

("subsidizees"),<sup>37</sup> government intervention should always be a measured and principled intervention -- one that achieves valid goals efficiently.

In an industry like telecommunications, where continuing advancements in technology and innovations in services are important to both individual customers at all income levels and the economy at large, any surcharge is essentially a tax on an important and presumably favored activity. Like all taxes, it deters rather than spurs that activity. While some level of surcharge to support universal service goals will promote the overall efficiency of the system, a surcharge that is excessive will be counterproductive. While it is impossible to specify exactly what that level is, the potential for excessive and therefore deleterious overpricing must be kept in mind in establishing the level of subsidy support to universal service and designing the processes to monitor the results.

Overcharging one customer group or service in order to benefit another customer group or service also distorts market signals and thereby misdirects research, product development and marketing, resulting in inefficient markets, in the unavailability of services that might otherwise be provided, and, overall, in the industry's provision of relatively less value to all customers and to society. For instance, subsidizing rural services reduces pro tanto the incentive to competing entrepreneurs to develop and deploy new technologies which would cost more than the retail price of the subsidized service but less than the real cost of the subsidized service to society. This may be why established telephone companies support cross-subsidies to rural customers -- to forestall competitive entry by more efficient providers. It is important that policymakers take this into account in establishing the level of subsidy support to achieve universal service goals and designing the processes to monitor the results.

Efficiency is also measured by the level of benefits received by those who need help, and the impact of the subsidy burdens on those who may also need help. Since regulation is inevitably crude -- since regulation almost inevitably lumps diverse persons into single groups rather than treating customers individually -- a cross-subsidy usually involves some measure of unfairness, in that at least some customers in the paying group may be in greater need of economic assistance than the customers in the receiving group. For instance, some marginally low-income Californians make large numbers of long-distance calls to their relatives and friends here and in foreign countries; charging customers more than the cost to provide those long-distance calls to subsidize services to other customers, particularly when the customers being subsidized are affluent customers living in a remote community, is unfair to the marginally low-income customer who makes many long-distance calls. Similarly, many owners or operators of small businesses are poor -- whole families often staff them -- and overcharging them to subsidize other customers would seem to be highly unfair to them. For particular customers in a paying group, the basic unfairness of a needlessly excessive subsidy is exacerbated, and the subsidy program may be even more unjustified, both morally

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<sup>37</sup> Egan, Bruce L., Information Superhighways Revisited: The Economics of Multimedia (Boston: Artech House, 1996), p. 254.

and economically. If a subsidy program could be made perfect, there would be less of a problem, but "social engineering" tends to be imperfect and usually has unanticipated consequences.

One way to help achieve efficiency is to target subsidies to those who truly need economic help, and who would leave the market without help. As Bruce Egan suggests, "[d]irect subsidies, especially of the current untargeted variety, are ... not socially efficient. The current flow of toll-to-local, urban-to-rural and large telco to smaller telco subsidies, is generally inefficient because it is not based on need ...."<sup>38</sup> A narrow focus helps to assure that limited subsidy funds are not dissipated, so that the level and quality of help that is provided to those who need help is sufficient to accomplish the goals of universal service. The Act's requirement that subsidies must be "explicit" is still another way to help achieve an efficient subsidy process. That means that the subsidy payor and the subsidy receiver are both made aware of the fact and amount of the subsidy, and can communicate their concerns if they believe the amounts are too high or too little.

### C. California's Regulatory Initiative.

In the proceedings which resulted in its October 25, 1996, decision on universal service, the CPUC originally proposed to fund the new universal service programs it created through an assessment on telecommunications carriers of a fixed percentage of the revenues of every carrier net of certain expenses such as access charges -- a "net trans account". The theories advanced by the CPUC for using a net trans account included the theory that such a funding mechanism might result in some portion of the subsidy being borne by a company's shareholders instead of its customers, and the theory that customers might view a customer surcharge as a tax.

The CPUC's original theories are not valid. Like all other costs incurred by a successful business operating in the private sector -- real estate, equipment, supplies, salaries, etc. -- amounts paid to fund subsidies are ultimately passed on to and borne by the customers of the business.<sup>39</sup> As Bruce Egan said, "there are fundamentally only two types of local telephone company subscribers" -- the subsidizers and the subsidizees.<sup>40</sup> In this marketplace, the assertion that the consumers do not bear the burden of expenses of this kind is a fiction. The practical effect of the CPUC's initial proposal of a "net trans account" would have been to hide from consumers information about the fact and extent of any

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<sup>38</sup> *Id.*, at 307.

<sup>39</sup> *See*, e.g., Compton, George R., Ph.D., and Curtiss, Audrey J., Ph.D., "Interconnection Policy That Reconciles Network Cost Recovery and Universal Service: Part 2 -- Implementing The Correct Costing Paradigm" NARUC Quarterly Bulletin (Vol. 17, No. 4) 453, at p. 463 ("The argument that a flat rate could be imposed on the retailers without it being passed on to the end user is not persuasive. In a competitive environment, costs tend to be passed on in the same manner they are incurred.")

<sup>40</sup> *Id.*, at 254.

contribution they might be making to support universal service, and of the fact and extent of the assistance they were receiving.

In 1994 legislation, AB 3643 (Polanco), the Legislature reiterated its earlier preference for openness, and mandated that any universal service subsidy must be explicit.<sup>41</sup> Policies articulated in AB 3643 which are particularly relevant to this issue, and with which the Commission's order on universal service "shall be consistent", include the following:

(3) Any subsidy that may be required to ensure that universal service remains a viable reality must have a clearly stated purpose and scope, include a broad based and competitively neutral funding mechanism, and be imposed in a manner that clearly identifies the source of the subsidy.

(5) Consumers should be able to have access to all the information needed in order for them to make timely and informed choices about telecommunications products and services, and how to best use them.<sup>42</sup>

In its October 29, 1996, decision, the CPUC rightly interpreted the Legislature's expression of intent that any subsidy required to provide universal service must be "explicit" to mean that: (1) the amount of the subsidy should be identified to those who pay it and to those who receive it; (2) those who receive the subsidy should be aware of the amount of subsidy they receive; and, (3) those who fund the subsidy should be aware of the amount they are contributing to it.

In arriving at its decision, the CPUC concluded that --

- "An AEUS conforms with AB 3643 because it clearly identifies the source of the subsidy, customers can see how much they are paying into the fund, and customers are informed as to the amount of the surcharge."<sup>43</sup>

- "With a net trans account funding mechanism, if the carrier decided to absorb some or all of the fund charge, or chose not to disclose that part of their bill pays to support the CHCF-B, then the AB 3643 principle that the subsidy be

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<sup>41</sup> Statutes 1994, chapter 278, Section 2(b)(3).

<sup>42</sup> Statutes 1994, chapter 278, section 2(b)(3) and (5).

