2. Pleadings

268. Several petitioners contend that non-common carriers should not be required to contribute to universal service.[792]

269. *Systems Integrators*. Several systems integrators[793] assert that the public interest would not be served by requiring them to contribute to universal service because the costs associated with requiring these entities to contribute outweigh any benefits.[794] Ad Hoc asserts that the administrative costs incurred by systems integrators to develop accounting systems to comply with universal service reporting requirements will exceed the amount that systems integrators will contribute to universal service. In view of these costs, Ad Hoc maintains that the public interest will not be served by requiring systems integrators to contribute.[795] Ad Hoc also argues that systems integrators do not provide interstate telecommunications on a stand-alone basis and, instead, charge a single monthly fee for a package of services.[796] IBM contends that total end-user telecommunications revenues of all systems integrators will not significantly expand the total funding base and, thus, the inclusion of systems integrators in the pool of contributors will not add significant additional revenues to the funding base.[797]

270. IBM asserts that it would be consistent with the Commission's goal of competitive neutrality to exempt systems integrators from contribution requirements because such firms do not compete with common carriers or other carriers for the same customers. IBM claims that systems integrators provide service to a different market in which telecommunications are not the primary focus.[798] Consequently, IBM states that the Commission's rationale for requiring non-common carriers to contribute does not apply to

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[792] *See, e.g.*, Ad Hoc petition at 12-13; ITAA petition at 5-7; EDS reply at 8; IBM reply at 3-4; AAPTS informal comments.

[793] Systems integrators provide integrated packages of services and products that may include the provision of computer capabilities, interstate telecommunications services, remote data processing services, back-office data processing, management of customer relationships with underlying carriers and vendors, provision of telecommunications and computer equipment, equipment maintenance, help desk functions, and other services and products. Ad Hoc petition at 11-12. Systems integrators are non-facilities-based, non-common carriers.

[794] *See* Ad Hoc petition at 12-13; ITAA petition at 5-7; EDS reply at 8; IBM reply at 3-4.

[795] Ad Hoc petition at 12.

[796] Ad Hoc petition at 12.

[797] IBM opposition at 12-13.

[798] IBM comments at 3-4.

systems integrators.[799] Ad Hoc contends that, contrary to the Commission's stated intention, contribution requirements will influence business decisions and may prompt systems integrators to discontinue the provision of interstate telecommunications.[800]

271. Systems integrators also contend that the contribution assessment mechanism is not competitively neutral as applied to systems integrators. Ad Hoc alleges that the assessment mechanism is not competitively neutral because systems integrators face a double-counting problem. Ad Hoc states that, because systems integrators cannot determine the precise amount of service that they utilize internally and the amount of service that they resell, underlying carriers will charge these companies "end-user" rates for services that are actually resold.[801] Ad Hoc claims that, for those resold services that are mistakenly billed as end-user services, systems integrators will pay universal service contributions twice; once through their own direct contributions and once through rates that include the underlying carriers' universal service contribution. ITAA adds that many wholesale carriers may not know that private service providers contribute to the support mechanisms and thus may charge them "end-user" rather than "reseller" rates for all of their services.[802] Furthermore, IBM notes that, prior to the adoption of the *Order*, many systems integrators entered into multi-year contracts with common carriers and that the carriers' universal service costs are reflected in the terms of those contracts. IBM maintains that, unless common carriers reduce their rates to take into account systems integrators' contributions to universal service, the assessment mechanism is not competitively neutral because systems integrators will contribute twice to universal service.[803] IBM avers that parties may not be able to renegotiate their contracts for several years, thus perpetuating the double payment problem.[804] For these reasons, systems integrators claim that they should not be required to contribute to universal service.[805]

272. Ad Hoc contends that Congress did not intend non-common carriers, including systems integrators, to contribute to universal service unless private telecommunications

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[799] IBM comments at 3-4.

[800] Ad Hoc petition at 14-15. *See also* IBM comments at 14-15.

[801] Ad Hoc petition at 15-16. *See also* IBM comments at 6; EDS reply at 8.

[802] ITAA petition at 8.

[803] IBM comments at 4-5. *See also* EDS reply 6-7.

[804] IBM comments at 8-9.

[805] *See* Ad Hoc petition at 12-13; ITAA petition at 5-7; IBM reply at 3-4.

services become a significant means of bypassing the public switched telephone network.[806] Ad Hoc further contends that the Commission made no finding that private networks are a significant means of bypassing the public switched telephone network and therefore erred in finding that the public interest requires private service providers that serve others for a fee to contribute to universal service.[807]

273. In addition, ITAA contends that systems integrators should not be required to contribute to universal service because they are information service providers.[808] ITAA states that, pursuant to long-standing Commission precedent, if a service provider offers an enhanced service "in conjunction with" a basic service, the entire service offering is deemed to be an enhanced service. Thus, ITAA concludes that a systems integrator would only be required to contribute to universal service if it provides a free-standing telecommunications service.

274. In response to these arguments, Bell Atlantic asserts that systems integrators do compete with common carriers and cautions that exempting them would skew the competitive marketplace.[809]

275. *Broadcasters.* On September 2, 1997, the Association of America's Public Television Stations and the Public Broadcasting Service (AAPTS)[810] asked the Commission to clarify the contribution obligations of broadcasters, including Instructional Television Fixed Service (ITFS) licensees. AAPTS urges the Commission to clarify that broadcasters that lease excess capacity to others for a fee are not "providers of interstate telecommunications" that are required to contribute to universal service. Alternatively, AAPTS contends that public broadcasters and ITFS licensees should be exempt from or receive a waiver of the contribution requirement. AAPTS states that educational, non-profit broadcasters sometimes lease excess transmission capacity to third parties to transmit educational programming, radio reading services for the visually impaired, and informational programming guides for television viewers.[811] AAPTS asserts that public broadcasters and ITFS licensees are engaged

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[806] Ad Hoc petition at 17-18, citing Report of the Senate Committee on Commerce, Science, and Transportation on the *Telecommunications Competition and Deregulation Act of 1995*, S.Rep.No. 104-23, 104th Cong., 1st Sess. (March 30, 1995) at 28.

[807] Ad Hoc petition at 17-18.

[808] ITAA petition at 5 n. 9.

[809] Bell Atlantic comments at 8-9. *See also* AT&T comments at 22.

[810] America's Public Television Stations and the Public Broadcasting Service Petition for Clarification and Exception or Waiver, filed Sept. 2, 1997 (AAPTS informal comments).

[811] AAPTS informal comments at 3.

primarily in educational activities, rather than in providing telecommunications services, and should not be required to contribute to universal service. AAPTS also contends that such a requirement would undermine non-profit broadcasters' ability to fulfill their primary educational purposes.[812] No parties responded to AAPTS petition.

