

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
High Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company	)	

**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc. (Qwest), submits these comments in accord with the Commission's Public Notice in the above-referenced docket.<sup>1</sup> USAC has sought guidance from the Commission on several issues related to the universal service programs that it administers. Qwest responds here to some of these issues and recommends that the Commission (1) not require ETCs to advertise each supported service and functionality enumerated in 47 C.F.R. § 54.101, (2) not apply its document retention rules retroactively, (3) implement the earlier company-specific caps on the CETC high-cost support of Alltel and AT&T, and (4) overhaul the universal service contribution methodology as soon as practicable.

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<sup>1</sup> *Public Notice*, WC Docket Nos. 05-337, 06-122 and CC Docket No. 96-45, Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the USAC, DA 09-2117 (rel. Sept. 28, 2009).

**I. The Commission Should Not Require ETCs To Advertise Each Supported Service And Functionality Enumerated In 47 C.F.R. § 54.101.**

USAC is seeking guidance as to whether eligible telecommunications carriers are required to separately list each supported service enumerated in 47 C.F.R. § 54.101 and the charges for those services when advertising the availability of the services. Under the Commission's rules, ETCs must offer the services supported by federal universal service mechanisms set out in Rule 54.101 and "[a]dvertise the availability of such services and the charges therefore using media of general distribution."<sup>2</sup> Interpreting this advertising requirement to mandate that ETCs advertise each of the identified services and functionalities listed in Rule 54.101(a) is excessive. All of the services and functionalities except the toll limitation service are provided by ETCs as part of their basic telephone service offerings.

Requiring ETCs to advertise each of these elements of their telephone service as part of their general advertising is impractical. It serves no useful purpose for anyone – customer, potential customer, or carrier – to require carriers to advertise that their telephone service includes, for example, “dual tone multi-frequency signaling or its functional equivalent.” Nor do carriers even necessarily have separate charges for these particular services or functionalities. Instead, most of these items are included in a single charge for basic telephone service. A better interpretation is that ETCs are required to advertise the basic telephone service that incorporates these services and functionalities and the cost of that service.

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<sup>2</sup> 47 C.F.R. § 54.201(d)(2). The services and functionalities specifically identified as supported by federal universal service mechanisms in Rule 54.101(a) are: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

This issue has also arisen in the context of ETCs advertising their services for the universal service low-income program.<sup>3</sup> The Commission should also take this opportunity to clarify that in advertising the availability of Lifeline service, ETCs are not required to advertise each of the enumerated supported services and functionalities of Rule 54.101(a).

## **II. The Commission Cannot Apply Its Document Retention Rules Retroactively.**

USAC also seeks guidance on how to address a carrier's failure to retain documentation prior to the effective date of the Commission's document retention rule for the high-cost program. On August 29, 2007 the Commission released an order adopting a five-year document retention requirement for the high-cost program.<sup>4</sup> The new rule became effective on January 23, 2008.<sup>5</sup> The Commission should make clear that carriers are not in violation of the Commission's high-cost program document retention rule if they did not retain high-cost program documentation prior to the effective date of the rule. Carriers should not be penalized for failing to retain documentation prior to the time that there was an effective obligation to do so. Rules are to be implemented prospectively, and any effort to implement rules retrospectively where no statutory authority exists to do so, as would be the case here, is invalid.<sup>6</sup> The Commission has expressed no intent to implement this rule retroactively; nor has it identified any statutory authority which would permit it to do so. Here, if a carrier is faulted for not retaining

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<sup>3</sup> Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, WC Docket No. 03-109, Apr. 17, 2009, at 8-9.

<sup>4</sup> *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Report and Order, 22 FCC Rcd 16372 (2007); 47 C.F.R. § 54.202(e).

<sup>5</sup> 73 Fed. Reg. 11837 (Mar. 5, 2008).

<sup>6</sup> *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988) (stating that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms[]") (citation omitted).

documents prior to the time the retention rule went into effect, USAC is judging the carrier's prior conduct by applying the requirements of 47 C.F.R. § 54.202(e) retroactively. This is patently unfair and contrary to long-standing legal tenets.<sup>7</sup> The Commission must confirm that the document retention requirements of Section 54.202(e) only require a carrier to retain documentation starting from the effective date of the rule.

This issue of the appropriate scope of Commission document retention rules has come up in other FUSF programs as well.<sup>8</sup> The Commission should also take this opportunity to clarify that all of its FUSF document retention rules are only to be applied prospectively from their effective dates.