<sup>43</sup> Decision, at pp. 273-274, Conclusion of Law No. 118.

imposed in a manner that clearly identifies the source of the subsidy would not be met."<sup>44</sup>

- "The AEUS method of funding is a more competitively neutral method of funding than the net trans account method because it is imposed on virtually all telecommunications services and customers."<sup>45</sup>

#### **D. Federal Regulatory Standards**

Section 254(e) of the federal Telecommunications Act of 1996 ("TCA") requires that subsidies to achieve universal service goals be "explicit." It states, in pertinent part, that "[a]ny such support [for universal service] should be explicit and sufficient to achieve the purposes of this section."

The FCC Joint Conference Statement confirms that "[t]o the extent possible, the conferees intend that any support mechanisms continued or created under new section 254 should be explicit, rather than implicit as many support mechanisms are today,"<sup>46</sup> and that it is "the conferees' intent that all universal service support should be clearly identified."<sup>47</sup>

In the Federal-State Joint Board's Recommended Decision to the FCC, FCC Commissioner Susan Ness noted that "[o]ur job is to construct a new universal service regime that makes subsidies more explicit, more targeted, more efficient, and more compatible with competition, . . ."<sup>48</sup> Commissioner Rachelle B. Chong recognized that a key task of the Joint Board "is to identify all implicit universal service subsidies and to either remove them or make them explicit."<sup>49</sup> As FCC Commissioner Laska Schoenfelder acknowledged, the funding mechanism proposed by the Joint Board is not explicit.<sup>50</sup>

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<sup>44</sup> Decision, at pp. 273-274, Conclusion of Law No. 119.

<sup>45</sup> Decision, at pp. 273-274, Conclusion of Law No. 120.

<sup>46</sup> Joint Explanatory Statement of the Committee of Conference, at p. 16.

<sup>47</sup> Id., at p. 17. [Emphasis added.]

<sup>48</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision FCC96J-3 ("Recommended Decision"), Separate Statement of Commissioner Susan Ness ("Separate Statement of Ness"), at p. 1. [Emphasis added.]

<sup>49</sup> Separate Statement of FCC Commissioner Rachelle B. Chong Concurring in Part, Dissenting in Part ("Separate Statement of Chong"), November 7, 1996, at p. 1. Emphasis added.

<sup>50</sup> "In closing, I would also like to express my reservations about not providing explicit notification on customers' bills about the charges assessed to fund these programs." Recommended Decision, Separate Statement of Commissioner Laska Schoenfelder Dissenting in Part ("Separate Statement of Schoenfelder"), at p.

Commissioner Schoenfelder recognized that "[c]onsumers are entitled to be made aware of the charges that they are paying to support the recommendations made herein."<sup>51</sup>

Implicit subsidies -- those federal universal-service-supporting cross-subsidies that have existed until now -- are hidden: the beneficiaries are not aware that they are receiving a subsidy, and the payors are not aware that they are paying the subsidy. In contrast, an "explicit" subsidy is one which is identified as a subsidy and made known to both the recipient and the payor. An AEUS is an explicit subsidy.

#### IV. ANALYSIS OF ARGUMENTS AGAINST AN AEUS.

Because the rates of newly competing local exchange carriers ("CLECs") will be largely unregulated, it is not surprising that many of them support the use of a net trans account. Such a funding mechanism possibly could provide a CLEC with the opportunity to pass on to its customers, under the guise of universal service, not only the amount actually paid by the CLEC to fund universal service but other costs as well. Such a funding mechanism would also enable a CLEC to allocate a proportionately greater portion of the subsidy burden to residential customers than to business customers, or, more likely, to favor the very largest customers over both residential and business customers. Like a sales tax, an AEUS provides reasonable assurances that the burden of a government-mandated subsidy program is borne by and known to all customers -- residential and business, large and small.

Some ILECs and some consumer groups support the use of a net trans account to fund universal service. That position is most surprising with respect to consumer groups, who generally represent low-income and disadvantaged consumers. It would be reasonable to anticipate that a program which collects surcharges from both average-income consumers and the near-poor in order to subsidize affluent customers would be repugnant to them, and that focusing the subsidy on only those who are in economic need of a subsidy in order to remain connected to the network would have an instinctive appeal. Similarly, on the surface it would seem reasonable to anticipate that groups representing consumers would advocate disclosure of the surcharge and the subsidy so that each consumer, and each member of the public at large, is aware of the subsidy. Typically, representatives of consumers advocate full disclosure of pertinent facts to those affected.

As stated above, on December 4, 1996, TURN, a consumer group, filed with the CPUC an Application for Rehearing of Decision 96-10-066 asserting that the CPUC erred by adopting an AEUS as the funding mechanism for two new universal service programs instituted in that Decision. Subsequently, on January 21, 1997, TURN filed a complaint

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<sup>51</sup> *Id.*, at p. 2.

against the CPUC in the U.S. District Court for the Northern District of California.<sup>52</sup> The complaint seeks both declaratory and injunctive relief.

Those two filings are instructive regarding the arguments which are being made in support of the view that universal service programs should be funded through a net trans account rather than an AEUS. For that reason, the remainder of this paper analyzes the arguments made by TURN in those two filings, and attempts to explain why, as the DCA views it, those arguments are not valid.

In its first claim for relief in the federal court action, TURN alleges that, pursuant to Article VI, Clause 2 of the United States Constitution (the "Supremacy Clause"), 47 U.S.C. Section 254(f) (Section 254(f) of the TCA)<sup>53</sup> prohibits the CPUC from funding the CHCF-B and the CTF through contributions from consumers, rather than through contributions from carriers.<sup>54</sup> TURN also claims that enforcement by the CPUC of the AEUS will violate Article I, Section 8, Clause 3 of the United States Constitution (the "Commerce Clause") in that it will affect, disrupt, and interfere with interstate commerce in the following manner: (1) California-based businesses will incur increased costs of doing business as a result of paying the AEUS, which costs will raise the cost of their goods and services for sale in interstate commerce, and will place them at a competitive disadvantage with respect to competing businesses located outside of California that do not pay the AEUS; and, (2) California consumers will pay more for telecommunications services as a result of paying the AEUS and, therefore, will have less money to spend on goods and services provided through interstate commerce.

TURN seeks a declaration from the court that: (1) the Supremacy Clause of the U.S. Constitution and the TCA prohibit the CPUC from imposing an AEUS, and that any surcharge imposed by the CPUC must be "carrier-funded"; and, (2) the Commerce Clause of the U.S. Constitution and the TCA prevent the CPUC from enforcing the AEUS, on the basis that it is an impermissible burden on interstate commerce, and any surcharge imposed by the CPUC must be carrier-funded.<sup>55</sup>

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<sup>52</sup> In addition to the CPUC, TURN also named as defendants each of the CPUC's five commissioners, as well as the CPUC's executive director.

