COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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January 29, 1998

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Magalie R. Salas, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

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JAN 30 1998
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Re: CC Docket No. 96-45
Public Notice DA 98-2
Corrected Comments of the Pa.PUC

Dear Ms. Salas:

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this corrected version of the Consolidated Comment on behalf of the PaPUC, the Pennsylvania Department of Education, the Office of Information Technology, the Pennsylvania Rural Development Council, and the Office of Rural Health of Pennsylvania State University. The corrected version reflects linguistic changes and editorial corrections that do not alter the substantive comments submitted to the FCC on January 26, 1998 and received on January 27, 1998. A copy of the original and corrected versions is enclosed for your reference. Please time-stamp two copies and return them in the enclosed self-addressed envelope, postage pre-paid.

Joseph K. Witmer, Assistant Counsel

Joseph K. Witmer

Frank W. Wilmarth, Deputy Chief Counsel
John F. Povilaitis, Chief Counsel

FOR:

The Pennsylvania Public Utility Commission
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Harrisburg, PA 17105-3265

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JAN 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-45
Public Notice DA 98-2

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Dear Ms. Salas:

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this Consolidated Comment on behalf of the PaPUC, the Pennsylvania Department of Education, the Office of Information Technology, the Pennsylvania Rural Development Council, and the Office of Rural Health of Pennsylvania State University. The PaPUC appreciates this opportunity to comment on matters of particular concern to rural Pennsylvania and rural America in general.

Joseph K. Witmer, Assistant Counsel

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JAN 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	CC Docket No. 96-45
	)	[DA 98-2]
Federal-State Joint Board on Universal Service	)	(Report to Congress)

CONSOLIDATED COMMENT OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR THE REPORT TO CONGRESS ON UNIVERSAL SERVICE

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1997), the Pennsylvania Public Utility Commission (PaPUC) submits these comments on behalf of the PaPUC as well as the Center for Rural Pennsylvania (CRP) of the Pennsylvania General Assembly, the Pennsylvania Rural Development Council (PRDC), the Office of Information Technology (OIT), the Pennsylvania Department of Eduation (PDE), and the Pennsylvania Office of Rural Health of Penn State University (Penn State). The PaPUC respectfully submits these consolidated comments in order to efficiently address the FCC Common Carrier Bureau's January 5, 1998 Public Notice DA 98-2 titled "*Common Carrier*

Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996" and released in the above-captioned proceeding.

The Common Carrier Bureau ("CCB" or "Bureau") notice requests comment on five specific issues in connection with the Report to Congress on Universal Service required in Congress' 1998 appropriations legislation. The CCB report will provide Congress with a detailed description of the extent to which the FCC's interpretations in specifically designated areas are consistent with the language of the Telecommunications Act of 1996 (TA-96).[1]

The five areas addressed by the CCB notice are a result of the 1998 appropriations legislation which specifically requires the FCC to review its implementation of the Act's universal service provisions and "provide a detailed description of the extent to which the Commission's interpretations in the following areas are consistent with the plain language" of the Act. The five focus areas identified by the FCC Notice are (1) definitions, (2) application of those definitions, (3) contributors, (4) recipients of support, and (5) percentage of support provided by the federal mechanism. All five areas set for comment focus on the FCC interpretations of the universal service provisions found in § 254 of the new legislation. The PaPUC submits these comments in recognition of the fact that virtually every issue raised in this

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et. seq.*) ("1996 Act" or "Act").

CC Docket 96-45 proceeding could have a significant impact on intrastate operations and local rates of carriers subject to the PaPUC's jurisdiction.[2]

Summary of Comments

The PaPUC generally supports the NARUC comments. The PaPUC is also concerned about recent actions by the Commission pertaining to Pennsylvania that could have the unintended effect of narrowing the broad definitions and goals intended by the Congress in the TA-96. The FCC's approach will result in narrow policies that contravene the plain meaning of the TA-96.

The PaPUC's principal concern is the FCC's recent refusal to provide a waiver from the FCC's definition of a rural area for nine rural counties in Pennsylvania. The PaPUC's second concern is the release of NXX codes needed to implement transparent overlays.

