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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

JAN 26 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Federal State Board on )  
Universal Service: Report to Congress )

CC Docket No. 96-45  
DA 98-2

**COMMENTS OF GTE**

GTE Service Corporation, on behalf of its  
affiliated domestic telephone operating,  
wireless and long distance companies

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## SUMMARY

GTE submits that the Report to Congress should reflect that the Federal plan, as currently defined, will not meet the requirements of the Act inasmuch as (amongst other reasons) the amount of funding is insufficient to address the need for universal service support. Interstate access charges currently generate implicit support flows which must first be made explicit so that the universal service support mechanism becomes both predictable and sufficient.

GTE fully supports the continuing effort to develop a competitive bidding mechanism ("auction") as a means of improving the mechanism for universal service support at both the federal and state levels as well as providing a market test of the "right" level of support. Any mechanism must incorporate the ability for adjustment to reflect not only changes in the definition of universal services but also in the prices, cost levels and technology including the evolution of hybrid offerings. The packaging of services and the corresponding universal service support must be addressed in the context of affordability -- the amount customers are able to pay and are willing to pay to obtain the services they desire.

GTE has never acceded to the Commission's decision to include Internet access and inside wire in the definition of services for which universal service support is available. Contrary to the Commission's erroneous position, the Act expressly limits universal service support to telecommunications services, which do not include Internet access and inside wire. It has been estimated that the provision of these services, alone, would deplete nearly half of the available fund for schools and libraries. GTE does recommend, however, that the Commission should examine its general framework

for classifying services and providers in order to produce consistent treatment for the various entities which interconnect with local carriers' networks.

The Commission should work with the states to develop a Federal universal service fund which is sufficient and which strikes a reasonable balance of the concerns of the various states, including those states with relatively high support needs and small funding bases. As recommended by the Joint Board, the appropriate funding base should include both state and interstate revenue. The Federal fund should be sufficient, at the very least, to replace the implicit support for universal service that is generated today by interstate access rates. Maintaining implicit support by assuming revenues from services other than basic local service will create false price signals, further inhibiting competition at the local level. The new Federal plan should build upon the existing universal service support to the states. Finally, all carriers should be able to recover their Federal universal service contributions through surcharges or rate adjustments.

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Universal Service: Report to Congress ) DA 98-2

**COMMENTS OF GTE**

GTE Service Corporation and its affiliated domestic telephone operating,<sup>1</sup> wireless,<sup>2</sup> and long distance<sup>3</sup> companies (collectively "GTE") respectfully respond to the Commission's Public Notice DA 98-2 (released January 5, 1998) ("Notice") seeking comment to assist the Commission in preparing its Report to Congress on Universal

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- <sup>1</sup> GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.
- <sup>2</sup> GTE Mobilnet Incorporated, Contel Cellular Inc. And GTE Airfone Incorporated.
- <sup>3</sup> GTE Communications Corporation, Long Distance division.

Service as required by H.R. 2267, the 1998 appropriations legislation for the Departments of Commerce, Justice and State.<sup>4</sup>

**I. THE PLAN SET FORTH BY THE COMMISSION IS NOT ADEQUATE TO MEET THE REQUIREMENTS OF THE 1996 ACT.**

In its Notice, the Commission seeks comment on certain specific interpretations of language in the Act and of the effect of the Commission's chosen interpretations on the provision of universal service. GTE will respond to these specific questions herein. However, in order to properly advise Congress of the status of universal service, it is useful to begin with a broader assessment of the plan adopted by the FCC in May

