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EX PARTE

FILED VIA ECFS

October 23, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *In the Matters of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *IP-Enabled Services*, WC Docket No. 04-36

Qwest Communications International Inc. ("Qwest") is filing this *ex parte* with the Federal Communications Commission ("Commission") in the above-referenced dockets.[1]

EXECUTIVE SUMMARY

As Qwest has indicated in prior filings, Commission Chairman Martin is to be commended for his efforts to address comprehensive intercarrier compensation ("ICC") reform before the end of this year. Finding a solution to the complex and intractable problems that plague the current regime has proven to be a difficult and elusive task, to say the least. There is still considerable disagreement about what is the ideal ICC comprehensive reform plan. But, according to recent press reports, the Chairman has presented a potential solution whereby the Commission would implement an ICC reform plan under which states would craft a uniform rate applicable to both interstate and intrastate traffic at or below a $0.0007 per minute cap, local exchange carriers ("LECs") would be able to increase subscriber line charges ("SLC") above existing SLC caps, and

[1] *See In the Matters of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *IP-Enabled Services*, WC Docket No. 04-36.

LECs may be able to tap Universal Service Fund ("USF") monies to offset lost access revenue. If the Chairman's proposed plan is accompanied by provisions or clarifications on certain issues, it could accomplish a significant step towards comprehensive ICC reform. Specifically, as discussed more fully below, it is critical that the Commission do the following:

- Permit carriers to average SLC increases under the new plan across states;
- Establish a short transition period of three years or less;
- Take action immediately, regardless of the length of a transition to a new plan, to address access stimulation;
- Require that states establish a single uniform rate for all carriers in each state;
- Ensure that the access tariff structure remains intact;
- Accompany any delegation to the states with mandatory timelines;
- Clarify that originating access, signaling and transiting are expressly excluded from the scope of the new plan;
- Clarify that, under the new plan, Internet protocol ("IP") traffic is treated identically to all other traffic on the public switched telephone network ("PSTN");
- Ensure that the new plan does not create a new obligation that makes tandem providers the guarantors of the terminating compensation obligations of other carriers; and
- Ensure that its decision implementing that reform has no unintended retroactive consequences regarding Internet service provider ("ISP")-bound traffic.

These issues are all critical, as are the other details that must accompany a plan such as that apparently being studied.

Of course, in the event the Commission does not implement comprehensive ICC reform by November 5, 2008, it is critical that it issue a final order by that date providing further legal justification in response to the D.C. Circuit's remand of the *ISP Remand Order* and ensuring that the decision has no unintended retroactive consequences regarding ISP-bound traffic. As Qwest and other carriers have demonstrated, there are multiple potential legal grounds to support the regime created by the *ISP Remand Order*.

And, if the Commission is unable to accomplish comprehensive ICC reform in the near term, it should still, in addition to addressing ISP-bound traffic as described above, address access stimulation, the status of IP traffic and phantom traffic.

Finally, press reports also indicate that the Commission is considering a universal service reform plan that would require carriers to commit to deploy broadband to 100% of their study areas or wire centers within five years or risk losing their current federal universal service support in those areas. For non-rural carriers, such federal support would include high-cost model support and Interstate Access Support ("IAS"). This proposal apparently would also "freeze" existing federal support in each study area. Qwest heartily supports the Commission's goal of facilitating broadband deployment in unserved areas and, in fact, submitted a proposal last year to use universal service support to spur the deployment of broadband. In pursuing the laudable objective of facilitating broadband deployment, however, it is important that the Commission not lose sight of the following legal and practical considerations: (1) the Commission must address the Tenth Circuit's mandate in *Qwest II*, and cannot do so while freezing or reducing existing high-cost support to rural wire centers served by non-rural incumbent LECs; (2) there is no basis for conditioning IAS on a commitment to deploy broadband; (3) the Commission should adopt achievable objectives for broadband deployment; and (4) the Commission should promote a Lifeline/Link-Up broadband pilot program primarily through outreach by public agencies that already have contact with eligible consumers.

