

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

In the Matter of)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF SECRETARY

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JOINT PETITION FOR A STAY PENDING JUDICIAL REVIEW

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SUMMARY*

Petitioners respectfully request a stay of the Universal Service Order. The structural basis that provided implicit subsidies for ensuring universal service -- widely available and inexpensive local telephone service -- was rendered impotent by the Act. By opening up all markets to competition, the Act permits competitors of incumbent LECs to undercut the prices set to generate those subsidies. Congress realized that implicit support was not sustainable in this new competitive environment, and enacted Section 254 to "ensure and advance universal service" by replacing those implicit subsidies with explicit support that was "specific, predictable, and sufficient" and which would be funded on an "equitable and nondiscriminatory basis."

The Commission has failed to implement Section 254 in a timely fashion by not identifying the implicit support, by not adopting mechanisms to make universal service support explicit, and by not making funding "equitable and nondiscriminatory" within the required period. Instead, the Commission has decided to continue to rely on implicit support which will continue to erode. And with the creation of a new \$2.65 billion a year subsidy, incumbent LECs must embed even more subsidies in their interstate access rates, taking them even farther away from the Congressional objective. The entire Order thus violates the fundamental requirements of Section 254.

Furthermore, the Access Charge Order will place the implicit support generated by interstate access rates (which is acknowledged by the Commission) under even more pressure, especially since the Price Cap Order has reduced those rates without any understanding of how much implicit support is generated by access. The effect of the Interconnection Order also

* The abbreviations used in this Summary are as defined in the main text.

exacerbates the pressure on universal service and incumbent LECs. Petitioners will suffer irreparable harm as they lose customers as a result of the failure of the Universal Service Order to fund universal service explicitly in accordance with Section 254, especially as incumbent LECs recover their contributions to the \$2.65 billion fund through increased interstate access charges.

The entire Order should therefore be stayed. At a minimum, the Commission should stay the implementation of Section 254(h), especially the provisions of Federal support for Internet access and "internal connections," for toll-free access to Internet access providers to rural and non-rural health care providers, and to non-telecommunications carriers. Moreover, the Commission should stay the "no disconnect"/deposit rules for Lifeline customers. In each case, Petitioners demonstrate the (1) the likelihood of success on the merits on appeal; (2) whether irreparable injury will be suffered absent a stay; (3) whether a stay will substantially harm other parties; and (4) whether the public interest favors preserving the *status quo* pending appeal. In addition, Petitioners have met the standard set forth in Holiday Tours.

Section 254(h): Neither Section 254(c)(3) nor (h)(1)(B) authorize universal service support for Internet access or "internal connections." Section 254(c)(3) is limited to designating additional telecommunications services, and (h)(1)(B) refers to "its services" inasmuch as the *sine qua non* of being a telecommunications carrier is the provision of telecommunications services. Even the title of Section 254(h) -- "Telecommunications Services For Certain Providers" -- establishes its limitation. Moreover, the Commission's interpretation of the first sentence of (h)(1)(B) cannot be reconciled with the second sentence, and Section 254(h)(2)(A) creates no "broad context" for interpretation. The Commission's interpretation also places no limitation on its funding abilities.

The Commission also has misused Section 254(h)(2)(A); it simply cannot be used to provide any universal service support, much less to non-rural health care providers, or funding to non-telecommunications carriers. The Commission's interpretation violates established rules of statutory construction, and Section 4(i) does nothing to bolster the Commission's action. Again, such an interpretation of (h)(2)(A) places no limit on what the Commission can fund. The Commission's interpretation renders Section 254(h) a clear unconstitutional delegation of authority and an unconstitutional tax. Finally, the Commission has exceeded its jurisdictional authority by creating a single, combined fund to support both interstate and intrastate services for schools, libraries, and health care providers.

Petitioners will suffer irreparable harm by this aspect of the Order as they have to fill a substantial number of service orders, and expend considerable capital and other resources to do so. If Petitioners are successful on appeal, they have no assurance of recovery or reimbursement of those outlays. Further, the implementation of the \$2.65 billion a year fund will increase Petitioners' rates and thereby result in loss of customers, customer goodwill, and unrecoverable economic losses. Others will not be harmed by the stay, and they may actually benefit as schools, libraries, and health care providers do not make commitments in reliance upon Federal support that will be substantially modified by the appeal of the Order. The public will likewise be served by a stay.

