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Hon. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

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

Dear Secretary Caton:

Enclosed are an original and eleven copies of the comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

Mary E Burgess

Mary E. Burgess
Assistant Counsel

FCC:avy:96-45.ltr

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF
THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE
ON THE RECOMMENDED DECISION OF
THE FEDERAL-STATE JOINT BOARD ON
UNIVERSAL SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) hereby submits its comments on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) released by the Commission on November 8, 1996.

On November 7, 1996, the Federal Communications Commission (FCC or Commission) adopted the Recommended Decision (RD) of the Federal-State Joint Board on Universal Service. In accordance with the Telecommunications Act of 1996 (the Act), the Joint Board made numerous recommendations for universal service according to the principles enumerated by Congress in §254(b) of the Act.

The NYDPS applauds the efforts of the Joint Board for its timely release of the RD. Specifically, the Joint Board recommends that federal universal service support for schools,

libraries, and rural health care providers be funded by interstate telecommunications carriers based on the revenues derived from the provision of both intrastate and interstate services (para. 817). The Joint Board further suggests that federal high cost and low income programs might be funded, in part, by assessing intrastate revenues, but recommends that the Commission seek further comment on this issue (para. 822).

We recommend the Commission carefully evaluate the scope of the Joint Board's proposals inasmuch as Congress did not intend that the federal program be funded by revenues generated from the provision of intrastate telecommunications. For all the reasons below, the plain language of §254 and its legislative history do not support the Joint Board's proposal that the Commission fund the federal program from intrastate revenues. Therefore, §152(b)(1) of the 1934 Act prohibits the Commission's authority "for or in connection with intrastate communication service". Moreover, §152(b)(2) specifically prohibits the Commission's jurisdiction over the intrastate revenues of carriers that provide interstate access.

Furthermore, if the Commission intends to adopt a new high cost support mechanism as part of its efforts to advance universal service, it should allow interested parties a meaningful opportunity to comment on a specific, fully developed proposal. In lieu of adopting the Joint Board's proposed high cost funding mechanism, the Commission should adopt a simple interim universal service mechanism to meet the time frame

required under the Act and continue the Joint Board process to devise a permanent mechanism. Moreover, before deciding whether to increase the level of federal Lifeline assistance, the Commission should work with the states to develop additional information on whether expanding the program, as proposed, will increase subscribership.

Finally, the NYDPS believes Congress intended the states to play a significant role in achieving the goal of connecting schools and libraries to information age tools that can advance learning and public access to information. We believe that any requirement which mandates that states adopt the federal discount matrix as a condition of eligibility for federal support would improperly limit the states' flexibility to design intrastate discount programs appropriate to conditions in each state.

I. Section 254 of the Act Does Not Authorize the Commission to Use Intrastate Revenues to Fund Federal Universal Service Support Mechanisms

A. The Plain Language of Section 254

In its Recommended Decision, the Joint Board proposes that universal service support mechanisms for schools and libraries and rural health care providers be funded by assessing both the intrastate and interstate revenues of providers of interstate telecommunications services (para. 817). However, the plain language of the 1996 Act does not authorize the Commission to use intrastate revenues to fund the federal program.

In the Act, Congress identified a number of principles to guide the Joint Board and the Commission in developing universal service policies. One of the principles explicitly directs the Commission, in developing federal universal policy, to take into account that states would have an independent and primary role in developing state specific universal service policies. Section 254(b)(5) states that "there should be specific, predictable, and sufficient federal and state mechanisms to preserve and advance universal service." Moreover, the universal service provisions specify the authority of both the Commission and the states. Section 254(d) provides that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service" (emphasis added).[1] Thus, the statute does not explicitly authorize the Commission to use intrastate revenues to fund an interstate plan.

Moreover, under the Joint Board's interpretation of §254, virtually all providers of telecommunications services would be required to pay into the interstate fund. All local exchange carriers provide interstate access and under the Joint

[1] Parallel state programs are expressly authorized in §254(f), which provides that states may require "every telecommunications carrier that provides intrastate telecommunications services...[to] contribute...in a manner determined by the State to the preservation and advancement of universal service in that State."

