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

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

CC Docket No. 96-45

REPLY COMMENTS OF NETSCAPE COMMUNICATIONS CORPORATION

Netscape Communications Corporation ("Netscape"), by its attorneys,
respectfully submits these reply comments on the recommended decision of the
Federal-State Joint Board on Universal Service ("Joint Board").¹

INTRODUCTION

The opening comments on the Joint Board's *Recommended Decision* reveal sharp jurisdictional, legal and policy opposition—largely, but not exclusively, from the Regional Bell Operating Companies ("RBOCs") and other local exchange carriers ("LECs")—to the recommendations on basic universal telephone service. Of more direct interest to Netscape, the leading provider of client/server and related open software for Internet applications such as the World Wide Web, is the *Recommended Decision's* treatment of subsidies, and support obligations, in connection with Internet access for K-12 schools and libraries under Section 254(h) of the Act.² Here, too, many

¹ *Federal-State Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (released Nov. 8, 1996)("Recommended Decision").

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 254(h) (1996)(to be codified at 47 U.S.C. § 254(h)).

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commenters argue that the Commission either lacks the legal authority to include Internet access as part of universal service, or that it would be poor public policy to do so, or both.³

Netscape disagrees strongly with this position. While there clearly are difficult legal issues presented in the area of Internet access—in part because of the ambiguity of the 1996 Act, and in part due the ambiguity of the *Recommended Decision* itself—Internet access for schools and libraries is essential to the use of this revolutionary new medium, and its educational benefits, by students in every classroom in America. Netscape believes the Commission should adopt the Joint Board’s recommendation to provide discounts for Internet access as an enhanced “information service” under Section 254(h)(2). At the same time, we urge the Commission to clarify the *Recommended Decision* in order to establish a more competitively neutral approach to funding discounts for Internet connectivity.

DISCUSSION

The Joint Board has concluded that Internet services are not “telecommunications services” that should be subsidized under Section 254(h)(1)(B), but rather information services eligible for discount under the broader scope of Section 254(h)(2).⁴ This recommendation is challenged by the LECs and several interexchange carriers (“IXCs”), who assert that only telecommunications services can be included as part of universal service. On the other hand, the *Recommended Decision* concludes that providers of Internet access services, whether Internet Service Providers (“ISPs”) or

³ See, e.g., AT&T Comments at 20; Bell Atlantic Comments at 20; MCI Comments at 18; NYNEX Comments at 40; Pacific Telesis Comments at 38.

Online Service Providers (“OSPs”), cannot be required to contribute to the universal service fund, because the Act limits support obligations to telecommunications carriers.⁵

This recommendation, for obvious reasons, is supported strongly by ISPs and OSPs.⁶

These two positions cannot easily be reconciled. It is difficult to understand how the Commission could conclude simultaneously that “enhanced” Internet services are eligible for subsidy while all providers of Internet access are not subject to comparable universal service obligations. As Netscape explained in its opening comments, part of the problem arises from the *Recommended Decision’s* undifferentiated treatment of both Internet access (*i.e.*, connectivity) and Internet services (*i.e.*, information services). Clearly, America’s schoolrooms will be the losers if the Commission’s decision is held up in lengthy appellate review initiated by telecommunications carriers opposed to unilateral funding of Internet access discounts supporting their competitors. Netscape’s proposal that the Commission assess universal service support requirements on ISPs and OSPs to the extent they provide the telecommunications facilities and services used for Internet “access”—T-1 lines, frame relay services, etc.—would therefore better serve the interests of educational technology by eliminating a compelling ground for appellate delay and possible reversal.⁷

The Joint Board recommendation would include both dedicated and “dial-up” Internet access as eligible for discount under Section 254(h)(2). Some parties have informally questioned whether, under Netscape’s approach, only dedicated Internet

⁴ *Recommended Decision*, ¶ 463.

⁵ *Recommended Decision*, ¶ 790.

⁶ *See, e.g.*, ISA Comments at 2; ITI Comments at 9.

⁷ Netscape Comments at 6-8.

access would be eligible for universal service support. That was not our intent. Netscape's proposal for disaggregating Internet access from Internet services was fashioned to remedy the competitive imbalance arising from the wholesale exclusion of OSPs and ISPs from universal service support requirements. Contributions to the universal service fund should be driven not by the regulatory status of competing providers of Internet access, but rather by the services actually provided in the marketplace. Thus, to the extent ISPs and OSPs provide (or resell) dedicated telecommunications facilities to end users for Internet access purposes, they should be considered to offer telecommunications services for purposes of universal service support obligations.⁸ We disagree with ITAA's suggestion that ISPs and OSPs should be subject to universal service payment requirements only if they "provide a stand-alone telecommunications service to the public for a fee."⁹

With respect to discounts for Internet access, Netscape firmly supports the Joint Board's decision to make competitive neutrality a key policy of universal service. Limiting discounts to dedicated Internet access would not be competitively neutral, because many ISPs and OSPs offer primarily dial-up access arrangements. Furthermore, such an approach would disadvantage and discriminate against rural and smaller school districts, for whom 28.8 Kbps dial-up Internet access may be the most feasible and cost-effective way of bringing Internet services to the classroom.

⁸ Dial-up Internet access is provided by ISP and OSP purchase of local exchange services, as end users, out of LEC state tariffs. These services are inputs into the Internet services provided to ISP and OSP subscribers, and are not themselves telecommunications services sold or resold by ISPs and OSPs. As a technical and jurisdictional matter, therefore, it is legitimate to limit universal service support obligations to dedicated telecommunications facilities and services, which clearly are sold by ISPs and OSPs to their subscribers.

⁹ ITAA Comments at iii.

