

No. \_\_\_\_\_

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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In re QWEST CORPORATION,  
MAINE PUBLIC UTILITIES COMMISSION,  
VERMONT PUBLIC SERVICE BOARD, AND  
WYOMING PUBLIC SERVICE COMMISSION,

*Petitioners.*

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**PETITION FOR A WRIT OF MANDAMUS  
TO THE FEDERAL COMMUNICATIONS COMMISSION**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the petitioners submit this Corporate Disclosure Statement.

Qwest Corporation is a provider of local exchange and other communications services throughout its 14-state incumbent local exchange region. It is a wholly owned subsidiary of Qwest Communications International Inc. (“QCII”). QCII is a publicly held corporation that has no parent company. QCII, through its operating subsidiaries, including Qwest Corporation, provides a variety of communications services for businesses and consumers. Legg Mason Capital Management, Inc. (a/k/a Investment Adviser Subsidiaries of Legg Mason, Inc.), a wholly owned subsidiary of Legg Mason, Inc., a publicly traded company, owns more than 10 percent of the stock of QCII. No other publicly held company owns more than 10 percent of the stock of QCII.

The Maine Public Utilities Commission, Vermont Public Service Board, and Wyoming Public Service Commission are non-corporate, governmental entities that do not issue stock and have no parent company.

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## ISSUE PRESENTED

Whether the Federal Communications Commission’s delay of almost four years in complying with this Court’s remand in *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (PA 18-33)<sup>1/</sup>—and almost thirteen years in adopting a non-rural, high-cost universal service funding mechanism that complies with Section 254 of the Communications Act—constitutes unlawful withholding or unreasonable delay of agency action, thus warranting a writ of mandamus under Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1), and the All Writs Act, 28 U.S.C. § 1651(a).

## INTRODUCTION

Qwest Corporation (“Qwest”), the Maine Public Utilities Commission (“Maine”), the Vermont Public Service Board (“Vermont”), and the Wyoming Public Service Commission (“Wyoming”) respectfully petition this Court for a writ of mandamus directing the Federal Communications Commission (“FCC”) to issue final rules within ninety days addressing reform of the non-rural, high-cost universal service fund, as required under Section 254 of the Communications Act, 47 U.S.C. § 254, and under the terms of this Court’s decision in *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (“*Qwest I*”) (PA 18-33).

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<sup>1/</sup> “PA xx” citations refer to pages in Petitioners’ Addendum of Essential Materials Filed Pursuant to Federal Rule of Civil Procedure 21(a)(2)(C).

In that decision, this Court remanded for the second time an FCC order attempting to satisfy the requirements of Section 254<sup>2/</sup> and expressed its expectation that the agency would “comply with our decision in an expeditious manner, bearing in mind the consequences inherent in further delay.” *Qwest II*, 398 F.3d at 1239 (PA 33). But after opening a rulemaking proceeding to consider the remanded questions in December 2005,<sup>3/</sup> the FCC abandoned the matter.

Rather than bear in mind the “consequences inherent in further delay,” the FCC has left the telecommunications industry to continue operating for nearly four years under the constraints of the non-rural, high-cost universal service support mechanism that this Court deemed unlawful. Carriers serving many high-cost areas across the United States therefore have been operating for almost thirteen years without the funding that Congress recognized as essential to their ability to support high-cost telephone service at rates and service levels reasonably comparable to those in urban areas. And those carriers’ customers have endured higher rates and/or fewer services than their urban counterparts, in direct contravention of Congress’ s intent.

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<sup>2/</sup> Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559 (2003) (“*Order on Remand*”), remanded, *Qwest II*, 398 F.3d 1222.

<sup>3/</sup> Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, 20 FCC Rcd 19731 (2005) (“*Remand NPRM*”) (PA 34-60).

And yet just recently—to compound its disregard of this Court’s order and the requirements of the Act—the FCC proposed what it called a “comprehensive” overhaul of certain aspects of the non-rural, high-cost universal service support fund, without so much as a single reference to the pending remand issues. It did so notwithstanding the fact that its proposed new plan would freeze in place the very determinations concerning the eligibility for and sufficiency of support that this Court deemed unlawful nearly four years ago. The Court should put an end to the FCC’s delay and its willful disregard for its obligation to address the basic requirements of Section 254 of the Act.

### **JURISDICTION AND VENUE**

Because the Federal Courts of Appeal would have exclusive jurisdiction to review the FCC’s final non-rural, high-cost universal service rules if they were issued, *see* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a), this Court has jurisdiction to issue a writ of mandamus ordering their final adoption. *See Environmental Defense Fund v. NRC*, 902 F.2d 785, 786-87 (10th Cir. 1990); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75-76 (D.C. Cir. 1984) (“TRAC”); *see also* 5 U.S.C. § 706 (“The reviewing court *shall* (1) compel agency action unlawfully withheld or unreasonably delayed.”) (emphasis added). Further, this Court has jurisdiction to enforce and effectuate orders it previously issued. *See, e.g., United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977); *TRAC*, 750

F.2d at 76 (“Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.”); *see also* 28 U.S.C. § 1651(a) (providing that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions”). Qwest’s principal office is in Denver, Colorado, and therefore venue in this Court is proper under 28 U.S.C. § 2343.