Board proposal, their revenues from intrastate services would be used to fund the federal program.[1] If Congress had intended that intrastate revenues of all carriers be used, there would have been no reason to use the word "interstate" in identifying those services subject to the federal fund. It simply would have directed that "every telecommunications carrier that provides telecommunications services shall contribute...." Therefore, the Joint Board's interpretation of the provision would render an entire clause ("that provides interstate service") nugatory. This reading violates the fundamental rule of statutory construction that a statute must be read in a manner that assigns meaning to each word, and renders no words superfluous, (Fox-Knapp, Inc. v. Employers Mut. Cas. Co., 725 F.Supp 706 (1989)), and must be rejected.[2]

B. Legislative History of Section 254

The legislative history of the Act also indicates that, irrespective of whether a carrier provided interstate service, Congress did not intend to base the assessment of the Federal Universal Service fund on revenues produced through intrastate service. The Conference Report that accompanies the Act

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[1] The Joint Board concludes that "access (including SLCs), alternative access, and special access" all constitute "interstate telecommunications" (para. 785).

[2] Between §152(b)(1), which bars the FCC's jurisdiction of intrastate services of all carriers, and §152(b)(2), which severely limits the FCC's jurisdiction over "connecting carriers" (intrastate companies that provide only interstate access) Congress has never considered access alone to be an interstate service, as discussed below in Section II.

indicates that the Senate version of the universal service bill was adopted with modifications. The Senate Report on S. 652 expressly states that "the Senate intends that States shall continue to have the primary role in implementing universal service for intrastate services..."[1]

Moreover, Congress' intent to preserve parallel authority is further articulated in the Senate Report stating "[t]his new section is intended to make explicit the current implicit authority of the FCC and the States to require common carriers to provide universal service."[2] Congress chose to address intrastate carriers' contributions in the context of intrastate universal service established at the states' discretion.

Furthermore, the specific language in the Senate bill expanding the scope of the contributors did not survive the Conference. The Senate bill specifically stated that "every telecommunications carrier engaged in intrastate, interstate, or foreign communication shall contribute..." (S.652 §253(c)). However, the final version of the Act reads "every telecommunications carrier that provides interstate telecommunications services shall contribute..." (§254(d)). Thus, the modification in the final legislation indicates a more narrow reading of the Commission's authority than is proposed by the Joint Board.

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[1] Conference Report on S. 652 at 128.

[2] Senate Report on S. 652 (Report No. 104-230 at 25).

C. Implied Preemption

Section 601 specifically provides that the Act and the amendments made by the Act shall not be construed "to modify, impair or supersede federal, state, or local law unless expressly provided...." Not only does the plain language of Act dictate against preemption, but the Joint Board also acknowledges that §254 does not identify the specific revenue base to be used for assessing universal service fund contribution (para. 820). Therefore, §601 of the Act prohibits implied preemption of state jurisdiction.

II. Section 152(b) Prohibits the Commission for Using Intrastate Revenues to Support the Federal Mechanism

Since §254 does not explicitly mandate the use of intrastate revenues for all the reasons above, the Commission would be acting outside the scope of its authority if it were to include intrastate revenues in the federal universal service assessment. Section 152(b) of the Communications Act of 1934 gives the FCC no jurisdiction over intrastate revenues. Section 152(b)(1) of the Communications act reserves to the states authority over "...charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service...." As demonstrated in Louisiana v. FCC, §152(b) does not simply forbid the FCC to establish specific rates for certain intrastate services; it denies the FCC jurisdiction over a broad range of matters associated with intrastate communications and services (476 U.S. 356, 373). Accordingly, the FCC's use of intrastate revenues to fund the

federal program violates §152(b)(1)'s express prohibition.

Second, §152(b)(2) specifically limits the Commission's jurisdiction over companies that provide only intrastate services and interstate access. Connecting carriers (the carriers described in §152(b)(2)) simply facilitate the interstate or foreign communications of other licensed carriers. GTE Services Corp. v. FCC, 474 F.2d 724,736 (1973). The only jurisdiction given to the FCC over connecting carriers is that contained in §§201-205 (relating to interconnection).

Under §§201-05, the FCC can order connecting carriers to provide access to interstate carriers. North Carolina Utilities Commission v. FCC, 537 F.2d 287 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976) (hereinafter "NCUC I"); NCUC II; Lincoln Telephone and Telegraph Company v. FCC, 659 F.2d 1082 (D.C. Cir. 1981). It can set the rates that connecting carriers charge interexchange carriers for access to the local exchange. And it can take steps to insure that those rates are not discriminatory. What it does not have the authority to do, however, is to order a connecting carrier to pay a portion of its intrastate revenues into a federal fund. Yet, that is precisely what the Joint Board seeks to do here.

