

unnecessarily receive subsidies.⁶³ Thus, by encouraging states to establish smaller service areas, the Commission can reduce the size of the universal service fund while not reducing its effectiveness.

IV. THE COMMISSION MUST CAREFULLY DESIGN THE CONTRIBUTION REQUIREMENTS TO BE IMPOSED ON TELECOMMUNICATIONS CARRIERS

As described above in these comments, the current design of the universal service support mechanism could result in the imposition of substantial payment obligations upon telecommunications carriers, with serious harm for the public interest. Even if, however, the Commission reduces the universal service fund consistent with the policies outlined in this pleading, the Commission must take care in designing its funding rules in order to comply with the statutory mandates as well as otherwise protecting the public interest.

It is essential that the Commission adopt a funding mechanism that fully accounts for competitive considerations. One factor to be included in the calculus should be some comparison in payment amounts between direct competitors, especially where payments made by one set of competitors might be used to support the activities of a direct competitor. Consideration of such factors is fully consistent with the statutory provisions of Section 254(d), which directs telecommunications carriers to contribute to the universal service fund on an "equitable and nondiscriminatory basis."⁶⁴

⁶³ Sprint Reply Comments, CC Docket No. 96-45 at 13 (filed May 7, 1996).

⁶⁴ 47 U.S.C. § 254(d).

V. UNIVERSAL SERVICE SUPPORT FUNDS SHOULD BE COLLECTED BY MEANS OF A DIRECT LINE ITEM ON THE BILLS RENDERED BY TELECOMMUNICATIONS CARRIERS TO THEIR SUBSCRIBERS

The Joint Board found that telecommunications carriers should not recover their contributions to the universal service fund through the subscriber line charge or from retail end-user surcharges.⁶⁵ The Joint Board expressed its belief that Section 254 requires that contributions be made by telecommunications carriers, not customers.⁶⁶ This is an improper interpretation. Rather, the Act does *not* prohibit carriers from recovering the costs of their contributions to the fund from end users. In fact, such recovery of costs is consistent with the public interest and the objectives of the universal service program.

Section 254 states that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."⁶⁷ The 1996 Act is silent with respect to whether carriers may pass those costs through to end users. Absent any prohibition upon end user surcharges in the 1996 Act, the Commission should permit carriers to recover their costs from end users where such recovery is consistent with the public interest.

The recovery of carriers' contributions to the fund from end users is consistent with the goals of the universal service program. The universal service program benefits all end-users, by enabling them to reach -- and to be reached by -- customers who otherwise would not have access to the "core" services designated by the Joint Board. Allowing the costs of universal

⁶⁵ Assuming that the Commission eliminates the prohibition on retail end-user surcharges, a mechanism must be adopted to prevent carriers from having to count revenues earned from the pass through as part of total revenues that are subject to the contribution formula. Otherwise, carriers will be paying "a tax upon a tax."

⁶⁶ *Joint Board Recommendation*, ¶ 812.

service to be passed along to these beneficiaries of the program is appropriate.⁶⁸ Indeed, as Commissioner Chong aptly stated in her separate statement, "It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace."⁶⁹ Thus, a pass through of contribution costs to end-users is clearly envisioned.

Permitting carriers to recover their contributions to the universal service fund from end-users also is consistent with the public interest. Congress and the Commission have determined that an increase in the number of market participants and increased competition foster the public interest. However, market entry and participation would be discouraged if carriers were inhibited from recovering fully the costs of conducting their business. At the same time, competitive market forces will prevent carriers from overpricing their services to end-users. Ultimately, this is an area where the Joint Board should let the marketplace decide, and not place regulatory prohibitions on subscriber surcharges.⁷⁰

Moreover, allowing the costs of universal service to be passed through to end-users would correct the inequality between wholesale and retail service providers that exists in the current formulation. The *Joint Board Recommendation* contemplates in some instances that a

(..continued)

⁶⁷ 47 U.S.C. § 254(b)(4).

⁶⁸ While carriers contributing to the fund could recover these costs from end users, carriers recovering subsidies from the fund presumably would pass along those savings to end users in the form of reduced rates which reflect the amount of the subsidies received

⁶⁹ *Joint Board Recommendation, Separate Statement of Commissioner Chong*, at 10.

⁷⁰ Assuming that the Commission eliminates the prohibition on retail end user surcharges, a mechanism must be adopted to prevent carriers from having to count revenues earned from the pass through as part of total revenues that are subject to the contribution formula. Otherwise, carriers will be paying a "tax upon a tax."

wholesaler can pass the costs of universal service onto another carrier.⁷¹ This will result in having the burden of the universal fund trickle down to the last carrier who has the direct subscriber relationship. If this carrier cannot pass the charge on to the end-user, a competitive disparity between the wholesaler and retailer is created. It is difficult to imagine how competition at the retail level will be fostered, by such a result.⁷²

PCIA further believes that the public will best understand the effects of the universal service policies adopted by Congress and implemented by the Commission through knowing each month the amount of funds required to support such efforts. Accordingly, contrary to the Joint Board's position,⁷³ PCIA believes that an explicit charge should be reflected each month on the telecommunications bills received by consumers and businesses alike. Indeed, a separate line item on each telecommunications service bill appears to be most consistent with the goal expressed by Congress that "all universal service support should be clearly identified . . ."⁷⁴ By knowing the exact financial effect on them, and understanding what activities those funds are being used to support, members of the public can make a determination whether the program is appropriate, needs expansion or contraction, or should be funded through some

⁷¹ *Joint Board Recommendation*, ¶ 108.

