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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DEC 19 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

To: The Commission

Comments of UTC

Pursuant to Section 1.415 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),¹ hereby submits its comments in response to the *Recommended Decision* of the Federal-State Joint Board on Universal Service, released on November 8, 1996, in the above-captioned proceeding to implement the universal service provisions of the Telecommunications Act of 1996. UTC's comments are specifically limited to the Joint Board's interpretation of the statutory definition of "telecommunications service" contained in the Act.

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. Over 1,200 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric which cooperatives serve only a few thousand customers each. All utilities depend upon reliable and secure communications to assist them in carrying out their public service obligations. In order to meet these

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¹ UTC was formerly known as the Utilities Telecommunications Council.

communications requirements, utilities and pipelines operate extensive private, internal communications networks consisting of both wired and wireless components.

UTC submitted comments at the *Notice of Proposed Rulemaking (NPRM)* stage of this proceeding, in which UTC explained that while many utilities and pipelines intend to take an increasingly active role in the provision of telecommunications services, the vast majority will retain a strong need for private internal communications networks.

Unfortunately, one aspect of the Joint Board's Recommended Decision if adopted by the Commission could place an undue burden on these critical private networks, and could act as a disincentive for the provision of communications infrastructure in rural and remote areas of the country.

I. The Joint Board Has Adopted An Overly Broad Interpretation Of What Constitutes A Telecommunications Service Provider

While the Joint Board is to be commended for its efforts in crafting a well-reasoned and balanced Recommended Decision for the implementation of universal service, UTC is concerned that the Joint Board may have inadvertently adopted an overly-broad interpretation of who is required to contribute to universal service. Section 254(d) specifically states that:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.

In order to ensure that all competing carriers make an equitable contribution, the Joint Board recommends that the FCC construe these obligations as broadly as possible. However, a broad implementation is necessarily constrained by the statutory definition of

telecommunications service and the FCC's previous interpretation of that definition. The Act defines "telecommunications service" as:

The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

A parsing of this definition indicates that in order to be considered a telecommunications service provider an entity must satisfy two requirements: (1) telecommunications has to be offered for a fee; and (2) the service has to be offered directly to the public, or to such classes of users as to be effectively available directly to the public.

A. Private Internal Networks

Applying this definition, the Joint Board recognized that operators of private networks used for the owner's internal communications are not telecommunications service providers and are therefore not subject to the Act's universal service contribution requirement. Moreover, while the Joint Board concluded that operators of private, internal telecommunications systems are nominally subject to universal service support requirements under the FCC's discretionary authority over "*other providers of telecommunications*," the Board recommended against requiring contributions from private system operators at this time.

UTC absolutely agrees with this recommendation. Utilities and pipelines rely on sophisticated private communications networks as a necessary tool to ensure reliable, safe and efficient delivery of electric, gas and water service to the public. These privately-owned and -maintained telecommunications systems allow for efficient day-to-day service and more timely restoration of critical service than could be provided if utilities and

pipelines were forced to rely entirely on third-party communications providers. Further, the unique operational aspects of utility and pipeline service -- critical time delay parameters; transmission of volatile substances; and expansive or remote operating territories -- necessitate the use of internal communications systems.

The imposition of a universal service contribution requirement on the operators of vital private communications networks would be contrary to the public interest. A funding obligation would constitute an unnecessary tax that would ultimately have to be absorbed by the ratepaying consumers. Aggravating the inequity of such an obligation is the fact that many of these private systems are required by Federal, state and local laws and statutes for the safe operation of utilities and pipelines. Moreover, since many of these communication systems serve unique functions not offered by commercial carriers, such as protection of the electric grid, control of pipeline valve pressure, or detection of contaminants in the water supply, it cannot be argued that the private operation of these systems negatively impacts the funding of public networks. It is therefore appropriate that these and other essential industries relying on private internal networks not be compelled to contribute towards universal service.²

B. Offered For A Fee

A disturbing aspect of the Joint Board's recommendation is its interpretation of the Act's requirement that a telecommunications service be offered "for a fee." In its comments on the *NPRM*, UTC pointed out that the requirement that the service be offered for a fee evidenced Congress' intent that the service only apply to commercial

² To the extent utilities and pipelines engage in the offering of telecommunications services they fully expect to be subject to the Act's universal service requirements on the same terms and conditions as other similarly situated entities.

telecommunications services; that is, services offered on a for-profit basis rather than on a non-profit, cost-shared basis. However, at paragraph 789 of the Recommended Decision the Joint Board indicated that it does not consider the phrase “for a fee” to mean “for profit,” and instead recommended that the FCC interpret the phrase as meaning “services rendered in exchange for something of value or a monetary payment.”