### **III. The Commission Should Affirm The Earlier Implementation Of The AT&T And Alltel Company-specific Caps On Their High-cost CETC Support.**

USAC seeks guidance on whether the AT&T and Alltel company-specific CETC high-cost support caps should have been implemented in accord with the effective date of their orders which would have been prior to the August 1, 2008 effective date of the CETC industry-wide interim cap order. The Commission should determine that the company-specific caps should be implemented consistent with the terms of those Orders and thus prior to implementation of the industry-wide cap. In the Alltel Order the Commission stated that it was in the public interest to

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<sup>7</sup> *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 . . .”) (footnote omitted).

<sup>8</sup> Among other issues, Qwest has sought review of a USAC audit finding that Qwest was not in compliance with the Lifeline program document retention requirement of 47 C.F.R. § 54.417(a) because Qwest had not retained proper documentation of its customers' Lifeline eligibility in accord with the rule before the rule's effective date. *See* Request for Review by Qwest Communications International Inc. of Decision of the Universal Service Administrator, WC Docket No. 03-109, Apr. 25, 2008, at 10-12. All comments on the Request have supported Qwest's positions on the issues raised, and the Request is awaiting a Commission decision.

“immediately” address Alltel’s continued receipt of CETC funding.<sup>9</sup> Less than a month later, it released the AT&T Order imposing an interim cap on AT&T’s CETC funding and applying the same condition of capping the funding at the combined companies’ June 2007 funding annualized. In the Alltel Order, the Commission required that the cap be maintained “until fundamental comprehensive reforms are adopted to address issues related to the distribution of support and to ensure that the universal service fund will be sustainable for future years.”<sup>10</sup> Similarly, AT&T’s cap was to apply until the earlier of (1) “comprehensive universal service reform addressing issues related to the distribution of high-cost support[.]” or (2) any change to Alltel’s cap.<sup>11</sup> Consistent with the terms of these orders, Alltel and AT&T’s CETC support should be capped at their June 2007 support annualized, and should remain that way until the Commission implements fundamental reform of the distribution of high-cost support. The fact that the Commission subsequently issued an industry-wide CETC cap which capped support for CETCs at their March 2008 support annualized, should not alter the terms under which the Alltel and AT&T support were previously capped.

#### **IV. The Commission Should Move To A New Contribution Methodology.**

USAC is seeking guidance on the appropriate classification of revenues from the provision of ATM, frame relay, virtual private network (VPN) and dedicated Internet protocol services. Some carriers are reporting these revenues as non-telecommunications revenues that

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<sup>9</sup> *In the Matter of Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee For Consent To Transfer Control of Licenses, Leases and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 19517, 19521 ¶ 9 (2007).

<sup>10</sup> *Id.*

<sup>11</sup> *In the Matter of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20329 ¶ 71 (2007).

are not FUSF-assessable revenues, but USAC apparently believes that these revenues are subject to FUSF contributions.

Often ATM and frame relay are basic transmission services that are telecommunications services and when they are interstate services they are subject to FUSF contributions. But, if ATM or frame relay is offered as the transmission component of wireline broadband Internet access on a non-common carrier basis, under the Commission's *Wireline Broadband Internet Access Order*, these would be services that are not telecommunications services and not FUSF-assessable.<sup>12</sup> Consequently, classifying the revenues of ATM and frame relay services is not a clear or simple task.

With respect to VPNs, they can be accomplished through different transmission architectures, and different transmission protocols including multi-protocol label switching (MPLS). The Commission has recently addressed MPLS and FUSF contributions. Earlier this year, the Commission proposed certain "non-substantive" clarifications to the FCC Form 499-A instructions including adding language to "clarify" that MPLS services are "interstate telecommunications" for FUSF contribution purposes and that FUSF-assessable revenues include those obtained from "offering dedicated capacity between specified points even if the service is provided over local area switched *MPLS*, ATM or frame relay networks."<sup>13</sup> These revisions regarding MPLS in the Form 499-A instructions set off a flurry of activity in the industry, and the Commission subsequently sent a letter to USAC explaining that the changes to

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<sup>12</sup> *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14909-12 ¶¶ 102-06, 14915-16 ¶¶ 112-13 (2005).

