2. Pleadings

214. Several petitioners contend that the Commission should reconsider its decision to limit the exemption to the competitive bid requirement to contracts that terminate no later than December 31, 1998.[656] EdLiNC contends that the Commission's *July 10 Order* will disadvantage many schools and libraries by nullifying eligibility for discounts on services obtained through multi-year contracts signed on or after November 8, 1996.[657] It contends that many schools and libraries have exercised good faith business decisions since November 8, 1996 in procuring services for educational purposes and had no reason to believe from the Joint Board's recommendation that such business decisions would result in discount penalties.[658] EdLiNC also contends that the Joint Board's rationale that strong incentives exist for schools and libraries to obtain the lowest possible pre-discount price continued after November 8, 1996 and that most schools and libraries that entered into contracts after November 8, 1996 are unaware that they may not be eligible for discounts on services received after December 31, 1998.[659] EdLiNC recommends that discounts be available for all contracts that were entered into after November 8, 1996 but before the date on which the school and library website becomes fully operational, even if the termination dates of such contracts occur after December 31, 1998.[660]

215. Bell Atlantic contends that the Commission should encourage longer-term contracts in order to give schools and libraries greater savings and access to services that meet their particular needs.[661] It argues that carriers generally offer lower prices for longer-term service commitments. Bell Atlantic also asserts that carriers are willing to finance projects involving special construction and other customized activity over the term of a multi-year contract, "thus saving the schools and libraries from the need to fund the up-front costs."[662] Colorado DOE urges the Commission to adopt a five-year limit based on its view that a five-year extension "will accommodate the development plans of telecommunications vendors in

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[656] *See, e.g.*, Bell Atlantic comments to *July 10 Order* at 1-2; Colorado DOE comments to *July 10 Order* at 1, 3; EdLiNC petition to *July 10 Order* at 1; USTA comments to *July 10 Order* at 1-2.

[657] EdLiNC petition to *July 10 Order* at 1.

[658] EdLiNC petition to *July 10 Order* at 2.

[659] EdLiNC petition to *July 10 Order* at 4.

[660] EdLiNC petition to *July 10 Order* at 8-9.

[661] Bell Atlantic comments to *July 10 Order* at 2.

[662] Bell Atlantic comments to *July 10 Order* at 2.

reaching areas where competition is needed to reduce prices and increase access."[663] Colorado DOE also suggests that a five-year limitation represents the "maximum amount of time that is prudent for any technology-related contract, due to substantial and rapid changes in the marketplace."[664] Newport News requests that the existing contract rule be modified to permit universal service discounts for contracts that extend beyond December 31, 1998.[665] Newport News cites its intention to contract for services for a two year period to implement its "Techplan."[666] Newport News contends that it is not practical or financially advantageous to separate the work into phases to comply with the December 31, 1998 limitation.[667]

216. AHA, which represents 5,000 hospitals and health systems, states in an *ex parte* letter that many health care institutions have negotiated contracts for the provision of telecommunications services that will remain in effect upon commencement of the new universal service support mechanisms.[668] AHA argues that these institutions, many of which are small, rural hospitals with little administrative capability to renegotiate contracts, should be entitled to the same relief from the competitive bid requirements as the Commission granted to schools and libraries facing similar circumstances in the *July 10 Order*.[669] Similarly, the Telecare Network, an interactive telemedicine service offered by St. Alexius Medical Center in Bismarck, North Dakota, in cooperation with other health care providers in North and South Dakota, asks for relief from the competitive bid requirement with respect to contracts that will still be in effect on and after January 1, 1998. Specifically, Telecare Network asserts that requiring an eligible health care provider to comply with the competitive bid requirement for services received under an existing contract could require parties to "cancel existing contracts -- thereby adding significant penalty costs for terminating the

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[663] Colorado DOE comments to *July 10 Order* at 3.

[664] Colorado DOE comments to *July 10 Order* at 3.

[665] Newport News petition to *July 10 Order* at 1-2.

[666] Newport News petition to *July 10 Order* at 1-2.

[667] Newport News petition to *July 10 Order* at 2.

[668] *See* Letter from James Bentley, AHA, to Chmn. Reed Hundt, FCC, dated October 3, 1997 (AHA Oct. 3 *ex parte*) at 1; *see also*, Letter from Michael J. Mabin, St. Alexius, to Chmn. Reed Hundt, FCC, dated October 3, 1997 (St. Alexius Oct. 3 *ex parte*); Letter from Nancy R. Willis, North Dakota Healthcare Association, to Chmn. Reed Hundt, FCC, dated October 7, 1997 (NDHA Oct. 7 *ex parte*) at 1; Letter from Susan S. Gustke, MD, Eastern Area Health Education Center, to Chmn. Reed Hundt, FCC, dated October 3, 1997 (Eastern AHEC Oct. 3 *ex parte*).

[669] *See* AHA Oct. 3 *ex parte* at 1; Eastern AHEC Oct. 3 *ex parte*.

contracts prior to the original terms."[670]

3. Discussion

217. We reconsider our earlier finding that contracts signed on or after November 8, 1996 are not eligible for universal service support after December 31, 1998. We conclude that a contract of any duration signed on or before July 10, 1997 will be considered an existing contract under our rules and therefore exempt from the competitive bid requirement for the life of the contract. Discounts will be provided for eligible services that are the subject of such contracts on a going-forward basis beginning on the first date that schools and libraries are eligible for discounts. We further conclude that contracts signed after July 10, 1997 and before the date on which the Schools and Libraries Corporation website is fully operational will be eligible for support and exempt from the competitive bid requirement for services provided through December 31, 1998. Contracts that are signed after July 10, 1997 are only eligible for support for services received between January 1 and December 31, 1998, regardless of the term or duration of the contract as a whole. In reconsidering our prior determination, we seek to avoid penalizing schools and libraries that were reasonably uncertain of their rights pursuant to the *Order* and to allow greater flexibility for schools and libraries to obtain the benefits of longer-term contracts, including potentially lower prices. The *Order* permitted schools and libraries to apply the relevant discounts to only those "contracts that they negotiated prior to the Joint Board's Recommended Decision [November 8, 1996] for services that will be delivered and used after the effective date of our rules."[671] We agree with commenters, however, that section 54.511(c) did not make clear that only contracts that were entered into prior to the date of the Joint Board's Recommended Decision would be eligible for discounts.[672] The *July 10 Order*, by contrast, clearly established that discounts would be provided only for those contracts that either complied with the competitive bid requirement or qualified as "existing" contracts under our rules.

