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February 6, 1998

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

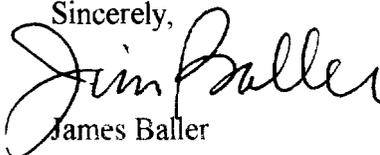
Re: In the Matter of Federal-State Joint Board on Universal Service
CC Docket No. 96-45 (Report to Congress)

Dear Secretary Caton:

Enclosed are an original and four (4) copies of the Reply Comments of the American Public Power Association (APPA) in the proceeding referenced above.

We are delivering, by courier, a copy of APPA's Reply Comments to Sheryl Todd of the Universal Service Branch and to International Transcription Services, Inc.

Sincerely,


James Baller

Enclosures

cc: Ms. Sheryl Todd
International Transcription Services, Inc.

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To the Common Carrier Bureau:

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (APPA) applauds the Commission and the Joint Board for their herculean efforts in crafting a workable universal service program in the face of an imperfect statute and sharply competing interests. APPA generally supports the rules, orders and interpretations that the Commission has issued to implement the program. With these comments, APPA offers additional support for UTC's request in its opening comments that the Commission make explicit that leasing "dark fiber" is not covered by the definitions of "telecommunications" or "telecommunications service" in the Telecommunications Act of 1996.

Interest of APPA

APPA is the national service organization for approximately 2000 consumer-owned, not-for-profit electric utilities located throughout the Nation, in all states except Hawaii. About 35 million Americans receive electricity from the more than 2,000 public power systems operated by municipalities, counties, states and public utility districts.

For more than a century, public power utilities have played a vital role in providing essential electric service and competition in their communities. As a result, communities that have public power utilities have generally obtained lower prices and higher quality of electric service than other

communities. Public power utilities are now well-situated to play a similar role in the field of telecommunications.

In recent years, many public power utilities have upgraded their telecommunications infrastructure to support their core business of providing electric service. Hundreds more will do so in the next few years. That is so because electric utilities need sophisticated telecommunications facilities to meet ever-increasing demands for efficient and reliable electric service, especially in an environment of decontrol and restructuring.

The telecommunications facilities to which electric utilities have upgraded, or will upgrade, can readily support the provision of video, voice, data and other advanced telecommunications services, either by the electric utilities themselves or by other providers of such services. Public power utilities can therefore help accelerate the pace of deployment of our national information infrastructure, facilitate local competition, advance universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way.

To ensure that its members would have a full and fair opportunity to provide or facilitate the provision of telecommunications services and promote universal service in their communities, APPA participated actively in the congressional debates that led to the Telecommunications Act and has also participated actively in the proceedings, including this docket, through which Commission has implemented the Act.

Discussion

As indicated, APPA supports UTC's request that the Commission make clear that leasing dark fiber does not come within the definitions of "telecommunications" or "telecommunications service" in Telecommunications Act. A key component of these definitions is the "transmission" of

information. Since the term “dark fiber,” by definition, excludes the electronics necessary for the transmission of information, leasing dark fiber cannot meet the definitions of “telecommunications” or “telecommunications service.” The regulatory threshold is crossed only when a person adds and uses the electronics necessary to “light up” the fiber. That person is the one who derives income from providing “telecommunications” or “telecommunications service” and should appropriately bear any pertinent universal service obligations.

As UTC noted in its opening comments, the Commission recently determined in its Fourth Order on Reconsideration in this docket that leasing bare satellite transponder capacity is not a “telecommunications service” because it does not involve the “transmission” of information. The Commission should apply the same rationale to leasing dark fiber. APPA would add that this result would be fully supported, and arguably even compelled, by the legislative history of the term “telecommunications service.”

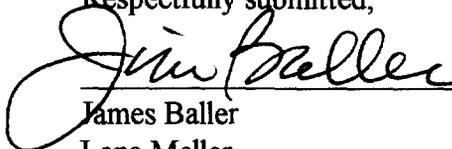
In the 103rd Congress, APPA and UTC advised Congress that many public power utilities would make “dark fiber” available to potential providers of telecommunications service if doing so would not subject them to the burdens applicable to providers of such services. In its report accompanying S.1822, Congress not only observed that “some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers,” but it also expressly confirmed its understanding and intent that “the offering by an electric utility of bulk fiber optic capacity (i.e., “dark fiber”) does not fall within the definition of telecommunications service.” S. Rep. No. 103-367, 103d Cong., 2d Sess. 54-56 (1994), Attachment A hereto. The report also illustrated the application of these principles as follows:

For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier. A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses that capacity, or any other capacity, to provide telecommunications services.