3. Discussion

276. We affirm our decision that private service providers that provide interstate telecommunications on a non-common carrier basis must contribute to universal service, pursuant to our permissive authority over "providers of interstate telecommunications." In the *Order*, we found that the public interest requires private service providers that furnish interstate telecommunications to others for a fee to contribute to universal service on the same basis as common carriers. We concluded that this approach (1) was consistent with the principle of competitive neutrality because it will reduce the possibility that carriers with universal service obligations will be placed at an unfair competitive disadvantage in relation to carriers that do not have such obligations; (2) will avoid creating a disincentive for carriers to offer services on a common carrier basis; and (3) will broaden the funding base, thereby lessening contribution requirements of any particular class of telecommunications providers.[813] We affirm each of these findings.

277. Contrary to petitioners' arguments, we conclude that the Commission was not required to find that private networks constitute a significant means of bypassing the public switched telephone network before exercising our permissive authority to apply the universal service contribution requirements to non-common carriers.[814] Section 254(d) grants the Commission explicit and unambiguous authority to require "other providers of interstate telecommunications" to contribute to universal service if the public interest so requires. On this issue, the Joint Explanatory Statement merely states that this section "preserves the Commission's authority to require all providers of interstate telecommunications to contribute, if the public interest requires it to preserve and advance universal service."[815] There is no mention of a network bypass requirement in either the Act or the Joint Explanatory Statement. Thus, we find that the plain language of section 254(d) allows the Commission to require non-common carriers to contribute if the Commission concludes that doing so serves the public interest and furthers the goals of universal service. We conclude, however, for the reasons discussed below that we should not exercise our permissive authority to require

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[812] AAPTS informal comments at 7-12.

[813] *Order*, 12 FCC Rcd at 9183-9184.

[814] *See* Ad Hoc petition at 17-18.

[815] Joint Explanatory Statement at 131.

systems integrators, broadcasters, and non-profit schools, universities, libraries, and rural health care providers to contribute to universal service.

278. *Systems Integrators.* We are persuaded by systems integrators' arguments that the public interest would not be served if we were to exercise our permissive authority to require entities that do not provide services over their own facilities[816] and are non-common carriers that obtain a *de minimis* amount of their revenues from the resale of telecommunications to contribute to universal service. Systems integrators provide integrated packages of services and products that may include, for example, the provision of computer capabilities, data processing, and telecommunications.[817] Systems integrators purchase telecommunications from telecommunications carriers and resell those services to their customers. They do not purchase unbundled network elements from telecommunications carriers and do not own any physical components of the telecommunications networks that are used to transmit systems integration customers' information. In other words, systems integrators provide telecommunications solely through reselling another carrier's service. We conclude that systems integrators that satisfy these criteria, as discussed below, should not be required to contribute to the federal universal service support mechanisms.

279. In our view, systems integrators that obtain a *de minimis* amount of their revenues from the resale of telecommunications do not significantly compete with common carriers that are required to contribute to universal service. Systems integrators are in the business of integrating customers' computer and other informational systems, not providing telecommunications. Occasionally, systems integrators may provide interstate telecommunications along with their traditional integration services, but the provision of telecommunications is incidental to their core business. Systems integration customers who receive telecommunications from systems integrators choose systems integrators for their systems integration expertise, not for their competitive provision of telecommunications.

280. In determining what constitutes a *de minimis* amount of revenues, we could compare the amount of revenues derived from telecommunications to overall business revenues,[818] revenues derived from systems integration,[819] or revenues derived from systems

[816] We interpret the phrase "own facilities" to mean exclusive use of any physical components of the telecommunications network that are used to transmit systems integration customers' information for a period of time. *See Order*, 12 FCC Rcd at 8861-8866.

[817] *See* Ad Hoc petition at 11-12.

[818] *See* Letter from Randolph J. May, EDS, to Magalie Roman Salas, FCC, dated December 18, 1997; Letter from Steven W. Stewart, IBM, to Magalie Roman Salas, FCC dated December 18, 1997.

integration contracts that also contain telecommunications.[820] We conclude that the second approach, telecommunications revenues relative to systems integration revenues, is the best method to determine whether systems integrators derive a *de minimis* amount of revenues from telecommunications. Overall business revenues are irrelevant to the determination of whether telecommunications revenues constitute a small part of the systems integration business. Similarly, evaluating only systems integration contracts that contain telecommunications will not provide an accurate account of the systems integration business as a whole. IBM and EDS suggest that *de minimis* should be defined as revenues that are less than five percent of systems integration revenues.[821] Based on this record, we conclude that systems integrators' telecommunications revenues will be considered *de minimis* if they constitute less than five percent of revenues derived from providing systems integration services. A systems integrator would not be required to file a Universal Service Worksheet if, over the requisite reporting period, its total revenues derived from telecommunications represent less than five percent of its total revenues derived from systems integration. Systems integrators that derive more than a *de minimis* amount of revenues from telecommunications will be required to contribute to the federal universal service support mechanisms and comply with universal service reporting requirements. We conclude that the limited nature of this exclusion from the obligation to contribute will ensure that systems integrators that are significantly engaged in the provision of telecommunications do not receive an unfair competitive advantage over common carriers or other carriers that are required to contribute to universal service.

281. To maintain the sufficiency of the support mechanisms, we find that systems integrators that are excluded from contribution requirements constitute end users for universal service contribution purposes.[822] In addition, systems integrators that obtain a *de minimis* amount of their revenues from the resale of telecommunications must notify the underlying facilities-based carriers from which they purchase telecommunications that they are excluded

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[819] IBM states that telecommunications revenues represent less than five percent of its systems integration revenues. Letter from Steven W. Stewart, IBM, to Magalie Roman Salas, FCC dated December 18, 1997. EDS states that telecommunications revenues represent less than five percent of its systems integration revenues. Letter from Randolph J. May, EDS, to Magalie Roman Salas, FCC, dated December 18, 1997.

[820] Letter from Randolph J. May, EDS, to Magalie Roman Salas, FCC, dated December 18, 1997.

[821] *See* Letter from Steven W. Stewart, IBM, to Magalie Roman Salas, FCC dated December 18, 1997. Letter from Randolph J. May, EDS, to Magalie Roman Salas, FCC, dated December 18, 1997.