DISCUSSION

I. THE COMMISSION'S ICC PLAN MUST ADDRESS CERTAIN CRITICAL ISSUES

As noted, the problems that plague the current regime are complex and intractable. Despite years of attention, a solution has proven elusive. There is widespread agreement about the cause of the arbitrage problems that plague the current regime -- vastly disparate rates applicable to services that are functionally identical. But, there is considerable disagreement about what is the ideal ICC comprehensive reform plan.[2] Press reports indicate that the Commission is now contemplating a potential ICC reform plan under which states would craft a uniform rate applicable to both interstate and intrastate traffic at or below a $0.0007 per minute cap, LECs would be able to increase SLCs above existing SLC caps, and LECs may be able to tap USF

[2] Qwest's own positions have been detailed most recently in *ex partes* filed on Sept. 24, 2008 and Oct. 7, 2008. *See* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Melissa E. Newman, Qwest, CC Docket Nos. 01-92, 96-45, 99-68, WC Docket Nos. 05-337, 07-135 and 04-36 dated Sept. 24, 2008 ("Qwest Sept. 24, 2008 *ex parte*"). *Also see* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Melissa E. Newman, Qwest, CC Docket Nos. 01-92, 96-45, 99-68, WC Docket Nos. 05-337, 04-36, 06-122 and 05-195 dated Oct. 7, 2008 ("Qwest Oct. 7, 2008 *ex parte*").

monies to offset lost access revenue.[3] If the Chairman's proposed plan is accompanied by provisions or clarifications on the critical issues detailed below, it could accomplish a significant step towards comprehensive ICC reform. These issues are critical as are the other details that must accompany a plan such as that apparently being studied.

A. Carriers Should Have The Ability To Average SLC Increases

It is critical that carriers have the flexibility to choose to average any SLC increases under a new plan across their study areas. SLC increases are essential in order for any ICC reform plan to, as it must, take another significant step in the Commission's long-standing effort to replace implicit subsidies inherent in LEC legacy access charge regimes with direct charges on end users.[4] And, granting carriers the ability to average their SLC increases will accomplish this while ensuring that any resulting SLC increases be as small as possible across the board.[5]

B. It Is Critical That Any Transition Period Be As Short As Possible And No Longer Than Three Years

As Qwest and other carriers have detailed at length in these dockets, the arbitrage problems that plague the Commission's current ICC regime result largely from the application of vastly disparate rates to identical services based on meaningless distinctions. A low uniform rate cap plan like that apparently being studied would go a long way toward eliminating these problems. However, if adopted, it is critical that uniformity be accomplished as soon as possible. Some press reports indicate that Commission is considering a transition period of as long as ten years. A transition even approaching that length will significantly dilute the effectiveness of the plan in eliminating the arbitrage problems it is designed to address. And, given the pace of technological

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[3] *See, e.g.,* "Martin Unveils USF, Intercarrier Compensation Overhaul," Communications Daily, Oct. 16, 2008.

[4] Qwest has proposed that the Commission both allow for SLC increases and establish an explicit support mechanism. Together, these features would ensure that any revised intercarrier compensation system satisfies the legal requirement that carriers have a reasonable opportunity to recover their costs.

[5] Under the Commission's existing rules (Rules 69.152 and 61.3(d)), price cap carriers are permitted to charge SLCs up to defined caps. And, carriers are permitted to calculate their SLCs on a de-averaged or study area basis. Carriers should be permitted to calculate any SLC increases permitted under a new ICC regime on either an averaged or de-averaged basis regardless of how their current SLC levels are calculated. And, presumably, the new rule enabling SLC increases would also have to address the additional revenue component from which these SLC increases would be derived. The easiest way to accomplish this is to define this component as the access shift created by the new plan -- calculated by dividing the annual net access shift by 12 months per year and then by the total billable SLCs (for all SLC types -- *i.e.*, Primary, Non-Primary, and Multiline Business).

change in this industry, it is questionable how effective any new regime would be after such a lengthy passage of time. There is no reason why a transition to a new uniform $0.0007 rate cap plan can not be accomplished in three years and in three simple steps: step #1, an initial reduction of each carrier's rates for all traffic subject to reciprocal compensation and to intrastate or interstate terminating access charges, respectively, by one-third of the difference (as of the effective date of the order) between their current rates and $0.0007; step #2, in which such rates would be reduced in an amount equal to an additional one-third of the difference between their initial (effective date) rates and $0.0007; and step #3, in which such rates would be reduced to the single uniform terminating rate established by each state under the new plan for all traffic.[6]

C. Regardless Of The Length Of A Transition To A New Plan, The Commission Still Must Address The Traffic Stimulation Problem