"No Disconnect"/Deposit Rules for Lifeline Customers: The Commission's imposition of a prohibition against (i) disconnecting Lifeline customers for unpaid intrastate toll charges, and (ii) requiring a deposit to institute service based upon past unpaid intrastate toll charges, exceeds the Commission's limitation found in Section 2(b). Moreover, the Commission has directly

contradicted itself by imposing additional requirements on being designated an eligible telecommunications carrier. The prohibitions are also an abuse of discretion and unreasonable.

Petitioners will suffer irreparable harm as they experience customer confusion, loss of customer goodwill, and increased uncollectibles and expenses (*e.g.*, costs of providing toll services; collection; administrative, and programming expenses) for which no funding is provided. Pacific Bell will be particularly affected since nearly 25% of its residential customers are Lifeline participants and it serves over 50% of the Nation's Lifeline participants. Others will not be harmed by preserving the status quo, which leaves the issue within the jurisdiction of the State commissions. The public interest will be served as customers are not confused, and expenses and other resources are not incurred or used to implement an unlawful order.

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While this system has been changed over the years, its fundamental purpose and nature have remained the same -- to use implicit subsidies to fund low-priced and ubiquitously available local service. Notwithstanding the increasingly competitive telecommunications markets that pre-dated the Act, the use of implicit subsidies to achieve universal service goals was generally workable because of the legal and regulatory barriers that made the high-priced, subsidy-producing services less vulnerable to targeting by competitors.

The Act eliminates the structural basis upon which the system of implicit subsidies rests. No longer are there legal barriers to prevent any local exchange carrier ("LEC") competitor from undercutting the prices of those implicit subsidy-producing services. LEC competitors now can and do target the most profitable services and customers at will, creating an immediate adverse effect on these subsidies. Indeed, this fundamental truth was acknowledged by the Commission in a brief filed in CompTel v. FCC, No. 96-3604, 8th Circuit.⁴

The Act also recognized that by removing barriers to competition, the implicit subsidies that have traditionally supported universal service would evaporate and universal service would be jeopardized. Congress accordingly chose to "preserve and advance universal service" by requiring the funding of universal service through a new system of explicit subsidies that would be borne by all telecommunications carriers on an "equitable and nondiscriminatory" basis -- a system that would be sustainable in the new competitive environment. Indeed, the United States Court of Appeals for the Eighth Circuit thought "it

⁴ See CompTel v. FCC, No. 96-3604, 8th Circuit, "Brief for Respondents Federal Communications Commission and United States of America," p. 17 (carrier common line subsidizes local customers, large access users "likely to be the prime targets" of new entrants).

apparent that universal service soon would be nothing more than a memory” without protection for continued implicit support until explicit support and funding were in place. CompTel v. FCC, No. 96-3604, 8th Circuit, Slip Opinion, p. 13 (June 27, 1997).

Congress provided a fifteen-month transition period for the Commission, with the recommendations of a Federal-State Joint Board,⁵ to define universal service, to identify the implicit subsidies supporting that definition, and to replace that implicit support with explicit support mechanisms that were “specific, predictable, and sufficient.” The depletion of the implicit subsidies, however, is already occurring and is an immediate problem.

With the Universal Service Order, the Commission has failed to fulfill those Congressional directives by not identifying the implicit support, by not adopting mechanisms to make such support explicit (much less “specific, predictable, and sufficient”), and by not making funding “equitable and nondiscriminatory” within the required period. The Commission’s failure to implement the Congressionally-mandated, competitively neutral system to support universal service means that the desired competitive environment ensured by the Act will continue to erode the implicit subsidies that are needed to support universal service.

