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

Federal Communications Commission
Office of Secretary

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In the Matter of)
Federal-State Joint Board on)
Universal Service)
To: The Commission)

CC Docket No. 96-45

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Richard L. Cimerman
Teresa A. Pitts
Directors, State Telecommunications
Policy

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
202-775-3664

National Cable Television
Association, Inc.

Counsel for the National Cable
Television Association, Inc.

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**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby files its Reply Comments in response to the Common Carrier Bureau's Public Notice in the above-captioned proceeding.¹ In the Public Notice, the Bureau asked for comments on the Recommended Decision adopted by the Federal-State Joint Board in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

In our initial comments,³ we generally endorsed most aspects of the Joint Board's Recommended Decision and urged that the Commission adopt the Joint Board's proposals with minor modifications. Among other things, we said that the Commission should (1) accept the

¹ Public Notice, "Common Carrier Bureau Seeks Comment on Universal Service Recommended Decision," CC Docket No. 96-45, DA 96-1891, released November 18, 1996 ("Public Notice").

² In the Matter of Federal-State Joint Board, CC Docket No. 96-45, Recommended Decision, FCC 96J-3, released November 8, 1996 ("Recommended Decision").

³ Comments of the National Cable Television Association, Inc., CC Docket No. 96-45, filed December 19, 1996 ("NCTA Comments").

recommendation that a proxy model based on forward-looking economic costs should be used to determine the level of support a carrier needs to serve high-cost areas;⁴ (2) endorse the Joint Board recommendation that Internet access services offered by entities other than telecommunications carriers would be entitled to universal service support pursuant to Section 254(h)(2)(A) of the Communications Act, but that only providers of interstate telecommunications services -- not non-telecommunications services such as enhanced and information services -- be required to contribute to the universal service support fund;⁵ (3) require specific guidelines for RFPs schools and libraries would issue in seeking bids for the provision of discounted services,⁶ and (4) base universal service fund contributions of interstate carriers on both the net interstate and net intrastate revenues of such carriers.⁷

A number of commenters -- primarily Regional Bell Operating Companies ("RBOCs") and other incumbent local exchange carriers ("ILECs) take issue with many of the Joint Board proposals, including those noted above which NCTA and others have endorsed. In these Reply Comments we address those comments and reiterate our conclusion that the Joint Board Recommended Decision -- as modified by NCTA's proposals -- should be adopted by the Commission.

⁴ Id. at 10.

⁵ Id. at 9.

⁶ Id. at 20-23.

⁷ Id. at 28-32.

II. **THE JOINT BOARD'S TREATMENT OF INTERNET ACCESS SERVICES SHOULD BE ENDORSED BY THE COMMISSION**

In the Recommended Decision, the Joint Board concluded that Internet access is not a “telecommunications service.”⁸ As a result, the Joint Board concluded that providers of Internet access -- like providers of enhanced or information services -- are not required to contribute to universal service support.⁹ On the other hand, in furtherance of the 1996 Telecommunications Act’s objective to provide schools and libraries with access to advanced services, the Joint Board concluded that Internet access services for schools and libraries should be eligible for universal service support.¹⁰ It also concluded that providers of such services need not be telecommunications carriers to receive universal service support.¹¹ A number of parties take issue with these conclusions. Their arguments are without merit.

A. **Internet Access Is Not a Telecommunications Service**

The Joint Board concluded that Internet access and on-line services are not telecommunications services. In the comments filed in this proceeding, this conclusion is supported not only by NCTA but also by the majority of other commenters addressing this issue, including a number of RBOCs.¹² However, one commenter -- People for the American Way, et

⁸ Recommended Decision at ¶¶69,790.

⁹ Id. at ¶790.

¹⁰ Id. at ¶¶ 462-463.

¹¹ Id. at ¶460 (“[T]he competitively neutral rules contemplated under [Section 254(h)(2)(A)] are applicable to all service providers.”); ¶613 (“Non-telecommunications carriers providing eligible services to schools and libraries ...would be entitled ...to reimbursement from universal support mechanisms); and ¶484.