The unlawful practice of some rural incumbent LECs and competitive LECs to artificially "pump" free conference calling and chat line traffic into their switches, and then charge high access rates which were set based on the assumption that traffic volumes would be low,[7] continues to grow despite the fact that the Commission has taken great strides to fix the problem in the case of incumbent LECs. This is because the artificially pumped traffic has, in many cases, been shifted to sham competitive LECs -- *i.e.*, competitive LECs owned by the same small incumbent LECs whose access stimulation activities the Commission has tried to deal with in the past. In the event that the Commission adopts the comprehensive ICC reform plan under study, traffic stimulation would still need to be addressed during the transition. Traffic stimulation is a somewhat unique form of arbitrage as it is not caused by differentials in ICC rates for the same services. Instead, it is an unlawful abuse of the interstate and intrastate switched access regimes which permit rural LECs to charge extremely high access rates to compensate them for the fact that they have and can expect only limited traffic volumes. The abuse occurs when certain rural LECs in partnership with free calling companies pump artificially high volumes of traffic through these rural switches and share the revenues generated by the extremely high interstate or intrastate access rates. Thus, requiring rural LECs to lower their intrastate switched access rates to their current, and relatively high, interstate levels would not deter these access stimulation schemes.

The Commission can address the problem of access stimulation through modest and immediate measures. Qwest has suggested several possible solutions for dealing, prospectively, with LECs engaged in traffic stimulation, including limiting and clarifying the ability of rural LECs to tariff access services, generally, or by permitting rural LECs to provide tariffed access services only when they certify that they are not engaging in revenue sharing or business

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[6] As discussed in Section I.D, below, in no event should rates be permitted to rise under the new plan.

[7] As Qwest has asserted in several pending cases and dockets, this traffic fails to fall within the scope and language of switched access tariffs in the first instance; yet, these LECs continue to engage in such schemes and continue to bill for this illegitimate traffic.

partnerships with so-called "Free Service Providers."[8] The point is the problem is not going away and it is incumbent on the Commission to deal with it before it wreaks further damage to the access structure.

D. In No Event Should ICC Rates Rise Under Any Comprehensive Reform Plan

If the Commission adopts a unified terminating rate plan with a $0.0007 per minute cap, the Commission also has the authority to freeze current bill and keep arrangements or other arrangements calling for rates lower than $0.0007. As Qwest detailed in recent filings, there are very good policy reasons to ensure that, in adopting any comprehensive ICC reform plan, the Commission does not cause rates to rise. There is also ample legal authority for this result. The Commission indisputably can and should make clear in its order that it does not preempt prior state decisions calling for either a rate lower than the rate established by a state or calling for bill and keep. The Commission can also go further and order that those prior arrangements should at least presumptively remain in force after the implementation of its new regime.[9] As suggested in Verizon's recent white paper, this conclusion would be justified by a finding that negotiated rates are presumptively reasonable, coupled with a finding that the public interest warrants retention of rates closer to bill and keep where such rates have proven feasible in a given context.[10] And, if the Commission has any doubts about its authority to do this, it can simply establish bill and keep/lower rates as the presumptive methodology in those limited circumstances subject to the ability of a party to present adequate evidence supporting an increase to a higher rate at or below $0.0007 per minute to overcome that presumption.

Similarly, the Commission should make certain that its transition methodology does not result in an increase in the rates for any form of terminating traffic, particularly reciprocal compensation. For example, a transition towards a uniform rate could require, as an initial transition stage, that all terminating access traffic become subject to interstate switched access levels (*i.e.*,that intrastate access rates be reduced to interstate access levels).[11] But, in no event, should a transition plan call for all traffic (*i.e.*, traffic including reciprocal compensation traffic) to be subject to rates matching interstate switched access levels. Otherwise, the transition plan would result in higher reciprocal compensation rates, create new forms of arbitrage, and undermine one of the primary objectives that is driving ICC reform.

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[8] *See, e.g.,* Qwest *ex* partes, in WC Docket No. 07-135, dated May 21, 2008 and attachment thereto at 3 and April 25, 2008 and attachment thereto.

[9] Qwest Oct. 7, 2008 *ex parte* at 12-14.

[10] Letter (and attachment thereto) from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *et al.*, dated Sept. 19, 2008.

[11] Again, Qwest supports a simple three-step transition as set forth in section I.B.

E. The Commission Should Require A Single Uniform Terminating Rate For All Carriers In Each State

In the event the Commission adopts a comprehensive ICC reform regime like that being studied, it should clarify in the order that states are required to establish a single uniform terminating rate applicable to all carriers in each state. The alternative, allowing states to establish carrier-specific rates in each state, would create a costly and drawn-out administrative nightmare. Such a step is unnecessary and only promises to significantly dilute the benefits of the plan.