To make matters worse, the Commission’s creation of a new \$2.65 billion a year subsidy means that incumbent LECs must embed even more subsidies in their interstate access rates if they are to recover their share of that \$2.65 billion annual fund. The result is that this proceeding has taken incumbent LECs farther away from the Congressional objective and

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 96J-3, 12 FCC Rcd 87 (1996) and Erratum, FCC 96J-3 (November 19, 1996) (“Recommended Decision”).

made universal service support more inequitable and discriminatory, and less sustainable.

The entire Order thus violates the fundamental requirements of Section 254. The reliance on generating implicit support embedded in incumbent LEC rates to ensure universal service cannot be seen as an implementation of Section 254, “equitable and nondiscriminatory,” or competitively neutral.

Moreover, the limited actions taken by the Commission clearly did not meet the statutory deadlines. In upholding certain interim rules that continued implicit support until June 30, 1997, the Eighth Circuit relied upon the fact that the

nine-month disparity between the deadline for implementation of cost-based service and the deadline for reform of universal service raises the threat of serious disruption in universal service for those nine-months if cost-based service is required before universal service is funded by competitive neutral means.

CompTel, Slip Op., pp. 13. With the Universal Service Order, the Commission has stretched that 9-month period into a 29-month period, and no explicit support is available to replace the implicit support that disappears as a result of the Commission rules or as a result of competition. By not correctly implementing Section 254 in a timely fashion, the very pressure on local rates that Congress sought to avoid is being created by these actions. And with the disincentives created by the Interconnection Order⁶ against facilities deployment by other carriers, that pressure on incumbent LEC local rates can only get worse.

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (August 8, 1996) (“Interconnection Order”), appeals pending sub nom. Iowa Utilities Board v. FCC, No. 96-3321, and CompTel v. FCC, No. 96-3604, 8th Circuit.

Furthermore, the Commission's Access Charge Order⁷ compounds the deficiencies of the Universal Service Order by restructuring incumbent LECs' interstate access rates with the objective of placing them under more competitive pressure.⁸ And notwithstanding those added pressures, the Commission also cut interstate access rates in the Price Cap Order⁹ without knowing, even in general terms, how much implicit subsidy exists in those rates. Those two other orders (which are subject to separate appeals) place Petitioners and their customers at a continuing and increasing disadvantage. Indeed, as a result of the combined effect of the Commission's interrelated so-called "Competition Trilogy" orders -- the Interconnection Order, the Universal Service Order, and the Access Charge Order -- especially as implemented in the Price Cap Order, the system of universal service is placed at risk.

Petitioners will suffer irreparable harm as a result of the Commission's failure to replace implicit subsidies with adequate, competitively neutral, explicit subsidies for universal service. Until the Commission finally makes explicit funding available, Petitioners will lose customers with no assurance that they will be able to regain them if they prevail on appeal or to recover their losses through future charges to their remaining customers. This process will

⁷ *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (released May 16, 1997) ("Access Charge Order").

⁸ For example, the Commission has prohibited the imposition of interstate access charges on unbundled network elements ("UNE"), thereby encouraging the use of UNE alternatives that will eliminate those implicit subsidy flows. Access Charge Order, ¶¶ 337-40. Incredibly, the Commission is also relying on market forces to identify and eliminate implicit subsidies with the objective of decreasing the subsidies through competition instead of replacing them with explicit and sufficient support. *See, e.g., Order*, ¶ 246 (the Commission is relying "in part on competition to eliminate subsidies in the prices"); Access Charge Order, ¶ 9.

⁹ *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, CC Docket Nos. 94-1, 96-262, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, FCC 97-159 (released May 21, 1997) ("Price Cap Order").

be exacerbated by the new \$2.65 billion program for schools that adds to the burden placed on Petitioners, as well as by the Access Charge and Price Cap orders which would limit Petitioners' ability to meet their obligations.

Given the magnitude of the harm to Petitioners, the need to ensure that sufficient funds remain available to maintain universal service, and the close relationship between the Order and the other orders in the "Trilogy," Petitioners urge the Commission to stay the Universal Service Order in its entirety. Such a stay is necessary to be sure that the Act is properly implemented as a whole and to avoid the problems of piecemeal administration.