The FCC's refusal to waive the definition of a "rural area" under the Commission's regulations effectively means that nine rural counties in Pennsylvania, which are clearly rural even though they might not come within the contours of the narrow definition set forth in

[2]The PaPUC shares the concern of the National Association of Regulatory Utility Commissioners (NARUC) that the issue of diverting federal universal service funds to support reducations in interstate access cahrges was not presented or considered by the Joint Board.

Section 54.5 of the Commission's rules, are being denied the benefits intended by Section 254(h) of the TA-96.[3] That result is not, the PaPUC contends, within the plain meaning of the TA-96.

The PaPUC's comments are submitted not only on behalf of Pennsylvania's nine counties but also on behalf of other states with similarly-situated counties. The PaPUC, although it supports the FCC's definition to the extent it creates a necessary national definition for crafting the basic contours sought by Section 254(h), is concerned that the FCC's refusal to grant a waiver from this national definition will result in a far narrower program for rural America than that envisioned by the TA-96.

The PaPUC believes that the definitions and policy goals of the TA-96, at least with respect to the provisions governing schools and libraries and health care provisions in Section 254(h), are intended to be more flexible than those adopted by the FCC. The PaPUC urges the FCC to adopt the flexible approach intended by Congress for rural areas in the TA-96. To that end, the PaPUC is submitting a Petition for Reconsideration of the Commission's earlier determination in the Pennsylvania decision. That filing, as well as these comments, are submitted in order to give the Commission vehicles for accomplishing the distribution of basic and advanced telecommunications services to rural America on a comparable basis as required by the plain meaning of Sections 254(b)(2), 254(b)(3), and 254(h) of the TA-96.

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[3]In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Memorandum Opinion and Order, January 2, 1998 (the Pennsylvania Decision). Attached as Appendix A to these comments.

The PaPUC believes that the situation facing Pennsylvania's nine counties is very relevant to the FCC's solicitation of universal service comments in several respects. First, the PaPUC is concerned that the increasingly rigid and inflexible approach to definitions, evident in the Pennsylvania decision, is not really taking into account the local realities in any state that has rural areas which do not fall squarely within the combined OMB-Goldsmith definition of a rural area. The PaPUC is particularly concerned that the negative effects of this rigidity will largely fall on states east of the Mississippi which contain areas with large numbers of rural residents in rural counties even if those rural areas are not as sparsely populated as rural areas west of the Mississippi. The fact that one rural area east of the Mississippi may be more densely populated than another area west of the Mississippi does not detract from the essential rural nature of both rural areas when both areas are compared to urban counterparts east and west of the Mississippi.

In addition, the PaPUC does not believe that Congress intended to provide the benefits of Section 254(h) along a Mississippi River fault line with rigid definitions. The PaPUC, while it supports the FCC's definition because it tries to roughly define a rural area for national purposes, does not believe Congress intended the rough contours of a regulatory approximation to be an national straight-jacket that binds every situation in every state in every region of the nation. The FCC's definition, while it does include almost all of the rural areas in America, would result in regulatory absolutism if considered to be the definitive word on what is rural in rural America.

Also, the PaPUC does not believe that the plain meaning of Sections 254(b) and 254(h) includes denying state requests for waivers when the result of that denial prevents states such as Pennsylvania, which has the largest number of rural residents of any state in the nation, from accomplishing the universal service goals set forth by Congress for rural America. This result, inherent in the FCC's denial in the Pennsylvania decision, means higher costs to deliver basic and advanced telecommunications in Pennsylvania's rural areas and throughout the nation. The PaPUC does not believe that the plain meaning of Sections 254(b) and (h) means higher costs for similar services in rural America compared to urban America.

Finally, the PaPUC urges the Commission to take a more flexible approach when states request a waiver from the rigid OMB-Goldsmith definition of a rural area as set forth in Section 54.5. The PaPUC urges the Commission to consider criteria from states, such as Pennsylvania, and use them to develop criteria to make the Commission's discretionary determinations for waivers more predictable under Section 1.3 of the Commission's rules as it pertains to Section 54.5 and 1.5. Such an approach effectively balances the FCC's need for a national definition with enough flexibility to address unique local situations.