¹² See NCTA Comments at 9. See also Bell Atlantic at 21; PacTel at 37-40; NYNEX at 40; BellSouth at 21-26; SBC at 43; Comments of the Commercial Internet eXchange Association at 2; Comments of the Interactive Services Association at 2; Comments of the Information Technology Association of America at 5-9.

al, (“PAW”) -- contends that Internet services, as well as Internet access services, should be deemed “telecommunications services” and included in the core services the Commission must designate for universal service support.¹³ This is clearly an incorrect reading of the Act.

“Information services” and “enhanced services” provided over the facilities of common carriers have long been treated as separate and distinct from the basic telecommunications capacity used to transmit those services.¹⁴ The Joint Board recognized this fundamental distinction. The Joint Board’s conclusion has even more force in the context of a cable operator’s provision of Internet access over its cable system because, under the 1996 Act, neither the Internet access services offered by cable operators nor the underlying cable network used to distribute them are subject to regulation as telecommunications offerings.¹⁵ For this reason, PAW’s argument that Internet access is a “telecommunications service” must fail.

¹³ Joint Comments of People For The American Way, et al., at 5-7 (“PAW Comments”).

¹⁴ See Amendment of Section 4.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (“Computer II Final Order”) (subsequent history omitted). A common carrier’s basic transmission capacity is a telecommunications service that must be made available to any information service providers under tariff. Independent Data Communications Mfrs. Assoc., DA 95-2190 (rel. Oct. 18, 1995) (“Frame Relay Order”), at 13, 59 citing Computer II Final Order, 77 FCC 2d at 475. A common carrier’s Internet access service is not a telecommunications service, however. See, e.g., Bell Atlantic Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCB Pol 96-09, DA 96-981 (rel. June 6, 1996), at 2.

¹⁵ Section 301(a)(1) of the 1996 Act adds “or use” to the definition of cable service. As amended, that definition now includes “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction... which is required for the selection or use of such video programming or other programming service.” “Other programming service” means “information that a cable operator makes available to all subscribers generally.” 47 U.S.C. Section 522(14). The amended definition of cable service is intended “to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.” H.R. Conf. Rep. 104-458, at 169 (1996) (“Conference Report”). A cable system is not subject to common carrier requirements. 47 U.S.C. Section 541(c) (“A cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”).

B. Internet Access Services Are Eligible for Support Under the Schools and Libraries Provision of the Act And Providers of Services Need Not Be Telecommunications Carriers to Receive Such Support

The Joint Board recognized the importance of Internet access to the development of our Nation's youth by including Internet access as a service eligible for support for schools and libraries under section 254(h)(2) of the Act. As the Joint Board recognized, there is no need to reclassify these services as telecommunications services in order to bring them within the scope of universal services for schools and libraries.¹⁶

The majority of commenters from the school, library and public policy communities which address the issue support the Joint Board's conclusion that Internet access services are eligible for support under the schools and libraries provision of the Act and that the providers of such services need not be telecommunications carriers to receive universal service support.¹⁷ The ILECs take exception to this conclusion but they are wrong.¹⁸

The ILECs argue that the Act does not authorize the Commission to designate non-telecommunications services, such as Internet access, for support under the schools and libraries provision of the Act and that only telecommunications carriers are eligible for universal service support.¹⁹ However, although section 254(h)(1)(B) appears to limit certain universal service

¹⁶ Recommended Decision at ¶¶462-63. Such an expansion of regulation would be inconsistent with the historic treatment of these services, and fundamentally at odds with "pro-competitive, deregulatory national policy" embodied in the Telecommunications Act of 1996. Conference Report at 1.

¹⁷ See, e.g. American Association of Community Colleges at 13-14, Illinois State Library at 2, Net Action at 4-7, North Dakota PSC at 2; Ohio PUC at 17.

¹⁸ See NYNEX at 40; BellSouth at 21-25; PacTel at 37-40; SBC at 43.

