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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 THE  
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

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PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA")<sup>1</sup> hereby submits its reply comments with respect to opening comments on the proposals set forth in the Recommended Decision adopted by the Federal-State Joint Board<sup>2</sup> in the above-captioned proceeding as well as the Commission's related public notice.<sup>3</sup> The record confirms PCIA's opening round

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<sup>1</sup> PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private Systems Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

<sup>2</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision (Nov. 8, 1996) ("*Joint Board Recommendation*"); *Errata*, FCC 96J-3 (Nov. 19, 1996).

<sup>3</sup> *Common Carrier Bureau Seeks Comment on Universal Service Recommended Decision*, DA 96-1891 (Nov. 18, 1996). The date for filing opening comments was extended to December 19, 1996, by *Order*, CC Docket No. 96-45 (Dec. 11, 1996).

comments that the *Joint Board Recommendation* has many commendable aspects but also should be revised in a number of significant respects as part of the Commission's adoption of universal service rules and policies.

## **I. SUMMARY**

PCIA has participated throughout the subject proceedings regarding the implementation of Section 254 of the Telecommunications Act of 1996 ("1996 Act"), and has consistently maintained that the public interest will be best served by a universal service program that is equitably funded, narrowly targeted, and technologically neutral. The record in this proceeding indicates that reliance on these principles as cornerstones of the universal service policy will effectively further the public interest.

In these reply comments, PCIA focuses on several significant issues raised in the opening comments on the *Joint Board Recommendation*. Initially, PCIA believes that the Commission must examine with a critical eye the recommendations of the Joint Board concerning the schools and libraries discount arrangements and related fund. The Joint Board has been very ambitious in seeking to allocate \$2.25 billion per year from telecommunications carriers to benefit the providers of various telecommunications and other services to schools and libraries. While the Joint Board is striving to achieve laudable goals, the result is a fund size that will adversely affect telecommunications consumers as well as the telecommunications marketplace. Accordingly, the Commission should look for ways in which to reduce the schools and libraries fund size below the \$2.25 billion cap proposed by the Joint Board, such as by more careful targeting of the disbursements from the fund.

Beyond the overall fund size, the Joint Board has proposed to reimburse schools and libraries for the installation and maintenance of inside wiring and internal connections. Commenters in this proceeding generally agree that such inside wiring and internal connections activity is not a telecommunications service as defined by the 1996 Act. Section 254(h)(1)(B) of the 1996 Act, however, provides for reimbursement to telecommunications carriers only for the provision of discounted telecommunications services. Neither are inside wiring and internal connections "information services," which possibly might be included within a discretionary discount plan under Section 254(h)(2).<sup>4</sup> Accordingly, inside wire and internal connections cannot legally be included within the scope of services for which schools and libraries may obtain discounts.

Finally, the record reflects a substantial lack of clarity as to whether Internet access also may be funded through the schools and libraries discount program. Until these legal and policy questions can be fully resolved, PCIA urges the Commission to defer including Internet access in the schools and libraries basket of services. Effective resolution of the issues at a later date would be more consistent with the public interest than a rush to judgment that results in judicial battles and possible judicial stays that could have greater adverse effects for the goals the Commission and the Joint Board are trying to achieve.

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<sup>4</sup> It is not certain that the Commission has the authority to establish a discount plan under Section 254(h)(2) for information services comparable to the one required under Section 254(h)(1)(B).

The Joint Board concluded that carriers should not be able to impose a separately stated surcharge on customer bills as the method for recouping carrier contributions to the universal service support mechanisms. The record in this proceeding demonstrates that the Joint Board's conclusion that such a surcharge is not permitted by the 1996 Act is completely wrong and that the objectives of Section 254 in fact would be furthered by the imposition of such a surcharge. Such action would make the universal service charges explicit; would ensure that all telecommunications carriers are able to recoup the expenses of universal service contributions; would facilitate additional competition in the telecommunications industry; and would promote competitive neutrality.