F. The Commission Should Leave The Access Tariff Structure Intact

The Commission should also ensure that the new uniform terminating rate applicable to terminating switched access remains in the state and federal access tariff (*i.e.*, and not an interconnection agreement) under its new plan. In other words, it should clarify that the only change accomplished by its plan is that states would now have the authority to establish the terminating access rate. But, this would not change the fact that the rate and all related terms and conditions for access service remain tariffed.[12] It would be unrealistic and contrary to the public interest to open the massive switched access tariffs to contract negotiations. Indeed, for these reasons, the role of tariffs, generally, in carrier access should, like the subject of originating access, be dealt with in a further rulemaking.

G. The Commission Should Accompany Any Delegation To The States With Mandatory Timelines

If the Commission were to implement a uniform rate ICC reform regime under which states would establish a uniform rate applicable to all traffic capped at $0.0007 per minute, the Commission should accompany any such delegation with mandatory timelines to ensure that the intended benefits of such a reform plan are achieved.

1. The Commission should call for specified timelines that include, among other things, coordination of ICC rate decreases and SLC increases

As discussed above, two aspects critical to any comprehensive ICC reform plan are that the plan eliminate rate disparity that underlies the current arbitrage problems plaguing ICC <u>and</u> that ICC rate decreases occur simultaneously with SLC increases. In order to accomplish the first, the Commission would need to, as part of the plan, ensure that any transitional or permanent ICC rate decreases become effective at the same time across the industry and in all states. Otherwise, the Commission runs the risk of creating a whole host of new arbitrage problems. Indeed, this is another reason to keep any transition to as short a time period as possible and as few steps as

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[12] That is, where they are currently tariffed. This clarification would not create any new tariff obligations.

possible. Finally, the Commission should also ensure that carrier SLC increases become effective on the same date as the carrier ICC rate decreases. Of course, in the event, as Qwest proposes, there will be multiple step-downs in ICC rates, carriers must have the ability to increase their SLCs at each stage.

2. The Commission should establish a default rate in the event states do not act within specified timelines

In addition to adopting a simple three-step transition to be accomplished in no longer than three years with specified timelines imposed on the states, the Commission should address the possibility that certain states may not act within the Commission's specified timelines. The Commission should specify that, in such an event, either bill and keep or a default unified termination rate of $0.0007 shall be triggered for all traffic terminated in that state.

H. The Commission Should Expressly Exclude Both Originating Access, Signaling And Transiting From The Scope Of Any Comprehensive ICC Reform Plan

The Commission should, in the event it adopts a uniform rate cap plan like that described above, clarify that the new regime replaces only terminating ICC charges (*i.e.*, reciprocal compensation for local traffic and interstate and intrastate terminating access charges). Originating access should remain unchanged under this approach and the Commission would address the future status of originating access in a *Further Notice of Proposed Rulemaking*. The Commission should also clarify that the status of transit services and jointly provided switched access and the status of signaling (to the extent that separate rate elements already exist for the signaling messages exchanged and signaling links required) are unchanged by the new regime. These services are not now covered by reciprocal compensation arrangements under section 251(b)(5) nor are they covered by the terminating switched access rates that should be replaced under the plan being studied.

I. Any Comprehensive ICC Reform Plan Should Apply To All Traffic On The PSTN Regardless Of Underlying Technology

The Commission should also clarify that the plan applies identically to all traffic on the PSTN regardless of underlying technology -- *i.e.*, without regard to whether it is local, long distance, wireless, or IP voice traffic -- both during any transition and upon full implementation of the plan. IP voice traffic uses local exchange switching facilities to terminate traffic in the same manner as all other providers and users of voice services. Accordingly, the Commission should rule that a new uniform terminating rate regime applies to IP voice traffic in the same way that it applies to all other traffic that uses the PSTN.[13] Qwest recognizes that the Commission has, in

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[13] In other words, among other things, geographical end-points and not telephone numbers are the proper determinants of whether a call is local versus non-local (or, for non-local traffic, whether

prior rulings, made clear that it has not yet categorized IP traffic as either an information service or a telecommunications service. However, the Commission can ensure that a new uniform terminating rate regime applies equally to IP voice traffic regardless of which regulatory status it assigns to such traffic.