Nonetheless, Netscape believes that the Commission should encourage dedicated and high-bandwidth Internet access arrangements for K-12 schools, and concurs with Cox Communications that the universal service rules should provide proportionately larger discounts for high-bandwidth access in order to create incentives for schools and libraries to adopt broadband Internet solutions.¹⁰ Over the next several years, Internet access will increasingly be characterized by non-dial-up, high-bandwidth technologies, and Netscape believes schools must avoid becoming locked into access methods that may become obsolete sooner than commonly expected.

Netscape's opening comments observed that the Joint Board's distinction between "conduit" and "content" for Section 254 purposes is not sustainable. As ISPs increasingly add content—for instance Internet directories, search engines, user-configurable real-time information distribution, "push" and "streaming" technologies for Internet publishing, etc.—to their services, it is likely that the "conduit/content" distinction itself will be overtaken by market developments well before most American schools can take advantage of Section 254(h) discounts themselves.¹¹ America Online ("AOL") cogently argues that the *Recommended Decision's* limitation of discounts to Internet access providers who offer "minimal content" would favor one information service model (ISPs) over another (OSPs).¹² The apparent fear of the Joint Board, as AOL points out, was that the Commission might inadvertently encourage schools and libraries to use Internet access subsidies to pay for expensive proprietary database

¹⁰ Cox Comments at 13-15.

¹¹ Netscape Comments at 6 & n.10.

¹² AOL Comments at 4-5.

services bundled with what the Joint Board terms "basic" Internet access.¹³ AOL's proposal that the Commission address this issue directly, by fashioning a per-subscription "cap" on Internet access discounts,¹⁴ is a competitively neutral approach to this potential problem, far preferable to the creation of a new, factually incorrect and highly transitory system for classification of Internet providers as "content" and so-called "conduit" services.

On the other hand, Netscape firmly believes that the Commission cannot for long ignore the pressures being placed on its *Computer II* regime by the increasing convergence of circuit-switched telecommunications services and packet-switched information services. See Netscape Comments at 4. We applaud Chairman Hundt for his recent recognition that "we must avoid the trap of applying circuit-switched law to a packet-switched world."¹⁵ By the same token, however, regulatory classifications developed in an era where the demarcations between circuit-switching and packet-switching were far clearer than today are an insufficient basis on which to base regulatory policies for the next decade and the 21st century. While we agree with ITAA that the 1996 Act's codification of the basic/enhanced dichotomy of *Computer II* may limit the Commission's power to devise a new regulatory structure without legislative action,¹⁶ Netscape does not concur with ITAA's suggestion that the Commission cannot re-

¹³ Another concern not mentioned by the Joint Board is that some proprietary content providers may also bundle computer operating system software with information services, thus leveraging their market power to disadvantage competitors. This aspect of bundled content raises some antitrust issues that are beyond the scope of this proceeding. But the universal service fund should not be used by content providers to gain an unfair competitive advantage in the operating system market. The FCC has traditionally been concerned with media concentration, and should equally be concerned with potential dominance of new electronic media by any one company.

¹⁴ AOL Comments at 6-7.

¹⁵ R. Hundt, "The Hard Road Ahead—An Agenda for the FCC in 1997," at 8 (Dec. 26, 1996).

evaluate *Computer II* in light of changes in technology and the marketplace. We believe the Commission must do so—not in the context of this universal service proceeding, but rather by initiating a separate Notice of Inquiry (“*Internet I*”) on long-run regulatory treatment of the Internet. Consistent with the Act, the objective of such a proceeding must be to devise means to assure that the Internet continues to “flourish, to the benefit of all Americans,” with a minimum of governmental oversight and regulation.¹⁷

Another question that should be addressed—but again, not in this proceeding—are the calls by LECs for imposition of access charges on ISPs and OSPs. Contrary to Pacific Telesis’ comments, there is no need to “consider the relationship” in this docket between universal service and these highly controversial proposals.¹⁸ The Commission has already concluded that access charges “as currently constituted” should not apply to Internet services.¹⁹ In the access charge reform proceeding, the Commission has issued an NOI inquiring into the effects of growing dial-up Internet usage on LEC networks, and how to create incentives for the deployment of data-friendly local exchange facilities that can meet the needs of both ISPs and local service subscribers. There plainly are legitimate issues presented concerning the jurisdictional classification of ISP access services, the pricing of local loops when used by ISPs for analog dial-up access, the appropriate costing of these services under LEC price cap regulation, and the linkage between LEC technology deployment and increased charges to competing Internet providers for use of the LEC networks. Pacific Telesis is wrong in claiming that

¹⁶ ITAA Comments at 10-11.

¹⁷ 47 U.S.C. § 230(a)(4).

¹⁸ Pacific Telesis Comments at 41.

¹⁹ *Access Charge Reform*, Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 96-488, (released Dec. 31, 1996).

ISPs receive a “subsidy” from LECs by paying local business line rates for the local business lines they purchase.²⁰ PacTel is right, on the other hand, that efficiency and competitive parity require that ISPs and OSPs pay economically correct prices for the LEC services they do use. Whether or not these principles compel modification or elimination of the so-called “ESP exemption” is a valid question, but one for another day and another proceeding.

²⁰ Pacific Telesis Comments at 42.

CONCLUSION

The Commission should clarify the Joint Board's recommendations on discounting Internet access for K-12 schools and libraries in order to ensure competitive neutrality by (1) fashioning a mechanism under which telecommunications carriers, ISPs and OSPs all contribute to funding subsidies for Internet access, and (2) rejecting the Joint Board's unworkable "content/conduit" distinction. Regulatory classification of the Internet and potential access charges for ISPs should not be decided in this universal service proceeding.

Respectfully submitted,

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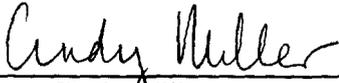
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