III. If the Commission Intends to Adopt a High Cost Mechanism Based on the Joint Board's Proposal, It Should Issue a Complete and Specific Proposal for Comment Before Making a Final Determination in this Proceeding

NYDPS recognizes the complex task and difficult timeframe faced by the Joint Board and appreciates having had the opportunity to be directly involved in its deliberations through

participation on the Joint Board staff. Nevertheless, we believe the RD lacks sufficient specificity for interested parties to offer comprehensive, meaningful comments. The RD leaves a number of fundamental questions unanswered. This lack of information impedes parties' ability to evaluate and comment on how the Commission should fulfill Congress' mandate.

Although the Act states "(t)here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service,"[1] the RD does not specifically discuss and define what portion of cost recovery will be deemed universal service support, what the federal role in ensuring that support should be under the Act, what level of support would be "sufficient," or what specific mechanism(s), particularly with respect to rural, insular and high cost support, should be employed. Consequently, parties cannot address whether, for example, the broadly described "proxy cost minus benchmark revenues" high cost funding mechanism constitutes sound policy and meets the statutory requirements. Furthermore, the RD leaves unresolved how, or even whether,[2] carriers should be allowed to recover any universal service support obligation they might be assessed by any mechanism ultimately adopted. Both ratepayers and shareholders have significant interest in knowing how and by whom universal service will be paid for, but are

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[1] Section 254(b)(5).

[2] The RD suggests there is a "statutory requirement that carriers, not consumers, finance support mechanisms" (para. 812).

precluded from commenting meaningfully in the absence of a specific cost recovery proposal.

The RD suggests that the Joint Board staff further refine the Board's proposals and that the state members of the Board may communicate their views to the Commission (para. 269). However, this process is inadequate. Given that these further efforts to specify the support mechanism(s) may implicate all existing rate structures, as well as shareholder interests, all parties should be afforded a reasonable opportunity to comment thereon. We urge the Commission to issue a complete and specific proposal for sufficient public comment prior to its adoption.

IV. The Commission Should Not Adopt the Proposed "Proxy Cost Minus Revenue Benchmark" Method For High Cost Funding at This Time

Congress directed that there be explicit and sufficient federal and state funding mechanisms to ensure that consumers in rural, insular and high cost areas have access to telecommunications and information services "at rates that are reasonably comparable to rates charged for similar services in urban areas (§254(b)(3)." To fulfill the Commission's share of this mandate, the Joint Board proposes eliminating, over a transitional period, three existing mechanisms it considers to constitute universal service support (USF, DEM weighting, and LTS). In their place, the Joint Board recommends establishing a "high cost" support mechanism based on the difference between an undetermined forward-looking proxy cost model and an undefined revenue benchmark (paras. 7, and 183-356). However, neither

variable (cost or revenue) in this equation is yet known, and the Joint Board has not explained what it considers the proper federal role in ensuring comparable rates. Therefore, it is impossible to determine at this juncture whether the resulting support would be sufficient to meet the Commission's obligations under the Act.

The issue of the proper role of the Commission in implementing the universal service requirements of §254 is not addressed in the RD and yet implicitly defines the scope of most of the Board's recommendations. Those recommendations, taken together, suggest that the Joint Board believes Congress intended a greatly expanded federal role in preserving and advancing universal service. We disagree. We believe the Act's repeated references to the States' universal service responsibilities and authorities (see e.g., §§254(b)(5), 254(f), 254(h)(1)(B), and 254(k)), in addition to the required Joint Board process itself, clearly reflect Congress' intent to retain the States' historically significant responsibility for universal service, as discussed above. Thus, with respect to high cost support, we believe Congress intended the Commission to continue to provide federal support for extremely high cost areas, not to be responsible for determining recovery of all universal service costs.

There is no indication in the Act that Congress considered existing federal support for "rural, insular and high cost areas" to be either too large or too small. Thus, there is

no explicit requirement for the Commission to provide more or less support to these areas than is currently provided by the three universal service mechanisms identified by the Joint Board. Nevertheless, the Joint Board recommends a new mechanism that appears to contemplate significant changes in federal universal service support to the target areas. Not only might this mechanism, when fully defined, produce significantly more or less support than is currently provided to the target areas, but the RD also suggests (para. 821) that some of this support might be recovered through assessments on intrastate revenues (which as a matter of law we do not believe it has the authority to do), raising the possibility that all interstate and intrastate rate designs might need to be adjusted to accommodate the new mechanism. There is no support for the position that Congress intended, or even contemplated, a wholesale restructuring of the nation's telephone rates in order to maintain comparable rates in rural (para. 356), insular and high cost areas. Because the proposed "proxy cost minus revenue benchmark" mechanism has not been shown to satisfy the Commission's obligations under the Act and may have far-reaching effects not intended by Congress, it should not be adopted at this time.

