

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
(Report to Congress)

REPORT TO CONGRESS

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By the Commission: Chairman Kennard and Commissioners Ness, Powell and Tristani
issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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#### APPENDIX A Parties Filing Comments

#### APPENDIX B Parties Filing Reply Comments

1. On November 26, 1997, in a recent Appropriations Act,<sup>1</sup> Congress directed the

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<sup>1</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522, § 623 (the "Appropriations Act"). Specifically, the Appropriations Act requires the Commission to submit a report to Congress, no later than April 10, 1998, providing:

a detailed description of the extent to which the Commission's interpretations [identified below] are consistent with the plain language of the Communications Act of 1934 (47 U.S.C. 151 et seq.), as amended by the Telecommunications Act of 1996, and shall include a review of --

(1) the definitions of "information service", "local exchange carrier", "telecommunications", "telecommunications service", "telecommunications carrier", and "telephone exchange service" that were added to section 3 of the Communications Act of 1934 (47 U.S.C. 153) by the Telecommunications Act of 1996 and the impact of the Commission's interpretation of those definitions on the current and future provision of universal service to consumers in all areas of the Nation, including high cost and rural areas;

(2) the application of those definitions to mixed or hybrid services and the impact of such application on universal service definitions and support, and the consistency of the Commission's application of those definitions, including with respect to Internet access under section 254(h) of the Communications Act of 1934 (47 U.S.C. 254(h));

(3) who is required to contribute to universal service under section 254(d) of the Communications Act of 1934 (47 U.S.C. 254(d)) and related existing Federal universal service support mechanisms, and of any exemption of providers or exclusion of any service that includes telecommunications from such requirement or support mechanisms;

(4) who is eligible under sections 254(e), 254(h)(1), and 254(h)(2) of the Communications Act of 1934 (47 U.S.C. 254(e), 254(h)(1), and 254(h)(2)) to receive specific Federal universal service support for the provision of universal service, and the consistency with which the Commission has interpreted each of those provisions of section 254; and

Commission to report to Congress on the Commission's implementation of certain provisions of the Telecommunications Act of 1996<sup>2</sup> regarding the universal service system. In response to this mandate, we have undertaken a thorough review of the Commission's interpretations of the relevant provisions of the 1996 Act with respect to each of the subjects identified in the Appropriations Act.

2. We are mindful of the fact that telecommunications is an industry characterized by extremely rapid changes, as technological advances lead to the introduction of revolutionary services. A few years ago, few consumers in this country were aware of the Internet and the notion that a packet-switched network could be used to complete a long distance call placed from a residential telephone probably would have been regarded as far-fetched. Today, millions of consumers, both in the United States and around the world, daily obtain access to the Internet for a wide variety of services. We can only speculate about the technologies and services that will be offered in the future. We must take care to preserve the vibrant growth of these new technologies and services. But we also must remain constant in our commitment to ensuring universal service.

3. In this Report, we find, under the framework of the 1996 Act, that universal service and the growth of new Internet-based information services are mutually reinforcing. The development and continued growth of information services depends upon the preservation and advancement of universal service. By connecting our nation's telecommunications networks to all citizens, we expand the potential customer basis for information services. At the same time, the growth of Internet-based information services greatly stimulates our country's use of telecommunications, and thereby the revenue base from which we now fund universal service. As we confirm below in our Report, the parties supplying the underlying interstate transmission services used by those information services contribute to universal service based on their telecommunications service revenues. Because Internet service providers are major users of telecommunications, they make substantial indirect contributions to universal service support in the charges they pay to their telecommunications suppliers. We also consider below the regulatory status of various forms of "phone-to-phone" IP telephony service mentioned generally in the record. The record currently before us suggests that certain of these services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services," but we do not believe it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings. To the extent we conclude that the services should be characterized as "telecommunications services," the providers of those services would fall within the 1996 Act's mandatory requirement to contribute to universal service mechanisms. Thus, in general,

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(5) the Commission's decisions regarding the percentage of universal service support provided by Federal mechanisms and the revenue base from which such support is derived.

*Id.*

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), codified at 47 U.S.C. §§ 151 et seq. (Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.) The 1996 Act amended the Communications Act of 1934 (the Act).

continued growth in the information services industry will buttress, not hinder, universal service.

4. We recognize that we are in the midst of a transition from an outmoded system of universal service support that will be undermined by the emergence of local competition to one that is compatible with competitive local markets. We underscore that during and after this transition, it is our duty and intention to ensure that financial support for federal universal service support mechanisms is maintained. In carrying out those responsibilities, we must think ahead, so that our policies are right not just for the present but for the future as well. Our rules should not create anomalies and loopholes that can be exploited by those seeking to avoid universal service obligations.

5. In this Report, we also commit to a reexamination of the issues regarding the respective federal and state responsibilities for maintaining and advancing universal service goals, including a full consideration of the specific alternatives to the Commission's decisions last May that parties have placed in the record before us. This will include a reevaluation of the decision regarding the federal share of high cost support (the "25-75" decision) prior to January 1, 1999. Section 254(b)(3) of the Act establishes the principle that federal and state universal service mechanisms be "specific, predictable and sufficient." We plan to redouble our efforts to work with state commissions to ensure that this statutory principle is fully realized. Therefore, in full recognition of the importance of the mission given to us by Congress in the Appropriations Act, we respectfully submit this Report to Congress on universal service.

## I. INTRODUCTION

6. This Report to Congress focuses on the Commission's implementation of the 1996 Act's provisions regarding universal service. The universal service system is designed to ensure that low-income consumers can have access to local phone service at reasonable rates. Universal service also ensures that consumers in all parts of the country, even the most remote and sparsely populated areas, are not forced to pay prohibitively high rates for their phone service.

7. Before passage of the 1996 Act, universal service was promoted through a patchwork quilt of implicit and explicit subsidies at both the state and federal levels.<sup>3</sup> Charges to long distance carriers and rates for certain intrastate services provided to carriers and to end users were priced above cost, which enabled local telephone companies to keep rates for basic local telephone service at affordable levels throughout the country. The effect of these subsidies was to increase subscribership levels nationwide by ensuring that residents in rural and high cost areas were not prevented from receiving phone service because of prohibitively high telephone rates.

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<sup>3</sup> See 47 U.S.C. § 151. The Commission's specific programs pursuant to the 1934 Act's mandate include the high cost loop fund, the dial equipment minutes (DEM) weighting program, long term support, Lifeline, and Link-Up. In addition, the Commission's interstate access charge system provided implicit subsidies for universal service support.