⁷² This disparity also raises Equal Protection concerns. The Equal Protection clause prohibits the government from "treating differently persons who are in all relevant respects alike." *Nordinger v. Hahn*, 505 U.S. 1 (1992). However, the proposed funding mechanism precludes the recovery of contributions from end users, and would require solely the carrier with the direct subscriber relationship to bear the costs of universal service. The Joint Board has not articulated any basis upon which to treat retail service providers differently from wholesale service providers. Absent any such reason, the Equal Protection clause prohibits the currently proposed distinction between these two types of service providers.

⁷³ *See Joint Board Recommendation*, ¶ 812.

⁷⁴ Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 104-458, at 131 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 143.

other mechanism. Having an informed electorate on this issue certainly seems to be fully consistent with the public interest.

The Joint Board opposes the adoption of a retail end user surcharge, yet states that "carriers are permitted under section 254 to pass through to users of unbundled elements an equitable and nondiscriminatory portion of their universal service obligation."⁷⁵ Thus, according to the Joint Board, it is acceptable to bundle in the universal service charges with service rates but not set the charges out separately on bills.⁷⁶ This approach runs contrary to the philosophy embodied in the 1996 Act as well as many recent Commission decisions. Moreover, bundling the universal service charges in with the rates for service would appear to affect marketplace pricing without an accurate basis for so doing. Separating the charges for supporting the universal service support mechanisms from actual service rates would appear to be less distortive of the marketplace.

The public interest as well as the statutory goals of the 1996 Act thus would be best served by including universal service support payments as a separate line item on the bills for all telecommunications subscribers.

VI. CMRS PROVIDERS SHOULD BE REQUIRED TO CONTRIBUTE ONLY TO THE FEDERAL UNIVERSAL SERVICE FUND

PCIA has previously demonstrated that CMRS is primarily an interstate service, both legally and factually, and thus should be required to contribute only to the interstate universal service fund. The Joint Board ignores the plain language of Section 332(c)(3) to reach its contrary conclusion that this section "does not preclude states from requiring CMRS providers to contribute to state support mechanisms."⁷⁷ This conclusion is not only inconsistent with the

⁷⁵ *Joint Board Recommendation.*, ¶ 808.

⁷⁶ The Joint Board asserts that Section 254 does not permit the imposition of direct end user charges, but it is unclear to PCIA what language in the statute forms the basis for the Joint Board's conclusion. *See id.*, ¶ 808.

⁷⁷ *Id.*, ¶ 791.

statutory terms but also ignores applicable precedent.

Legally, by adding Section 332(c) to the Communications Act of 1934, Congress federalized the treatment of CMRS. Congressional intent to place CMRS within the ambit of federal regulators is confirmed by the statute's legislative history, which states that the purpose of Section 332(c) "is to establish a Federal regulatory framework governing the offering of all commercial mobile service."⁷⁸

Moreover, in language apparently ignored by the Joint Board, Section 332(c) explicitly addresses the obligations of CMRS licensees to pay into state universal service programs:

Nothing in this paragraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.⁷⁹

Under this provision, CMRS providers may be subject to state universal service funding obligations only at such time as they become a substantial substitute for landline telephone services throughout a state. That clearly is not the case in any state at present.

Further, the factual nature of CMRS makes it an inherently interstate service. As stated in the House Report accompanying Section 332(c), "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."⁸⁰ Moreover, it is appropriate to treat CMRS as wholly interstate under the inseverability doctrine. There are a number of economic and technical reasons why the interstate and intrastate portions of CMRS regulatory treatment cannot be

⁷⁸ H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993).

⁷⁹ 47 U.S.C. § 332(c)(1)(B).

⁸⁰ H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993).

severed, as PCIA has repeatedly demonstrated to the Commission.

Accordingly, the Commission should reject the conclusion reached by the Joint Board and require CMRS licensees to contribute only to the federal, interstate universal service support fund.

VII. CONCLUSION

The Joint Board has provided the Commission with a useful starting place in implementing the provisions of Section 254 of the 1996 Act. PCIA urges the Commission to adopt a number of provisions contained in the Joint Board recommendations intended to carefully define the total amount of the universal service fund. At the same time, certain of the Joint Board proposals would result in excessive funding levels and inequitable treatment of competitors. In those situations, PCIA urges the Commission to reject the Joint Board proposals and instead implement steps consistent with PCIA's comments as outlined above. Defining universal service objectives and obligations as recommended in these comments will best further the public interest.

Respectfully submitted,

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