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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 1 9 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

SEPARATE COMMENTS OF THE PAGING AND NARROWBAND PCS ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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December 19, 1996

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To: The Commission

SEPARATE COMMENTS OF THE PAGING AND NARROWBAND PCS ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Paging and Narrowband PCS Alliance ("PNPA") of the Personal Communications Industry Association ("PCIA") respectfully submits these separate comments regarding the proposals set forth in the Recommended Decision adopted by the Federal-State Joint Board[1/] in the above-captioned proceeding as well as the Commission's related public notice.[2/] PNPA fully concurs in the PCIA comments being concurrently filed in this docket. PNPA files separately in order to address the appropriate policies for calculating the contributions to be made by individual carriers.

1/ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, (November 8, 1996) ("Recommended Decision" or "R.D.").

2/ DA 96-18911 (Nov. 18, 1996) ("Notice").

I. Introduction and Summary

PNPA respectfully submits that carriers' contributions to the universal service fund should reflect their ability to recover from the fund. Such a modification to the contribution formula proposed by the Joint Board is consistent with the principle of competitive neutrality adopted in the Recommended Decision. Providers of messaging services are not eligible to receive support from the universal service fund for the messaging services they provide. At the same time, certain of their competitors are eligible for support from the fund based upon the services they provide. Nonetheless, messaging service providers are required to contribute to the fund on a *pari passu* basis. This clearly places messaging service providers at a competitive disadvantage vis-a-vis their competitors. In addition, the disproportionate burden imposed on messaging service providers, without regard to the relative benefits enjoyed by all carriers contributing to the fund, is an unconstitutional taking. Based upon the foregoing, PNPA recommends that only 50% of messaging service revenues be included in calculating the total gross revenues that are subject to the contribution formula as a fair approximation of the benefits received from universal service.

PNPA also suggests that contributions to the fund be based upon both intrastate and interstate revenues. The majority of services supported by the universal service fund are intrastate. Therefore, it is reasonable to require carriers providing intrastate services to contribute to the fund. In addition, contributions to the fund based upon intrastate and interstate revenues are more administratively feasible than contributions based only on interstate revenue. The majority of the carriers required to contribute to the fund are not subject to existing separations rules which distinguish intrastate from interstate revenues, and the telecommunications relay services program does not provide adequate guidance regarding the separations of revenues. In

addition, the potential gamesmanship in connection with revenue separations, and resultant disparate cost burdens imposed upon carriers, raises Equal Protection concerns.

II. Contributions to the Fund Should Reflect Carriers' Ability to Recover From the Fund

PNPA generally agrees with the Joint Board's tentative conclusion that the appropriate starting point from which to calculate contributions to the universal service fund is a carrier's gross telecommunications revenues net of payments for telecommunications services made to other telecommunications carriers.[3/] PNPA believes, however, that the relative amount of a carrier's contribution should depend in part upon the potential for the carrier to recover subsidies from the universal service fund. A contribution mechanism of this nature is consistent with the important principle of competitive neutrality which is properly reflected in the Recommended Decision.[4/]

One-way messaging services will not be subsidized by the universal service fund currently proposed. Pursuant to the Recommended Decision, carriers may only receive universal support for their services that satisfy all of the "core" or "designated" elements set forth in the Recommended Decision. One-way messaging service does not include voice grade access to the public switched telephone network, DTMF or its equivalent, access to emergency services, or access to operator services.[5/] Thus, carriers providing one-way messaging services are precluded from

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3/ R.D. ¶ 807.

4/ R.D. ¶ 23.

5/ R.D. ¶ 46.

recovering the costs associated with those services from the universal service fund, regardless of where or to whom communications service is provided.[6] Nonetheless, the Recommended Decision contemplates that messaging service providers will be required to contribute to the universal service fund on a *pari passu* basis.[7]

This situation violates the principle of competitive neutrality. Messaging companies compete with other telecommunications service providers in the marketplace. In some instances, they compete directly for one-way messaging business against carriers who bundle messaging service with, or offer messaging service incidental to, other telecommunications services. In other instances, messaging companies are competing against other classes of service (e.g. two-way mobile) that, at a certain price point, are deemed by the customer to be substitutable service offerings. Messaging service providers have thrived, and will continue to thrive, in this competitive marketplace as long as they are given a level playing field on which to compete. However, the proposed contribution formula for the universal service fund will skew the market.