8. Recognizing the vulnerability of these implicit subsidies to competition, Congress, in the 1996 Act, directed the Commission and the states to restructure their universal service support mechanisms to ensure the delivery of affordable telecommunications services to all Americans in an increasingly competitive marketplace. Congress specified that universal service support under the new federal system "should be explicit," and that "every telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."<sup>4</sup> In addition, Congress specified that a telecommunications carrier meeting the statutory requirements in section 214(e) of the Act would be eligible to receive federal universal service support and required states to designate more than one eligible telecommunications carrier for service areas other than those served by a rural telephone company.<sup>5</sup> To sustain universal service in a competitive environment, Congress recognized that: (1) the appropriate amount of the universal subsidy must be identifiable; (2) all carriers (rather than only interexchange carriers) that provide telecommunications service should contribute to universal service, on an equitable basis; and (3) any carrier (rather than only the incumbent LEC) should receive the appropriate level of support for serving a customer in a high cost area.

9. In the 1996 Act, Congress codified the long-standing commitment to ensuring universal service first expressed in section 1 of the Act,<sup>6</sup> and directed that "[c]onsumers . . . in rural, insular, and high cost areas should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to [those] in urban areas."<sup>7</sup> Congress

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<sup>4</sup> 47 U.S.C. § 254(d)-(e).

<sup>5</sup> 47 U.S.C. § 214(e); *see also* 47 U.S.C. § 153(37), which provides that:

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity --

(A) provides common carrier service to any local exchange carrier study area that does not include either --

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

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

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

<sup>6</sup> 47 U.S.C. § 151.

<sup>7</sup> 47 U.S.C. § 254(b)(3).

also expanded the concept of universal service by requiring, for the first time, universal service support for eligible schools, libraries and rural health care providers.<sup>8</sup>

10. Consistent with the timetable established in the 1996 Act, the Commission issued the *Universal Service Order* in May 1997 implementing the new universal service provisions and setting forth a plan that fulfills the universal service goals established by Congress.<sup>9</sup> In the *Universal Service Order*, the Commission announced its plan for establishing a system of universal service support for rural, insular, and high cost areas that will replace the existing high cost programs and the implicit federal subsidies with explicit, competitively-neutral federal universal service support mechanisms. The Commission made some modifications to the existing high cost support mechanisms that took effect on January 1, 1998. Those changes were the first steps in moving to a support system that is sustainable in a competitive environment, as Congress has directed. For example, the Commission modified the funding methods for the existing federal universal service support programs, beginning January 1, 1998, so that such support is not generated exclusively through charges imposed on long distance carriers. Instead, as the statute requires, the new universal service rules require equitable and non-discriminatory contributions from all telecommunications carriers and require other providers of interstate telecommunications service to contribute when the Commission finds that the public interest so requires. In addition, the Commission modified the existing high cost support programs so that implicit subsidies previously recovered through interstate access charges will be recovered through the new explicit federal universal service funding mechanism. The Commission also adopted rules to implement the new programs created by Congress in the 1996 Act to encourage and promote universal service for eligible schools, libraries and health care providers.

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<sup>8</sup> 47 U.S.C. § 254(h).

<sup>9</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997) (*Universal Service Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 18400 (1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, FCC 97-292, 12 FCC Rcd 12437 (rel. Aug. 15, 1997); Federal-State Joint Board on Universal Service, *Third Report and Order*, 12 FCC Rcd 22480 (1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Second Order on Reconsideration in CC Docket 97-21*, 12 FCC Rcd 22423 (1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420 (rel. Dec. 30, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998) ("*Fourth Order on Reconsideration*"), *appeal pending in Alenco Communications, Inc., et al. v. FCC and USA*, No. 98-1064 (D.C. Cir. 1998).

11. The Commission's revised universal service rules seek to ensure that the Commission's long-standing commitment to maintaining affordable rates throughout the country, codified in the 1996 Act,<sup>10</sup> is maintained in a competitive environment. Although the Commission has many decisions still before it that will affect the ultimate amount of universal service support that will be provided by federal mechanisms,<sup>11</sup> there is no indication that the revised universal service rules will result in a reduction in federal support from the current level. The Commission also intends to continue to consult with the Universal Service Joint Board and other state regulators and take additional steps, if necessary, to ensure that rates remain affordable. At the same time, however, the Commission recognizes the 1996 Act's mandate that universal service reforms must accommodate and encourage competition. The Commission also is aware that affordable rates can best be maintained through support mechanisms that provide as much support as is necessary, but no more than is necessary.

12. We are mindful that the proper implementation of these provisions is critical to the success and survival of the nation's universal service system and, accordingly, have taken our obligations very seriously. In preparing this Report, we have sought and reviewed thousands of pages of public comments. We have considered more than 5,000 informal public comments filed via electronic mail. We have held two *en banc* hearings during which panels of experts -- including representatives of the Internet community, telecommunications companies, educators and state officials -- discussed their views with us concerning the interpretive issues surrounding the relevant provisions of the 1996 Act. Although many of the rules at issue have been in place for nearly a year, we have considered each rule and interpretation anew and without preconceptions, in light of both the plain language and overall purposes of the 1996 Act.

## II. EXECUTIVE SUMMARY

### A. Definitional Issues

13. Section 623(b)(1) of the Appropriations Act directs the Commission to review "the definitions of 'information service,' 'local exchange carrier,' 'telecommunications,' 'telecommunications service,' 'telecommunications carrier,' and 'telephone exchange service.'" In response to Congress's directive, we have revisited the Commission's findings with regard to the way the Commission interpreted these statutory terms when it implemented the universal service provisions of the 1996 Act. In particular, we have carefully evaluated the impact of those definitions on the treatment of Internet-based offerings under the universal service system. We conclude, as the Commission did in the *Universal Service Order*, that the categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior

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<sup>10</sup> 47 U.S.C. § 254.

<sup>11</sup> For example, the Commission must select a mechanism to determine non-rural carriers' forward-looking cost to provide the supported services and determine the relevant benchmark against which to compare cost to determine support levels.

to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to be mutually exclusive, like the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T.<sup>12</sup> We recognize that the 1996 Act's explicit endorsement of the goals of competition and deregulation represents a significant break from the prior statutory framework. We find generally, however, that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services "via telecommunications."<sup>13</sup>

## B. Application of Definitions

14. The Appropriations Act also requires the Commission to review "the application of those definitions [set forth in section 623(b)(1)] to mixed or hybrid services and the impact of such application on universal service definitions and support, and the consistency of the Commission's application of those definitions, including with respect to Internet access under section 254(h)." Pursuant to that directive, we have reviewed various mixed or hybrid services, including those services that are commonly described as Internet telephony services. The record currently before us suggests that certain forms of "phone-to-phone" IP telephony services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services." We do not, however, believe it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings. To the extent that we conclude that IP certain forms of "phone-to-phone" IP telephony services should be characterized as "telecommunications services," the providers of those services would fall within the 1996 Act's mandatory requirement to contribute to universal service mechanisms.