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<sup>4</sup> Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (rel. May 8, 1997) ("USF Order"). The Commission released an erratum correcting this Order on June 4, 1997, FCC 97-157, 1997 FCC LEXIS 2995. Order on Reconsideration, FCC 97-246, 12 FCC Rcd 10095 (rel. July 10, 1997). The Commission issued an errata correcting this Order on July 24, 1997. Report and Order and Second Order on Reconsideration, FCC 97-253 (rel. July 18, 1997). Third Report and Order, FCC 97-380, 1997 FCC LEXIS 5608 (rel. October 10, 1997). Third Order on Reconsideration, FCC 97-411 (rel. December 16, 1997). Fourth Order on Reconsideration, FCC 97-420, 1997 FCC LEXIS 7229 (rel. December 30, 1997). Petitions for review are pending sub nom. Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir.). While GTE generally responds herein to the issues raised by the Commission in the Public Notice, GTE in no way limits its right to either raise other issues on appeal or to otherwise address issues raised by the parties on appeal. These comments are not, and are not intended to be, an exhaustive critique of the USF Order with respect matters which may be addressed on appeal. Indeed, they assume for the purpose of discussion, the validity of rules that GTE may challenge.

1997, and subsequently revised, in terms of the extent to which it fulfills the requirements of the Telecommunications Act of 1996.<sup>5</sup>

The Federal plan, as currently defined, will not meet the requirements of the Act.<sup>6</sup> Among other things, the amount of funding that would be provided is insufficient to address the need for universal service support. This will be the case regardless of any steps the states may take, through their own plans, to fund universal service.<sup>7</sup> Beyond the basic question of the adequacy of the funding the plan would provide, there are also certain deficiencies in the structure of the plan which will limit its effectiveness.

**A. The Federal Plan Will Not Provide Sufficient Funding.**

The need for universal service support arises because state commissions, in their efforts to ensure the widespread availability of local service at affordable rates, have chosen to hold the price for basic local service below the level a competitive market would set, given the cost of the service. In order to provide incumbent local

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<sup>5</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 et seq. (the "1996 Act"). All references to "the Act" refer to the Communications Act of 1934, as amended by the 1996 Act.

<sup>6</sup> Important details of the plan have yet to be established by the Commission. For example, the platform and inputs for the cost model have not been chosen. However, because of structural defects in the plan as currently defined, it would be inadequate, even if the cost estimates employed were perfectly accurate. The assessment presented here thus does not depend on any assumptions regarding the adequacy of the cost model chosen by the Commission. Of course, if the model were to underestimate the cost of basic service, the effectiveness of the plan would be still further reduced.

<sup>7</sup> The division of responsibility for universal service between the Federal plan and state plans will be discussed in greater detail below, in response to issue 5) in the Notice.

exchange carriers ("ILECs") with revenue sufficiency, rates for other services have been set above their market levels, thus providing an implicit flow of support for basic local service.<sup>8</sup> These other services include interstate access, state access, state toll services, vertical services, and some local business services.<sup>9</sup> The Act requires that these implicit support flows should be replaced by explicit ones. Since the implicit support comes from both state and interstate rates, replacing it with explicit funding must involve both state commissions and the FCC.

In particular, interstate access charges represent a large proportion of the current implicit support flow. As the Commission has recognized, the plan outlined in May 1997 will not be sufficient to replace this flow with explicit support.<sup>10</sup> Interstate access will therefore continue, after the new plan is implemented in January 1999, to provide a large flow of implicit support for universal service.

If the Federal plan is implemented in this inadequate form and if interstate access charges continue to include large amounts of implicit support, then the outcome Congress sought to achieve through the 1996 Act cannot be accomplished. Because funding is insufficient, the revenue associated with serving local customers who do not

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<sup>8</sup> USF Order at ¶ 271.

<sup>9</sup> There are also flows of implicit support across geographic areas to the extent that rates do not reflect the costs in each area.

<sup>10</sup> Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997) ("Access Reform Order"), at ¶ 9, petitions for review pending sub. nom. Southwestern Bell Tel. Co. V. FCC, No. 97-2618 (8th Cir.).

make large numbers of long distance calls will not cover the cost of service; new entrants will therefore not find it attractive to serve these customers. Competition in local markets, which the 1996 Act sought to promote, will be inhibited. As the Commission recognized in its Access Reform Order, competition will erode any implicit support which remains in access charges; support for universal service will thus not be ensured. In addition, artificially high access prices create artificial incentives to serve customers with high concentrations of toll usage, thus distorting the market strategies of current and potential competitors. Of course, the same concerns apply to implicit support which is built in to rates for various intrastate services. However, while the appropriate division of responsibility for universal service generally between the FCC and the states is open to debate, it is clear that only the FCC, through the Federal plan, can address the issue of implicit support currently generated by interstate access rates.

