

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (Qwest) submits these comments in accord with the Federal Communications Commission's (Commission) *Further Notice of Proposed Rulemaking (FNPRM)* released on December 15, 2009 in the above-referenced dockets.¹

I. INTRODUCTION AND SUMMARY

The current non-rural high cost support program is fundamentally flawed. In clear contravention of universal service principles, it does not provide sufficient support and it does not ensure reasonably comparable rates. But, rather than substantively addressing the program's defects identified by the Tenth Circuit in its *Qwest II* decision, the *FNPRM* proposes to sustain the failed program with a new legal justification. To justify its inaction, the Commission proposes to reclassify the existing mechanism as "interim" -- fourteen years after Congress directed the Commission to establish the fund and five years after the Tenth Circuit issued its second remand of the non-rural high-cost program. It is too late for interim orders, and the problems with the current program are too significant to be glossed over by new legal arguments. It is time for the Commission to satisfy its obligations both to Congress and the Tenth Circuit by

¹ *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, FCC 09-112, Further Notice of Proposed Rulemaking, WC Docket No. 05-337 and CC Docket No. 96-45, rel. Dec. 15, 2009.

establishing a program that provides sufficient support to non-rural carriers and ensures reasonably comparable rates.

In *Qwest II*, the Tenth Circuit instructed the Commission to accomplish three tasks on remand: (1) define “sufficient” support in a manner that appropriately considers the range of universal service principles, (2) define “reasonably comparable” in a manner that is consistent with the Commission’s duty to preserve *and advance* universal service, and (3) provide data to demonstrate that the distribution mechanism results in reasonably comparable rates and otherwise addresses universal service principles including the obligations to preserve and advance universal service.² The Commission’s tentative conclusions fail to accomplish any of these tasks.

First, the Commission submerges its definition of sufficient support by refusing to consider any increase to the size of the fund. Starting from the prerequisite that the size of the non-rural fund may not be increased precludes the Commission’s proper consideration of universal service principles and arbitrarily penalizes incumbent non-rural carriers for the problems of the high-cost program and the contribution mechanism. The Commission needs to address those problems directly, and not use them as an excuse to evade its legal obligations to fix the non-rural high-cost support program.

Second, the Commission raises further questions but proposes no definition of “reasonably comparable” that is consistent with its obligation to advance universal service. The Commission must redefine “reasonably comparable” because it cannot justify the existing approach and satisfactorily address the court’s concerns. The current definition has in fact permitted a larger gap between rural and urban rates than the gap that the Tenth Circuit

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

suggested should be narrowed in order for the Commission to comply with its obligation to advance universal service. The Commission must adopt a definitional approach to reasonable comparability that will advance universal service.

Third, the Commission concludes that the existing distribution mechanism is a valid “interim” mechanism, but fails to justify this assertion. The Commission provides no data showing that the mechanism results in reasonably comparable rates and fails to demonstrate that the current mechanism advances universal service in any manner.

And, in fact, the Commission cannot do so. The current mechanism neither provides sufficient support nor ensures reasonably comparable rates. There is nothing the Commission can say to alter this reality. Practically, the only way the Commission can satisfy its legal remand obligations is to modify the mechanism. Nothing less will suffice.

Further, the Commission must adopt and implement those substantive modifications now. At a minimum, the Commission must better target support to high-cost areas. To better target support, the Commission should target support to wire centers where costs exceed 125% of the national average urban rate. The use of statewide average costs for distributing non-rural high-cost support must be eliminated, because it overwhelmingly fails to provide support to many of the nation’s most sparsely populated communities served by non-rural carriers.

The Commission should define rural rates as reasonably comparable to urban rates where the rural rates in a given state are within 25% of the statewide average urban rate for similar services within the state. Further, in a state where the state cannot certify that rates are reasonably comparable and the state has rebalanced rates to remove implicit subsidies, the Commission should have an automatic process for providing that state additional funding to enable the rates to be reasonably comparable.

Qwest projects that its proposal if adopted would increase the non-rural high-cost model fund size from the currently-projected fund size for 2010 of \$322 million to approximately \$1.6 billion. But, the Commission could implement measures to reduce or offset this amount, such as altering the support benchmark, only supporting a single line per household or business per eligible telecommunications carrier (ETC), eliminating interstate common line support and interstate access support for competitive ETCs, eliminating the identical support rule, and reforming the universal service contribution mechanism.