¹⁹ For example, SBC argues that only telecommunications services may be supported, and that Internet access is not a telecommunications service. Other commenters, such as Bell Atlantic (at 21), point to

support to telecommunications services provided by telecommunications carriers, section 254(h)(2) contains no such restrictions. To the contrary, section 254(h)(2) contemplates the inclusion of “access” as part of universal service without regard to the regulatory treatment of access services. While Internet access services (including cable modem services) are not telecommunications services, as the Joint Board concluded, section 254(h)(2) clearly empowers the Commission to bring these services within the ambit of universal service for schools and libraries, without having to classify them as “telecommunications.”²⁰

The ILECs are also wrong in arguing that only telecommunications carriers may receive support for providing services to schools and libraries. Section 254(h)(2) directs the Federal Communications Commission to establish “competitively neutral rules to enhance ... access to telecommunications and information services” for schools, libraries, and health care providers. Consistent with this mandate for competitive neutrality, the Joint Board correctly concluded that eligibility for universal service support made available pursuant to section 254(h)(2) is not limited to telecommunications carriers.²¹ In this significant regard it differs from section 254(h)(1)(B), which specified that telecommunications carriers are entitled to offsets or reimbursements in connection with the discounted telecommunications services they provide.²²

section 254(h)(1)(B) which requires that telecommunications services be made available at a discount and section 254(h)(2) which requires in subsection (B) that the Commission establish competitively neutral rules to “define the circumstances under which a telecommunications carrier may be required to connect its network”

²⁰ Recommended Decision at ¶462-63.

²¹ Id. at ¶¶460, 484, and 613.

²² 47 U.S.C. Section 254(h)(1)(B). The broad language of Section 254(h)(2) would permit the funding of access to advanced services by applying the discount established for telecommunications services.

With the adoption of section 254(h)(2), Congress recognized that the most efficient provider of access to advanced services may not be a telecommunications carrier. In many circumstances, cable operators, on-line service providers, and other entities that are not common carriers may be able to offer access with greater bandwidth capacity at a lower cost than access offered by telecommunications providers. Section 254(h)(2)'s mandate of competitive neutrality ensures that any entity can compete to provide access to schools and libraries regardless of whether it is a telecommunications carrier. The Joint Board's recommendation on this issue should be adopted by the Commission

C. Revenues From Non-Telecommunications Services Cannot Be Used To Determine Universal Service Contributions

Finally, as the Joint Board concluded, because Internet access services are not telecommunications services, revenues from those services cannot be used to determine an entity's universal service contribution.²³ NCTA, as well as commenters from the information services industry²⁴ and the educational community²⁵ supported this conclusion. A number of RBOCs agree although they do so (incorrectly) on the theory that Internet access services can neither be assessed nor funded because they are not telecommunications services.²⁶

Under Section 254(b)(4), only "providers of telecommunication services" can be required to contribute to universal service. To the extent a cable operator or any other provider of Internet access services is also providing telecommunications services, it would, of course, be obligated

²³ Id. at ¶790.

²⁴ See e.g. Net Action at 4-5.

²⁵ See e.g. American Association of Community Colleges at 13-14.

²⁶ See e.g. Bell Atlantic at 21; PacTel at 37-40; SBC at 43.

to contribute to universal service based on its telecommunications service revenues. To require a contribution from Internet access or on-line revenues, however, the Commission would either have to impose contributions on providers of other than telecommunications services or effectively reclassify these services as telecommunications services in order to bring them within the contribution requirement.

As we said in our initial comments, neither course is supported by the 1996 Act: the former would violate section 254(d) of the 1996 Act which limits such contributions to telecommunications carriers; the latter would violate section 3(46) which effectively defines telecommunications service to mean only the offering of transmission capacity to the public. Moreover, assessment of such services would be inconsistent with the past treatment of Internet access and on-line services.²⁷

For these reasons, the Commission should adopt the Joint Board's conclusions that (1) Internet access is not a "telecommunication service"; (2) Internet access services for schools and libraries are eligible for support under section 254(h)(2) and providers of such services need not be telecommunications carriers; and (3) Internet access revenues are not subject to assessment for contributions to the universal service support fund.