15. Moreover, we clarify that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as "telecommunications service" or "telecommunications" rather than "information service," and that the provision of such transmission should also generate contribution to universal service support mechanisms. Thus, we find, in general, that continued growth in the information services industry will buttress, not hinder, universal service. In those cases where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service, we do not currently require it to contribute to universal service mechanisms. We believe it is appropriate to reexamine that result, as one could argue that in such a case that the Internet service provider is furnishing raw transmission capacity to itself. We recognize, however, that there are significant operational difficulties associated with determining the amount of such an Internet service

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<sup>12</sup> *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>13</sup> 47 U.S.C. § 153(20).

provider's revenues to be assessed for universal service purposes and with enforcing such requirements. We intend to consider these issues in an upcoming proceeding. Finally, we find that Internet service providers generally do not provide telecommunications. Our analysis, we believe, reflects a consistent approach that will safeguard the current and future provision of universal service to all Americans, and will achieve the Congressionally-specified goals of a "pro-competitive, deregulatory communications policy."

### C. Who Contributes to Universal Service Mechanisms

16. Section 623(b)(3) of the Appropriations Act requires the Commission to review "who is required to contribute to universal service under section 254(d) of the Communications Act . . . and related existing mechanisms, and of any exemption of providers or exclusion of any service that includes telecommunications from such requirement or support mechanisms." Accordingly, we have reviewed our decision regarding which entities must contribute to universal service support mechanisms, which entities should contribute, and which entities should be exempt from contributing. We affirm that the plain language of section 254(d), which mandates contributions from "every telecommunications carrier that provides interstate telecommunications services," requires the Commission to construe broadly the class of carriers that must contribute.<sup>14</sup> In addition, we find that the Commission properly exercised the permissive authority granted by section 254(d) to include other providers of interstate telecommunications in the pool of universal service contributors. We have also re-examined the Commission's implementation of the limited authority set forth in section 254(d) to exempt *de minimis* contributors and affirm that the Commission has not exceeded the boundaries established by the statute. We conclude that the Commission appropriately exercised the flexibility that section 254(d) grants it to exempt those entities whose contributions would be *de minimis* and to include in the pool of contributors those providers of telecommunications whose contributions are required by the public interest.

### D. Who Receives Universal Service Support

17. Section 623(b)(4) of the Appropriations Act requires the Commission to review who is eligible under sections 254(e), 254(h)(1), and 254(h)(2) of the Communications Act ". . . to receive specific federal universal service support for the provision of universal service, and the consistency with which the Commission has interpreted each of those provisions of section 254." We have carefully evaluated the general standards of eligibility for support set forth in section 254(e) of the 1996 Act, as well as the eligibility standards for providers of services to schools and libraries under section 254(h)(1)(B) and for providers of services to health care providers under section 254(h)(1)(A). Although we observe that certain of the provisions of the 1996 Act appear to render the statute susceptible to more than one interpretation with respect to eligibility for the receipt of universal service support, we conclude that the Commission properly implemented eligibility rules that are consistent with both the language and the spirit of the 1996 Act.

### E. Revenue Base and Percentage of Federal Funding

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<sup>14</sup> See *Universal Service Order*, 12 FCC Rcd at 9177, para. 783.

18. Finally, as required by section 623(b)(5) the Appropriations Act, we reexamine "the Commission's decisions regarding the percentage of universal service support provided by federal mechanisms and the revenue base from which such support is derived." As explained in detail below, we find that the Commission's decisions with respect to the appropriate revenue base for universal service contributions are legally consistent with the 1996 Act and fulfill the intended goal of establishing an orderly transition from federal implicit subsidies to federal explicit subsidies. After analyzing the Commission's conclusions regarding the jurisdictional parameters placed on the Commission and on states, we agree that the Commission has the authority to assess universal service contributions on both the interstate and intrastate revenues of telecommunications providers.

19. With respect to the percentage of federal universal service funding, as discussed below, we regard the Commission's earlier decision as a place holder, an initial step in its plan for implementing section 254. States and other affected entities have raised serious concerns about the extent of federal support for high cost areas. In this Report, we commit to reconsidering those aspects of the Universal Service Order prior to fully implementing high cost universal service mechanisms. We conclude that a strict, across-the-board rule that provides 25 percent of unseparated high cost support to the larger LECs might provide some states with less total interstate universal service support than is currently provided. The Commission will work to ensure that states do not receive less funding as we implement the high cost mechanisms under the 1996 Act. We find that no state should receive less federal high cost assistance than it currently receives. The Commission decided to provide an evolving level of support and to revise funding mechanisms as necessary to maintain adequate support to ensure reasonable rates. Some of the larger LECs that have higher than average costs, however, currently recover more than 25 percent of their cost from the interstate jurisdiction. Beginning on January 1, 1999, this additional allocation above 25 percent is eliminated. At the same time, however, the basis for providing high cost support is fundamentally altered. We are mindful that the Commission's work in this regard is not yet complete. We are committed to issuing a reconsideration order in response to the petitions filed asking the Commission to reconsider the decision to fund 25 percent of the required support amount. In the course of that reconsideration, we will take all appropriate steps, including continued consultation with the states, to ensure that federal funding is adequate to achieve statutory goals. We also recognize that Congress assigned to the Commission, after consultation with the Joint Board, the ultimate responsibility for establishing policies that ensure that: 1) quality services are available at just, reasonable and affordable rates; 2) all consumers have "access to telecommunications and information services" at rates that are reasonably comparable to the rates charged for similar services in urban areas; and 3) there are "specific, predictable, and sufficient" federal and state mechanisms to preserve and advance universal service. We are committed to implementing section 254 consistent with these objectives.

20. We note that the discussion of the issue of federal support for high cost in this Report relates only to non-rural local exchange carriers. With respect to *rural* LECs, the Commission has determined that there shall be no change in the existing high cost support mechanisms until January 1, 2001 at the earliest. We do not revisit that determination in this

Report. Thus, the method of determining federal support for rural local exchange carriers will remain unchanged until at least January 1, 2001, meaning that the amount of universal service support for rural local exchange carriers will be maintained initially at existing levels and then should increase in accordance with specified factors, such as inflation, that have historically guided changes in such support. Any possible change in the support mechanism for rural local exchange carriers would require a separate rulemaking proceeding.