II. AN INVALID MECHANISM – FOURTEEN YEARS AND COUNTING

In Section 254 of the Communications Act, Congress directed the Commission to act within fifteen months to establish a universal service fund to support affordable telecommunications services in all regions of the country, and to ensure, in particular, that customers in rural and urban areas pay “reasonably comparable” rates for “reasonably comparable” services. But, in the almost fourteen years since that enactment, the Commission has failed to craft a mechanism that achieves these aims with respect to the support of services provided in high-cost areas by non-rural carriers. The Commission has attempted to implement its statutory universal service obligations with respect to non-rural high-cost support, but has twice produced a mechanism that the Tenth Circuit has deemed arbitrary and inconsistent with the statute’s universal service principles. As a result, the Tenth Circuit has twice rejected and remanded the Commission’s non-rural, high-cost universal service orders, first in 2001 and again in 2005. Both times, the court directed the Commission to revisit its statutory universal service obligations and adopt a high-cost support program for non-rural carriers that comports with the statute’s principles and goals. In its 2005 decision, *Qwest II*, the court declined to impose a deadline by which the Commission had to act, recognizing that it would take some time to develop the administrative record, empirical findings, and careful analysis that would be needed

to comply with the court's remand. But it also stated that "[w]e fully expect the FCC to comply with our decision in an expeditious manner, bearing in mind the consequences inherent in further delay."³

Approximately nine months after the *Qwest II* decision issued, the Commission issued a *Notice of Proposed Rulemaking* to address the court's remand of the non-rural high-cost support program.⁴ But, after receiving public comment on the *NPRM*, the Commission let the issue languish. Entreaties to the Commission to address the remand were unsuccessful. Thus, last January, Qwest and the state public service commissions for Maine, Vermont, and Wyoming petitioned the Tenth Circuit to issue a writ of mandamus directing the Commission to resolve the *Qwest II* remand issues and comply with the universal service statutory requirements within ninety days of the court's order. Ultimately, the Commission agreed to a timeline for releasing a final order in April 2010 that responds to its *Qwest II* remand obligations, and the court denied the mandamus petition as moot.⁵

But, for the reasons discussed below, the Commission's tentative conclusions in the *FNPRM* indicate that the Commission's anticipated final order still will not satisfy its *Qwest II* remand obligations.

³ *Id.*, 398 F.3d at 1239.

⁴ *In the Matter of Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 20 FCC Rcd 19731 (2005).

⁵ See Response of Federal Communications Commission to Petition for a Writ of Mandamus, Case No. 09-9502, filed Mar. 6, 2009 at 2; Mandamus denied as moot, Order, Mar. 20, 2009 (10th Cir.).

III. THE COMMISSION'S TENTATIVE CONCLUSIONS DO NOT SATISFY ITS REMAND OBLIGATIONS

A. The Commission's Definition of "Sufficient" Fails to Appropriately Consider the Range of Universal Service Principles

In *Qwest II*, the court held that the Commission's definition of "sufficient" (as used in Section 254(e)) inappropriately focuses only on the issue of reasonable comparability in Section 254(b)(3), and fails to consider any of the other principles of Section 254(b). On remand, the court ordered the Commission to articulate a definition of "sufficient" that appropriately considers the range of principles identified in the text of the statute. But, in the *FNPRM*, the Commission precludes an appropriate definition of "sufficient" by starting from the premise that in fixing the non-rural high-cost support mechanism it must not increase the size of the Federal Universal Service Fund (FUSF). Most, if not all, would agree that the size of the FUSF is a problem and that solutions must be found. But, refusing to increase the size of the non-rural high-cost fund is a faulty prerequisite that immediately destroys the validity of the Commission's proposed compliance solution. It also irrationally penalizes incumbent non-rural carriers for the problems of the high-cost fund and contribution mechanism which the Commission needs to address directly. Those problems cannot excuse the Commission's evasion of its legal obligations to create a valid non-rural high-cost support program.

