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EX PARTE

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August 20, 2009

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

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

Dear Ms. Dortch:

1. The Federal Communications Commission Can Lawfully Define Reasonably Comparable Rates And Services Based On A Comparison Of Rates And Services Within Each State

Qwest Communications International Inc. (“Qwest”) has proposed that the Federal Communications Commission (“Commission”) define reasonably comparable high-cost/rural rates by comparing high-cost/rural rates with urban rates *within a state*. There are several reasons why such a comparison is legally permissible.

First and foremost, the plain language of the Communications Act permits this interpretation. The guiding principle for access to services in rural and high cost areas is the following:

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.¹

This language affords the Commission flexibility in defining “reasonably comparable,” including defining which rural and urban rates should be compared.

In fact, the Joint Board recognized early on that reasonable comparability under this principle could include comparison of rural and urban rates within a state.² Although the Joint Board later recommended that the Commission require the states to certify that rates in high-cost areas were reasonably comparable to a national average urban rate benchmark, the record does not reflect whether the Joint Board ever considered comparing rates in high-cost areas to a state average urban rate benchmark within each state.³

Further, such a comparison for universal service purposes under the Act is not novel. Congress has already recognized and adopted this type of comparison for providing certain universal service support. In the rural health care program, the Act provides support to telecommunications providers to enable them to provide telecommunications services to health care providers in rural areas at rates that are reasonably comparable to the rates at which they provide such services to health care providers in urban areas within the same state.⁴ Thus, not only is such a comparison plausible under the plain language of the Act for preserving and advancing access to communication services to all consumers in high-cost areas, but it has been expressly endorsed by Congress for preserving and advancing access to communication services by health care providers in rural areas. It would be eminently reasonable to extend this approach to other consumers of communication services in high-cost areas.

¹ 47 U.S.C. § 254(b)(3).

² *In the Matter of Federal-State Joint Board on Universal Service*, Second Recommended Decision, 13 FCC Rcd 24744, 24754 ¶ 18 (1998) (stating that “[w]hile the Act does not define reasonable comparability, we interpret that term to refer to a fair range of urban/rural rates both within a state’s borders, and among states nationwide.”). The Commission subsequently adopted this view, but the Tenth Circuit later found that this was too vague to be a sufficient definition of “reasonably comparable” for addressing universal service support to high-cost areas. *In the Matter of Federal-State Joint Board on Universal Service, Access Charge Reform*, Seventh Report & Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report & Order in CC Docket No. 96-262, and Further Notice of Proposed Rulemaking, (“*Seventh Report and Order*”), 14 FCC Rcd 8078, 8092 ¶ 30 (1999); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-02 (10th Cir. 2001) (“*Qwest I*”).

³ *See In the Matter of Federal-State Joint Board on Universal Service*, Recommended Decision, 17 FCC Rcd 20716, 20736-38 ¶¶ 50-53 (2002) (recommending that the Commission evaluate reasonable comparability of rates in high-cost areas using a national average urban rate benchmark).

⁴ *See* 47 U.S.C. § 254(h)(1)(A).

Still further, the Tenth Circuit's decisions in *Qwest I* and *Qwest II* also permit this interpretation. In both decisions the Tenth Circuit concluded that the Commission had failed to adequately define "reasonably comparable" for purposes of addressing universal service support to high-cost areas.⁵ In each case, the Tenth Circuit in remanding the matters instructed the Commission to better define "reasonably comparable" to comport with the Commission's duties under the universal service provisions of the Act. Nothing in the orders prohibits the Commission from redefining reasonably comparable to be a comparison of high-cost/rural and urban rates within each state.

2. The Commission Can Justify Using A Cost-Based Support Mechanism In Compliance With The Statutory Obligation To Promote Reasonably Comparable Rates

As Qwest has stated, it may be very difficult for the Commission to provide empirical data showing that a cost-based support mechanism causes reasonably comparable rates.⁶ But, in finding fault with the existing funding mechanism, the Tenth Circuit ultimately directed the Commission to "utilize its unique expertise to craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service . . . [and] fully support its final decision on the basis of the record before it."⁷

Thus, what is critically important is that the Commission: (1) show that its adopted support mechanism preserves and advances universal service; and (2) provide a method for confirming that rates in high-cost areas receiving support under that mechanism are reasonably comparable to urban rates. By re-targeting high-cost support to individual high-cost wire centers, the Commission can demonstrate that the cost-based support mechanism is preserving and advancing universal service. And requiring a state certification that rural rates are reasonably comparable to urban rates in the state will enable compliance with the statutory obligation to address reasonably comparable *rates*.