Clearly, at a minimum, the Commission should stay the following portions of that order both to prevent irreparable harm to Petitioners and to protect the public interest in an orderly transition to the new system that Congress mandated:

- The implementation of any education/library/health care support fund under 47 U.S.C. § 254(h). In particular the Commission must stay its unlawful decisions that would otherwise:
 - Provide Federal universal service support for Internet access and "internal connections" for schools and libraries even though the Act does not permit funding anything but telecommunications services;
 - Provide support for toll-free access to Internet service providers to rural and non-rural health care providers even though the Act does not permit general funding to health care providers, and does not allow for support to non-rural providers; and
 - Permit entities that are not telecommunications carriers to receive Federal universal service funding in contravention of the Act, and even though they do not contribute to the Federal support funds.

Universal Service Order, ¶¶ 424-607; §§ 54.500-54.749.

- The Commission's prohibition on disconnecting customers participating in Lifeline programs for failure to pay toll charges, including those that are intrastate in nature, and on requiring a deposit from those customers based

upon previous failures to pay such charges. Universal Service Order, ¶¶ 390-402; §§ 54.401(b) and (c).

A petition for review of the Universal Service Order has been filed in the United States Court of Appeals, and additional issues are planned to be presented for the Court's review. It is anticipated that a stay will be sought from the Court if this Petition is not granted in its entirety. To ensure that the Court has sufficient time to act on such a motion before the Order becomes effective, Petitioners respectfully request that the Commission rule on this request no later than July 14, 1997.

II. THE ELEMENTS FOR ASSESSING A STAY REQUEST

When deciding whether to grant a stay pending appeal, both the courts and the Commission traditionally consider: (1) the likelihood of success on the merits on appeal; (2) whether irreparable injury will be suffered absent a stay; (3) whether a stay will substantially harm other parties; and (4) whether the public interest favors preserving the *status quo* pending appeal.¹⁰ The presence of each of these factors is not absolute, but rather their strengths must be balanced, and “[i]f the arguments for one factor are particularly strong, an

¹⁰ The standards were first set forth in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), and were modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). The Commission follows Holiday Tours, e.g., Order Granting Stay, Amendment of Parts 15 and 76 Relating to Terminal Devices Connected to Cable Television Systems, GEN Docket No. 85-301 (FCC 87-323), 2 FCC Rcd 6488 (1987); Memorandum Opinion and Order, MM Docket No. 86-406, RM 5480 (FCC 87-248) (July 17, 1987). See also Arkansas Peace Center v. Arkansas Department of Pollution Control, 992 F.2d 145, 147 (8th Cir. 1993), cert. denied, 476 U.S. 1114 (1986).

injunction may issue even if the arguments in other areas are rather weak.”¹¹

Alternatively, the Courts have recognized that an agency considering a request to stay its own order need not confess error to grant the requested relief. It is enough that the agency recognize that it has ruled on concededly difficult issues and that the equities favor relief. As the D. C. Circuit explained in Holiday Tours, 559 F.2d at 844-45:

Prior recourse to the initial decision maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

As discussed above, in view of the Commission’s failure to replace implicit subsidies with explicit, competitively neutral subsidies that are sufficient to support universal service, as well as the increased burdens and risks created by both the new program for schools, libraries, and health care providers, and by the Access Charge and Price Caps orders, the Commission should stay the Universal Service Order in its entirety. In particular, for the reasons set forth below, the provisions of that Order dealing with support for schools, libraries, and health care providers and placing restrictions on the ability to disconnect non-paying Lifeline participants are unlawful and must be stayed.

¹¹ CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995). See also Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 974 (D.C. Cir. 1985) (applying the four factors identified in Holiday Tours, noting that the “[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a probability of success and some injury, or *vice versa*.”); Milk Industry Foundation v. Glickman, 949 F.Supp. 882, 888 (D.D.C. 1996) (“Plaintiff is not required to prevail on each of these factors. Rather, under Holiday Tours, the factors must be viewed as a continuum, with more of one factor compensating for less of another.”).