[822] Where systems integrators are treated as end users, those systems integrators will not be required to contribute to universal service based on revenues derived from the provision of interstate telecommunications to others. Revenues derived from the provision of telecommunications to systems integrators should be included in lines 34-47, where appropriate, of the Universal Service Worksheet by carriers providing telecommunications to systems integrators.

from the universal service contribution requirements. We conclude that excluding systems integrators that obtain a *de minimis* amount of their revenues from the resale of telecommunications from the obligation to contribute will not significantly reduce the universal service contribution base because revenues received by common carriers for minimal amounts of telecommunications provided to systems integrators will be included in the contribution bases of underlying common carriers. We anticipate that, by providing this exclusion from the obligation to contribute, the total contribution base will be reduced only by systems integrators' mark-up on telecommunications.

282. We disagree with ITAA's contention that, because systems integrators provide both basic telecommunications services as well as enhanced services for a single price, systems integrators are engaged exclusively in the provision of enhanced or information services.[823] Traditionally, the Commission has not regulated value-added networks (VANs)[824] because VANs provide enhanced services. VAN offerings are treated as enhanced services because the enhanced component of the offering, i.e., the protocol conversions, "contaminates" the basic component of the offering, thus rendering the entire offering enhanced.[825] Citing the Commission's position that all enhanced services are information services,[826] ITAA argues that, because systems integrators offer information and telecommunications services for a single price, the information services "taint" the telecommunications services, thereby rendering the entire package an information service for purposes of applying the universal service contribution requirements. The Commission's treatment of VANs, however, does not imply that combining an enhanced service with a basic service for a single price constitutes a single enhanced offering.[827] The issue is whether, functionally, the consumer is receiving two

[823] Enhanced services are "services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

[824] VANs provide services that combine protocol processing with basic transmission services. Basic services are regulated by the Commission and can be characterized as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *See* Amendment to Sections 64.702 of the Commission's Rules and Regulations, *Report and Order*, 2 FCC Rcd 3072, 3074 (1987).

[825] *See* Amendment to Sections 64.702 of the Commission's Rules and Regulations, *Report and Order*, 2 FCC Rcd 3072, 3075 (1987).

[826] *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, *First Report and Order & Further Notice*, 11 FCC Rcd 21905 (1996).

[827] For example, if a reseller offers basic voice-grade telephone service with Internet service for one flat monthly fee, the fact that the reseller provides an enhanced service with a basic service for a single price does not render the basic voice service an enhanced service. In that instance, the enhanced service is not combined

separate and distinct services. A contrary interpretation would create incentives for carriers to offer telecommunications and non-telecommunications for a single price solely for the purpose of avoiding universal service contributions. Thus, a private service provider that provides information services along with a basic interstate voice-grade telecommunications service is not relieved of its statutory obligation to contribute to universal service. To the extent that a provider is offering basic voice-grade interstate telephone service and is not otherwise exempt, it is required to contribute to universal service.[828]

283. *Broadcasters.* The deadline for filing petitions for reconsideration in a notice and comment rulemaking proceeding are prescribed in section 405 of the Communications Act of 1934, as amended.[829] The Commission lacks discretion to waive this statutory requirement.[830] The filing deadline for petitions for reconsideration of the *Order* was July 17, 1997. Therefore, to the extent that AAPTS' petition, filed September 2, 1997, seeks reconsideration of the *Order*, we will treat it as an informal comment.[831] We agree with AAPTS and reconsider, on our own motion, our determination that all providers of interstate telecommunications must contribute to universal service.[832] For the reasons described below, we find that the public interest would not be served if we were to exercise our permissive authority to require broadcasters, including ITFS licensees, that engage in non-common carrier interstate telecommunications to contribute to universal service.[833] In the *Order*, we found that, in order to ensure that our contribution rules do not confer a competitive advantage to non-common carriers, non-common carriers should contribute to universal service pursuant to our permissive authority over "other providers of interstate telecommunications." On further

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with the basic service into a single enhanced offering because, functionally, the consumer is receiving two separate and distinct services, voice-grade telephone service and Internet service.

[828] *See Recommended Decision* at para. 790. We base this decision pursuant to conclusions set forth in the May 8 *Order*. We will be reexamining those underlying conclusions pursuant to our Report to Congress.

[829] *See* 47 U.S.C. § 405(a).

[830] *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).

[831] 47 U.S.C. § 154(j).

[832] In light of pending petitions for reconsideration in this proceeding, the Commission retains jurisdiction to reconsider its own rules on its own motion. *See* 47 U.S.C. § 405, 47 C.F.R. § 1.108, and *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48, note 51 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

[833] Broadcasters that provide interstate telecommunications to others will be treated as end users and will not be required to contribute to universal service based on those revenues. Revenues derived from the provision of telecommunications to broadcasters should be included in lines 34-47, where appropriate, of the Universal Service Worksheet by carriers providing telecommunications to broadcasters.

reconsideration, however, we agree with AAPTS that broadcasters do not compete to any meaningful degree with common carriers that are required to contribute to universal service because broadcasters primarily transmit video programming, a service that is not generally provided by common carriers. Moreover, we conclude that broadcasters' primary competitors for programming distribution are cable, OVS, and DBS providers. Because cable, OVS, and DBS providers are not required to contribute to universal service,[834] the exclusion from the obligation to contribute for broadcasters will ensure that broadcasters are not competitively disadvantaged in the video distribution industry by our contribution requirements. As broadcasters begin to offer digital television, however, they may choose to provide interstate telecommunications that are not used to distribute video programming. We will, therefore, monitor broadcasters' provision of interstate telecommunications on a non-common carrier basis. If we determine that broadcasters compete with common carriers that are required to contribute to universal service, we will revisit our exclusion of broadcasters from the contribution requirements.

284. *Non-profit Schools, Colleges, Universities, Libraries, and Health Care Providers.* We also find, on our own motion, that non-profit schools, colleges, universities, libraries, and health care providers should be not be made subject to universal service contribution requirements. To the extent these non-profit entities provide interstate telecommunications on a non-common carrier basis, our rules require them to contribute to universal service, pursuant to our permissive authority over "other providers of interstate telecommunications."[835] We conclude, however, that the public interest would not be served if we were to exercise our permissive authority to require these entities to contribute to universal service. Many of these entities will be eligible to receive support pursuant to sections 54.501(b), (c), and (d) and 54.601(a) and (b). We conclude that it would be counter-productive to the goals of universal service to require non-common carrier program recipients of support to contribute to universal service support because such action effectively would reduce the amount of universal service support they receive. In addition, we find that it would be inconsistent with the educational goals of the universal service support mechanisms to require colleges and universities to contribute to universal service. To maintain the sufficiency of the federal support mechanisms, we have determined to treat non-profit schools, colleges, universities, libraries, and health care providers as telecommunications end users for universal service contribution purposes.[836]

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[834] 47 C.F.R. § 54.703.

[835] *Order*, 12 FCC Rcd at 9183-9184.