### **SUMMARY OF ARGUMENT**

In Section 254 of the Communications Act, Congress directed the FCC 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 their services and enjoy comparable services. But in the almost thirteen years since the enactment of Section 254, the FCC has repeatedly failed to craft a mechanism that achieves these aims with respect to the funding of high-cost services provided by so-called “non-rural” carriers.<sup>4/</sup> Instead, each time the FCC

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<sup>4/</sup> For purposes of the universal service rules, “rural” carriers are defined by statute as those serving a very small number of lines, typically in sparsely populated areas. *See* 47 U.S.C. § 153(37). Carriers that serve a larger number of lines—such as Qwest—receive support from the “non-rural” high-cost universal service fund, even though they too serve areas that would commonly be referred to as “rural.”

has revisited its obligations under Section 254 with respect to supporting these carriers, it has produced a mechanism that this Court has deemed not only arbitrary but also inconsistent with the statute's mandatory guidelines. As a result, this Court has twice rejected and remanded the FCC's non-rural, high-cost universal service orders, first in 2001 and again in 2005. Both times, the Court directed the FCC to revisit its obligations under Section 254 and to adopt an order that is faithful to the statute's principles and goals. And in the 2005 *Qwest II* decision, the Court expressed its expectation that the FCC would do so promptly.

Instead, the FCC has simply ignored altogether both the Court's remand and the agency's fundamental obligations under Section 254. After issuing a notice of proposed rulemaking immediately after the *Qwest II* decision, the FCC has never revisited the remand issues—even in the face of repeated entreaties from the industry and states to do so. Thus, during the almost thirteen years that have elapsed since Congress directed the FCC to adopt a support mechanism within *fifteen months*, the industry has operated without a lawful high-cost universal service support mechanism for non-rural carriers, and, since 2003, the unlawful, insufficient mechanism the FCC adopted prior to the *Qwest II* remand has remained in place.

The harm resulting from this unlawful regime is significant. Under the FCC's existing mechanism, non-rural carriers must provide service in many very-

high-cost areas without the support that Congress deemed critical to ensuring that rates in these areas are reasonably comparable to those in lower-cost areas across the country. And in the absence of adequate federal support, consumers in such areas may face much higher rates than their urban counterparts across the country, and may enjoy fewer service offerings. Such a regime is neither fair nor indefinitely sustainable—as Congress recognized when it adopted the explicit universal service requirements in 1996.

Worse, the agency is now moving forward to perpetuate this unlawful support mechanism. Just two months ago, in the *Intercarrier Compensation/USF NPRM*,<sup>5/</sup> the FCC proposed a dramatic overhaul of some aspects of the existing high-cost support mechanism in order to stimulate the deployment of next-generation “broadband” services in high-cost areas. Yet this next-generation program would perpetuate the precise flaws that the Court directed the FCC to address on remand nearly four years ago. While the FCC proposals would change what services universal service support recipients must offer and how those recipients are chosen, it would *not* change the criteria for determining which states are eligible for non-rural support; whether that support achieves rate comparability; or how the sufficiency of that support is evaluated. Indeed, in almost 400 pages of

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<sup>5/</sup> See Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, WC Docket No. 05-337 (and related proceedings), FCC No. 08-262, 2008 WL 4821547 (rel. Nov. 5, 2008) (“*Intercarrier Compensation/USF NPRM*”) (PA 78-490).

text that includes several proposals to reform universal service, the *Intercarrier Compensation/USF NPRM* fails even to *mention* the FCC’s obligation to address the *Qwest II* remand. In short, the agency has demonstrated utter disregard for this Court’s and Congress’s direction—and for the plight of carriers and consumers in high-cost areas.

In its 2005 *Qwest II* decision, this Court considered but rejected a request to retain jurisdiction and impose a specific deadline for FCC compliance. *Qwest II*, 398 F.3d at 1239 (PA 33). The time has come for the Court to reconsider that decision. This case is paradigmatic of the “unreasonable delay” in agency action that courts must redress under Section 706 of the Administrative Procedure Act. 5 U.S.C. § 706(1). The law in this Circuit provides that mandamus is an appropriate remedy in such circumstances. *See, e.g., Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991). Accordingly, the Court should grant the writ and set a deadline by which the FCC must act to issue rules for the non-rural, high-cost fund that comply with Section 254 and this Court’s mandate.

## **STATEMENT OF FACTS**

***Universal Service Support Requirements Under the 1996 Telecommunications Act.*** State and federal regulators have long recognized that a paramount objective of telecommunications industry oversight must be to ensure that “consumers in all regions of the nation have access to affordable, quality

telecommunications services.”<sup>6/</sup> This is challenging, however. It is far more costly for a local exchange carrier (“LEC”) to deploy facilities to serve dispersed customers in rural areas or in areas with difficult terrain than to provide the same service in an urban area, where customers are concentrated.<sup>7/</sup> For many decades, regulators sought to achieve some degree of parity by requiring LECs to implicitly subsidize the rates in higher-cost areas through above-cost rates in lower-cost areas—or through rates for other services, including rates charged to other carriers, known as “intercarrier compensation charges.” *See, e.g., Qwest II*, 398 F.3d at 1226 (PA 23).