Competitors to messaging companies that provide each of the "core" services that the Joint Board found to be eligible for support under the universal service fund will be entitled to recover the costs of those services from the fund for those services qualifying for support. As a result, these competitors will be able to enhance their revenues, increase their number of subscribers, and allocate their costs over a larger customer base.[8] Not only are messaging-only companies denied these

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6/ R.D. ¶ 79.

7/ R.D. ¶¶ 784, 785 (all telecommunications carriers providing interstate telecommunications service are required to contribute to the universal service fund).

8/ This advantage is exacerbated if subsidies from the fund are calculated to include a profit with respect to the services provided.

benefits with respect to messaging services, but they are forced to contribute to the universal service fund for the benefit of their competitors. This exacerbates the adverse impact of the currently proposed universal service fund recovery mechanism. Carriers receiving subsidies from the fund are at a competitive advantage vis-a-vis carriers providing potentially substitutable services which are not entitled to such recovery.

This result is contrary to the principle of competitive neutrality adopted by the Joint Board in the Recommended Decision and embraced in Section 254.[9/] The universal service support program is intended to enhance the public welfare by enabling telecommunications carriers to provide service to customers otherwise unable to receive service. The program is not intended to provide those carriers with an advantage over their competitors. Thus, to the extent that certain carriers benefit significantly based upon their eligibility to recover from the fund for "core" services, other carriers' obligation to contribute to the fund should be reduced accordingly.

Requiring all carriers to contribute to the universal service fund without regard to the benefits those carriers receive from the program is an unconstitutional taking. The Fifth Amendment to the United States constitution prohibits the taking of private property for public use without just compensation.[10/] If an assessment against a particular entity or group is to pass muster under the Takings Clause, the government must provide benefits that are a "fair approximation" of the value

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9/ R.D. ¶ 23 ("[T]his recommendation is consistent with the concept of competitive neutral contribution embodied in section 254(b)(4) and the explicit requirement of equitable and nondiscriminatory contributions in section 254(d), where Congress clearly articulated that all providers of interstate telecommunications shall contribute on an 'equitable and nondiscriminatory' basis to universal service support mechanisms.")

10/ U.S. Const. amend. 5.

relinquished.[11] As explained above, the benefits messaging service providers will receive from the universal service program are not reasonably related to the proposed amount messaging service providers would be required to contribute pursuant to the Joint Board's proposed funding mechanism. In order to comply with the Takings Clause, the contribution adopted must take into consideration the relative benefits enjoyed by each contributing party subject to the formula.

Based upon the foregoing, PNPA respectfully submits that the relative contribution of companies providing services that are inherently ineligible for subsidy from the universal fund be reduced by applying a discount factor to the gross revenues from such services.[12] Specifically, PNPA recommends that only 50% of messaging service revenues be included in calculating the total gross revenues that are subject to the contribution formula as a fair approximation of the benefits received from universal service. Such an adjustment would account for the fact that messaging service is not eligible for support from the universal service fund.[13]

III. Contributions to the Fund Should be Calculated Using Intrastate and Interstate Revenues

The Joint Board recommends that the universal service support fund for schools and libraries and rural health care providers be funded by assessing both the

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11/ Colorado Springs Production Credit Association v. Farm Credit Administration, 967 F.2d 648, 654 (D.C. Cir. 1992); see e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980).

12/ The test ought to be whether the inherent nature of the service is such that it cannot support the "core" or "designated" services eligible for support under the funding mechanism.

13/ PNPA is not recommending a total elimination of contribution based upon message revenues because all telecommunications carriers get some benefit from the increased access to telecommunications services fostered by the universal service program.

intrastate and interstate revenues of telecommunications service providers.[14/] The Joint Board and the Commission then request comment on whether the modified high cost and low income assistance programs also should be funded in this same manner.[15/] PNPA supports the Joint Board's recommendation with respect to the support fund for schools and libraries and rural health care providers, and recommends that the fund relating to the high cost and low income programs also be based upon both intrastate and interstate revenues.