[836] Where eligible schools, libraries, and health care providers are treated as end users, those entities will not be required to contribute to universal service based on revenues derived from the provision of interstate telecommunications to others. Revenues derived from the provision of telecommunications to eligible schools, libraries, and health care providers should be included in lines 34-47, where appropriate, of the Universal Service Worksheet by carriers providing telecommunications to such entities.

C. Providers of Bare Transponder Capacity

1. Background

285. Section 254(d) allows the Commission to require "other providers of interstate telecommunications" to contribute to universal service if the public interest so requires.[837] In the *Order*, the Commission found that the public interest requires "other providers of interstate telecommunications," which include entities that provide interstate telecommunications on a non-common carrier basis, to contribute to universal service because "other providers of interstate telecommunications" compete with telecommunications carriers that must contribute to universal service.[838]

2. Pleadings

286. Several commenters request that the Commission clarify that satellite providers are not required to contribute to universal service on the basis of revenues derived from the lease of bare transponder capacity.[839] AT&T, however, asserts that, because satellite providers can offer bare transponder capacity pursuant to tariffs, leasing bare transponder capacity constitutes the provision of telecommunications. AT&T, therefore, argues that leasing bare transponder capacity should be subject to the universal service contribution requirements.[840]

287. GE Americom urges the Commission to find that satellite providers must contribute to universal service only to the extent that they provide interstate telecommunications on a common carrier basis.[841] To support its assertion, GE Americom points out that the Commission stated in the *Order* that ". . . satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services."[842] Several commenters argue that a contrary finding would be inequitable because leasing bare transponder capacity does not directly involve the

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[837] 47 U.S.C. § 254(d).

[838] *Order*, 12 FCC Rcd at 9183.

[839] *See, e.g.*, Columbia petition at 5-6; GE Americom petition at 3, 9-12; Loral comments at 2-3, 9; PanAmSat comments at 3-4; Vyvx reply at 3-4.

[840] AT&T comments at 23. *See also* Bell Atlantic comments at 8-9.

[841] GE Americom petition at 6-7. *See also* Vyvx reply at 3-4.

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

public switched telephone network.[843] PanAmSat contends that requiring contribution by bare transponder providers is inequitable because such providers would be ineligible to receive universal service support.[844]

3. Discussion

288. We affirm the Commission's finding that satellite providers that provide interstate telecommunications services or interstate telecommunications to others for a fee must contribute to universal service. We conclude that GE Americom's assertion that the Commission found that satellite and video service providers need only contribute to universal service if they are operating as common carriers misconstrues that passage of the *Order*. As discussed in the *Order*, the sentence in section 254(d) that requires all telecommunications carriers to contribute to universal service applies only to common carriers. Thus, the Commission concluded that only common carriers fall within the category of mandatory contributors. Accordingly, satellite operators that provide transmission services on a common carrier basis are mandatory contributors to the universal service support mechanisms. Pursuant to section 254(d), the Commission also exercised its permissive authority to impose contribution obligations on other providers of interstate telecommunications. The Commission's statement that satellite providers must contribute to universal service only to the extent that they are providing interstate telecommunications services described satellite providers' mandatory contribution obligation as set forth in section 254(d).[845] The Commission further concluded that satellite providers that provide interstate telecommunications on a non-common carrier basis must contribute to universal service as "other providers of interstate telecommunications" under section 254(d). The obligation of satellite providers to contribute to universal service as mandatory contributors does not relieve them of their obligation to contribute as other providers of interstate telecommunications. Therefore, if a satellite provider offers interstate telecommunications on a common carrier or non-common carrier basis, it must contribute to universal service, unless otherwise excluded.

289. We are not persuaded by petitioners' assertions that satellite providers that are ineligible to receive universal service support should not be required to contribute to universal service. As discussed in the *Order*, section 254 does not limit contributions to eligible telecommunications carriers.[846] Section 254(b)(4) provides that the Commission should be guided by the principle that "all providers of telecommunications services" should contribute

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[843] Columbia petition at 5-6; GE Americom petition at 6; Loral comments at 4-5; PanAmSat comments at 2.

[844] PanAmSat comments at 3.

[845] *See Order*, 12 FCC Rcd at 9176.

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

to universal service. Because not all providers of telecommunications services may be eligible to receive universal service support, we believe that the plain text of the statute contemplates that the universe of contributors will not necessarily be identical to the universe of potential recipients.

290. Several parties ask us to clarify that satellite providers do not transmit information to the extent that they merely lease bare transponder capacity to others. According to PanAmSat,

> [w]hen a satellite operator enters into a bare transponder agreement with a customer, the satellite operator is merely providing its customer with the exclusive right to transmit to a *specified piece of hardware on the satellite*. That, essentially, is the extent of the operator's obligation.[847]

Based on the descriptions by PanAmSat and other commenters of the very limited activity that satellite providers engage in when they lease bare transponder capacity, it appears that, for purposes of the contribution requirements under section 254 of the Act, satellite providers do not transmit information when they lease bare transponder capacity. Satellite providers, therefore, are not required to contribute to universal service on the basis of revenues derived from the lease of bare transponder capacity. We emphasize that this conclusion is premised on the accuracy of the uncontested representations by satellite providers of what is involved in the lease of bare transponder capacity. We might reconsider our determination if presented with different factual evidence. Satellite providers must, however, contribute to universal service to the extent they provide interstate telecommunications services and interstate telecommunications.

291. We are not persuaded by AT&T's assertion that, because the lease of bare transponder capacity may be provided pursuant to tariff, it necessarily constitutes the provision of telecommunications. Because the definition of "telecommunications" was added to the Act in 1996, the fact that bare transponder capacity may be provided or was provided pursuant to tariff is not dispositive.

D. Universal Service Report to Congress

[847] PanAmSat comments at 4. PanAmSat further notes that the party leasing bare transponder capacity (or its customer) is required by Commission rules to obtain a separate earth station license to transmit to the satellite. *Id. See also* GE Americom petition at 10 ("satellite companies [that lease bare transponder capacity] . . . make available and maintain the network component consisting of a repeater at the spacecraft. . . . The space segment user must configure and manage the transmission path for itself"); Loral comments at 6; Columbia reply at 1-2; Vyvx reply at 2 ("Vyvx or its affiliates engage in various non-telecommunications activity, including the provision of customer premises equipment, switches, and most relevant here, bare satellite space segment or earth stations. In each case, the customer uses these network elements, generally along with others obtained elsewhere, to design and operate a transmission path").

292. Congress has instructed the Commission to review our decisions regarding who is required to contribute to the federal universal service support mechanisms and to submit our findings to Congress.[848] Consistent with the statutory deadline, the Commission will submit such a report to Congress by April 10, 1998.

