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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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| **FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE** | ) ) ) ) | **CC DOCKET NO. 96-45** |

## REPLY COMMENTS OF COMPUSERVE INCORPORATED

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**May 7, 1996**

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## SUMMARY

The initial comments filed in this proceeding indicate a general consensus among many local exchange carriers, interexchange carriers, state public utility commissions and online service providers in support of the Commission proposal to rely primarily on marketplace forces and private sector initiative to meet the universal service obligations under new Section 254 of the Communications Act of 1934. To the extent that universal service subsidies are deemed necessary, the consensus recommendation is that such subsidies should be explicit and narrowly targeted, and that their distribution be limited to those entities specifically designated by statute (qualified elementary and secondary schools, libraries, rural health care providers) and to those residential customers who require financial assistance in order to stay on the network.

In its initial comments, CompuServe provided an analysis of the statutory language which demonstrated that enhanced service providers which provide online and Internet access services are not providers of either "telecommunications" or "telecommunications services" subject to mandatory or discretionary universal service contribution requirements. No party has refuted CompuServe's analysis of the statutory language in this regard. The only party that even attempted to provide any rationale for extending universal service contribution requirements to enhanced service providers is LDDS WorldCom, which claimed that perhaps "some" enhanced service providers may be subject to universal service contribution requirements. However, LDDS specifically identified only providers of Internet voice capability as candidates for making universal service contributions.

LDDS WorldCom's suggestion is inconsistent both with the statutory language and the Commission's long-standing distinction between regulated basic telecommunications services and unregulated enhanced services. In particular, LDDS WorldCom failed to address the unambiguous expressions of Congressional intent not to treat any enhanced services as "telecommunications" or "telecommunications services." LDDS WorldCom also totally ignored new Section 230 of the Communications Act which declares it to be "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. . . ."

Moreover, Internet voice capability essentially is a software product. LDDS WorldCom's failure even to identify which entity, the software developer or the unaffiliated Internet access provider, should be treated as a "telecommunications carrier" under its theory demonstrates the defects in its suggestion. LDDS WorldCom also fails to heed the admonition of Congressional leaders that the Commission must not stray from Congressional intent in implementing the universal service provisions of the 1996 Act. Congress provided no indication whatsoever that it intended to change, or even re-examine, the unregulated status of enhanced service providers in general and providers of Internet voice capability in particular.

The Commission also should dismiss the suggestion by a couple of commenters that the Commission revisit its earlier decisions treating enhanced service providers similar to other end users by not requiring them to pay common carrier access charges. The Commission already has announced its intention to initiate a separate proceeding to investigate comprehensive reform of the current interstate access charge regime, and that would be the more appropriate proceeding to reexamine the access charge treatment of enhanced service providers if it is to be reexamined at all. Indeed, because the Commission did not even hint that it would revisit this issue in the universal service rulemaking, it would be a violation of the notice requirement under the Administrative Procedure Act to adopt any changes to the access charge policy governing the classification of enhanced service providers in this proceeding. In any event, as shown in these comments, it would be unwise for the Commission to propose requiring enhanced service providers to pay common carrier access charges for the same reasons the Commission has found it unwise to do so in the past.

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**TO: FEDERAL-STATE JOINT BOARD**

## REPLY COMMENTS OF COMPUSERVE INCORPORATED

CompuServe Incorporated ("CompuServe"), by its attorneys, hereby files its reply to the initial comments filed April 12, 1996, in the above-captioned proceeding.[1/]

### I. THE INITIAL COMMENTS INDICATE A CONSENSUS SUPPORTING COMMISSION RELIANCE ON MARKETPLACE FORCES AND ON NARROWLY TARGETED SUBSIDIES TO SATISFY ITS UNIVERSAL SERVICE RESPONSIBILITIES

In its initial comments, CompuServe recommended that the Commission should, consistent with the pro-competitive and regulatory focus of the Telecommunications Act of 1996, rely to the maximum extent possible on free competition and private sector initiative to meet its universal service obligations under new Section 254 of the Communications Act of 1934, as amended ("the Act"). CompuServe at 4-5.

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[1/] Federal-State Joint Board On Universal Service, CC Docket No. 96-45, FCC 96-93, March 8, 1996 ("Notice"). CompuServe recognizes that the Joint Board initially will review these comments and then make a recommendation to the Commission, so CompuServe intends that its references in these comments to the Commission be read to include the Joint Board as well.