### III. STATUTORY DEFINITIONS

#### A. Overview

21. All of the specific mandates of the 1996 Act depend on application of the statutory categories established in the definitions section. The 1996 Act added or modified several of the definitions found in the Communications Act of 1934, including those that apply to "telecommunications," "telecommunications service," "telecommunications carrier," "information service," "telephone exchange service," and "local exchange carrier." In section 623(b)(1) of the Appropriations Act, Congress directed us to review the Commission's interpretation of these definitions, and to explain how those interpretations are consistent with the plain language of the 1996 Act.<sup>15</sup> Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system. We recognize that the 1996 Act's explicit endorsement of the goals of competition and deregulation represents a significant break from the prior statutory framework. We find generally, however, that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services "via telecommunications."<sup>16</sup>

#### B. Background

22. The Communications Act of 1934. The Communications Act of 1934, as amended, gives the Commission extensive authority over all "common carriers," defined as all persons "engaged as a common carrier for hire, in interstate and foreign communication."<sup>17</sup>

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<sup>15</sup> Appropriations Act, § 623(b)(1).

<sup>16</sup> 47 U.S.C. § 153(20).

<sup>17</sup> *Id.* § 153(10). Section 2(a) of the Act makes plain that the Commission has authority only over communication, and persons engaged in communication, "by wire or radio." *Id.* § 152(a).

Title II of the Act, derived from the federal Interstate Commerce Act,<sup>18</sup> includes (among other things) requirements that common carriers provide service at just and reasonable prices, and subject to just and reasonable practices, classifications, and regulations;<sup>19</sup> that they make no unjust or unreasonable discrimination;<sup>20</sup> that they file tariffs, subject to Commission scrutiny;<sup>21</sup> and that they obtain Commission approval before acquiring or constructing new lines.<sup>22</sup>

23. Computer II. More than three decades ago, the Commission recognized that "the growing convergence and interdependence of communication and data processing technologies" threatened to strain its existing interpretations of Title II.<sup>23</sup> It began an inquiry into the regulatory and policy problems posed by that confluence. In 1980, it issued the *Computer II* decision,<sup>24</sup> embodying its thinking on how it could best advance its regulatory goals of "minimiz[ing] the potential for improper cross-subsidization, safeguard[ing] against anticompetitive behavior, and [protecting] the quality and efficiency of telephone service" while "foster[ing] a regulatory environment conducive to . . . the provision of new and innovative communications-related offerings" and "enabl[ing] the communications user to [take] advantage of the ever increasing market applications of computer . . . technology."<sup>25</sup>

24. In *Computer II*, the Commission classified all services offered over a telecommunications network as either *basic* or *enhanced*. A basic service consisted of the offering, on a common carrier basis, of pure "transmission capacity for the movement of information."<sup>26</sup> The Commission noted that it was increasingly inappropriate to speak of carriers offering discrete "services" such as voice telephone service. Rather, carriers offered communications paths that subscribers could use as they chose, by means of equipment located on subscribers' premises, for the analog or digital transmission of voice, data, video or

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<sup>18</sup> Interstate Commerce Act of 1887, 24 Stat. 379 (1887).

<sup>19</sup> 47 U.S.C. § 201(b).

<sup>20</sup> *Id.* § 202(a).

<sup>21</sup> *Id.* §§ 203-05.

<sup>22</sup> *Id.* § 214.

<sup>23</sup> *Regulatory & Policy Problems Presented by the Interdependence of Computer and Communications Services & Facilities (Computer I)*, 7 FCC 2d 11, 13 (1966) (*Notice of Proposed Rulemaking*); 28 FCC 291 (1970) (*Tentative Decision*); 28 FCC 2d 267 (1971) (*Final Decision*), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973).

<sup>24</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Tentative Decision*), 77 FCC 2d 384 (1980) (*Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

<sup>25</sup> *See Computer II Tentative Decision*, 72 FCC 2d at 389-90.

<sup>26</sup> *Computer II Final Decision*, 77 FCC 2d at 419, para. 93.

other information.<sup>27</sup> The Commission therefore defined basic transmission service to include the offering of "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."<sup>28</sup>

25. An enhanced service, by contrast, was defined as "any offering over the telecommunications network which is more than a basic transmission service."<sup>29</sup> Specifically, the Commission defined enhanced services to include

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.<sup>30</sup>

26. Enhanced service providers, the Commission found, were not "common carriers" within the meaning of the Communications Act of 1934, and hence were not subject to regulation under Title II of that Act. Enhanced services involve "communications and data processing technologies . . . intertwined so thoroughly as to produce a form different from any explicitly recognized in the Communications Act of 1934."<sup>31</sup> Seeking to regulate enhanced services, the Commission concluded, would only restrict innovation in a fast-moving and competitive market.<sup>32</sup>

27. The Commission stressed that the category of enhanced services covered a wide range of different services, each with communications and data processing components. Some might seem to be predominantly communications services; others might seem to be predominantly data processing services. The Commission declined, however, to carve out any subset of enhanced services as regulated communications services. It found that no regulatory scheme could "rationally distinguish and classify enhanced services as either communications or data processing,"<sup>33</sup> and any dividing line the Commission drew would at best "result in an unpredictable or inconsistent scheme of regulation" as technology moved forward.<sup>34</sup> Such an attempt would lead to distortions, as enhanced service providers either artificially structured

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<sup>27</sup> *Id.* at 419, para. 94.

<sup>28</sup> *Id.* at 419-20, paras. 93, 96.

<sup>29</sup> *Id.* at 420, para. 97.

<sup>30</sup> 47 C.F.R. § 64.702(a).

<sup>31</sup> *Computer II Final Decision*, 77 FCC 2d at 430, para. 120.

<sup>32</sup> *See id.* at 434, para. 129.

<sup>33</sup> *Id.* at 428, para. 113.

