

**Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

High-Cost Universal Service Support	:	WC Docket No. 05-337
	:	
	:	
Federal-State Joint Board on Universal Service	:	CC Docket No. 96-45
	:	

**COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Richard Cordray
Ohio Attorney General

Duane W. Luckey
Section Chief

Sarah J. Parrot
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
614.466.4396 (telephone)
614.644.8764 (fax)
sarah.parrot@puc.state.oh.us

Dated: May 7, 2009

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	1
DISCUSSION.....	2
I. General Comments	2
A. The Function of Section 254 of the Telecommunications Act.....	4
B. The Action and Conclusions of the Joint Board	6
C. Additional General Observations	8
II. Responses to Specific Questions Posed in the Notice of Inquiry	11
A. "Reasonably Comparable" Rates	11
B. Non-Rural High Cost Reform in the Context of Broader Universal Service Fund Reform	14
C. "Sufficient" Mechanisms and the Principles Outlined in the Act	14
D. "Affordable" Rates	15
CONCLUSION	16

**Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

High-Cost Universal Service Support	:	WC Docket No. 05-337
	:	
	:	
Federal-State Joint Board on Universal Service	:	CC Docket No. 96-45
	:	

**COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION AND SUMMARY

On April 8, 2009, the Federal Communications Commission (FCC) released a Notice of Inquiry (Notice)¹ regarding the provision of high cost universal service support to non-rural carriers and the issues raised by the remand of the *Qwest II* decision.² In this Notice of Inquiry, the FCC discussed a number of proposals regarding the structuring and development of high cost support for non-rural carriers, and asked a series of questions regarding resolving the issues raised by the *Qwest II Remand*, including alternative ways of resolving these issues. In the Notice, the FCC established a comment cycle in which initial comments are filed by May 8, 2009. Reply comments are due on June 8, 2009.

¹ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Inquiry, FCC 09-28 (rel. April 8, 2009).

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

The Public Utilities Commission of Ohio (Ohio Commission) hereby submits its initial comments on these matters.

The Ohio Commission will focus its comments initially on some broad observations regarding the universal service fund, its purpose in the Telecommunications Act of 1996 (Act), and the Federal-State Joint Board's Second Recommended Decision regarding non-rural high cost support. The Ohio Commission's answers to some of the specific questions posed by the FCC in the Notice of Inquiry will follow, based on the background outlined in the first section below.

DISCUSSION

I. General Comments

As the Ohio Commission has commented previously, the universal service fund initially had a single, fairly clear mission – the universal availability of telephone service. To a great extent, it achieved this goal. In part, it did so because there was a balance between the provision for high cost funding to rural incumbent local exchange carriers, and the responsibility and obligations that they carried. In recent years, the high cost fund has suffered from an imbalance between benefit and the twin needs for responsibility and accountability. If the high cost fund is to return to reasonable function, that balance between benefit and responsibility/accountability must be restored and maintained.

It is worth considering that using a single mechanism to deal with multiple societal goals often leads to conflict between those goals. For any societal goal, there may come a time when that goal no longer needs artificial support, or needs to be supported

differently. The mechanism that supports a societal goal should stand alone, so that when the time comes that it is no longer needed, or is in need of adjustment, the support can be altered or discontinued without disturbing the support of other societal goals.

The original high cost fund was focused on the societal goal of basic telephone service being universally available. It (or an identifiable part of it) should return to that original goal. Additional societal goals, whether providing a competitor (or alternative provider), providing ubiquitous broadband services, or some other societal goal, should be supported via a segregated, though possibly parallel, mechanism.

That being said, the Ohio Commission is concerned that the continuance of the various inquiries and proceedings into universal service support for different segments of the telecommunication industry may result in a fragmented, inconsistent system of mechanisms, open to arbitrage and manipulation. This would seem to be inconsistent with the Act's call for "specific, predictable and sufficient" mechanisms.³ At the same time, a fragmented system of support, based on multiple decisions, proceedings, and rules, is far less likely to efficiently meet the public policy goals stated in the Act, even if it could be made free from arbitrage and manipulation. The FCC should consider whether a wholesale revamping of universal support mechanisms may be needed, in order to make them more effective, and consistent with technological and market change. Such a task is far from trivial, but it may be required. While the Ohio Commission appreciates the opportunity to comment in the specific context of high cost support for non-rural carriers, the Ohio Commission urges the FCC to consider universal service as a

³ 47 U.S.C. § 254(b)(5) (2009).

whole, and develop a single, comprehensive decision that addresses all aspects of universal service.