Many other parties filing initial comments also concluded that the best mechanism for ensuring widespread access to essential telecommunications services is through operation of competitive marketplace forces and, only when required, through the use of narrowly targeted subsidies. Indeed, a consensus in this regard appears to have emerged among a wide variety of industry participants, including incumbent local exchange carriers, interexchange carriers, enhanced service providers, corporate end users and state public utility commissions.

For example, US West stated that "[t]o the greatest extent possible, the competitive marketplace should be relied upon to define and provide universal service at reasonable rates." U.S. West at 3. NYNEX recognized that an overly broad definition of universal service would impede the statutory goal of promoting competition. NYNEX at 1-2. Ameritech echoed the comments of many when it emphasized that any universal service subsidies that are provided should be narrowly targeted. Ameritech at 8. USTA stated that market forces wherever possible should provide the means to make the widespread availability of telecommunications services a reality. USTA at 5.

Interexchange carriers agreed with the LECs at least on these principles. MCI explained that market competition will best ensure all consumers access to providers and services and that the currently effective universal service subsidies are not properly targeted. MCI at 3, 9. Sprint stated that to be consistent with the 1996 Act the Commission must adopt policy

changes that foster a competitive marketplace and that are neutral in competitive effect. Sprint at 3.

End users such as the Ad Hoc Telecommunications Users Committee also concluded that vigorous competition will be the most reliable source of economically efficient universal service funding. Ad Hoc at 1. The Georgia Public Service Commission (GPSC) recognized that development of a state-of-the-art telecommunications infrastructure must be produced by a competitive market where possible. GPSC at 2. The GPSC also urges that universal service burdens be made as small as possible in order that telecommunications technology continues to be deployed rapidly and efficiently. Id. at 4.

Consistent with this general consensus among disparate sectors of the industry, the Commission should adopt policies which avoid broad or intrusive subsidy programs that distort the workings of the competitive marketplace. Universal service subsidies should be distributed by narrowly targeting only those individuals that require financial assistance in order to stay on the network.

## II. NO PARTY HAS REFUTED COMPUSERVE'S ANALYSIS OF THE STATUTORY LANGUAGE WHICH DEMONSTRATES THAT PROVIDERS OF ONLINE AND/OR INTERNET ACCESS SERVICES ARE NOT SUBJECT TO EITHER MANDATORY OR DISCRETIONARY UNIVERSAL SERVICE CONTRIBUTION REQUIREMENTS.

In its initial comments, CompuServe demonstrated that enhanced service providers which provide online and Internet access services are not subject to universal service contribution

requirements under new Section 254(d) of the Communications Act. CompuServe explained that under the statute only "telecommunications carriers" and "other providers of interstate telecommunications" are subject to potential universal service contribution requirements and that online and Internet access services neither engage in "telecommunications," provide "telecommunications service," nor act as "telecommunications carriers" as those terms are defined under the statute. CompuServe at 7-15.

Those commenters which also undertook a detailed analysis of the statutory language agreed with CompuServe's conclusion that online and Internet access providers are not subject to statutory universal service contribution requirements. The Interactive Services Association ("ISA"), for example, showed that online and Internet access services meet none of the three statutory tests a service must satisfy to be classified as a "telecommunications service." ISA at 6-9. Similarly, Netscape Communications explained that information service providers, online service providers, and other Internet services providers are not "telecommunications carriers" within the meaning of Section 254(d) of the Act. Netscape at 13-14.

In fact, the overwhelming majority of initial comments filed were consistent with CompuServe's analysis to the extent that they recommended that universal service contributions be required only from "carriers." See, e.g., Southwestern Bell at 20; BellSouth at 15; Sprint at 16-17; MCI at 15; Information

Technology Association of America and the Electronic Messaging Association at 16.

LDDS WorldCom, on the other hand, claimed that "some" enhanced service providers ("ESPs") meet the statutory definition of a "provider of telecommunications service" and thus could be required to contribute to universal service. LDDS WorldCom at 15.[2/] In particular, LDDS WorldCom claimed that "a discrete category of entities that provide interstate and international telephone services over the Internet (the so-called Voice-Over-Net, or "VON" service providers)" properly is classified as a "provider of interstate telecommunications" subject to universal service contribution requirements. Id. at 16. LDDS WorldCom is incorrect.