218. We also clarify on our own motion that, if parties take service under or pursuant to a master contract, the date of execution of that master contract represents the applicable date for purposes of determining whether and to what extent the contract is exempt from the competitive bid requirement. For example, if a state signed a master contract for service prior to July 10, 1997, such contract would qualify as an existing contract. If an

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[670] St. Alexius Oct. 3 *ex parte*.

[671] *Order*, 12 FCC Rcd at 9062-9063.

[672] 47 C.F.R. § 54.511(c). Schools and libraries bound by existing contracts. Schools and libraries bound by existing contracts for services shall not be required to breach those contracts in order to qualify for discounts under this subpart during the period for which they are bound. This exemption from competitive bidding requirements, however, shall not apply to voluntary extension of existing contracts.

eligible school subsequently elects to obtain services pursuant to that contract, that school will be exempt from the competitive bid requirement because it is receiving service pursuant to an existing contract. This clarification is consistent with our rules regarding competitive bidding for master contracts set forth in section VI.J, *infra*. Nevertheless, as discussed in sections VI.E. and VI.J. herein, we believe that schools and libraries may benefit from soliciting competitive bid even in cases where they are exempt from such competitive bidding requirements.

219. We further conclude that we should extend our rules regarding support for existing contracts to eligible rural health care providers. Members of the health care community have expressed concern that they will face the same difficulties as those faced by members of the school and library communities, including negotiating lower prices through longer term contracts and avoiding penalties in terminating existing contracts.[673] For generally the same reasons noted above regarding schools and libraries, we also conclude that an eligible health care provider that entered into a contract prior to the date on which the websites are operational would be unfairly penalized by requiring that provider to comply with the competitive bid requirement. We thus extend the same treatment with regard to existing contracts to eligible rural health care providers as we have extended to eligible schools and libraries. An eligible rural health care provider will not be required to comply with the competitive bid requirement for any contract for eligible telecommunications services that it signed on or before July 10, 1997, regardless of the duration of the agreement. In addition, such providers will be eligible to receive reduced rates for services provided through December 31, 1998 for any contract for telecommunications services signed after July 10, 1997 and before the website is operational. Although the *July 10 Order* addressed the issue of existing contracts for only schools and libraries, we believe that establishing July 10, 1997 as the date relevant to our existing contracts rule for rural health care providers is reasonable. We note that this determination is consistent with the request of rural health care providers to be treated in the same manner as schools and libraries.[674] In addition, we anticipate that adopting the same existing contract rules for schools, libraries, and rural health care providers should be administratively simpler and reduce potential confusion on the part of program participants and providers regarding the existing contracts eligible for universal service support. We note that no existing contract exception from the competitive bid requirement previously had been adopted for rural health care providers and that this modification will serve to benefit rural health care providers.

220. We reject the suggestion of EdLiNC that we eliminate any limitation on the duration of discounts for contracts executed before the website for schools and libraries is fully operational. Although we agree with EdLiNC that schools and libraries have a strong

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[673] *See* AHA Oct. 3 *ex parte* at 1; *see also* St. Alexius Oct. 3 *ex parte*.

[674] *See* AHA Oct. 3 *ex parte* at 1; *see also* St. Alexius Oct. 3 *ex parte*.

incentive to negotiate contracts at the lowest possible pre-discount price in an effort to reduce their costs, we affirm our initial finding that competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about the choices available to them and receive the lowest prices.[675] Allowing eligible schools, libraries, and rural health care providers to receive discounts indefinitely on contracts entered into after July 10, 1997 without requiring participation in the competitive bid process would hinder the competitive provision of services for the reasons discussed above.

221. Schools, libraries, and rural health care providers that qualify for the "existing contract" exemption from the competitive bid process described herein will continue to be required to file applications each year with the Schools and Libraries Corporation and Rural Health Care Corporation, respectively, in order to receive universal service discounts. We note that approval of discounts in one year should not be construed as a guarantee of future coverage or assurance that the same level of support will be available in subsequent years.[676] We will continue to monitor the existing contract rule and will make further modifications if necessary.

J. Competitive Bid Requirements for Schools, Libraries, and Rural Health Care Providers

1. Background

222. Section 254(h)(1)(A) states that "[a] telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services that are necessary for the provision of health care services in a State . . . to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State."[677] Section 254(h)(1)(B) states that "[a]ll telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service . . ., provide such services to elementary schools, secondary schools, and libraries"[678] at discounted rates. In the *Order*, the Commission concluded that any school, library, or rural health care provider that is eligible to receive supported services will be required to seek competitive bids for all services eligible for support pursuant to section 254(h) by submitting a bona fide request for services to the Administrator that includes a description of the services

[675] *Order*, 12 FCC Rcd at 9029.

[676] *Order*, 12 FCC Rcd at 9058.

[677] 47 U.S.C. § 254(h)(1)(A).

[678] 47 U.S.C. § 254(h)(1)(B).

that the school, library, or health care provider seeks.[679] The Commission required the Administrator to post this information on a website for all potential providers to review.[680]

a. Minor Modifications to Contracts

1. Pleadings

223. USTA argues that there are circumstances in which requiring eligible schools, libraries, and rural health care providers to undertake a full competitive bid process is unduly burdensome.[681] For example, USTA states that "a school may need to add a few additional lines to an already existing contract and it would appear burdensome to require it to adhere to the entire bid process."[682] USTA suggests that the Commission develop a streamlined application process to address such situations.[683] No parties commented on USTA's petition with respect to this issue.

2. Discussion

224. We agree with USTA that requiring a competitive bid for every minor contract modification would place an undue burden upon eligible schools, libraries, and rural health care providers. Such eligible entities should not be required to undergo an additional competitive bid process for minor modifications such as adding a few additional lines to an existing contract. We, therefore, conclude that an eligible school, library, or rural health care provider will be entitled to make minor modifications to a contract that the Schools and Libraries Corporation or the Rural Health Care Corporation previously approved for funding without completing an additional competitive bid process. We note that any service provided pursuant to a minor contract modification also must be an eligible supported service as defined in the *Order* to receive support or discounts.[684]

225. In the *Order*, the Commission explained that the universal service competitive

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[679] *Order*, 12 FCC Rcd at 9029, 9133-9134.

[680] *Order*, 12 FCC Rcd at 9078, 9133-9134.

[681] USTA petition at 22.

[682] USTA petition at 22.

[683] USTA petition at 22.

