

service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption.⁵⁹

Accordingly, cellular providers are not required to contribute to Connecticut's universal service fund. Given that cellular carriers are a subset of CMRS, the Connecticut court's analysis would apply to the same extent to contributions by all CMRS providers.

A substantial number of commenters in this proceeding concurred with the Connecticut court's analysis. For example, Bell Atlantic NYNEX Mobile, Inc. noted that the Joint Board cited no authority in support of its conclusion that Section 332(c)(3) does not exempt CMRS providers from contributions to state universal service fund programs until those providers serve as a substantial substitute for land line service, nor did the Joint Board address the commenters' arguments to the contrary.⁶⁰ AirTouch and American Personal Communications added that Section 253(e) expressly states that the preemptive provisions of Section 332(c)(3) remain in force, unaffected by the passage of the 1996 Act.⁶¹ Finally, PageMart requested

⁵⁹ *Id.*

⁶⁰ Bell Atlantic NYNEX Mobile, Inc. Comments at 5-6. *See also* Cellular Telecommunications Industry Association Comments at 13-16 (arguing that Section 332(c)(3) generally preempts state universal service contribution requirements); Nextel Communications, Inc. Comments at 3-5 (same); PageMart, Inc. Comments at 2-3 (same); PageNet Comments at 6-9 (same).

⁶¹ AirTouch Comments at 30-34; American Personal Communications Comments at 10-13. *See also* Bell Atlantic NYNEX Mobile, Inc. Comments at 7-8.

that, if the FCC nevertheless requires CMRS providers to contribute to both the state and the federal universal service funds, it should take steps to avoid double taxation.⁶²

Against this record of opposition to the Joint Board's position, there is little, if any, support for its conclusory assertion that CMRS providers should be required to contribute to state universal service funds. Therefore, in deference to the will of Congress -- as clearly set forth in Sections 332(c)(3)(A) and 253(e) -- the Commission should determine that, until CMRS reaches the requisite level of substitutability in a given state, CMRS providers cannot be required to contribute to that state's universal service fund. Of course, certain CMRS services, such as paging, will never reach this level of substitutability.

V. THE RECORD DEMONSTRATES THAT THE COMMISSION MUST ADOPT UNIVERSAL SERVICE FUNDING POLICIES THAT ACHIEVE THE CONGRESSIONAL GOALS WHILE CAREFULLY LIMITING THE FEES TO BE COLLECTED FROM TELECOMMUNICATIONS CARRIERS AND EXPENDED IN SUPPORT OF UNIVERSAL SERVICE

In its opening comments, PCIA cautioned that, by enacting a universal service program that was overly expensive, the Commission might inadvertently price many telecommunications services out of the reach of the average consumer, and damage competition. Ironically, such a result would run diametrically counter to the "universal service principles" embodied in Section 254(b), among which is to ensure the availability of "quality services" at "just, reasonable and affordable rates."⁶³ PCIA added that excessively large

⁶² PageMart Comments at 2-3.

⁶³ 47 U.S.C. § 254(b)(1). If end user charges increase to meet universal service funding needs, more customers will need support, thus requiring an even larger support fund.

carrier contributions -- when passed on to customers as increased rates -- would be particularly injurious to the CMRS industry, where the demand for service is extremely elastic.

In order to reduce the overall size of the fund, PCIA made several suggestions. In particular, the Commission should adopt the Joint Board's recommendation that carrier reimbursements be based on forward-looking costs, rather than embedded costs.⁶⁴ PCIA opposed the use of embedded costs because they were incurred based on obsolete, rate-of-return regulation, will create incentives to "game the system," and overestimate the cost of universal service by assuming that all local loop costs are necessary to provide local service. Second, the Commission should adopt the Joint Board's recommendation that universal service support be limited to "services carried on a single connection to a subscriber's principal residence."⁶⁵ Although cautioning that it might be administratively difficult to determine whether an additional phone connection to a house is in fact a second connection for one set of the house's residents, or a primary connection for another set of residents, PCIA supported this recommendation as a reasonable means of more narrowly targeting the fund.⁶⁶

A number of parties joined PCIA in arguing that the use of forward-looking costs would shrink the universal service fund, ensure competitive neutrality, and be consistent with the pro-competitive, deregulatory goals of the 1996 Act. Regarding cost containment, the Ad

⁶⁴ *Joint Board Recommendation*, ¶ 276.