A. The Function of Section 254 of the Telecommunications Act

While all concerned are clearly familiar with the language of Section 254 of the Telecommunications Act of 1996, it may be worthwhile to spend some time reviewing the language of that section, in order to provide a background and basis for later discussion.

Section 254(b) of the Act establishes six principles regarding universal service, and gives the FCC and the Joint Board the authority to enact additional principles as needed “for the protection of the public interest, convenience, and necessity.”⁴ The proper structural elements of the universal service fund are to some extent dictated by these identified principles. Of specific interest for these comments are the principles of “Access to Advanced Services,” “Access in Rural and High Cost Areas,” and “Specific and Predictable Support Mechanisms.”

“Access to Advanced Services” is a simply stated principle, but that simplicity belies the complexity of its accomplishment. The provision of “advanced telecommunications and information services . . . in all regions of the Nation” is not a simple task.⁵ The United States is made up of a very diverse group of entities, differing

⁴ 47 U.S.C. § 254(b) (2009).

⁵ 47 U.S.C. § 254(b)(2) (2009). It is worth noting that although the principle of “Access to Advanced Services” identifies “telecommunications and information services” as services to which access should be provided, the definition of “information service” in Section 153 of the Act indicates that “telecommunications” is the means of accessing

in geography, climate, and political and regulatory history. Any system to advance and preserve that goal of national availability of advanced services needs to take into account that diversity, or it will not succeed.

The principle of “Access in Rural and High Cost Areas” lays out a number of criteria regarding the services that the fund is to support, as well as to whom Congress was most concerned that access be provided. It specifically identifies low-income consumers, as well as those in rural, insular, and high cost areas as consumers to whom access must be provided, and presumably would not be absent some support mechanism.⁶ It also indicates that the services provided to those categories of customers should be “reasonably comparable to those services provided in urban areas,” and should be provided “at rates that are reasonably comparable to rates charged for similar services in urban areas.”⁷

The final principle that the Ohio Commission draws attention to is the principle of “Specific and Predictable Support Mechanisms,” which states simply that “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”⁸ A few aspects of this principle are worthy of particular note:

- The use of the plural “mechanisms” indicates that more than one mechanism was expected by Congress.

“information service.” 47 U.S.C. § 153(20) (2009). It could be argued that by supporting advanced telecommunication services, the fund inherently supports access to advanced information services.

⁶ 47 U.S.C. § 254(b)(3) (2009).

⁷ *Id.*

⁸ 47 U.S.C. § 254(b)(5) (2009).

- “Federal and State” indicates that Congress envisioned that more than simply federal involvement in these mechanisms would be required.
- “Specific” would seem to indicate that Congress also expected that unique mechanisms would be required to “preserve and advance” the universality of different services.
- “Predictable” would seem to indicate that a minimum of unexpected outcomes was desired by Congress, as well as clarity in the mechanisms so that entities in the market would know how to establish themselves.

While it is not in the list of principles outlined in Section 254(b) of the Act, Section 254(k) appears to state an additional principle that should be met by any universal service mechanism, specifically, that a telecommunications carrier may not use services that are not competitive to subsidize those that are.⁹ As a logical extension of this prohibition, it would be rational to conclude that the subsidization of more competitive services by less competitive services should be minimized, if not outright prohibited.

B. The Action and Conclusions of the Joint Board

The Act also required the FCC to institute a Federal-State Joint Board.¹⁰ In 1998, that Joint Board issued its Second Recommended Decision regarding high cost support.¹¹ In that Recommended Decision, the Joint Board stated:

⁹ 47 U.S.C. § 254(k) (2009).

¹⁰ 47 U.S.C. § 254(a)(1) (2009).

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Second Recommended Decision, FCC 98J-7, 13 FCC Rcd 24744 (Jt. Bd. 1998) (*Second Recommended Decision*).

- “We recommend that the Commission compute federal high cost support for non-rural carriers through a two-step process. First, the Commission should develop a total support amount necessary to reflect those areas considered to have high costs relative to other areas. Second, for areas that have high costs relative to other areas, the Commission should consider, *in a consistent manner* across all states, *any particular state’s ability to support high cost areas* within the state. Federal support should be provided to the extent that the state would be unable to support its high cost areas through its own reasonable efforts.”¹²
- “We recommend that federal support be available to non-rural carriers serving consumers in areas with *costs* significantly above the national average and whose average *costs* throughout its study area significantly exceed the national average.”¹³

In addition, the Joint Board identified some important principles, including:

- “the principle that additional federal high cost support should be targeted to areas with the greatest need”;¹⁴
- “the principle of competitive neutrality that [the Joint Board] previously recommended and the [FCC] subsequently adopted in the *Universal Service Order*”;¹⁵ and
- “[b]asic economic principles [that] tell us that competition will develop primarily

¹² *Id.* at 24746-24747, para. 5 (emphasis added).