<sup>53</sup> Unless otherwise noted, all further references to code sections are to sections of the TCA.

<sup>54</sup> TURN's Complaint, at ¶ 16.

<sup>55</sup> It is noteworthy that TURN specifically states in its complaint that it is not challenging the authority of the CPUC to adopt either the CHCF-B or the CTF. (TURN's Complaint, at ¶ 12.) Such a claim would appear to be a state, rather than a federal claim; the federal court possibly could require that such a claim be decided by the state court before proceeding with the federal law claims. In DCA's opinion, such a claim with respect to the CTF might be more difficult for the CPUC to defend. Apparently, TURN does not want to be viewed as opposing implementation of the CHCF-B and the CTF.

In its second claim for relief, TURN alleges that if the CPUC is allowed to enforce the AEUS, California consumers will suffer substantial, immeasurable and irretrievable harm, and that business telecommunications customers will be subject to a competitive disadvantage. TURN seeks a preliminary and permanent injunction preventing the CPUC from enforcing the AEUS.

In its third claim for relief, TURN alleges that the TCA "secures to California ratepayers . . . the right to be free from the imposition of ratepayer-funded contributions to finance new universal service support mechanisms . . . ." <sup>56</sup> TURN asserts that by imposing an AEUS, the CPUC has violated the civil rights of consumers. There appears to be no separate or different relief sought for this claim.

In accordance with federal court procedure, TURN's Complaint contains the bare allegations necessary to state a federal claim, and gives little information about the arguments which might be used to support those claims. However, TURN's Application for Rehearing reflects arguments that likely would be used to support those claims.

In its Application for Rehearing, TURN makes the following arguments to the CPUC:

1. The TCA requires that states fund universal service programs through carrier contributions, rather than customer contributions.
2. The members of the Federal-State Joint Board unanimously concluded that the TCA bars the use of an AEUS funding mechanism.
3. The CPUC's interpretation of Section 254(f) of the TCA violates basic rules of statutory construction.
4. "Whether universal service funding is collected directly from carriers or customers makes an important difference to customers."
5. The carrier funding requirement of Section 254(f) does not conflict with AB 3643.
6. "If the Commission decides that AB 3643 precludes carrier funding, then there is a conflict between federal preemption and Article III, Section 3.5 of the California Constitution."

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<sup>56</sup> TURN Complaint, at ¶ 3, middle of page 6.

**A. The TCA Does Not Prohibit States From  
Adopting an AEUS to Fund Universal Service Programs.**

The basis for all of TURN's claims rests on its interpretation of Section 254(f), which states that:

(f) *STATE AUTHORITY.* -- A State may adopt regulations not inconsistent with the Commission's<sup>57</sup> rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State [sic] to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.<sup>58</sup> [Emphasis added.]

In its Application, TURN focuses solely on the first phrase in the second sentence of this section -- "Every telecommunications carrier that provides intrastate telecommunications services shall contribute," and particularly on the word "contribute" -- and argues that the phrase requires that any universal service programs created by a state must be funded by telecommunications carriers, rather than by telecommunications customers. It concludes that, therefore, an AEUS violates Section 254(f) because customers, rather than carriers, contribute to an AEUS. TURN asserts that it is impossible to interpret that phrase in any other manner.

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<sup>57</sup> All references in the TCA to the "Commission" are to the Federal Communications Commission.

<sup>58</sup> Section 254(d) contains a similar provision applicable to interstate telecommunications providers and the FCC. It states, in pertinent part, that:

*TELECOMMUNICATIONS CARRIER CONTRIBUTION.*--Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the [Federal Communications] Commission to preserve and advance universal service. . .  
[Emphasis added.]

This first sentence of Section 254(d) is virtually identical to the second sentence of Section 254(f), with the important exceptions of the type of telecommunications carriers to which the section applies, and the identity of the body that is given the jurisdiction to establish the parameters of the universal service programs.

TURN asserts that if Congress wished to allow states the option to select either carrier funding or customer funding, it could have phrased this directive in terms of telecommunications services, e.g., "every telecommunications service shall contribute . . . ."59 As shall be shown below, a proper interpretation of Section 254(f) does not support that position.

### **1. Section 254(f) Should Not Be Interpreted to Require Carrier Funding of Universal Service Programs.**

TURN points out that "the dictionary defines 'contribute' (where, as here, used as an intransitive verb) to mean: 'to give (money, food, etc.) to a common fund, etc.'"<sup>60</sup> TURN argues that with an AEUS, the carriers give nothing to a common fund; the only parties that contribute funds are customers.<sup>61</sup> As stated earlier, TURN argues that Section 254(f) requires that universal service be financed through carrier contributions, not customer contributions.<sup>62</sup> Proponents of this argument appear to believe that carriers who collect the universal service obligation from customers through an AEUS are no longer "contributing" to support universal service, but are merely conduits between the customers and the universal service fund.<sup>63</sup>

The logical application of TURN's argument shows that Congress could not have intended the interpretation of Section 254(f) that TURN seeks. TURN argues that use of a net trans account will force carriers to absorb some of the cost of universal service, though TURN admits that carriers are certain to pass at least some of that cost on to their customers.<sup>64</sup> TURN views those absorbed costs as the carriers' "contribution" to universal service.

It is true that carriers who collect the universal service obligation from their customers through an AEUS are not "contributing" from their profits to support universal service. It is equally true, however, that carriers who pay a universal service obligation

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<sup>59</sup> Of course, "services" do not possess money, and therefore cannot contribute funds.

<sup>60</sup> TURN Application, at p. 6, citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989).

<sup>61</sup> TURN Application, at p. 6.

<sup>62</sup> TURN Application, at p. 3.

<sup>63</sup> The DCA agrees with TURN's conclusion that the TCA's reference to contributions by providers was not intended to refer to the carrier's costs to administer an AEUS.

<sup>64</sup> TURN Application, at p. 7 ("The legal issue presented in this application for rehearing has extremely important implications for determining whether the support of universal service will be a shared burden or rest solely on customers." [Emphasis added.]

through a net trans account recoup the cost of that obligation from customers;<sup>65</sup> therefore, even if a net trans account funding mechanism were used, the carriers would not be "contributing" from their profits to support universal service. Thus, the carrier's "contribution" is not altered by the type of funding mechanism used.