⁶⁵ *Id.*, ¶ 89.

⁶⁶ PCIA also urged the Commission to take steps to reduce costs in areas of the country where no competition exists for the sole supplier of telecommunications services and to explore all other available tools, including competitive bidding, in order to meet universal service funding needs on the most cost-effective basis. *See* PCIA Comments at 13-16.

Hoc Telecommunications Users Committee, for example, agreed that embedded costs incorporate past engineering and acquisition practices that have little relevance for future markets, and are distorted by capital investment decisions that were made under rate-of-return regulation,⁶⁷ while the Public Utility Commission of Texas supported the use of forward-looking long run incremental cost that incorporated the least expensive technology.⁶⁸

AT&T further stated that, to ensure competitive neutrality, the FCC should adopt a proxy model that fully disassociates itself from embedded costs and capitalizes on the benefits of modern technology.⁶⁹ WorldCom, Inc. added that embedded costs unfairly favor ILECs by guaranteeing them a certain historic level of profitability.⁷⁰ On the other hand, as pointed out by American Personal Communications, forward-looking costs send true market signals to both incumbents and new entrants.⁷¹ This theory was echoed by MCI, which stated that a forward-looking model will promote competitive neutrality and provide the correct long-run entry, investment, and innovation signals.⁷²

Similarly, a number of commenters supported the Joint Board's recommendation that universal service support be limited to a single line to a customer's primary residence. For

⁶⁷ Ad Hoc Telecommunications Users Committee Comments at 6-8.

⁶⁸ Public Utility Commission of Texas Comments at 5-6.

⁶⁹ AT&T Comments at 13.

⁷⁰ WorldCom Comments at 6-7. *See also* Ad Hoc Telecommunications Users Committee Comments at 6-8 (embedded costs act as a subsidy that cushions ILECs against competition).

⁷¹ American Personal Communications Comments at 2.

⁷² MCI Comments at 2-3.

example, American Personal Communications and PageMart stated that, in order to push the subsidy needed to support universal service down to an efficient level, the FCC should not support second lines.⁷³ Ameritech concluded that "[t]here are no good public policy reasons for funding a second line to a consumer's home or service to a subscriber's summer residence."⁷⁴

Finally, PCIA supports the recommendation of Sprint Spectrum L.P. d/b/a/ Sprint PCS that minimizing the size of the universal service fund be adopted as an additional guiding principle.⁷⁵ The public interest harms of an uncontrolled fund have been well-documented in this proceeding. Such effects warrant appropriate Commission efforts to control the amount of collected funds and adopting the recommended principle will help to achieve that goal.

At present, it is not possible to determine even a ballpark range for the size of the high cost and low income universal service support fund. It seems apparent, however, that the figure must be in the billions of dollars, in order to accomplish the statutory requirements and the Commission's implementation plans. For the reasons discussed in connection with the schools and libraries discount fund, the total size of the fund, especially if the amount exceeds that which is actually required, can have dramatic and adverse effects on competition in the telecommunications marketplace and on subscribership levels. Clearly, there are important goals to be achieved in effectuating the universal service goals; yet, implementation must be

⁷³ American Personal Communications Comments at 5-6; PageMart Comments at 6.

⁷⁴ Ameritech Comments at 6. *See also* People of the State of California and the Public Utilities Commission of the State of California Comments at 2.

⁷⁵ Sprint PCS Comments at 2-4.

accomplished in a manner that does not undercut other policy objectives of the 1996 Act.

Accordingly, the Commission must carefully circumscribe the size of the high cost and low income support fund to maximize the benefits to all elements of the public interest.

VI. UNIVERSAL SERVICE POLICIES THAT PROMOTE COMPETITION AND DO NOT UNFAIRLY FAVOR ESTABLISHED CARRIERS WILL MOST EFFECTIVELY SERVE THE PUBLIC INTEREST

Certain commenters in this proceeding made the following suggestions: (1) any carrier that receives universal service funds must be subject to the same regulatory treatment as an ILEC; (2) if a carrier receives universal service funds, it must support access to interexchange services on an equal access basis; and (3) CMRS carriers receiving universal service funds must be subject to special regulatory restrictions. As demonstrated in more detail below, adoption of these proposals would stifle competition for universal service funds and unfairly favor established carriers. On the other hand, PCIA agrees with those entities that called for targeting universal service support based on small areas, such as census block groups. Such a means of targeting support will increase the number of carriers competing for universal service funds, thereby giving the American public access to a wider variety of telecommunications services.