The Joint Board also erred in finding that commercial mobile radio service ("CMRS") providers could be required to pay into state universal service funds prior to the time that CMRS offerings in a particular state are a substitute for landline telephone service for a substantial portion of the communications within a state. The language of Section 332 of the Communications Act is absolutely clear on this point, as recently ruled by a Connecticut state court and as described by numerous commenters in this proceeding. Thus, for the foreseeable future, CMRS providers can be required to contribute only to the federal universal service fund and not to any specific state funds.

It is critical that the Commission limit carefully the total amount of the universal service fund, so that the Congressional goals can be achieved without adverse effects on telecommunications competition or telecommunications consumers. Numerous parties joined PCIA in concluding that use of forward looking costs is an equitable yet accurate manner in which to determine costs subject to reimbursement under the universal service support

mechanism, while not unduly increasing the amount of the fund. Similarly, it is appropriate for the Commission to limit universal service fund support to the first line to a residence, as consistent with the statutory requirements, meeting the public interest needs, and delimiting the universal service fund in a fair manner.

Finally, PCIA urges the Commission to be sure to adopt policies that do not unfairly favor incumbents in the universal service process, since that would inflate fund contributions and discourage the full development of competition. Despite the claims of some commenters, there is no reason to subject wireless carriers to regulation comparable to that applied to an incumbent local exchange carrier ("ILEC") in order for the wireless carrier to receive funds from the universal service fund. Similarly, imposing a requirement that universal service supported offerings include *equal access* to interexchange services (rather than just access) is not necessary in light of the competitive environment in which wireless carriers operate, as compared to the circumstances still present in the landline marketplace. There also is no valid justification for the Commission to adopt the NYNEX proposal that CMRS carriers receiving universal service funds be subject to restrictions and filing requirements not generally applicable to telecommunications carriers. Lastly, the Commission should strongly urge the states to adopt small universal service areas throughout the country — specifically including rural areas — in order to facilitate opportunities for new entrants (wireless or otherwise) to participate in meeting universal service needs.

**II. THE RECORD IN THIS PROCEEDING DEMONSTRATES THAT THE JOINT BOARD'S RECOMMENDATIONS CONCERNING IMPLEMENTATION OF THE SCHOOLS AND LIBRARIES PROVISIONS OF SECTION 254(h) EXCEED THE STATUTORY AUTHORIZATION**

In its opening comments on the *Joint Board Recommendation*, PCIA demonstrated that the proposals for implementing Section 254(h), if adopted by the Commission, would adversely affect telecommunications consumers, the wireless industry, and the telecommunications marketplace generally.<sup>5</sup> PCIA pointed out that the Joint Board's plans for funding inside wiring or internal connections were inconsistent with the statutory directives contained in Section 254(h). Specifically, inside wiring and internal connections are not telecommunications services and therefore may not be supported by the universal service support mechanisms under the language of Section 254(h).<sup>6</sup> In addition, PCIA argued that the proposed annual cap for the funding of schools and libraries discounts was excessive and needed to be reduced to a more reasonable level in order to achieve the Commission's goals while not undermining competition in the telecommunications marketplace or reducing the current levels of subscribership due to rate increases necessary to support the various universal service support mechanisms.<sup>7</sup>

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<sup>5</sup> See, e.g., PCIA Comments at 18.

<sup>6</sup> See *id.* at 19-22.

<sup>7</sup> See *id.* at 22-23.

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**A. The Record Demonstrates That Adverse Public Consequences Will Result From Excessive and Unwarranted Funding of Telecommunications Services and Products Supplied to Schools and Libraries Under Section 254(h)**

To implement Section 254(h) of the 1996 Act, the Joint Board has recommended that the Commission adopt policies providing that "all eligible schools and libraries may receive discounts of between 20 and 90 percent on all telecommunications services, Internet access, and internal connections, subject to a \$2.25 billion annual cap."<sup>8</sup> Numerous commenters agreed with PCIA's view that an annual fund of \$2.25 billion is excessive,<sup>9</sup> particularly in light of the risks posed by a fund of that size for the existing levels of subscribership in the United States. Cincinnati Bell Telephone Company ("Cincinnati Bell"), for example, accurately reflected the concerns expressed by many commenters with its statements:

CBT agrees that telecommunications services are important to schools and libraries. However, CBT believes that the needs of schools and libraries must be balanced against the impact funding such services will have on all telecommunications customers. At a time when the size and method of funding the basic universal service mechanism has not been determined, CBT submits that there is no basis for the Commission to determine that \$2.25 billion is the appropriate amount for schools and libraries.<sup>10</sup>

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<sup>8</sup> *Joint Board Recommendation*, ¶ 440.