[684] *Order*, 12 FCC Rcd. at 9005-9023, 9098-9110.

bid process is not intended to be a substitute for state, local, or other procurement processes.[685] Consistent with this observation, we conclude that eligible schools, libraries, and rural health care providers should look to state or local procurement laws to determine whether a proposed contract modification would be considered minor and therefore exempt from state or local competitive bid processes. If a proposed modification would be exempt from state or local competitive bid requirements, the applicant likewise would not be required to undertake an additional competitive bid process in connection with the applicant's request for discounted services under the federal universal service support mechanisms. Similarly, if a proposed modification would have to be rebid under state or local competitive bid requirements, then the applicant also would be required to comply with the Commission's universal service competitive bid requirements before entering into an agreement adopting the modification.

226. Where state and local procurement laws are silent or are otherwise inapplicable with respect to whether a proposed contract modification must be rebid under state or local competitive bid processes, we adopt the "cardinal change" doctrine as the standard for determining whether the contract modification requires rebidding. The cardinal change doctrine has been used by the Comptroller General and the Federal Circuit[686] in construing the Competition in Contracting Act (CICA)[687] as implemented by the Federal Acquisition Regulations.[688] The CICA requires executive agencies procuring property or services to "obtain full and open competition through the use of competitive procedures."[689]

227. Because CICA does not contain a standard for determining whether a modification falls within the scope of the original contract, the Federal Circuit has drawn an analogy to the cardinal change doctrine.[690] The cardinal change doctrine is used in connection with contractors' claims that the Government has breached its contracts by ordering changes

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[685] *Order*, 12 FCC Rcd at 9079, 9134.

[686] 31 U.S.C.A. § 3554(a)(4)(1996) gives the Comptroller General authority to determine whether solicitations of contracts by executive agencies, their proposed awards, or awards comply with statute and regulation. However, this jurisdiction is shared with the district courts of the United States and the Court of Federal Claims. 31 U.S.C.A. § 3556 (1996); 28 U.S.C.A § 1491(b)(1996); *see also* 41 U.S.C.A § 253(1996).

[687] 41 U.S.C. § 253(a)(1)(A) (1994).

[688] The FAR is issued as Chapter 1 of Title 48, CFR.

[689] The CICA is inapplicable here. We reference this statute and the decisions construing the open competition requirement under 41 U.S.C. § 253(a)(1)(A) only to inform our understanding as to when a contract modification may be deemed to fall within the scope of an original competition and when a contract, as modified, materially departs from the scope of the original competition.

[690] *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 781 (Fed. Cl. 1997) (citation omitted).

that were outside the scope of the changes clause.[691] The cardinal change doctrine looks at whether the modified work is essentially the same as that for which the parties contracted.[692] In determining whether the modified work is essentially the same as that called for under the original contract, factors considered are the extent of any changes in the type of work, performance period, and cost terms as a result of the modification.[693] Ordinarily a modification falls within the scope of the original contract if potential offerors reasonably could have anticipated it under the changes clause of the contract.[694]

228. The cardinal change doctrine recognizes that a modification that exceeds the scope of the original contract harms disappointed bidders because it prevents those bidders from competing for what is essentially a new contract. Because we believe this standard reasonably applies to contracts for supported services arrived at via competitive bidding, we adopt the cardinal change doctrine as the test for determining whether a proposed modification will require rebidding of the contract, absent direction on this question from state or local procurement rules. If a proposed modification is not a cardinal change, there is no requirement to undertake the competitive bid process again.[695]

229. An eligible school, library, or rural health care provider seeking to modify a contract without undertaking a competitive bid process should file FCC Form 471 or 466, "Services Ordered and Certification," with the School and Libraries Corporation or the Rural Health Care Corporation, respectively, indicating the value of the proposed contract modification so that the administrative companies can track contract performance.[696] The school, library, or rural health care provider also must demonstrate on FCC Form 471 or 466 that the modification is within the original contract's change clause or is otherwise a minor modification that is exempt from the competitive bid process.[697] The school, library, or rural

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[691] *See* American Air Filter Co. - DLA Request for Reconsideration, 57 Comp. Gen. 567, 572 (1978), 78-1 CPD para. 443 at 9-10.

[692] *See Graphicdata, LLC supra; AT&T v. WILTEL*, 1 F.3d 1201, 1205 (Fed. Cir. 1993); *Cray Research v. Dept. of Navy*, 556 F. Supp. 201, 203 (D.D.C. 1982); *CAD Language Systems*, 68 Comp. Gen. 376 (1989), 89-1 CPD para. 364.

[693] *Information Ventures, Inc.*, B-240458, Nov. 21, 1990, 90-2 CPD para. 414.

[694] *Master Security, Inc.*, B-274990.2, Jan. 14, 1997, 97-1 CPD para. 21; *Air A-Plane Corporation v. United States*, 408 F.2d 1030 (Ct. Cl. 1968); *Hewlett Packard Co.*, B-245293, Dec. 23, 1991, 91-2 CPD para. 576.

[695] *See, e.g., MCI Telecommunications Corp.*, B-276659.2, Sept. 29, 1997, 1997 WL 602194 (C.G.) at 13;

[696] *See* USTA Oct. 3 *ex parte* at 2.

[697] *Graphicdata, LLC supra, citing AT&T Communications, Inc. v. WilTel*, 1 F.3d 1201, 1205 (Fed.Cir. 1993).

health care provider's justification for exemption from the competitive bid process will be subject to audit and will be used by the Schools and Libraries Corporation and Rural Health Care Corporation to determine whether the applicant's request is, in fact, a minor contract modification that is exempt from the competitive bid process.[698] We emphasize that, even though minor modifications will be exempt from the competitive bidding requirement, parties are not guaranteed support with respect to such modified services. A commitment of funds pursuant to an initial FCC Form 471 or Form 466 does not ensure that additional funds will be available to support the modified services. We conclude that this approach is reasonable and is consistent with our effort to adopt the least burdensome application process possible while maintaining the ability of the administrative companies and the Commission to perform appropriate oversight.

b. Master Contracts

1. Pleadings

230. USTA points out that schools, libraries, and rural health care providers in some states may be able to purchase services from a master contract at rates negotiated by a third party. USTA defines a "master contract" as a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to other entities that purchase directly from the provider.[699] According to USTA, "the decision to purchase from the master contract may be independent of the competitive bid process, although the rates offered via that contract may in fact be the most competitive, lowest rates available."[700] USTA notes that there is typically no contractual, financial, or management relationship between the third party that negotiates a master contract and the entity that purchases and receives the service under that master contract.[701] USTA asks the Commission to clarify: (1) that eligible entities that choose to obtain supported services by purchasing them from a master contract may do so without going through the competitive bid process; and (2) whether a third party that seeks to negotiate a master contract for services that eligible entities are expected to purchase would be required to adhere to the universal service competitive bid requirements, or in the case of existing contracts, be required to submit those contracts to the

[698] *Graphicdata, LLC v. United States supra, citing Executive Bus. Media, Inc. v. United States, 3 F.3d at 763 n.3* (4th Cir. 1993).