E. *De Minimis* Exemption

1. Background

293. Section 254(d) states that the "Commission may exempt a carrier or class of carriers from this [contribution] requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution ... would be *de minimis*."[849] Based on language in the Joint Explanatory Statement, the Commission found that the *de minimis* exemption should only exempt contributors whose contributions are less than the Administrator's administrative costs of collection.[850] The Commission found that, if a contributor's annual contribution would be less than $100.00, it is not required to contribute to universal service or comply with Commission Worksheet filing requirements.[851] Contributors that do not qualify for the *de minimis* exemption must file a semi-annual Universal Service Worksheet.[852]

2. Pleadings

294. Several petitioners seek reconsideration of the Commission's interpretation of the *de minimis* exemption. Ad Hoc petitions the Commission to include a contributor's costs of complying with contribution reporting requirements when setting the *de minimis* threshold.[853] Ad Hoc asserts that, because some contributors do not provide interstate telecommunications on a stand-alone basis and charge a single monthly fee for a package of

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[848] Pub. L. 105-119, 111 Stat. 2440 (approved November 26, 1997).

[849] 47 U.S.C. § 254(d).

[850] *Order*, 12 FCC Rcd at 9187. Specifically, the Joint Explanatory Statement provides that "this [*de minimis*] authority would only be used in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make under the formula for contributions selected by the Commission." Joint Explanatory Statement at 131 (1996).

[851] *Order*, 12 FCC Rcd at 9187.

[852] 47 C.F.R. § 54.711.

[853] Ad Hoc petition at 13-14. *See also* ITAA petition at 6-7. ITAA alleges that all private service providers will incur significant costs to create new accounting systems to comply with reporting requirements.

services, it can be costly and administratively difficult to separate interstate and intrastate end-user telecommunications revenues by the category breakdowns that are required by the Worksheet.[854] Ad Hoc states that the *de minimis* exemption should encompass a contributor whose contribution would be less than the combined administrative expenses of the Administrator and the contributor, including costs of separating and identifying revenues in accordance with the Worksheet. ITAA adds that the Administrator's administrative costs of collecting contributions should be higher than $100.00 because the Administrator will have to expend significant funds to identify private service providers.[855] Ozark contends that all carriers that are not "eligible telecommunications carriers" should be eligible for the *de minimis* exemption.[856]

3. Discussion

295. Based on petitioners' arguments, we reconsider our previous determination and conclude that the *de minimis* exemption should be based on the Administrator's costs of collecting contributions and contributors' costs of complying with the reporting requirements. In reaching its finding that the *de minimis* exemption should only exempt contributors whose contributions would be less than the Administrator's administrative costs of collection,[857] the Commission looked to the Joint Explanatory Statement for guidance. Specifically, the Joint Explanatory Statement observes that "this [*de minimis*] authority would only be used in cases where the administrative cost of *collecting* contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make under the formula for contributions selected by the Commission."[858] In the *Order*, the Commission found that this statement indicated that the Commission should look only to the Administrator's costs of *collecting* contributions and not the carrier's cost of determining contribution obligations. We find, however, that "the administrative cost of collecting contributions" can include both the Administrator's as well as contributors' administrative costs. We agree with Ad Hoc that the public interest would not be served if compliance costs associated with contributing to universal service were to exceed actual contribution amounts. We decline to exclude from the contribution requirement all entities that claim compliance costs in excess of their contribution amounts, however, based on our concern that such a rule may encourage contributors to report artificially high administrative compliance costs in order to avoid their contribution obligation. Rather, we adopt a substantially increased *de minimis* threshold that takes into account

[854] Ad Hoc petition at 12.

[855] ITAA petition at 7.

[856] Ozark petition at 5.

[857] *Order*, 12 FCC Rcd at 9187.

[858] *Order*, 12 FCC Rcd at 9187, *quoting* Joint Explanatory Statement at 131 (1996) (emphasis added).

contributors' compliance costs in addition to the Administrators' administrative costs of collection based on our view that this increased threshold will accommodate a reasonable level of reporting compliance costs for all contributors.

296. We also agree with ITAA that the contribution collection costs incurred by the Administrator in many cases will exceed $100 per contributor. We find that in determining the Administrator's administrative costs, we should include the costs associated with identifying contributors, processing and collecting contributions, and providing guidance on how to complete the Universal Service Worksheet.

297. Therefore, we conclude that the *de minimis* contribution threshold should be raised to $10,000. If a contributor's annual contribution would be less than $10,000, it will not be required to contribute to universal service. We find that this exclusion will reduce significantly the Administrator's collection costs. Based on Universal Service Worksheets, we estimate that approximately 1,600 entities will qualify for the *de minimis* exemption. Therefore, the Administrator will have to collect and process 1,600 fewer Worksheets and will have to identify and collect contributions from 1,600 fewer entities. Additionally, by exempting entities whose annual contributions would be less than $10,000 from contribution and Worksheet reporting requirements, we anticipate that we will reduce reporting burdens on many small entities.

298. To maintain the sufficiency of the universal service support mechanisms, we conclude that entities that qualify for the *de minimis* exemption should be considered end users for Universal Service Worksheet reporting purposes. Entities that resell telecommunications and qualify for the *de minimis* exemption must notify the underlying facilities-based carriers from which they purchase telecommunications that they are exempt from contribution requirements and must be considered end users for universal service contribution purposes. Thus, underlying carriers should include revenues derived from providing telecommunications to entities qualifying for the *de minimis* exemption in lines 34-47, where appropriate, of their Universal Service Worksheets.

F. Requirement that CMRS Providers Contribute to State Universal Service Support Mechanisms

1. Background

299. In 1993, Congress amended the Communications Act to include section 332. Section 332(c)(3)(A) of the Act provides that:

> . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or private mobile service, except that this paragraph shall not prohibit a State from regulating the

> other terms and conditions of commercial mobile services. Nothing in this paragraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates.[859]

Subsequently, in 1996, Congress enacted a new section 254. Section 254(f) of the Act provides that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."[860] In earlier stages of this proceeding, several commenters argued that the second sentence of section 332(c)(3)(A) prohibits states from requiring CMRS providers operating within a state to contribute to state universal service support programs unless the CMRS provider's service is a substitute for land line service in a substantial portion of the state.[861] In the *Order*, the Commission agreed with the Joint Board that section 332(c)(3)(A) "does not preclude states from requiring CMRS providers to contribute to state support mechanisms."[862] The Commission also noted that, although the California PUC has required CMRS providers to contribute to the California state universal service mechanisms, a Connecticut state court ruled that section 332(c)(3) prohibits Connecticut from assessing contributions against CMRS providers for Connecticut's universal service programs.[863] The Commission rejected the argument that interpreting section 332(c)(3)(A) and section 254(f) violates the notice and comment requirements of the Administrative Procedure Act (APA), noting that an exception to the notice requirement exists for interpretive rules and general statements of policy.[864]

2. Pleadings

300. Several CMRS providers have requested that the Commission reconsider its

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[859] 47 U.S.C. § 332(c)(3)(A).