<sup>9</sup> *E.g.*, Bell Atlantic Comments at 21; Citizens for a Sound Economy Foundation at 11-13; Citizens Utilities Company at 16-17; Fred Williamson & Associates Comments at 4; Frontier Corporation ("Frontier") Comments at 12-13; General Communication, Inc. Comments at 7; WorldCom, Inc. ("WorldCom") Comments at 27.

<sup>10</sup> Cincinnati Bell Comments at 11-12.

Cincinnati Bell went on to observe that "the unlimited desires of schools for access to the latest developments in telecommunications services must be tempered by the reality of the impact that meeting these requests will have on consumers' telecommunications rates."<sup>11</sup> Cincinnati Bell estimated that, "[i]f funded on a per line basis, ... consumers could see increases in excess of one dollar per month solely to fund services for schools and libraries."<sup>12</sup> The Chairman of the Delaware Public Service Commission likewise observed that the large size of the fund for the schools and libraries discounts will almost invariably lead to increases in the monthly telephone bills of Delaware ratepayers.<sup>13</sup>

MCI Telecommunications Corporation ("MCI") underscored the competitive considerations noted by PCIA resulting from the sheer size of the schools and libraries support mechanism.<sup>14</sup> Specifically, MCI pointed out that the Joint Board recognized the fact that "true competition in local markets is the first step towards ensuring universal service and bringing the benefits of competition — lower prices, greater choice, and higher quality services — to all consumers, including schools and libraries."<sup>15</sup> Yet, as explained, by MCI, the overall size of the universal service fund, including the scope of the services deemed eligible for support for schools and libraries as well as the level of the cap, will impact the pace at which competition

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<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at 12-13.

<sup>13</sup> Chairman of the Delaware Public Service Commission Comments at 7.

<sup>14</sup> Similar concerns are applicable to the size of the overall universal service support mechanisms as well.

<sup>15</sup> MCI Comments at 18.

can be brought to local telephone markets, by imposing undue costs on potential competitors that will impede their ability to enter new markets.<sup>16</sup> Congress clearly cannot have intended that, in furtherance of the universal service objective, the Commission would take actions that would undermine the equally important goal of promoting competition throughout all segments of the telecommunications marketplace.<sup>17</sup>

Despite the very serious concerns raised in the opening comments about the likely adverse effects on customer rates and possible telecommunications competition stemming from just the large size of the schools and libraries fund, it is significant to note that the Joint Board undertook virtually no assessment of the real world impact of its recommended fund for schools and libraries discounts. Yet, as the record makes clear, decisions about the amount of the schools and libraries fund (or the other universal service support mechanisms, for that matter) cannot be made in a vacuum. The amount of revenue collected for the schools and libraries fund is significant in its effect for customer rates and telecommunications competition, and thus must be taken into account in ensuring that the full scope of the

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<sup>16</sup> *Id.* at 17-18.

<sup>17</sup> This is particularly evident in the wireless industry. As PCIA described in its opening comments in this proceeding, an increase in wireless service rates will lead to a decrease in demand from consumers. Yet, the Commission has found that wireless carriers hold great promise for introducing essential competition into the local exchange marketplace. *See, e.g., Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 8965, 8969, 8976 (1996). This "promise" is placed at substantial risk by the Joint Board's proposals in this proceeding and the resulting increases in wireless service prices.

Communications Act of 1934, as most recently amended by the 1996 Act, is furthered to the greatest degree possible.