3. The Commission Should Build On Its Existing Process For Permitting States To Request Further Federal Action When Rural Rates Are Not Reasonably Comparable

⁵ See *Qwest I*, 258 F.3d at 1201-02; *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222, 1234-37 (10th Cir. 2005) ("*Qwest II*").

⁶ See Comments of Qwest Communications International Inc., WC Docket No. 05-337 and CC Docket No. 96-45, filed May 8, 2009 at 15-17 ("Qwest Comments").

⁷ *Qwest II*, 398 F.3d at 1237 (emphasis in original).

The Commission currently has in place the following process as set out in its *Order on Remand* from *Qwest I*:

93. We adopt the Joint Board's recommendation to permit states to request further federal action, if necessary, based on a showing that federal and state action together are not sufficient to achieve reasonable comparability of basic service rates in rural, high-cost areas served by non-rural carriers within the state to urban rates nationwide. Further federal actions could include, but are not limited to, additional targeted federal support or actions to modify calling scopes or improve quality of service where state commissions have limited jurisdiction. The ability to request further federal action provides a means to address any isolated failures to achieve reasonable comparability of rural rates that may require extraordinary efforts to resolve. Consistent with the Joint Board's recommendations, we will require that any request for further federal action fully explain the basis of the request, including a demonstration that the state's rural rates are not reasonably comparable to urban rates nationwide and that the state has taken all reasonably possible steps to achieve reasonable comparability through state action and existing federal support.
94. On receipt of a request for further federal action, the Wireline Competition Bureau will expeditiously issue a public notice seeking comment on the request. Although we expect the Commission to act as rapidly as possible, we note that a request for further federal action will necessarily involve consideration of a wide range of issues, including rates in non-rural carriers' service areas throughout the state and state universal service mechanisms. We further note that, although we expect requests for further federal action to be rare, it is possible that multiple requests for further federal action may be filed at the same time.⁸

The basic structure of the two requirements should be sufficient for the Commission to evaluate state requests for additional federal support. But the Commission could also require the states to quantify the amount of additional federal support needed. In fully explaining the issue, the states should describe the regulatory basis for their existing rates. Additionally, the states' discussion of the actions that have been taken should describe the states' use of federal high-cost support as well as the use of the states' own universal service support and how the two funds together have been used to reduce the gaps between the urban rates (however they are defined) and the rural rates. Finally, the states should fully describe the method for calculating the additional support

⁸ *In the Matter of Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559, 22614-15 ¶¶ 93-94 (2003) (footnotes omitted).

requested and demonstrate how the additional support will bring the rates within the acceptable range of comparability.

4. The Commission Can Legally Choose To Support A Single Line Per Household Or Business Per Eligible Telecommunications Carrier

As Qwest has stated previously, Qwest continues to believe that the Joint Board's 2004 recommendation to limit high-cost support to one connection per household is the most sensible solution to move the high-cost support mechanism toward its core objectives, while controlling the size of the fund. By supporting a single connection for each subscriber, the Commission would help ensure that subscribers in high-cost areas continue to have affordable access to supported services, consistent with the principles of Section 254(b). Of course, Qwest recognizes that each year since the Joint Board made that recommendation Congress has passed language to prevent implementation of that recommendation, including in legislation earlier this year:

None of the funds appropriated by this Act may be used by the Federal Communications Commission to modify, amend, or change its rules or regulations for universal service support payments to implement the February 27, 2004 recommendations of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal service support payments.⁹

As a legal matter, however, the Commission remains free to implement a solution other than the specific recommendation made by the Joint Board in its February 27, 2004 decision. Arguably, this includes adopting a proposal to limit support to a single connection per household or business that is not based on the Joint Board's 2004 recommendation. But such action would rely on a very narrow reading of the restriction and, in any case, would be difficult to implement where more than one eligible telecommunications carrier ("ETC") provides telephone service to the household or business. Thus, Qwest believes that a legal and workable compromise would be to support a single connection for each ETC serving a particular household or business.