Irrespective of whether the funding mechanism is an AEUS or a net trans account, the funds paid to the administrators of universal service programs (at both the federal and state levels) are paid by the carriers.<sup>66</sup> In the case of the state universal service programs, those moneys are collected from the carrier's customers and then paid by the carrier to the administrator. In the case of the federal universal service programs, those moneys are paid to the fund administrator by the carrier, who includes in its rates to customers charges sufficient to recoup the funds paid to the administrator.<sup>67</sup>

Thus, irrespective of which funding mechanism is used, the funds contributed are paid by carriers but are ultimately borne by the carriers' customers. The only practical difference between the two funding mechanisms -- and it is a very important one -- is that with an AEUS, customers know that they are paying, and how much they are paying, to support universal service; with a net trans account, customers are not specifically informed that they are paying to support universal service, or (more importantly) how much they are paying.<sup>68</sup>

Even the members of the Federal-State Joint Board ("Joint Board") recognized that irrespective of the funding mechanism used, customers, and not carriers, ultimately pay the

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<sup>65</sup> See., e.g., Compton, George R., Ph.D., and Curtiss, Audrey J., Ph.D., "Interconnection Policy That Reconciles Network Cost Recovery and Universal Service: Part 2 -- Implementing The Correct Costing Paradigm" NARUC Quarterly Bulletin (Vol. 17, No. 4) 453, at p. 463 ("The argument that a flat rate could be imposed on the retailers without it being passed on to the end user is not persuasive. In a competitive environment, costs tend to be passed on in the same manner they are incurred.")

<sup>66</sup> See., e.g., Compton, George R., Ph.D., and Curtiss, Audrey J., Ph.D., "Interconnection Policy That Reconciles Network Cost Recovery and Universal Service: Part 2 -- Implementing The Correct Costing Paradigm" NARUC Quarterly Bulletin (Vol. 17, No. 4), at p. 463; Egan, Bruce L., Information Superhighways Revisited: The Economics of Multimedia (Boston: Artech House, 1996), at p. 254; and, Recommended Decision, Separate Statements of Commissioner Ness, Commissioner Chong, Commissioner Schoenfelder, Commissioner Johnson and Chairman Nelson, as more specifically quoted and cited below.

<sup>67</sup> As shown above in the discussion on economic policy, there can be no question that the full amount of the funds carriers pay to support universal service programs are recouped from their customers.

<sup>68</sup> The DCA also questions whether funding universal service through a net trans account rather than through an AEUS might provide unregulated carriers with an additional profit opportunity. If an AEUS is used, the provider collects an established amount from the customer and remits that same amount to the program administrator. However, if a net trans account is used, the provider pays a set amount to the administrator, and as competition develops and the need to regulate prices diminishes or is eliminated, the amount the provider charges its customers to cover that cost may not be transparent. Because of the significant difficulty in establishing exact costs for any one element of telecommunications service, it seems possible that the provider could add a mark-up to its universal service cost, and such a practice might be difficult to detect.

cost of universal service programs. For example, Commissioner Ness noted that "we are mindful that the funds for universal service ultimately come from consumers, . . ." <sup>69</sup> Commissioner Chong stated unequivocally:

*Let us make no mistake about who will foot the bill for this universal service program. It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace.* <sup>70</sup>

Similarly, Commissioner Julia Johnson and Joint Board Chairman Sharon L. Nelson admitted that, "[a]s we all know, ratepayers are the ultimate supporters of any program, . . ." <sup>71</sup>

It is true that the TCA does not expressly state that telecommunications customers must contribute monies to fund universal service. It also is true that nothing in Section 254(f) limits carriers' "contributions" to only some portion of the costs of universal service. Congress did not limit the "contributions" by carriers to some portion of the universal service obligation, but it also did not specifically state that consumers will "contribute" to the support of universal service programs. It follows that if Congress intended that Section 254(f) should be interpreted to explicitly require carrier funding of universal service programs, and to explicitly prohibit funding those programs through an AEUS, then Congress must have intended that universal service programs be entirely funded through carrier contributions, and that no portion of universal service programs be funded by customers. In other words, if Section 254(f) prohibits the use of an AEUS because the funds come from customers rather than carriers, then it also must preclude any other funding mechanism in which customers pay any portion of the cost of universal service programs, irrespective of whether they pay it directly or indirectly.

Any other interpretation would make Section 254(f) a farce, because it would preclude direct, explicit customer funding of universal service programs, but allow indirect, implicit customer funding. Such an interpretation cannot be correct, because Section 254(e) provides, in pertinent part, that universal service support should be "explicit and sufficient to achieve the purposes of this section."

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<sup>69</sup> *Id.*, at p. 2. Emphasis added.

<sup>70</sup> Recommended Decision, Separate Statement of FCC Commissioner Rachelle B. Chong Concurring in Part, Dissenting in Part ("Separate Statement of Chong"), at pp. 12-13. [Emphasis in original.]

<sup>71</sup> Recommended Decision, Separate Statement of Commissioner Julia Johnson and Chairman Sharon L. Nelson on Recommended Decision of the Federal-State Joint Board on Universal Service Re: *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 ("Separate Statement of Johnson and Nelson"), at p. 8.

In order for TURN's argument to fly, Congress must have intended that Section 254(f) both require carriers to contribute their profits to fund universal service, and that Section 254(f) also preclude carriers from recouping those costs from customers. Thus, strict application of TURN's interpretation of the TCA would require that the CPUC mandate that all universal service obligations be funded entirely by telecommunications carriers and their shareholders, without recouping those costs from customers. Proponents of a net trans account seem to ignore this bit of logic.

The only logical interpretation of Sections 254(f) and 254(d) is that Congress recognized that, irrespective of whether a net trans account, an AEUS, or some other funding mechanism is used to pay for universal service, the moneys will be paid into the fund by carriers, just as taxes on retail sales are ordinarily paid to state taxing authorities by retailers -- customers will not send their monthly contributions directly to the fund administrator. Had Congress intended that the moneys be collected directly from carriers through a net trans account, it would have explicitly so stated. It did not. The inescapable conclusion is that Congress did not intend through Sections 254(d) and (f) to adopt any particular funding mechanism; it left to the states with respect to state universal service programs, and to the FCC with respect to federal universal service programs, the selection of a funding mechanism which assures that the "contributions" are equitable and competitively neutral with respect to carriers.

The question which should concern the regulatory bodies and the court is whether consumers will know they are funding the universal service programs. The DCA strongly supports the CPUC's election to use an AEUS to fund the universal service programs, and urges the FCC to adopt an AEUS funding mechanism for federal universal service programs so that consumers have as much information as possible about their provision and receipt of support under those programs.

## **2. The CPUC's Interpretation of Section 254(f) Does Not Violate Basic Rules of Statutory Construction.**

TURN asserts that the CPUC's interpretation of Section 254(f) in a manner which does not preclude a state from adopting an AEUS violates two basic rules of statutory construction: (1) when a general and a specific provision of a statute are inconsistent, the specific will control over the general;<sup>72</sup> and, (2) a statute should be construed, if possible, in a way which will give effect to every provision.<sup>73</sup>

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<sup>72</sup> TURN cites California Code of Civil Procedure section 1859 in support of this principle of statutory construction. However, that same rule of statutory construction can be found in federal case law. See, e.g., *United States v. Cihal* 336 F.Supp. 261; 73 Am.Jur.2d, Statutes, § 257, p. 427.