[860] 47 U.S.C. § 254(f).

[861] *See Order*, 12 FCC Rcd at 9590.

[862] *Order*, 12 FCC Rcd at 9181.

[863] *Id.*, *comparing* California PUC, Decision 94-09-065, 56 CPUC2d 290 *with Metro Mobile CTS v. Connecticut Dept. of Public Utility Control*, No. CV-95-05512758 (Conn. Super. Ct., Judicial Dist. of Hartford-New Britain, Dec. 9, 1996).

[864] *Order*, 12 FCC Rcd at 9182, *citing* 5 U.S.C. § 553(b)(3)(A).

conclusion that section 332(c)(3)(A) does not preclude states from requiring CMRS providers to contribute to state universal service support mechanisms. They argue that, except when a CMRS provider's service is a substitute for land line service in a substantial portion of the state, section 332(c)(3)(A) prohibits states from requiring providers of commercial mobile services to contribute to state support mechanisms.[865] These petitioners also argue that the *Order* conflicts with Congress's express purpose in adopting the 1993 amendments to section 332, which was to provide that CMRS offerings are to be considered exclusively interstate for purposes of government regulation.[866] According to AirTouch, section 254(f)'s command that "every telecommunications provider that provides intrastate telecommunications services . . . contribute" to state universal service mechanisms should not apply to CMRS providers.[867] Commenters also assert that the specific provisions of section 332(c)(3)(A) cannot be superseded by section 254(f)'s general grant of authority to the states.[868] ProNet argues that paging carriers should be exempt from state universal service fund contributions because paging services are not substitutes for land line exchange services. ProNet also argues that, because there was no notice that issues regarding state universal service funds would be considered in this proceeding, the Commission's decision on this issue violated the notice and comment requirements of the APA.[869] Some petitioners further request that, if the Commission affirms its decision, it ensure that state universal service requirements are consistent with federal policy, *i.e.*, that they do not amount to rate regulation or become effective barriers to entry, and that the Commission establish a framework that would prevent duplicative contributions.[870]

3. Discussion

301. The Commission recently addressed, in *Pittencrieff Communications, Inc.*,[871] the

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[865] *See* AirTouch petition at 13; CTIA petition at 9; Comcast Cellular/Vanguard Cellular joint petition at 2-9; Nextel petition at 5-12; ProNet petition at 9-13. *See also* 360° Communications comments at 2-7; PCIA comments at 3-10; AMSC comments at 3-4.

[866] *See, e.g.*, AirTouch petition at 15; Nextel petition at 9; ProNet petition at 11.

[867] *See* AirTouch petition at 15.

[868] *See, e.g.*, AirTouch petition at 15-16; Comcast Cellular/Vanguard Cellular petition at 10-12.

[869] ProNet petition at 12-13.

[870] *See, e.g.*, Nextel petition at 18-20; CTIA petition at 6-10; Comcast Cellular/Vanguard Cellular joint petition at 19-20. *See also* CTIA opposition at 9-12; AMSC comments at 4; GTE comments at 20.

[871] Pittencrieff Communications, Inc., *Memorandum Opinion and Order*, File No. WTB/POL 96-2, FCC 97-343 (rel. October 2, 1997) (*recon. pending*) (*Pittencrieff*). In addition, three parties, Airtouch, CTIA, and Sprint Spectrum, have filed Petitions for Review of *Pittencrieff* with the U.S. Court of Appeals, D.C. Circuit.

issue of whether section 332(c)(3)(A) limits the ability of states to require CMRS providers to contribute to state universal service support mechanisms. The issues raised on reconsideration in this proceeding were resolved in *Pittencrieff*. In *Pittencrieff*, the Commission explicitly affirmed the finding made in the *Order* that section 332(c)(3)(A) does not preclude states from requiring CMRS providers to contribute to state support mechanisms.[872] The Commission concluded that a state's requirement that CMRS providers contribute on an equitable and nondiscriminatory basis to its universal service support mechanisms is neither rate nor entry regulation but instead is a permissible regulation on "other terms and conditions" under section 332(c)(3)(A).[873] The Commission also stated:

> We believe [the second sentence of section 332(c)(3)(A)] applies only to a state's authority to impose requirements that would otherwise constitute regulation of rates or entry. In that situation, a state would have to comply with section 332(c)(3) by showing that CMRS is 'a substitute for land line telephone exchange service for a substantial portion of the communications within such State.' The state is not required to demonstrate that CMRS is a substitute for land line service, however, when it requires a CMRS provider to contribute to the state's universal service mechanisms on an equitable and nondiscriminatory basis, in compliance with section 254(f).[874]

Finally, the Commission noted that, if section 332(c)(3) were interpreted to conflict with section 254(f), section 254(f) would take precedence over section 332(c)(3).[875] Section 254(f), which requires all telecommunications carriers that provide intrastate telecommunications services, including CMRS providers, to contribute to state universal service programs, was enacted later in time and speaks directly to the contribution issue.[876] Reconsideration petitions to this proceeding do not raise issues that were not addressed in *Pittencrieff*. We find that our order in *Pittencrieff* resolves the issues that have been raised by the reconsideration petitions in this proceeding and we find no basis in this record for reaching a different determination.

302. We do not anticipate that state contribution requirements will violate section 253. Section 253(a) prohibits state and local governments from enacting any statute, regulation or legal requirement that prohibits or has the effect of prohibiting the ability of any

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[872] *See also Mountain Solutions, Inc. v. State Corporation Commission of the State of Kansas*, 966 F.Supp. 1043 (D. Kan. 1997) (refuting Connecticut state court decision in the *Metro Mobile* decision) (*Mountain Solutions*). This case is on appeal in the Tenth Circuit.

[873] *Pittencrieff* at paras. 15-22.

[874] *Pittencrieff* at para. 5. *See also Mountain Solutions*, 966 F.Supp. at 1049.

[875] *Pittencrieff* at para. 26.

[876] *Pittencrieff* at para. 26.

entity to provide any interstate or intrastate telecommunications service.[877] Section 253(b), among other things, protects state authority to impose universal service requirements, as long as they are done "on a competitively neutral basis and consistent with section 254 . . . ."[878] Section 254(f) of the Act allows states to adopt universal service regulations "not inconsistent with the Commission's rules . . . ."[879] To demonstrate that state universal service contribution requirements for CMRS providers violate section 253, there must be a showing that the state universal service programs act as a barrier to entry for CMRS providers and are not competitively neutral.