Starting from the prerequisite that the fund size may not be increased is contrary to the Commission's statutory and remand obligations. In *Qwest II*, the Tenth Circuit addressed the fact that part of the Commission's definition of "sufficient" was limiting federal support to be "only as large as necessary" to meet the statutory goal of reasonably comparable rates. The Tenth Circuit explained that it was not against this concept in the abstract.⁶ But, this concept

⁶ *Qwest II*, 398 F.3d at 1234.

requires that the Commission *first* determine what support is “necessary” and then evaluate whether other universal service principles, such as affordability, mitigate what is “sufficient” support. Section 254 instructs that “[t]he Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles” and then sets out those principles in section 254(b).⁷ None of those principles --including the current Commission-identified principle of competitive neutrality -- addresses the size of the fund in any manner. This is not to say that the size of the fund is wholly irrelevant to the analysis, but it cannot be the driving principle for implementing the non-rural high-cost support mechanism. The Joint Board has recognized as much in declining to include non-rural high-cost support in any proposed funding cap pending reform of that mechanism in accord with the Tenth Circuit remand in *Qwest II*.⁸

Starting from a premise that is not an articulated principle underlying universal service policy precludes the Commission’s compliance with the Tenth Circuit’s instruction that “[o]n remand, the FCC must articulate a definition of ‘sufficient’ that appropriately considers the range of principles identified in the text of the statute.”⁹ By elevating the size of the fund above the statutory universal service principles, the Commission destroys its ability to appropriately define sufficient support.

For high-cost support to be truly “sufficient” it should enable a carrier of last resort to recover its costs to provide the supported services in high-cost areas that exceed an affordable

⁷ 47 U.S.C. § 254(b).

⁸ As the Joint Board recognized in its Recommended Decision, addressing the *Qwest II* remand could result in increasing federal high-cost support to non-rural carriers and thus the Joint Board declined to include that support in its proposed caps on high-cost support. Recommended Decision, 22 FCC Rcd 20477, 20487 ¶ 42 (2007).

⁹ *Qwest II*, 398 F.3d at 1234.

price benchmark for the supported services. An “affordable” price benchmark is necessary because sufficient high-cost support should include enough support to enable rates in high-cost areas to remain affordable for most customers. Where carriers provide the services at a price greater than the benchmark, those carriers need only recover support for their costs above that price. For carriers providing their services at lower than the price benchmark because a state has required the lower price, a state universal service fund should provide support for the additional costs not being recovered.¹⁰ The Commission should develop empirical data that demonstrates that it is providing support in this manner that accomplishes rural rates that are not unreasonably above the affordable price benchmark and are reasonably comparable to urban rates for comparable services.

Additionally, refusing to consider any increase to the size of the non-rural fund continues to penalize incumbent non-rural carriers for the inequities and errors of the high-cost program and contribution mechanism. For instance, rural carriers receive more than five times the amount of high-cost support that non-rural carriers receive for providing a similar amount of comparable high-cost lines. In 2010, rural carriers are currently projected to receive approximately \$1.7 billion in High Cost Loop support and Local Switching Support, while non-rural carriers are projected to receive approximately \$322 million in High-Cost Model support.¹¹ This significant difference in support, 84% for rural carriers, and only 16% for non-rural carriers, suggests that rural carriers must serve many more high-cost lines than the non-rural carriers. Yet, a comparison of lines served out of wire centers with a cost above \$50 per line reveals that

¹⁰ Congress fully expected that universal service would be preserved and advanced through specific, predictable and sufficient federal *and state* mechanisms. *See* 47 U.S.C. § 254(b)(5).

¹¹ *See* Universal Service Administrative Company Report HC-01, High Cost Support with Capped CETC Support Projected by State by Study Area 1Q2010.

rural carriers serve 2.8 million of these lines and non-rural carriers serve 2.9 million.¹² The Commission could ameliorate this inequity by modifying high-cost support to focus on the nature of the area served and not the nature of the carrier providing the service. Instead, the Commission intends to perpetuate this significant disparity in high-cost support by refusing to consider any increase to the size of the non-rural fund.