Unlike CompuServe and the ISA, LDDS WorldCom failed to undertake a comprehensive analysis of the relevant statutory definitions. If it had done so, it would have concluded that enhanced service providers do not constitute "telecommunications carriers" nor otherwise engage in "telecommunications" or "telecommunications services" and, therefore, are not subject to universal service contribution requirements. Indeed, a Commission decision imposing universal service contribution

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[2/] America's Carriers Telecommunication Association ("ACTA") also proposed that universal service contributions be required of enhanced service providers, information service providers, Internet access providers, private networks and end users. ACTA at 12. Because ACTA provided no supporting analysis whatsoever for its proposal, however, CompuServe will not focus on ACTA's bald claims.

requirements on enhanced service providers would be inconsistent with the Commission's long-standing dichotomy between regulated basic telecommunications services and unregulated enhanced services. See CompuServe at 11-16. New Section 153(44) of the Act requires the Commission to treat all "telecommunications services" as common carrier services for purposes of Title II of the Act; and if the Commission treats enhanced services as "telecommunications services," subject to universal service contribution requirements, it would require the Commission for the first time to regulate enhanced services under Title II. As discussed in CompuServe's initial comments at 13, however, Congress provided no indication whatsoever that it intended to erode the bright line distinction between regulated basic services and unregulated enhanced services.

This conclusion is confirmed by a review of the 1996 Act's legislative history. In adopting new Section 153(48) of the Act, the Congress accepted the Senate's definition of "telecommunications".[3/] The report accompanying the Senate bill unambiguously explains that the Senate's definition of "telecommunications" is not intended to include "information services,"[4/] a category of services which essentially is identical to enhanced services. See CompuServe at 15-16. The

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[3/] H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 116 (1996).

[4/] S. Rep. No. 23, 104th Cong. 1st Sess. 17-18 (1995) ("This definition excludes those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services").

legislative history of new Section 153(51) defining "telecommunications service" is to the same effect. There also Congress accepted the Senate's definition, and the report accompanying the Senate bill confirmed that telecommunications service "does not include information services, cable services or 'wireless' cable services, but does include the transmission, without change in the form or content, of such services."[5] LDDS WorldCom did not address these unambiguous expressions of Congressional intent not to treat enhanced services as "telecommunications" or "telecommunications services."

Significantly, LDDS WorldCom also totally ignored new Section 230 of the Act which declares it to be "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. . . ."[6] CompuServe showed in its initial comments that this Congressional policy not to regulate interactive computer services logically can be implemented only by a determination that providers of interactive computer services (which encompass both online and Internet access services) are not "telecommunications carriers" subject to mandatory universal service contribution requirements. CompuServe at 14-15.

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[5] Id. at 18.

[6] Section 509 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 137 (adding new Section 230(b)(2) to the Communications Act of 1934, as amended) (emphasis added).

LDDS WorldCom also incorrectly concluded that providers of two-way voice capability over the Internet are subject to discretionary universal service funding requirements as "providers of interstate telecommunications." First, LDDS WorldCom failed to identify which entity involved in providing voice capability over the Internet is the alleged provider of interstate telecommunications. Internet voice capability may be purchased completely separate from Internet access service as a stand-alone computer software product. Such a computer software product does not fit within the statutory definition of "telecommunications" which is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" (to be codified at 47 U.S.C. §153(48)) (emphasis supplied). To state the obvious, sellers of computer software products sell software and do not provide transmission services within the meaning of "telecommunications."

Second, the analysis of the statute provided in CompuServe's initial comments at 9-11, which showed that online and Internet services such as e-mail constitute enhanced services and not "telecommunications," is equally applicable to voice capability provided over the Internet. Enhanced services are defined in Section 64.702(a) of the FCC's rules as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscribers transmitted

> information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

Similar to other uses of the Internet, such as e-mail, Internet voice applications are enhanced services because they require the use of computer processing protocols and the use of storage and retrieval technology.[7]

For example, a typical use of Internet phone software establishes a session with a host or "server" computer on the Internet.[8] The server registers the end user as "active" (that is, able and willing to call and be called) and downloads a list of other people who are registered "active" on the server. The function of the registration server effectively is to act as a storage and forwarding mechanism. When two parties who are registered "active" decide to accept a connection, they speak into microphones, and their analog voice signals are converted by a sound card into digital samples of the audio data. Small samples of the digital audio data are stored in a buffer while they are processed by compression software. After the voice signal is digitally compressed, the data are retrieved in near real-time by the other party and converted back into an analog

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[7] The Commission expressly found that data storage and retrieval applications similar to e-mail are considered enhanced services rather than basic pipeline transmission services. Computer II, 77 F.C.C.2d at 420-21.

[8] Proprietary online services and Internet access services typically are provided on a client-server model under which end user clients are afforded remote access through their computer terminals to information and computer applications stored in host or "server" computers.

voice signal. An Internet voice capability application which incorporates protocol processing capabilities is really an advanced form of storage and retrieval service using protocol processing capabilities which is excluded from Title II regulation as an enhanced service.