A. Subjecting All Carriers Receiving Universal Service Funds to ILEC-Style Regulation Unfairly Discriminates Against Non-ILECs

Several commenters have asserted that, for wireless carriers to obtain funding from the universal services support mechanisms, they must be subject to the same regulation as the pre-

existing ILEC in the area.⁷⁶ This policy is claimed to be necessary in order to promote competitive neutrality. In fact, the argument turns the competitive neutrality principle on its head, with the effect of thwarting competitive service offerings by new entrants.

Arguments that all recipients of universal service funds must be subject to comparable regulation ignores significant competitive and operational realities in the marketplace. Wireless carriers, for example, are subject to different regulatory requirements because of the competitive market in which the former operate and because the former do not control the types of essential facilities owned by existing local exchange carriers. If greater regulatory burdens are imposed on wireless carriers at this time, then they should also succeed to the same rights and prerogatives from which ILECs now benefit.

The proper analysis here is that the Joint Board has sought to implement policies that promote participation in the provision of telecommunications services to meet the universal service objectives by the maximum number of carriers. In that context, competitive neutrality does not mean that all carriers must be subject to the same regulation. Rather, the adoption of policies can take into account the fact that different categories of carriers operate in different competitive environments. Regulation appropriate in one context (such as for ILECs) may not be warranted in another context (such as for CMRS operators). These significant differences, under competitive neutrality principles, can affect the design of universal service principles and mechanisms.

⁷⁶ See, e.g., Ameritech Comments at 7-10 (under competitive neutrality, a requirement that funding recipients must be under regulatory obligations comparable to those imposed on other competitors is essential).

B. Mandating Equal Access for Interexchange Services Is Not Competitively Neutral and Is Contrary to the 1996 Act

A few commenters disagreed with the Joint Board's recommendation that "access to interexchange service should not be defined, at this time, to include equal access to interexchange carriers,"⁷⁷ arguing that the doctrine of competitive neutrality mandates that, if ILECs must provide equal access, then so too must all recipients of universal service funds.⁷⁸ PCIA believes that this group of commenters has ignored the sound legal and policy reasons set forth by the Joint Board in support of its decision, and misconstrues the meaning of "competitive neutrality."

Specifically, the Joint Board opposed requiring all recipients of universal service funds to offer equal access because of "the potential costs to wireless carriers involved in upgrading facilities and because wireless carriers are not currently required to provide equal access."⁷⁹ Thus, in reaching its decision, the Joint Board recognized that, in order to offer equal access, CMRS providers would have to incur substantial switch and network upgrade costs. The Joint Board further recognized that, under Section 332(c)(8), CMRS providers are not "required to provide equal access to common carriers for the provision of telephone toll services."⁸⁰ It is an elementary principle of statutory interpretation that courts "are to construe statutes, where

⁷⁷ *Joint Board Recommendation*, ¶ 66.

⁷⁸ Ad Hoc Telecommunications Users Committee Comments at 3-5; Ameritech Comments at 4-7; WorldCom Comments at 10-11.

⁷⁹ *Joint Board Recommendation*, ¶ 66.

⁸⁰ *Id.*, ¶ 66 n.194.

possible, so that no provision is rendered 'inoperative or superfluous, void or insignificant,'⁸¹ and where a "statute admits a reasonable construction which gives effect to all of its provisions," a court will not "adopt a strained reading which renders one part a mere redundancy."⁸² Because Sections 332(c)(8) and 254 *were enacted together*, as part of the Telecommunications Act of 1996, the Commission must interpret these sections so that neither of them is nullified. The Joint Board's proposed interpretation, which makes CMRS providers exempt from equal access obligations, while still creating a universal service program consistent with Section 254, represents such a permissible interpretation.

Those who argue that access to interexchange services must be provided on an equal access basis in order to be supported under the universal service rules would simply ignore the fact that the Commission and Congress have found that equal access requirements are not warranted in the CMRS environment. Certainly, for reasons similar to those stated in the preceding section, competitive neutrality does not require that access to interexchange services be provided only on an equal access basis. Moreover, no other basis has been introduced into the record to indicate that competitive conditions in the CMRS marketplace somehow require the Commission to revisit the statutory conclusion and now take steps to require all CMRS licensees to provide equal access to interexchange services.

⁸¹ *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993) (citations omitted).

⁸² *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (citation omitted).

C. There Is No Merit to NYNEX's Contention That CMRS Providers Must Be Subject to Special Restrictions

In its comments, NYNEX argued that, because "there is no dedicated 'loop' for wireless service . . . a wireless carrier could claim it was providing universal service to a customer even if the customer did not use, or own, a mobile phone."⁸³ To prevent such potential fraud, NYNEX concluded that a wireless carrier should be eligible to receive universal service support only if it was providing the only service to a customer, or the customer designated the wireless carrier as the primary carrier and the customer was required to pay a non-subsidized rate for any wireline service to the same residence.⁸⁴

PCIA opposes NYNEX's proposal as unnecessary and discriminatory against CMRS providers. Preliminarily, NYNEX presents no evidence of misconduct in support of its rather bold assertion that CMRS carriers would attempt to defraud the United States government or the universal service fund administrator in order to receive universal service subsidies. Further, NYNEX neglects to mention that the penalties for submitting false statements to the federal government -- up to five years in prison⁸⁵ -- are already sufficient to deter any such misconduct. Finally, the solution proposed by NYNEX for this non-problem is in fact discriminatory, as it places a number of burdens on wireless carriers seeking to provide universal service while failing to similarly burden wireline carriers.

⁸³ NYNEX Comments at 5.

⁸⁴ *Id.* at 5-6.

⁸⁵ *See* 18 U.S.C. § 1001 (false statements to federal agencies punishable by up to five years imprisonment and fines).

D. Smaller Study Areas, Such As Census Block Groups, Will Increase Competition for Universal Service Funds

Contrary to the Joint Board's recommendation that "the Commission retain the current study areas of rural telephone companies as service areas for such companies,"⁸⁶ PCIA expressed support for the concept of targeting universal service support based on Census Block Groups ("CBGs"), whether within a rural telephone company's service area or not. PCIA based its support for CBGs on the fact that such small service areas would encourage competitive entry by both wireless and wireline carriers, thereby providing customers in high-cost areas with a wider variety of fairly priced, high quality telecommunications services.

A number of wireless providers joined PCIA in expressing support for smaller service areas. For example, Vanguard Cellular stated that the FCC should define "service area" in a manner that does not inadvertently exclude wireless operators from universal service support mechanisms.⁸⁷ Furthermore, Vanguard noted that, because wireless carriers are licensed within prescribed geographic regions, mandating that they serve larger and potentially disbursed areas will ensure that only ILECs are eligible for federal universal service support.⁸⁸ Sprint PCS added that reliance on CBGs -- as opposed to larger units such as exchanges, wire centers, and traditional service areas -- will bring competition to high-cost areas more quickly, and furthers the Act's goal of competitive neutrality because exchanges, wire centers, and

⁸⁶ *Joint Board Recommendation*, ¶ 172. Paradoxically, the Joint Board made this recommendation even after conceding that small service areas encourage competition for universal service funds. *Id.*, ¶ 175.

⁸⁷ Vanguard Cellular Comments at 4-5.

⁸⁸ *Id.*

service areas are all based on the architecture of incumbents' networks, and thus favor such providers.⁸⁹ Accordingly, the Commission should emphatically recommend to the states that universal service support areas in all regions of the country (whether rural or not) should be based on census blocks.

VII. CONCLUSION

The Joint Board has provided the Commission with a useful starting place for implementing the provisions of Section 154 of the 1996 Act. The record in this docket makes clear, however, that the Commission must reject or modify a number of the Joint Board recommendations in order more carefully to define the total amounts to be collected from telecommunications carriers to support the various universal service support mechanisms. In addition, the Commission should ensure that its action in this proceeding fully effectuates the goal of competitive neutrality while ensuring that the American public fully understands the

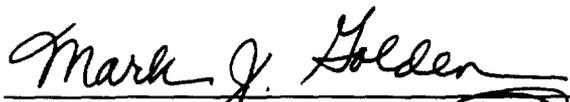
⁸⁹ Sprint PCS Comments at 8-9.

scope of the universal service program, including the nature of their individual contributions to support the federal objectives.

Respectfully submitted,

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January 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1997, I caused copies of the foregoing Reply Comments of the Personal Communications Industry Association to be mailed via first-class postage prepaid mail to the individuals and parties on the following list.

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A handwritten signature in black ink that reads "Rede Green". The signature is written in a cursive style with a large initial "R" and a long horizontal flourish at the end.

Rede Green