In light of the services supported by the federal universal service fund, an assessment based in part on intrastate revenues is consistent with the public interest, and passes statutory and constitutional muster. The majority of services supported by the high cost and low income programs are intrastate in nature. Therefore, including intrastate revenues in the federal fund does not impose an undue burden on providers of intrastate telecommunications services. To the extent that carriers are able to recover directly from subscribers the costs of the intrastate services provided, those revenues should be included in the fund which will expand the number of customers able to receive intrastate service.

Contributions to the universal service fund based upon gross intrastate and interstate revenues also are more administratively feasible than contributions based solely on interstate revenue, and reduce opportunities for gamesmanship with respect to jurisdictional classifications. The majority of carriers who are expected by the Joint Board to contribute to the universal service fund are not subject to the Commission's separations rules which serve to distinguish intrastate and interstate revenues. Consequently, the adoption of a contribution formula based solely upon

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14/ R.D. ¶ 718.

15/ R.D. ¶¶ 814, 822; Notice.

interstate revenues would require the promulgation of complex separations rules which would apply to diverse service providers who contribute to the fund. The adoption of such rules would impose a significant burden upon carriers not previously subject to such regulatory oversight and would be contrary to Congress's and the Commission's general trend toward deregulation of competitive marketplaces.

Although carriers currently are required to "separate" interstate from intrastate revenues for purposes of contributing to the telecommunications relay services ("TRS") fund, carriers have complete discretion with respect to the method which they use to determine the appropriate jurisdiction of revenues. Carriers may base their revenue allocations upon figures in their routine accounting books or use a special study. Neither of these methods is reviewed by the Commission or fund administrator.[16/] Thus, if the Commission were to rely upon the TRS program to provide carriers with revenue allocation guidelines, carriers could allocate revenues in the manner most favorable to them without being required to justify that allocation and without regard to Commission rules prohibiting such gamesmanship. This result could not have been intended by Congress.

In addition, the exclusion of intrastate revenues from the federal universal service fund could result in a violation of the Equal Protection clause by subjecting carriers who are, in all relevant respects, alike, to disparate treatment.[17/] The exclusion of intrastate revenues from the federal universal service fund would create an incentive for carriers to minimize interstate revenues if intrastate revenues are not assessed, or are assessed at a lower rate. Thus, carriers could reduce their contribution obligation through gamesmanship in separating revenues and "forum-

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16/ Although NECA, the TRS fund administrator, may conduct an audit with respect to carriers' responses.

17/ See, Bolling v. Sharpe, 347 U.S. 693 (1954).

shopping" for the least costly universal service fund jurisdiction. As a result, although all telecommunications carriers providing interstate services are required to contribute to the federal universal service fund, those carriers who are able to "classify" revenue as intrastate in nature will have a loophole by which to escape such obligation. Those carriers left to bear the burden of supporting the federal universal service fund will bear a disproportionate burden of the costs associated with the program.[18/] There is no rationale by which to justify such disparate treatment.[19/] Most of the services supported by the universal service fund are intrastate in nature. These carriers should not be allowed to avoid their share of the obligation to support the universal service program.

In light of the foregoing, PNPA respectfully submits that carriers' contributions to the universal service fund supporting the high cost and low income programs be based upon gross intrastate and interstate telecommunications revenues.[20/]

18/ Equal Protection issues also would arise if dramatically different contribution mechanisms or formulas are adopted at the state and federal levels.

19/ To that end, PNPA believes that federal oversight is necessary to ensure that the application of the universal service program, in totality, is nondiscriminatory.

20/ Net of payments to other telecommunications carriers, and modified to reflect a carrier's ability to recover from the fund, as discussed above.

IV. Conclusion

Wherefore, for the foregoing reasons, PNPA respectfully requests that the Commission adopt the proposals set forth in these Comments.

Respectfully submitted,

PAGING AND NARROWBAND PCS ALLIANCE
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December 19, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1996, I caused copies of the foregoing Separate Comments of the Paging and Narrowband PCS Alliance of the Personal Communications Industry Association to be mailed via first-class postage prepaid mail to the individuals and parties on the following list.

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