With the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Congress opened all telecommunications markets to competition. In doing so, it recognized that the historic system of funding affordable “universal service” through implicit subsidies would have to be overhauled; new competitors would inevitably cherry pick the LECs’ customers in

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<sup>6/</sup> *Remand NPRM*, 20 FCC Rcd at 19732 ¶ 2 (referencing “historical commitment” of the Commission and state regulators) (PA 35); *see also Qwest II*, 398 F.3d at 1226-27 (PA 23).

<sup>7/</sup> *See, e.g., Qwest Corp. v. FCC*, 258 F.3d 1191, 1195 (10th Cir. 2001) (“*Qwest I*”) (citing Ninth Report and Order and Eighteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20432, 20441 ¶ 15 (1999) (“*Ninth Report and Order*”)) (PA 7).

lower-cost areas by undercutting any above-cost rates.<sup>8/</sup> Congress therefore directed the FCC to establish “explicit,” “specific and predictable support mechanisms . . . to preserve and advance universal service.” 47 U.S.C. § 254(e), (a)(1), (b)(5). Section 254 of the Act mandates that the FCC craft the new universal service support mechanisms so that the resulting support is “sufficient” to achieve certain, specified principles. These include ensuring that consumers in “rural, insular, and high cost areas . . . have access to telecommunications . . . services, that are reasonably comparable to those services provided in urban areas . . . at rates that are reasonably comparable to rates charged for similar services in urban areas,” and that “comparable,” “quality services” be available to *all* consumers “at just, reasonable, and affordable rates.” 47 U.S.C. § 254(b)(3), (1). As this Court recognized, “[t]he plain text of the statute mandates that the FCC ‘shall’ base its universal [service] policies on the[se] principles.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (“*Qwest I*”) (PA 11). “Under the Act, the FCC’s duty is mandatory.” *Qwest II*, 398 F.3d at 1234 (PA 29). Finally, Congress made clear that the new support mechanism was a priority: it directed the FCC to complete its rulemaking to adopt new universal service support rules within 15 months of the passage of the Act. 47 U.S.C. § 254(a)(2).

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<sup>8/</sup> See, e.g., *Qwest II*, 398 F.3d at 1226 (“Congress feared that carriers entering the market would compete aggressively for low-cost, urban areas, leaving former monopoly carriers the unsustainable burden of providing service to rural areas in the face of a dwindling urban base.”) (PA 23); S. Rep. No. 103-367, at 34 (1996).

*The FCC's Non-Rural, High-Cost Universal Service Orders.* The FCC adopted two separate high-cost universal service mechanisms: a so-called “rural” fund for very small carriers,<sup>9/</sup> and the “non-rural,” “high-cost” fund at issue here, which, contrary to its name, is targeted at the carriers that actually serve the majority of high-cost, rural areas throughout the country. Qwest, for example, has one of the most rural, high-cost service regions in the country, composed of 14 western and midwestern states, including Wyoming.<sup>10/</sup> Vermont and Maine also include large, rural areas served by a carrier that draws support from the “high-cost” fund.

The FCC first adopted non-rural, high-cost support rules in the *Ninth Report and Order*. It determined that only those non-rural LECs in states with average per-line costs exceeding 135% of the nationwide average cost per line would receive funding. It adopted this benchmark without much elaboration about how it would produce “sufficient” support to achieve “reasonable comparability” between rural and urban rates (as Section 254 requires), but it noted that the mechanism

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<sup>9/</sup> See note 4, *supra*; 47 U.S.C. § 153(37).

<sup>10/</sup> Qwest serves Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

would achieve a different FCC objective—ensuring that “the federal fund should not increase substantially at this time.”<sup>11/</sup>

This Court reversed and remanded the *Ninth Report and Order*, finding that the FCC had failed to “provide sufficient reasoning or record evidence to support [the *Ninth Report and Order*’s] reasonableness.” *Qwest I*, 258 F.3d at 1195 (PA 6). Among other things, the FCC had not adequately defined key terms in Section 254’s guiding principles: “reasonably comparable” rates and “sufficiency.” *Id.* Further, the Court found that the FCC had failed to show how the 135% benchmark satisfied those statutory goals—and had in fact failed entirely to establish that the benchmark represented “an informed and rational choice.” *Id.* at 1202 (PA 13).

A little more than two years later, the FCC finally issued its *Order on Remand*, purporting to respond to this Court’s direction in *Qwest I*. But once again, the FCC failed to grapple with the statute’s basic requirements. It defined rural rates as “reasonably comparable” if they were within two standard deviations—or about 138%—of a national urban rate average,<sup>12/</sup> and determined eligibility for support based on whether the statewide average cost per line

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<sup>11/</sup> *Ninth Report and Order*, 14 FCC Rcd at 20461-62 ¶ 52.

<sup>12/</sup> *Order on Remand*, 18 FCC Rcd at 22582 ¶ 38.

exceeded the national average cost per line by the same percentage.<sup>13/</sup> The FCC conceded that its plan would not reduce existing rate disparities much (if at all), but it insisted that it could reasonably conclude that Congress wanted to “preserve” those disparities<sup>14/</sup>—notwithstanding the Act’s mandate to “advance” universal service. And the FCC again defined the “sufficiency” of its mechanism with reference to a desire to cap federal support at a level no larger than strictly necessary to achieve its constrained definition of “reasonable comparability.”<sup>15/</sup>

On review in 2005, this Court again reversed the FCC’s order, finding that the agency had failed 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.” *Qwest II*, 398 F.3d at 1237 (PA 32). The Court noted that the FCC’s “reasonable comparability” benchmark would deem rural rates that exceed the lowest urban rates by 100% to be “reasonably comparable,” an outcome “no less arbitrary than [the agency’s] prior selection of a 135% cost-support benchmark.” *Id.* (PA 31). It found the funding mechanism itself to be without any basis in the record, *id.* (PA 32), and determined that the agency’s definition of the mechanism’s “sufficiency” failed to “take[] into account

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<sup>13/</sup> *Id.* at 22597-98 ¶ 64.

<sup>14/</sup> *Id.* at 22583-84 ¶¶ 39-40.

<sup>15/</sup> *Id.* at 22578 ¶ 30.

the full range of principles Congress dictated to guide the Commission in its actions,” *id.* at 1234 (PA 29).

Petitioners in that appeal asked the Court to retain jurisdiction and impose a specific deadline of no more than 180 days for the FCC to issue a revised order. While acknowledging that nine years had already passed since Congress mandated a compliant mechanism and three years had passed since *Qwest I*, the Court declined to retain jurisdiction or set a specific timeline, stating that it did not wish to “constrain the Commission’s consideration of the issues before it.” *Id.* at 1239 (PA 33). Nevertheless, the Court cautioned: “We fully expect the FCC to comply with our decision in an expeditious manner, bearing in mind the consequences inherent in further delay.” *Id.* In the interim, the Court left the existing FCC non-rural, high-cost support mechanism in place.

***FCC Actions on the Non-Rural, High-Cost Mechanism Since Qwest II.***

The FCC initiated a rulemaking proceeding to address the remand issues within a year of the *Qwest II* remand.<sup>16/</sup> After parties filed comments and reply comments,

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<sup>16/</sup> *Remand NPRM* (PA 34-60). The *Remand NPRM* also addressed the distinct issue of funding for “insular” areas such as Puerto Rico. The Puerto Rico Telephone Company has filed a petition in the D.C. Circuit seeking a writ of mandamus ordering the FCC to finally decide that issue. Petition for a Writ of Mandamus to the Federal Communications Commission, *In re Puerto Rico Telephone Company, Inc.*, D.C. Cir. Case No. 08-1391 (filed Dec. 22, 2008).

however, the FCC let the matter drop. It has not addressed the *Qwest II* remand issues since.<sup>17/</sup>

To be sure, the FCC has on several occasions revisited aspects of its funding mechanism. In 2007 and 2008, for example, it considered various proposals to reform the high-cost fund, including whether and how much to support competitive and wireless carriers under that mechanism, and whether to use “reverse auctions” to choose funding recipients in eligible areas.<sup>18/</sup> Petitioners and others have repeatedly pled with the agency to include the *Qwest II* remand issues in its

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<sup>17/</sup> The FCC has likewise ignored a long-pending petition filed by Wyoming, a party to this proceeding, seeking supplemental funding under the existing *Order on Remand* mechanism, on the ground that the mechanism fails to produce “reasonably comparable” rates in Wyoming, even as compared to the FCC’s national urban rate benchmark. See 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, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Dec. 21, 2004), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6516885848](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516885848); see also *Order on Remand*, 18 FCC Rcd at 22594 ¶ 57 (noting that, according to a GAO study, Michigan, Vermont, and Wyoming had residential rates in rural and high-cost areas served by non-rural carriers exceeding the national urban rate benchmark).

<sup>18/</sup> See, e.g., Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 22 FCC Rcd 9705 (2007); Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 23 FCC Rcd 1467 (2008); Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 23 FCC Rcd 1495 (2008); Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 23 FCC Rcd 1531 (2008) (“2008 NPRM”); *Intercarrier Compensation/USF NPRM* at Appx. A ¶¶ 17, 55 (“Draft Order A”) (PA 93, 110).

consideration of these other universal service reforms.<sup>19/</sup> Yet the FCC has never taken up that task. Instead, in early 2008, the Commission issued a notice of proposed rulemaking considering *other* reforms to universal service funding, but ignoring the remand issues—even while acknowledging the Joint Board’s concern

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<sup>19/</sup> See, e.g., Comments of Qwest Communications International Inc., *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 5 (April 17, 2008), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519893569](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519893569) (“[T]he most pressing high-cost reform needed is reform of the existing non-rural high cost support mechanism as required by the Tenth Circuit’s remand in *Qwest II*.”); Letter from R. Steven Davis & Shirley Bloomfield, Qwest Communications International Inc., to Marlene H. Dortch, FCC, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 2 (May 5, 2008), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520008134](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520008134) (“Regardless of whether it modifies the non-rural support mechanism for all non-rural ILECs, or only the medium-size LECs, it is critical that the Commission move forward to address the Tenth Circuit’s decision in *Qwest II*.”); Reply Comments of the Vermont PSB, Vermont DPS, Maine PUC, ConnectMe Authority and Wyoming PUC and Response to Qwest Proposal to Revise the Non-Rural Mechanism, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 1-2, 5-6, Exhibit A (June 2, 2008), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520012120](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520012120) (advocating that the agency “respond to the 10th Circuit’s decision . . . before it adopts specific long term reform” and detailing numerous parties’ efforts to engage the Commission on the remand issues throughout 2007); Comments of the National Association of State Utility Consumer Advocates on the Identical Support Rule, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-377, CC Docket No. 96-45, at 9 (April 17, 2008), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519893335](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519893335) (urging the FCC to avoid being distracted “by new or peripheral issues while older and more fundamental issues remain unresolved,” and explaining the basic statutory terms at issue in *Qwest II* are “the underpinnings and the purpose of the universal service programs”).