III. THE DISCOUNTS FOR SCHOOLS, LIBRARIES, AND HEALTH CARE PROVIDERS ARE UNLAWFUL

Congress enacted Section 254(h) to provide discounted telecommunications services to specified schools, libraries, and rural health care providers. The Commission has concluded, however, that it can also support non-telecommunications services and goods (inside wiring, computers acting as servers, information services) as well as services to non-rural health care providers, and will fund non-carriers (Internet providers, electricians). Order, ¶¶ 424-607; 738-749. The Commission has used Section 254(h) to increase the amount of support required, and embedded more implicit support into incumbent LEC interstate access rates. The result makes the pre-existing implicit support, as well as the new implicit support, more vulnerable to competitive erosion and is thus contrary to Section 254 and its objective of making universal service support explicit and sustainable.

The Commission has accordingly violated Sections 254(c)(3), (h)(1)(B), and (h)(2)(A) and otherwise acted arbitrarily, no matter how worthy the goal of increased education and health care spending. Moreover, as interpreted by the Commission, Sections 254(c)(3), (h)(1)(B), and (h)(2)(A) also represent an unconstitutional delegation of Congressional authority to the Commission and a tax imposed in violation of the Origination Clause of the United States Constitution.

A. Petitioners Are Likely to Prevail on the Merits

1. Neither Section 254(c)(3) nor (h)(1)(B) Authorizes Universal Service Support for Internet Access or “Internal Connections”

The Commission’s interpretation of Section 254 is simply incorrect. The Commission has interpreted Section 254 to achieve its objective of providing Federal funding for

discounted Internet access and “internal connections,” and to permit non-telecommunications carriers to receive such funding. Presumably responding to the multitude of commenting parties that opposed the Joint Board’s identical recommendation and the strong criticisms of the legal analysis used to support its Section 254 interpretation, the Commission adopted in the Order a different, overlapping interpretation. The Commission’s interpretation, however, is no more sound or convincing than the one used by the Joint Board. Not only does Section 254 not permit support for those items or allow non-carriers to receive funds, it does not contemplate or authorize increased universal service funding implicitly funded by LEC rates, especially when the implicit subsidies already in those rates have not been identified and explicitly supported.

First, the Commission attempts to rely upon Sections 254(c)(3) and (h)(1)(B) as authority for funding discounts on “all telecommunications services, Internet access, and internal connections provided by telecommunications carriers.” Order, ¶ 425. By the express terms of Section 254, Section 254(c)(3) is the sole source of the Commission’s authority to supplement the Section 254(c)(1) definition of universal service, and it is Congressionally limited to only designating additional telecommunications services, and not Internet access or internal connections. Section 254(c)(3) states that:

In addition to the *services* included in the definition of universal service under [Section 254(c)(1)], the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h). (italics and emphasis added)

The above-italicized reference to “services” refers to “telecommunications services” inasmuch as the Section 254(c)(1) definition of “universal service” is expressly defined as “an evolving level of telecommunications services.” 47 U.S.C. § 254(c)(1) (emphasis added). With the

above-underlined phrase “additional services,” Section 254(c)(3) clearly means “additional telecommunications services,” consistent with the use of supported “services” throughout Section 254(c).

Any doubt of that interpretation is removed by Section 254(h)(1)(B), which discusses reimbursement for a telecommunications carrier providing “any of its services which are within the definition of universal service under [Section 254(c)(3)].” The *sine qua non* of being a telecommunications carrier is the provision of telecommunications services.¹² The lack of an express reference to “telecommunications services” only highlights the fact that Congress had already resolved the issue by limiting funding to telecommunications services in Section 254(c)(3), and to telecommunications carriers in (h)(1)(B).

By interpreting “its services” to mean that Congress authorized discounts and funding for any and all “services” that telecommunications carriers might provide, the Commission’s interpretation removes any limitation on the type of “services” that can qualify for inclusion. To the Commission, the only two questions are, first, can it be characterized as a “service,” and second, does a telecommunications carrier provide it? And with the inclusion of computers, software, radio equipment, and transmission facilities (*e.g.*, copper wire, fiber, coaxial cable) in the definition of “internal connections” the Commission has essentially concluded that any “good” can be a Section 254(c)(3) “service” if only viewed properly.¹³ Universal Service Order, ¶¶ 452, 460. Through its overly expansive interpretation, the

¹² 47 U.S.C. § 153(44) (means “any provider of telecommunications services”).