<sup>34</sup> *Id.* at 425, paras. 107-08.

their offerings so as to avoid regulation, or found themselves subjected to unwarranted regulation.<sup>35</sup> The Commission therefore determined that enhanced services, which are offered "over common carrier transmission facilities," were themselves not to be regulated under Title II of the Act, no matter how extensive their communications components.<sup>36</sup> The Commission reaffirmed its definition of enhanced services in the *Computer III* proceeding.<sup>37</sup>

28. The Modification of Final Judgment. On August 11, 1982, the District Court for the District of Columbia entered a consent decree, commonly known as the Modification of Final Judgment or MFJ, settling the United States Government's long-running antitrust lawsuit against AT&T. Under the MFJ, AT&T was required to divest itself of the Bell Operating Companies. The MFJ distinguished between "telecommunications" and "information" services: the Bell Operating Companies were to provide local exchange telecommunications service, but were forbidden to provide interexchange telecommunications service or information services.<sup>38</sup>

29. The Telecommunications Act of 1996. On February 8, 1996, the 1996 Act became law.<sup>39</sup> Whereas historically the communications field had been dominated by a few, heavily regulated providers, Congress sought to establish "a pro-competitive, deregulatory national policy framework," making "advanced telecommunications and information technologies and services" available to all Americans, "by opening all telecommunications markets to competition."<sup>40</sup>

30. Although the 1996 Act left intact most of the existing provisions of Title II, it added new provisions referring to "telecommunications" and "information service." The 1996 Act defined "telecommunications" to mean "the transmission, between or among points

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<sup>35</sup> See *id.* at 423-28, paras. 102-13.

<sup>36</sup> See *id.* at 428, paras. 114.

<sup>37</sup> See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Report and Order, Phase II, 2 FCC Rcd 3072, 3081-82 (1987) (*Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order vacated*, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), recon. dismissed in part, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 115 S.Ct. 1427 (1995), on remand, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, CC docket No 95-20, FCC 98-8 (rel. Jan. 30, 1998) (*Computer III Further Remand Proceedings*).

<sup>38</sup> See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 226-32 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>39</sup> Pub. L. No. 104-104, 110 Stat. 46, codified at 47 U.S.C. §§ 151 et seq.

<sup>40</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."<sup>41</sup> It defined "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used."<sup>42</sup> It defined "telecommunications carrier" to include "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services."<sup>43</sup> It defined "information service" to mean

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.<sup>44</sup>

31. The 1996 Act redefined "telephone exchange service" to include not only "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers interconnecting service of the character ordinarily furnished by a single exchange," but also "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."<sup>45</sup> It defined "local exchange carrier" to include "any person that is engaged in the provision of telephone exchange service or exchange access." The definition excludes persons "engaged in the provision of a commercial mobile service . . . except to the extent the Commission finds that such service should be included in the definition of such term."<sup>46</sup>

32. The 1996 Act imposes a wide variety of obligations on telecommunications carriers, including, among other things, obligations relating to interconnection<sup>47</sup> and privacy of subscriber information.<sup>48</sup> One such obligation relates to universal service: section 254(d)

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<sup>41</sup> 47 U.S.C. § 153(43).

<sup>42</sup> *Id.* § 153(46).

<sup>43</sup> *Id.* § 153(44). An aggregator is an entity that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using operator services. *Id.* § 226(a)(2). Restaurant owners who make pay telephones available to their customers, for example, are aggregators.

<sup>44</sup> *Id.* § 153(20).

<sup>45</sup> 47 U.S.C. § 153(47).

<sup>46</sup> *Id.* § 153(26).

<sup>47</sup> *See id.* §§ 251-52.

<sup>48</sup> *See id.* § 222.

dictates that every telecommunications carrier that provides interstate telecommunications services must contribute to the mechanisms established by the Commission to preserve and advance universal service.<sup>49</sup> The 1996 Act does not impose obligations on telecommunications providers who do *not* provide interstate "telecommunications services" (and therefore are not "telecommunications carriers"), except that the Commission may require any provider of interstate telecommunications to contribute to universal service mechanisms if the public interest requires.<sup>50</sup> The Act imposes no regulatory obligations on information service providers as such.

### C. Discussion

#### 1. "Telecommunications," "Telecommunications Service," "Telecommunications Carrier" and "Information Service" Definitions

33. The proper interpretation of the terms "telecommunications" and "telecommunications service" in the 1996 Act raises difficult issues that are the subject of heated debate. The Commission previously concluded that the 1996 Act's definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services, in that they were intended to refer to separate categories of services. After finding in the *Non-Accounting Safeguards Order* that "the differently-worded definitions of 'information services' and 'enhanced services' . . . should be interpreted to extend to the same functions,"<sup>51</sup> the Commission ruled in the *Universal Service Order* that entities providing enhanced or information services are not thereby providing "telecommunications service."<sup>52</sup> It found that the 1996 Act's definition of telecommunications, which "only includes transmissions that do not alter the form or content of the information sent," excludes Internet access services, which "alter the format of information through computer processing applications such as protocol conversion and

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<sup>49</sup> See *id.* § 254(d).

<sup>50</sup> *Id.*; see also *Universal Service Order*, 12 FCC Rcd at 9182-9184, paras. 793-96.

<sup>51</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56, para. 102 (1996) (*Non-Accounting Safeguards Order*), Order on Reconsideration, 12 FCC Rcd 2297 (1997), further recon. pending, Second Report and Order, 12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997). The Commission in the *Non-Accounting Safeguards Order* treated the category of information services as distinct from telecommunications. It reaffirmed its conclusion that protocol processing services were information services, rejecting the possibility of treating such services as telecommunications and thus potentially making them subject to Title II regulation. *Id.* at 21956-57, paras. 104-05.

<sup>52</sup> *Universal Service Order*, 12 FCC Rcd at 9179-80, paras. 788-89.

interaction with stored data."<sup>53</sup> In the *Pole Attachments Telecommunications Rate Order*, we relied on the Commission's finding that Internet access service does not constitute a telecommunications service,<sup>54</sup> and in *Use of Customer Proprietary Network Information* we summarized Commission precedent as indicating that telecommunications services and information services are "separate, non-overlapping categories, so that information services do not constitute 'telecommunications' within the meaning of the 1996 Act."<sup>55</sup>

34. Senators Stevens and Burns, along with commenters including some incumbent local exchange carriers, urge in their comments that this approach is incorrect. The 1996 Act's definition of "telecommunications," they state, creates a new category unrelated to anything in the Commission's earlier regulatory approach.<sup>56</sup> Senators Stevens and Burns state that Congress, in defining "telecommunications" and "information service" in the 1996 Act, intended to replace the Commission's existing regulatory structure. As mentioned above, under the regulatory structure in place in 1996, a service could fall into either the "basic" or the "enhanced" category, but not both.<sup>57</sup> An entity offering a service with both communications and computer-processing components was deemed to be providing an

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<sup>53</sup> *Id.* at 9180, para. 789. The Commission also noted that section 254(h)(2)(A) calls on it to enhance "access to advanced telecommunications and information services," and concluded that the phrase would be redundant if "information services were a subset of advanced telecommunications." *Id.*

<sup>54</sup> *Amendment of the Commission's Rules and Regulations Governing Pole Attachments*, Report and Order, Further Notice of Proposed Rulemaking, CC Docket No. 97-151 (rel. Feb. 6, 1998), at para. 33 (*Pole Attachments Telecommunications Rate Order*).