III. THE COMMISSION HAS THE AUTHORITY TO ASSESS INTRASTATE REVENUES OF INTERSTATE CARRIERS FOR UNIVERSAL SERVICE FUNDING

The Joint Board has recommended that both the net intrastate and net interstate revenues of interstate carriers be assessed for contribution to the federal schools, libraries and rural health care providers support mechanisms. The Joint Board did not reach a conclusion on whether

²⁷ Providers of information services are exempt from paying the network access charges applicable to interexchange carriers. Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Red 2631 (1988).

intrastate revenues of interstate carriers should be assessed for contributions to the high-cost and low-income support mechanisms. NCTA continues to strongly endorse the view that both the net intrastate and net interstate revenues of interstate carriers should be assessed for the high-cost, low-income, and schools, libraries and rural health care providers support mechanisms.

As did NCTA,²⁸ numerous other commenters demonstrate that there are compelling policy rationales for assessing both intrastate and interstate revenues of interstate carriers for the high-cost/low-income universal service support mechanisms.²⁹ Among these policy rationales are: fairness and equity to all states, regardless of whether they have enacted an intrastate universal service program; avoidance of the ILEC incentive to manipulate interstate versus intrastate revenue reports; and the fact that the services to be supported are essentially intrastate services. However, some other commenters not only argue against the assessment of intrastate revenues of interstate carriers on policy grounds, they also claim the Commission has no statutory authority to assess the intrastate revenues of interstate carriers.³⁰

²⁸ NCTA Comments at 30-32.

²⁹ New Jersey Division of Ratepayer Advocate at 9; Alaska PUC at 10-11; Vermont PSB at 2-10; LCI at 3-5; Worldcom at 42-43; CPI at 6-13; NRTA-NTCA at 27-31.

³⁰ See e.g. Bell Atlantic at 4-5; New York DPS at 3-8. Of course, it is clear that to the extent the RBOCs make these self-serving arguments it is because the bulk of their revenue is intrastate revenue. These commenters continue to seek not only assessment of only interstate revenues, but particularly interstate retail revenues. As we have previously pointed out, this is because the RBOCs have virtually zero interstate retail revenue since the bulk of their interstate revenue is derived from access charges which are considered a wholesale service. Even if interstate gross revenues were assessed, the RBOCs would be unfairly advantaged since only about 33% of their revenues are interstate in nature. It is instructive to note that some ILECs, particularly the small rural carrier members of NRTA and NTCA as well as GTE, whose interstate revenues make up upwards of 40-45% of their total revenues, argue that intrastate assessment is appropriate. Thus it is primarily the RBOCs that seek to avoid virtually any contribution to the federal universal service fund.

We have addressed the jurisdictional question in our initial comments and will not repeat that argument here.³¹ Yet, it is instructive to note that six members of the Joint Board saw no jurisdictional bar to assessing the intrastate revenues of interstate carriers for the schools and libraries portion of the universal service fund. For purposes of jurisdictional arguments, there is no meaningful distinction that can be made between assessing intrastate revenues for that fund and assessing them for the high-cost/low-income fund.

In any event, suffice it to say that the 1996 Act forged a new set of federal-state relationships. In particular, section 254(d) clearly contemplates that a national universal service system be established by the Commission. As Commissioner Chong has said, “If Congress had intended that the system be funded entirely by contributions based solely on interstate revenue of interstate carriers, I believe it would have been more specific.”³²

The Commission has jurisdiction to assess intrastate revenues of interstate carriers. It should take such an approach given the overwhelming policy reasons to do so discussed in our comments and those of other parties.

IV. THE ILECS’ ARGUMENTS AGAINST USE OF FORWARD-LOOKING PROXY MODELS ARE WITHOUT MERIT

NCTA supports the Joint Board’s decision to use a proxy model approach to determine costs to be supported by a universal service fund. In their comments, several ILECs take issue with this approach, claiming that a proxy cost model does not reflect actual costs, specifically embedded “legacy costs,” and thus by ILEC standards would violate a “regulatory compact” between ILECs and government, would constitute an unconstitutional “taking” and are

³¹ See NCTA Comments at 28-32.