<sup>73</sup> TURN cites California Civil Code section 1858 in support of this rule of statutory construction. However, that same rule of statutory construction can be found in federal case law. See, e.g., *United States v. Powers* 307 U.S. 214; 73 Am.Jur.2d, Statutes, § 250, p. 423.

a. The Specific Controls Over the General.

During the comment period for new universal service rules in the CPUC's proceeding, TURN repeatedly argued that an AEUS violates Section 254(f). In rejecting TURN's argument, the CPUC in its Decision appears to rely for its conclusion in part on the first sentence of Section 254(f) when the CPUC states that:

Section 254(f) of the Telco Act permits the states to adopt regulations pertaining to universal service that are not inconsistent with the FCC's rules to preserve and advance universal service.

TURN interprets that statement as a conclusion by the CPUC that the first sentence of Section 254(f) conflicts with the second sentence, and that the first sentence controls over the second sentence.<sup>74</sup> TURN then argues that application of the rule of statutory construction that a specific statutory provision controls over a general one, requires a conclusion that the second sentence of Section 254(f), which is more specific, controls over the first sentence, which is more general. Applying TURN's interpretation of the second sentence of Section 254(f), TURN then concludes that the CPUC erred in adopting an AEUS.<sup>75</sup>

Although TURN correctly states the principle of statutory construction, that principle is invoked only when a conflict between the two statutory provisions is found. Before a court makes such a finding, it should first attempt to apply the second principle of statutory interpretation which TURN invokes -- that the statute should be interpreted in a manner which will give effect to every phrase.<sup>76</sup>

TURN admits that "there is not necessarily a conflict between the two [first and second sentences of Section 254(f)]."<sup>77</sup> Indeed, if one interprets the second sentence as does the CPUC, there is no conflict between the two sentences. It is only if one interprets the second sentence as TURN does that a potential conflict between the meaning of the first and second sentence exists.

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<sup>74</sup> There is nothing in the Decision that supports TURN's conclusion that the CPUC believes either that the first and second sentences of Section 254(f) are conflicting, or that the first sentence controls over the second one.

<sup>75</sup> TURN does not directly argue that use of an AEUS funding mechanism is inconsistent with the FCC's universal service rules. Indeed, the FCC has not yet adopted universal service rules. Therefore, at this time, it would be impossible for the CPUC to be in violation of the first sentence of Section 254(f).

<sup>76</sup> See, generally, 73 Am.Jur.2d, Statutes, §§ 254 and 255, p. 425-426.

<sup>77</sup> TURN Application, at p. 5.

b. Giving Effect to Every Provision.

TURN next asserts that interpreting the language in the second sentence of Section 254(f) "in a manner determined by the State" to allow customer funding would nullify the previous portion of that sentence -- "Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, . . ." <sup>78</sup> Doing so, TURN asserts, violates the principle of statutory interpretation that a statute should be interpreted so as to give each provision meaning. TURN interprets the "in a manner determined by the State" language as "meaning that States retain the discretion to determine the other particulars of universal service support programs, such as how to define high cost areas, which services to fund, and which revenues to use as offsets to any support fund." <sup>79</sup> TURN cites no authority to support that interpretation.

As shown above in the background discussion, the Moore Universal Telephone Service Act provides that Lifeline service should be supported by every carrier. Specifically, it states that:

(d) The furnishing of lifeline telephone service is in the public interest and should be supported fairly and equitably by every telephone corporation, and the commission, in administering the lifeline telephone service program, should implement the program in a way that is equitable, nondiscriminatory, and without competitive consequences for the telecommunications industry in California. <sup>80</sup>

Yet, the Moore Universal Telephone Service Act also specifically requires that the Lifeline program is to be funded through an AEUS. <sup>81</sup>

Therefore, the Moore Act stands as statutory precedent that a legislative body can view a mandate that carriers support universal service programs as consistent with a mandate that an AEUS funding mechanism be used. The two mandates are not necessarily

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<sup>78</sup> TURN's Application actually states that the phrase cannot be interpreted to allow carrier funding, but that most certainly is a clerical error since TURN's Application specifically seeks an interpretation that the quoted language requires carrier funding.

<sup>79</sup> TURN Application, at p. 6. [Emphasis added.] It is important to note that this statement is another acknowledgement by TURN that the cost of universal service programs will be funded through profits from other services, which ultimately originate from a carrier's customers, not from the carrier's shareholders. It appears that TURN understands that customers ultimately will pay the full cost of universal service programs; however, TURN appears to prefer that customers pay that "contribution" through charges for other services -- a contribution of which customers would not be aware -- rather than through an explicit support mechanism of which customers would be aware.

<sup>80</sup> California Public Utilities Code section 871.5(d). [Emphasis added.]

<sup>81</sup> California Public Utilities Code section 879(c).

conflicting. Whether or not a conflict may exist would depend on the meaning one gives to the word "support," or in the case of Section 254(f), to the word "contribute."

If Section 254(f) is interpreted to allow the use of either an AEUS or a net trans account, then the "in a manner determined by the State" language clearly allows a state to determine which funding mechanism it will use to fund its state universal service programs. In that instance, both phrases of the sentence are given meaning and do not conflict. The "in a manner determined by the State" language conflicts with the "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute" language of Section 254(f) only if one interprets the latter phrase to require carrier funding of universal service programs.

Thus, applying the principle of statutory interpretation that a statute should be interpreted so as to give each provision meaning, Section 254(f) must be interpreted to allow each state to select the particular mechanism it will use to fund its state universal service programs. Additionally, a correct application of that principle of statutory interpretation negates the need to apply the first principle of statutory interpretation upon which TURN relies.

**3. Interpreting Section 254(f) to Require  
Carrier Funding Would Preclude California From  
Continuing to Use the AEUS Funding Mechanism  
for its Other Universal Service Programs, and for  
the State's Contribution to the Federal Lifeline Program.**

Another basic rule of statutory construction is that a legislative body is deemed to be aware of the current state of the law when it adopts legislation.<sup>82</sup>

Federal and state "Lifeline" telephone service programs, which provide telephone service to low-income customers at reduced rates, are the most well-known of several universal service programs. Because federal and state Lifeline programs are universal service programs, the provisions of Section 254 apply to them.

Section 254(d) is the federal universal service programs' counterpart to Section 254(f) for state universal service programs. Section 254(d) states, in pertinent part, that:

***TELECOMMUNICATIONS CARRIER CONTRIBUTION.***--Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the [Federal Communi-

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<sup>82</sup> See, generally, 73 Am.Jur.2d, Statutes, § 180, p. 383.

cations] Commission to preserve and advance universal service.  
... [Emphasis added.]