Further, the fact that the high-cost fund has grown as large as it has is due to several factors that the Commission also needs to remedy. It is well recognized that growth in high-cost support to competitive ETCs has been the greatest factor in increasing the size of the high-cost fund.¹³ And fundamentally, there is a tension between enabling universal access to telecommunications services and supporting competitive ETCs at all. As the number of competitive ETCs continues to increase, the Commission must address whether or how supporting those competitive ETCs advances universal service. The Commission needs to directly address interstate access support and interstate common-line support to competitive ETCs as well as the continued validity of the identical support rule.¹⁴ Additionally, the

¹² For this comparison, Qwest used data from Universal Service Fund Data: NECA Study Results, 2008 Report (submitted to the Commission on Sept. 30, 2009), <http://www.fcc.gov/wcb/iatd/neca.html/>, to calculate the rural carrier lines and data from the Commission's Hybrid Cost Proxy Model to calculate the non-rural carrier lines.

¹³ See, e.g., *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6491 ¶ 33 (2008).

¹⁴ Comments of Qwest Communications International Inc., WC Docket No. 05-337, *et al.*, filed Nov. 26, 2008 at 35-36.

Commission needs to develop a method for assessing whether there are areas receiving high-cost support where that support is no longer necessary to preserve or advance universal service.¹⁵

Similarly, the high contribution factor, for the first time this quarter at over 14%, is also due to a variety of factors that need to be addressed. Certainly, the increasing size of the universal service fund, driven to a large extent by increases in the high-cost fund, is a key factor. But, there is also the problem of a decreasing revenue base as customers move away from purchasing the volume of traditional interstate telecommunications services that they have in the past and as more services are available that do not require contributions in the same manner as traditional interstate telecommunications services.¹⁶ There is also the problem of insufficient guidance on the proper contribution treatment of new services that are not easily classified as telecommunications services or information services, as interstate or intrastate, which seems to result in inconsistent contribution treatment of similar services across the industry.¹⁷

The Commission needs to address these problems directly. It cannot use them as an excuse to evade its legal obligations to fix the non-rural high-cost support mechanism. Refusing to increase support to non-rural ETCs because of the problematic growth in high-cost support from other causes and the growing contribution factor is not an effective solution to the fund-size problem. It is just another wrong solution that will perpetuate the need for high-cost reform. Instead, the Commission needs to address the causes in high-cost fund growth and contribution-

¹⁵ See Comments of Qwest Communications International Inc., GN Docket No. 09-51, WC Docket No. 05-337, RM-11584, filed Jan. 7, 2010.

¹⁶ See *In the Matter of Universal Service Contribution*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Red 7518, 7527-28 ¶¶ 17-18 (2006).

¹⁷ See Comments of Qwest Communications International Inc., WC Docket Nos. 05-337 and 06-122 and CC Docket No. 96-45, filed Oct. 28, 2009 at 7-9.

factor growth which are at cross-purposes with the statutory universal service principles directly. It cannot use those problems to preclude mandated reform of the non-rural high-cost program.

B. The Commission Has Not Proposed A Definition of “Reasonably Comparable” That Is Consistent With Its Duty To Advance Universal Service

In *Qwest II*, the court held that the Commission’s definition of “reasonably comparable” is faulty. The court instructed the Commission, on remand, to define the term “reasonably comparable” in a manner that comports with its concurrent duties to preserve *and advance* universal service.”¹⁸

The Commission’s current definition is that rates are reasonably comparable if they fall within two standard deviations of the national average urban rate. The Tenth Circuit found that the Commission’s approach assumes that Congress considered rural and urban rates reasonably comparable in 1996. The court concluded that “[t]he Commission erred in premising its consideration of the term ‘preserve’ on the disparity of rates existing in 1996 while ignoring its concurrent obligation to advance universal service, *a concept that certainly could include a narrowing of the existing gap between urban and rural rates.*”¹⁹

In the *FNPRM*, the Commission has not reached a tentative conclusion on this issue, but has instead asked for further comment on how to address this remand obligation. The Commission should define “reasonably comparable” in a manner that is consistent with how the supported services are available in the telecommunications marketplace. It may be that in today’s market the Commission should require comparison of both stand-alone local service rates and bundled local and long distance service rates. This could advance universal service by expanding the scope of rates offered to rural consumers that should be reasonably comparable to

¹⁸ *Qwest II*, 398 F.3d at 1237 (emphasis added).

