

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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I. INTRODUCTION

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

In its Notice of Inquiry released last month,¹ the Federal Communications Commission (“FCC” or “Commission”) seeks to refresh the record regarding the *Qwest II*² “remand” issues. The New Jersey Division of Rate Counsel (“Rate Counsel”) submitted initial and reply comments in 2006 addressing the issues that the Court remanded to the FCC,³ and, in these initial comments, now reiterates many of the same points, which continue to be relevant to the FCC’s deliberations. More recently, in 2008, Rate Counsel submitted initial and reply comments, which address issues that relate in

¹ / *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 09-28, *Notice of Inquiry*, released April 8, 2009 (“NOI”).

² / *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (“Qwest II”).

³ / 96-45/05-337, Initial Comments of the New Jersey Division of Rate Counsel, March 27, 2006 (“Rate Counsel Remand Initial Comments”); 96-45/05-337, Reply Comments of the New Jersey Division of Rate Counsel, May 26, 2006 (“Rate Counsel Remand Reply Comments”). These comments are listed in Appendix A to these comments, and are available through the Commission’s Electronic Comment Filing System (“ECFS”).

part to *Qwest II*.⁴ Rate Counsel does not attempt to repeat its many analyses and discussions in these comments but rather incorporates them by reference.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.⁵ The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices."⁶ The FCC's decisions regarding high cost funds will affect New Jersey's competitive landscape and New Jersey's consumers. Unduly large universal service support burdens consumers in contributing states, thus thwarting the goal of universal service.

⁴ / 96-45/05-337, Initial Comments of the New Jersey Division of Rate Counsel on the Joint Board Recommended Decision, April 17, 2008 ("Rate Counsel RD Initial Comments"); 96-45/05-337, Reply Comments of the New Jersey Division of Rate Counsel on the Joint Board Recommended Decision, June 2, 2008 (Rate Counsel RD Reply Comments). These comments are listed in Appendix A, and are available through the FCC's ECFS.

⁵ / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

⁶ / *N.J.S.A.* 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

B. SCOPE OF THE PROCEEDING

The FCC seeks comment on four proposals: the Qwest proposal; the Vermont and Maine proposal; the Embarq proposal; and the CostQuest proposal.⁷ The FCC also seeks comment on:

- The definition of “reasonably comparable”;⁸
- The definition of “sufficient”;⁹ and
- The funding mechanism.¹⁰

Rate Counsel has addressed many of the questions that the FCC raises in this *NOI* in other phases of this proceeding, and, therefore, will simply highlight some of its major recommendations. In reply comments, Rate Counsel may elaborate further on these matters based on its review of others’ initial comments.

C. PROCEDURAL BACKGROUND

In its *Ninth Report and Order* (1999), the Commission established a forward-looking federal high-cost support mechanism for non-rural carriers¹¹ and a nationwide cost benchmark to determine support that was set at 135% of the national average cost per line.¹² The *Ninth Report and Order* was remanded by the Tenth Circuit in 2001, after

⁷ / *NOI*, at paras. 8-13.

⁸ / *Id.*, at paras. 14-16.

⁹ / *Id.*, at paras. 17-20.

¹⁰ / *Id.*, at paras. 21-28.

¹¹ / Non-rural carriers are defined as incumbent local exchange carriers that do not meet the definition of a rural telephone company. *Federal-State Joint Board on Universal Service*, FCC CC Docket No. 96-45, *Order on Remand*, 18 FCC Rcd 22559 (2003), *remanded, Qwest II*, 398 F. 3d 1222 (“Order on Remand”), at note 1, citing 47 U.S.C. § 153(37). As explained by the Commission, “rural telephone companies are incumbent carriers that either serve study areas with fewer than 100,000 access lines or meet one of the three alternative criteria.” *Id.* Rural carriers serve fewer than twelve percent of lines. *Id.*

¹² / *In the Matter of Federal-State Joint Board on Universal Service*, FCC CC Docket No. 96-45; *High-Cost Universal Service Support*, FCC WC Docket No. 05-337, *Notice of Proposed Rulemaking*, Rel. December 9, 2005 (“2005 NPRM”), at para. 3.