[699] *See* Letter from Hance Haney, USTA, to Chmn. Reed Hundt, FCC, dated October 3, 1997 (USTA Oct. 3 *ex parte*) at 1.

[700] USTA petition at 22-23.

[701] *See* USTA Oct. 3 *ex parte* at 1.

Administrator for registration.[702] USTA suggests that the Commission clarify that eligible entities purchasing from a master contract are required only to submit the paperwork necessary to notify the Administrator of the services it plans to order and to secure a commitment of funds from the Administrator.[703]

231. USTA also seeks clarification that a third party negotiating a master contract, or the lead member of another consortium or aggregated buying arrangement, is not itself required to be an entity eligible to receive universal service benefits and that non-eligible entities would be allowed to submit requests for proposals to the website on behalf of eligible entities.[704]

2. Discussion

232. We find that eligible schools, libraries, and rural health care providers seeking discounted services or reduced rates should be allowed to purchase services from a master contract negotiated by a third party.[705] In the *Order*, the Commission found that the competitive bid requirement would minimize the universal service support required by ensuring that schools, libraries, and rural health care providers are aware of cost-effective alternatives.[706] The Commission concluded that, like the language of section 254(h)(1) that targets support to public and nonprofit rural health care providers, this approach "ensures that the universal service fund is used wisely and efficiently."[707] Insofar as an independent third party negotiating a master contract may be able to secure lower rates than an eligible entity negotiating on its own behalf, we conclude that allowing schools, libraries, and rural health care providers to order eligible telecommunications services from a master contract negotiated by a third party is consistent with our goal of minimizing universal service costs and therefore is also consistent with section 254(h)(1).[708]

233. We wish to emphasize, however, that for eligible schools and libraries to receive discounted services, and for rural health care providers to receive reduced rates, the

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[702] *See* USTA Oct. 3 *ex parte* at 1-2.

[703] *See* USTA Oct. 3 *ex parte* at 2.

[704] *See* USTA Oct. 3 *ex parte* at 2.

[705] USTA petition at 22-23.

[706] *Order*, 12 FCC Rcd at 9029, 9134.

[707] *Order*, 12 FCC Rcd at 9134.

[708] *Order*, 12 FCC Rcd at 9134.

third party initiating a master contract either must have complied with the competitive bid requirement or qualify for the existing contract exemption before entering into a master contract.[709] An eligible school, library, or rural health care provider shall not be required to satisfy the competitive bid requirement if the eligible entity takes service from a master contract that has been competitively bid under the Commission's competitive bid requirement. If a third party has negotiated a master contract without complying with the competitive bid requirement, then an eligible entity must comply with the competitive bid requirement before it may receive discounts or reduced rates for services purchased from that master contract.

234. As noted above, the date of execution of a master contract represents the applicable date for purposes of determining whether and to what extent the contract is exempt from the competitive bid requirement under the existing contract exemption. For example, if a state signed a master contract for service prior to July 10, 1997 that qualifies as an existing contract under our rules, and a school elects to take service pursuant to that contract at a date after the website is operational, that school will be exempt from the competitive bid requirement because it is receiving service pursuant to an existing contract.[710] As we stated above, we strongly encourage schools and libraries to engage in competitive bidding even if they are exempt from such requirement pursuant to Commission rules. Schools and libraries may well be able to obtain more favorable terms if they issue new requests for bids designed to accommodate their specific needs, rather than obtain service under the terms of the master contract. For instance, a master contract that was put out for bid several years ago but has not yet expired might not reflect the cost reductions resulting from recent entry into the local exchange market, for example, by wireless carriers. Although we have provided for certain exemptions from competitive bidding requirements, to enable schools and libraries to transition to the Commission's procedures implementing the new universal service mechanisms, we believe that even institutions subject to the exemptions may obtain substantial benefit from soliciting competitive bids. Moreover, those institutions may ultimately obtain service pursuant to the master contract, if they determine that the master contract is the most cost effective provider. We intend to monitor the impact of the competitive bid exemptions on an ongoing basis.

235. Furthermore, even if eligible schools, libraries, and health care providers are obligated by the school district or a consortium, for example, to purchase from a master contract, the third party nevertheless must have complied with the competitive bid process in order for an eligible entity to receive discounts or reduced rates on services ordered from the master contract. If the third party has not complied with the competitive bid requirement before entering into a master contract, then an eligible school, library, or rural health care

[709] Letter from Hance Haney, United States Telephone Association, to Kim Parker, FCC, Universal Service Branch, Dec. 4, 1997.

[710] *See* Section VI.I. *supra*.

provider itself must undertake the competitive bid process before it may receive discounts or reduced rates on services purchased from the master contract. These requirements will ensure that the eligible entity is receiving the most cost-effective service.

K. Reimbursement for Telecommunications Carriers

1. Background

236. Section 254(b)(5) establishes the principle that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."[711] Furthermore, section 254(e) directs that any universal service support "should be explicit and sufficient to achieve the purposes of [section 254]."[712]

237. The Commission concluded that discounts for eligible schools and libraries shall be capped at $2.25 billion annually.[713] The Commission also concluded that discounts would be committed on a first-come-first-served basis. If and when total payments committed during a funding year have exhausted any funds carried over from previous years and there are only $250 million in funds available for the funding year, a system of priorities will govern the distribution of the remaining $250 million.[714] The Commission stated in the Order that some uncertainty may remain about whether an institution will receive the same level of discount from one year to the next because demand for funds may exceed the funds available.[715] The Commission stated further that it cannot guarantee discounts in the subsequent year in such a situation because doing so would place institutions that have not formulated their telecommunications plans in the previous year at a disadvantage, and possibly preclude such entities from receiving any universal service support.[716] The Commission directed Schools and Libraries Corporation to recommend to the Commission a reduction in the guaranteed percentage discounts as necessary to permit all expected requests in the next funding year to be fully funded, if it estimates that the $2.25 billion cap will be reached for the current funding year.[717] The Commission encouraged schools and libraries to make their

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[711] 47 U.S.C. § 254(b)(5).

[712] 47 U.S.C. § 254(e).

[713] *Order*, 12 FCC Rcd at 9057.

[714] *Order*, 12 FCC Rcd at 9057-9058.

[715] *Order*, 12 FCC Rcd at 9058.

[716] *Order*, 12 FCC Rcd at 9058.

