

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

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

**Further Notice of Proposed Rulemaking Concerning Issues Raised by the
February 23, 2005, United States Court of Appeals for the Tenth Circuit in the
Qwest II Decision**

Reply Comments of the Wyoming Public Service Commission

February 12, 2010

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INTRODUCTION

The Wyoming Public Service Commission (WyPSC) submits these reply comments in the matter of the Federal Communications Commission's (FCC) December 15, 2009, further notice of proposed rulemaking (FNPRM) concerning the remands by the United States Court of Appeals for the Tenth Circuit (Tenth Circuit or the Court) in *Qwest I* and *Qwest II*.¹ We filed initial comments to the FNPRM on January 28, 2010. In accordance with the FCC's March 6, 2009, response to the Tenth Circuit, the WyPSC anticipates a final FCC order by April 16, 2010.

In 2009 the WyPSC joined in filing a petition for a writ of mandamus in the Tenth Circuit to require the FCC to define sufficiency and comparability in accordance with the principles of §254(b) of the Telecommunications Act of 1996 (or the Act) within 90 days.² Citing changes in leadership, on February 19, 2009, the FCC asked the Tenth Circuit for more time, seeking an extension of the response deadline to March 6, 2009.³ To resolve the mandamus proceeding, the FCC responded to the Tenth Circuit on March 6, 2009:

The FCC has now agreed to complete this proceeding as follows.

In order to refresh the record compiled in response to the 2005 NPRM, the Commission will release a notice of inquiry no later than April 8, 2009. It will then issue a further NPRM no later than December 15, 2009. After the Commission receives and reviews the comments submitted in response to the further NPRM, it will release a final order that responds to this Court's remand no later than April 16, 2010.⁴

The Tenth Circuit responded, stating:

Petitioners have filed a petition for a writ of mandamus to compel agency action by the Federal Communications Commission (FCC). The FCC has responded, indicating that the FCC and petitioners have agreed on a timetable for the FCC to take action. [Footnote

¹ *Qwest Corp. v. FCC*, 258 F.3d 1191 (2001) (*Qwest I*) and *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

² IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, In re QWEST CORPORATION, MAINE PUBLIC UTILITIES COMMISSION, VERMONT PUBLIC SERVICE BOARD, AND WYOMING PUBLIC SERVICE COMMISSION, Petitioners. PETITION FOR A WRIT OF MANDAMUS TO THE FEDERAL COMMUNICATIONS COMMISSION, Docket No. 09-9502, (*Joint Petition for Writ of Mandamus*).

³ IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, In re QWEST CORPORATION, MAINE PUBLIC UTILITIES COMMISSION, VERMONT PUBLIC SERVICE BOARD, AND WYOMING PUBLIC SERVICE COMMISSION, Petitioners. PETITION FOR A WRIT OF MANDAMUS TO THE FEDERAL COMMUNICATIONS COMMISSION, Docket No. 09-9502, FCC CONSENT MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO MANDAMUS PETITION, February 9, 2009.

⁴ RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR WRIT OF MANDAMUS, IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, In re QWEST CORPORATION, MAINE PUBLIC UTILITIES COMMISSION, VERMONT PUBLIC SERVICE BOARD, AND WYOMING PUBLIC SERVICE COMMISSION, Petitioners. PETITION FOR A WRIT OF MANDAMUS TO THE FEDERAL COMMUNICATIONS COMMISSION, Docket No. 09-9502, March 6, 2009.

omitted] Accordingly, the FCC and petitioners agree that no writ of mandamus need issue at this time.

Petitioners, however, have requested that this court retain jurisdiction over this matter to ensure the FCC's compliance with the agreed timetable. We decline the request to retain jurisdiction, but petitioners shall be free to re-file a petition if the FCC fails to meet its deadlines or petitioners otherwise believe they are entitled to relief.⁵

The WyPSC hopes the FCC will quickly set forth revised rules providing for a high-cost universal service fund that is sufficient to promote reasonable comparability of rural rates in Wyoming with the FCC's nationwide weighted average urban rate in accordance with the principles of section 254(b)(3) of the Act.

SUMMARY

To provide sufficient universal service support that will allow for reasonable rural/urban rate comparability and correct the FCC's unlawful current regime, the WyPSC recommends establishing a new funding benchmark for uniquely high cost universal service provided by non-rural carriers at 125% of nationwide average cost. Qwest is the non-rural carrier in Wyoming. To target additional funding and avoid unnecessary increases to the overall size of the universal service fund, the WyPSC suggests that the new funding benchmark of 125% be applied only where high-cost factors such as low local loop density are extreme. .