If the Federal plan is inadequate, it will fail to meet the requirements of Section 254. Support will not be predictable and sufficient nor will implicit support mechanisms be replaced by explicit ones. Further, Section 254(d) requires that all telecommunications carriers shall contribute to universal service mechanisms on an equitable basis. This requirement is not satisfied if a significant proportion of universal service funding is provided implicitly by the rates of a single carrier -- the incumbent -- in each area.

**B. It is Widely Recognized That the Federal Plan Raises Serious Concerns.**

GTE urges the Commission to reexamine the Federal plan, building on the strengths of what has already been adopted and repairing the deficiencies. In its USF

Order, the Commission left several important issues to be decided later, including the choice of a Federal benchmark, the selection of a cost model and the definition of lines to be supported. Moreover, the plan set forth in the USF Order represents a significant departure from the one previously recommended to the Commission by the Joint Board in matters such as the revenue base for the fund and the percentage of the funding need above the Federal benchmark that would be provided by the Federal fund. The states themselves have raised concerns over the plan adopted last May and a working group has been established by NARUC to evaluate alternative proposals.

**C. The Commission Should Move Forward with the Development of a Competitive Bidding Mechanism for Universal Service.**

As part of its effort to review and improve its approach to universal service, the Commission should move ahead to develop a competitive bidding mechanism for universal service support. This development would build on work already undertaken by the Commission staff.

In the USF Order, the Commission recognized that an auction mechanism could provide significant advantages. It directed the staff to prepare a Further Notice to provide a more specific record upon which the Commission might adopt a plan for competitive bidding. It is GTE's understanding that the staff has completed the necessary preparations, as directed by the May Order. It should therefore be possible for the Commission to issue a Further Notice and begin building a record on auctions. GTE urges the Commission to do this without delay.

GTE also believes that it would be most productive for the Commission to develop its auction plan in cooperation with interested state commissions. This would

continue a long tradition of states as "laboratories" for the development of innovative proposals through joint efforts with the FCC. Once a template has been developed through such a cooperative effort, Federal guidelines could be established under which additional states could choose to join in the auction program.

As discussed above, if the support provided is either too small or too large, serious damage will be done both to universal service and to the development of competitive markets for telecommunications. Even if the obvious deficiencies in the Federal plan are corrected, there will remain uncertainty as to whether the support amount calculated through a comparison of rates and costs is correct. An auction mechanism will provide a market test of whether the Commission has established the "right" level of support and a mechanism for correcting support amounts wherever necessary. It is therefore important that this corrective mechanism should be put in place in a timely manner to minimize the damage that could be caused by errors in universal service support.

GTE suggests that it would be advantageous for the Commission to adopt an auction mechanism and for the terms of this mechanism to be known to all the parties before the flow of payments under the new Federal plan begins in January, 1999. This will allow all firms in the market to plan their activities on a rational basis. Further, once payments begin under the new Federal plan, a pattern of winners and losers will have

been established and it will become increasingly difficult to adopt new arrangements which might disturb these constituencies.<sup>11</sup>

Finally, the Federal plan will no sooner have been adopted than the need will arise to adjust it to reflect changes that will occur in prices, cost levels, technology, and in the definition of universal service. This will involve the Commission, on an ongoing basis, in a complex, contentious, and resource-intensive exercise in traditional cost-of-service regulation. However necessary a cost-based approach may be to determine the starting point for the Federal plan, it is not reasonable as a path for the Commission to follow into the future. It is not compatible with the pro-competitive, de-regulatory intent of the 1996 Act that free markets should control. Further, it will divert scarce Commission resources that could otherwise be used to address other important matters

For all of these reasons, GTE urges the Commission to release a Further Notice as soon as possible and to move forward expeditiously with the development of an auction mechanism. Given the ground work which has already been laid by the Commission staff, GTE submits that the goal of adopting an auction plan in 1998 is a reasonable one.