The Joint Board’s recommended interpretation of “for a fee” should be rejected as against the public interest and the FCC’s prior interpretation of the phrase. Such an interpretation would extend universal service contribution requirements to public safety and public service organizations that operate networks with other entities on a non-profit, cost shared basis. For example, the interconnected nature of electric transmission systems often requires that adjacent electric utilities share components of the communications networks that are used to monitor, balance and protect the nations’ electric grid. Large electric generation and transmission cooperatives often own and manage, on a non-profit basis, the communications networks that are utilized by the individual distribution cooperatives that collectively “own” the generation and transmission cooperatives. State and local government agencies frequently develop communications networks shared by all agencies in the community. Likewise, large corporations frequently develop communications systems that are used by their subsidiary or affiliate corporations, with costs allocated among the system users on an equitable, non-profit basis.³ In addition, spectrum scarcity, budget concerns and an interoperability requirements, has lead a growing number of utilities and other private system operators including Federal, state and municipal organizations to enter into non-profit, cost-sharing arrangements for the

³ For regulated utilities, allocation of such costs among affiliates is often required by state and Federal authorities.

construction and operation of private communications networks. Such sharing arrangements have been encouraged by the FCC, particularly in the case of radio-based systems as cost effective and spectrally efficient.⁴

Moreover, the Joint Board's recommended interpretation of "for a fee" should be rejected as inconsistent with the FCC's recent interpretation of the phrase in its "interconnection" proceeding. In its August 8, 1996, *First Report and Order*, CC Docket 96-86, implementing the Act's interconnection provisions the FCC stated:

*We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of telecommunications services... We believe that such methods of cost sharing do not equate to a "fee directly to the public" under the definition of telecommunications service.*⁵

Even though one of the private system owners or operators may receive cost-reimbursement from other users, this does not constitute a "fee" in the sense of being a payment for the rendition of a communications service. In fact, the FCC's Rules differentiate between non-profit, cost shared systems and systems used to provide for profit telecommunications services.⁶ Therefore, consistent with its earlier interpretation, for purposes of universal service funding obligations the FCC should not consider non-profit, cost-shared systems as offering services for a "fee."

⁴ The Final Report of the Joint FCC and Commerce Department Public Safety Wireless Advisory Committee also advocated the development of cost-shared, non-profit systems to meet the needs of public safety and public service.

⁵ *First Report and Order*, CC Docket No. 96-98, para. 994, released August 8, 1996.

⁶ *See* Section 90.179(f) (Private radio channels above 800 MHz available to Industrial/Land Transportation and Business Radio Licensees may be used on a cost-shared, non-profit basis but not on a for-profit basis).

B. Carriers' Carrier Networks

UTC also disagrees with the Joint Board's recommendation as to the treatment of privately negotiated, individualized carriers' carrier arrangements. At paragraph 788 of the Recommended Decision the Joint Board states that "wholesale" carriers' carriers that provide service to other carriers should be required to contribute to universal service. This recommendation is based on the Board's opinion that such carriers' activities are included in the phrase "*to such classes of eligible users as to be effectively available to a substantial portion of the public.*" The Joint Board notes that "[t]he Commission has interpreted this phrase to mean "*systems not dedicated exclusively to internal use,*" or systems that provide service to users other than significantly restricted classes."

The Joint Board's analysis is fundamentally flawed. The statutory phrase that it cites is not from the Act's definition of "telecommunications services," it is from the 1993 Budget Act's definition of "commercial mobile radio services;" (CMRS). Similarly, the FCC language that it quotes in support of its interpretation is taken from the FCC's *Second Report and Order* implementing the CMRS requirements, GN Docket 93-252.

The Act's new definition of "telecommunications services" contains a number of vital distinctions from the CMRS definition which was only intended to apply to mobile radio services. The most important difference between the two definitions is that unlike CMRS, telecommunications services must be offered "*to such classes of users as to be effectively available directly to the public.*" By adopting this element of the definition, Congress expressed its intent that the determination of whether an entity is acting as a telecommunications service provider should focus on whether the service provider is itself directly offering service to the end-user public. The inclusion of the requirement that the

service be offered directly to the public strongly implies that Congress did not intend private wholesale carriers' carrier offerings to be regulated as telecommunications services.

