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Federal Communications Commission
Office of Secretary

HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation
CC Docket No. 96-45 - Universal Service

Dear Mr. Caton:

On behalf of The National Cable Television Association, Inc., I today provided the attached memoranda addressing the definition of information services and the eligibility of non-carriers for funding to provide schools and libraries with access to advanced services to David Solomon and Sonja Rifken of the Office of General Counsel.

In accordance with section 1.1206(a)(1) of the Commission's rules, I am submitting two copies of this notice and the attached memoranda to the Office of the Secretary.

Sincerely,

Howard J. Symons, pp

Howard J. Symons

cc: David Solomon
Sonja Rifken

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UNIVERSAL SERVICE SUPPORT FOR ACCESS TO ADVANCED SERVICES IS NOT LIMITED TO "ELIGIBLE CARRIERS"

Section 254(e) of the Communications Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."[1] Incumbent local exchange carriers ("ILECs") argue that this limitation prevents non-carriers from receiving support for providing schools and libraries with access to advanced telecommunications and information services mandated by section 254(h)(2)(A). A review of the statutory language, however, demonstrates that section 254(e) is not applicable to section 254(h)(2)(A).

Section 254(e) is part of a carefully-structured scheme intended to limit eligibility for the universal service support provided in connection with basic telecommunications services. Congress sought to ensure that only carriers willing to provide basic services throughout a given area would qualify for basic service support. This limitation is applicable solely with respect to support for these basic services, however. Indeed, it is the offering of "services that are supported by Federal universal service support mechanisms under section 254(c)"[2] that defines an eligible carrier.[3]

The limited carrier-only eligibility under section 214(e) and 254(e) is not relevant to establishing eligibility for support under section 254(h)(2)(A). That section deals not with basic telecommunications services, but rather directs the Commission to establish "competitively neutral rules to enhance . . . access to telecommunications and information services" for schools, libraries, and health care providers.[4] Consistent with the mandate for competitive neutrality and the fact that "access to telecommunications and information services" is different from "telecommunications," the Joint Board correctly found that eligibility for support made available pursuant to section 254(h)(2)(A) should not be limited to telecommunications carriers.[5]

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[1] 47 U.S.C. § 254(e). An eligible telecommunications carrier is one that, inter alia, provides those telecommunications services designated as universal service throughout a particular service area using its own facilities or a combination of its own facilities and resale of another carrier's services. See 47 U.S.C. § 214(e)(1).

[2] Section 254(c) establishes the principles for designating which telecommunications services will be defined as universal services. See 47 U.S.C. § 254(c)(1) ("Universal service is an evolving level of telecommunications services") (emphasis added).

[3] 47 U.S.C. § 214(e)(1)(A).

[4] 47 U.S.C. § 254(h)(2)(A) (emphasis added).

[5] Recommended Decision at ¶¶ 462-63.

Section 254(h)(2)(A) thus differs significantly from sections 254(e) and 254(h)(1)(B), which contemplate that telecommunications carriers will receive universal service support in connection with the provision of telecommunications services they provide.[6] Given that the Joint Board has proposed that support for access to advanced services be provided to schools and libraries rather than to carriers, the limitation in section 254(e) is particularly inapposite.

Because section 254(e) would otherwise permit only "eligible carriers" to receive universal service support in connection with the provision of telecommunications services, Congress created a specific exception to that section so that any carrier could receive support for discounted telecommunications services provided to schools and libraries under section 254(h)(1)(B).[7] By contrast, no such exemption is necessary in section 254(h)(2)(A) because this provision is not limited to the provision of telecommunications services by telecommunications carriers.

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[6] 47 U.S.C. §§ 254(e), 254(h)(1)(B). When Congress wanted to limit advanced services obligations to carriers, it did so expressly. See id. § 254(h)(2)(B).

[7] See 47 U.S.C. § 254(h)(1)(B)(ii) (any telecommunications carrier providing discounted telecommunications services may receive reimbursement "notwithstanding the provisions of [section 254(e)]").

MEMORANDUM

TO: Federal-State Joint Board on Universal Service

FROM: National Cable Television Association (NCTA)

DATE: October 16, 1996

RE: Eligible Providers of Broadband Access to Schools and Libraries Under Section 254(h)(2)

Attached for your consideration please find NCTA's proposal for bringing telecommunications and access to advanced services to schools and libraries. This proposal is a natural outgrowth of the cable industry's long-standing commitment to bringing new technologies and advanced services to the classroom. It would provide an average of $10,000 per institution annually toward the purchase of voice, data, and advanced services, and meet the parallel objectives of ensuring universal access to the information age while promoting competition in the provision of these services to schools and libraries.[1/]

We urge the you to utilize the statutory authority provided under section 254(h)(2) of the Communications Act to enable schools and libraries to choose from among the widest possible array of providers of access to advanced telecommunications and information services, including cable operators and on-line service providers who are not telecommunications carriers. As we explain below, cable modem services and on-line access services are not telecommunications services. Nonetheless, section 254(h)(2) clearly enables the Joint Board to bring these services within the ambit of universal service for schools and libraries, without having to classify them as "telecommunications."