¹³ As Commissioner Chong recognized earlier, these items of hardware and software are not “services”; they are “goods.” Recommended Decision, “Separate Statement of FCC Commissioner Rachelle B. Chong, Concurring in Part, Dissenting in Part,” pp. 6-10.

Commission has turned a statutorily-imposed limitation into an authority loophole that will expand and contract with the scope of the businesses and corporate structures of carriers. The Commission has thus disregarded the very title of Section 254(h) -- "*Telecommunications Services for Certain Providers*" (italics added) -- and its clear expression of Congressional intent.¹⁴

Nowhere is the unreasonableness of the Commission's interpretation better illustrated than with the interstate/intrastate jurisdictional split for establishing discounts. As discussed in the previous section, Section 254(h)(1)(B) permits the Commission to establish the discount only for "interstate services;" the States for "intrastate" discounts. This bifurcation is a clear acknowledgment of the historical dual jurisdiction of telecommunications regulation embedded in 47 U.S.C. § 152(b). Congress followed that same split in (h)(1)(B) -- for interstate telecommunications services, the Commission has the jurisdiction to set the discounts, and each State the discounts for intrastate telecommunications services. There is no such split for unregulated, non-telecommunications services like internal connections, and the Commission has not indicated which discount schedule is to apply to Internet access. Given that the discounts between the jurisdictions can be different, exactly how is one to determine which discount schedule is used in those instances? What is an "interstate" server, or "intrastate" software? The Commission's interpretation of the first sentence of Section 254(h)(1)(B) -- that "service" goes beyond telecommunications services -- cannot be logically and reasonably

¹⁴ See, e.g., FTC v. Mandel Bros., Inc., 359 U.S. 385, 388-89 (1959); United States v. Wallington, 889 F.2d 573, 577 (5th Cir. 1989) ("section heading enacted by Congress in conjunction with the statutory text [is considered] to 'come up with the statute's clear and total meaning'"). The Commission itself has attempted to rely upon a heading to stretch Section 254(c)(3). See Order, ¶ 426.

reconciled with the second sentence of (h)(1)(B).

Although otherwise disavowing the legal interpretation used in the Recommended Decision, the Commission has retained a flavor of it when Section 254(h)(2)(A) was erroneously used in an attempt to bolster its expansive definition of “additional services.” Order, ¶¶ 436, 451 (interpreting Sections 254(c)(3) and (h)(1)(B) in the “broad context” of Section 254(h)(2)(A)). There is no basis for using Section 254(h)(2)(A) in such a manner; it only authorizes and directs promulgation of competitively neutral rules “to enhance . . . access to advanced telecommunications and information services” (emphasis added). Far from considering the statute in its “broad context,” the Commission’s reliance on the phrase “to enhance. . .access” as a basis for expanding the definition of “additional services” takes that phrase out of context in a manner that Congress never intended. The “enhance access” language of Section 254(h)(2)(A) does not affect, much less broaden, the scope or authority of Section 254(c)(3) or (h)(1)(B), and does not create another category of “services” for which support is available; it speaks only of “competitively neutral rules.”

Moreover, Section 254(h)(2)(A) addresses access-enhancing rules that benefit “all public and non-profit elementary and secondary classrooms, health care providers, and libraries.” (emphasis added). It creates no “broad context” for expanding support to only certain schools and libraries under Section 254(h)(1)(B) as done by the Commission; it instead envisions limited rules aimed at a larger target (“all” schools, libraries, and classrooms) but authorizes no support. Earlier in the Order, the Commission properly recognized the distinction between supporting a telecommunications service, and enhancing “access to” a telecommunications service. See Order, ¶ 76 (“access to” interexchange service does not

include support for “the interexchange or toll service”). Section 254(h)(2)(A) embodies a similar concept. The Commission cannot use this provision as a loophole to avoid the limitations of Sections 254(c)(3), (h)(1)(B), and (h)(4).