<sup>55</sup> *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking CC Docket No. 96-115, FCC 98-27 (rel. Feb. 26, 1998), at para. 46. In both the *Pole Attachments Order* and *Use of Customer Proprietary Network Information* we noted the pendency of this Report, and we made clear that we did not intend to foreclose the Report's reexamination of the underlying issues:

We are currently seeking comment on whether

the 1996 Act's definition of "telecommunications service" should be interpreted to extend to the same functions [covered by the Commission's "basic services" category, and] whether there is any basis to conclude that, by using the term "telecommunications services," Congress intended a significant departure from the Commission's usage of "basic services."

*Computer III Further Remand Proceedings*, at para. 41. We have not yet received reply comments in that proceeding.

<sup>56</sup> See, e.g., Senators Stevens and Burns comments at 1-6, TDS comments at 2. See also, e.g., Low Tech Designs comments at 1-3, RTC comments at 10-17, Reply Comments of Bell Atlantic at 7-9. But see GTE Comments at 17.

<sup>57</sup> See *Computer II Final Decision*, 77 FCC 2d at 419-22, paras. 93-97; *supra* Section II.B.

enhanced service, not a basic one.<sup>58</sup> Senators Stevens and Burns state that Congress rejected that approach, intending instead that a service could fall simultaneously into both of the new categories created by the 1996 Act.<sup>59</sup> Under this approach, an information service provider is deemed a telecommunications carrier to the extent it engages in "transmission" of the information it provides.<sup>60</sup> In particular, Senators Stevens and Burns indicate, an information service provider transmitting information to its users over common carrier facilities such as the public switched telephone network is a "telecommunications carrier."<sup>61</sup>

35. In support of their position, Senators Stevens and Burns note that the terms "basic" and "enhanced" do not appear in the 1996 Act; rather, Congress defined new categories.<sup>62</sup> Their interpretation of the statute, they explain, flows naturally from the statute's definition of "telecommunications" as "the transmission, between or 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," its definition of "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and its definition of telecommunications carrier as including "any provider of telecommunications services."<sup>63</sup> These definitions taken together, they state, "make it plain that Congress intended [the term 'telecommunications carrier'] to include anyone engaged in the transmission of 'information of the user's choosing.'"<sup>64</sup> Senators Stevens and Burns note that other language in the definition of "telecommunications carrier" makes clear that a given entity may simultaneously offer telecommunications and other services.<sup>65</sup> They also point out that Congress failed to adopt language, included in the House version of the 1996 Act,

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<sup>58</sup> See *Computer II Final Decision*, 77 FCC Rcd at 420-21, 423-28, paras. 97, 102-13; see also *id.* at 432, para. 125 (notwithstanding that enhanced services providers are not "common carriers" subject to Title II, they are subject to the Commission's jurisdiction because they provide "the electronic transmission of writing, signs, signals, pictures, etc., over the interstate telecommunications network"); *id.* at 435, para. 132 (enhanced services have "a communications component"); *supra* Section II.B.

<sup>59</sup> Senators Stevens and Burns comments at 3-6.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.* at 5 & n. 19; see also, e.g., RTC comments at 12-13, TDS comments at 5.

<sup>62</sup> Senators Stevens and Burns comments at 1-2; see also, e.g., TDS comments at 2.

<sup>63</sup> 47 U.S.C. § 153(43), (44), (46).

<sup>64</sup> Senators Stevens and Burns comments at 4.

<sup>65</sup> Senators Stevens and Burns comments at 3-5; see 47 U.S.C. § 153(44): "A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . ."

providing that the term "telecommunications service" . . . does not include an information service."<sup>66</sup> Somewhat similar language in the text of the Senate bill was deleted as well.<sup>67</sup>

36. Finally, Senators Stevens and Burns assert that the Commission's current understanding of the statutory terms could "seriously undermine the universal service, competitive neutrality, and local competition goals that were at the heart" of the 1996 Act.<sup>68</sup> The regulatory provisions of the 1996 Act are addressed to "telecommunications carriers" and "telecommunications services."<sup>69</sup> They explain that, to the extent that the categories of telecommunications and information services are interpreted to be mutually exclusive, the scope of the "telecommunications carrier" and "telecommunications service" categories is accordingly narrowed, and the reach of the 1996 Act is correspondingly limited.

37. Other Senators and other interested parties, however, have filed comments in this proceeding expressing a contrary view. Senator McCain urges that "[n]othing in the 1996 Act or the legislative history supports the view that Congress intended to subject information services providers to the current regulatory scheme applicable to common carriers which is, if anything, too intrusive and burdensome."<sup>70</sup> Rather, he explains, "[i]t certainly was not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation."<sup>71</sup> Senator McCain states, in defining "telecommunications," "telecommunications service" and "information service," Congress "distinguished between information services and telecommunication services to reflect the distinction set forth on the Modification of Final Judgment and the Commission's *Second Computer Inquiry* proceeding between those services that offer pure transmission capacity and others that somehow enhance the transmission capacity."<sup>72</sup> An information service, he continues, "is the offering of particular capabilities via telecommunications, but is itself not telecommunications or a telecommunications service."<sup>73</sup> For the Commission to rule that some or all information

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<sup>66</sup> See Senators Stevens and Burns comments at 5 ("Language that specifically stated that a telecommunications service did not include an information service was struck before the final definitions were adopted."); see also February 19, 1998 *en banc* transcript at 24 (testimony of Mr. Comstock).

<sup>67</sup> We discuss the Senate language below.

<sup>68</sup> Senators Stevens and Burns comments at 1.

<sup>69</sup> See *supra* Section II.B.

<sup>70</sup> Senator McCain letter at 1.

<sup>71</sup> *Id.* at 2 (emphasis in original).

<sup>72</sup> *Id.* at 3.