We also note that section 254(b)(4) requires only "providers of telecommunications services" to contribute to universal service. Thus, revenues from cable modem and on-line services could not be used to determine an entity's contribution to the universal service fund. We do not believe that this should be a deterrent to including providers of these services as eligible recipients for funding to provide access to advanced services for schools and libraries, to ensure that educational institutions may choose from among the full range of available broadband options.

[1/] The funding of universal service for schools and libraries would be separate from and in addition to the mechanism for ensuring that low income and high cost areas have access to basic telecommunications services at affordable rates.

Broad Eligibility Under Section 254(h)(2)

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. 47 U.S.C. § 254(h)(2). Consistent with the mandate for competitive neutrality, eligibility for universal service support made available pursuant to section 254(h)(2) is not limited to telecommunications carriers. In this significant regard it differs from section 254(h)(1)(B), which specifies that telecommunications carriers are entitled to offsets or reimbursements in connection with the discounted telecommunications services they provide.[2]

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 competitively neutrality ensures that any entity can compete to provide access to schools and libraries regardless of whether it is a telecommunications carrier.

Regulatory Classification of Access to Advanced Services

Internet access and on-line services are not telecommunications services. "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.[3] Under the 1996 Act, moreover, neither the

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[2] 47 U.S.C. § 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.

[3] Amendment of Section 64.702 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 services 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, CCBPol 96-09, DA 96-981 (rel. June 6, 1996), at ¶ 2.

Internet access services offered by cable operators nor the underlying cable network used to distribute them are subject to regulation as telecommunications offerings.[4]

As noted above, there is no justification or need to reclassify these services as telecommunications services in order to bring them within the scope of universal services for schools and libraries.[5] While section 254(h)(1)(B) appears to limit certain universal service 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.

Because access services are not telecommunications services, moreover, revenues from those services cannot be used to determine an entity's universal service contribution. Under section 254(b)(4), only "providers of telecommunications services" must contribute to universal service.[6] 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 to contribute to universal service. To require a contribution from Internet access or on-line revenues, however, the Joint Board must either expand the scope of contributions beyond providers of telecommunications services or effectively reclassify these services as telecommunications services in order to bring them within the contribution requirement. Neither course is supported by the 1996 Act or the past treatment of Internet access and on-

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[4] 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 of . . . other programming service, and subscriber interaction . . . which is required for the selection or use of such . . . other programming service." "Other programming service" means "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 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. § 541(c) ("A cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

[5] Such an expansion of regulation would be inconsistent with the historic treatment of these services, and fundamentally at odds with the "pro-competitive, de-regulatory national policy" embodied in the Telecommunications Act of 1996. Conference Report at 1.

[6] 47 U.S.C. § 254(b)(4).

line services.[7] To do so now would represent an abrupt departure from the historically unregulated nature of these services.

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[7] Indeed, 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 Rcd 2631 (1988).

INTERNET ACCESS, VOICEMAIL, AND E-MAIL ARE INFORMATION SERVICES, NOT TELECOMMUNICATIONS SERVICES

The Telecommunications Act of 1996 ("1996 Act") establishes specific definitions for information services and telecommunications.[1] These definitions are based on the terms used in the Modification of Final Judgment ("MFJ") in U.S. v. Western Electric Co., Inc.[2] Under the MFJ, voice storage and retrieval, electronic mail, and "gateway" services for obtaining access to information providers were all considered information services rather than telecommunications because they included the capabilities for generating, acquiring, storing and retrieving information. The same is true under the 1996 Act.

The definition of information services in the 1996 Act is nearly identical to the language of the MFJ, except that the MFJ referred to "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making

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[1] "Information service" means "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 such capability for the management, control, operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). By contrast, "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43). "Telecommunications service" is the offering of telecommunications for a fee directly to the public; a "telecommunications carrier" is any provider of telecommunications services. Id. §§ 153(46), (44).

[2] 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted). See H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. 125 (1995) ("'Information service' and 'telecommunications' are defined based on the definition [sic] used in the Modification of Final Judgment"); cf. MFJ, §§ IV(J), (O). In the House-Senate conference on the 1996 Act, the Senate receded to the House on the definition of information service. The House receded to the Senate on the definition of telecommunications, but the House and Senate bills contained similar definitions of this term. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996).

available information which may be conveyed via telecommunications."[3] The underlined phrase does not appear in the 1996 Act, but it was not given any special meaning by the Department of Justice or the MFJ court and the legislative history of the 1996 Act offers no rationale for omitting it. One possible explanation for the omission is that Congress wanted to clarify that only services actually utilizing telecommunications were "information services."[4] The "may be conveyed" language could have been read to include information that was not, but could be, conveyed via telecommunications.