This first sentence of Section 254(d) is virtually identical to the second sentence of Section 254(f), with the important exceptions of the type of telecommunications carriers to which the section applies, and the identity of the body that is given the jurisdiction to establish the parameters of the universal service programs.

Pursuant to FCC regulation, the federal contribution to support the federal Lifeline program is funded through a surcharge on interstate interexchange carriers, not through an AEUS.<sup>83</sup> Therefore, interpreting the language in Section 254(d) as TURN suggests would not conflict with the current funding mechanism for the federal Lifeline program.

However, in order to participate in the federal Lifeline program, states are required to make a contribution to the federal program equal in amount to the federal contribution.<sup>84</sup> States are not limited by federal law or regulation with respect to the manner in which they fund their contribution, and the methods used by various states to fund their contributions cover a wide range of options.

The amount necessary to cover California's contribution to the federal Lifeline program is included in the surcharge for its ULTS program. Thus, California funds its contribution to the federal Lifeline program through an AEUS.<sup>85</sup> That practice sets a precedent for using an AEUS to collect a state's contribution to support federal universal service programs.

We can assume that when Congress enacted the TCA, it knew about the manner in which states, including California, fund their contributions to federal universal service programs. Interpreting the TCA as TURN argues would mean that California can no longer collect its contribution to the federal Lifeline program through an AEUS.

Federal law and regulation allow, but do not require, states to establish their own Lifeline programs in addition to the federal program.<sup>86</sup> As discussed above, California's Lifeline program is mandated by California state statute -- the Moore Universal Telephone Service Act, which requires that California's Lifeline program be funded through an AEUS.<sup>87</sup> State statute also mandates that the Deaf and Disabled Telecommunications

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<sup>83</sup> 47 Code of Federal Regulations section 69.117.

<sup>84</sup> 47 Code of Federal Regulations section 69.104.

<sup>85</sup> California may not be the only state who funds its contribution in that manner.

<sup>86</sup> Ibid.

<sup>87</sup> California Public Utilities Code section 879(c).

Program ("DDTP") be funded through an AEUS.<sup>88</sup> Following that lead, the CPUC ordered that the California High Cost Fund ("CHCF-A"), which subsidizes the rates of customers who live in high-cost areas served by California's small and rural ILECs, also be funded through an AEUS.

If Section 254(f) were interpreted as TURN asserts, it would supersede California Public Utilities Code sections 879(c), 2881(d) and 739.3, and would preclude California from continuing to fund its universal service programs through an AEUS funding mechanism, and also would preclude California's use of an AEUS to fund its contribution to the federal universal service programs.

#### **4. Section 254(j) Does Not Protect California's Use of an AEUS for Its Already-Established Universal Service Programs.**

TURN recognized that if its interpretation of Section 254(f) were correct, then that section would supersede the Moore Act, making it unlawful for California to continue to fund its Lifeline program through an AEUS.<sup>89</sup> Apparently TURN does not object to California continuing to use an AEUS funding mechanism for the Lifeline program, because TURN asserts that Section 254(j) protects California's Lifeline program as it currently functions, and that Section 254(j) makes Section 254(f) inapplicable to California's Lifeline program.

Section 254(j) states that:

(j) *LIFELINE ASSISTANCE*. -- Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the [Federal Communications] Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title. [Emphasis added.]

47 Code of Federal Regulations section 69.117 et seq., relates only to the federal Lifeline program. Therefore, Section 254(j) could be interpreted to protect the current method of funding the federal contribution to the federal Lifeline program from any adverse impact which the remainder of Section 254 otherwise might have on that funding mechanism. However, since the federal contribution is funded through a carrier surcharge, the protection provided by Section 254(j) appears to be superfluous.

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<sup>88</sup> See California Public Utilities Code Section 2881.

<sup>89</sup> Such an interpretation also would mean that Section 254(f) precludes California's continued use of an AEUS to fund the DDTP, the CHCF-A, and California's contribution to federal universal service programs, but TURN does not mention Section 254(f)'s application to those programs.

The manner in which states fund their contribution to the federal Lifeline program is not controlled by 47 Code of Federal Regulations section 69.117 or related sections. Therefore, Section 254(j) does not provide any protection for a state's continued use of a particular funding mechanism for a state's contributions to support the federal Lifeline program if that funding mechanism violates Section 254.

However, even assuming, arguendo, that Section 254(j) could be interpreted to protect California's ability to continue to use an AEUS funding mechanism to finance its contribution to the federal Lifeline program, even the most cursory reading of this section reveals that it applies only to the federal Lifeline program established by the FCC.

California's Lifeline program was not established by the FCC or pursuant to 47 U.S.C. section 69.117 or related sections. Therefore, Section 254(j) does not provide any protection for state Lifeline programs, and could not be construed to protect California's ability to continue to fund its Lifeline program through an AEUS in the event that Section 254(f) is interpreted as TURN asserts.

Moreover, Section 254(j) is limited specifically to the federal Lifeline program. Therefore, if Section 254(f) is interpreted as TURN asserts, then Section 254(j) also could not be reasonably interpreted to provide any protection whatsoever for California's continued use of an AEUS to fund its DDTP and CHCF-A programs.

It defies logic that Congress would have intended that Section 254(j) protect California's ability to fund its contribution to the federal universal service programs through an AEUS, and at the same time have intended that Section 254(f) preclude California from using an AEUS funding mechanism for any other universal service program. Therefore, application of the principle of statutory construction that a statute should be interpreted to give effect to each provision requires that Section 254(f) be interpreted in a manner which does not affect a state's ability to fund its state universal service programs and its contribution to federal universal service programs in any manner the state chooses.

##### **5. The TCA Does Not State an Intent by Congress To Take Away From States Their Jurisdiction Over State Universal Service Programs.**

Applying the principle of statutory construction that a legislative body is deemed to have knowledge of the current state of the law when it adopts legislation, reveals another flaw in TURN's interpretation of Section 254(f).

It is appropriate to presume that Congress knew when it enacted the TCA of the long-standing tradition that the federal government exercises jurisdiction over interstate carriers, and preserves the rights of the states to exercise jurisdiction over intrastate carriers. If Section 254(f) is interpreted as TURN asserts, then that section reflects a departure by Congress from that long-standing tradition. As TURN interprets Section 254(f), Congress

has taken away from the states jurisdiction over how to fund state universal service programs and a state's contribution to federal universal service programs, and has conferred jurisdiction over those matters on the FCC.

If Congress had intended to depart from that tradition in the manner which TURN asserts, Congress would have explicitly stated in Section 254(f) that the FCC has jurisdiction to determine the manner in which state universal service programs will be funded, and that the states have jurisdiction to determine all other matters relating to state universal service programs. Congress did not state that.