<sup>73</sup> *Id.*

service providers should simultaneously be deemed telecommunications carriers would ignore a "clear distinction" drawn by Congress, and would have "disastrous" results.<sup>74</sup>

38. Senators Ashcroft, Ford, John F. Kerry, Abraham and Wyden emphasize that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."<sup>75</sup> Like Senator McCain, they state: "Rather than expand regulation to new service providers, a critical goal of the 1996 Act was to diminish regulatory burdens as competition grew."<sup>76</sup>

39. In addressing the difficult interpretation issues posed by the conflicting positions, we start by observing that the 1996 Act effected landmark changes in a variety of areas of communications policy. We recognize that the interpretation presented by Senator Stevens would serve the goal of eliminating distinctions that result in different regulatory treatment for firms that arguably provide similar functionalities based on whether firms provide "telecommunications" or "information services." We find, however, that in defining "telecommunications" and "information services," Congress built upon the MFJ and the Commission's prior deregulatory actions in *Computer II*. After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive.<sup>77</sup> Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though it uses telecommunications to do so. We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.

40. We begin our analysis with the statutory text. Senators Stevens and Burns contend that a service qualifies as a "telecommunications service" whenever the service provider transports information over transmission facilities, without regard to whether the service provider is using information-processing capabilities to manipulate that information or provide new information.<sup>78</sup> That approach, however, seems inconsistent with the language

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<sup>74</sup> *Id.* at 4.

<sup>75</sup> Senator Ashcroft, et al., letter at 1.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> As we explain *infra* Section IV.B, we interpret the Act to contemplate that a single entity can be both a telecommunications provider and an information services provider, but only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service.

<sup>78</sup> See Senators Stevens and Burns comments at 4-5. At one point, the comments of Senators Stevens and Burns suggest a second argument: that a firm provides both a "telecommunications service" and an "information service" when it provides information content via the public switched telephone network. In that context, the

Congress used to define "telecommunications." That language specifies that the transmission be "without change in the form or content of the information as sent and received." It appears that the purpose of these words is to ensure that an entity is *not* deemed to be providing "telecommunications," notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information.

41. The statutory text suggests to us that an entity should be deemed to provide telecommunications, defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form and content of the information," only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information.<sup>79</sup> When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications," it does not provide telecommunications; it is using telecommunications.<sup>80</sup>

42. We also find that the legislative history supports our initial conclusions drawn from the statutory text. The 1996 Act's definition of "telecommunications" was closely patterned on the corresponding definition in the MFJ. The MFJ defined "telecommunications" as

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the

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firm would be deemed to be providing transmission of its data, to the consumer, over the telephone company's facilities. See Senators Stevens and Burns comments at 5 & n. 18 (describing it as irrelevant whether the information service provider "make[s] the transmission" over "the ISP's own facilities, leased facilities, private lines, wireless facilities, cable facilities, broadcast facilities [or] common carrier facilities"). The statutory definition of "telecommunications service," however, requires that the provider be "offering . . . to the public" the "transmission . . . of information of the user's choosing." Where users rely on the public switched network to reach the information service provider, it is the telephone company, not the information service provider, that is offering to the public transmission over the public switched network. The information service provider, therefore, is not providing telecommunications service in those circumstances.

<sup>79</sup> One might make the more limited argument that Congress, rejecting the *Computer II* approach, intended that a service qualify as both "telecommunications" and an "information service" if the service provider transported information of the user's choosing over facilities it owns or leases, *and* did so "without change in the form or content of the information as sent and received," but nonetheless offered a capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information." It is difficult to determine, though, what services would fall in this category. A service that generates, acquires, transforms, processes, retrieves, utilizes or makes available information is by definition not merely transmitting the user's information without change. Arguably, a service involving simple storage of user information could transmit it without change, and thus fall within both the "telecommunications service" and "information service" definitions. Our examination of the legislative history, however, convinces us that Congress intended the two categories to be mutually exclusive, and did not contemplate any such overlap. See *infra* paras. 39-42.

<sup>80</sup> See, e.g., CIX comments at 5-6; Compuserve comments at 3-4; Coalition comments at 4-9; ITI and ITAA comments at 3-6; Reuters comments at 3-4; Worldcom comments at 3-5. *But see* TDS comments at 2-3; RTC reply comments at 5-10 (characterizing the distinction as an "irrational, disparate, discriminatory, marketplace-distorting" fiction).

information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.<sup>81</sup>

The Senate and House bills echoed that language. The House bill defined telecommunications as

the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without change in the form or content of the information as sent and received, by means of an electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission,<sup>82</sup>

and the Senate bill truncated the definition to include

the transmission, between or among points specified by the user, of information of the user's choosing, including voice, data, image, graphics, and video, without change in the form or content of the information, as sent and received, with or without benefit of any closed transmission medium.<sup>83</sup>

By contrast, the two bills took different approaches in defining "information service." The House bill derived its definition of "information service" from the MFJ.<sup>84</sup> The Senate, however, used the Commission's definition of enhanced services as its model.<sup>85</sup>

43. The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as

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<sup>81</sup> *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>82</sup> H.R. 1555, § 501(a)(48), reprinted in H.R. Rep. No. 204, 104th Cong., 1st Sess. 46 (1995) (*House Report*). The House Report explicitly noted that its definition was "based on the definition used in the Modification of Final Judgment." *Id.* at 125.

<sup>83</sup> S. 652, § 8(b), 104th Cong., 1st Sess. (1995).

<sup>84</sup> See *House Report* at 125.

<sup>85</sup> S. Rep. No. 23, 104th Cong., 1st Sess. 18 (1995) (*Senate Report*). We note that Judge Greene, in the opinion approving the MFJ, referred to the enhanced-services and information-services categories as "essentially . . . equivalent." *United States v. AT&T*, 552 F. Supp. 131, 178 n. 198 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *United States v. Western Electric Co.*, 673 F. Supp. 525, 575 (D.D.C. 1987) (referring to "enhanced services, i.e. generally speaking, information services"), *aff'd in part & rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990); CIX comments at 3-4.

mutually exclusive categories.<sup>86</sup> The House bill explicitly stated in the statutory text: "The term 'telecommunications service' . . . does not include an information service."<sup>87</sup> The Senate Report stated in unambiguous terms that its definition of telecommunications "excludes those services . . . that are defined as information services."<sup>88</sup> Information service providers, the Report explained, "do not 'provide' telecommunications services; they are users of telecommunications services."<sup>89</sup> Accordingly, the Senate Report stated, the legislation "does not require providers of information services to contribute to universal service."<sup>90</sup> We believe that these statements make explicit the intention of the drafters of both the House and Senate bills that the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation.