From a plain reading of the language, however, the absence or inclusion of the phrase has no effect on the analysis of whether Internet access, voicemail, or electronic mail is an information service. The services at issue were considered information services under the MFJ because they included the capabilities for storing and retrieving information.[5] The same analysis is valid under the statutory definition of information services. The fact that service providers offer their capabilities via telecommunications does not convert the services themselves into telecommunications services.

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[3] MFJ, § IV(J).

[4] The Commission has suggested that the use of the phrase "via telecommunications" means that information services are broader than "enhanced services," which are limited to services offered over common carrier transmission facilities. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996), at ¶ 103.

[5] See pp. 3-4, infra.

The dichotomy between telecommunications and information services embodied in the MFJ and the 1996 Act parallels the distinction between "basic" and "enhanced" services[6] articulated in the FCC's Computer II proceeding.[7] In essence, Computer II, the MFJ, and the 1996 Act all draw the distinction between the provision of a telecommunications conduit and the provision of services that add value to the conduit (that "enhance" the conduit) through the addition of content or capabilities for "generating, acquiring, storing, transforming, processing, retrieving, or making available" content via telecommunications.

Under the MFJ, "information services" included not only services in which the telephone company controlled the content but also "services which would involve no control [by the telephone company] over the content of the information other than for transmission purposes."[8] In this latter category were contained data processing services as well as voice

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[6] The Commission defined basic services as "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 420 (1980) ("Computer II Final Order") (subsequent history omitted). Enhanced services are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

[7] See U.S. v. Western Electric Co., Inc., 552 F. Supp. 131, 178 n. 198 (D.D.C. 1982) (subsequent history omitted) ("'enhanced services' . . . are essentially the equivalent of the 'information services' described in the proposed decree"). Accord Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996), at ¶ 102 ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"). As noted above, however, the Commission has suggested that the term "information services" is broader than "enhanced services." See note 4, supra.

[8] U.S. v. Western Electric Co., Inc., 552 F. Supp. at 179 (emphasis supplied).

storage and retrieval services and electronic mail. These services were considered "information services" because voice or data storage in this context was "a feature of [the] service offering"[9] rather than simply an "inherent aspect of the technology used in transmission or switching."[10] Likewise, the provision of an information "gateway" was considered to be an information service.[11] The fact that these services involved, at some level, the transmission of information of the user's choosing did not render them telecommunications because what was being offered was the "capability for generating, acquiring, storing, . . . [and] retrieving . . . information . . . via telecommunications" -- the hallmark of an information service. Indeed, the MFJ court specifically included voicemail and e-mail within the definition of information services rather than telecommunications services.[12] To be sure, providers of these services today use telecommunications to deliver

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[9] U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23320, 23334 (May 27, 1982).

[10] U.S. Department of Justice, Competitive Impact Statement in Connection With Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7176 (Feb. 17, 1982). Accord U.S. v. Western Electric Co. Inc., 627 F.Supp. 1090, 1110 (D.D.C. 1986) ("[a]s Ameritech itself has recognized, voice storage and retrieval services fall squarely" within the definition of information services). As the MFJ court subsequently noted, voice storage and electronic mail "are much alike," except in that the former involves the storage of information as a voice message and the latter storage as a printed message. U.S. v. Western Electric Co., Inc, 714 F. Supp. 1, 20 n.82 (D.D.C. 1988).

[11] U.S. v. Western Electric Co., Inc., 673 F. Supp. 525, 597 (D.D.C. 1987), (rev'd on other grounds).

[12] U.S. v. Western Electric Co., Inc., 714 F. Supp. at 11 ("electronic mail . . . involves the generation or manipulation of content and for that reason should remain prohibited to the Regional Companies under any general restriction on content"); id. at 23 (permitting the BOCs to provide "voice storage and retrieval services, including . . . electronic mail," notwithstanding the inclusion of these services within the definition of information services) (emphasis added).

service to end users; as the statutory definition states, an information service provides capability for generating, etc. information via telecommunications. That in and of itself does not transform an information service into a telecommunications service, however.[13]

To the extent a person provides enhanced or information services, that person is not a telecommunications carrier.[14] Rather, an information services provider uses telecommunications capacity to deliver value-added or content based services. The 1996 Act does not disturb this traditional conduit/content or basic/enhanced distinction. Rather, by borrowing the telecommunications/information services distinction from the MFJ, the 1996 Act codifies that distinction. Thus, providers of information services are not "telecommunications carriers" or "providers of telecommunications services." Such entities are thus not obligated to contribute to the maintenance of universal services; nor are they subject to common carrier regulation applicable to telecommunications carriers.

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[13] Further evidence of the enhanced nature of voicemail and e-mail can be found in the fact that providers of such services routinely add time- and date-stamps to messages, in essence "enhancing" the message itself. Cf. U.S. v. Western Electric Co., Inc., 1988-1 Trade Cases ¶ 67,904, at 57,546 (D.D.C. 1988) (time announcements are information services).

[14] See, e.g., Amendment of the Commission's Rules and Regulations (Third Computer Inquiry), Phase II, 2 FCC Rcd 3072, 3080 (1987) ("Computer III Phase II Order").