V. The Commission should Adopt a Simplified High Cost Funding Mechanism at this Time

While the Joint Board's high cost funding proposal has not been shown to satisfy the requirements of the Act and raises significant contentious issues, a far simpler alternative can be adopted now to satisfy the Commission's statutory obligations.

The Commission should quantify the support currently provided by the three universal service support sources identified by the Joint Board (USF, DEM, LTS). This total obligation could be allocated among interstate providers in proportion to their interstate revenues.[1] Funds could be disbursed to entities currently receiving support on a frozen per-line basis (as suggested by the Joint Board to accommodate the transition for rural carriers). Eligible carriers competing with these recipients would be eligible for matching per-line funding.

We do not suggest that this simplified proposal resolves all issues surrounding high cost support in a competitive market. It does, however, provide an acceptable interim mechanism to satisfy the Commission's statutory mandate before its May 1997 deadline and would provide the Commission additional time to develop a more thorough permanent mechanism through a continuing Joint Board process, as provided for in the Act.[2]

VI. Additional Information is Required to Determine Whether to Increase the Level of Federal Lifeline Support

The NYDPS supports the Joint Board's recommendations that (1) contributions to Lifeline and LinkUp and eligibility of carriers to receive support for these programs should be

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[1] For entities that do not separate revenues jurisdictionally, a surrogate separation factor, based on the average percent of interstate revenues of entities that do separations, can be used to determine an interstate revenue estimate.

[2] Section 254(a)(2) directs the Commission to "complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year..." (emphasis added).

competitively neutral (paras. 423-4); (2) and the level of Federal Lifeline contribution should be de-coupled from the Federal Subscriber Line Charge (SLC),[1] to enable local carriers that do not charge SLCs to be eligible for Federal Lifeline support (para. 423).

The Joint Board also recommended changes in the distribution and amount of Federal Lifeline support. The result of this proposal would be to expand the availability of Federal Lifeline assistance to low-income customers in all states and to increase the amount of federal support from the current $3.50 to a range of $5.25-$7.00, depending on whether or not a state chose to provide intrastate matching funds (para. 419).

It is unclear from the Recommended Decision how the Joint Board determined that expanding Lifeline assistance to low-income households is necessary at this time to ensure universal service. First, there is no analysis in the RD comparing subscription levels in non-participating and participating states to determine if statistically significant differences exist in subscription levels between the non-participating and participating states. It may be that states not participating in the Federal Lifeline program have chosen not to do so because there is no perceived need in those particular states.[2] Nor does

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[1] Presently, the $3.50 residential SLC is waived for Lifeline customers.

[2] In fact, subscription levels in non-participating states tend to be quite high (e.g., Nebraska 97.1%, Iowa 96.4%, New Hampshire 96.2%, Delaware 96.2%). Industry Analysis Division, FCC,
(continued...)

the RD discuss the role of other assistance programs which may be available to low income households in states electing not participate in the Federal Lifeline program. For example, of those states which do not participate in Lifeline, all participate in the LinkUp Program. Some may have other state programs to assist low-income customers. Similarly, for states participating in the Federal Lifeline program, it is not clear whether providing additional federal support will affect the number of lifeline customers that subscribe to and retain their telephone service.

What is clear is that the Joint Board's recommendation to expand the availability and level of Federal Lifeline assistance will increase the overall cost of the program significantly. Therefore, before making a determination to expand the level of Federal Lifeline assistance, the Commission, in concert with the states, should examine whether a relationship exists between expanding Lifeline assistance and the likelihood of increased subscription levels among low income customers.

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[2](...continued)
Monitoring Report May 1996, CC Docket No. 87-339, at table 1-2 (1996).

CONCLUSION

The NYDPS applauds the Joint Board's efforts. For all of the reasons above, the Commission should make significant modifications to recommendations of the Board.

Respectfully submitted,

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Of Counsel:
Mary E. Burgess

Dated: December 20, 1996
Albany, New York

CC Docket No. 96-45

In the Matter of

Federal-State Joint Board
on Universal Service

Comments of New York State
Department of Public Service

CERTIFICATE OF SERVICE

I, Mary E. Burgess, hereby certify that an original and eleven copies of the comments of the New York State Department of Public Service on the Recommended Decision of the Federal-State Joint Board on Universal Service were sent via Airborne Express to Mr. Caton. Copies of the Universal Service were sent by First Class United States Mail, postage prepaid, to all parties on the attached service list.

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