¹³ *Id.* at 24754, para. 19 (emphasis added).

¹⁴ *Id.* at 24761, para. 41.

¹⁵ *Id.* at 24765, para. 56. It should be noted that the implementation of competitive neutrality, a principle adopted in the *Universal Service Order* (“identical support” rule), has not worked. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd 8776 (1997) at 8801, para. 46. While the principle of competitive neutrality is important, as the Ohio Commission has noted elsewhere, competitive neutrality is not as simple as giving everyone the same dollar amount of support. *Notice of Proposed Rulemaking Regarding an Interim Cap on High-Cost Universal Service Support for Competitive Eligible Telecommunications Carriers*, WC Docket No. 05-337, CC Docket No. 96-45, Reply Comments (July 2, 2007) at 4-6.

in the urban areas of urban states first. These consumers will expect to see the benefits of competition through lower prices. Competitive benefits should not be completely eroded through high cost fund surcharges or other rate increases to customers.”¹⁶

It should also be noted with regard to the concept of competitive neutrality that the FCC concluded, in the Notice of Proposed Rulemaking regarding the “identical support” rule, that “the goal of universal service will be better served if [the FCC] eliminate[s] the identical support rule and instead provide[s] support based on the competitive [eligible telecommunications carriers’] own costs.”¹⁷

C. Additional General Observations

The Act uses “reasonably comparable” twice in the same paragraph, first discussing the need for “reasonably comparable” services to be available in urban and rural, insular, and high cost areas, then indicating that the rates for similar services in those areas should be “reasonably comparable.”¹⁸

In its *Qwest II Remand* decision, the court correctly noted that advancing universal service could include narrowing the rate gap,¹⁹ but narrowing the “services gap” must be a first principle. The system is called universal *service*, not universal rates, and identical rates for a service that is not available does not address the goal. At this point, the

¹⁶ *Second Recommended Decision* at 24778 (Joint Statement of Chairman Johnson and Commissioner Baker).

¹⁷ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-4, 23 FCC Rcd 1467 (rel. Jan. 29, 2008) at 1473, para. 12.

¹⁸ 47 U.S.C. § 254(b)(3) (2009).

¹⁹ *Qwest Communications*, 398 F.3d at 1236.

services available between differing market areas (urban and rural) of non-rural carriers are not reasonably comparable. Because of this, there are services for which the rates can and should be made “reasonably comparable” (if they are not already comparable), and other services for which the service availability itself is not yet “reasonably comparable.” Again, as the Ohio Commission has commented previously, this situation indicates the need for separate but parallel mechanisms for services for which availability is not reasonably comparable (broadband) and those services where availability is reasonably comparable (POTS).

Additionally, both the Act and the Joint Board identify costs, rather than rates, as the determinant for the need for support. The conditions under which services are provided, whether climatic, geographical, or regulatory, differ among and between the states. Some differences (geographic and climatic) affect primarily costs, and indirectly rates, but others (such as regulatory history) affect rates, but not whether a given area is high cost. Therefore, basing universal service support solely on a rate comparison between or across the states will either fail to achieve reasonable comparability (as the court found in its *Qwest II Remand* decision²⁰), or will fail to be specific, predictable, and sufficient. In any case, it is less likely to actually provide high cost support where it is truly needed.

The Ohio Commission believes that the Joint Board recognized and addressed this difficulty when it indicated that the FCC should consider in a consistent manner each

²⁰

Id. at 1236-1237.

state's ability to support high cost areas, and structure a universal fund that would meet each state's needs. This description does not require a single, national rate benchmark. Rather, it argues against such a benchmark, as it indicates that a benchmark, derived in a consistent manner across all states, would be unique to each state.

The FCC put itself in a statistical bind when it ignored the Joint Board's emphasis on individual state situations²¹ in favor of a national calculation. The simple fact that even urban rates vary so much between state jurisdictions necessitates the broad "zone of reasonableness," which the court rejected.²² If urban rates are not reasonably comparable between states, a national standard for what is "reasonably comparable" to urban rates becomes unworkable.

There is no advantage in creating such a broad-based indirect determination. Rather, the structure of the universal service fund should be national, with the calculations made on a state-by-state basis. In this way, the comparison will remain between rural and urban areas operating under the same local conditions and regulatory philosophy. By making the actual calculation a state-by-state calculation, the "zone of reasonableness" can be greatly narrowed.