## **II. RESPONSES TO THE SPECIFIC ISSUES SET FORTH IN THE NOTICE.**

The Notice seeks comment in five specific areas. GTE provides here its comments on each of these.

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<sup>11</sup> The Commission's experience with the expiration of the equal charge rule for switched access transport, and the development of a new rate structure for switched transport, is a recent example of this phenomenon.

**1) Artificial Distinctions Among Different Providers Will Undermine the Competitive Neutrality of the Universal Service Plan.**

The Commission has, in most respects, adopted an inclusive view of the entities to be included as "telecommunications carriers" who will be expected to contribute to the universal service fund. GTE supports this approach, since it is essential that carriers should be treated equally in order to promote the Commission's goal of competitive neutrality. It is also important to ensure the broadest possible funding base, which in turn will minimize the rate at which contributions must be assessed to generate the necessary funding.

However, the Commission, in its desire to expand the benefits schools and libraries can derive from the new funding mechanism, has chosen to add inside wire and Internet access to the list of items to which the supported discounts will apply. GTE has previously expressed concern that these items are outside the confines of what is provided for in the 1996 Act, since they are not telecommunications services. Certainly, the inclusion of these items will have the effect of expanding the cost of the school and library program; one party has estimated that they may account for nearly half of the demands on this fund.<sup>12</sup>

More generally, the inclusion of inside wire and Internet access creates an inconsistency between the set of entities who will contribute to the fund and the set of entities who might qualify to receive funds. If the Commission had confined itself to supporting only telecommunications services, then it would at least always be the case

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<sup>12</sup> Comments of AT&T, December 19, 1996, at 20.

that every entity that might qualify to receive funds would also be a contributor to the fund.<sup>13</sup>

**1a) Under the Act, Support May Be Provided Only for "Telecommunications Services."**

In reaching its conclusion that some information services were eligible for support, the Commission mistakenly relied on the purported significance of Congress' use of the term "services" with and without the express qualifier of "telecommunications." Moreover, the Commission's failure to acknowledge the self-evident distinction between the Congressional directive to subsidize the provision of telecommunications services while merely promoting "access to" information services is an unsustainable misreading of the statute. As shown below, the universal service program described in Section 254 as construed in the context of the statutory scheme established by Congress is clearly limited to the support of "telecommunications services" meeting the criteria enumerated in that section.

The 1996 Act defines "Universal service" as "an evolving level of telecommunications services."<sup>14</sup> In defining the "services" eligible for universal service support under subsection (c), the 1996 Act requires the FCC to consider the extent to which "such telecommunications services": (A) are essential to education, public health, or public safety; (B) have been subscribed to by a substantial majority of

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<sup>13</sup> Note that the obverse is not the case, since a telecommunications carrier would only be entitled to receive universal service funding if it provided a supported service.

<sup>14</sup> 47 U.S.C. § 254(c)(1).

residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity.”<sup>15</sup> Although Subsection (c)(3) allows the Commission to establish additional “services for such support mechanisms” for designated entities, that subsection also explicitly references subsection (h) of Section 254, which is entitled “Telecommunications Services for Certain Providers.” However, neither this section nor any other provision of the Act provides the Commission with discretion to extend these subsidies to unregulated non-telecommunications services.<sup>16</sup>

The Commission nonetheless argues that the statute’s use in Section 254(c)(3) of the term “services” unqualified by “telecommunications” means that Congress intended for subsidies to flow to information as well as telecommunications services.<sup>17</sup> But, as is evident in the text of Section 254(c)(1), Congress used the term “services” interchangeably with “telecommunications services” throughout Section 254 because the meaning of the term is unambiguous in that context. Indeed, this is the only logical

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<sup>15</sup> 47 U.S.C. § 254(c)(1).

<sup>16</sup> Although the Commission may take “into account advances in telecommunications and information technologies and services” when it establishes the definition of universal service, *id.* at § 254(c)(1), the legislative history makes clear that the definition of universal service must be based on a consideration of the four criteria set forth in the subsection (c)(1). H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 131 (1996) (“Conference Report”). That is, the Commission must consider “the extent to which such telecommunications services” satisfy these four criteria. Subsection (b)(6) likewise refers only to “advanced telecommunications services” in referencing subsection (h). 47 U.S.C. § 254(b)(6)(emphasis added).