³² Separate Statement of FCC Commissioner Rachelle B. Chong, Concurring in Part, Dissenting in Part, November 7, 1996 at 9-10 (emphasis in original).

confiscatory.³³ But it is the very separation of ILEC reported costs (including embedded costs) which is the rationale for a proxy model approach. The value of utilizing a proxy model is that it uses objective, forward-looking economic costs free from the past investment decisions of the ILECs to determine the true cost of serving a particular area.

In the Recommended Decision the Joint Board rejected the ILEC argument that the federal universal service fund must include the recovery of “legacy costs.” Instead the Joint Board recommended that a forward-looking cost approach be adopted:

In order to ensure that a universal service support mechanism provides the correct signals for entry, investment, and innovation in the long-run, it is vital that the Commission use forward-looking economic costs as the basis for determining support levels. If support is based on embedded costs for the long-run, then incumbents and new entrants alike will receive incorrect signals about where they should invest.... Support based on embedded costs could jeopardize the provision of universal service.³⁴

Embedded costs reflect past engineering and acquisition decisions that may have been made obsolete by fundamental changes in telecommunications technology. In addition they may be the result of capital investment initiatives that may have been driven more by the then-extant form of cost-plus rate-of-return regulation and by business goals of the individual LECs than by an ILEC goal of achieving universal residential exchange service penetration. For example, NCTA’s consultants concluded that “the aggregate cost of providing outside plant was materially increased by virtue of the ILECs’ decisions to accommodate the demand for additional residential access lines and other services that go well beyond any universal service obligation which is properly associated with the non-growing, non-variable primary residential access line

³³ See e.g., BellSouth Comments at 6-7; GTE Comments at 26, 32; PacTel Comments at 7-8; SBC Comments at 23; NRTA-NTCA at 2.

³⁴ Recommended Decision at ¶275.

demand.”³⁵ In fact, in order to provide capacity to satisfy demand for additional lines, the ILEC’s embedded plant has been designed and constructed with far more extensive feeder and distribution infrastructures than would have been required for a “one line per household” service objective. For these reasons, as well as others enumerated in NCTA’s previous filings, sound policy reasons dictate that a forward-looking proxy model be used in lieu of an ILEC’s reported costs to determine the level of support needed in particular high cost areas.

Sensing an inability to prevail in the policy debate, as noted above, a number of ILECs resort to statutory and constitutional arguments in an attempt to preserve the fruits of imprudent investment decisions. These arguments too are unavailing. Contrary to their claims, neither the Act nor any “regulatory compact” ever guaranteed ILECs the unmitigated right to recover “legacy costs.” Under any version of a regulatory compact, the only guarantee a provider was given was the opportunity to recover a reasonable return on its investment. This “opportunity” by no means was intended to be a blank check in order to indemnify ILECs from the consequences of their management choices. Moreover, even assuming a “regulatory compact” of the sort envisioned by the ILECs ever existed, any price cap regulated ILEC no longer can use such a “compact” as an excuse to recover its embedded costs. Where rate-of-return regulation no longer exists, neither does the so-called regulatory compact.

In amending the Communications Act of 1934, the Congress had wide discretion in formulating the universal service policies to guide state and federal regulators. Congress did not choose to embrace the recovery of ‘legacy costs’ as a principle necessary to preserve and

³⁵ See The Cost of Universal Service: A Critical Assessment of The Benchmark Cost Model, Economics and Technology, Inc., April, 1996 at 106, submitted with the Comments of The National Cable Television Association, Inc., CC Docket No. 96-45, April 12, 1996.

advance universal service. In fact section 254(e) states that “A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” This language clearly expresses Congress’s intent to support, on a going forward basis, only those services which shall be defined by the Commission following the recommendation of the Joint Board. If Congress had intended to use the federal universal service support mechanism to compensate ILECs for past legacy costs, they would have provided clear guidance in the definition and principles provisions of Section 254 of the Act.