Id. at 55. Congress's understanding and intent carried over into the definition of "telecommunications service" in the Telecommunications Act of 1996, which the 104th Congress enacted without material change from the version that the 103rd Congress had considered.

An explicit statement that leasing dark fiber does not meet the definitions of "telecommunications" or "telecommunications service" would be helpful because some of the Commission's orders and forms have suggested that leasing "excess capacity on private networks" may be a "telecommunications service." The Commission should make clear that the term "excess capacity" in this context refers only to leasing "bandwidth," which includes transmission of information, and not to leasing dark fiber.

Respectfully submitted,



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Attorneys for the
American Public Power Association

February 6, 1998

103D CONGRESS
2d Session

SENATE

REPORT
103-367

COMMUNICATIONS ACT OF 1994

Mr. HOLLINGS, from the Committee on Commerce, Science,
and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

together with

ADDITIONAL AND MINORITY VIEWS

ON

S. 1822



SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1994.—Ordered to be
printed

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New subsection (hh) defines a "local exchange carrier" to mean a provider of telephone exchange service that the FCC determines has market power. Such term does not include providers of commercial mobile services except to the extent that such a service is a replacement for a substantial portion of wireline telephone exchange service within a State. The statement regarding providers of commercial mobile service is intended to be consistent with language in section 332 of the 1934 Act. The definition of local exchange carrier is intended to cover a provider of telephone service that the FCC determines has market power *with respect to local exchange service*.

The definition of "telecommunications" in new subsection (ii) is expanded from the version in S. 1822 as introduced to cover all forms of information sent by means of electromagnetic transmission, without regard for the facilities used to provide such service. This definition excludes interactive games or shopping services and other services involving interaction with stored information that qualify as information services. The underlying transport and switching capabilities on which these interactive services are based, however, are "telecommunications services."

The phrase "between or among points specified by the user" is not intended to limit the definition of "telecommunications" to transmission between or among specific fixed points in a carrier's network predetermined or preselected by a user. The definition covers transmission and transport in a carrier's network involving origination and termination points. The definition is intended to include network services employing "virtual" numbers used in 900, 800, 700, and 500 services, for example, and may involve changes in termination. The intention of the phrase is to distinguish between traditional point-to-point common carrier services and broadcast services.

The definition of "telecommunication service" in new subsection (jj) was broadened from the version in S. 1822 as introduced to ensure that all entities providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act. This expanded definition ensures that these competitors will make contributions to universal service. This definition is intended to include commercial mobile services, competitive access services, and alternative local telecommunications services to the extent that they are offered to the public or to such classes of users as to be effectively available to the public. The Committee does not intend any distinction between the term "general public" and "public."

The term "telecommunications service" does not include information services, cable services, or "wireless" cable services. While the line of distinction between telecommunications services and information services cannot be drawn with scientific certainty, experience has demonstrated the need to draw such a distinction to enable the FCC to tailor its regulations appropriately.

The term "telecommunications service" is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity

(i.e., "dark fiber") does not fall within the definition of telecommunications service.

New subsection (kk) provides a definition of "telecommunications carrier" as any provider of telecommunications services, except for hotels, motels, hospitals, and other aggregators of telecommunications services. For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier. A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses that capacity, or any other capacity, to provide telecommunications services. Similarly, a provider of information services or cable services is not a telecommunications carrier to the extent it provides such services. If an electric utility, a cable company, or an information services company also provides telecommunications services, however, it will be considered a telecommunications carrier for those services.

The definition of "number portability" is clarified from the version in S. 1822 as introduced to make clear that number portability does not allow consumers to travel across the country or across the street and retain their existing telephone number. Number portability allows consumers to retain their existing telephone numbers when switching from one telecommunications carrier to another at the same location.