that some of the proposed reforms might be incompatible with the FCC's obligations on remand.<sup>20/</sup>

***The Most Recent Intercarrier Compensation/USF NPRM.*** As noted above, the universal service regime has historically been closely tied to the compensation carriers pay one another for the exchange of traffic, since those charges implicitly supported universal service. When Congress directed the FCC to revamp universal service, it also set new ground rules governing such intercarrier compensation. The FCC's attempts to interpret and apply these rules have been the source of substantial industry controversy from the start. In particular, the compensation rules the FCC adopted for dial-up Internet-service-provider traffic resulted in two reversals and remands by the D.C. Circuit.<sup>21/</sup> After the second of these, in 2002, the proceeding languished while the FCC left the remanded rules in effect, just as it has done here. In October 2007, Core Communications—an affected carrier—filed a mandamus petition with the D.C.

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<sup>20/</sup> 2008 NPRM, 23 FCC Rcd at 1538, Appx. A ¶ 33. The Joint Board on Universal Service complained that “a deficit of record support regarding [high-cost support] . . . reform” left many critical issues open, and it specifically recognized that the cap it proposed should not be applied to “any incremental support required as a result of the Commission’s response to the Tenth Circuit’s remand in *Qwest II*.” Recommended Decision, *High-Cost Universal Service Support*, 22 FCC Rcd 20477, 20487, 20484 ¶¶ 42, 26 n.26 (2007); see also *id.* at 20485-86, 20487 ¶¶ 33, 41.

<sup>21/</sup> *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

Circuit, asking the court to direct the Commission to adopt an order responding to the court's earlier decision. This was Core's second effort: its earlier mandamus petition in 2004 had been denied. *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 853-54 (D.C. Cir. 2008). This time, however, the court granted the petition. The court observed that the FCC's failure to respond to the remand "effectively nullified our determination that its interim rules are invalid, because our remand without vacatur left those rules in place." *Id.* at 856. Noting that it had "repeatedly, and mistakenly, put our faith in the Commission," the court concluded that it would "not do so again" and required the FCC to issue an order responding to the court's 2002 decision within four months. *Id.* at 861.

The FCC issued the required order on November 5, 2008<sup>22/</sup> and attached to it three different draft orders proposing additional, significant reforms.<sup>23/</sup> Taking up almost 400 pages, the draft orders spell out complex revisions not only to the intercarrier compensation system but also to many aspects of universal service, including the non-rural, high-cost funding mechanism.<sup>24/</sup> The universal service

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<sup>22/</sup> Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 08-262, 2008 WL 4821547 (rel. Nov. 5, 2008) (included in the same document as the *Inter-carrier Compensation/USF NPRM*) (PA 61-75).

<sup>23/</sup> *Inter-carrier Compensation/USF NPRM* (PA 78-490).

<sup>24/</sup> *See Draft Order A* ¶¶ 4-63, 186-325 (PA 86-112, 166-227); *Inter-carrier Compensation/USF NPRM* at Appx. B ¶¶ 5-38 (PA 242-55); *id.* at Appx. C ¶¶ 4-59, 181-306 (PA 286-311, 364-419).

proposals include capping the size of the fund and eliminating “identical support” for carriers competing with a LEC already receiving support.<sup>25/</sup> The FCC also proposed new rules that would require funding recipients to deploy broadband facilities, and suggested “reverse auctions” as a means of choosing the sole funding recipient in each covered area.<sup>26/</sup>

Nowhere in that massive rulemaking did the FCC acknowledge its obligation to address the underlying issues in the *Qwest II* remand.<sup>27/</sup> To the contrary: the FCC’s proposals would perpetuate today’s unlawful system. First, only those states and wire centers that are eligible to receive non-rural, high-cost funding under the invalidated mechanism would receive it under the newly proposed system. Additionally, the proposed amount of support would be capped at the support the existing mechanism produces. Finally, the draft orders abandon

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<sup>25/</sup> See, e.g., *Draft Order A* ¶¶ 12, 16 (PA 91, 93).

<sup>26/</sup> See, e.g., *id.* ¶¶ 20-30, 33 (PA 94-100, 101-02).

<sup>27/</sup> The draft orders do mention the *Qwest II* remand, but—incomprehensibly—only to note that the agency’s new proposal may reasonably “cap the high-cost mechanism” in light of the Court’s observation in *Qwest II* that “excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in [section] 254(b)(1).” *Draft Order A* ¶ 15 & n.55 (quoting *Qwest II*, 398 F.3d at 1234) (PA 93). That reference illustrates doubly the FCC’s disregard for the Court’s decision. Not only does the FCC acknowledge and yet ignore the remand, but it also cites, in support of that course of action, a comment the Court made in connection with its finding that the FCC had *failed* to define “sufficiency” in accordance with the requirements of Section 254—a failing the FCC has yet to remedy.

any notion of the FCC’s obligation to adopt a non-rural, high-cost support mechanism designed to achieve “reasonably comparable” rates across the nation. Instead, the FCC now is focused exclusively on achieving other Section 254 principles with that funding, such as “advanc[ing] universal service” and ensuring that all consumers have comparable “access” to advanced services.<sup>28/</sup> As important as those principles may be, the FCC has no more right now than it did when *Qwest II* was decided to simply ignore some statutorily mandated principles in pursuit of others.<sup>29/</sup>

## ARGUMENT

***Legal Standard.*** As this Court has made clear, “[m]andamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty. Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform.” *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991); *see also Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (“If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to

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<sup>28/</sup> See, e.g., *Draft Order A* ¶ 21 (citing 47 U.S.C. § 254(b)(2), (b)(3)) (PA 95).