¹⁹ *Id.* at 1236 (emphasis added).

the rates offered to urban consumers. But, the Commission must not only determine what rates and services should be compared, but also how they should be compared. In this instance, the approach of two standard deviations from an average urban rate does not ensure reasonably comparable rates as it permits too great a range in rates. Another approach is needed.

One approach would be to compare rural and urban rates within a state. Although currently rural rates are compared to a national average urban rate, there is no language in Section 254 that requires that the rates be compared on a nationwide basis. The Commission could determine that rural rates within a state are reasonably comparable to urban rates within that state if the rural rates were within 25% of the statewide average urban rate for similar services. Urban rates would be the rates for services offered in standard metropolitan statistical areas.²⁰ Each state commission would certify annually whether the rates offered by non-rural carriers in the state's rural areas are reasonably comparable to the rates offered in the state's urban areas. Assessing reasonable comparability based on a comparison of rural and urban rates within a state is a more practical comparison that is better aligned with states' authority over local rates. Such an exercise should also yield a more meaningful comparison as well, assuming state rate designs are consistent across the state.²¹

Certainly, however, the Commission should not maintain its existing definition of reasonably comparable rates. In the five years since the *Qwest II* remand order, the gap between urban and rural rates that the court held could be narrowed to comply with the Commission's obligation to advance universal service has not narrowed, but has instead widened. At issue in

²⁰ See Comments of Qwest Communications International, WC Docket No. 05-337, CC Docket No. 96-45, filed May 8, 2009 at 12-13 (Qwest May 8 Comments).

²¹ If, however, a state certifies that rural and urban rates are not reasonably comparable, additional federal support should be available to enable reasonable comparability to the extent that the state has rebalanced rates to remove implicit subsidies.

the *Qwest II* decision was the fact that a “reasonably comparable” rural rate just below the comparability benchmark of \$32.28 was just over 106% of the lowest urban rate.²² The Tenth Circuit was unable to sanction this difference as accomplishing reasonably comparable rates.²³ Now, using 2007 data, the most recent Commission data available, a rural rate just below the comparability benchmark of \$36.52 would be 119% of the lowest urban rate.²⁴ While the Commission’s current definition of “reasonably comparable” has been in place, the court-concerning rate disparity between rural and urban rates has only increased. The Commission must redefine what constitutes reasonably comparable rates.

C. The Commission Fails to Justify Maintaining the Existing Mechanism

In *Qwest II*, the Tenth Circuit held that the Commission’s non-rural high-cost support mechanism is invalid because the Commission had provided no empirical evidence that the mechanism results in reasonably comparable rates. The court instructed that “[o]n remand, the FCC must 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. No less important, the FCC must fully support its final decision on the basis of the record before it.”²⁵

²² See *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, 22584-85 ¶ 41 (2003); see also, *Qwest II*, 398 F.3d at 1236-37; *Qwest, et al.*, Petition for Mandamus to the Federal Communications Commission, filed Jan. 14, 2009 at 25-26.

²³ See *Qwest II*, 398 F.3d at 1237.

²⁴ See 2008 FCC Reference Book, Table 1.13. It is worth noting that the text of the Commission’s Reference Book refers -- apparently erroneously -- to Table 1.13 as showing a comparability benchmark of \$37.36. Reference Book at I-4. If that were correct, the disparity allowed under the Commission’s methodology would be even greater: A rural rate of \$37.35 would be almost 124% of the lowest urban rate.

²⁵ *Qwest II*, 398 F.3d at 1237.

In the *FNPRM*, instead of proposing any substantive modifications to the invalid mechanism, the Commission attempts to justify the existing mechanism. Although the Tenth Circuit's order provides the opportunity for the Commission to provide further data and explanation to justify the existing mechanism as a valid distribution mechanism, in reality there is no further data or explanation that can justify the current mechanism. The mechanism as currently structured does not provide sufficient support or enable reasonably comparable rates. The mechanism must be modified to satisfy the Commission's legal remand obligations.