In that regard, the PaPUC is submitting a proposal with these comments that would go a long way to providing the FCC and the Congress with a means of ensuring that the flexibility

Congress intended for rural areas can be facilitated by the exercise of discretion as opposed to a major reworking of the TA-96. To that end, the PaPUC's criteria allows states with rural areas falling outside the the OMB-Goldsmith definition to secure the waiver they need to obtain the benefits Congress intended them to have in Section 254(h).

The PaPUC suggests that states seeking waivers show that the counties they would classify as rural demonstrate two characteristics to be considered for a waiver from the OMG-Goldsmith definition set forth in the Commission's rules. First, the population within each county would be less than 50% urbanized as deefined by the U.S. Census Bureau. Second, each county not contain a central city as also defined by the US Census Bureau. Counties meeting this threshold criteria would receive a waiver from the Commission's rules so long as there was additional evidence of prior state commitments to these rural counties and provided evidence corroborating evidence was submitted on the different characteristics of these rural counties compared to ineligible counties. In those cases, states with counties that could make these affirmative showings would be granted a waiver from the OMG-Goldsmith defintion as a "modified non-urbanized" exception.[4]

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[4]The suggestion that some kind of conceptual device be developed for determining waiver requests from the FCC's definition of rural is not unfounded. For example, peer-reviewed articles in the Journal of Rural Health from 1993 to 1993 proposed **26 different definitions of "rural" by researchers**. Webb, Karen D.; Baer, Leonard D.; and Gesler, Wilbert, "What is Rural? Issues and Considerations," The Journal of Rural Health (Summer 1997): 253-256.

The cost of using this modified non-urbanized concept in Pennsylvania is not prohibitive. The net increase in costs for bringing Pennsylvania's nine counties, not currently within the OMB-Goldsmith definition, adds 2/10 of 1 percent to the health care provision and 3/100 of one percent to the schools and libraries provisions in Section 254(h) of the TA-96.[5]

The application of this modified non-urbanized concept does not open the floodgates at the national level. Pennsylvania research shows that the maximum number of counties that might even seeks a waiver based on the Pennsylvania request is 229. The increase in the number of counties under Section 254(h) would increase from 2,385 under the OMB-Goldsmith definition to 2,614. This 229 county increase represents only 7% of the counties in the United States. Moreover, one hundred-ninety four (194) of the counties are located east of the Mississippi in the older colonial states of the North and South and the upper Midwest. Pennsylvania is not the largest beneficiary; the primary beneficiaries would be Georgia (20), Virginia (19), Tennessee (18), Ohio (14), Indiana (14), New York (12), and Kentucky (10).[6]

This modified non-urbanized approach also meshes with prior efforts Pennsylvania has taken to enhance education and public health in the nine rural counties before enactment of TA-96. For example, every school district in every one of the nine counties, with the exception

[5]Pennsylvania Decision, pp. 3-4.

[6]Appendix B, p. 1; Appendix B-1.

of one aberrant district in Lebanon county, does not meet the definition of an urban area as defined for purposes of the Urban and Rural Teacher Loan Forgiveness Program for Pennsylvania.[7] Moreover, many of the nine counties Pennsylvania is concerned with are served by at least one rural telephone company as defined in the TA-96.[8]

The PaPUC does not believe that the plain meaning of Section 254(b) authorizes the rigid application of a necessary FCC definition for rural areas under the TA-96 when the results largely operate to the detriment of rural counties east of the Mississippi. That belief is underscored by the fact that, at least in Pennsylvania, many of the counties are served by rural telephone companies as defined under the TA-96 and every county at issue has been the focus of prior state efforts regarding their rural situation. Finally, the nine rural counties in Pennsylvania that are the focus of this comment have other characteristics that distinguish them from their urban counterparts.

Finally, the PaPUC urges the Commission to include cable companies, wireless carriers, and other providers of basic and advanced telecommunications services within the scope of

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[7]Act of December 6, 1998, P.L. 1259, No. 155, as amended, 24 P.S. §§5191-5198.7 in H.B. 2513, No. 1988-155, enacted December 26, 1988. Pennsylvania committed financial resources to provide comparable educational opportunities for rural Pennsylvanians, in advance of the TA-96, in enacting this program in 1988. The program provides for student loan forgiveness for those graduates willing to teach in eligible rural public school districts defined, in No. 1988-155, as "a public school district that has a population of less than 300 per square mile" See Attachments C and C-1.