In the event the Commission deems IP traffic on the PSTN (hereafter "IP-on-the-PSTN" traffic)[14] an information service, the Commission can ensure that it receives identical treatment as all other traffic by either clarifying that its Enhanced Service Provider ("ESP") Exemption (hereafter the "ESP exemption") does not apply to such traffic or by, as Qwest has proposed, forbearing from the application of the ESP Exemption to this traffic -- either of which would be change of law rulings.[15] Numerous carriers have contended that the ESP Exemption does not apply to such traffic and, therefore, that, even if such traffic is deemed an information service, it would be subject to the same treatment as other traffic on the PSTN.[16] Other parties have contended, incorrectly, that applying the ESP Exemption to such traffic means that its traffic is

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interstate or intrastate access charges apply). As Qwest explained in previous filings, carriers may use telephone numbers as a surrogate for billing purposes provided, however, that, as in other contexts such as nomadic wireless use, there must be an ability for carriers to ensure that, in the end, billing accurately reflects jurisdiction.

[14] IP-to-IP traffic, as distinct from IP-to-PSTN traffic or PSTN-to-IP traffic, would by indisputably outside the scope of Title II and therefore entirely outside the scope of the Commission's new plan.

[15] To the extent there is a transitional period where there remains a difference between access and reciprocal compensation rates, the most logical approach would be for terminating ILECs who receive IP traffic from a competitive LEC, to bill competitive LECs (rather than treating the IP providers as an interexchange carrier) at the tariffed access rate for access traffic and at reciprocal compensation rates for local traffic. And, once rates for all traffic become uniform, these terminating incumbent LECs would bill competitive LECs at the new uniform rate for all traffic.

[16] *See* Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption, WC Docket No. 08-8, filed Jan. 11, 2008 at iii-iv, 5-6 and Petition of the Frontier Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption, WC Docket No. 08-205, filed Sept. 30, 2008 at iii-iv, 5 (arguing, in the alternative that, should the Commission conclude that IP traffic on the PSTN is subject to the ESP Exemption, the Commission should forbear from its application). Other parties who have shared this position. *See, e.g.*, Comments of the National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Independent Telephone and Telecommunications Alliance and the Eastern Rural Telecommunications Association, WC Docket No. 08-8, filed Feb. 19, 2008 at 2-3.

wholly exempt from access charges under all circumstances.[17] Qwest has previously advocated that the ESP Exemption (using the construct that an ISP Point of Presence or POP is an end user) allows for reasoned analysis of the rights and obligations of carriers when exchanging IP-on-the-PSTN traffic. Under this view, should the Commission deem IP-on-the-PSTN traffic an information service, such traffic would be exempt from access charges to the extent it fell within this definition and would otherwise be treated the same as other traffic on the PSTN. At the same time, however, Qwest does not believe that it makes sense from a policy perspective to treat IP-on-the-PSTN traffic as any different from other like services that utilize the switching architecture of the PSTN in the very same manner. Accordingly, Qwest has previously advocated that the Commission forbear from the application of the ESP Exemption to IP-on-the-PSTN traffic.[18]

J. The Commission Should Not Impose A New Obligation On Tandem Service Providers To Be The Guarantors Of The Terminating Compensation Obligations Of Other Carriers

Certain parties have suggested that the Commission should, as part of a solution to the phantom traffic problem, impose a new obligation on tandem service providers to be the guarantors of the terminating compensation obligations of other carriers.[19] As discussed in Qwest's past filings, a uniform rate plan would go a long way toward eliminating the arbitrage problems that underlie the phantom traffic problem. But, even with adoption of the type of plan currently under study, the Commission should still adopt the proposal the United States Telecom Association ("USTelecom") submitted earlier this year to ensure that adequate signaling stream information accompanies telecommunications traffic.[20] And, in no event should the Commission take action that would result in a new realm of arbitrage opportunities and disputes where transit carriers would be financially responsible when other carriers send traffic to the transit provider for termination with inaccurate or invalid signaling information (and when they pass on the signaling information they receive). Again, transiting occurs when a LEC receives local or intraLATA toll traffic from one carrier for delivery to another carrier. In the transit scenario, the transit service provider has no relationship with either the calling party or the called party and often does not

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[17] *See* Petition for Forbearance of Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC, filed Oct. 23, 2007. *And see* Public Notice, DA 07-5029, rel. Dec. 18, 2007, Order, DA 08-93, rel. Jan. 14, 2008, Erratum, rel. Jan. 18, 2008.

[18] *See* Comments of Qwest Communications International Inc., WC Docket Nos. 07-256 and 08-8 at 13-16, filed Feb. 19, 2008.

[19] *See, e.g.*, Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Thomas Jones, Counsel for tw telecom inc. and One Communications Corp., CC Docket No. 01-92, filed Oct. 14, 2008 at 6-7, 14-15.