REPLY COMMENTS

- **The FCC should act immediately to avoid irreparable harm.**

There is irreparable harm in further delay. It has now been 14 years since the passage of the 1996 Act. The FCC has failed to implement a legal universal service regime. The development and implementation of a national broadband plan does not justify additional delay. There simply is no adequate excuse for more delay.

We agree with GVNW's January 28, 2010, comments that the "job" of ensuring universal service in rural America is not finished.⁶ Furthermore, basic universal service in high-cost rural areas is not "a rapidly obsolescing business model."⁷

There is significant support for the FCC's adoption of a 125% funding benchmark, and for the proposition that population density is an important consideration.

⁵ Order, United States Court of Appeals for the Tenth Circuit, QWEST CORPORATION; MAINE PUBLIC UTILITIES COMMISSION; VERMONT PUBLIC SERVICE BOARD; WYOMING PUBLIC SERVICE COMMISSION, Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, Respondent. Docket No. 09-9502, March 20, 2009, pp. 1-2.

⁶ GVNW January 28, 2010, comments in this matter at page 6.

⁷ See our June 8, 2009, reply comments in the NOI leading up to this FNPRM.

- We agree with the Coalition of States that the FCC should immediately run the high cost model with updated line counts and a 125% funding benchmark.⁸
- We agree with AT&T that providing additional support in high-cost areas with low population density is appropriate.⁹

We do not agree that concerns about fund size necessarily outweigh statutory sufficiency and rate comparability principles. However, we recommend that to avoid unnecessary growth of the fund size, it would be appropriate to limit extra support under our proposal to the incumbent.¹⁰ We agree with the Coalition of States that the FCC should allow itself no more than one year to act to repair the situation if a state certifies that rural residential rates of the non-rural carrier are not reasonably comparable to the FCC's urban rate benchmark.¹¹ We also find in other comments support for the general idea that the FCC should act when states certify that rates are not reasonably comparable.¹² The consequences of the FCC's current pattern are obviously undesirable.¹³

- **The FCC's high-cost mechanism for rural carriers does not satisfy Section 254.**

We strongly disagree that the mechanism as currently structured comports with Section 254 and that this should satisfy the Tenth Circuit.¹⁴ We think it is noteworthy that NASUCA's view of the matter is not a matter of total agreement amongst its membership, evidenced by the fact the West Virginia Consumer Advocate chose to sign on with the coalition of states in this matter instead. However, we believe NASUCA's comments express some acceptance of the idea that there may be room for a finding that additional support is necessary if there is state effort with a state universal service fund, and rates are not comparable.¹⁵

⁸ Maine Public Utilities Commission, the Maine Office of Public Advocate, Montana Public Service Commission, the Vermont Public Service Board, and West Virginia Consumer Advocate Division comments, January 28, 2010, (Coalition of States), page 35.

⁹ AT&T comments, January 28, 2010, pages 6-7.

¹⁰ Note that Verizon had a similar idea in their March 26, 2006 comments, "the Commission also should limit support to a single provider in the narrow circumstances where support is warranted to avoid a snowballing effect that jeopardizes the continuing viability of the fund." at page 3.

¹¹ "To ensure that the Commission takes an appropriate share of responsibility for future failures to reach Section 254 goals, the Commission should adopt a rule that requires a Commission decision within one year following any certification by a state that rural rates are not comparable and following the filing of any petition similar to the Wyoming petition from 2004." Coalition of States comments, January 28, 2010, page 18.

¹² "the Commission cannot rely on annual certifications (provided by either states or carriers) to demonstrate that rates are reasonably comparable unless it is prepared to act if a state or carrier certifies that rates are not reasonably comparable and additional federal support is necessary" and "AT&T sees little point in maintaining, let alone expanding, what can only be charitably described as the paper tiger that is its annual state certification requirement." AT&T comments, January 28, 2010, pp. 15 - 16.

¹³ "AT&T believes that Commission inaction has likely dissuaded other states from taking the necessary steps, as Wyoming did, to eliminate implicit access subsidies." AT&T comments, January 28, 2010, footnote 39.

¹⁴ National Association of State Utility Advocates (NASUCA) comments, January 28, 2010, at page 4.

¹⁵ "It is up to Qwest to seek rate relief first from the state. If Qwest will not do so (or if the state will not accede to that request), then it should not be the responsibility of consumers in other states to provide

We have shown that there are unique characteristics of providing high-cost universal service in rural areas in Wyoming.¹⁶ Others agree.¹⁷ This opinion is held by associations as well as state commissions, consumer advocates, and very large phone companies.¹⁸ The FCC has not provided a high-cost regime for non-rural carriers sufficient to maintain rural residential rates in Wyoming that are reasonably comparable to urban rates.

- **Rural residential non-rural carrier rates in Wyoming are not reasonably comparable to the FCC’s benchmark.**¹⁹

Wyoming’s non-rural ILEC’s (Qwest) rural residential customers pay a monthly rate of \$46.37, or 181 percent (181%) of the nationwide weighted average urban rate. Wyoming’s rates are among the highest in the nation. Wyoming’s rates are among the highest in the nation.

Verizon asserts that rates are reasonably comparable; however, Verizon’s position is based upon a dated and flawed study.²⁰ The rates for Wyoming carriers used in the study do not reflect current rates, and do not include Qwest. The issue in this docket is rural residential rates of the non-rural carrier. Omitting Qwest’s Zone 3 rate from the analysis produces misleading results. Our annual rural residential rate certification of non-rural carrier rates shows definitively that rural/urban rates are not comparable.

additional support, especially when the state rates are both reasonably comparable within the state and reasonably comparable to the national average urban rate.” NASUCA ex parte communication, WC Docket No. 05-337 and CC Docket No. 96-45, August 7, 2009, pp. 2 – 3.

¹⁶ See our December 9, 2009, ex parte with the FCC staff.

¹⁷ “Public policy makers must come to grips with the fact that the population density of the eastern United States is not representative of large portions of our country’s geography and concomitant population dispersion.” GVNW comments, January 28, 2010, at footnote 7.

¹⁸ “the parties agreed that the Commission would issue a Notice of Inquiry no later than April 8, 2009; issue a new Notice of Proposed Rulemaking no later than December 15, 2009; and, issue final rules responding to the court’s remand no later than April 16, 2010. Although the instant *FNPRM* may satisfy the chronological aspects of that agreement, it hardly seems poised to respond qualitatively to the court’s remand.” Independent Telephone & Telecommunications Alliance (ITTA) comments, January 28, 2010, page 4.

¹⁹ See each of the Wyoming Public Service Commission annual rate certifications stating that the rural residential rates of the non-rural carrier are not reasonably comparable to the FCC’s urban rate benchmark, 2004 – 2009.

²⁰ “There can by now be no dispute that urban and rural rates for voice services tend to be about the same, and to the extent there are differences rural rates tend to be lower. The empirical data demonstrate that this is true across the country in non-rural LEC study areas.” Verizon comments, January 28, 2010, page 5, referencing a study by Patrick Garzillo, attached to Verizon comments, March 27, 2006.

- **Wyoming’s proposal satisfies Section 254.**

Our proposal to lower the funding benchmark to 125% where low population densities create extremely high cost conditions would create additional support for the incumbent carrier, while guarding against an unreasonable increase in the size of the fund.²¹

CONCLUSION

Based on the comments of other parties, the facts set forth here and in the previous 33 filings we have referenced here and in our initial comments, the methods in which the average urban rate was calculated and the rate comparison requirements of the *Order on Remand*, the WyPSC concludes that its rural residential rates are not reasonably comparable to the nationwide urban rate benchmark. Another factor influencing the rate comparison is the continued presence of substantial implicit subsidies in local rates underlying the average urban rate and the nationwide urban rate benchmark.

The WyPSC pursued a remedy for rural/urban residential rate disparity through its request for further federal action, provided to state commissions in Part IV.D.2.e. of the *Remand Order*. On December 21, 2004, the WyPSC, along with the Wyoming Office of Consumer Advocate, filed with the FCC a *Joint Petition for Supplemental Federal Universal Service Funds for Customers of Wyoming’s Non-Rural Incumbent Local Exchange Carrier*. More than five years later, the FCC has taken no action on that petition.

The WyPSC has provided ample summary of the background, circumstances and history of the WyPSC’s requests for additional federal universal service funds. Wyoming has taken all necessary steps to achieve reasonable comparability through its actions and the application of existing federal support.

Wyoming has done its homework.²²

- Wyoming’s local rates are cost based.
- Wyoming’s local rates have had intrastate internal and access subsidies wrung out.
- Federal non-rural carrier universal service support in Wyoming is targeted to bill credits in high-cost zones.
- Wyoming is diligent in certifying ETCs annually.

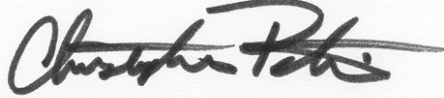
²¹ “based on where it sets the variables or dials, discussed above, the Commission will control the size of this increase” AT&T January 28, 2010, comments, page 11.

²² See our January 28, 2010, comments for additional detail and references.

We appreciate the comments filed by others in this matter and look forward to an expeditious resolution. We urge the FCC to act immediately to correct the long-standing deficiencies identified in the Tenth Circuit Court of Appeal's remand order in Qwest II.

Respectfully submitted February 12, 2010.

FOR THE COMMISSION

A handwritten signature in black ink, appearing to read "Christopher Petrie", written over a light gray rectangular background.

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