<sup>29/</sup> See *Qwest II*, 398 F.3d at 1234 (“We are troubled by the Commission’s seeming suggestion that other principles, including affordability, do not underlie federal non-rural support mechanisms.”) (PA 29); *id.* (“On remand, the FCC must . . . consider[] the range of principles identified . . . in the text of the statute.”).

perform, the court should compel performance, thus effectuating the congressional purpose.”). Further, “[t]hrough § 706 [of the APA] Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed.” *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (“This conclusion accords with the Tenth Circuit’s established approach under the APA to requests for writs of mandamus to compel agency action unlawfully withheld.”); *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) (“[A]s a reviewing court, we must compel agency action unlawfully withheld or unreasonably delayed.”).

Courts consider a variety of factors in determining whether an agency’s delay is sufficiently unreasonable to warrant mandamus. The most important is that “the time agencies take to make decisions must be governed by a rule of reason.” *TRAC*, 750 F.2d at 80 (internal quotation marks omitted). Significantly, “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.” *Id.* Other factors courts consider are “the effect of expediting delayed action on agency activities of a higher or competing priority”; “the nature and extent of the interests prejudiced by delay”; “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake”; and “the court need not

find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *Id.* (internal quotation marks omitted); *see also Forest Guardians*, 174 F.3d at 1191 n.18 (listing factors).

Moreover, mandamus is particularly warranted where an agency has failed to respond to a court’s remand. As the D.C. Circuit explained in *Core*, where a remand without vacatur leaves rules in place, the agency, through its inaction, “effectively nullifie[s] [the Court’s] determination that [the rules at issue] are invalid,” and a court in such circumstances “has authority to issue a writ of mandamus to prevent the frustration of orders previously issued.” *Core*, 531 F.3d at 856 (internal quotation marks omitted); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977) (“This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.”).

***Mandamus Is Clearly Warranted Here.*** Applying these well-established legal standards, mandamus is clearly warranted in this case. The FCC’s duty to adopt a compliant non-rural, high-cost funding mechanism under Section 254 of the Act is entirely non-discretionary. Congress provided that the agency “shall” adopt a new universal service regime and “shall base” that regime on the Section 254 principles. *See* 47 U.S.C. § 254(a)(2), (b); *see Lopez v. Davis*, 531 U.S. 230,

231 (2001) (“use of a mandatory ‘shall’ . . . impose[s] discretionless obligations”). The FCC thus had no discretion to simply disregard the *Qwest II* remand and move on to other things.

Further, under any analysis, the FCC’s delay in acting on this Court’s remand and fulfilling its Section 254 obligations falls well outside the “rule of reason.” As an initial matter, Congress dictated a timetable indicating “the speed with which it expects the agency to proceed.” *TRAC*, 750 F.2d at 80. It mandated that the FCC act within *fifteen months* to devise the rules necessary to implement the new Section 254 support mechanism. 47 U.S.C. § 254(a)(2). Yet it is now *almost thirteen years* since Section 254 was enacted, and the FCC has yet to fulfill this duty. Even the four-year delay since the *Qwest II* remand is longer than the time Congress initially provided for the FCC to craft the required mechanism. That alone is sufficient ground on which the Court could compel the FCC to act. *See Forest Guardians*, 174 F.3d at 1191 (“When an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action.”).

The FCC has defied not only Congress, but also this Court’s mandate. In *Qwest II*, this Court admonished the FCC to “comply with our decision in an expeditious manner, bearing in mind the consequences inherent in further delay.” *Qwest II*, 398 F.3d at 1239 (PA 33). Yet, far from acting expeditiously, the FCC has not acted *at all*. After issuing the *Remand NPRM* in late 2005, the FCC simply

dropped the matter. The agency has never revisited the basic definitional issues that are fundamental to interpreting Section 254's requirements, notwithstanding repeated entreaties by parties that it do so—and notwithstanding several other reform measures that it has proposed for the non-rural, high-cost fund. Courts have issued writs of mandamus for an agency's failure to be “responsive to the court's remand” for periods shorter than the four years during which this remand has been pending.<sup>30/</sup>

The FCC cannot excuse its delay by attempting to point to “agency activities of a higher or competing priority.” *TRAC*, 750 F.2d at 80. As much as the FCC may wish to avoid dealing with the specific aspects of Section 254 that the *Qwest I* and *Qwest II* Courts found it had ducked, it cannot claim that it is too busy pursuing unrelated policy objectives to do so. To the contrary, the FCC has made clear that universal service is a high agency priority and has repeatedly revisited its universal service regime in the nearly four years since the remand. As noted above, it considered various proposals to reform the fund in 2007 and 2008.