<sup>17</sup> USF Order at ¶¶ 437, 438.

reading that can be given to the following statutory passage: “The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services-. . . .”<sup>18</sup> It follows that, notwithstanding the fact that subsection (c) permits the Commission to “designate additional services” for support for schools, libraries, and health care providers,<sup>19</sup> such additional “services” can include only “telecommunications services” consistent with the overall definition of universal service.

The Commission further contends that Section 254(h)(2)(A) itself “suggests that Congress did not intend to limit the support provided under section 254(h) to telecommunications services.”<sup>20</sup> In fact, Section 254(h)(2)(A) is completely consistent with the conclusion that universal service support is available solely for “telecommunications services” because, as noted above, even the heading of the section – “Telecommunications Services for Certain Providers” - contains such a limitation. That section merely permits the Commission to establish competitively neutral rules “to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services,”<sup>21</sup> not to establish a subsidy mechanism for the latter.

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<sup>18</sup> 47 U.S.C. § 254(c)(1).

<sup>19</sup> 47 U.S.C. § 254(c)(3); USF Order at ¶ 437.

<sup>20</sup> USF Order at § 439.

<sup>21</sup> 47 U.S.C. § 254(h)(2)(A) (emphasis added).

The class of telecommunications services that enhance access to advanced and information services is likely to be broader than those services that traditionally have been deemed to constitute universal service. As the legislative history suggests, the Commission could conclude that "dedicated data links" and other telecommunications services in addition to standard local exchange and related services would be eligible for support under this provision.<sup>22</sup> But, there is a fundamental distinction between the promotion of "access to" information services and the actual subsidized provision of such services. Therefore universal service may be interpreted to extend only to telecommunications services without rendering subsection 254(h)(2) redundant of subsection 254(h)(1)(B).

The Commission ignores the import of this "access to" language and, instead, asserts that Congress intended to broaden the class of actual services eligible for support in this elliptical fashion. Had Congress intended to provide support directly for information services themselves, it simply could have said so as it did for telecommunications services. Because Congress instead spoke only in terms of "access to" these services, accepted principles of statutory construction compel the conclusion that it intended different consequences to flow from different operative language.<sup>23</sup>

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<sup>22</sup> See Conference Report at 133.

<sup>23</sup> It is important to note that Congress understood the longstanding distinctions between telecommunications services on the one hand, and information or enhanced services on the other. See discussion *infra*. Indeed, Congress codified these mutually exclusive categories in the Act. 47 U.S.C. § 153 (20).

Congress' parallel use of the "access to" language in the general universal service principles section confirms this analysis. That provision declares that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation."<sup>24</sup> If the "access to" language for schools and libraries in subsection (h) can be used to justify direct subsidization of information services for these entities, it would be difficult to deny the same subsidies to all universal service recipients. This hardly could have been the congressional intent. Consequently, the statutory scheme for universal service can best be understood as authorizing support (in the form of service discounts) only for telecommunications services designated as part of the universal service package for schools and libraries.

**1b) Sufficient, Explicit Universal Service Funding Is a Necessary Step Toward More Consistent Treatment of All Providers.**

The difficulty of drawing arbitrary distinctions among different classes of carriers, and different types of communication, has already presented itself to the Commission in other forms. For example, the Commission has grappled with the distinction between information service providers ("ISPs") and interexchange carriers ("IXCs") for purposes of assessing access charges. The Commission has chosen to exempt ISPs from paying access charges on the same basis as do IXCs. In its Access Reform Order, the Commission again declined to apply access charges, in their current form, to ISPs,

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<sup>24</sup> 47 U.S.C. § 254(b)(2).

although the Commission left open the possibility that some other method might be devised for ISPs to compensate local carriers.<sup>25</sup>

It is worth noting that the importance attached to the ISP exemption issue is directly related to the fact that access charges generate implicit support for universal service. Because the current system sets an artificially low price for the local service connection and for local usage, and supports these local prices by setting an artificially high price for access, there is a dramatic difference in price which depends upon the classification of usage as either local or access. This difference in price does not reflect any underlying difference in cost; it is almost entirely an artifact of the current system of implicit support.