2. The Commission Has Misused Section 254(h)(2)(A) to Erroneously Expand Universal Service Support for Non-Rural Health Care Providers and Non-Telecommunications Services, and Funding to Non-Carriers

The Commission likewise cannot use Section 254(h)(2)(A) as authority to provide either Federal universal service support for Internet access or “internal connections” or to non-rural health care providers, or to provide funding to non-telecommunications carriers.¹⁵

Universal Service Order, ¶ 589. Interpreting Section 254(h)(2)(A) as a means of embedding more implicit universal support into rates in order to fund non-telecommunications services and support non-carriers is fundamentally contrary to the goal of providing explicit support for telecommunications carriers that provide telecommunications services. Without first identifying and funding the current implicit support with the type of mechanisms required by Section 254, the decision to use more implicit support in this manner is particularly egregious and can only harm the goal of ensuring universal service.

The Commission has indeed grasped at a non-existent straw, as Section 254(h)(2)(A) makes no reference to funding or universal service support, and simply authorizes the

¹⁵ Neither Internet service providers nor internal connection providers are telecommunications carriers. *See Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Cos.*, 85 FCC 2d 818 (1981), *recon.*, 89 FCC 2d 1094 (1982), *further recon.*, 92 FCC 2d 864 (1983); *Detariffing the Installation and Maintenance of Inside Wiring*, 1 FCC Rcd 1190 (1986); *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Procedures for Implementing the Detariffing of CPE and Enhanced Services (Second Computer Inquiry)*, 104 FCC 2d 509 (1986); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 438-447 (1980).

Commission to adopt rules “to enhance . . . access.” With its interpretation, the Commission violated fundamental rules of statutory construction -- namely, that more specific provisions (Section 254(h)(1)) govern over more general (Section 254(h)(2)(A))¹⁶ and that where Congress has considered an issue in one context but not in another in the same statute, Congress only intended to include where so indicated.¹⁷ Congress set forth in considerable detail the process for establishing and administering Federal universal service support for telecommunications services provided by eligible carriers in high-cost areas, and to qualified schools, libraries, and rural health care providers. The Commission reads two words -- “enhance . . . access” -- to authorize what Congress did not authorize in the several hundred words that do authorize explicit universal service funding.

What the Commission has essentially done is a re-write of Section 254 to merge the discount and funding concept of Section 254(h)(1) with the “enhance . . . access to” language of Section 254(h)(2)(A). Obviously, had Congress intended non-carriers to receive funding for “services” (as interpreted by the Commission), Congress could have easily inserted the phrase “and other persons” into Section 254(h)(1)(B) and accomplished the same result as the Commission has reached through unreasonable interpretation. Similarly, if Congress had

¹⁶ It is a “well-settled rule of statutory construction that the specific terms of a statute override the general terms.” Monte Vista Lodge v. Guardian Life Insurance Co., 384 F.2d 126, 129 (9th Cir. 1967), cert. denied, 390 U.S. 950 (1968). Under long-standing principles of statutory construction, a general section of a statute must give way to a specific one. See Busic v. United States, 446 U.S. 398, 406 (1980) (“a more specific statute will be given precedence over a more general one, regardless of their temporal sequence”); Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973); United States v. LaPorta, 46 F.3d 152 (2nd Cir. 1994).

¹⁷ See, e.g., United States v. Azeem, 946 F.2d 13 (2nd Cir. 1991); California Rural Legal Assistance v. Legal Service Co., 917 F.2d 1171, 1175-77 (9th Cir. 1990).

intended support to non-rural health care providers, it would have written (h)(1)(A) more like (h)(1)(B). The fact that Congress did not so write Section 254(h) is a clear indication that neither non-carriers nor non-rural health care providers were to be funded under Section 254 (and, for that matter, that non-telecommunications services were to be funded under Section 254(h)(1)(B) or (A)). And the Commission lacks the authority to rewrite the statute to achieve its own goals. By authorizing the funding for non-rural health care providers and non-carriers in reliance on provisions that have nothing to do with funding, the Commission has violated the clear and explicit funding provisions of Section 254.