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<sup>30/</sup> See *Radio-Tele. News Directors Ass'n v. FCC*, 229 F.3d 269, 271-72 (D.C. Cir. 2000) (nine months); cf. *Marathon Oil*, 937 F.2d at 501 (compelling agency action when almost three years had elapsed since obligation for agency action had been triggered); *Community Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985) (“While there is no absolute definition of what is a reasonable time, we know that it may encompass ‘months, occasionally a year or two, but not several years or a decade.’”) (quoting *MCI Commc'ns Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)).

Moreover, the agency has now launched a major effort to “*comprehensively* reform the high-cost universal service support mechanism.”<sup>31/</sup> One might expect that such “comprehensive reform” would include consideration of the *Qwest II* remand issues, especially since many of those involve basic definitional questions that must underpin any non-rural, high-cost universal service funding proposal. In fact, however, the new *Intercarrier Compensation/USF NPRM* makes no effort to resolve those questions.<sup>32/</sup> The voluminous rulemaking proposal does not even pretend to address “reasonable comparability” of rural and urban rates, instead focusing exclusively on other goals of Section 254, even where those may be in tension with the “reasonable comparability” requirement.

This course not only demonstrates the FCC’s complete disregard for its obligations under Section 254 and the *Qwest II* remand, but it also significantly prejudices the interests of consumers in high-cost areas across the country. *TRAC*, 750 F.2d at 80. For almost thirteen years, non-rural carriers serving customers in many high-cost areas across the country have been deprived of the funding

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<sup>31/</sup> See, e.g., *Draft Order A* ¶ 12 (emphasis added) (PA 90).

<sup>32/</sup> Even if the FCC required additional time to adopt a comprehensive plan to reform intercarrier compensation, it clearly could respond to the *Qwest II* remand before that time. The Commission has issued numerous orders and notices of proposed rulemaking that address aspects of the high-cost, non-rural mechanism separate from intercarrier compensation reform—including, for example, the *Ninth Report and Order*, the *Order on Remand*, and the *Remand NPRM*.

necessary to serve those customers at rates comparable to those in lower-cost, urban areas—support that Congress specifically mandated. As a result, consumers in many of those areas have suffered higher rates than their urban counterparts—and in some cases have been deprived altogether of certain services that are available in urban areas because the costs of providing them without sufficient support would simply be too high.<sup>33/</sup>

Moreover, during the agency’s delay, the disparity between rates in urban and high-cost areas that would be deemed “reasonably comparable” under the FCC’s formula has grown even larger, putting the lie to any notion that the FCC’s mechanism is “sufficient” to produce comparable rates.<sup>34/</sup> The FCC’s rate comparability benchmark of \$32.28 was based on urban rates in 2002, which

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<sup>33/</sup> Further, regulators may be less likely to require carriers to introduce new services in high-cost areas if it means that rates in those areas will increase even more.

<sup>34/</sup> Moreover, the support provided by the mechanism continues to leave rates in many high-cost areas well above “comparable” urban rates even according to the FCC’s distorted benchmark. In Wyoming, for example, rural residential customers served by Qwest pay a monthly charge of \$49.50, including taxes and fees—a rate even the FCC’s benchmark would identify as non-comparable—despite Wyoming’s receipt of support from the non-rural, high-cost mechanism. Letter from Wyoming Public Service Commission to Marlene H. Dortch, FCC, and Karen Majcher, USAC, *Residential Rate Comparability Certification for Wyoming’s Non-Rural Incumbent Local Exchange Carrier Serving in Rural Areas Within Wyoming Pursuant to 47 C.F.R. § 54.316*, CC Docket No. 96-45, at 2 (filed Sept. 29, 2008), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520173005](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520173005). As discussed in note 17, *supra*, the FCC has ignored Wyoming’s entreaties to remedy this problem.

ranged from \$15.65 to \$35.19, with an average of \$23.38.<sup>35/</sup> As this Court found, this meant that “rural rates falling just below the comparability benchmark may exceed the lowest urban rates by over 100%.”<sup>36/</sup> *Qwest II*, 398 F.3d at 1237 (PA 31). The Court “fail[ed] to see how [such rates] could be deemed reasonably comparable.” *Id.* The problem identified by the Court has only grown worse in the years since, as the benchmark readjusts annually to reflect current data.<sup>37/</sup> Using FCC data from 2007, urban rates now range from \$16.70 to \$38.59, with an average of \$25.62.<sup>38/</sup> The comparability benchmark is now \$36.52, meaning that rural rates may now exceed the lowest urban rates by almost 120% and still be deemed “reasonably comparable” to urban rates.<sup>39/</sup> In other words, in the nearly

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<sup>35/</sup> *Order on Remand*, 18 FCC Rcd at 22584-85 ¶ 41; *see also Qwest II*, 398 F.3d at 1236-37 (PA 31). Petitioners take no position here on the merits of the FCC’s use of a rate benchmark; petitioners merely note that application of the current, unlawful benchmark demonstrates that, under any common-sense measure, rates are not “comparable” and support is not “sufficient” to achieve the Act’s goals.

<sup>36/</sup> A rural rate of \$32.27 (below the benchmark of \$32.28) would exceed the lowest urban rate (i.e., \$15.65) by \$16.62, which is just over 106% of the lowest urban rate.