5. Qwest Refutes NASUCA's Complaints Regarding The *Ex Parte*

On August 7, 2009, the National Association of State Utility Consumer Advocates ("NASUCA") filed an *ex parte* addressing our July 13, 2009 *ex parte*. Qwest briefly responds here to that *ex parte*.

First, NASUCA complains that Qwest has only mentioned the high-cost support it receives from the high-cost model. Qwest has focused on the Commission's high-cost support model for distributing high-cost support to non-rural carriers, because that is the mechanism that has twice

⁹ P.L. 111-8, Mar. 11, 2009, 123 STAT. 658 at Section 502.

been found by the U.S. Court of Appeals for the Tenth Circuit to be invalid, and thus is the mechanism the Commission must address to satisfy its obligations under the *Qwest II* remand. Qwest's Interstate Access Support ("IAS") is irrelevant to this proceeding. As the Commission explained in creating the IAS mechanism, "[i]n contrast to the Commission's existing high-cost support mechanisms for rural and non-rural carriers, which provide support to enable states to ensure reasonable comparability of *intrastate* rates, the purpose of the new federal interstate access universal service support mechanism is to provide explicit support to replace the implicit universal service support in *interstate* access charges."¹⁰ Thus, any support Qwest receives through the IAS mechanism does nothing to alleviate Qwest's high intrastate costs of providing local service in more rural areas. It is these high costs that are addressed by the high-cost model mechanism which must be fixed by this Commission in accord with the Tenth Circuit's remand in *Qwest II*.

Next, it seems NASUCA wishes to place the entire burden of ensuring universal service in high-cost areas on the states. NASUCA's view is that if rural rates in a state are reasonably comparable to urban rates, no additional support can be needed to sustain service in the rural areas. Any relief Qwest might need from artificially low rates should be provided by the state. The problem with this view is that it is contrary to the Commission's statutory universal service obligations. As the Tenth Circuit held, "[i]n drafting the statute, Congress unambiguously imposed an explicit subsidy requirement on federal support mechanisms; no such requirement is expressly imposed on the states."¹¹ The Commission cannot abandon its statutory obligation to provide explicit federal universal service support.

NASUCA also complains that Qwest has not identified sufficient sources and amounts to fully offset the increases to the universal service fund caused by its proposal. Qwest has suggested ways the Commission could *partially* offset any increases to the fund. There is no obligation for the Commission to fully offset any increases to the fund. As the Joint Board recognized in its Recommended Decision, addressing the *Qwest II* remand could result in increasing federal high-

¹⁰ See *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, 13043 ¶ 195 (2000), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied, National Association of State Utility Consumer Advocates v. FCC*, 535 U.S. 986 (2002); *on remand, Access Charge Reform; Price Cap Performance Review for LECs; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249 and 96-45, Order on Remand, 18 FCC Rcd 14976 (2003).

¹¹ *Qwest II*, 398 F.3d at 1232.

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cost support to non-rural carriers and thus the Joint Board declined to include that support in its proposed caps on high-cost support.¹²

Finally, NASUCA complains that Qwest has not demonstrated that its reform proposal is necessary to ensure that non-rural carriers' rural rates are reasonably comparable to their urban rates. Qwest respectfully disagrees. Qwest has repeatedly shown that areas that are high-cost areas as identified by the high-cost model are not receiving federal high-cost support.¹³ These areas need federal high-cost support if reasonably comparable services and rates in these areas are to be achieved and maintained.

This *ex parte* is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b). Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

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¹² *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd 20477, 20487 ¶ 42 (2007).

¹³ *See, e.g.*, Qwest Comments at 8; Qwest *ex parte* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission from Shirley Bloomfield and R. Steven Davis, Qwest, CC Docket No. 96-45 and WC Docket No. 05-337, filed May 5, 2008 and its attached Proposal for Implementing the Tenth Circuit's Remand in *Qwest II* at 25 & Attachment A.