303. We reject the argument that state universal service mechanisms should not apply to CMRS providers because CMRS services should be considered jurisdictionally "interstate." Data submitted to the Commission by CMRS carriers in connection with their TRS reporting for the year 1995 reveal that interstate revenues amounted to only 5.6 percent of total revenues for cellular and personal communications service carriers, and 24 percent of total revenues for paging and other mobile service carriers.[880] Thus, we find that it would be inappropriate to classify all CMRS services as "interstate." CMRS providers that offer intrastate CMRS services cannot shield themselves from state universal service contributions.

304. We also reject ProNet's argument that the Commission's consideration of this issue in the *Order* violates the notice provisions of the APA. The general requirement of notice contained in section 553(b) of the APA does not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice . . . ."[881] Although the courts have recognized that the distinction between those agency rules that are subject to the notice requirement and those that are exempt is not always easy to discern,[882] the relevant law here is clear. As the U.S. Court of Appeals for the D.C. Circuit stated:

> Ultimately, an interpretive statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties, but only

[877] 47 U.S.C. § 253(a).

[878] 47 U.S.C. § 253(b).

[879] 47 U.S.C. § 254(f).

[880] *See Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Industry Analysis Division, Common Carrier Bureau, December 1996.

[881] 5 U.S.C. § 553(b)(A).

[882] *See, e.g., American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("[T]he spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (distinction is "enshrouded in considerable smog").

"'reminds' affected parties of existing duties." A statement seeking to interpret a statutory or regulatory term is, therefore, the quintessential example of an interpretive rule.[883]

At issue here is the correct interpretation of the second sentence of section 332(c)(3)(A) of the Act. The Commission's statement on this issue, as expressed in the *Order*, created neither new rights or new obligations that did not exist before. Therefore, the Commission did not violate the notice provisions of the APA by addressing this issue.

305. ProNet argues that, because the Commission's interpretation of the statute "has immediate, direct impact on universal service contributions at the state level," it cannot be exempt from the APA's notice requirement, and that notice was required because "the Commission's interpretation of Sections 332(c)(3) and 254(f) of the Act operates as an instruction to the states regarding their ability to fund universal services, and creates immediate burdens on CMRS carriers . . . ."[884] We disagree. No burdens on CMRS carriers are created as a result of the Commission's statement on this issue in the *Order*. Individual states must determine whether to exercise their authority under section 254(f) to require universal service contributions from CMRS carriers. Even if our interpretation had a substantial impact, the mere fact that a rule may have a substantial impact, however, "does not transform it into a legislative rule."[885] If not, the exemption for interpretative rules from the APA's notice requirement would have little practical application. We therefore reaffirm our conclusion that the Commission's interpretation of sections 332(c)(3)(A) and 254(f) in the *Order* is exempt from the notice requirement of the APA.

G. Recovery of Universal Service Contributions by CMRS Providers

1. Background

306. In the *Order*, the Commission determined to continue its historical practice of permitting carriers to recover the amount of their contributions to the federal universal service support mechanisms through rates for interstate services only.[886] This determination was based on a desire to ensure the continued affordability of residential dialtone service, to

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[883] *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993), *quoting General Motors Corp. v. Ruckelshaus*, 742 F.2d at 1565. *Accord, National Medical Enterprises, Inc. v. Shalala*, 43 F.3d 691, 697 (D.C. Cir. 1995) ("[I]nterpretive rules are those that merely clarify or explain existing laws or regulations").

[884] ProNet petition at 13 n. 27.

[885] *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984).

[886] *Order*, 12 FCC Rcd at 9198-9199.

promote comity between the federal and state governments in light of the fact that the Joint Board had not reached a recommendation as to whether to include intrastate revenues in the base for the high cost and low income mechanisms, and to "maintain the traditional federal-state partnership."[887] The Commission also noted that limiting the recovery of contributions to revenues from interstate services would "avoid any of the asserted difficulties raised by commenters such as NYNEX that oppose assessing contributions from interstate and intrastate revenues because some carriers may face difficulty recovering contributions based on intrastate revenues."[888]

2. Pleadings

307. In its petition for reconsideration and clarification, CTIA requests that the Commission make clear that CMRS providers will be permitted to recover their universal service contributions through rates on all their services.[889] In a similar vein, Comcast Cellular and Vanguard Cellular jointly argue that, because wide area wireless traffic cannot be easily classified as intrastate or interstate, the Commission should recognize CMRS as a wholly interstate service and treat CMRS revenues and traffic accordingly.[890] CTIA asserts that, because of the mobile nature of most CMRS communications and the technical configuration of many CMRS systems, it is difficult to determine exactly when users are using the systems for interstate telecommunications or intrastate telecommunications.[891] In particular, CTIA argues that CMRS service areas do not correspond with state boundaries, and that conventional assumptions about telecommunications traffic are not applicable to CMRS because CMRS antennas often cover territory in more than one state.[892] CTIA also claims that to the extent that the Commission's decision was based on a desire to avoid the legal and political issues involved in requiring carriers to ask states to alter intrastate rates, this problem does not exist for CMRS providers because states are precluded by section 332(c)(3) from engaging in rate regulation over CMRS services.[893]

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[887] *Order*, 12 FCC Rcd at 9198-9199.

[888] *Order*, 12 FCC Rcd at 9199.

[889] CTIA petition at 10. *Accord*, Arch comments at 4-5. *See also* CTIA petition for expedited consideration 4-5.

[890] Comcast Cellular/Vanguard Cellular joint petition at 10.

[891] CTIA petition at 13-18.

[892] CTIA petition at 13-14.

[893] CTIA petition at 10-11.

308. Arch, a paging carrier, argues that the two reasons given for the Commission's decision -- avoiding increases in charges for basic residential dialtone service and federal/state comity -- afford no basis for "precluding paging carriers from passing through universal service obligations to 'intrastate' service customers."[894] Arch claims that, because paging does not constitute basic residential dialtone service, allowing paging carriers to pass through universal service contributions to all customers will have no impact on rates for basic services. Arch also argues that comity is not a concern because states have no jurisdiction over paging rates.[895] Arch expresses concern that cellular and PCS carriers, which compete with paging carriers but whose customers might more readily be regarded as "interstate" customers, would be given an unfair competitive advantage if paging carriers were not allowed to recover contributions from both interstate and intrastate services.[896]

3. Discussion

309. The Commission permitted contributors to recover contributions to the federal universal service support mechanisms through rates on interstate services, in order to ensure the continued affordability of residential dialtone service and to promote comity between the federal and state governments.[897] We agree with petitioners that these considerations do not apply to CMRS providers. Because section 332(c)(3) of the Act alters the "traditional" federal-state relationship with respect to CMRS by prohibiting states from regulating rates for intrastate commercial mobile services, allowing recovery through rates on intrastate as well as interstate CMRS services would not encroach on state prerogatives. Further, allowing recovery of universal service contributions through rates on all CMRS services will avoid conferring a competitive advantage on CMRS providers that offer more interstate than intrastate services. If CMRS carriers were permitted to recover contributions through their interstate services only, carriers that offer mostly intrastate services would be required to recover a higher percentage of interstate revenues from their customers than carriers that offer mostly interstate services. We therefore will permit CMRS providers to recover their contributions through rates charged for all their services.