**B. Discounts for Inside Wiring or Internal Connections Are Not Authorized by Any Portion of Section 254(h)**

Numerous parties filing opening comments (including state public utility commissions and consumer agencies) demonstrated, as did PCIA, that inside wiring and internal connections are not "telecommunications services" as defined under the 1996 Act.<sup>18</sup> Section 254(h)(1)(B) is explicit that discounts provided to schools and libraries under its terms are to cover "services" or "telecommunications services."<sup>19</sup> Similarly, Section 254(h)(2)(A)

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<sup>18</sup> *E.g.*, AirTouch Communications, Inc. ("AirTouch") Comments at 18-19; ALLTEL Telephone Services Corporation ("ALLTEL") Comments at 5; Ameritech Comments at 19; Association for Local Telecommunications Services Comments at 16-18; AT&T Corp. ("AT&T") Comments at 18-20; BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") Comments at 25-28; Cincinnati Bell Comments at 13-14; Frontier Comments at 13; GTE Service Corporation ("GTE") Comments at 89-93; MFS Communications Company, Inc. ("MFS") Comments at 30-32; North Dakota Public Service Commission Comments at 3; PageMart, Inc. ("PageMart") Comments at 5; SBC Communications, Inc. ("SBC") Comments at 43-50; TCA, Inc.-Telecommunications Consultants Comments at 8; United States Telephone Association Comments at 34-35.

<sup>19</sup> PCIA notes that Section 254(h)(1)(B) indicates that such discounts are to be provided only by "telecommunications carriers," and that such "telecommunications carriers" may offset an amount equal to the discount against their obligations to contribute to universal service support mechanisms, or may receive reimbursement from the universal service support mechanisms in the amount of the discount. A "telecommunications carrier" is defined to mean "any provider of telecommunications services." 47 U.S.C. § 153(44). Thus, it appears that any schools and libraries discount program adopted under Section 254(h)(1)(b) cannot include non-telecommunications carriers as the recipients of universal service funds to cover service discounts required by the 1996 Act and the Commission's implementing decisions. Section 254(h)(2)(A) is not expressly limited to telecommunications carriers, but it also does not specifically require or authorize the provision of discounts to schools and libraries in connection with "enhanc[ing], to the extent technically feasible and economically reasonable,

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references only telecommunications and information services.<sup>20</sup> The efforts of the Joint Board to overcome this fact by trying to demonstrate that "installation" and "maintenance" of inside wiring and internal connections somehow are telecommunications services simply are fruitless. Indeed, the absurdity of this effort was demonstrated by the California Department of Consumer Affairs, which described how the Joint Board's logic would also include computers, modems, and computer hardware and software in the concept of inside wiring/internal connections.<sup>21</sup> In addition, if the Joint Board's analysis in fact were accurate, then, as pointed out by MFS, companies that install and maintain inside wiring should be considered telecommunications carriers and should be required to contribute to the funding mechanisms.<sup>22</sup>

PCIA acknowledges that a number of parties voiced support for the Joint Board's proposed inclusion of inside wiring and internal connections within the scope of the schools and libraries discount program funded by telecommunications carriers. While those parties may have proffered their perceptions as to the value of inside wire and internal connections, not one single party was able to demonstrate that the 1996 Act could be interpreted to permit

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(...Continued)

access to *advanced* telecommunications and information services." 47 U.S.C. § 254(h)(2)(A) (emphasis added).

<sup>20</sup> "Information service" is defined by the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(41). It is apparent from the face of this definition that inside wire and internal connections do not fall within the definition of information services.

<sup>21</sup> California Department of Consumer Affairs Comments at 27-28.

<sup>22</sup> MFS Comments at 32.

the Commission to include inside wiring and internal connection as part of the discounted telecommunications services to be made available to schools and libraries. Rather, any statements of legitimacy were entirely unsupported.<sup>23</sup> Thus, there is no basis whatsoever in the record that inside wiring and internal connections can lawfully be included in the schools and libraries discount program set forth in Section 254 of the 1996 Act.