[8]Appendix D.

eligible recipients in order to advance the broad definitions and policies Congress envisioned under Sections 706 and 254(h) of the TA-96.

In further response to each of the issues set forth in Notice DA 98-2, the PaPUC provides more detailed comment in support of the general comments below.

CCB Issue 1: Definitions.

Pennsylvania Issue #1: Denial of A Waiver for Nine Rural Pennsylvania Counties. The PaPUC believes that the FCC's recent decision denying a request for a waiver from the definition of a rural area under Section 54.5 of the Commission's rules prevents the delivery of cost-effective hybrid services to rural areas in Pennsylvania's counties. In support of that observation, the PaPUC notes that many of the counties denied the waiver is served by at least one, if not several, rural telephone companies as defined in the TA-96. The PaPUC fails to see how areas served by one, if not several, rural telephone companies can be denied that waiver given the higher costs to provide basic and advanced telecommunications, as set forth in Section 254 of the TA-96, including services to schools and libraries and rural health care providers.

CCB Issue 2: Application of The Definitions to Mixed or Hybrid Services.

Pennsylvania Issue #1: Denial of A Waiver for Nine Rural Pennsylvania Counties. The PaPUC believes that the Commission's recent action in the Pennsylvania Decision is contrary to the concern for rural areas evident, in particular, in the House definition of "rural telephone company" endorsed in the TA-96. The PaPUC notes that the Pennsylvania Decision denies support for schools and libraries and health care providers even though **many of the nine counties denied such relief are served by at least one "rural telephone company"** as defined in the TA-96.

CCB Issue 3: Required Contributors to Universal Service. The PaPUC urges the Commission to continue with its efforts to ensure that all telecommunications carriers, especially the CMS providers, contribute to the Universal Service goals set forth in Section 254 of the TA-96. The PaPUC believes the Commission's attempts to secure contributions from all carriers serving the general public is a laudable and consistent with the intent of the TA-96.

CCB Issue 4: Eligible Recipients of Universal Service. The PaPUC generally supports the NARUC's comments on this issue. In addition, the PaPUC repeats its concerns about the Commission's recent refusal to grant Pennsylvania the waiver needed so that nine rural counties

in Pennsylvania can be eligible recipients of Universal Service support as set forth in Section 254(h) of the TA-96.

Moreover, the PaPUC believes that the competitive thrust of the TA-96 warrants allowing cable companies, wireless carriers, and other providers of the basic and advanced telecommunications services envisioned by the TA-96. Pennsylvania has already worked with these carriers to provide basic and advanced telecommunications services to rural counties in order in securing the benefits obtained under Section 254(h) of the TA-6. To that end, the PaPUC is particularly concerned that the Pennsylvania decision jeopardizes the delivery of basic and advanced telecommunications services in rural counties by cable companies, wireless carriers, and other service providers.

While the PaPUC understands that the Commission's intent in the 4th Order on Reconsideration was to prevent leveraging the E-rate discounts to construct wide area networks, the PaPUC is also concerned that limiting service providers to common carriers may have unintended consequences. The PaPUC is concerned that this action by the Commission could have the unintended consequence of narrowing the broader defintions and policies envisioned by the TA-96. The PaPUC believes that this narrowing of the definition of eligible recipients may contradict Section 706 of the TA-96. That is because this constricted definition appears to contradict Congress' view that the delivery of basic and advanced telecommunications services

in all areas of the nation, including rural America, depends upon promoting competition and removing barriers to infrastructure investment. Moreover, the preferencing for common carriers at the expense of cable companies, wireless carriers, or other service providers may contradict the TA-96's call for technology neutrality.

In Pennsylvania, education technology initiatives sponsored and supported by the Pennsylvania Department of Education and the Office for Information Technology are premised on technology neutrality and stress the need for innovation and flexibility as the community level, particularly in rural counties in Pennsylvania. This emphasis pre-dates the Commission's more recent action and could place those initiatives in jeopardy notwithstanding the PDE and OIT belief that these policies are sound decision for rural Pennsylvania and the nation.

