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

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| **In The Matter of** | ) | |
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| **FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE** | ) | **CC Docket No. 96-45 (Report to Congress)** |

# REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to *Public Notice*, DA 98-2 (released January 5, 1998) (the "*Notice*"), hereby replies to selected comments addressing the consistency of the Commission's implementation of the universal service provisions of the Telecommunications Act of 1996 ("Telecommunications Act") with the "plain language" of the statute.[1] Specifically, TRA endorses AT&T Corp.'s call for redesignation of amounts contributed to fund universal service support as mandatory end-user surcharges.[2] In order to enhance competitive neutrality, TRA also joins with AT&T in urging the Commission to require all providers of telecommunications services, regardless of the transmission technology utilized by, or the nature of the core business of, such entities, to levy such surcharges on their customers. In the alternative, TRA concurs with those commenters that argue that the obligation to fund universal service support must be imposed equally on all providers of

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1 Pub. L. No. 104-104, 110 Stat. 56, § 101(a), 102 (1996).

2 Comments of AT&T Corp. at 2 - 8.

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telecommunications services, again regardless of the transmission technology utilized by, or the nature of the core business of, such entities.[3]

# I.

# ARGUMENT

As TRA pointed out in its comments, the contributory scheme by which universal service support is being funded has proven to be neither competitively neutral, nor equitable and nondiscriminatory, as it applies to non-facilities-based (and to a lesser extent, "switch-based") resale carriers; indeed non-facilities-based resale carriers are bearing a disproportionate share of the financial burden associated with universal service funding. As TRA explained, many of TRA's non-facilities-based and partially switch-based resale carriers have not benefitted from either the limited access charge reductions produced by the Commission's access charge reforms or the elimination of such pre-existing universal service funding requirements as the universal service fund and lifeline assistance assessments, because these savings have not been passed through to them by their interexchange network service providers. Moreover, given that virtually all of TRA's resale carrier members operate pursuant to long-term contracts which generally provide for the "pass-through" of new governmental levies, as well as new or increased assessments by exchange access providers, but seldom require a like pass-through of decreases in access or other costs, many of TRA's non-facilities-based and partially switch-based resale carrier members will not benefit from any access- or universal service-related cost savings until their existing one, two, three or more year contracts

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[3] *See, e.g.,* Comments of AT&T at 9 - 13; Comments of AirTouch Communications, Inc. at 23 - 33; Comments of the Senators Stevens and Burns; Comments of Rural Telephone Coalition at 10 - 17.

expire. Accordingly, the new universal service contributions, as well as the presubscribed interexchange carrier charges ("PICC"), represent "pure and simple" cost increases, without any offsetting reductions in costs for these small carriers. Obviously, while they await the expiration of their current multi-year contracts such carriers will be at a significant competitive and financial disadvantage -- a circumstance which is exacerbated not only by their size and resource limitations, but by the unique characteristics of their customer bases.

TRA recommended that the Commission remedy this problem by either (i) relieving non-facilities-based resale carriers (and switch-based resale carriers to the extent their traffic is carried on a "switchless" basis) of the obligation to contribute to universal service funding, or (ii) requiring interexchange network service providers to immediately pass through savings associated with access charge reform and the restructuring of universal service funding to their resale carrier customers on a dollar-for-dollar basis. Another means of achieving the same competitively- neutral end is that suggested by AT&T in its comments, as well as in its earlier-filed petition for reconsideration.[4] AT&T has recommended that the Commission fund universal service support through an explicit, mandatory end-user surcharge that would be assessed as a separate line item on all interstate telecommunications usage.

The explicit, mandatory end-user surcharge proposed by AT&T would serve a number of public interest functions. First, by eliminating at least one component of the dramatic cost increases non-facilities-based and partially switch-based providers have experienced as a result of access charge/universal service reform, it would help to "level the playing field" between non-

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[4] Petition for Reconsideration filed by AT&T in CC Docket No. 96-45 on July 11, 1997) at 2 - 8.

facilities-based and facilities-based providers. Of course, the playing field would be completely leveled if the Commission were to mandate the immediate pass-through of all savings associated with access charge reform and the restructuring of universal service funding.[5]

If levied by all entities that provide telecommunications services, regardless of the transmission technology utilized by them to transmit information or the nature of their "core" business, the AT&T explicit, mandatory end-user surcharge would also promote competitive neutrality among various technologies and market segments.[6] Obviously, with the emergence of internet voice telephony, as well as the rapid growth of internet facsimile and electronic mail, as viable alternatives to traditional interexchange service offerings, the importance of ensuring that regulation does not prefer one technology over another has increased measurably. Certainly, pricing differentials which are attributable to efficiencies related to technological capability are to be encouraged; the market obviously should reward innovation. Pricing differentials which are attributable solely to regulatory quirks, however, distort market performance. No competitor should prosper over another simply because it receives preferential regulatory treatment.

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[5] TRA's resale carrier members would of course support a mandatory pass-through to end users of the net reductions in access and universal service-related costs they received.

[6] An explicit, mandatory end-user surcharge would also enhance competitive neutrality vis-a-vis incumbent local exchange carriers which, as shown by AT&T, recover the vast bulk of their universal service support contributions through interstate access charges under the price cap system. *See* Comments of AT&T at 4. In other words, interexchange carrierss indirectly pay the incumbent local exchange carriers' ("LEC") contributions.