[20] *See* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Glenn Reynolds, United States Telecom Association, CC Docket No. 01-92, filed May 16, 2008.

have the ability to identify the true financially responsible party for the traffic.[21] Nor should transit providers have a mandatory call record obligation, but rather call records should be subject to commercial contract negotiation -- both as to the services provided and the rates paid. Among other reasons, this is because the capabilities of carrier networks vary across the industry. At the very least, if the Commission determines to impose these types of new obligations, it should caveat the obligation so that any new obligations are limited to what a carrier's current capabilities commercially permit and that in all events carriers are not required to build new features to implement any new requirements for which they cannot obtain adequate compensation. And, the Commission should expressly rule that the imposition of any new obligations in this area constitute a change of law entitling transit service providers to modify their existing agreements with originating and terminating carriers as appropriate.

K. The Commission Should Ensure That Its Plan Has No Unintended Retroactive Impact On ISP-Bound Traffic

As Qwest has addressed in detail in a prior filing, if the Commission implements comprehensive ICC reform by November 5, 2008, it should ensure that its decision implementing that reform has no unintended retroactive consequences regarding ISP-bound traffic.[22]

II. IN THE EVENT THE COMMISSION DOES NOT ENACT COMPREHENSIVE REFORM IN THE NEAR-TERM, IT IS CRITICAL THAT IT TAKE IMMEDIATE ACTION ON THE *ISP REMAND ORDER* AND OTHER ISSUES

As Qwest has detailed in prior filings in these dockets, in the event the Commission does not enact comprehensive reform in the near-term, it is most critical that the Commission adopt, by November 5, 2008, a final order providing further legal justification for the framework adopted in the *ISP Remand Order* and ensuring that that decision has no unintended retroactive consequences regarding ISP-bound traffic.[23] And, the Commission should take the following important actions:[24]

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[21] As Qwest has detailed in prior filings, transit service is not subject to sections 251 and 252 and transit service providers have no mandatory obligation to provide such service. *See* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Timothy M. Boucher, Qwest, CC Docket No. 01-92, dated Mar. 23, 2006 at 10-16. Nor should a transit service provider be financially responsible when other carriers send traffic to the transit service provider for termination and the transit service provider passes on the signalling information it receives. *See* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Ms. Melissa E. Newman, Qwest, CC Docket No. 01-92, dated Sept. 26, 2007 at 2.

[22] *See* Qwest Sept. 24, 2008 *ex parte* at 4, 12-13.

[23] *Id.* at 12-13.

[24] In addition to the ISP-bound traffic/*ISP Remand Order*, access stimulation, access charges for IP voice traffic, and phantom traffic issues discussed herein, Qwest believes the Commission should also take interim action, as soon as possible and consistent with Qwest's past filings regarding

(1) take further steps to prevent massive and fraudulent "access stimulation" by competitive LECs; (2) rule that, at least on an interim basis, IP-voice traffic is subject to the same access charge treatment as other traffic that uses the PSTN; and (3) address phantom traffic by adopting the proposal of USTelecom submitted earlier this year. Qwest has addressed each of these issues in detail in recent filings.[25]

III. IN PURSUING THE WORTHY GOAL OF BROADBAND DEPLOYMENT THROUGH UNIVERSAL SERVICE REFORM, IT IS CRITICAL THAT THE COMMISSION TAKE ACCOUNT OF CERTAIN LEGAL AND PRACTICAL CONSIDERATIONS

According to press reports, the Commission is also considering requiring carriers to commit to deploy broadband to 100% of their study areas or wire centers within five years or risk losing their current federal universal service support in those areas. For non-rural carriers, such federal support would include high-cost model support and IAS. This proposal apparently would also "freeze" existing federal support in each study area, and establish a pilot program to provide discounted broadband services to Lifeline and Link-Up customers.

Qwest heartily supports the Commission's goal of facilitating broadband deployment for consumers in unserved areas and of limited means. Indeed, Qwest submitted a proposal last year to use universal service support to spur the deployment of broadband connections to unserved households at the lowest possible cost.[26] Qwest also has supported state programs to identify unserved areas through broadband mapping technologies, and to subsidize broadband deployment to such areas. In pursuing the laudable objective of facilitating broadband deployment, however, it is important that the Commission not lose sight of the following legal and practical considerations: (1) the Commission must address the Tenth Circuit's mandate in *Qwest II*, and cannot do so while freezing or reducing existing high-cost support to rural wire centers served by non-rural ILECs; (2) there is no basis for conditioning IAS on a commitment to deploy broadband; (3) the Commission should adopt achievable objectives for broadband deployment; and (4) the

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transiting, Virtual NXX, and intraMTA traffic. *See, generally*, Reply Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking, CC Docket No. 01-92, dated July 20, 2005. Qwest also agrees with AT&T that the Commission should promptly address the asymmetrical compensation, "IP-in-the-Middle," and interconnection point manipulation problems addressed by AT&T in its July 17th *ex parte*. *See* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Henry Hulquist, AT&T, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 05-337, 99-68 and 04-36, dated July 17, 2008 at 10-12. The issues noted above, however, are of highest priority.