In Pennsylvania, many of the 2500 public and non-public schools are now receiving telecommunications services from cable and wireless companies. In many cases, the school districts choose these providers because the service was unavailable from common carriers or else the level and quality of service was not cost effective. Moreover, many of these same public and non-public school districts are moving toward more flexible arrangements with service providers, including those in rural counties in Pennsylvania, wherein basic and advanced telecommunications services are leased from providers ranging from cable companies to electric utilities companies that operate cost-effective and high-speed solutions to Pennsylvanai's

educational needs. While this is true for Pennsylvania generally, this situation is especially thecase in rural counties and throughout rural Pennsylvania. Finally, the willinness of common carriers to invest in the basic and advanced telecommunications infrastructure, needed to provide that improved education Pennsylvania needs in the 21st century, is often directly proportional to the competitive incentive evident in the infrastructure decisions made by cable companies, wireless carriers, and other service providers.

In particular, the PaPUC notes that a narrow definition of eligible recipients will limit the use of other mainstream, cost-effective solutions for schools, libraries, and health care providers -- especially in rural Pennsylvania and the nation. Such a constricted approach will prosper no one -- not the students or library patrons, the alternative service providers, nor the innovative creators of basic and advanced telecommunications services which have yet to be envisioned.

The PaPUC urges the Commission to return to the broader definitions and policies envisioned by the TA-96 by expanding the scope of eligible recipient to include cable companies, wireless carriers, and other service providers under Sections 706 and 254(h) of the TA-96. The PaPUC believes that other approaches jeopardize the advances already made because schools, libraries and health care providers could otherwise be forced to purchase higher-cost services from common carriers.

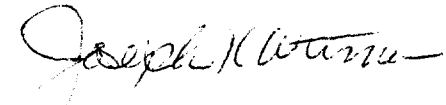
The PaPUC urges the Commission to include cable, wireless, and other service providres as eligible providers of the telecommunications services envisioned by Section 706 and Section 254(h) of the TA-96.

Conclusion

For these reasons, the PaPUC requests that the Commission set forth Pennsylvania's position on its Denial of A Waiver for Nine Rural Counties in the Report to Congress to the extent these concerns remain unresolved. The PaPUC is convinced that these are matters of concern not only to Pennsylvania but also to many other states, especially those states east of the Mississippi that may have rural counties under the TA-96 but fail to come within the narrow confines of the OMB-Goldsmith definition in the Commission's rules.

The PaPUC thanks the Commission, and the CCB in particular, for providing Pennsylvania with this welcome opportunity to raise its concerns to the extent they impact Pennsylvania and the nation.

Respectfully submitted,



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Appendix A

Before the
Federal Communications Commission
Washington. D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1998 Released: January 2, 1998

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 30, 1997, the Pennsylvania Public Utility Commission ("Pennsylvania Commission") submitted a request for waiver of the definition of "rural area" contained in section 54.5 of the Commission's rules.[1] This definition is used to determine which health care providers are eligible to participate in the universal service support program[2] and also partially determines the discount rate for schools and libraries that are eligible for universal service support.[3] We conclude that the Pennsylvania Commission has not demonstrated good cause justifying a waiver. Accordingly, we deny the Pennsylvania Commission's request.

II. BACKGROUND

2. With respect to support mechanisms for health care providers, section 254(h)(1)(A) of the Communications Act of 1934, as amended ("the Act"), requires the Commission to adopt a definition of "rural area" both to determine the location of health care providers eligible for universal service support, and to determine the "comparable rural areas" used to calculate the credit or reimbursement to a telecommunications carrier that provides

[1] 47 C.F.R. § 54.5.

[2] *See* 47 C.F.R. § 54.601(a)(4).