Interpreting Section 254(f) as the CPUC does maintains the traditional boundaries between FCC and state jurisdiction, and comports with an interpretation of Section 254(f) which gives effect to every provision thereof.

Thus, with respect to both of the rules of statutory construction cited by TURN, the CPUC's Decision would violate them only if one interprets the beginning of the second sentence of Section 254(f) as TURN does. Interpreting that phrase as does the CPUC supports both rules of statutory construction, gives meaning to the entire section, and does not impute to Congress an intent to supersede traditional jurisdictional separation and state law where no intent was indicated.

#### **6. The Federal-State Joint Board Did Not Unanimously Find That Section 254(f) Prohibits the Use of an AEUS.**

As stated above, Section 254(d) governs the funding of universal service programs by interstate telecommunications carriers. It states, in pertinent part, that:

**(d) TELECOMMUNICATIONS CARRIER CONTRIBUTION.** -- Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.

TURN correctly points out that, with the exception of the word "interstate," the first two phrases of the first sentence of Section 254(d) are identical to the first two phrases of the second sentence of Section 254(f).

TURN asserts that with respect to Section 254(d), the Federal-State Joint Board ("Joint Board") reached a "unanimous" conclusion that:

. . . [W]e reject commenters' suggestions that support mechanisms be funded through the SLC or a retail end-user surcharge. We find that these mechanisms would violate the

statutory requirement that carriers, not consumers, finance support mechanisms.<sup>90</sup>

TURN asserts that the same conclusion is inescapable with respect to Section 254(f), and that, therefore, the Joint Board's conclusion is controlling on an interpretation of Section 254(f). TURN's conclusion is unpersuasive for two reasons.

**a. The Federal-State Joint Board's Conclusion Regarding Section 254(d) is not Controlling.**

The Joint Board's comments are only a recommendation. It does not constitute an official FCC decision, and does not have any binding effect on the FCC.<sup>91</sup> The FCC received both opening and reply comments on the Recommended Decision. Indications are that many competing local exchange carriers (CLECs), particularly small ones, may vigorously oppose the Joint Board's recommendation on this issue. They view a net trans account as a mechanism which forces CLECs, who at least initially are likely to be net payors into the universal service programs, to fund the operations of the large and established ILECs.<sup>92</sup> Upon further consideration of the matter, the FCC may decide to adopt a course in favor of an AEUS.

**b. The Joint Board Did Not Unanimously Find that Section 254(f) Precludes the Use of an AEUS to Fund Universal Service Programs.**

A reading of the separate statements of the members of the Joint Board reveals that the Joint Board's conclusion that Section 254(d) precludes the use of an AEUS funding mechanism was less than unanimous.

In her Separate Statement, Commissioner Laska Schoenfelder stated unequivocally that:

I have reservations regarding the support for these mechanisms not being explicit on customers' bills, . . .

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. . . I would also like to express my reservations about not

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<sup>90</sup> Recommended Decision, at ¶ 812.

<sup>91</sup> See, Section 254(a), 47 United States Code section 410(c), and 5 United States Code section 557.

<sup>92</sup> See, e.g., Response of ICG Telecom Group Inc. (U 5406 C) to Application for Rehearing of Decision 96-10-066 by the Utility Reform Network ("ICG Response"), at pp. 10-11.

providing explicit notification on customers' bills about the charges assessed to fund these programs. Consumers are entitled to be made aware of the charges that they are paying to support the recommendations made herein.<sup>93</sup>

Implicit subsidies -- those federal universal-service-supporting cross-subsidies that have existed until now -- are hidden; the ultimate payors are not aware that they are paying the subsidy. In contrast, an explicit subsidy is one which is apparent to the payor. Thus, an AEUS is an explicit subsidy.

Section 254(e) provides, in pertinent part, that "[a]ny such support should be explicit and sufficient to achieve the purposes of this section." Even though none of the other Joint Board members who issued separate statements specifically objected to a funding mechanism which does not inform customers of the amount they pay to support universal service, several other members noted that the TCA requires that the funding mechanisms for universal service be explicit. They also admit that, contrary to TURN's assertion that "[u]nder carrier funding, the source of the subsidy is carriers,"<sup>94</sup> in fact, consumers, and not carriers, ultimately bear the full cost of universal service programs, irrespective of the funding mechanism used.

As noted above, Commissioner Ness commented that "[o]ur job is to construct a new universal service regime that makes subsidies more explicit, more targeted, more efficient, and more compatible with competition, . . ."<sup>95</sup> She noted that "we are mindful that the funds for universal service ultimately come from consumers, . . ."<sup>96</sup> Commissioner Chong stated unequivocally:

*Let us make no mistake about who will foot the bill for this universal service program. It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace.*<sup>97</sup>

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<sup>93</sup> Recommended Decision, Separate Statement of Commissioner Laska Schoenfelder Dissenting in Part ("Separate Statement of Schoenfelder"), at pp. 1 and 2.

<sup>94</sup> Turn's Application, at p. 11.

<sup>95</sup> Recommended Decision, Separate Statement of Commissioner Susan Ness ("Separate Statement of Ness"), at p. 1. [Emphasis added.]

<sup>96</sup> *Id.*, at p. 2. Emphasis added.

<sup>97</sup> Recommended Decision, Separate Statement of FCC Commissioner Rachelle B. Chong Concurring in Part, Dissenting in Part ("Separate Statement of Chong"), at pp. 12-13. Emphasis in original.

Similarly, Commissioner Julia Johnson and Joint Board Chairman Sharon L. Nelson admitted that, "[a]s we all know, ratepayers are the ultimate supporters of any program, . . ."98

Since one member of the Joint Board indicated in a separate statement that she supports a funding mechanism which informs consumers about the amount they pay to fund universal service programs, the Joint Board's recommendation certainly was not unanimous on this issue.

Several Joint Board members, in their separate statements, recognized that the TCA requires that any funding mechanism for universal service be explicit, and that irrespective of which funding mechanism is used, it is consumers who ultimately pay the cost of universal service programs.<sup>99</sup> Since, as shown above, a net trans account is not an explicit funding mechanism, it is possible that other Joint Board members and the FCC ultimately may conclude that Sections 254(d) and (f) do not preclude the use of an AEUS funding mechanism.

For those reasons, the Joint Board's recommendation in Paragraph 812 of the Recommended Decision should not be given significant weight when interpreting Section 254(f).

**B. The True "Important Difference to Customers" Between an AEUS and Carrier Funding Supports the Use of an AEUS Rather than Carrier Funding.**

TURN argues that, with an AEUS, "it is certain that 100 percent of the cost of universal service support programs will be borne by customers," whereas a "surcharge on carrier revenues" (the "net trans account"/"value added tax" approach) "may end up being absorbed partially or completely by the carriers."<sup>100</sup> Thus, TURN asserts, there is an "important difference to customers" amounting to "hundreds of millions or even billions of dollars" between an AEUS and carrier funding.<sup>101</sup>

As shown above, this argument ignores reality. Not only does the "net trans account" method of financing universal propose no real economic benefit to consumers; it lays the groundwork for unpredictable net losses for all classes of residential and business customers because of its lack of openness and disclosure to those affected.