the Court determined that the Commission had failed to define “sufficient” and “reasonably comparable” adequately¹³ and failed to provide sufficient support for its 135% benchmark.¹⁴ In addition to requiring the Commission to define the statutory terms and to provide adequate justification for the level of support selected on remand, *Qwest I* also required the FCC to develop mechanisms to induce state action with regard to the development of their own universal service programs and to explain its plan for all universal service mechanisms, as a whole, more fully.¹⁵

The Commission issued its *Order on Remand*, in response to *Qwest I*, in October 2003. In its *Order on Remand*, the Commission adopted a rate review and expanded certification process “to induce states to ensure reasonable comparability of rural and urban rates in areas served by non-rural carriers.”¹⁶ The Commission defined “sufficient” as “enough federal support to enable states to achieve reasonable comparability for rural and urban rates in high-cost areas served by non-rural carriers,” and “reasonably comparable” by setting a national urban residential rate benchmark.¹⁷ The Commission set a national urban *rate* benchmark at two standard deviations above the average urban residential rate and a *cost* benchmark based on two standard deviations above the national average cost.¹⁸

¹³ / *Qwest II*, at 1228, citing *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001)(“Qwest I”).

¹⁴ / *2005 NPRM*, at para. 4.

¹⁵ / *Qwest II*, at 1228.

¹⁶ / *2005 NPRM*, at para. 5.

¹⁷ / *Id.*

¹⁸ / *Id.*

In February 2005, the Tenth Circuit remanded the Commission's *Order on Remand. Qwest II* held that the Commission had still failed to define "sufficient" and "reasonably comparable" stating that the Commission's definition of sufficient:

. . . ignores the vast majority of § 254(b) principles by focusing solely on the issue of reasonable comparability in § 254(b)(3). The Commission has not demonstrated in the Order on Remand or the limited record available to this court why reasonable comparability conflicts with or outweighs the principles of affordability, or any other principles for that matter, in this context.¹⁹

The Court directed the Commission to define "sufficient" in a manner which "considers the range of principles" contained in the statute.²⁰ The Court further found that:

. . . the Commission's selection of a comparability benchmark based on two standard deviations appears no less arbitrary than its prior selection of a 135% cost-support benchmark. On remand, the FCC must define the term "reasonably comparable" in a manner that comports with its concurrent duties to preserve and advance universal service.²¹

Thus, the non-rural high-cost support mechanism was deemed invalid.²² The Court did, however, uphold the Commission's determination that states are not required to replace implicit subsidies with explicit subsidies and the Commission's requirements with respect to state certification of reasonably comparable rates.²³

In its *2005 NPRM*, the FCC sought comment on issues raised by the court in *Qwest II*, but has not yet issued a decision addressing those issues. In his statement issued with the NOI in this proceeding, Acting Chairman Michael J. Copps indicates that the Commission "will conclude with a final order by the middle of April 2010."

¹⁹ / *Qwest II*, at 1234.

²⁰ / *Id.*

²¹ / *Id.*, at 1237.

²² / *2005 NPRM*, at para. 6.

²³ / *Id.*

II. DISCUSSION OF ISSUES

In seeking to achieve reasonable comparability, the Commission should focus on broadband deployment.

The Court directed the Commission to take into account the range of principles set forth in Section 254(b) of the Act. These principles include:

- (1) *Quality and Rates* – Quality services should be available at just, reasonable, and affordable rates.
- (2) *Access to Advanced Services* – Access to advanced telecommunications and information services should be provided in all regions of the Nation.
- (3) *Access in rural and high cost areas* – Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
- (4) *Equitable and Nondiscriminatory contributions* – All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
- (5) *Specific and predictable support mechanisms* – There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
- (6) *Access to Advanced Telecommunications Service for Schools, Healthcare, and Libraries*- Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).
- (7) *Additional principles* – Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

As Rate Counsel stated previously:

In the legislation enacted more than ten years ago, Congress directed the Commission and state regulators to “promote universal service by ensuring that consumers in all regions of the nation have access to affordable, quality telecommunications services.” Ten years later, as the Commission continues to grapple with how to achieve this objective while balancing the Congressionally-established principles, the major difference in the local telecommunications market is that consumers are increasingly availing themselves of broadband access, in an apparent mirroring of the trend when consumers increasingly adopted basic local exchange service between the 1920s and 2000.²⁴