[3] *See* 47 C.F.R. § 54.505(b)(3).

services to those health care providers at reduced rates.[4] The Commission, adopting the approach recommended by the Federal-State Joint Board on Universal Service ("Joint Board"), defined a "rural area" as one that is located in a non-metropolitan county, as classified by the Office of Management and Budget's ("OMB's") list of Metropolitan Statistical Areas ("MSAs"), or is identified by the Goldsmith Modification published by the Office of Rural Health Policy of the U.S. Department of Health and Human Services ("ORHP/HHS").[5] The Commission agreed with the Joint Board's conclusion that the MSA/Goldsmith approach is more easily used and administered than other proposals suggested for identifying rural areas.[6]

3. In addition, section 254(h)(1)(B) mandates that discounts for eligible schools and libraries must be "appropriate and necessary to ensure affordable access to and use of" the services designated for support.[7] Building on the Joint Board's recognition that schools and libraries in high cost areas will confront relatively higher barriers to maintaining communications links, the Commission identified high cost schools and libraries as those located in rural, as opposed to urban, areas for purposes of determining discount amounts.[8] The Commission concluded that, for purposes of discounts for telecommunications providers serving eligible schools and libraries, "rural area" is defined as non-metropolitan counties, as measured by the OMB's MSA list, and census blocks or tracts in metropolitan counties identified by the Goldsmith Modification.[9]

III. POSITION OF PARTIES

4. The Pennsylvania Commission contends that applying these rules will have an "adverse impact" on the schools, libraries and health care providers located in nine Pennsylvania counties.[10] Specifically, the Pennsylvania Commission argues that, although

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[4] 47 U.S.C. § 254(h)(1)(A). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd at 9113 (1997) (Universal Service Order).

[5] 47 C.F.R. § 54.5. *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd at 441 at 441 (Recommended Decision).

[6] Universal Service Order, 12 FCC Rcd at 9115-16.

[7] 47 U.S.C. § 254(h)(1)(B). *See also* Universal Service Order, 12 FCC Rcd at 9035.

[8] Universal Service Order, 12 FCC Rcd at 9042.

[9] 47 C.F.R. § 54.505(b)(3)(ii).

[10] Pennsylvania Commission petition at 1. The counties at issue are: Butler, Carbon, Columbia, Fayette, Lebanon, Perry, Pike, Somerset, and Wyoming. Pennsylvania Commission petition at 3.

these counties do not qualify as "rural" under the Commission's rules, they have a "strong 'rural' character and nature."[11] The Pennsylvania Commission cites various factors to demonstrate that a waiver is necessary, including, relative to 24 Pennsylvania counties classified as urban under the Commission's rules: a significantly lower primary care physician-to-population ratio; a significantly higher proportion of residents living within designated areas of medical underservice; and significantly fewer hospitals and hospital beds.[12]

5. In addition, the Pennsylvania Commission attaches to its petition an "Interim Report" prepared by the Pennsylvania Universal Telephone Service Task Force ("Pennsylvania Task Force").[13] This report presents an analysis of the fiscal impact of (1) providing universal service support to the public or non-profit health care providers located in the nine counties at issue and (2) increasing by ten percent the discount percentage eligible schools and libraries located in these counties would receive if they were designated as rural.[14] Based on its analysis, the Pennsylvania Task Force concluded that including the 46 health care providers located in the nine counties at issue would cost $475,087.00, or less than 2/10 of one percent of the $400 million dollar cap imposed on the health care portion of the universal service program.[15] The Pennsylvania Task Force also concluded that the additional ten percent discount -- the most a school's discount can increase by reclassifying its location as rural -- would result in approximately $504,955.00 of additional support for the 317 schools

[11] Pennsylvania Commission petition at 1.

[12] Pennsylvania Commission petition at 3. By the phrase, "designated areas of medical underservice," we interpret the Pennsylvania Commission to mean areas reporting demographics indicative of below-average medical care.

[13] Interim Report Concerning the Definition of Rural Areas Prepared by the Subcommittee on Rural Health Care and Schools and Libraries, Pennsylvania Universal Telephone Service Task Force, adopted July 14, 1997 ("Pennsylvania Interim Report").

[14] *See* Pennsylvania Interim Report at 5-7.