Moreover, the available information suggests that inclusion of inside wiring in the schools and libraries discount program will dramatically increase the amount of resources needed to reach the objectives set forth by the Joint Board. Specifically, the Joint Board cites to a report prepared by McKinsey & Company for the National Information Infrastructure Advisory Council entitled *K-12 Schools to the Information Superhighway*.<sup>24</sup> Depending upon which of four infrastructure models is examined, the costs of installing basic connections to the schools is estimated to run from \$815 million to \$1.645 billion, with annual ongoing costs varying from \$589 million to \$920 million. In three of the four models, the cost of installing internal connections in schools is estimated to *exceed* the installation of basic connections by at least half a billion dollars. In the case of the scenarios likely to approximate the goals set out by the Joint Board, the costs of installing internal connections are estimated to be over \$5 billion (for the partial classroom model) and nearly \$7 billion (for the full classroom

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<sup>23</sup> For example, the Council of Great City Schools asserted that there was "no debate" over the Commission's legal authority to authorize funding for inside wire. Council of Great City Schools Comments at 2. In fact, if anything, there is no dispute that inside wiring and internal connections are not telecommunications services.

<sup>24</sup> See *Joint Board Recommendation*, ¶¶ 505-509.

model).<sup>25</sup> It is unclear from the data in the record and the Joint Board's decision what portion of these costs would be discounted — but the *Joint Board Recommendation's* plan for discounts suggests that a substantial portion of the internal connection charges would be priced to schools and libraries below their usual rates and thus reimbursed from the schools and libraries support fund.

As discussed above, the large size of the schools and libraries funds is likely to have adverse repercussions throughout the entire telecommunications marketplace. Given the level of charges likely to be associated with installation and maintenance of inside wiring and internal connections, and in light of the legal infirmities with including inside wiring and internal connections under the "telecommunications service" rubric, the Commission should reject the recommendation to include inside wiring and internal connections as activities eligible for discount under Section 254(h) and should reduce the annual cap for the schools and libraries discount fund by at least a commensurate amount.<sup>26</sup>

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<sup>25</sup> Of course, these numbers are only estimates and may or may not reflect the circumstances that would be found when the schools and libraries program is put into place.

<sup>26</sup> As discussed in the preceding section and its opening comments, PCIA believes that the Commission should take additional steps to minimize the amount of the schools and libraries discount fund while meeting the statutory requirements of Section 254(h).

**C. A Decision To Fund Discounts for Internet Access by Schools and Libraries Should Be Deferred Until the Commission Can Adequately Resolve the Legality of Such Funding or Obtain Congressional Guidance as to the Scope of the Commission's Jurisdiction in This Area**

While the record is quite clear that inside wiring and internal connections are not encompassed within the terms of Section 254(h), there also is substantive question whether Internet access is legally covered by the schools and libraries discount plan proposed by the Joint Board. A large number of commenters has argued that Internet access is not a telecommunications service, and thus may not be supported under the 1996 Act.<sup>27</sup> In contrast, a number of parties agreed with the recommendation of the Joint Board that Internet access can and should be included within the categories of services eligible for discounts when provided to schools and libraries.<sup>28</sup>

As discussed previously in these reply comments, Section 254(h)(1)(b) prescribes discounts for schools and libraries for only telecommunications services provided by telecommunications carriers. The Joint Board itself has acknowledged that "Internet access," at least as it has used the term, is not exclusively a telecommunications service.<sup>29</sup> Section

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<sup>27</sup> *E.g.*, ALLTEL Comments at 5; Ameritech Comments at 18; AT&T Comments at 18-20; BellSouth Comments at 25-28; GTE Comments at 89-93; Pacific Telesis Group Comments at 37-41; SBC Comments at 43-50; United States Telephone Association Comments at 34-35.

<sup>28</sup> *E.g.*, America OnLine, Inc. Comments at 1; Business Software Alliance Comments at 1-3; Commercial Internet eXchange Association Comments at 2; Council of Great City Schools Comments at 2; Netscape Communications Corporation ("Netscape") Comments at 2, 6; North Dakota Public Service Commission Comments at 2; Oracle Corporation Comments at 1.