As for their constitutional claims, the courts have repeatedly rejected constitutional claims by utilities that regulated rates deprive them of the opportunity to recover embedded costs. There is no constitutional obligation “to include in the rate base all actual costs for investments prudent when made.” Illinois Bell Tel. Co. v. FCC, 988 F. 2d 1254, 1263 (D.C. Cir. 1993). See also, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 315-316 (1989); Federal Power Commission v. Hope Natural Gas, 320 U.S. 591, 601 (1944); Market Street Railway Co. v. Railroad Comm’n of California, 324 U.S. 548, 567 (1945).³⁶

The ILECs also ignore settled authority that a taking cannot be found unless a rate order produces overall rates so low as to “jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital.” Duquesne, supra, 488 U.S. at 312. See also Federal Power Comm’n v.

³⁶ Nor would there be any merit to claims that changes in ratemaking methodology violate a constitutionally-protected “regulatory compact.” That was precisely the claim made and rejected in Duquesne. 488 U.S. at 303, 313. See also Market Street Railway Co., 324 U.S. at 555,567 (change resulting from competition); Rogers Truck Line, Inc. v. United States, 14 Ct. Cl. 108, 112-113 (1987) (same).

Texaco, Inc., 417 U.S. 380, 391-92 (1974); FPC v. Natural Gas, 315 U.S. at 607. The ILECs have not made such a showing here, and, in any event, any such claim would be premature.

To prove that application of a cost proxy model has produced an overall return “so unjust as to be confiscatory,” Duquesne Light Co., *supra*, 488 U.S. at 307, a judicial inquiry “must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.” Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 294-95 (1981). See also MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986). “[A] claim that the application of government regulation effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

Here, no rates have been set. Indeed, no proxy model has been adopted, let alone applied in the context of a particular ILEC’s high-cost service area. For these reasons, ILEC “taking” claims must fail. Utilizing forward-looking proxy model costs, rather than embedded historic costs, is not confiscatory and best represents the costs for providing universal service over an efficient network. The Joint Board correctly concluded that it is inappropriate for consumers and ILEC competitors to be saddled with the costs of past management decisions of the ILECs. Moreover, if an ILEC believes its revenues from local service, intrastate access, intrastate toll, interstate access, vertical services, yellow pages, voice messaging, operator services, and non-regulated services plus recovery from the federal universal service fund, do not sufficiently compensate it for its investments, the company may petition federal and state regulators to modify its local service rates.

V. THE COMMISSION SHOULD NOT WEAKEN THE RECOMMENDED BONA FIDE REQUEST PROVISIONS BUT SHOULD ADOPT GUIDELINES FOR SCHOOLS' AND LIBRARIES' RFPS

The 1996 Act requires that schools and libraries make a bona fide request for services in order to receive discounts on supported services. NCTA urged the Joint Board to adopt specific requirements for bona fide requests to insure that the universal service funds are used for the purposes Congress envisioned and to limit the size of the fund.

In its decision, the Joint Board did recommend some minimal requirements for bona fide requests, but did not propose guidelines for the RFPs which schools and libraries would issue to potential providers of supported services. To ensure competitive neutrality, NCTA and others urged the Commission to be more specific, and to spell out in more detail what should be required in a school or library RFP.³⁷ We believe the Joint Board's proposed bona fide request requirements should be adopted by the Commission but again ask the Commission to adopt more detailed RFP guidelines.

The Joint Board recommended that schools be subject to three minimal bona fide request requirements: the school or library must certify to the fund administrator that it has the ability to use the services effectively; it must submit a written request for services to the fund administrator and all certificated service providers in the school's or libraries' respective service area; and it must self-certify its eligibility for supported services and that such services provided will be used

³⁷ See NCTA Comments at 20-23 (urging Commission to require (1) separate RFPs for telecommunications services, Internet services and provision of internal connections; (2) itemized bids; (3) a single round of sealed bids; and (4) a detailed description of the school/library's telecommunications plans for the use of the supported services). See also Joint Comments of the American Association of Community Colleges and The Association of Community College Trustees, at 14-15 (urging prohibition of "bundled" bids); Comments of Nextel Communications, Inc., at 12-13 (same).

in accordance with purposes of the Act.³⁸ Coupled with the annual limit on the schools and libraries portion of the universal service fund, these three minimal requirements should serve to limit the fund to the purposes intended by Congress.