But, working from the incorrect premise that it must not increase the size of the high-cost support fund, the Commission attempts to justify the invalid mechanism on the basis that it is a valid "interim" mechanism for distributing high-cost support. This cannot be countenanced. The Commission cannot now call the current invalid distribution mechanism an "interim" mechanism, and expect that moniker to excuse its failure to fix the mechanism.

The "interim" label is not appropriate. The non-rural high cost support mechanism was not adopted as an "interim" mechanism. And, for the last fourteen years, the mechanism has never been considered to be an "interim" mechanism. It is true the Commission is now working at a frenetic pace to complete its National Broadband Plan for Congress. The plan was originally scheduled to be presented to Congress by February 17, 2010, but the Commission has requested an additional month to prepare the report. And, it is good to hear that the Commission anticipates that it will "undertake comprehensive universal service reform when it implements [the Plan's] recommendations."²⁶ But, the future is far from certain, and given the Commission's track record, there is no guarantee that such reform will occur anytime soon. Even if the Commission acts quickly to propose universal service reforms in the Plan, there will likely be

²⁶ *FNPRM* ¶ 1.

long transition plans to implement those reforms, such that the current non-rural high-cost support mechanism will most likely remain in place for several more years.

Consequently, the fact that the Commission is now working hard at issues related to broadband cannot excuse the Commission from complying with its *Qwest II* remand obligations, which arose five years ago. It is neither necessary nor appropriate to wait for comprehensive universal service reform in the context of the National Broadband Plan to address the Commission's obligations under the *Qwest II* remand. To attempt to justify continuing the invalid non-rural support distribution mechanism indefinitely because the Commission has delayed so long in addressing its remand obligations that it is now considering additional reforms to the entire universal service system mocks judicial authority and is unfair to the non-rural carriers and their customers who have been waiting years for this reform.

If the Commission were to make substantive changes to the non-rural high-cost support program in its April order, but also anticipate that it would make additional substantive changes in the near future, then that modified mechanism could arguably be an "interim" mechanism. Even then, the mechanism the Commission adopts in April must still satisfy the Commission's legal obligations under the *Qwest II* remand. But for certain, merely re-labeling the existing mechanism as an "interim" mechanism pending further reform, will not satisfy those legal obligations.

Further, the fact that the Commission cannot justify the non-rural high-cost support mechanism as a valid mechanism without the "interim" label speaks volumes. It reveals that the Commission is unable to provide a rationale supported by the record that this is otherwise a valid mechanism for distributing high-cost support to non-rural carriers. And, ultimately, this is the fatal blow to the Commission's efforts to sustain the existing mechanism. The mechanism is

flawed to its core, and there is no explanation or data that can sustain it and satisfy the Commission's remand obligations. The Commission has not demonstrated that the current mechanism advances universal service, provides sufficient support, or ensures reasonably comparable rates. And there is no way for the Commission to do so.

First, that the Commission may be considering explicitly providing universal service support for broadband services is not sufficient to satisfy the Commission's obligation to advance universal service under the *Qwest II* remand. If the Commission intends to provide non-rural high-cost support to expand broadband to high-cost areas as the method for satisfying its obligation to advance universal service, it will not satisfy that obligation until it adopts rules intended to accomplish that outcome. If the Commission issues an order in this docket in April that neither adopts such proposed rules, nor otherwise provides data to demonstrate how the existing mechanism currently advances universal service, it will not be in compliance with its legal obligations under the *Qwest II* remand.

Second, the Commission has not demonstrated that the existing mechanism provides sufficient support and reasonably comparable rates. The Commission tentatively concludes that given the level of current telephone subscribership, current non-rural high-cost support is at least sufficient to ensure reasonably comparable and affordable rates that permit widespread access to basic telephone service.²⁷ This conclusion is problematic. First, to some degree, the current high level of telephone subscribership suggests that universal subsidies *as a whole* are enabling *affordable* rates. But, the Commission presents no data whatsoever to demonstrate that non-rural high-cost support is actually contributing to affordable rates. In the absence of any empirical

²⁷ *Id.* ¶ 34.

data, the Commission's conclusion is nothing more than a guess. This provides minimal, if any, evidence that the existing mechanism is providing *sufficient* support.