<sup>29</sup> *Joint Board Recommendation*, ¶ 462.

254(h)(2)(A), however, does mention information services, which would appear to encompass Internet access, but does not prescribe a system of discounts like that applicable to telecommunications services under Section 254(h)(1)(B). In addition, Section 254(h)(2)(A) focuses on "access" to advanced telecommunications and information services, which arguably is a limitation on the nature of the services subject to the Commission's rulemaking authority under that section. The Joint Board failed to explain the statutory basis for its recommended Internet access discount treatment, instead referring only to Section 254(h) generally in connection with the proposals for the schools and libraries discounts. This makes it difficult for commenters to assess the legality and appropriateness of the Joint Board's recommendations, and raises unresolved uncertainties about the statutory permissibility of funding Internet access discounts for schools and libraries.

In addition, Netscape has pointed out that, under the *Joint Board Recommendation*, some Internet access providers would be required to contribute to the universal service support mechanism and other providers would not be subject to the funding obligation, yet all such providers would be eligible to receive subsidies.<sup>30</sup> PCIA believes that Netscape is correct in concluding this situation is not competitively or technologically neutral, is precarious, and is open to substantial legal challenge.<sup>31</sup> Whether the solution is to adopt the approach recommended by Netscape, or to obtain additional authority from Congress to impose funding obligations upon all entities eligible to benefit from the universal service support mechanisms,

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<sup>30</sup> Netscape Comments at 7-8.

<sup>31</sup> *Id.* at 7.

or some third option, it is clear that this issue warrants careful consideration by the Commission and interested parties, beginning with an explanation by the Joint Board of the legal basis for its recommended plan. Rather than risk legal challenges to an inadequately evaluated action, the Commission should defer including Internet access in the schools and libraries fund until the Commission can be certain that such arrangements are consistent with the 1996 Act.

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The recommendations of the Joint Board to provide increased funding to schools and libraries are commendable in theory. In practice, however, the proposals fail to take into account the adverse effects on telecommunications consumers and telecommunications competition. The public interest will more effectively be furthered by more careful targeting of schools and libraries discounts and a reduction in the annual amount to be expended on such funding.

**III. THERE IS VIRTUALLY UNANIMOUS AGREEMENT THAT CARRIERS SHOULD BE PERMITTED TO RECOVER THEIR UNIVERSAL SERVICE CONTRIBUTIONS BY WAY OF AN EXPLICIT END USER SURCHARGE**

In its opening comments, PCIA advocated that carriers be permitted to recover the costs of their universal service fund contributions through explicit end user surcharges.<sup>32</sup> Contrary to the conclusion of the Joint Board,<sup>33</sup> adoption of an end user surcharge plan is fully

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<sup>32</sup> PCIA Comments at 28-31.

<sup>33</sup> *Joint Board Recommendation*, ¶ 812.

consistent with the statutory language.<sup>34</sup> In that regard, PCIA first noted that nothing in the 1996 Act prohibits the use of end user surcharges to fund universal service. To the contrary, such charges are "specific" and "predictable" within the meaning of Section 254(b)(5). Second, carriers must be permitted to recover their full costs of conducting business, or else market entry will be discouraged, to the ultimate detriment of consumers. Third, retailers, like wholesalers, must be allowed to recover their costs from their customers; any other scheme would not be "nondiscriminatory," in express defiance of Section 254(b)(4). Finally, an end user surcharge serves the public interest by informing the American public of the costs of the universal service program.

The record in this proceeding demonstrates virtually unanimous support for the notion that carriers must be permitted to recover their universal service contributions through an end user surcharge. Commenters favoring such a surcharge include ILECs,<sup>35</sup> CMRS providers,<sup>36</sup> interexchange carriers ("IXCs"),<sup>37</sup> consumer advocates,<sup>38</sup> and business associations.<sup>39</sup> The

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<sup>34</sup> See 47 U.S.C. § 254(b)(4). This section provides that "[a]ll providers of telecommunications should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."

<sup>35</sup> See, e.g., ALLTEL Comments at 7-8; Ameritech Comments at 30-31; BellSouth Corporation Comments at 14-16; GTE Comments at 36; NYNEX Telephone Companies ("NYNEX") Comments at 23; SBC Comments at 11-14; TDS Telecommunications Corporation and Century Telephone Enterprises, Inc. Comments at 7; U S West, Inc. Comments at 45-47.

<sup>36</sup> See, e.g., Paging Network, Inc. ("PageNet") Comments at 16; Vanguard Cellular Systems, Inc. ("Vanguard Cellular") Comments at 8.

<sup>37</sup> See, e.g., AT&T Comments at 8-10; Competitive Telecommunications Association Comments at 4-6; MFS Comments at 12-13, 26; WorldCom Comments at 40-41.

<sup>38</sup> See California Department of Consumer Affairs Comments at 38-40.

<sup>39</sup> See California Small Business Association Comments at 6-10, 12.

overall thrust of these comments was summed up by Vanguard Cellular, which stated that, to ensure consumers are aware of the full amount of the charges imposed on them as a result of universal service obligations, the Commission's rules should allow carriers to reflect these charges on a separate line of the bill, much as is done with 911 taxes and telecommunications relay service obligations.<sup>40</sup> This philosophy was echoed by the California Department of Consumers Affairs, which requested that the Commission adopt an All End User Surcharge ("AEUS") funding mechanism, based on the principle that all subsidies should be direct and explicit, and that contributions should clearly be specified and apparent to consumers.<sup>41</sup>

As a matter of statutory interpretation, SBC correctly noted that Section 254(d) does not preclude recovery of universal service contributions through an explicit charge; it indicates only that Congress wanted to ensure that all carriers providing interstate telecommunications services share equitably in the funding of universal service.<sup>42</sup> SBC highlighted the fact that Congress rejected implicit funding as a matter of policy, and that continued reliance on implicit funding, as apparently suggested by the Joint Board, will inequitably distribute the amounts that different classes of customers and geographic areas must contribute.<sup>43</sup>

Further, a number of commenters agreed that the public interest demands that consumers be informed of precisely how much they have to contribute to the universal service

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<sup>40</sup> Vanguard Cellular Comments at 8.

<sup>41</sup> California Department of Consumer Affairs Comments at 38-40. *See also* GTE Comments at 40 (citing favorably to the AEUS program).

<sup>42</sup> SBC Comments at 11-13.

<sup>43</sup> *Id.* 12-13.

fund. MFS argued that such an explicit enumeration of universal service support will:

- (1) inform consumers of the total costs of the services and the subsidies they receive;
- (2) ensure that the benefits of universal service support flow to consumers, rather than carriers; and
- (3) mitigate the "rate shock" that might otherwise occur when rates are geographically deaveraged and increased to cost-based rates in high-cost areas.<sup>44</sup>

Contributions to the universal service support mechanisms are a cost of doing business that must be recovered by telecommunications carriers.<sup>45</sup> There is, as asserted by LCI International, Inc. ("LCI"),

no justifiable basis for requiring carriers to drive the cost of universal service underground by incorporating it into the rates carriers charge for service. Indeed, doing so would violate the clear intent of Congress to make universal service support mechanisms explicit and identifiable.<sup>46</sup>

Moreover, an explicit end user surcharge would further the goal of competitive neutrality, particularly across different categories of carriers. This stems from the fact that the competitive environment in which different types of carriers operate may provide them with varying abilities to recoup the universal service contribution amounts through their service charges. As PageNet indicated, requiring all carriers to disclose universal service charges on

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<sup>44</sup> MFS Comments at 12-13, 26.

<sup>45</sup> See BellSouth Comments at 14-16; see also LCI Comments at 13-14.