Nevertheless, some objections have been raised to the imposition of even these limited requirements. Some parties argue that even the minimal requirements recommended by the Joint Board are too complicated.³⁹ Contrary to these assertions, the Joint Board proposal has clearly attempted to minimize the obligations of an entity seeking support.

The Joint Board's recommendation strikes an appropriate balance between the desire of schools and libraries to avoid unnecessarily burdensome administrative requirements and the public policy goal of ensuring that the enormous level of funding for schools and libraries be put to its proper purpose, while minimizing waste and abuse. However, as discussed below, an additional notice requirement should be adopted to encourage the maximum number of bidders for particular projects.

The first bona fide requirement merely asks that some form of technology assessment have taken place and that the school or library certify that a post-assessment plan is in place which will make effective use of the supported services. As pointed out by the Joint Board, the burden of this requirement "would be particularly light given the likely development of clearinghouses of information for schools and libraries, such as the one proposed by Information

³⁸ Recommended Decision at ¶¶600-604.

³⁹ See e.g., Comments of New York Department of Education at 9; Comments of The Southern Adirondack Library System at 1-2.

Renaissance.”⁴⁰ Given a recommended fund size of \$2.25 billion annually, the public interest mandates such a requirement which “would prevent waste.”⁴¹

The second requirement is in the interest of both the school/library and the public at large since the requirement that a written request be sent to the fund administrator and to certificated providers will help “maximize the number of potential competitors aware of each institution’s desire to purchase services.”⁴² As pointed out by the Joint Board, most schools and libraries already face competitive bid requirements when contemplating a major purchase. Thus the requirement that virtually the same type of information be transmitted to the fund administrator and certificated providers calls for little more than a school or library would already face in seeking contracted services.

But this “notice” requirement may not serve its intended purpose of maximizing the number of potential competitors aware of a school or library RFP because potential competitors may not be “certificated providers” who are to receive notice of the RFP and they may not become aware in a timely manner of the notice provided by the fund administrator. To cure this defect, NCTA recommends that schools and libraries also be required to publish notice of their requests in their local daily newspapers for some reasonable period beginning when they send notice to any certificated providers. This will place all potential providers on a level playing field with respect to their ability to submit timely bids and thus will maximize the number of potential bidders. Given the magnitude of the support at issue and the potential for lower prices resulting from more bidders, the expense of such newspaper publication will be de minimis.

⁴⁰ Recommended Decision at ¶601.

⁴¹ Id.

⁴² Id.

The third requirement is essentially nothing more than a statement under oath that the purchasing entity will abide by the statutory and Commission guidelines.

Taken as a whole, these three requirements are the minimum requirements the Commission could adopt to safeguard the public interest in ensuring that only eligible entities receive funding, that resources are not wasted, and that applicable statutory guidelines are followed. Therefore, the Commission should accept the recommendation of the Joint Board on that issue and should also adopt the specific RFP guidelines recommended by NCTA and others.

VI. CONCLUSION

For the reasons stated above and in our initial comments, the Commission should adopt the Joint Board's recommendations as modified by the proposals advanced in our initial comments.

Respectfully submitted,



Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-775-3664

Richard L. Cimerman
Teresa A. Pitts
Directors, State Telecommunications
Policy

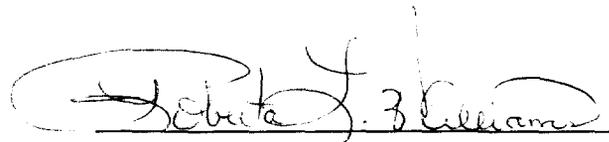
National Cable Television
Association, Inc.

Counsel for the National Cable
Television Association, Inc.