Second, the level of telephone subscribership does not demonstrate that rates are reasonably comparable. The only way to determine whether rates are reasonably comparable is to actually compare the rates. And, in fact, as has been demonstrated to and ignored by the Commission for several years, rates are not reasonably comparable. The joint petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate seeking additional federal high-cost support because non-rural carrier rates in Wyoming are not reasonably comparable -- under the Commission's own standard -- has been pending before the Commission for over five years now.²⁸ The current non-rural high-cost support program is not enabling reasonably comparable rates and yet the Commission views that the "program as currently structured is consistent with [the Commission's] statutory obligations under section 254 of the Communications Act."²⁹ The Commission's conclusion is not correct. The Commission cannot satisfy its statutory universal service obligations where the non-rural high cost program does not enable reasonably comparable rates and the Commission does nothing to remedy that situation. The mechanism's failure to provide reasonably comparable rates also means that the mechanism fails to provide *sufficient* support. The Commission must address these failures of the current mechanism through substantive reform of the non-rural high-cost program.

²⁸ See *In the Matter of Federal-State Joint Board on Universal Service*, Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier, CC Docket No. 96-45 (filed Dec. 21, 2004).

²⁹ *FNPRM* ¶ 12.

IV. THE COMMISSION MUST SUBSTANTIALLY MODIFY THE EXISTING NON-RURAL HIGH-COST SUPPORT PROGRAM NOW TO SATISFY ITS REMAND OBLIGATIONS

To satisfy its remand obligations and appropriately fix the flawed non-rural high-cost support program the Commission must implement concrete reforms now. At a minimum, the Commission must better target support to high-cost areas. The Commission can best advance universal service by better targeting support to where it is needed most to sustain quality telecommunications services in high-cost areas, and then ensuring that rates in those areas are reasonably comparable to rates in urban areas. Sufficient high-cost support for non-rural carriers should be just enough to enable those carriers to offer in high-cost areas, quality services at rates that are affordable and are reasonably comparable to rates for similar services offered in urban areas.

To better target support, the Commission should target support to wire centers where costs exceed 125% of the national average urban rate. Costs, not rates actually paid by consumers, should continue to be the basis for allocating high-cost support. It is ultimately where costs are high that support is needed to maintain quality services at affordable and reasonably comparable rates for the long term. Where rates are regulated to be artificially low relative to costs, it would be unwise and potentially contrary to universal service goals to interpret that no support is necessary.

The use of statewide average costs for distributing non-rural high-cost support must be eliminated, because it overwhelmingly fails to provide support to many of the nation's most sparsely populated communities served by non-rural carriers. At the local level, Qwest and other "non-rural" incumbent local exchange carriers serve thousands of rural wire centers with very high costs -- as calculated by the Commission's High Cost Model -- yet receive little, if any, explicit federal support for those wire centers. For example, as Qwest has previously noted,

Qwest serves Patagonia, AZ (model monthly cost \$127 per line), Deckers, CO (model monthly cost \$137 per line), Rose Hill, IA (model monthly cost \$162 per line), Comstock, MN (model monthly cost \$221 per line), and Leonard, ND (model monthly cost \$204 per line), but receives no federal high-cost support in any of these areas. Currently, the national average cost developed by the Commission's cost model is \$21.43, and high-cost support is available where a non-rural carrier's statewide average cost per line exceeds two standard deviations of this national average, or \$28.13 (the national benchmark). Clearly, all of the costs noted above, well exceed this national benchmark, but because statewide average costs -- and not individual wire center costs -- are measured against the benchmark, none of these wire centers receives federal high-cost support. There are hundreds of other examples of Qwest wire centers with costs above the national benchmark where Qwest receives no federal high-cost support. Additionally, the current use of statewide average costs to allocate high-cost support assumes that low cost urban areas can subsidize high-cost areas. But, competition today in more urban areas does not allow support to flow to high-cost areas.³⁰ In today's competitive marketplace a different allocation method must be adopted to effectively and efficiently target high-cost support to high-cost areas.