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<sup>98</sup> Recommended Decision, Separate Statement of Commissioner Julia Johnson and Chairman Sharon L. Nelson on Recommended Decision of the Federal-State Joint Board on Universal Service Re: *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 ("Separate Statement of Johnson and Nelson"), at p. 8.

<sup>99</sup> It is clear, then, that the Joint Board members do not interpret Sections 254(d) and 254(f) to require that carriers pay some portion of the cost of universal service out of their profits.

<sup>100</sup> TURN Application, at p. 7.

<sup>101</sup> Ibid.

Further evidence of the business realities which disprove TURN's argument are provided by ICG Telecom Group Inc., ("ICG") -- a CLEC -- who, in response to TURN's Application, so plainly admitted:

Carriers are not going to voluntarily transfer "hundreds of millions," much less "billions" of dollars from their shareholders to their customers. This is wishful thinking pushed to an extreme. CLCs like ICG, TCG, GST, and Brooks are already spending billions of dollars building facilities-based networks in California and do not have endless supplies of money to "contribute" to their incumbent (and entrenched) LEC competitors. They have to get funds for their supposed "contribution" from somewhere. Certainly their shareholders are not going to cough up "billions of dollars" out of general good will for customers. If they cannot collect their "contribution" through a competitively neutral surcharge that all carriers have to collect in the same manner, then "net payors" into a universal service pool will have to pass on the costs of their "contribution" to their customers in another (albeit far less competitively neutral) manner. It may come through a rate increase or it may occur through deferral of a rate decrease (or possibly a reduction in the quality of service), but there is no doubt that "net payors" will collect the money they need for their so-called "contribution" to the universal service fund, directly or indirectly, from their customers. Surely consumers do not gain a great "victory" if they pay for universal service indirectly rather than directly. Carriers must collect the "contribution" through rates charged to their customers or they will go out of business; in the long run, carriers must cover their costs. Directly or indirectly, consumers will always be the source of the moneys paid into the universal service fund.<sup>102</sup>  
[Footnote in original.]

In the end, therefore, the issue is not whether consumers should pay, for no matter what, in the long run, consumers will pay for costs imposed by the Commission. The sole issues are whether the cost will be collected in the most competitively

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<sup>102</sup> TURN argues that ". . . carrier funding would promote lower prices for consumers than an end user surcharge because carriers may be forced to absorb part of a carrier surcharge." Application for Rehearing, p. 9, n. 7. TURN may hope this will be the case, but wishing and hoping will not make it so. Carriers must recover their costs of doing business from their customers or they will go out of business. The "savings" that TURN envisions consumers gaining are merely transitory. Costs that are not collected today will certainly be collected tomorrow if carriers want to stay in business.

neutral manner possible and whether consumers should be told, and whether they should have a chance to see, directly and openly, what they are being made to pay and why. Consumers should be told the real cost of supporting universal service programs. In the best democratic tradition, and equally in the spirit of promoting maximum economic efficiency, the Polanco Bill requires that "any subsidy" used to support universal service be "imposed in a manner that clearly identifies the source of the subsidy." (AB 3643, § 2(b)(3).) To its credit, the [California Public Utilities] Commission has forthrightly stood up and made it possible for all consumers to know exactly what they are paying to support universal service policies. In the words of the Polanco Bill, the Commission has made it possible for consumers "to have access to all the information needed . . . to make timely and informed choices about telecommunications products and services," including universal service. (*Id.*, § 2(b)(5).) Contrary to TURN's argument (Application for Rehearing, pp. 7-11), "net trans account" carrier funding is inconsistent with the open disclosure requirements of [sic] Polanco Bill. (*See*, D. 96-10-066, pp. 181-85.) The Commission's political courage in this regard, in "biting the universal service bullet" and insuring that consumers know what they are being made to pay and why, should be commended, not criticized, by TURN. To perpetuate the existing system of hidden cross-subsidies, which in effect is what TURN wants, would be to move in exactly the wrong policy direction. The Commission, therefore, should not disturb D. 96-10-066.<sup>103</sup>

As ICG pointed out, carrier funding is not either competitively neutral or good for consumers. Even if some large carriers were able to "absorb" some small portion of their universal service contribution for a short time, other carriers, particularly small ones, might not be able to do that. As a result, some carriers might not be able to offer services to customers at competitive rates. Those carriers who cannot be competitive may go out of business, leaving customers with fewer carriers from which to choose. Funding universal service should not be a pawn in the game of competition which large carriers can absorb for a time, using it as a club to destroy their competitors, and afterward raising their prices to cover their past and future universal service costs. We should not support a universal service funding policy which is likely to leave customers with fewer carriers from which to choose.

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<sup>103</sup> ICG Response, at pp. 11-13.

**C. Both the TCA's and AB 3643's Requirements  
that Universal Service Funding Be Explicit are  
More Easily and Effectively Met By Using an AEUS.**

AB 3643 (Polanco)<sup>104</sup> required that the CPUC initiate an investigation and hold public hearings on how universal service programs should be designed to function effectively in a competitive local exchange market environment. The objectives of the proceeding were to include delineating "the subsidy support needed to maintain universal service in the new competitive market," and designing and recommending "equitable and broad based subsidy support for universal service in freely competitive markets."<sup>105</sup> It required that the recommendations of the CPUC be consistent with Public Utilities Code section 709, and with several enumerated principles, including:

(3) Any subsidy that may be required to ensure that universal service remains a viable reality must have a clearly stated purpose and scope, include a broad based and competitively neutral funding mechanism, and be imposed in a manner that clearly identifies the source of the subsidy.

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(5) Consumers should be able to have access to all the information needed in order for them to make timely and informed choices about telecommunications products and services, and how to best use them.<sup>106</sup>

In reaching its decision to adopt an AEUS funding mechanism, the CPUC articulated the following Conclusions of Law:

117. In deciding which type of funding mechanism to adopt, the following criteria should be met: (1) that it is competitively neutral; (2) that it clearly identifies the source of the subsidy; and (3) that consumers have the information they need to make informed choices.

118. An AEUS conforms with AB 3643 because it clearly identifies the source of the subsidy, customers can see how much they are paying into the fund, and customers are informed as to the amount of the surcharge.

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<sup>104</sup> Statutes 1994, chapter 278.

<sup>105</sup> AB 3643 (Polanco), Statutes 1994, chapter 278, at Sections 2(a)(2) and (3).

<sup>106</sup> *Id.*, at Sections (2)(b)(3) and (5).