New technology is creating a wide variety of services which can be provided to customers, and of arrangements which can be used to provide service. The growth of voice traffic over the Internet is one aspect of this development. As new technology and services develop, the ability to maintain artificial distinctions among carriers will become even more tenuous than it is today. GTE believes that the ultimate answer to the issue of the ISP exemption lies in the establishment of more rational, and more consistent, pricing structures by local carriers, structures in which large differences in price no longer depend on arbitrary classifications of carriers or usage. GTE urges the Commission to pursue this goal, and to evaluate the ISP exemption in this broader context. However, the first, essential step in this process must be the adoption of an explicit universal service funding mechanism which is sufficient to replace implicit

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<sup>25</sup> Access Reform Order at ¶ 348.

support built into access rates today. As long as access continues to bear a burden of implicit universal service support, it will be impossible to establish a system that treats ISPs and other entities in a consistent manner.

**2) The Growth of Hybrid Services Represents a Definitional Challenge.**

The Notice seeks comment on the application of the definitions of "information service" and "telecommunication service" to what the Notice terms "mixed or hybrid" services, and the effect of this application in the context to the universal service mechanisms. Many services today combine transmission and content in ways which are difficult to disentangle. As new services develop, this problem is likely to become more acute.

In the past, the Commission has dealt with this problem by establishing broad categories of service providers, in which the different aspects of the services are effectively lumped together, but the treatment afforded the carrier is based on only one aspect of the service. For example, ISPs are treated as content providers or processors, even though their offerings often combine content with transmission.<sup>26</sup> This has led the Commission to treat offerings which look very much like telecommunications services as something else.

However, in the context of the school and library fund, the Commission has been unwilling to live with this existing framework, since it desired to offer support for discounts on what are clearly information services. The Commission sought to work

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<sup>26</sup> Note, however, that this is not the only such case. Cable firms, for example, also provide a combination of transmission and contents.

around this difficulty in two ways. First, it argued that the 1996 Act permits support for products and services other than telecommunications services. For the reasons given above, this argument is incorrect. Second, recognizing the problems that would be created by subsidizing content, the Commission has attempted to draw a new distinction within the class of information services, between "conduit" services and "content" services. This distinction does not accomplish the Commission's purpose, since, regardless of this new distinction, no form of information service is eligible for support under the 1996 Act. However, the distinction does create new inconsistencies in the collection and distribution of universal service support.<sup>27</sup> Further, the reasoning employed by the Commission to arrive at its new distinction underscores the need to reexamine the current framework of information and telecommunications services in an effort to arrive at more consistent treatment of the various entities that interconnect with local carriers' networks.

**2a) The Commission's Supported Services Are Information or Enhanced Services, Not Telecommunications Services.**

It is undisputed that the additional subsidized services identified by the Commission, such as Internet access, are not telecommunications services within the existing framework of information services and telecommunications services. By definition and FCC precedent, these "conduit" services are enhanced or information services.

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<sup>27</sup> GTE will discuss these below in response to the questions set forth in the *Notice* regarding fund contributions and eligibility.

Initially, "[t]elecommunications services" are defined by statute as "the offering of telecommunications for a fee directly to the public. . ."<sup>28</sup> "Telecommunications" is in turn defined as "the transmission, between and 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."<sup>29</sup> Internet access is not so limited in its functionality.

In contrast, "information services" are defined by the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunication, and include[] electronic publishing. . . ." 47 U.S.C. §153(20). Internet access service is an "information service" because it has the capability to store, transform, retrieve, and utilize information. By performing a protocol conversion on all transmissions, Internet access providers "transform" information from asynchronous protocol to TCP-IP. Moreover, the very core of the Internet and its associated services is the ability to "retrieve" and "utilize" information. The Commission concedes this characterization: "We conclude, therefore, that we can include the 'information services,' e.g., protocol conversion and information storage" as eligible for support.<sup>30</sup>

In an effort to limit the potentially sweeping scope of its Decision, the Commission attempted to subdivide information services into two categories: (1) content services, not eligible for support and (2) non-content services which would be

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<sup>28</sup> 47 U.S.C. § 153(51).