The fact that matters have progressed reasonably well for basic telephone services in these high cost areas of non-rural carriers for a decade argues for the idea that basic services in these areas may not need additional federal support. The fact that advanced

²¹ *Second Recommended Decision* at 24762, paras. 44-46.

²² *Qwest Communications*, 398 F.3d at 1237.

services in these same areas have languished indicates that support may be required for certain services in a high cost area, but not others. Again, this distinction argues for a state-by-state analysis, and the segregation of support mechanisms for different services.

As a result of this observation, the Ohio Commission expresses concern regarding proposals that tie support for some services to the provision of additional services. As the Ohio Commission has maintained previously,²³ different societal goals should be met through different mechanisms. In addition to this practical need, the Act requires universal service support mechanisms to be specific.

II. Responses to Specific Questions Posed in the Notice of Inquiry

The FCC posed a number of questions in the Notice, many of which the Ohio Commission believes can be addressed based on the discussion above, and some of which require further study and analysis. Thus, the Ohio Commission cannot at this time provide answers for each of the FCC's questions. However, in an effort to provide a more useful response, the Ohio Commission will address many of the questions asked by the FCC on a topical basis.

A. “Reasonably Comparable” Rates

As discussed earlier, the Ohio Commission believes that the original recommendation of the Joint Board to develop a nationally applied, cost based method of

²³ See, e.g., *High-Cost Universal Service Support et al.*, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36, Comments (Nov. 26, 2008) at 22-23; *Notice of Proposed Rulemaking Regarding an Interim Cap on High-Cost Universal Service Support for Competitive Eligible Telecommunications Carriers*, WC Docket No. 05-337, CC Docket No. 96-45, Reply Comments (July 2, 2007) at 3, 11.

determining the support needed in each state, best meets the universal service goals of the Act. The FCC should not seek to compare rural rates to a national average urban rate or a benchmark above the average. As discussed above, the Ohio Commission believes that greater granularity is required in any rate comparison, and suggests that a state-by-state analysis is more appropriate.

The Ohio Commission agrees with the Joint Board that the national average cost should be used as a basis for establishing the need for support. The Ohio Commission believes that using costs will be a more reliable determinant of the actual need for support, that is not met by state action, than rates. The lowest urban rate, and certainly the lowest national urban rate, is not necessarily going to reflect what the rates are or what a “reasonably comparable” rate would be, in any individual state.

The Ohio Commission believes that what constitutes a “reasonably comparable” rate depends on the state and the areas within that state that are being compared. The Ohio Commission believes that the FCC put itself in a statistical bind by attempting to encompass too many variances in a single national benchmark rate. This required an exceedingly large band to be considered “reasonably comparable.” Returning to the original state-by-state analysis, under a consistent methodology, resolves these issues. As noted earlier, the use of state-by-state comparison and analysis both meets the requirements of the Act, and allows a much tighter and more statistically valid “zone of reasonableness.”

The Ohio Commission agrees with the court’s suggestion that “advancing” universal service is “a concept that certainly could include a narrowing of the existing

gap between urban and rural rates.”²⁴ If a service is not affordable in a given area, it is effectively not available. However, this does not mean that the focus of universal service should turn on rates alone. Affordability is of no consequence if the service is not available. Conversely, as is noted elsewhere, if support for unserved, underserved, and high cost areas impairs affordability in otherwise low cost areas, universal service is not being advanced.

That being said, the Ohio Commission does not believe that the FCC should continue to define “reasonable comparability” in terms of rates, at least not on a national scale. If the rates for similar services are reasonably comparable *within a state*, then the requirements of the Act would appear to be met. Also, as the Ohio Commission has stated elsewhere, based on the Joint Board’s recommendation, the FCC should base support amounts on costs of providing a service rather than using rates as a proxy.

The FCC asked how the relationship between costs and rates could be explained to the court’s satisfaction.²⁵ The Ohio Commission does not believe that the relationship between costs and the resulting rates can be explained, on a statistically valid national basis, to the satisfaction of the court. The FCC has already tried this twice and failed. The Ohio Commission believes that this will be difficult to empirically demonstrate in any case. Most of the data that is needed would likely be considered proprietary. It will be costly and time consuming to get this information if it is possible at all.

²⁴ *Qwest Communications*, 398 F.3d at 1236.

²⁵ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Inquiry, FCC 09-28 (rel. April 8, 2009) at para. 16.