Finally, LDDS WorldCom fails to heed the admonition of Congressional leaders to the Commission that, in implementing the universal service provisions of the 1996 Act, the Commission should not stray from Congressional intent as expressed in the statutory language.[9] As described in CompuServe's initial comments, nothing in the 1996 Act indicates that Congress intended to change, or even re-examine, the unregulated status of enhanced service providers in general and providers of Internet voice capability in particular. Adoption of LDDS WorldCom's recommendations in this regard, therefore, would be inconsistent with this Congressional intent and must be rejected.

## III. THERE IS NO RECORD SUPPORT FOR TREATING ENHANCED SERVICE PROVIDERS DIFFERENTLY THAN ANY OTHER END USERS WITH RESPECT TO ACCESS CHARGES

A tiny minority of parties filing initial comments have suggested that the Commission use this proceeding to revisit its earlier decisions treating enhanced service providers similar to all other end users and not requiring them to pay carrier common

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[9] See, e.g., "Fields Cautions FCC On Telecom Act Enforcement," Communications Daily, Vol. 16, No. 61, March 28, 1996, at 1-2.

line access charges. LDDS WorldCom at 15; Southwestern Bell at 22-23.

The suggestions that the Commission revisit in this proceeding the so-called ESP exemption from interstate access charges should be rejected. The Commission already has announced its intention to initiate a separate proceeding to investigate comprehensive reform of the current interstate access charge regime.[10] It would be more appropriate to examine the access charge treatment of enhanced service providers in a proceeding addressing access charge reform rather than add an extraneous issue to the instant universal service proceeding under which the Joint Board and the Commission already are under tight statutory deadlines for completing their tasks.

Indeed, the very fact that the Commission has reviewed the appropriate access charge treatment of enhanced service providers on several different occasions over the past dozen years indicates that the complex issues raised by LDDS WorldCom and Southwestern Bell require a more comprehensive investigation than is feasible in the instant docket focusing on statutorily-directed universal service issues. In the future proceeding on access charge reform, the Commission and the parties at least would have an opportunity to provide data and arguments on the

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[10] See, e.g., "FCC To Begin Access Charge Reform Rulemaking Soon; Industry Polarizes Over Possible Changes," Telecommunications Reports, April 22, 1996, at 34.

following important issues relevant to any determination of the access charge treatment of ESPs:

- the fact that enhanced service providers already are paying the full cost of the local exchange facilities they use;

- the fact that imposition of carrier access charges on ESPs would have a severe economic impact on the information services and Internet access services industries just as those industries are achieving economies of scale and a critical mass of consumer acceptance in the marketplace;

- the fact that a dramatic increase in ESP access charges would shift the competitive balance toward deep-pocketed companies and away from the smaller, entrepreneurial firms which until today have tended to lead in consumer innovations and the development of new Internet computer applications;

- whether private networks that provide enhanced services also will be subject to carrier access charges and, if not, whether such a distinction constitutes unreasonable discrimination prohibited by Section 202(a) of the Act in light of the fact that the use of local exchange facilities by ESPs and by users of large private networks is essentially identical;

- the fact that it is impossible to determine whether enhanced services traffic is jurisdictionally interstate or intrastate for purposes of determining access charges; and the fact that the Commission itself has conceded that a plan to detect and measure enhanced service provider traffic has not been developed;

- whether a significant increase in access charges payable by ESPs will promote service and facilities bypass;

- the fact that, in order to assess carrier access charges on ESPs, the Commission for the first time would be required to try to develop a mechanism to identify each of the many ESPs now in the marketplace, a virtually impossible task;

- the fact that imposition of increased access charges on ESPs appears to be inconsistent with U.S. policy, as enacted in new Section 230(b)(1) of the Act, "to promote the continued development of the Internet and

other interactive computer services and other interactive media."

Finally, because the Commission did not even hint that it would revisit the access charge treatment of enhanced service providers, it would be a violation of the notice requirement under the Administrative Procedure Act to adopt any changes in this proceeding to the current access charge policy governing enhanced service providers. See, e.g., Natural Resources Defense Council v. EPA, 824 F.2d 1258, 1282-85 (1st Cir. 1987).

## IV. CONCLUSION

For the foregoing reasons, the Joint Board should make recommendations consistent with the views expressed herein.

**Respectfully submitted,**

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**May 7, 1996**

## CERTIFICATE OF SERVICE

I, Marcia Towne Devens, do hereby certify that true and correct copies of the foregoing document, "REPLY COMMENTS OF COMPUSERVE INCORPORATED" were served by first-class U.S. Mail, postage prepaid, this 7th day of May, 1996, on the following:

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