The attempted reliance on Section 4(i) to authorize these actions is unavailing and, in fact, supports the opposite result. This generic ‘necessary and proper’ clause empowers the Commission to execute the substantive authority granted elsewhere in the statute,¹⁸ and even then only empowers those actions “not inconsistent with this Act.” Only Section 254(c)(3) authorizes an expansion of the definition of universal service, and Section 254(h)(1) only authorizes discounts and support for those telecommunications services when provided by carriers to qualified institutions. In and of itself, Section 254(h)(2)(A) provides no substantive authority for discounts or other forms of support, and certainly does not permit the Commission to override the express limitations of Sections 254(h)(1)(A) and (B).

More fundamentally, the Commission’s interpretation places no limitation on funding authority, and even evades Congressionally established limitations on its authority. Under its approach, the Commission has unlimited authority to fund in unlimited amounts anything that

¹⁸ See California v. FCC, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); AT&T v. FCC, 487 F.2d 865, 877 (2nd Cir. 1973).

can be said to “enhance . . . access to advanced telecommunications and information services.” At least under the interpretation adopted by the Commission for Sections 254(c)(3) and (h)(1)(B) there must be a “service” provided by a carrier. If Section 254(h)(2)(A) acts as separate authority for funding, then the rural health care provider limitation of (h)(1)(A) and the “service” limitation of (h)(1)(B) *just disappear*. Thus, for example, while the Commission indicated that it would not fund personal computers as an “internal connection” “service” under Section 254(c)(3) and (h)(1)(B) (Order, ¶ 459), the Commission’s interpretation of Section 254(h)(2)(A) obliterates that limitation at the Commission’s discretion. Unless Section 254(h)(2)(A) is interpreted otherwise, universal service funding could be extended to all manner of services and goods -- whether they are related to telecommunications or not. Computers for classrooms, electricity, and even buildings can each be said to “enhance . . . access to advanced telecommunications and information services for all . . . school classrooms, health care providers, and libraries” (emphasis added). While the Commission elected not to require funding for computers or buildings, the fact that its reading of the statute apparently would have allowed it to do so demonstrates why that interpretation goes too far.

Moreover, as in the case of its use of the “enhance. . .access” language of Section 254(h)(2)(A) to expand the definition of “additional services,” the Commission’s attempt to use that Section to fund non-telecommunications carriers would violate the limitations in Sections 254(e) and (h)(1). Under Sections 254(e) and (h)(1), only telecommunications carriers are authorized to receive universal service support and only rural health care providers are eligible to receive services funded with such support. With Section 254(h)(4), certain

schools and libraries that would otherwise qualify under Section 254(h)(5) are disqualified from receiving support. However, under the Commission's overexpansive interpretation of Section 254(h)(2)(A), those limits apparently no longer exist. Non-telecommunications carriers can receive funding, and apparently so can "all public and non-profit elementary schools and classrooms, health care providers, and libraries." Section 254(h)(2)(A) (emphasis added). Indeed, the Commission itself acknowledges and uses this new found freedom when it states Section 254(h)(2)(A) "applies to *all* health care providers" and then proceeds to provide support to non-rural health care providers. Order, ¶ 596 (italics in original). Thus, apparently regardless of endowment size, an urban location, or other attributes which would disqualify under Section 254(h)(4), the Commission has decided it can use Section 254(h)(2)(A) as a convenient way around that limitation and the other limitations crafted into Sections 254(e) and (h)(1).

If Section 254(h) envisions a combined Federal/State fund for schools, libraries, and health care providers, this interpretation of Section 254(h)(1)(A) also permits the Commission to usurp the authority Congress provided to the States. Under Section 254(h)(1)(B), States are to set the discount for intrastate telecommunications services. Even if the Commission's current intrusion on that authority survives appeal,¹⁹ the Commission's interpretation of (h)(2)(A) would permit it to fund additional intrastate discounts notwithstanding any exercise of a State's discretion as Congress directed. Obviously, Congress did not define

¹⁹ The Commission has dictated that a State's discounts must be at least as generous as it has set for interstate services, or no funds will be available for intrastate services in that State. Order, ¶ 550.