44. As noted above, however, proponents of the alternative interpretation find support in the legislative history for the position that Congress intended overlapping categories. In particular, they point out that the following sentence was deleted from the Senate bill's definition of telecommunications service: "'Telecommunications service' . . . includes the transmission, without change in the form or content, of information services and cable services, but does not include the offering of those services."<sup>91</sup> At the February 19, 1998 en banc hearing, it was argued in support of the alternative interpretation that the sentence was deleted in conference so as to ensure that the "telecommunications" and "information service" definitions would not be viewed as mutually exclusive.<sup>92</sup> The amendment on its face can be read to support that inference. Our review of the legislative history leads us to conclude, however, that the deletion of the language in question was not intended to expand the definition of telecommunications service so that it would overlap with information services. Rather, the sentence was deleted on the Senate floor by a manager's amendment "intended to clarify that carriers of broadcast or cable services are not intended to be classed as common carriers under the Communications Act to the extent they provide broadcast services or cable services."<sup>93</sup> That is, the managers appear to have been concerned that the original language might lead courts to interpret "telecommunications service" too *broadly*, and inappropriately classify cable systems and broadcasters as telecommunications carriers. As a result, we believe that this amendment to the definition of "telecommunications

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<sup>86</sup> Moreover, Judge Greene's opinion accompanying the MFJ appears to treat telecommunications and information services as mutually exclusive. See, e.g., 552 F. Supp. at 179-80 (differentiating between "information services" and "transmission facilities for those services").

<sup>87</sup> H.R. 1555, § 501(a)(50), reprinted in *House Report* at 46-47.

<sup>88</sup> *Senate Report* at 18.

<sup>89</sup> *Id.* at 28.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 79 (text of the bill).

<sup>92</sup> See Feb. 19, 1998 *en banc* transcript at 24 (testimony of Mr. Comstock).

<sup>93</sup> 141 Cong. Rec. S7996 (June 8, 1995) (statement of Sen. Pressler).

service" does not undercut the Senate Report's earlier declaration that the bill's definition of "telecommunications" "excludes . . . information services." Rather, it underlines the legislative determination that information service providers should not be classified as telecommunications carriers.<sup>94</sup> Moreover, given the explicit statements in the House and Senate bills and the Senate Report, we believe it is significant that the Joint Explanatory Statement (adopting the Senate version of "telecommunications" and "telecommunications service") does not appear to contain anything inconsistent with the view that "telecommunications" and "information service" are mutually exclusive categories.

45. In addition, in considering the statutory history of the 1996 Act, we note that at the time the statute was enacted, the *Computer II* framework had been in place for sixteen years. Under that framework, a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth.<sup>95</sup> Accordingly, a decision by Congress to overturn *Computer II*, and subject those services to regulatory constraints by creating an expanded "telecommunications service" category incorporating enhanced services, would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so.<sup>96</sup> As a result, looking at the statute and the legislative history as a whole, we conclude that Congress intended the 1996 Act to maintain the *Computer II* framework.

46. We note that our interpretation of "telecommunications services" and "information services" as distinct categories is also supported by important policy considerations. An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.

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<sup>94</sup> A colloquy between Senator Pressler and Senator Kerrey, at the time the amendment was adopted, states that the amendment was not intended to disturb the application of statutory provisions relating to "telecommunications service" to businesses engaged in the "transmission of information services." *Id.* That statement was part of the Senate bill as reported; the bill had stated, in the deleted language, that "telecommunications service" included "the transmission, without change in the form or content, of information services and cable services, but does not include the offering of those services." Thus, the colloquy presents no reason to believe that the amendment was intended to *expand* the scope of the "telecommunications" definition beyond that expounded in the Senate Report. As a result, we have no reason to question that various statements in that Report apply to the 1996 Act, as adopted by Congress: that the telecommunications definition "excludes . . . information services"; that information service providers "do not 'provide' telecommunications services"; and accordingly that the legislation "does not require providers of information services to contribute to universal service." *See supra* paragraph 40.

<sup>95</sup> Various commenters stress the efficacy of the *Computer II* regime. *See, e.g.*, AOL comments at 6-8; CompuServe comments at 10-11; Coalition comments at 16; Internet Service Providers reply comments at 5.

<sup>96</sup> Feb. 19, 1998 *en banc* transcript at 93-94; *see also* CompuServe comments at 8-9, IAC comments at 17-18.

47. In response to this concern, Senators Stevens and Burns maintain that the Commission could rely on its forbearance authority under section 10 of the Act to resolve any such problems.<sup>97</sup> Under that provision, the Commission is required to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of carriers or services, if it determines that enforcement of that regulation or provision is not necessary to ensure that relevant charges, practices, classifications or regulations are just, reasonable and nondiscriminatory; enforcement of that regulation or provision is not necessary to protect consumers; and forbearance is consistent with the public interest.<sup>98</sup> That forbearance authority is important, and the Commission has relied on it in the past.<sup>99</sup> Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the "telecommunications carrier" classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.<sup>100</sup>

48. The classification of information service providers as telecommunications carriers, moreover, could encourage states to impose common-carrier regulation on such providers. Although section 10(e) of the Act precludes a state from applying or enforcing provisions of *federal* law where the Commission has determined to forbear, it does not preclude a state from imposing requirements derived from state law.<sup>101</sup> State requirements for telecommunications carriers vary from jurisdiction to jurisdiction, but include certification, tariff filing, and various reporting requirements and fees.<sup>102</sup> Furthermore, although the Commission has authority to forbear from unnecessary regulation, foreign regulators may not have comparable deregulatory authority to avoid imposing the full range of telecommunications regulation on information services. If these countries were to adopt an

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<sup>97</sup> Senators Stevens and Burns comments at 3; *see also* TDS comments at 2.

<sup>98</sup> 47 U.S.C. § 10(a).

<sup>99</sup> *See, e.g., Hyperion Telecommunications, Inc.*, 12 FCC Rcd 8596 (1997); Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd 20730 (1996), *on reconsideration*, 12 FCC Rcd 15014 (1997), *stayed sub nom. MCI Telecommunications Corp. v. FCC* (Feb. 13, 1997).

<sup>100</sup> *See* Senator McCain letter at 4: "[T]he state of permanent uncertainty that this approach would unavoidably cause would chill future development of Internet-based services and thereby disserve the public interest."

<sup>101</sup> The Commission has preempted certain inconsistent state regulation of jurisdictionally mixed enhanced services provided by the BOCs. *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7631 (1991) (*BOC Safeguards Order*), *aff'd in relevant part, California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995). That preemption decision, however, does not address state regulation of telecommunications services.

<sup>102</sup> *See* AOL comments at 12-13, 15-16. *Cf. Computer III Phase II Order*, 2 FCC Rcd 3072, 3078 (1987) (treating protocol processing as an adjunct-to-basic service would introduce regulatory uncertainty, since "even if we were to forbear from regulation on the federal level . . . a [provider] could be subject to state regulation").