Therefore, as each year passes, it becomes increasingly important that the FCC focus on mechanisms to ensure that all consumers throughout the country, whether in rural or non-rural areas, have access to affordable broadband service at reasonable speed upload and download speeds. The ubiquitous penetration of basic local service has been achieved. The wireless service (to which incumbent local exchange carriers refer in the numerous proceedings in which they have sought, often successfully, deregulation) is offered with “nationwide” plans, and, therefore, offer inherently “reasonably comparable” rates in rural and urban areas. VoIP-based services similarly are typically offered at rates that do not distinguish between rural and urban areas. As Rate Counsel’s earlier comments demonstrate, increasing numbers of customers subscribe to bundled services. For customers with limited disposable income, Lifeline support can be expanded, to ensure reasonably comparable access to basic and broadband services.²⁵

The focus of universal service funding, therefore, should shift to broadband service in order to ensure sufficient support and reasonably comparable access by all consumers throughout the country to affordable broadband service.

²⁴ / Rate Counsel Remand Initial Comments, at 8-9.

²⁵ / Rate Counsel was an early and consistent advocate of subsidies for broadband service offered to Lifeline customers, a position that has been gathering support over the recent years by many entities.

Among the key considerations that Rate Counsel reiterates regarding the Commission's deliberations for this proceeding are:

- States ultimately should retain authority over affordability issues.
- The FCC should acknowledge that the country has a long history of some rate variance, and, therefore, the achievement of “reasonable comparability” need not eliminate all variation.
- The Commission, in any order issued in this proceeding, should explain to the Court that the entire universe of the multiple universal service programs collectively *advance* universal service, and, therefore, the non-rural high cost fund should not be held up in isolation to fulfill entirely the congressional mandate to advance universal service.²⁶
- The use of universal service funds (whether they be for high cost support or to support the deployment of affordable broadband service) should translate into tangible benefits for consumers. As Rate Counsel has previously stated: “As a result of the Act, non-rural carriers are receiving more money, in the name of competition, but have not demonstrated a consumer benefit of either lower rates or higher service quality.”²⁷
- When funds are distributed to carriers, rather than to customers, the need for accountability is heightened in order to insure that consumers truly benefit from USF subsidies.

²⁶ / Rate Counsel Remand Initial Comments, at 14.

²⁷ / *Id.*, at 19.

- Rate Counsel applauds the Commission for its efforts to improve its broadband data collection²⁸ because improved data collection and analysis will support the “reasonably comparable” deployment of affordable broadband service. As Rate Counsel stated in comments filed earlier in this proceeding:

If, as a nation, we seek to ensure that all segments of society have comparable access to advanced services, the Commission should broaden its investigation beyond the framework of this proceeding, which simply compares rural and urban areas. In this more broadly defined investigation, the Commission should consider not only whether rural areas have broadband access comparable to that of urban areas, but also whether all socioeconomic groups have comparable access. Furthermore, access needs to be examined not only from the perspective of whether consumers have the *option* to subscribe to broadband service (*i.e.*, is the infrastructure deployed to the consumer’s neighborhood?), but also whether consumers actually *subscribe to* advanced services.²⁹

- As Rate Counsel stated two years ago: “To promote the affordable availability of advanced services, incumbent local exchange carriers (“ILEC”) should offer broadband and fiber to the home at plain old telephone (“POTS”) prices. If there are areas of the country that are either underserved or entirely neglected, the boundaries of those areas should be defined clearly. If the reason for the lack of advanced services is that the anticipated revenues from the advanced services would not cover the anticipated cost of deployment, the

²⁸ / *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, released: June 12, 2008 (“Form 477 Order”).