New subsection (mm) defines "information service" as the FCC has defined it. The definition is intended to provide the FCC with sufficient flexibility to amend its notion of what is and what is not an information service over time as technologies develop.

New subsection (nn) adds a definition of "rural telephone company" that includes companies that either serve a rural area or have fewer than 100,000 access lines within a State.

New subsection (oo) adds a definition of "service area." "Service area" means a geographic area established by the FCC and the States for the purpose of determining universal service obligations and support mechanisms. The FCC and the States shall define the boundaries of each "service area" for both urban and rural areas, consistent with the guidelines, if any, set forth in the statutory language.

Sec. 302.—Regulatory reform

Section 302 of S. 1822 as reported establishes the principles for permitting competition for local telephone service. It adds a new section 230 to the 1934 Act entitled "Telecommunications Competition."

New section 230(a)(1) preempts State and local statutes and regulations, and other State and local legal requirements, that may prohibit or have the effect of prohibiting interstate or intrastate competition for telecommunications services. The preemption is effective 1 year after enactment (except for rural markets described in subsection (k) of new section 230).

Paragraph (2) of new section 230(a) prevents any local government from distinguishing among local exchange carriers and other telecommunications carriers in imposing any franchise or other fee. The creation of a level playing field for the deployment of competitive telecommunications networks and services is of overriding na-

tional concern. Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and collection of local franchise fees in connection with the use of public rights-of-way. Some cities have imposed fees on competitors and not telephone companies; others have imposed fees on telephone companies but not competitors. This provision does not limit the authority of local governments to impose franchise or other fees on telecommunications carriers; it simply states that all providers of telecommunications service must be subject to the same franchise fee requirements as traditional local exchange carriers, and vice versa.

Paragraph (2) also states that States or local governments may make their own telecommunications facilities available to certain carriers and not others so long as making such facilities available is not a telecommunications service. This provision essentially allows a State or local government to discriminate not in the regulations it imposes, but in its offering of State-owned or local-owned telecommunications carriers. For instance, some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers. Such municipal utility may not have sufficient capacity to make it available to all carriers in the market. This provision clarifies that State or local governments may sell or lease capacity on these facilities to some entities and not others without violating the principle of nondiscrimination. Since the offering of telecommunications capacity alone is not a "telecommunications services," the nondiscrimination provisions of this section would not, in any case, apply to the offering of such capacity.

The FCC shall, under paragraph (4) of new section 230(a), preempt any State or local government provision that violates section 230(a). This paragraph does not cast any presumption as to the legality of any State or local provision. A State or local government regulation or provision can only be preempted if the FCC determines, after notice and an opportunity for public comment, that such statute, regulation, or other legal requirement violates or is inconsistent with section 230(a). The public comment period will allow all parties, including competitors and Government officials, to present their positions to the FCC for consideration. The FCC must base any decision under this paragraph on the record before it.

Subsection (b) of new section 230 recognizes, consistent with the provisions of subsection (a), that States may impose, on a competitively neutral basis and consistent with the universal service directives of new section 201A of the 1934 Act, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. For instance, States, and local authorities to the extent they are authorized by such State, continue to have the authority to impose competitively neutral universal service charges on all telecommunications carriers, to govern the use of rights-of-way, or to require telecommunications carriers to register with State or local business offices. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new

section 230(a). Subsection (b) is not intended to confer any additional authority to impose universal service requirements; all such authority is contained in new section 201A.

Subsection (c) of new section 230 sets forth the basic obligations of all telecommunications carriers to open and unbundle their networks in order to permit competition to develop. All telecommunications carriers shall be deemed common carriers, which makes them subject to Title II of the 1934 Act.

The intention of the Committee is that, in general, and except for rural markets, competition should be allowed to develop for local telecommunications services using certain of the facilities and services of existing and competitive carriers. It is unrealistic at this point to expect that competitors will be able to build their own stand-alone networks completely separate from the facilities of the existing local telephone companies. If access to a carrier's existing network and services is not made available to potential competitors, information providers, and providers of equipment, competition for local telecommunications service will be unlikely to become a reality for the vast majority of consumers. The Committee expects that competition will provide consumers substantial benefits in terms of technological innovation and lower prices.