[717] *Order*, 12 FCC Rcd at 9058.

agreements contingent on approval of universal service funding for the contracted services.[718]

238. In the *Order*, the Commission concluded that service providers, rather than schools and libraries, should seek compensation from the Administrator.[719] The Commission found, among other reasons, that permitting service providers to demand full payment from schools and libraries could create serious cash flow problems and would disproportionately affect the most disadvantaged schools and libraries.[720]

239. Similarly, in the health care section of the *Order*, the Commission adopted an annual cap of $400 million for universal service support for health care providers and concluded that support should be committed on a first-come-first-served-basis.[721] Health care providers will be permitted to submit funding requests once they have made agreements for specific eligible services, and the Administrator will commit funds based on those agreements until the total payments committed during a funding year reach the amount of the cap.[722] The Commission also encouraged health care providers to make their agreements contingent on approval of universal service funding for the contracted services.[723]

240. In the *October 14 Order*, the Commission adopted a filing window period and concluded that all applications for support from schools and libraries support mechanisms or the health care support mechanisms filed during the window will be treated as if received simultaneously.[724]

2. Pleadings

241. USTA asks the Commission to clarify that schools, libraries, and rural health care providers remain responsible for all charges incurred, "particularly if a provider is unable to receive full reimbursement from the universal service support mechanisms," as well as for

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[718] *Order*, 12 FCC Rcd at 9057 n. 1396.

[719] *Order*, 12 FCC Rcd at 9083.

[720] *Order*, 12 FCC Rcd at 9083.

[721] *Order*, 12 FCC Rcd at 9143.

[722] *Order*, 12 FCC Rcd at 9143.

[723] *Order*, 12 FCC Rcd at 9143 n. 1850.

[724] Federal-State Joint Board on Universal Service, *Third Report and Order*, CC Docket No. 96-45, FCC 97-380 (rel. Oct. 14, 1997) *(October 14 Order)* at para. 2. The *Order* delegated to Schools and Libraries Corporation and Rural Health Care Corporation, respectively, authority to determine the duration of the window period. The administrative companies have since adopted a 75 day window.

the full payment of other charges that may arise, "such as state and federal taxes, termination liability or penalty surcharges, franchise fees, etc."[725]

242. USTA expresses the concern that a carrier may not receive reimbursement to which it is entitled from the universal service support mechanisms under certain circumstances. In such a case, USTA asks the Commission to clarify that the eligible entity receiving the benefit of discounts or lower urban rates should remain responsible for any payment due to the provider. We note that USTA does not specify the particular set of circumstances that may cause a service provider to recover less than the amount owed to it. No parties commented on USTA's petition with respect to this issue.

3. Discussion

243. We do not anticipate that the cost of funding eligible services will exceed the cap on universal service funding for schools, libraries, and rural health care providers[726] An applicant's "place in line," or seniority for the purposes of allocating funding will be determined by the date on which an applicant submits FCC Form 471 or 466 to the applicable administrative corporation.[727] Because eligible entities will enter into contracts with service providers prior to the submission of requests for commitment of funds (FCC Form 466 or 471, "Services Ordered and Certification"), such a request could be denied in the unlikely event that funds prove to be insufficient. In light of this possibility, and because charges incurred for eligible telecommunications services remain the responsibility of the eligible entity, we agree with USTA and again urge schools, libraries, and rural health care providers to include clauses in their contracts that make implementation of the agreements contingent on the commitment of universal service funding.[728]

244. USTA asks for clarification regarding the types of charges associated with the purchase or termination of an eligible telecommunications service that will be covered by the federal support mechanisms. We conclude that the universal service support mechanisms will cover all reasonable charges, including federal and state taxes, that are incurred by obtaining an eligible telecommunications service. Charges for termination liability, penalty surcharges, and other charges not included in the cost of obtaining the eligible service will not be covered by the universal service support mechanisms. We do not include among the costs supported

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[725] USTA petition at 23.

[726] *See Order*, 12 FCC Rcd at 9060, 9144.

[727] *October 14 Order* at para. 3.

[728] *See Order*, 12 FCC Rcd at 9057 n. 1396 and 9080 n. 1496. Purchases of real estate are commonly contingent on approvals of mortgage applications.

by the support mechanisms charges associated with terminating a service because we conclude that such charges are avoidable. The imposition of such charges typically results from a party's failure to discharge its duty of performance under a contract and supporting such charges does not advance program goals.

L. Universal Service Support for Intrastate Telecommunications Services Provided to Rural Health Care Providers

1. Background

245. Section 254(h)(1)(A) requires that eligible health care providers be permitted to purchase telecommunication services "necessary for the provision of health care services in a State, including instruction relating to such services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas in that State."[729] In the schools and libraries section of the *Order*, the Commission determined that federal universal service support mechanisms will support discounts on both interstate and intrastate services.[730] The *Order* did not address whether intrastate services provided to eligible rural health care providers will be supported by the federal universal service support mechanisms.

2. Pleadings

246. USTA seeks clarification that the federal universal service support mechanisms will support reduced rates on intrastate services provided to rural health care providers.[731] No parties commented on USTA's request for clarification with respect to this issue.

3. Discussion

247. The Commission clarifies that the federal universal service support mechanisms will support reduced rates on intrastate services provided to eligible rural health care providers.[732] As set forth in section 54.601(c)(1) of the Commission's rules, any

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[729] 47 U.S.C. § 254(h)(1)(A).

[730] *Order*, 12 FCC Rcd at 9064-9065. Consistent with section 254(h)(1)(B), which authorizes the states to determine the level of discount available to eligible schools and libraries with respect to intrastate services, the Commission required states to establish intrastate discounts at least equal to the discounts available on interstate services as a condition of federal universal service support for schools and libraries in that state.

[731] USTA petition at 22.

[732] Unlike the Commission's decision, pursuant to section 254(h)(1)(B), to require states to establish intrastate discounts at least equal to the discounts available on interstate services as a condition of federal universal service support for schools and libraries in that state, the Commission did not impose such a

telecommunications service of a bandwidth up to and including 1.544 Mbps that is the subject of a properly completed bona fide request by an eligible health care provider is eligible for universal service support, subject to distance limitations.[733] These eligible telecommunications services may be intrastate or interstate in nature. In addition, limited toll free access to an Internet service provider is eligible for universal service support under section 54.621 of the Commission's rules for health care providers that are unable to obtain such access.[734]

M. Support for Services Beyond the Maximum Supported Distance for Rural Health Care Providers

1. Background

248. Section 254(h)(1)(A) states that "[a] telecommunications carrier shall . . . provide telecommunications services . . . to any public or non-profit health care provider . . . at rates that are reasonably comparable to rates charged for similar services in urban areas in that State."[735] In the *Order*, the Commission concluded that support for some distance-based charges is necessary to ensure that rates charged to rural health care providers are "reasonably comparable" to urban rates.[736] The Commission, therefore, determined that universal service support shall be provided for eligible telecommunications services carried over a distance not to exceed the distance between the health care provider and the farthest point on the jurisdictional boundary of the nearest large city to the health care provider's location (maximum supported distance).[737]

2. Pleadings

249. USTA asks the Commission to clarify that a rural health care provider may purchase a mileage-based service that is longer than the distance of the farthest point on the boundary of the nearest large city and pay the rural mileage price for the distance beyond the

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requirement in the health care context. Section 254 contains no requirement authorizing or requiring the states to establish urban rates for intrastate services provided to rural health care providers.

[733] 47 C.F.R. § 54.601(c)(1). *See also* 47 C.F.R. § 54.613(b) (lesser bandwidth services may be selected as long as the total annual support amount for those services does not exceed the support amount for a telecommunications service with 1.544 Mbps capability).

[734] 47 C.F.R. § 54.621.

[735] 47 U.S.C. § 254(h)(1)(A).

[736] *Order*, 12 FCC Rcd at 9127-9128.

[737] *Order*, 12 FCC Rcd at 9130.

maximum supported distance.[738] No parties commented on USTA's request for clarification with respect to this issue.

3. Discussion

250. Although the Commission limited universal service support to an amount that would cover an eligible telecommunications service provided over a maximum allowable distance, nothing in the *Order* precludes a health care provider from purchasing an eligible telecommunications service carried over a distance that exceeds this limitation. We clarify that we do not intend to restrict a rural health care provider from purchasing an eligible telecommunications service that is provided over a distance that is longer than the maximum supported distance, that is, from the health care provider to the farthest point on the boundary of the nearest large city. Rural health care providers, however, must pay the applicable price for the distance that such service is carried beyond the maximum supported distance. This approach is consistent with Congress's intent to make rural and urban rates comparable while affording the eligible rural health care provider that chooses to connect to a city that is farther than the nearest large city in that state the flexibility to make such a decision without jeopardizing the provider's entitlement to receive a discount on services carried within the maximum supported distance.

N. Establishing the Standard Urban Distance and Maximum Supported Distance for Rural Health Care Providers

1. Background

251. In an effort to make urban and rural rates comparable, the Commission adopted the standard urban distance concept for determining the urban rate the rural health care provider should pay for a supported service.[739] Section 54.605(d) of the Commission's rules provides that '[t]he standard urban distance' for a state is the average of the longest diameters of all cities with a population of 50,000 or more within the state, *calculated by the Administrator*."[740]

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[738] USTA petition at 22.

[739] *Order*, 12 FCC Rcd at 9131.

[740] 47 C.F.R. § 54.605(d) (emphasis added). In the *Order*, the Commission concluded that the longest diameters of all cities with a population of 50,000 or more within a state should be averaged to arrive at that state's standard urban distance. *Order*, 12 FCC Rcd at 9131 . If a rural health care provider requests that a service be provided over a distance that is less than or equal to the standard urban distance in a state, then the rate that would be paid by the rural health care provider for that service shall be the rate charged for a similar service provided over the same distance in the nearest large city. If a rural health care provider requests that a service be provided over a distance that is greater than the standard urban distance in a state, then the rate that

2. Pleadings

252. USTA asks the Commission to clarify that the Administrator should be responsible for establishing the standard urban distance and the maximum supported distance applicable to rural health care providers and for posting this information on its website.[741] No parties commented on USTA's petition with respect to this issue.

3. Discussion

253. We amend section 54.605(d) of our rules to provide that the Rural Health Care Corporation will be responsible for calculating the standard urban distance (and, by definition, the maximum supported distance) applicable to eligible rural health care providers. Section 54.605(d) of the Commission's rules currently requires the "Administrator" to establish the standard urban distance.[742] Specifically, the *NECA Report and Order* [743] assigned to USAC and to the entity ultimately selected to serve as the permanent Administrator, responsibility for performing the billing, collection and disbursement functions associated with all of the universal service support mechanisms, including the support mechanisms for rural health care providers.[744] The *NECA Report and Order* assigned to the Rural Health Care Corporation the remaining administrative functions associated with administering the rural health care

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would be paid by the rural health care provider for that service shall be the rate charged for a similar service provided over the standard urban distance in the nearest large city. *Order*, 12 FCC Rcd at 9131-9132.

[741] USTA petition at 24.

[742] 47 C.F.R. § 605(d). The term "Administrator" is defined in the Commission's Part 54 rules as:

> the National Exchange Carrier Association, Inc. until the date that an independent subsidiary of the National Exchange Carrier Association, Inc. is incorporated and has commenced the administration of the universal service support mechanisms. On that date and until the permanent Administrator has commenced the permanent administration of the universal service support mechanisms, the term "Administrator" shall refer to the independent subsidiary established by the National Exchange Carrier Association, Inc. for the purpose of temporarily administering the portions of the universal service support mechanisms described in section 69.616. On the date that the entity selected to permanently administer the universal service support mechanisms commences operations and thereafter, the term "Administrator" shall refer to such entity. 47 C.F.R. § 54.5.

[743] *NECA Report and Order* at paras. 30, 57-60 (directing NECA to establish USAC, the Schools and Libraries Corporation, and the Rural Health Care Corporation for purpose of administering the universal service support mechanisms).

[744] *NECA Report and Order* at para. 41.

program.[745] Consistent with this division of administrative responsibilities set forth in the *NECA Report and Order*, we conclude that the Rural Health Care Corporation rather than USAC or the permanent Administrator should perform the calculations necessary to establish the standard urban distance pursuant to section 54.605(d).

254. We also grant USTA's request that the calculation of the standard urban distance for each state be posted on a website. Accordingly, we direct the Rural Health Care Corporation to post such information to the Rural Health Care Corporation's website.

VII. ADMINISTRATION OF SUPPORT MECHANISMS

255. Universal service contribution requirements pursuant to section 254 of the Act will take effect on January 1, 1998. In the *Order*, the Commission found that requiring a broad range of providers to contribute to universal service was consistent with the statute.[746] Numerous parties have asked us to reconsider, prior to January 1, 1998, our decisions requiring certain providers to contribute to universal service pursuant to section 254. We herein reconsider those decisions. We note, however, that we will conduct a thorough reevaluation of who is required to contribute to universal service, pursuant to Congress's direction to issue a report on this issue by April 10, 1998.[747] That report to Congress may serve as the basis for subsequent Commission action on this issue.

A. Paging Carriers

1. Background

256. Section 254(d) states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis" to universal service.[748] Based on this provision, the Commission concluded that all telecommunications carriers, including paging carriers, that provide interstate telecommunications services must contribute to universal service.[749] In arriving at this conclusion, the Commission rejected suggestions that contributions to universal service should only be assessed against telecommunications carriers that are eligible to receive high cost

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[745] *NECA Report and Order* at paras. 65-66.

[746] *Order*, 12 FCC Rcd at 9173, 9177.

[747] Pub. L. 105-119, 111 Stat. 2440 (approved November 26, 1997) ("Report to Congress"). *See* Section VII.D., below.

[748] 47 U.S.C. § 254(d).

[749] *Order*, 12 FCC Rcd at 9206.

support or that carriers that are ineligible to receive such support should be permitted to make reduced contributions.[750] The Commission reasoned that the statute requires all telecommunications carriers to contribute to universal service support mechanisms, but provides that only "eligible" carriers should receive support, and therefore affords the Commission no discretion to establish preferential treatment for carriers that are ineligible for support.[751]

2. Pleadings

257. Several petitioners challenge the requirement that paging carriers contribute to universal service.[752] These petitioners argue that their contributions to universal service are tantamount to an unconstitutional tax, because paging carriers will derive no benefit from the tax.[753] For example, ProNet asserts that, because its customers are businesses and high-income individuals, it will receive no benefit from universal service.[754] ProNet adds that, even if contributions were considered "user fees" rather than a tax, the assessment of such contributions would still be unconstitutional because, according to ProNet, user fees must be reasonably related to the benefits conferred.[755] Teletouch argues that universal service contributions are tantamount to a tax because carriers must submit payments that will be distributed to non-contributing beneficiaries. ProNet also asserts that paging carriers receive no benefits from universal service and thus contributions represent an unconstitutional taking of property without just compensation under the Fifth Amendment. By contrast, Ozark contends that requiring paging carriers to contribute to universal service violates the universal service goal of providing affordable service to low-income consumers.[756] It asserts that most of its customers are low-income consumers or unemployed individuals and that, if it raises its rates to recover its contribution, those customers may not be able to afford its paging service.[757]

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[750] *Order*, 12 FCC Rcd at 9188.

[751] *Order*, 12 FCC Rcd at 9188.

[752] *See, e.g.*, Ozark petition at 4; PCIA petition at 3-7; ProNet petition at 7-9; Teletouch petition at 3-5.

[753] ProNet petition at 7-9; Teletouch petition at 3-5. Specifically ProNet argues that the universal service goals of upgrading the nation's school and library facilities are characteristic of general welfare goals, and thus render contributions a tax.

[754] ProNet petition at 7-8.

[755] ProNet opposition at 5-6.

[756] Ozark petition at 6-8.

[757] Ozark petition at 6-8.

258. Several paging carriers also contend that their obligation to contribute to universal service on the same basis as eligible telecommunications carriers is inequitable and discriminatory.[758] PCIA asserts that the contribution requirements are not equitable because paging carriers that are ineligible to receive high cost support would contribute equal percentages as entities that are eligible to receive high cost support.[759] PCIA further states that requiring paging carriers to make the same contributions as other carriers is discriminatory because paging carriers will be forced to compete with telecommunications carriers that are eligible to receive universal service support.[760] Specifically, PCIA claims that eligible telecommunications carriers that also provide paging services will have an unfair advantage over paging companies.[761] Teletouch asserts that the paging market is more competitive than other sectors of the telecommunications industry.[762] Therefore, Teletouch argues that the contribution requirements are not equitable because paging carriers, unlike other contributors, will be unable to raise consumer prices to recover universal service contributions.[763] ProNet further argues that "on a 'net' basis" the Commission's contribution requirements will discriminate in favor of eligible telecommunications carriers that receive support because that support will allow eligible telecommunications carriers to offset the cost of making contributions.[764] Paging carriers, however, according to ProNet, will make contributions based on total end-user telecommunications revenues, as opposed to "net revenues" as described above, and will have no opportunity to offset their contributions.[765]

259. To remedy what it describes as an inequitable tax on paging carriers, Teletouch proposes that paging carriers be exempt from universal service contribution requirements.[766] Alternatively, to take into account the highly competitive paging industry, Teletouch asserts that the Commission should assess paging carriers' contributions on the basis of net profits.[767]

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[758] *See* Ozark petition at 4; PCIA petition at 3-7.

[759] PCIA petition at 5-6.

[760] PCIA petition at 6-7. *See also* Ozark petition at 4; ProNet petition at 3-4.

[761] PCIA petition at 6-7.

[762] Teletouch petition at 6-7.

[763] Teletouch petition at 6-7. *See also* ProNet petition at 5.

[764] ProNet petition at 4.

[765] ProNet petition at 4.

[766] Teletouch petition at 7.

[767] Teletouch petition at 7.

PCIA proposes a different remedy, and recommends that paging carriers be required to make contributions that are 50 percent less than those made by eligible telecommunications carriers.[768] ProNet argues that the Commission has treated paging carriers differently than other CMRS providers in the context of regulatory fees, and states that there is no reason why the Commission must treat all carriers equally for universal service contribution purposes.[769]

260. In response to these arguments, RTC counters that other universal service contributors are not eligible to receive universal service support, such as IXCs,[770] payphone service providers, and private service providers, and the Commission should not exempt special categories of contributors.[771] AT&T and Bell Atlantic also contend that paging carriers should not be afforded special reduced contribution obligations or other special treatment.[772] ProNet responds that, unlike paging carriers, other "ineligible" carriers, such as IXCs, immediately benefit from an expanded local network.[773]

261. Finally, Teletouch challenges its obligation to contribute to universal service by asserting that, pursuant to section 2(b) of the Act, the Commission does not have jurisdiction over paging carriers, whose only interstate service is the provision of access to the interexchange network.[774]

3. Discussion

262. We affirm our conclusion in the *Order* that all telecommunications carriers,

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[768] PCIA petition at 8.

[769] ProNet petition at 5-6. Specifically, in FY 1996, CMRS one-way paging licensees paid regulatory fees of $0.02 per unit, while cellular carriers paid fees of $0.17 per unit. *See* Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774 (1996).

[770] We note that many IXCs will be ineligible to receive high cost support. IXCs that provide all of the core services, however, may be eligible to receive high cost support.

[771] RTC opposition at 6-8. *See also* AT&T opposition at 21; Bell Atlantic opposition at 8-9.

[772] AT&T opposition at 21; Bell Atlantic opposition at 8-9.

[773] ProNet opposition at 5.

[774] Teletouch supplement to petition at 2-4. Teletouch filed this supplement on September 9, 1997. The filing deadline for petitions for reconsideration in a notice and comment rulemaking proceeding are prescribed in section 405 of the Act. *See* 47 U.S.C. § 405(a). The Commission lacks discretion to waive this statutory requirement. *See Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986). The filing deadline for petitions for reconsideration of the *Order* was July 17, 1997. We will consider the supplement as an informal comment. 47 U.S.C. § 154(j).

including paging carriers, are required by section 254(d) to contribute to universal service. Petitioners offer no compelling arguments to alter the Commission's earlier decision. We find that universal service contributions do not constitute a tax. As noted in the *Order*, the U.S. Court of Appeals for the D.C. Circuit has held that "a regulation is a tax only when its primary purpose judged in legal context is raising revenue."[775] The fact that section 254 permits discounts to be provided to schools and libraries for certain services provided by non-telecommunications carriers also does not convert universal service contributions into a revenue-raising "tax" because the primary purpose of the contributions is not to raise general revenues.[776] Rather, the primary purpose of the universal service contribution requirements is the preservation and advancement of universal service in furtherance of the principles set forth in section 254(b). Universal service contributions are not commingled with government revenues raised through taxes. Furthermore, contrary to ProNet's assertions, requiring contributions to universal service confers a benefit on paging carriers because such contributions help preserve the universal availability of service over the public switched telephone network. Without the public switched telephone network, subscribers of paging carriers would not be able to receive pages, retrieve pages, or respond to messages. We find that the benefits of universal service accrue to all paging carriers, regardless of whether they serve high-income or low-income customers.[777]

263. Section 254(d) requires "[e]very telecommunications carrier" to contribute to universal service. It does not limit contributions to carriers eligible for universal service support.[778] In fact, as RTC notes, IXCs, payphone service providers, private service providers, and CMRS providers are required to contribute to universal service, even though they might not receive support from the high cost mechanisms. The petitioning paging companies have not advanced any credible evidence that would justify exempting them from the Congressional requirement that we create a broad base of support for universal service programs. The fact that the Commission may treat paging carriers differently than other CMRS providers in the context of regulatory fees is not relevant to the treatment of paging carriers under section 254(d).

264. We disagree with PCIA that requiring paging carriers to contribute to universal service is discriminatory or not competitively neutral. Although some two-way carriers that

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[775] *Order*, 12 FCC Rcd at 9088, *citing Brock v. Washington Metropolitan Area Transit Authority*, 796 F.2d 481, 488 (D.C. Cir. 1986).

[776] *See Order*, 12 FCC Rcd at 9088.

[777] We note that paging carriers may receive universal service support for providing discounted paging services to eligible schools and libraries, provided those telecommunications services are used for educational purposes only. *See* 47 U.S.C. § 254(h)(1)(B); *Order*, 12 FCC Rcd at 9006 n.1117.

[778] *See also supra* section V.B.

compete with paging carriers may be eligible to receive universal service support, such telecommunications carriers will receive support only for those services included within the core definition of universal service (*e.g.*, voice-grade access, single-party service, and access to emergency services).[779] Eligible telecommunications carriers that provide paging services will not receive support for their paging services. Thus, eligible telecommunications carriers that provide paging services will not have an unfair advantage over paging carriers.

265. We also disagree with ProNet's argument that requiring contributions from paging companies, that are not eligible for support, violates competitive neutrality unless eligible telecommunications carriers are required to include amounts they receive from the universal service support mechanisms in calculating their total end-user telecommunications revenues. To the contrary, as we found in the *Order*, basing contributions from all telecommunications carriers on their gross end-user telecommunications revenues best satisfies our goals of competitive neutrality and ease of administration, as well as the statutory requirement that support be explicit.[780] Payments received from the universal service support mechanisms are not counted as end-user telecommunications revenues in the assessment base, because such funds are derived from the federal support mechanisms, not end users of telecommunications.[781] Furthermore, high-cost support does not "offset" eligible telecommunications carriers' contributions. Support is provided to offset in part the cost of serving high cost areas. Moreover, it would be counter-productive to universal service goals to require carriers eligible for support to make a contribution based on support amounts. That approach would increase the level of contributions needed to provide adequate support to carriers that serve high cost areas.

266. Finally, we reject Teletouch's argument that the Commission lacks jurisdiction over paging carriers whose only interstate service is the provision of access to the interexchange network. It is well established that access to the interstate interexchange network is an interstate service that brings paging carriers within the coverage of section 254(c).[782] An interstate telecommunication is defined as a communication or transmission that originates in one state and terminates in another.[783] A page that originates in one state and terminates in another meets the statutory definition of "interstate telecommunication." Therefore, even if a paging carrier's service area does not cross state boundaries, if a paging carrier enables paging customers to receive out-of-state pages, i.e., be paged by someone

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[779] *Order*, 12 FCC Rcd at 8807, 8899-8900.

[780] *Order*, 12 FCC Rcd at 9211.

[781] *Order*, 12 FCC Rcd at 9212.

[782] *See National Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

[783] 47 U.S.C. § 153(22).

located in another state, then that paging carrier provides an interstate service and must contribute to universal service.[784]

B. Other Providers of Interstate Telecommunications

1. Background

267. Section 254(d) provides that "[e]very telecommunications carrier that provides interstate telecommunications services" must contribute to universal service.[785] Section 254(d) also states that "[a]ny other provider of interstate telecommunications may be required to contribute if the public interest so requires."[786] Under the Act, "telecommunications" are defined as the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received."[787] An "interstate" transmission generally is defined as a transmission that originates in one state, territory, or possession and terminates in another state, territory, or possession.[788] In the *Order*, the Commission found that the phrase "other providers of interstate telecommunications" refers to entities that provide interstate telecommunications on a non-common carrier basis.[789] "Other providers of interstate telecommunications" compete with telecommunications carriers, and the Commission did not want contribution obligations to influence a business's decision to sell telecommunications to others on a common carrier or private contractual basis. The Commission, therefore, found that the public interest requires private service providers that provide interstate telecommunications to others for a fee on a non-common carrier basis to contribute to universal service.[790] The Commission found, however, that entities providing direct broadcast satellite (DBS) services, open video services (OVS), and cable leased access would not be required to contribute on the basis of revenues derived from those services.[791]

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[784] *See* 47 U.S.C. § 153(22).

[785] 47 U.S.C. § 254(d).

[786] 47 U.S.C. § 254(d).

[787] 47 U.S.C. § 153(43).

[788] 47 U.S.C. § 153(22).

[789] *Order*, 12 FCC Rcd at 9182.

[790] *Order*, 12 FCC Rcd at 9182.

[791] *Order*, 12 FCC Rcd at 9176.