Drawing a sharp distinction between basic and enhanced services made sense when those service categories were first developed in the early 1980s.[7] With the convergence of services and technologies in recent years, however, distinguishing among like services on the basis of their transmission medium distorts the market in ways the Commission could not have anticipated in creating the basic/enhanced dichotomy. Traditional industry distinctions are being blurred.[8] If "voice-over-the-net" offers the same functional capabilities as standard voice service, requiring the latter but not the former to contribute to universal service funding provides the former with a wholly unwarranted price advantage. While delivery of voice telephony over the Internet does require protocol processing, no enhanced value is being added thereby; the service provided is still basic voice telephony. As the Commission has recognized, at least in spirit, protocol conversions that are used "merely to facilitate provision of an overall basic service" should be treated as basic, not enhanced, services.[9] And the Commission has classified as "adjunct to basic" and treated as basic

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[7] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *recon.* 84 F.C.C.2d 50 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C.Cir. 1984), *cert denied sub nom.* Louisiana Public Service Commission v. FCC, 461 U.S. 938 (1983), *further recon.* FCC 84-190 (released May 4,1984).

[8] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 4 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *pet. for cert. pending sub. nom* AT&T Corp. v. Iowa Utilities Board (Nov. 17, 1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

[9] Independent Data Communications Manufacturers Association, Inc.: Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service, 10 FCC Rcd. 13717, ¶¶ 11-18 (1995)).

for regulatory purposes, services that "might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly 'basic' in purpose and use."[10]

Likewise, exemptions granted to systems integrators that derive less than five percent of their system integration revenues from telecommunications resale also distort the market.[11] There is no basis for the Commission's assumption that "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."[12] As the Commission acknowledges, "[s]ystems integrators purchase telecommunications from telecommunications carriers and resell those services to their customers"[13] much like TRA's resale carrier members. A customer's decision to incorporate telecommunications into the package of services it takes from a systems integrator may well turn on the price at which the systems integrator's telecommunications offering is set. By exempting systems integrators from contributing to universal service support,

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[10] North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, 101 F.C.C.2d 349, ¶ 24 (1985).

[11] Other exemptions granted by the Commission also have market distorting impacts, but these additional exemptions are generally supported by a public interest rationale. Thus, relieving non-profit schools, colleges, universities, libraries and health care providers of the obligation to fund universal service can be justified as necessary to further the "educational goals of the universal service support mechanisms." Likewise, the *de minimis* exemption from universal service funding obligations provided to the smallest providers is warranted because "the public interest would not be served if compliance costs associated with contributing to universal service were to exceed actual contribution amounts." Federal-State Joint Board on Universal Service (Report and Order), 12 FCC Rcd. 8776, ¶¶ 284, 295 (1997), *recon.* CC Docket No. 96-45, FCC 97-420, ¶ 46. (1997), *pet. for rev. pending sub. nom.* Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir., June 24, 1997).

[12] Id. at ¶ 279.

[13] Id. at ¶ 278.

the Commission has afforded these entities, many of whom are substantially larger than the typical TRA resale carrier member, a decided pricing advantage.

As the Commission has repeatedly stated, regulation should "promote competition, not protect certain competitors."[14] "[A] firm's prowess in satisfying consumer demand," not preferred regulatory treatment, should "determine its success or failure in the marketplace."[15] Indeed, in "reforming the collection and distribution of universal service funds," the Commission sought to ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort competition."[16] As the Commission recognized in adopting "'competitive neutrality' as an additional principle upon which . . . policies for the preservation and advancement of universal service [were based]," competitive neutrality ensures that "no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition."[17] In fact, the Commission emphasized that the pre-existing universal service system was incompatible

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[14] Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158, ¶ 180 (1997), *recon.* 12 FCC Rcd. 10119 (1997), *second recon.* CC Docket No. 96-262, FCC 97-368 (Oct. 9, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997).

[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Notice of Proposed Rulemaking), 11 FCC Rcd. 14171, ¶ 1 (1996).

[16] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 7.

[17] Federal-State Joint Board on Universal Service (Report and Order), 12 FCC Rcd. 8776 at ¶ 855.

with the pro-competitive purposes of the Telecommunications Act because it "distort[ed] competition" by subsidizing only selected industry participants.[18]

Finally, funding of universal service support mechansims through explicit, mandatory end-user surcharges is consistent with the Congressional mandate that "universal service support should be explicit."[19] As directed by the Congress, "any support mechanism continued or created under new section 254 should be explicit, rather than implicit as many support mechanisms are today."[20] Certainly, an explicit, mandatory end-user surcharge levied equally on all consumers satisfies this mandate better than a carrier assessment which most likely will be passed through unevenly and may well not clearly identify its purpose.

In the event that it declines to adopt AT&T's recommendation that it fund universal service through explicit, mandatory end-user surcharges, the Commission should at least extend the principle of competitive neutrality in the manner discussed above. Certainly, the Commission should extend the obligation to fund universal service support to all providers of telecommunications services, regardless of the transmission technology utilized by, or the nature of the core business of, such entities. As discussed above, technological- or business-based distinctions which result in regulatory preferences for select categories of services or service providers create market distortions as traditional industry distinctions are eroded by technological and market forces. TRA urges the

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[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 5.

[19] Federal-State Joint Board on Universal Service (Report and Order), 12 FCC Rcd. 8776 at ¶ 750.

[20] Joint Explanatory Statement of the Committee of the Conference, H.R. Rep. No. 458, 104th Cong., 2d Sess., 131 (1996).

Commission to heed its own well-chosen words and "reform[] the collection and distribution of universal service funds" in a manner that "enhance[s], rather than distort[s] competition."[21] Allowing providers of services such as "voice-over-the-net" to avoid contributing to universal service support creates just such a market distortion, affording providers of this service a pricing advantage unrelated to their service capabilities.

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[21] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 7.

# II.

## CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to address the matters discussed herein and in TRA's earlier-filed comments in its report to Congress on the consistency of its implementation of the universal service provisions of the Telecommunications Act with the "plain language" of the statute.

Respectfully submitted,

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