This subsection, however, allows the FCC significant flexibility in the enforcement of these requirements. First of all, the FCC may forbear from applying most of these provisions to particular carriers or classes of carriers, or services or classes of services, if it determines that the carrier or service meets the criteria set forth under subsection (g) of new section 230. Second, carriers must comply with the unbundling and other obligations of subsection (c) only "upon bona fide request." Third, the FCC's regulations direct the carriers to comply on "reasonable terms and conditions." The Committee expects, for instance, that it is only reasonable for the carriers who provide such interconnection to be compensated for their costs of complying with these obligations by those who benefit from them. Fourth, the interconnection and unbundling requirements generally apply only where "technically and economically feasible," which was the standard suggested by Mr. Cullen, President of Bell Atlantic, in his testimony before the Committee on behalf of the RBOS. Fifth, subsection (1) of new section 230 requires the FCC to modify these obligations for rural telephone companies and allows the FCC to waive or modify these obligations for any carrier with less than 2 percent of the Nation's access lines. Finally, subsection (k) recognizes that States may adopt rules to protect against competition in certain rural markets.

Thus, the legislation provides the FCC with flexibility to tailor its regulations to implement these obligations to the needs and resources of the existing carrier and the potential competitors. The Committee expects, however, that the FCC will develop regulations to implement the requirements of subsection (c)(1) that will allow competition to have the opportunity to develop in most markets around the country.

Subsection (c) of new section 230 requires all telecommunications carriers to provide interconnection to their networks upon request. Section 332(c)(1)(B) of the 1934 Act permits the FCC to order a common carrier to establish physical connections, upon request,

DEFINITIONS

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of wiring, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(ee) "Construction permit" or "permit for construction" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

(ff) "Great Lakes Agreement" means the Agreement for the Promotion of Safety on the Great Lakes by Means of Radio in force and the regulations referred to therein.

(gg) [Repealed]

(hh) "Local exchange carrier" means a provider of telephone exchange service that the Commission determines has market power. Such term does not include a person engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service as provided by such person in a State is a replacement for a substantial portion of the wireline telephone exchange service within such State.

(ii) "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, including voice, data, image, graphics, or video, without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, with or without benefit of any closed transmission medium.

(jj) "Telecommunications service" means the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services. Such term does not include information services or cable services as defined under section 602.

(kk) "Telecommunications carrier" means any provider of telecommunications services, except that such term does not include hotels, motels, hospitals, and other aggregators of telecommunications services.

(ll) "Telecommunications number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of qual-

ity, reliability, or convenience when switching from one telecommunications carrier to another.

(mm) "Information service" means the offering of services which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information, provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.

(nn) "Rural telephone company" means a telecommunications carrier operating entity to the extent that such entity provides telephone exchange service, including access service subject to part 69 of the Commission's rules (47 C.F.R. 69.1 et seq.), to—

(1) any service area that does not include either—

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recent population statistics of the Bureau of the Census; or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; or

(2) fewer than 100,000 access lines within a State.

(oo) "Service Area" means a geographic area established by the Commission and the States for the purpose of determining universal service obligations and support mechanisms. In establishing a service area, the Commission and the States shall at a minimum consider—

(1) the principles and requirements of section 201A;

(2) the nature of Federal and State universal service support mechanisms;

(3) the historic area of service by a company and the economics of such company's operations; and

(4) the interest of consumers and competition in such area.

In the case of an area served by a rural telephone company, "service area" shall mean such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

SEC. 201A. UNIVERSAL SERVICE PROTECTION AND ADVANCEMENT.

(a) UNIVERSAL SERVICE PRINCIPLES.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality services are to be provided at just, reasonable, and affordable rates.

(2) Access to advanced telecommunications and information services should be provided in all regions of the Nation

(3) Consumers in rural and high cost areas should have access to telecommunications and information services, including interexchange services, reasonably comparable to those services provided in urban areas.

(4) Consumers in rural and high cost areas should have access to telecommunications and information services at rates that are reasonably comparable to rates charged for similar services in urban areas.