<sup>37/</sup> *Order on Remand*, 18 FCC Rcd at 22584-85 ¶ 41 (benchmark “should be adjusted every year based on actual rate data”).

<sup>38/</sup> Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, Table 1.13 (2008) (“*Reference Book*”).

<sup>39/</sup> *Id.* A rural rate of \$36.51 (below the benchmark of \$36.52) would exceed the lowest urban rate (i.e., \$16.70) by \$19.81, which is just under 119% of the

four years since the *Qwest II* remand, the operation of the FCC's unlawful mechanism has not eliminated the rate divide between rural and urban areas, as Congress intended. Instead, it has sanctioned an even greater divide.<sup>40/</sup>

Yet, despite all this, the FCC has shown no inclination to act on the remand at all over the past four years, and no intent to do so in the future. Before this Court, the agency will undoubtedly insist that action on the *Qwest II* remand is just around the corner and will be on the Commission's new agenda in 2009. But the D.C. Circuit's experience in the *Core* case illustrates the peril of relying on such

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lowest urban rate. Petitioners note that the text of the FCC's *Reference Book* refers—apparently erroneously—to Table 1.13 as showing a comparability benchmark of \$37.36. *Id.* at I-4. If that were correct, the disparity permitted under the FCC's methodology would be even greater: A rural rate of \$37.35 would exceed the lowest urban rate by \$20.65, which would be almost 124% of the lowest urban rate.

<sup>40/</sup> Furthermore, the changes the FCC proposes to make to non-rural, high-cost universal service funding in the *Intercarrier Compensation/USF NPRM* would be built upon the very foundation this Court has already invalidated, and would thus lock the current, unlawful system in place: the new “broadband” fund would be capped at levels calculated using the formula this Court rejected, and would be available only in those states deemed eligible under that same invalid mechanism. And the new proposals could actually worsen the plight of consumers in high-cost areas. Under the FCC's proposals, carriers would be required to deploy costly broadband facilities as a condition of receiving universal service support. *See, e.g., Draft Order A* ¶ 12 (PA 90-91). Because many carriers in high-cost areas will not be able to afford to deploy such facilities, and would therefore lose *all* their funding under the FCC's proposal, their customers could end up facing even higher rates than they do today. *See, e.g., Comments of Windstream Communications, Inc., High-Cost Universal Service Support*, WC Docket No. 05-337 (and related proceedings), at 49 (Nov. 26, 2008), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520189250](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520189250).

assurances. There, the Court initially deferred and then rejected a mandamus petition when the FCC had failed to act on remand for more than two years, accepting the agency's reassurances that a decision would soon be forthcoming. *Core*, 531 F.3d at 854. When the FCC had still not acted four years later, and a second mandamus petition was filed, the Court dismissed out of hand FCC counsel's representation that action was "imminent," noting, "We have heard this refrain before." *Id.* at 858. Reversing itself and issuing a sternly worded mandamus order, the Court expressed regret for "[h]aving repeatedly, and mistakenly, put our faith in the Commission." *Id.* at 861. The Court directed the FCC to act within four months of the mandamus decision, and it warned that, if the FCC did not act, the underlying rules would be vacated. *Id.* at 861-62.

Here, the evidence similarly suggests that relief will be forthcoming only if this Court takes the reins and gives the FCC a firm deadline by which it must act. Petitioners in *Qwest II* originally sought FCC action on the remanded issues within 180 days. In light of the nearly four years that have since elapsed, ninety days should be more than sufficient for the agency to consider and resolve those same issues. The Court should issue a mandamus order giving the FCC ninety days to reach a determination on the *Qwest II* remand issues, and to adopt a non-rural, high-cost universal service mechanism that accords with the full set of principles Congress articulated in Section 254.

## CONCLUSION

For the reasons set forth above, the Court should issue a writ of mandamus directing the FCC to resolve the *Qwest II* remand issues and comply with the requirements of Section 254 within ninety days of the Court's order.

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January 14, 2009

## **CERTIFICATION OF DIGITAL SUBMISSION AND ANTI-VIRUS SCAN**

I hereby certify that I have scanned for viruses the Portable Document Format version of the attached document, which was submitted in this case as an email attachment to <esubmission@ca10.uscourts.gov>. I scanned the document using Trend Micro OfficeScan Client for Windows, version 8.0 Service Pack 1, virus scan engine 8.911.1001, virus pattern 5.769.00 (updated Jan. 13, 2009), and according to that program, the document was free of viruses.

I further certify that I have not made any privacy redactions in the attached document. Thus, with the exception of the electronic signatures, the Portable Document Format version that was submitted to the court is an exact copy of the written document filed with the Clerk.

*s/ Heather Zachary*  
Heather M. Zachary

January 14, 2009

## CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2009, an original and three copies of the foregoing Petition for a Writ of Mandamus to the Federal Communications Commission were filed with the United States Court of Appeals for the Tenth Circuit by Federal Express overnight mail, postage prepaid, and submitted in Portable Document Format by electronic mail to <esubmission@ca10.uscourts.gov>.

I further certify that on this 14th day of January, 2009, I caused copies of the foregoing Petition for a Writ of Mandamus to the Federal Communications Commission to be served by Federal Express overnight mail, postage prepaid, on the parties listed below:

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