January 10, 1997

CERTIFICATE OF SERVICE

I, Roberta L. Williams, do hereby certify that on this 10th day of January, 1997, copies of the foregoing **“Reply Comments of the National Cable Television Association, Inc.”** were delivered by first-class, postage pre-paid mail upon the attached list.

A handwritten signature in black ink, appearing to read "Roberta L. Williams", written over a horizontal line.

Roberta L. Williams

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

The Honorable Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Julia Johnson
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure
Missouri Public Service Commission
302 West High Street, Suite 530
Jefferson City, MO 65101

The Honorable Sharon L. Nelson
Chairman
Washington Utilities and Transportation
Commission
P.O. Box 47250
Olympia, WA 98504-7250

The Honorable Laska Schoenfelder
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Street
Pierre, SD 57501-5070

The Honorable James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room
Washington, D.C. 20554

Martha S. Hogerty
Public Counsel for the State of Missouri
P.O. Box 7800
Jefferson City, MO 65102

Paul E. Pederson, State Staff Chair
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Lisa Boehley
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, D.C. 20554

Charles Bolle
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Street
Pierre, SD 57501-5070

Deonne Bruning
Nebraska Public Service Commission
300 The Atrium
1200 North Street, P.O. Box 94927
Lincoln, NE 68509-4927

James Casserly
Legal Advisor
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

John Clark
Federal Communications Commission
2100 M Street, N.W., Room 8619
Washington, D.C. 20554

Bryan Clopton
Federal Communications Commission
2100 M Street, N.W., Room 8615
Washington, D.C. 20554

John Nakahata, Esquire
Acting Chief, Competition Division
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Kimberly Parker
Federal Communications Commission
2100 M Street, N.W., Room 8609
Washington, D.C. 20554

Jeanine Poltronieri
Federal Communications Commission
2100 M Street, N.W., Room 8924
Washington, D.C. 20554

Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Richard Smith, Chief
Office of Engineering & Technology
Federal Communications Commission
2000 M Street, N.W., Room 480
Washington, D.C. 20554

Lori Wright
Federal Communications Commission
2100 M Street, N.W., Room 8603
Washington, D.C. 20554

Daniel Gonzalez, Esquire
Legal Advisor
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

L. Charles Keller
Federal Communications Commission
2100 M Street, N.W., Room 8918
Washington, D.C. 20554

Lee Palagyi
Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive, S.W.
Olympia, WA 98504

Barry Payne
Indiana Office of the Consumer Counsel
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2208

James Bradford Ramsay
National Association of Regulatory
Utility Commissioners
P.O. Box 684
Washington, D.C. 20044-0684

Gary Seigel
Federal Communications Commission
2000 L Street, N.W., Room 812
Washington, D.C. 20554

Pamela Szymczak
Federal Communications Commission
2100 M Street, N.W., Room 8912
Washington, D.C. 20554

Irene Flannery
Federal Communications Commission
2100 M Street, N.W., Room 8922
Washington, D.C. 20554

Emily Hoffnar
Federal Communications Commission
2100 M Street, N.W., Room 8923
Washington, D.C. 20554

Lori Kenyon
Alaska Public Utilities Commission
1016 West 6th Avenue, Suite 400
Anchorage, AK 99501

David Krech
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

Diane Law
Federal Communications Commission
2100 M Street, N.W., Room 8920
Washington, D.C. 20554

Robert Loube
Federal Communications Commission
2100 M Street, N.W., Room 8914
Washington, D.C. 20554

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Michael A. McRae
D.C. Office of the People's Counsel
1133 Fifteenth Street, N.W., Suite 500
Washington, D.C. 20005

Terry Monroe
New York Public Service Commission
3 Empire Plaza
Albany, NY 12223

Mark Nadel
Federal Communications Commission
2100 M Street, N.W., Room 8916
Washington, D.C. 20554

Debra M. Kriete
Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Mark Long
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Samuel Loudenslager
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0400

Philip F. McClelland
Pennsylvania Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Tejal Mehta
Federal Communications Commission
2100 M Street, N.W., Room 8625
Washington, D.C. 20554

John Morabito, Deputy Chief
Accounting and Audits
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20554