[25] *See* note 24, *supra*.

[26] *See* Qwest's Proposal for Broadband Deployment in Unserved Areas, attached to Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Melissa Newman, Qwest, CC Docket No. 96-45, dated July 9, 2007.

Commission should promote a Lifeline/Link-Up broadband pilot program primarily through outreach by public agencies that already have contact with eligible consumers.

A. The Commission Must Address The Tenth Circuit's Mandate In *Qwest II*

A dozen years after enactment of the Telecommunications Act of 1996, the Commission has yet to adopt lawful rules fulfilling the Act's guarantee that rural consumers have access to telecommunications and information services that are "reasonably comparable" in quality and price to those available in urban areas. Twice, the Tenth Circuit has found that the Commission's rules fall short of this fundamental mandate. Three years ago, the court directed the Commission in *Qwest II* to "comply with our decision in an expeditious manner, bearing in mind the consequences of delay."[27]

Under *Qwest II*, the Commission must: (1) revise its definition of what constitutes "sufficient" high-cost support to non-rural carriers to consider all the principles in section 254(b), including affordability, (2) revise its definition of "reasonably comparable" to meet the Commission's obligation to preserve and advance universal service, and (3) modify its methodology for distributing federal high-cost support to ensure that it provides "sufficient" support and guarantees "reasonably comparable" rates and services in rural areas served by non-rural carriers.

Qwest has previously addressed the elements that are necessary to satisfy the Tenth Circuit's mandate.[28] In particular, the Commission needs to reduce the existing benchmark and target additional federal support to the highest cost wire centers (*i.e.*, those with a cost per line of more than 125 percent of the national average urban rate) served by the non-rural incumbent LECs. Such action is necessary because the current study-area based methodology provides little if any federal support to most of these wire centers, while competition in urban areas, such as Phoenix and Omaha, has undermined implicit subsidies.[29] Consequently, any proposal to freeze existing support by study area would conflict with *Qwest II*, as the Joint Board has recognized.[30]

The Commission also cannot fulfill the court's mandate by simply adopting a new program to promote broadband deployment. Section 254's "reasonably comparable" requirement applies to all telecommunications and information services. Thus, the Commission must ensure that its rules

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[27] *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222, 1239 (10th Cir. 2005).

[28] *See* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Shirley Bloomfield and R. Steven Davis, Qwest, CC Docket No. 96-45, dated May 5, 2008.

[29] *Id.*

[30] *See In the Matter of High Cost Universal Service Support, Federal-State Joint Board on Universal Service,* Notice of Proposed Rulemaking, 23 FCC Rcd 1531 at Appendix A, Recommended Decision, n.26 and ¶ 42 (2008).

ensure the availability of voice services at reasonably comparable rates and quality by taking the steps noted above. Without sufficient support, both affordability and service quality are put at risk in these areas. Thus, the Commission should explicitly address its obligations under the Tenth Circuit remand in the context of proposed comprehensive reform.

B. The Commission Should Not Condition Continued IAS On A Commitment To Deploy Broadband

To the extent the Commission intends to refocus existing universal service high-cost support to the deployment of broadband, IAS should be left out of this equation. IAS has nothing to do with supporting deployment of facilities or services in high-cost areas, but rather is intended to replace implicit subsidies in interstate access charges. The *CALLS Order* "reduce[d] these subsidies, and ke[pt] rates affordable in high-cost areas, by replacing the subsidies with explicit interstate access universal service support."[31] Thus, if the Commission determines that universal service support is no longer needed for voice service in high-cost areas -- which it should not for the reasons noted above -- it should maintain existing IAS for non-rural incumbent LECs.

It is also questionable whether the Commission has provided sufficient notice or opportunity for public comment under the Administrative Procedures Act of its apparent intent to terminate IAS support to non-rural incumbent LECs in the absence of a broadband commitment. Neither the *Recommended Decision*, nor the *Further Notice of Proposed Rulemaking*, noted the possibility of such action, or sought public comment on this issue.