<sup>46</sup> LCI Comments at 13-14 (citation omitted).

customer bills will help to avoid having the disclosure of the universal service assessment become an element of competition among telecommunications service providers.<sup>47</sup>

As a matter of federal-state comity, the California Small Business Association noted that failure to adopt an explicit recovery mechanism would put the Commission on a collision course with a number of states that have adopted surcharges as a part of their state universal service funding mechanisms.<sup>48</sup> Finally, as a matter of constitutional law, a rule prohibiting line item identification might violate a telecommunications provider's First Amendment right to unfettered commercial speech, given that no legitimate governmental interest can be served through such a ban.<sup>49</sup> Moreover, even if such a governmental interest does exist, a complete ban is more intrusive than necessary to accomplish whatever objective the government seeks to promote.<sup>50</sup>

Thus, the record is clear that the 1996 Act in no way bars the adoption of a plan for explicit end user charges to recoup carrier universal service contributions. Indeed, reliance on such surcharges in fact seems to be the best methodology for effectuating a number of statutory goals, specifically including the objectives of making universal service contributions explicit, specific, and predictable as well as the promotion of competitive neutrality. The

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<sup>47</sup> PageNet Comments at 16.

<sup>48</sup> California Small Business Association Comments at 6-10, 12.

<sup>49</sup> See Competitive Telecommunications Association Comments at 16-17 (citing *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996); *Central Hudson Gas & Elec. Corp. v. New York Public Service Commission*, 447 U.S. 557, 564 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council*, 425 U.S. 748 (1976)).

<sup>50</sup> *Id.*

Commission should rejected the Joint Board's ill-founded conclusion and instead implement a plan for explicit end user charges, to be collected by telecommunications carriers, to recoup the costs of universal service.

**IV. THERE IS CONSIDERABLE AND UNREBUTTED RECORD SUPPORT FOR THE PROPOSITION THAT CMRS CARRIERS CAN ONLY BE REQUIRED TO CONTRIBUTE TO THE FEDERAL UNIVERSAL SERVICE FUND, EXCEPT UNDER A NARROW SET OF CIRCUMSTANCES**

In its opening comments, PCIA pointed out that the Joint Board's conclusion that Section 332(c)(3)(A) "does not preclude states from requiring CMRS providers to contribute to state support mechanisms"<sup>51</sup> is inconsistent with the statutory language of Section 332(c). As a matter of statutory language, the section at issue clearly exempts CMRS providers from contributing to state universal service funds unless "such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State."<sup>52</sup> Critically, at present, no CMRS operator provides service that functions as a substitute for the requisite quantity of land line telephone exchange service. Further, CMRS is jurisdictionally an inherently interstate service, given that "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."<sup>53</sup> Thus, CMRS providers cannot -- consistent with federal law -- be required to contribute to state universal service funds.

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<sup>51</sup> *Joint Board Recommendation*, ¶ 791.

<sup>52</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>53</sup> H.R. Rep. No. 103-111, at 260 (1993).

Both a Connecticut state court and many of the commenters in this proceeding joined PCIA in reaching this conclusion of law. Initially, in *Metro Mobile CTS of Fairfield County, et al. v. Connecticut Department of Public Utility Control*,<sup>54</sup> the court held that Section 332(c)(3)(A) prohibits the state of Connecticut from requiring cellular providers "to make payments toward the funding of a Universal Service Program."<sup>55</sup> In reaching this legal conclusion, the court noted that Section 332(c)(3)(A) consists of two distinct clauses; a clause that preempts states from regulating CMRS rates and market entry,<sup>56</sup> and a clause that "expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service."<sup>57</sup> Applying the rule of statutory construction "requir[ing] that no language in a statute be read to be redundant,"<sup>58</sup> the court concluded that:

[b]y expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular

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<sup>54</sup> No. CV-95-0551275S (Conn. Super. Ct. Dec. 9, 1996) ("*Metro Mobile CTS*").

<sup>55</sup> *Metro Mobile CTS*, slip op. at 3.

<sup>56</sup> *Id.* at 7 (discussing the portion of 47 U.S.C § 332(c)(3)(A) providing that "[n]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services").

<sup>57</sup> *Id.* at 7 (discussing the portion of 47 U.S.C § 332(c)(3)(A) providing that "[n]othing in this subparagraph 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").

<sup>58</sup> *Id.* at 7.