[15] The Pennsylvania Task Force determined that there are 46 eligible health care providers located in the nine counties at issue. The Pennsylvania Task Force calculated the distance from the health care provider to the city with a population of 50,000 or more nearest to each health care provider; identified the incumbent local exchange carrier (LEC) for each health care provider and for each city with a population of 50,000 or more; calculated the maximum allowable distance for each health care provider; compared the rates for T-1 service offered by each incumbent LEC serving the health care provider in the nine counties with the rates for T-1 service available in the cities with populations of 50,000 or more. Pennsylvania Interim Report at 5-6. We note that the Pennsylvania Task Force did not provide specific prices indicating that the prices of a T-1 in these nine counties are similar to rates in rural areas in the state. Rather, in describing its method, the Pennsylvania Task Force states generally:"[f]or example, the local channel charge for a T-1 is higher in rural areas than in urban areas." *Id.* at 6.

located in the nine counties.[16] The Pennsylvania Task Force also concluded that classifying the 55 libraries located in the nine counties would cost an additional $39,600.00.[17] Based on its calculations, the Pennsylvania Task Force concluded that designating the schools and libraries located in the nine counties would cost $544,555.00, or less than 3/100 of one percent of the $2.25 billion dollars of support that will be available for eligible schools and libraries.[18]

IV. DISCUSSION

6. Under section 1.3 of our rules, the Commission may waive any provision of its rules or orders if "good cause" is shown.[19] The standard for good cause requires the petitioner to demonstrate that special circumstances warrant deviation from the rule and that such a deviation would better serve the public interest than the general rule.[20] The Court of Appeals for the D.C. Circuit has stated that a waiver may permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that "[a]n applicant for waiver faces a high hurdle even at the

[16] Pennsylvania Interim Report at 6. The Pennsylvania Task Force cited the Commission's estimate that schools nationwide will spend $3.0 billion annually to purchase the technology services eligible for discounts. The Pennsylvania Task Force assumed that the weighted national average of discounts is 60 percent, and, thus, concluded that discounts for schools and libraries will cost $1.8 billion. The Pennsylvania Task Force divided this amount by 113,000, its estimate of the total number of schools nationwide, to compute an approximate discount for each school of $15,929.00. Using this number, the Pennsylvania Task Force determined that the maximum additional discount that would be available by reclassifying the 317 schools in the nine counties would be ten percent of the discount per school, or $1,592.92. Multiplying this number by 317, the number of schools in the nine counties, the Pennsylvania Task Force estimated that designating these counties as rural would cost approximately $504,955.00 in universal service support. *Id.*

[17] Pennsylvania Interim Report at 7. The Pennsylvania Task Force estimated that libraries nationwide will spend $180 million annually to purchase services eligible for discounts. The Pennsylvania Task Force also estimated that the national weighted average of discounts for libraries is 60 percent and, thus, calculated the cost of discounts on eligible services to be $108 million. The Pennsylvania Task Force then divided this number by the total number of libraries nationwide (15,000) and determined that $7,200.00 is the approximate discount per library. Assuming that a library's discount would increase by ten percent if a library was reclassified from urban to rural, the Pennsylvania Task Force determined that $720.00 is the average amount of support that each such library would gain. Finally, the Pennsylvania Task Force multiplied $720.00 by the number of libraries in the nine counties at issue (55) to calculate the approximate cost of the requested reclassification at $39,600.00. *Id.*

[18] Pennsylvania Interim Report at 7.

[19] 47 C.F.R. § 1.3.

[20] *See Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (*WAIT Radio*).

starting gate."[21] In *WAIT Radio*, the court explained that "[t]he very essence of a waiver is the assumed validity of the general rule. . . ."[22] Therefore, the test for whether the Pennsylvania Commission may be granted a waiver is whether it has shown such special circumstances that warrant deviation from our definition of "rural area." We conclude that the Pennsylvania Commission has failed to make this showing.

7. The identification of a rural area under our rules is a two-part process. First, a school, library or health care provider must determine whether it is located in a metropolitan county, as defined by the MSA lists published by OMB.[23] Second, if it is located in a metropolitan county, a school, library or health care provider may nevertheless be located in a rural area if its location falls within one of the rural pockets within metropolitan counties identified by the Goldsmith Modification list used by ORHP/HHS.[24] The Commission, based on the Joint Board's recommendation, found that adopting the MSA/Goldsmith Modification approach to identifying rural areas is "consistent with the Joint Board's recommendation and congressional intent to adopt a mechanism that includes the largest reasonably practicable number of rural health care providers, that because of their location, are prevented from obtaining telecommunications services at rates available to urban customers."[25] We remain convinced that the MSA/Goldsmith approach is the best method of identifying "rural areas" currently available.