Moreover, state universal service support mechanisms do not resolve this issue. In four of the five states referenced above, Arizona, Iowa, Minnesota, and North Dakota, there are no state universal service high-cost funds at all. In the absence of state support mechanisms it remains the Commission's obligation to provide "explicit" support that is "sufficient" to achieve the preservation and advancement of universal service.³¹ In cases such as Colorado, where there

³⁰ See Qwest May 5 *ex parte*, CC Docket No. 96-45 and WC Docket No. 05-337 and the attached Proposal for Implementing the Tenth Circuit's Remand in *Qwest II*, at 11-16, for a more detailed discussion of the decreasing ability of carriers to implicitly subsidize services in high-cost areas.

³¹ 47 U.S.C. § 254(e). In fact, in Qwest's fourteen in-region states, ten states have not implemented any state universal service high-cost mechanisms to support non-rural carriers. In

is a state high-cost support fund, the Commission is in fact overburdening the state fund through its inaction.

The Commission should define rural rates as reasonably comparable to urban rates where the rural rates in a given state are within 25% of the statewide average urban rate for similar services within the state. Further, in a state where the state cannot certify that rates are reasonably comparable and the state has rebalanced rates to remove implicit subsidies, the Commission should have an automatic process for providing that state additional funding to enable the rates to be reasonably comparable.³²

Qwest has calculated that its proposal would significantly increase the size of the non-rural high-cost fund. The Commission is projected to disburse \$322 million in federal non-rural high-cost model support in 2010.³³ Qwest projects that its proposal if adopted would increase that fund size to approximately \$1.6 billion.³⁴ But starting from the premise that this is the manner in which the support should be distributed and the amount of support that is projected to be necessary, there are a number of steps the Commission can take to address balancing this potential increase in the fund with affordability of telecommunication services. For example, the Commission could evaluate whether a different benchmark would better balance the competing universal service principles. Additionally, the Commission could consider partially offsetting

these cases, the Commission's non-rural high-cost support program has not induced states to move to explicit support mechanisms that preserve and advance universal service in furtherance of the universal service principles of Sections 254(b)(5) and (f).

³² See Qwest May 8 Comments at 13; Qwest Communications International Inc., WC Docket No. 05-337, CC Docket No. 96-45, *ex parte*, filed Aug. 20, 2009 at 3-5 for a more detailed discussion of this proposal (Qwest Aug. 20 *ex parte*).

³³ See Universal Service Administrative Company Report HC-01, High Cost Support with Capped CETC Support Projected by State by Study Area 1Q2010.

³⁴ This assumes that rural price cap carriers are included in the non-rural carrier high-cost program.

the potential increase to the non-rural high-cost fund by only supporting a single line per household or business per ETC, adopting its tentative conclusion to eliminate interstate access support and interstate common line support for competitive ETCs, and eliminating the identical support rule for competitive ETCs.³⁵ Further, the Commission could also implement direct reform of the contribution mechanism that would broaden the contribution base, such as moving to a numbers- and connections-based contribution mechanism.³⁶

V. CONCLUSION

The Commission must act to reform the non-rural high-cost support mechanism now. It must act not through explanation and justification, but through substantive modification of the non-rural high-cost program. Only then will it satisfy its obligations under the *Qwest II* remand and under the universal service provisions of the Communications Act. It has been almost five years since the second time the Tenth Circuit instructed the Commission to address the flaws in the non-rural high-cost support program. Any further delay by the Commission in substantively reforming this program is simply unconscionable. This Commission must quit the well-traveled road of inaction and excuse and forge a new path to meet its obligation to finally implement a non-rural high-cost support program that is properly grounded in the universal service principles that it is meant to serve. Nothing less will suffice.

³⁵ See *Qwest ex parte*, CC Docket No. 96-45, filed July 9, 2007 and the White Paper attached thereto at 19; *Qwest ex parte*, CC Docket No. 96-45, filed Aug. 9, 2007; *Qwest Aug. 20 ex parte* at 5.

³⁶ See Comments of Qwest Communications International Inc. on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan, NBP Notice # 19, GN Docket Nos. 09-47, 09-51 and 09-137, filed Dec. 7, 2009 at 7-9.

Respectfully submitted,

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January 28, 2010

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 No. 05-337 and CC Docket No. 96-45; 2) served via email on Ms. Katie King at Katie.King@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpweb.com.

/s/ Richard Grozier

January 28, 2010