during the audit, Qwest was not able to produce self-certifications for customers who initiated Lifeline service prior to May 12, 2005 and were still receiving that service in January 2006.[13] USAC concluded that Qwest's inability to produce these self-certifications meant that Qwest was not in compliance with Section 54.417(a).

The two commenters that addressed this issue, AT&T and USTelecom, agree with Qwest that USAC erred in this determination and that Qwest should not be penalized for not maintaining customer self-certifications before there was an effective obligation to do so.[14]

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[12] *See* Notices, FCC, Public Information Collections Approved by Office of Management and Budget, 70 FR 30110, May 25, 2005 (providing notice of the effective date of May 12, 2005 for certain Commission low-income program rules including 47 C.F.R. Section 54.417); *In the Matter of Lifeline and Link-Up,* Report and Order, 19 FCC Rcd 8302 (2004) (adopting section 54.417); 47 C.F.R. § 54.417(a) (2006).

[13] Qwest was able to produce self-certifications for all customers who had initiated Lifeline service after May 12, 2005 requested by the auditor.

[14] AT&T at 4; USTelecom at 9.

Here, in faulting Qwest for not retaining self-certifications that were obtained prior to the time the retention rule went into effect, USAC is judging Qwest's prior conduct by applying the requirements of Section 54.417(a) retroactively. This is unfair and contrary to deeply rooted legal jurisprudence. As mentioned in the previous section, rules are to be implemented prospectively. Any effort to implement rules retrospectively where no statutory authority exists to do so, as is being done here, violates the federal Administrative Procedure Act.[15]

For Qwest to have satisfied USAC's request for self-certifications for customers who initiated Lifeline service before May 2005, Qwest would have needed to have all of its existing customers that had initiated Lifeline service before May 2005 in federal default states re-certify their eligibility for Lifeline services back to the time they had initiated the service. But, the Commission has never explicitly imposed such an obligation. And, in the absence of any such requirement, the document retention requirements of Section 54.417(a) must be read to impose only an obligation to retain self-certifications starting from the effective date of the rule. Additionally, as AT&T has noted, any such re-certification effort would likely have confused customers and made some hesitant to re-certify for reasons that had nothing to do with their qualifications for Lifeline service.[16]

Thus, the Commission should determine that Section 54.417(a) can not be applied retroactively and thus does not include an obligation for ETCs to obtain self-certifications from all of their existing customers in federal default states that initiated Lifeline service before the effective date of the rule. The Commission should find that Qwest is maintaining customer self-

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[15] *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988) (stating that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result").

[16] AT&T at 5.

certifications of eligibility for Lifeline service in Iowa in compliance with Section 54.417(a) and reverse USAC's finding to the contrary and USAC's intended recovery action on this issue.

The Commission Should Grant Qwest's Requested Relief In Full. For the reasons stated above and in its Request for Review Qwest respectfully requests that the Commission reverse the USAC findings to provide the following relief: (1) determine that Qwest is not obligated to report partial Lifeline support amounts on the Form 497 for customers who begin or end Lifeline service during the month; (2) determine that Qwest's process of obtaining a signed certification from the customer that he or she resides on a reservation satisfies the carrier's obligation to ascertain tribal residency of a tribal Lifeline customer and vacate USAC's intended recovery actions on this finding; and (3) determine that Qwest is maintaining customer self-certifications of eligibility for Lifeline service in Iowa in compliance with Section 54.417(a) and vacate USAC's intended recovery action on this finding.

Respectfully submitted,

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July 1, 2008

CERTIFICATE OF SERVICE

I, Joan O'Donnell, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC in hard copy with the Office of the Secretary in WC Docket No. 03-109; 2) served via e-mail on Ms. Antoinette Stevens, of the Telecommunications Access Policy Division of the Wireline Competition Bureau at (antoinette.stevens@fcc.gov); 3) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at (fcc@bcpiweb.com); and 4) served via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

/s/ Joan O'Donnell

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