8. The Pennsylvania Commission's waiver petition fails to meet the "good cause" standard. The evidence submitted by the Pennsylvania Commission in support of its request, including significantly fewer hospitals and hospital beds and a lower physician-to-resident ratio in the nine counties relative to urban areas in Pennsylvania, does not demonstrate that a waiver of our rules governing universal service support for telecommunications services is

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[21] *WAIT Radio* at 1157.

[22] *Id.* at 1158.

[23] 47 C.F.R. § 54.505(b)(3)(ii); 47 C.F.R. § 54.601(a)(4). *See* Universal Service Order, 12 FCC Rcd at 9114 n.1698 (OMB, with assistance from the Bureau of Census, designates counties as metropolitan or non-metropolitan in character based on the size of the largest urban aggregation in a county and patterns of commuting between counties).

[24] 47 C.F.R. § 54.505(b)(3)(ii); 47 C.F.R. § 54.601(a)(4). *See* Universal Service Order, 12 FCC Rcd at 9115 n.1700 (the Goldsmith Modification identifies small town and open-country parts of large metropolitan counties by census tract or block-numbered area, as defined by the Bureau of Census).

[25] Universal Service Order, 12 FCC Rcd at 9116 *citing* Recommended Decision, 12 FCC Rcd at 441 and S. Rep. No. 230, 104th Cong., 2d Sess. at 132 and 133. We note that the Advisory Committee on Telecommunications and Health Care also recommended that the Commission use the ORHP/HHS method to identify rural areas. *See* Universal Service Order, 12 FCC Rcd at 9114.

justified.[26] Moreover, a showing that the rates charged for telecommunications services in the nine counties exceed those charged in other non-rural areas, without more, would not warrant a grant of a waiver from the Commission's rules. We note that schools, libraries and health care providers in the nine counties will benefit from universal service support despite their location in non-rural areas. To the extent that health care providers in these counties are unable to obtain toll-free access to the Internet, they are eligible to benefit from support designed to ensure such access.[27] With respect to the schools and libraries support mechanism, the schools and libraries in the nine counties at issue are already entitled to discounts, which are determined based on economic need as well as location in a rural area.[28] We conclude that the evidentiary showing presented by the Pennsylvania Commission does not establish the "special circumstances" that would justify a waiver of the Commission's general rule.

9. We also note that the Commission set forth clear guidelines for determining whether, and to what extent, rural health care providers and schools and libraries are eligible for support.[29] These guidelines are designed to comply with the statutory mandate that universal service mechanisms be "specific, predictable and sufficient."[30] The Pennsylvania Commission, by presenting the calculations of the Pennsylvania Task Force included with the Pennsylvania Commission's petition, provide estimates of the impact on universal service support if its waiver request concerning the nine Pennsylvania counties were granted. This analysis, however, does not take into account the impact on universal service support if other state commissions requested similar relief for non-rural counties in their states that have rural characteristics. Granting such waiver petitions would undermine the Commission's method

[26] We note that the Joint Board rejected an approach under which the Commission would consider specific factors -- such as the ratio of physicians to residents in an area -- to determine whether the health care providers in a particular area should be eligible to benefit from universal service support. *See* Recommended Decision, 12 FCC Rcd at 439 ("employing the methods recommended here for determining rural areas, we see no need to consider other factors such as number of doctors in the community or driving distance from the hospital in formulating a definition of rural area.").

[27] *See* Universal Service Order, 12 FCC Rcd at 9159 (concluding that each health care provider that cannot obtain toll-free access is entitled to receive a limited amount of toll-free access).

[28] *See* Universal Service Order, 12 FCC Rcd at 9050 (adopting discount matrix showing discounts ranging from 20 to 90 percent fulfills statutory obligation to ensure schools and libraries receive supported services at rates less than those charged to other parties).

[29] For example, the Commission established a matrix for determining the discount rate for which a school or library is eligible, based on two factors: economic need and location in a rural area.

[30] Universal Service Order, 12 FCC Rcd at 9141 *(citing* 47 U.S.C. § 254(b)(5)) and 9054-55.