Under a long-line of FCC and court precedents, regulated “common carriers” have been distinguished from unregulated “private carriers” based on their indiscriminate holding-out to the public to provide service.⁷ By defining “telecommunications service” in the Telecommunications Act by reference to the “offering of telecommunications for a fee directly to the public,” Congress seemed to be carrying forward *NARUC I*'s concept of an indiscriminate holding out to the general public.⁸ Moreover, it is significant to note that the Telecommunications Act of 1996, did not alter the statutory definition of a “common carrier,” which was further explained in *NARUC I*.

The “effectively available” clause does not alter this analysis. This language was included to ensure that providers who offer service directly to certain broad classes of end users, rather than the public-at-large, are included within the scope of the definition. In this way, carriers who directly serve a sufficiently large segment of the public so as to make their service effectively available directly to a substantial portion of the public are considered telecommunications service providers. The “effectively available” clause is not intended to capture services that are indirectly offered to the general public, but instead the language is aimed at distinguishing between services that are directly offered to a discrete class of users, and direct offerings of service to a subclass of the public that is sufficiently numerous that they effectively constitute a virtual public.

Thus, the provision of infrastructure, such as “dark fiber” or wholesale capacity to third-party carriers pursuant to privately negotiated, individualized contracts would not be

⁷ See, *NARUC v. FCC (NARUC I)*, 525 F. 2d 630 (1976).

⁸ There are several “petition’s for clarification,” including one by UTC, pending on this matter.

a “direct” offering of service to the public, and would therefore not be subject to universal service contribution requirements. Of course, an entity leasing such infrastructure or bulk capacity from a carrier’s carrier and using it to provide for-profit service directly to the public would be offering “telecommunications service” and would be required to contribute to universal service.

The legislative history for nearly identical language adopted by the Senate Commerce Committee in the 103rd Congress further validates this interpretation. The Commerce Committee Report to accompany S.1822, the Communications Act of 1994, explains that:

The term “telecommunications service” is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity (i.e., “dark fiber”) does not fall within the definition of telecommunications service.⁹

While S.1822 was not ultimately adopted, its definition for “telecommunications services” was incorporated in large part (including the specification that service be offered directly to the public) into the 1996 Act.¹⁰

The exclusion of private “carrier’s carrier” arrangements from the universal service contribution requirements comports with the overall intent of the Act to encourage additional facilities-based competition. Indeed, in many instances the provision of utility telecommunications capacity to third-party carriers in rural or remote areas actually serves

⁹ Report of the Senate Committee on Commerce, Science and Transportation on S.1822, Report 103-367, 103rd Congress 2nd Session, September 14, 1994.

¹⁰ S.1822 defined telecommunications services as: “[T]he direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services.” Note, that this definition is actually closer to the CMRS definition than that which was adopted in the 1996 Act, and the Senate language makes clear that private carrier’s carrier arrangements were not to be included within the definition.

to advance universal service. Moreover, private carrier's carrier arrangements should not in anyway diminish the available funding for universal service. The Joint Board has recommended that contributions be based on a carrier's gross telecommunications revenues net of payments to other carriers. Under this approach if private carrier's carrier arrangements are not telecommunications services then competitive access providers, interexchange carriers and other new entrants, that utilize private wholesale capacity will not deduct payments to these private carriers in calculating their universal support contributions. Thus, there is no net difference in the total payment to universal services.

Finally, it should be noted that it is incongruous to require entities that are not common carriers to contribute to universal service when they are themselves not eligible to draw down from the universal service fund. Section 254 limits eligibility for universal support to telecommunications carriers designated under Section 214(e), which specifically limits eligibility to common carriers.

III. Conclusion

UTC urges the FCC not to adopt an overly broad interpretation of who is required to contribute to universal service as a telecommunications service provider. Specifically, the Commission should reject the Joint Board's recommended interpretation of "for a fee" as against the public interest and the FCC's prior interpretation of the phrase. Otherwise, such an interpretation would extend universal service contribution requirements to public safety and public service organizations that operate networks with other entities on a non-profit, cost shared basis. Further, the FCC should resist efforts to broaden the definition of telecommunications carriers to include entities that provide wholesale capacity to other third-party carriers pursuant to privately negotiated carrier's carrier arrangements.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests
the Federal Communications Commission to take action in accordance with the views
expressed in these comments.

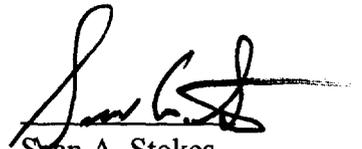
Respectfully submitted,

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Dated: December 19, 1996

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