<sup>13</sup> Public Notice, Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions, DA 09-454 (rel. Feb. 25, 2009); Telecommunications Reporting Worksheet, FCC Form 499-A (2009), Revised, February 2009, at Instructions – Page 26 (emphasis added).

the instruction were “non-substantive” and that “[f]ilers providing services that use frame relay, ATM, MPLS, or other transmission protocols should report their revenues consistent with Commission precedent.”<sup>14</sup>

About the same time, Masergy Communications filed a petition for clarification of the Commission’s addition of “MPLS” in the 2009 Form 499-A instructions asking that the Commission clarify that only local access between a customer’s location and ingress to the MPLS network could be subject to FUSF, but that the MPLS network itself was an information service. The Commission noticed the Masergy petition for comment. The comments filed in response to the Petition reflected that some in the industry view MPLS-based services to be information services that are not FUSF assessable. As such it seems that the plain language of the revised instruction is in conflict with industry interpretation of existing Commission precedent, and thus the Commission’s efforts to provide “clarification”, merely created greater confusion regarding the proper treatment of MPLS-based services for FUSF contribution purposes.

These situations highlight the need for reform of the FUSF contribution methodology. Since the Commission’s first decision to use interstate and international telecommunications service revenues as the basis for assessing FUSF contributions, the Commission has had to continually refine, modify, and clarify what services are and are not FUSF-assessable and how they should be assessed.<sup>15</sup> The existing FUSF contribution methodology is increasingly a

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<sup>14</sup> Letter from Jennifer K. McKee, FCC to Michelle Tilton, USAC, 24 FCC Rcd 3929, 3930 (2009).

<sup>15</sup> *E.g., In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, CC Docket Nos. 96-61 & 98-193, Report and Order, 16 FCC Rcd 7418, 7446-48 ¶¶ 47-54

patchwork of instruction clarifications and Commission decisions that leave too many gaps as to the proper contribution treatment of new services that are not easily classified as telecommunications services or information services, as interstate or intrastate. Providers attempt to impose these classifications on their services for contribution purposes only to find that others in the industry are drawing different distinctions. In today's market where FUSF assessments can constitute a 12% difference in the price of competitive services, inconsistent industry application of FUSF assessments can constitute competitive harm.

The simple fact is, enough is enough. It is time to move away from the artificial distinctions of this revenue-based approach. Universal service contributions need to be competitively neutral both as to what types of providers are contributing and how they are contributing. Universal service contributions should not influence or drive customer purchasing behavior. As telecommunications technology fortunately but relentlessly advances, determining revenues generated from interstate telecommunications services has become more complex. It is harder to separate interstate from intrastate revenues as (1) newer technologies have neither the need nor the ability to monitor the physical end points of the communications they enable, (2) services simultaneously enable interstate and intrastate communications, and (3) new providers

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(2001); *In re Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, IP-Enabled Services*, WC Docket Nos. 06-122 & 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006); *In re Regulations of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006); *In the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731 (2008).

generally are not subject to jurisdictional separations. Additionally, telecommunications revenues are increasingly difficult to separate from non-telecommunications revenues as new services, such as IP-enabled services, are difficult to classify and as telecommunications and non-telecommunications services are bundled. Moreover, the need to classify service as interstate or intrastate, telecommunications service or information service primarily, if not solely, for purposes of contribution to the Universal Service Fund is increasingly unreasonable.

Section 254(d) requires that providers of interstate telecommunications services contribute in an equitable and non-discriminatory manner.<sup>16</sup> The statute does not require that providers of interstate telecommunications services contribute based on the *revenues* of their interstate telecommunications services. Thus, the Commission has the authority to move away from requiring contributions on a revenue basis.

In lieu of spending more time providing piecemeal guidance on revenue classification of services for FUSF assessments, the Commission should reform the entire contribution methodology. The Commission needs to move to a methodology that is easier for both ETCs and USAC to administer, easier for customers to understand, and that affords a more competitively neutral application of universal service contributions in today's telecommunications marketplace.

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<sup>16</sup> 47 U.S.C. § 254(d).

Respectfully submitted,

By: /s/ Tiffany West Smink  
Craig J. Brown  
Tiffany West Smink  
Suite 950  
607 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20005  
303-383-6619  
[craig.brown@qwest.com](mailto:craig.brown@qwest.com)  
[tiffany.smink@qwest.com](mailto:tiffany.smink@qwest.com)

*Attorneys for Qwest Communications  
International Inc.*

October 28, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket Nos. 05-337, 06-122 and CC Docket No. 96-45; 2) served via email on Ms. Cindy Spiers at [Cindy.Spiers@fcc.gov](mailto:Cindy.Spiers@fcc.gov) and Ms. Antoinette Stevens at [Antoinette.Stevens@fcc.gov](mailto:Antoinette.Stevens@fcc.gov), both of the Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission; and 3) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

/s/ Richard Grozier

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