B. Non-Rural High Cost Reform in the Context of Broader Universal Service Fund Reform

Again, as discussed earlier, the Ohio Commission does not believe that these issues should be resolved in an isolated manner. However, as the Ohio Commission has also maintained, differing services (for example, broadband and POTS) should have separate, but possibly parallel, support mechanisms. While they should relate to one another, and can reinforce one another (because the same facility that carries one can often carry the other), support for either should not be *dependent* on the other.

The Act already defines appropriate state and federal roles in universal service support. While the Ohio Commission believes that implicit support should be replaced with explicit support, the Ohio Commission agrees with the Joint Board that “the level of federal support should reflect . . . each state’s ability to use its own resources to address its universal service needs, regardless of whether that or any other amount of support is explicitly provided by the state.”²⁶ As the Joint Board indicated, “[e]ach state is uniquely qualified to determine, based upon its own costs, rates and other circumstances, when and if it needs an explicit universal service support mechanism.”²⁷

C. “Sufficient” Mechanisms and the Principles Outlined in the Act

The term “sufficient” should not be regarded either as a stand alone term, or as a dollar-value target. The phrase “specific, predictable and sufficient” is applied in the Act to the federal and state *mechanisms* that are used to “preserve and advance” universal

²⁶ *Second Recommended Decision* at 24760, para. 36.

²⁷ *Id.* at 24760, para. 38.

service.²⁸ If the FCC develops, in conjunction with the states, mechanisms that are both “specific” and “predictable,” sufficiency (in the sense of being appropriate to the task of successfully preserving and advancing universal service) is possible, and can be determined by observation.

As a general statement regarding universal service, the Ohio Commission believes that giving priority to some principles over others would likely be challenged in the courts, as the Act has not indicated any priority. However, to the extent that universal service mechanisms (either existing or developed) are not sufficient (in the sense that they fail to preserve and advance one or more of the principles), then those individual mechanisms may be subject to adjustment to correct for that insufficiency.

D. “Affordable” Rates

The Ohio Commission does not believe that the FCC should define “affordable rates,” particularly with regard to local rates. To do so raises the specter of preemption in a way far outside of that contemplated by the Act.

In addition, if the FCC were to attempt to define affordability, it would need additional, detailed rate data from a broader range of carriers. However that would not be the end of the data required. Affordability is not based solely on the rate. Is the affordability of an item or service solely a result of the price charged for it? We would suggest the answer is “No.” The local economy, the economic situation of the customer, and the economic value of the item or service, among many other issues, impact the “affordability” of an item or service.

²⁸ 47 U.S.C. § 254(b)(5) (2009).

CONCLUSION

While the Ohio Commission appreciates the opportunity to comment on this specific aspect of universal service, the Ohio Commission remains concerned that a fragmented series of proceedings on universal service for various aspects of the market may result in a fragmented series of mechanisms, rather than a set of “specific, predictable and sufficient” mechanisms, as envisioned by the Act.

The Ohio Commission has in these comments referenced its earlier comments in other universal service proceedings, as the issues and situations addressed are similar, whether the service under review is urban, rural, non-rural, the market is high cost, insular, or otherwise limited, or the service is basic or advanced. The FCC has before it a demonstrated need for comprehensive universal service reform. The Ohio Commission believes that by returning to some basic principles and, applying those principles consistently, but independently, across services, service areas, and jurisdictions, the goal of universal service can be achieved in an effective and efficient manner for each service in each market. It is the Ohio Commission’s hope that its comments in this and other proceedings regarding universal service will be helpful in this development.

Respectfully submitted,

Richard Cordray
Ohio Attorney General

Duane W. Luckey
Section Chief

/s/ Sarah J. Parrot

Sarah J. Parrot

Assistant Attorney General

Public Utilities Section

180 East Broad Street, 9th Floor

Columbus, Ohio 43215-3793

614.466.4396 (telephone)

614.644.8764 (fax)

sarah.parrot@puc.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Comments** submitted on behalf of the Public Utilities Commission of Ohio was served by regular U.S. mail, this 7th day of May, 2009.

/s/ Sarah J. Parrot

Sarah J. Parrot
Assistant Attorney General

Best Copy and Printing, Inc.
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Antoinette Stevens
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street, SW
Room 5-B521
Washington, D.C. 20554

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/7/2009 3:34:39 PM

in

Case No(s). 93-4000-TP-FAD

Summary: Comments Comments Submitted On Behalf of the Public Utilities Commission of Ohio electronically filed by Ms. cora g peterson on behalf of Public Utilities Commission of Ohio