C. The Commission Should Adopt Achievable Commitments For Broadband Deployment

According to media reports, the Commission's broadband plan would include a requirement that carriers build out broadband to 100 percent of the customers in certain geographic areas. While an inspiring goal, such a requirement is unlikely to be achieved within five years. Indeed, the Commission does not require eligible telecommunications carriers ("ETCs") to provide ubiquitous coverage of supported services today. Where a request for service comes from a customer within an ETC's service area but outside its existing network coverage, the ETC is required to provide service within a reasonable period of time "if service can be provided at reasonable cost," by taking certain predefined measures.[32] In Qwest's service territory, there is

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[31] *In the Matter of Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262, et al., 15 FCC Rcd 12962, 12975 ¶ 32 (2000) ("*CALLS Order*").

[32] *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371, 6381 ¶ 22 (2005). If an ETC determines that it cannot serve the customer using one or more of these methods, then the ETC must report the unfulfilled request to the Commission within 30 days after making such determination. *Id.*

a small percentage of customers to which it may not be economically feasible to deploy broadband using today's technologies.[33]

In other contexts, the Commission also has stopped short of requiring providers to build-out to 100 percent of the population within a specified timeframe. Last year, the Commission adopted "stringent performance requirements" for C Block licensees in the 700 MHz band, including a requirement to provide coverage to at least 75 percent of the population of the license area by the end of the ten-year license term.[34] Even for services used for public safety networks, the Commission has recognized the infeasibility of ubiquitous deployment. Just last month, the Commission tentatively concluded that a ten-year build-out requirement of 99.3 percent of population for D Block licensees would not be commercially feasible, and that reducing this benchmark would result in billions of dollars in capital and expense savings.[35] The Commission therefore proposed to adopt coverage benchmarks ranging from 90 to 98 percent at the end of fifteen years, depending on population density.[36]

The Commission should take a similar approach here, by reducing broadband build-out requirements to more achievable levels.

D. The Commission Should Rely Primarily On State and Federal Government Initiatives To Promote A Lifeline/Link-Up Broadband Pilot Program

According to press reports, the Commission may establish a broadband pilot program under the umbrella of the current Lifeline and Link-Up programs. The success of such a pilot program depends on eligible consumers being aware of the program and signing up for it. It therefore is critical that the Commission adopt effective measures to promote the program and enable eligible low-income consumers to participate.

In Qwest's experience, outreach is most effective when done through public agencies that already have contact with eligible consumers. Tools that simplify the application process, such as

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[33] In some rural areas served by Qwest, local loops can exceed 75 miles. Several years ago, Qwest estimated that it would cost approximately two billion dollars to offer DSL throughout its service areas just in the states of Colorado, South Dakota, Washington, and Wyoming. Comments of Qwest Communications International Inc., CC Docket No. 96-45, dated Nov. 5, 2001 at 2 and n.7.

[34] *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15351 ¶¶ 162-63 (2007).

[35] *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, Third Notice of Proposed Rulemaking, WT Docket No. 06-150, PS Docket No. 06-229, FCC 08-230 ¶ 150 (Sept. 25, 2008). The Commission noted that existing commercial infrastructure currently covers only approximately 90 percent of the nation's population. *Id.* ¶ 151.

[36] *Id.* ¶ 149.

automatic enrollment through another qualifying program, can dramatically increase participation, and typically are much more effective than advertising of Lifeline and Link-Up by ETCs.

Qwest has engaged in a variety of Lifeline and Link-Up outreach efforts, including the use of bill inserts, radio and bus sign awareness campaigns, and print advertising, but these efforts have had limited success in increasing the number of customers purchasing Qwest's Lifeline and Link-Up services. Where Qwest has seen the greatest increases in Lifeline and Link-Up enrollment is where outreach has been conducted in conjunction with state, local or tribal agencies that enroll low-income consumers in qualifying government assistance programs, such as Low Income Home Energy Assistance Program ("LIHEAP"), Food Stamps, or Temporary Assistance for Needy Families ("TANF"). In states where consumers are provided an opportunity to "automatically" enroll for Lifeline benefits in this way, Qwest has seen greater participation by eligible consumers.

The Commission should use this experience with the current low-income programs to improve the success of the broadband pilot program, by focusing its outreach efforts on state, local and tribal agencies, and by providing a funding mechanism to support cooperative outreach and Lifeline enrollment assistance.

CONCLUSION

For the reasons stated above, Qwest requests that the Commission take the action described herein.

Respectfully submitted,

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