²⁹ / Rate Counsel Remand Initial Comments, at 21.

areas should be opened to high-cost bidding by competitors to serve the area. Competitors should then be required to commit to specified minimum service quality requirements, maximum pricing constraints, and minimum years of commitment to service. The competitor requiring the least amount of high cost support should be awarded the unique opportunity to serve the area for a specified period of time, until it can be demonstrated that the geographic area can support multiple suppliers. Alternatively, consumers should be awarded high cost/advanced services funds directly to be used as an offset against broadband charges.”³⁰

- An important component of determining whether high cost funds might be needed to promote advanced services is assessing the present demand for and deployment of broadband services.
- Reasonable comparability also means: “Connecting homes in disenfranchised inner-city neighborhoods to advanced infrastructure is equally as important as connecting rural communities to the nation’s evolving network.”³¹ Furthermore, “because there are important and inevitable differences in rate design, such as variations in the size of local calling areas, any comparisons should not seek precision, but rather approximations of comparability.”³²

³⁰ / *Id.*, at 23-24. *See also*, discussions of underserved and unserved in FCC Consultative Role in the Broadband Provisions of the Recovery Act, GN Docket No. 09-40, Rate Counsel Comments, April 13, 2009, which are available electronically through the FCC’s ECFS.

³¹ / Rate Counsel Remand Initial Comments, at 26.

³² / *Id.*, at 31.

Also, the increasing demand for bundled offerings underscores the importance of comparing similar “baskets” of services.³³

- Rate Counsel reaffirms its recommendation that non-rural high-cost support for traditional basic local service be eliminated.³⁴
- Furthermore, the Commission should acknowledge and explain to the Court the inherent tension and contradictions within the language of the Act. High cost support is intended to render implicit support explicit, which would imply rate reductions in lower cost areas, while maintaining existing rural rates as a result of the high cost subsidy. Yet were a carrier to lower urban rates, the disparity between urban and rural rates would simply increase, thwarting the goal of reasonable comparability.³⁵
- Rate Counsel reaffirms its concern that there has been no proof that continued support is still required when the basic loop is used for multiple services, many of which have been found to be competitive. As Rate Counsel previously stated:

The theory that carriers cannot lower urban rates to meet competition without eroding implicit support for rural areas, although superficially appealing, has not been proven. Indeed, the competition that the Act envisioned has not materialized, and now, ILECs are benefiting from a high cost windfall, which was created to replace implicit support purportedly eroded by competition. If such competition truly threatened ILECs, one would expect ILECs to voluntarily *lower* rates in urban areas to meet the competition. Rate Counsel is not aware of ILECs lowering

³³ / *Id.*, at 33-34.

³⁴ / Rate Counsel has previously advocated the sunset of the non-rural high-cost fund. *See, e.g.*, Rate Counsel Remand Reply Comments, at 3, Rate Counsel RD Initial Comments, at 46.

³⁵ / Rate Counsel Remand Initial Comments, at 38-39.

local exchange rates as a result of receiving high cost support.³⁶

- It is difficult to justify high cost support (that is purportedly granted because no carrier would otherwise serve the area) to a carrier when its rates have been deregulated in the face of purported competition.³⁷

Wire center proposals should be rejected.

In seeking comment on various proposals, the FCC has inexplicably neglected to include the proposals put forth by the National Association of State Utility Consumer Advocates (“NASUCA”), an oversight that Rate Counsel urges the Commission to address. Rate Counsel addressed the merits of Qwest’s proposal in Rate Counsel’s reply comments submitted in June 2008 (listed in Appendix A to these comments). Among other things, Rate Counsel described the flaws inherent in a support system that is based on the wire center and demonstrated why new sources of revenues easily offset the purported loss of implicit subsidies. Rate Counsel may address the other proposals in reply comments.

III. CONCLUSION

Rate Counsel urges the Commission to address the concerns raised in *Qwest II* in a timely manner, consistent with the suggestions set forth in these comments.

³⁶ / Rate Counsel RD Initial Comments, at 43.

³⁷ / Rate Counsel RD Reply Comments, at 15.

Respectfully submitted,

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Appendix A

List of Selected Rate Counsel Filings

Note: The following comments, all of which were filed in WC Docket No. 05-337/CC Docket No. 96-45, are available through the Commission's Electronic Comment Filing System

96-45/05-337, Initial Comments of the New Jersey Division of Rate Counsel, March 27, 2006

96-45/05-337, Reply Comments of the New Jersey Division of Rate Counsel, May 26, 2006

96-45/05-337, Initial Comments of the New Jersey Division of Rate Counsel on the Joint Board Recommended Decision, April 17, 2008

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