<sup>29</sup> *Id.* at § 153(48) (emphasis added).

<sup>30</sup> USF Order at ¶ 439.

eligible for universal service subsidies.<sup>31</sup> In its Decision, the Commission argues that commenters opposed to support for non-telecommunications services are “confusing [these] two different types of information services.”<sup>32</sup> According to the Commission, the former are entitled to universal service support, while the latter are not.

In order to draw this new line between content and non-content information services, the Commission “borrows” from a wholly unrelated provision of the Act, Section 274, which addresses Bell Operating Company electronic publishing. However, there is no support for distinguishing (for universal service purposes) between content and non-content information services in the Act or FCC precedent. In fact, the Commission itself has repeatedly rejected efforts to create a content-based definition for these services.

First, Section 254 itself references only telecommunications services and information services, not electronic publishing services or any exceptions thereto. Information services are defined broadly to include “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing. . . .”<sup>33</sup> The Commission’s statutory obligation to promote “access to” these services is not qualified by any “content/noncontent” limitation or any reference to electronic

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<sup>31</sup> The Commission distinguishes between information services that “are essential for effective transmission service, i.e. ‘conduit’ service;” and the “content services provided by information publishers.” USF Order at ¶ 441.

<sup>32</sup> USF Order at ¶ 441.

<sup>33</sup> 47 U.S.C. § 153(20).

publishing. If the "access to" language indeed were deemed to authorize direct service subsidies, it would be difficult if not impossible to justify the commission's denial of such support to the entire panoply of information service offerings. Of course, Congress could not have intended to create such a definitional - and fiscal - morass.

Second, even if these significant statutory issues could be overcome, distinguishing between information services based on content level has no basis in past FCC decision making. The definitions of neither enhanced services nor "information services" support the Commission's current effort to draw a distinction based on content level. Moreover, the Commission rejected just such a content-based analysis in its Non-Accounting Safeguards Proceeding. There, the agency found that "information services" require only that a service transform or process "information." Noting that the definition of "information services" does not refer to content, it rejected the argument that the definition includes only those services that transform or process the content of information transmitted by an end-user.<sup>34</sup>

**2b) The Distinction Between "Conduit" and "Content" Does Not Serve the Commission's Purpose.**

The distinction the Commission has attempted to establish between different types of information services does not, in and of itself, permit the Commission to include support for Internet access in its program of discounts for schools and libraries. This is because, as GTE has already shown, the 1996 Act permits support only for

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<sup>34</sup> *Implementation of the Non-Accounting Safeguards of sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21956 (1996).

telecommunications services. The effect of this limitation is not altered by drawing a distinction among different forms of information services. In order to include any form of "conduit" service in a universal service program, the Commission would have to determine that such service was a telecommunications service which is used to obtain "access" to an information service. While this would permit support to be offered for this function, it would create new complexities with respect to the administration of the fund, which will be discussed below.

Treating "conduit" functions as telecommunications services would involve a departure from the existing framework, which effectively treats transmission incidental to services which also provide or alter information as part of the information service. The Commission has previously declined to disentangle the transmission component of information services in this manner. It is far from clear, in view of the difficulties this approach would raise, that such an effort would be justified solely to permit discounts for "conduit" functions to be supported by a universal service program.

However, in a larger context, it is clear that there is a need for a reevaluation of the way in which different services, including the proliferation of "hybrid" services and their providers, are classified and treated. It is possible that, within the framework of a more comprehensive reassessment, perhaps in some future offspring of the Computer inquiry, a new approach could be developed which would allow services to be treated in a more consistent manner for purposes of pricing and interconnection. It is also conceivable that the same approach could be squared with the provisions of the Act in such a way as to permit functions which the Commission refers to as "conduit" services to be supported.