H. Technical Corrections Regarding Calculation of Contribution Factors

1. Background

[894] Arch comments at 4-5.

[895] Arch comments at 4.

[896] Arch comments at 6.

[897] *Order*, 12 FCC Rcd at 9198-9199, 9203-9204.

310. In the *NECA Report and Order*, the Commission established an administrative process by which quarterly universal service contribution factors will be calculated.[898] The Commission stated that the Universal Service Administrative Company (USAC) would be responsible for processing Universal Service Worksheets, FCC Form 457s, forms that require contributors to list their end-user telecommunications revenues.[899] The Commission also stated that the USAC, Schools and Libraries Corporation, and Rural Health Care Corporation must submit their projections of demand and administrative expenses for their respective programs to the Commission at least 60 days before the start of each quarter.[900] The Commission further stated that it would publish those projections and the contribution factors in a Public Notice and that USAC could not use those contribution factors to calculate individual contributions until those factors were deemed approved by the Commission.[901] The contribution factors will be deemed approved if the Commission takes no action within 14 days of the publication of the Public Notice announcing the contribution factors.[902] These findings were codified in section 54.709 of the Commission's rules.[903]

2. Discussion

311. Consistent with the Commission's findings in the *NECA Report and Order*, we issue a technical clarification to section 54.709(a) of our rules. We clarify that the Commission, not USAC, shall be responsible for calculating the quarterly universal service contribution factors. We also clarify that, based on Universal Service Worksheets, USAC must submit the total contribution bases, interstate and international and interstate, intrastate, and international end-user telecommunications revenues, to the Commission at least sixty days before the start of each quarter.

I. NECA/USAC Affiliate Transactions Rules

1. Background

312. In the *NECA Report and Order*, the Commission directed NECA to create an independent subsidiary, USAC, to administer temporarily portions of the new federal support

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[898] *NECA Report and Order* at paras. 47-48.

[899] *NECA Report and Order* at para. 43.

[900] *NECA Report and Order* at para. 47.

[901] *NECA Report and Order* at para. 48.

[902] *NECA Report and Order* at para. 48.

[903] 47 C.F.R. § 54.709.

mechanisms.[904] The Commission also stated that transactions between NECA and USAC will be subject to the Commission's affiliate transactions rules.[905] The affiliate transactions rules, established by the Commission in the *Joint Cost Order*,[906] apply to local exchange carriers subject to the Commission's Part 32, Uniform System of Accounts (USOA).[907] The affiliate transactions rules govern how LECs are to value and record transactions with affiliates in their regulated books of account.[908] The affiliate transactions rules contain several types of valuation methods for these transactions.[909] The Commission established the affiliate transactions rules to prevent abuses that may occur when a regulated carrier engages in transactions with its nonregulated affiliates.

2. Discussion

313. NECA is not a local exchange carrier subject to Part 32 and USAC is not a nonregulated affiliate engaged in a competitive business. NECA and USAC, however, must file annual cost accounting manuals with the Commission identifying their administrative costs.[910] We find that it is not practical to require NECA to follow the affiliate transactions rules as they are applied to local exchange carriers subject to Part 32. Because NECA does not provide services pursuant to tariff and does not provide more than 50 percent of its services to third parties, if NECA were subject to the affiliate transactions rules, it would be required to determine the fair market value of the services provided to USAC.[911] We find that the burden of making such a determination outweighs the benefit of imposing this

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[904] *NECA Report and Order* at para. 1.

[905] *NECA Report and Order* at para. 74.

[906] *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *modified on further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[907] 47 C.F.R. Part 32.

[908] 47 C.F.R. § 32.27.

[909] 47 C.F.R. § 32.27. The affiliate transactions rules require that regulated carriers record transactions with affiliates at the tariffed rate, if a tariffed rate exists, or at the prevailing market rate, which applies only if 50 percent of sales are made to unaffiliated entities. If no tariffed rate or prevailing market rate exist, carriers must record transactions based upon which direction the transaction flows. Transactions flowing from the carrier to the affiliate are recorded at the higher of estimated fair market value or cost. Transactions flowing from the affiliate to the carrier are recorded at the lower of estimated fair market value or cost.

[910] *See* 47 C.F.R. §§ 54.701, 69.604(H), 69.603.

[911] 47 C.F.R. § 32.27.

requirement. On our own motion, we clarify that NECA is subject to the affiliate transactions rules only to the extent necessary to ensure that transactions between NECA and USAC are recorded fairly. We conclude that NECA would satisfy this requirement by valuing and recording transactions with USAC at fully distributed cost in accordance with its Cost Accounting and Procedures Manual on file with the Commission. Consistent with this finding, we conclude that section 32.27 of the Commission's rules, to the extent that it requires regulated carriers to record transactions with affiliates at the tariffed rate, if a tariffed rate exists, at the prevailing market rate, if a prevailing market rate exists, or at the higher of estimated fair market value or cost, is not applicable to transactions between NECA and USAC.[912]

VIII. FINAL REGULATORY FLEXIBILITY ANALYSIS

314. As required by the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking and Order Establishing Joint Board*.[913] In addition, the Commission prepared an IRFA in connection with the *Recommended Decision*, seeking written public comment on the proposals in the *NPRM* and *Recommended Decision*.[914] A Final Regulatory Flexibility Analysis (FRFA) was included in the previous *Order*.[915] The Commission's Final Regulatory Flexibility Analysis (FRFA) in this order conforms to the RFA, as amended.[916]

315. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this order, the rules and statements set forth in those preceding sections shall be controlling.

A. Need for and Objectives of this Report and Order and the Rules Adopted Herein.

316. The Commission is required by section 254 of the Act, as amended by the 1996 Act, to promulgate rules to implement promptly the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules whose principle goal is to

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[912] *See* 47 C.F.R. § 32.27.

[913] *NPRM*, 11 FCC Rcd at 18,152-18,153.

[914] 61 Fed. Reg. 63,778, 63,796 (1996).

[915] *Order*, 12 FCC Rcd at 9219-9260.

[916] *See* 5 U.S.C. § 604. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, was amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA).