

policy decision to limit support for information services to schools and libraries. "Telecommunications services" provide the basic transmission functionality that enables customers in rural and high-cost areas to connect to the rest of America. These services also enable users to reach Internet access providers, so reductions in the cost of basic telephone service in rural areas will effectively reduce the cost of Internet access in those areas. The information services delivered over telecommunications networks are not sensitive to distance and density to the same extent as the telecommunications facilities themselves. Therefore, the rationale for establishing a subsidy mechanism for these services is far more attenuated.

103. At this early stage of Internet development, we cannot know whether market and technological forces will result in Internet access being widely available in rural and high cost areas. Already, free electronic mail services such as Juno and low-cost Internet access devices such as WebTV have made Internet-based services far more affordable. A recent study found that at least 87% of the U.S. population has access to a commercial Internet service provider through a local call, and that three-fourth of Americans live in local calling areas with at least three Internet service provider points of presence.²¹⁶ America Online reports that seventeen percent of its local access nodes are in rural counties.²¹⁷ Rural Internet service providers, especially smaller entrepreneurial companies, will be able to provide more affordable and widely-available service if they are not subject to unnecessary regulatory burdens.²¹⁸ Finally, the support mechanism that will benefit schools and libraries established pursuant to section 254(h) of the 1996 Act will enable rural libraries to provide public access Internet terminals, and rural school districts to make Internet access available to their students.

104. Congress did recognize that "telecommunications services" would evolve over time, and that universal service should adapt to reflect those change. Thus, for example, universal service today includes functionalities such as touchtone service and access to 911 that simply did not exist in previous decades.²¹⁹ Other such innovations, as well as improvements in voice transmission quality, will no doubt occur in the future, and we will update our definition of universal service to account for those changes. For example, it appears that universal service funds could be used to ensure rural and high-cost areas have affordable access to high-speed data transmission services, such as xDSL, when those services meet the criteria for support outlined in section 254(c).

c. Consistency of Commission Decisions

²¹⁶ Shane Greenstein, *Universal Service in the Digital Age: The Commercialization and Geography of US Internet Access* (available at <http://skew2.kellogg.nwu.edu/~greenstein/research/papers/ISPACCESS2.pdf>) at table 1. The author of the study notes that these numbers likely underestimate the true level of access. *Id.* at 22-23.

²¹⁷ AOL comments at 6 n.35.

²¹⁸ Carolina Connection, Inc. comments at 1; CUIISP comments at 2; City of Norfolk comments at 1-2; CIX comments at 11; Compuserve comments at 11-12.

²¹⁹ See *Universal Service Order*, 12 FCC Rcd at 8814-8817, paras. 71-74.

105. We believe that the framework described in this Report, and in the May 8th, 1997 *Universal Service Order*, is entirely consistent, both internally and with the letter and spirit of the Act. Companies that are in the business of offering basic interstate telecommunications functionality to end users are "telecommunications carriers," and therefore are covered under the relevant provisions of sections 251 and 254 of the Act. These rules apply regardless of the underlying technology those service providers employ, and regardless of the applications that ride on top of their services. Therefore, although we will need to consider further the definition of "phone-to-phone" IP telephony, 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." Further, we have found that providers of pure transmission capacity to support Internet services are providers of "telecommunications." Internet service providers and other information service providers also use telecommunications networks to reach their subscribers, but they are in a very different business from carriers. Internet service providers provide their customers with value-added functionality by means of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, but this makes them customers of telecommunications carriers rather than their competitors.

106. Under our framework, Internet service providers are not treated as carriers for purposes of interstate access charges, interconnection rights under section 251, and universal service contribution requirements. This treatment admittedly provides some benefits to such companies, but it also imposes limitations. Internet service providers are not entitled under section 251 to purchase unbundled network elements or discounted wholesale services from incumbent LECs, they are not entitled to federal universal service support for serving high-cost and rural areas, and they are not entitled to reciprocal compensation for terminating local telecommunications traffic.²²⁰ As we discuss below, the one case in which Internet service providers and carriers enjoy similar treatment is in the provision of certain services to schools and libraries at discounted rates.²²¹ In that case, Congress expressly directed the Commission to create "competitively neutral rules" to facilitate "access to advanced telecommunications and information services."²²² There is no necessary connection between those who contribute

²²⁰ The Commission has solicited comment on whether it should use its general rulemaking authority to extend to Internet service providers and other information service providers some or all of the rights accorded by section 251 to requesting telecommunications carriers. See *Computer III Further Remand Proceeding*, at para. 96.

We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider. See *Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, *Public Notice*, CCB/CPD 97-30 (released July 2, 1997).

²²¹ See *infra* Section V.B.2.

²²² 47 USC § 254(h)(2).

to universal service funding and those entitled to receive support.²²³ For example, contributions to the fund are primarily derived from interexchange carriers, but the companies that receive high-cost support are LECs. Paging providers are required to contribute to universal service, but have limited opportunity to receive support. We realize that Congress carefully balanced several competing concerns when it crafted the universal service provisions of the 1996 Act. After reviewing our implementation of those provisions, and considering novel issues such as the status of IP telephony, we believe that we are being faithful to the balance struck by Congress.

V. WHO CONTRIBUTES TO UNIVERSAL SERVICE MECHANISMS

A. Overview

107. In this section, we review 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.²²⁴ 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.

B. Background

108. The 1996 Act expands the class of entities that must contribute to federal universal service support mechanisms. Prior to the 1996 Act, only interstate interexchange carriers (IXCs) contributed to the universal service fund that subsidized the cost of local exchange service in high cost areas and for low-income consumers.²²⁵ Under this earlier

²²³ We note that while providers under the schools and libraries program receive support from the Universal Service Fund, their suppliers do not receive a subsidy. The providers provide services to schools and libraries at a price bid down, through a competitive bidding process, from the market rate. See 47 C.F.R. § 54.504(a),(b) (competitive bidding process), (d) (the Commission, or state commissions, may intervene if a carrier offers a rate higher than the "lowest corresponding price," that is, the lowest price that it charges similarly situated non-residential customers, or if the lowest corresponding price is unfairly high). The federal contribution then covers a portion of the payment that would otherwise be made by the school or library.

²²⁴ See *Universal Service Order*, 12 FCC Rcd at 9177, para. 783.

²²⁵ See 47 C.F.R. § 69.116(a). For a description of universal service as it existed prior to the 1996 Act, see Common Carrier Bureau, FCC, "Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms," 90-97 (1996).

approach, IXCs contributed through a tariffed interstate charge that was based on the number of subscriber lines presubscribed to the IXC.²²⁶ IXCs with fewer than .05 percent of the presubscribed lines nationwide were exempt from contributing.²²⁷

109. The Commission's current rules governing universal service contributions stem from section 254(d) of the 1996 Act, which reads:

[E]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contributions to the preservation and advancement of universal service would be *de minimis*. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

Section 623(b)(3) of the Appropriations Act requires us to review "who is required to contribute to universal service under section 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."

110. Based on the structure of section 254(d) of the 1996 Act, the Commission identified two categories of contributors to universal service mechanisms. First, the Commission identified a group of "mandatory" contributors based on section 254(d)'s mandate that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute . . . to the . . . mechanisms established by the Commission."²²⁸ Second, the Commission exercised its "permissive" authority under section 254(d) to require "other provider[s] of interstate telecommunications to contribute" based on a finding that the public interest requires these entities to contribute "to the preservation and advancement of universal service." In addition, consistent with section 254(d), the Commission exempted contributors whose contributions would be *de minimis*.²²⁹

²²⁶ 47 C.F.R. § 69.116(a).

²²⁷ *Id.*

²²⁸ 47 U.S.C. § 254(d).

²²⁹ *Universal Service Order*, 12 FCC Rcd at 9187, para. 802.

111. Mandatory Contribution Requirement. The Commission, concurring with the recommendation of the Joint Board,²³⁰ recognized that the first sentence of section 254(d) requires that all telecommunications carriers that provide interstate telecommunications must contribute to the support mechanisms.²³¹ The Commission concluded that to be a mandatory contributor to universal service under section 254(d): (1) a telecommunications carrier must offer "interstate" "telecommunications"; (2) those interstate telecommunications must be offered "for a fee"; and (3) those interstate telecommunications must be offered "directly to the public, or to such classes of users as to be effectively available to the public."²³² The Commission sought to construe the definition of "telecommunications" so as to include a broad class of mandatory contributors.²³³

112. The Commission concluded that telecommunications are "interstate" when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia.²³⁴ Further, the Commission determined that interstate telecommunications include telecommunications services among U.S. territories and possessions.²³⁵ The Commission also found that private or WATS lines will be considered entirely interstate when more than ten percent of the traffic they carry is interstate.²³⁶

113. In the Universal Service Order, the Commission further concluded that interstate telecommunications carriers that also provide international telecommunications services must contribute to universal service support mechanisms based on revenues from both their interstate and international services.²³⁷ The Commission found that the statute precludes it from assessing contributions on the revenues of purely international carriers providing service in the United States, but sought a legislative change that would allow it to reach the international revenues of all carriers providing service in the United States.²³⁸

²³⁰ Pursuant to section 254(a)(1), the Commission convened a federal-state Joint Board to make recommendations to the Commission regarding the implementation of sections 214(e) and 254 of the 1996 Act. 47 U.S.C. § 254(a)(1). The Joint Board made its recommendations to the Commission on November 8, 1996. *Recommended Decision*, 12 FCC Rcd 87 (1996).

²³¹ *Universal Service Order*, 12 FCC Rcd at 9173, para. 777 citing *Recommended Decision*, 12 FCC Rcd at 481, para. 484.

²³² *Id.*, 12 FCC Rcd at 9173, para. 777 citing 47 U.S.C. §§ 153(22), 153(43), and 153(46).

²³³ *See Id.*, 12 FCC Rcd at 9173, 9177, paras. 779, 783.

²³⁴ *Id.*, 12 FCC Rcd at 9173, para. 778.

²³⁵ *Id.*, 12 FCC Rcd at 9173, para. 778 citing 47 U.S.C. § 153(22) and *Recommended Decision*, 12 FCC Rcd at 481.

²³⁶ *Id.*, 12 FCC Rcd at 9173, para. 778 citing 47 C.F.R. § 36.154(a).

²³⁷ *Id.*, 12 FCC Rcd at 9173-9175, para. 779.

²³⁸ *Id.*, 12 FCC Rcd at 9173-9175, para. 779.

114. Based on the statutory definition of the term "telecommunications,"²³⁹ the Commission adopted the following list of services that satisfy the definition of "telecommunications" and are examples of interstate telecommunications:

cellular telephone and paging services; mobile radio services; operator services; PCS; access to interexchange service; special access; wide area telephone service (WATS); toll-free services; 900 services; MTS; private line; telex; telegraph; video services; satellite services; and resale services.²⁴⁰

The Commission also included among contributors those entities providing, on a common carrier basis, video conferencing services, channel service, or video distribution services to cable head-ends.²⁴¹ It expressly excluded entities providing services via open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) from contributing on the basis of revenues derived from those services.²⁴²

115. In interpreting the phrase "for a fee" in the definition of "telecommunications service," the Commission concluded that the plain language of section 153(46) means services rendered in exchange for something of value or a monetary payment.²⁴³ The Commission did not exempt from contribution any broad class of telecommunications carriers that provides interstate telecommunications services in light of the 1996 Act's mandate that "every telecommunications carrier that provides interstate telecommunications services" contribute to the support mechanisms.²⁴⁴ Further, the Commission found that, because it contains the phrase "directly to the public," the statutory definition of "telecommunications services" is intended to encompass only telecommunications provided on a common carrier basis.²⁴⁵ Therefore, the Commission concluded that only common carriers should be considered statutorily mandated contributors to universal service support mechanisms.²⁴⁶ In addition, the Commission concluded that common carrier services include services offered to other carriers, such as exchange access service, and not just services provided to end users.²⁴⁷

²³⁹ See 47 U.S.C. § 153(43).

²⁴⁰ *Universal Service Order*, 12 FCC Rcd at 9175, para. 780.

²⁴¹ *Id.*, 12 FCC Rcd at 9176, para. 781.

²⁴² *Id.*, 12 FCC Rcd at 9176, para. 781.

²⁴³ *Id.*, 12 FCC Rcd at 9177, para. 784 citing 47 U.S.C. § 153(46).

²⁴⁴ *Id.*, 12 FCC Rcd at 9179, para. 787 citing 47 U.S.C. § 254(d). The Commission did, however, exempt Internet service providers and enhanced service providers from contributing. See *supra* II.C.1.

²⁴⁵ *Id.*, 12 FCC Rcd at 9177-9178, para. 785.

²⁴⁶ *Id.*, 12 FCC Rcd at 9178, para. 786.

²⁴⁷ *Id.*, 12 FCC Rcd at 9178, para. 786.

116. Permissive Contribution Authority. The Commission observed that section 254(d) also confers "permissive authority" to require "other providers of interstate telecommunications" to contribute if the public interest so requires.²⁴⁸ The Commission, citing the statutory definition, concluded that providers of interstate telecommunications, unlike providers of interstate telecommunications services, do not offer telecommunications on a common carrier basis.²⁴⁹ In support of this conclusion, the Commission referred to the legislative history in which Congress noted the distinction between providers of interstate telecommunications and providers of interstate telecommunications services when it stated that an entity can offer telecommunications on a private-service basis without incurring obligations as a common carrier.²⁵⁰

117. The Commission found that private network operators that lease excess capacity on a non-common carrier basis for interstate transmissions should contribute to universal service support mechanisms because they are "other providers of interstate telecommunications."²⁵¹ Similarly, the Commission concluded that payphone aggregators fall within the Commission's permissive authority and that the public interest requires that they contribute.²⁵² The Commission sought to adopt an approach under which contribution obligations neither affect business decisions nor discourage carriers from offering services on a common carrier basis.²⁵³ Accordingly, the Commission found that the public interest requires both private service providers that offer interstate telecommunications to others for a fee and payphone aggregators to contribute to the preservation and advancement of universal service in the same manner as carriers that provide "interstate telecommunications services."²⁵⁴

118. The Commission also found that "other providers of telecommunications" that furnish telecommunications solely to meet their internal needs, including governmental entities such as state networks, should not be required to contribute at this time.²⁵⁵ In addition, the Commission held that cost-sharing for the construction and operation of private networks would not render participants "other providers of telecommunications" that could be required to contribute, although the lead participant in such a venture would be required to contribute

²⁴⁸ *Id.*, 12 FCC Rcd at 9182-9183, paras. 793-794.

²⁴⁹ *Id.*, 12 FCC Rcd at 9182, para. 793 citing 47 U.S.C. § 153(46).

²⁵⁰ *Id.*, 12 FCC Rcd at 9182, para. 793 citing Joint Explanatory Statement at 115.

²⁵¹ *Id.*, 12 FCC Rcd at 9178, 9184, paras. 786, 796.

²⁵² *Id.*, 12 FCC Rcd at 9183, 9184-9185, paras. 794, 797-798.

²⁵³ *Id.*, 12 FCC Rcd at 9183-9184, para. 795.

²⁵⁴ *Id.*, 12 FCC Rcd at 9183-9184, para. 795.

²⁵⁵ *Id.*, 12 FCC Rcd at 9185-9186, paras. 799-800.

if it provided interstate telecommunications.²⁵⁶ The Commission also found that neither public safety and local governmental entities licensed under Subpart B of Part 90 of its rules nor entities that provide interstate telecommunications solely to public safety or government entities will be required to contribute.²⁵⁷

119. In its *Fourth Order on Reconsideration*, the Commission affirmed its conclusion that private service providers that provide interstate telecommunications on a non-common carrier basis must contribute to universal service pursuant to its permissive authority over "providers of interstate telecommunications."²⁵⁸ In that Order, the Commission concluded that it should not exercise its permissive authority to require systems integrators, broadcasters, and non-profit schools, universities, libraries, and rural health care providers to contribute to universal service.²⁵⁹ Specifically, the Commission found that systems integrators that do not provide services over their own facilities and are non-common carriers that obtain a *de minimis* amount of their revenues from the resale of telecommunications are not required to contribute to universal service.²⁶⁰ In addition, the Commission concluded that the public interest would not be served if it were to exercise its permissive authority to require broadcasters that engage in non-common carrier interstate telecommunications to contribute to universal service.²⁶¹ The Commission also determined that it is not in the public interest for the Commission to exercise its permissive authority to require non-profit schools, colleges, universities, libraries and health care providers to contribute to universal service.²⁶²

120. In the *Fourth Order on Reconsideration*, the Commission also affirmed its finding that satellite providers that provide interstate telecommunications services or interstate telecommunications to others for a fee must contribute to universal service.²⁶³ The Commission explained that satellite providers that provide transmission services on a common carrier basis are mandatory contributors pursuant to section 254(d), while satellite providers that provide interstate telecommunications on a non-common carrier basis must contribute based on the Commission's permissive authority.²⁶⁴ The Commission concluded, however, that satellite providers are not required to contribute to universal service on the basis of revenues derived from the lease of bare transponder capacity because the lease of bare

²⁵⁶ *Id.*, 12 FCC Rcd at 9185-9186, para. 800.

²⁵⁷ *Id.*, 12 FCC Rcd at 9185-9186, para. 800.

²⁵⁸ *Fourth Order on Reconsideration* at para. 276.

²⁵⁹ *Id.*, at para. 277.

²⁶⁰ *Id.*, at para. 278.

²⁶¹ *Id.*, at para. 283.

²⁶² *Id.*, at para. 284.

²⁶³ *Id.*, at para. 288.

²⁶⁴ *Id.*, at para. 288.

transponder capacity does not involve transmitting information and, therefore, it is not "telecommunications."²⁶⁵ The Commission rejected arguments that satellite providers that are ineligible to receive universal service support should not be required to contribute.²⁶⁶

121. De Minimis Exemption. Section 254(d) provides that the Commission may exempt a carrier or class of carriers from contributing to universal service mechanisms "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*."²⁶⁷ The Commission, adopting the Joint Board's recommendation, initially concluded that contributors whose contributions would be less than the administrator's administrative costs of collection should be exempt from reporting and contribution requirements.²⁶⁸ The Commission found that the legislative history indicates that the *de minimis* exemption was to be narrowly construed.²⁶⁹ As a result of its conclusion that the exemption should be based on the administrator's costs to bill and collect individual carrier contributions, the Commission, in the *Universal Service Order*, adopted the \$100.00 minimum contribution requirement used for TRS contribution²⁷⁰ purposes.²⁷¹ In its *Fourth Order on Reconsideration*, however, the Commission revised its approach to setting a threshold for the *de minimis* exemption and concluded that the *de minimis* threshold should be increased to \$10,000.00.²⁷²

122. In the *Universal Service Order*, the Commission agreed with the Joint Board that the *de minimis* exemption was the only basis upon which to exempt contributors.²⁷³ The Commission explicitly rejected arguments that paging carriers should be exempted because it found that the statutory language unambiguously requires "every telecommunications carrier that provides interstate telecommunications services" to contribute.²⁷⁴ The Commission concluded that Congress required all telecommunications carriers to contribute to universal service support mechanisms but provided that in most instances only "eligible" carriers should receive support, and gave no direction to the Commission to establish preferential treatment

²⁶⁵ *Id.*, at para. 290.

²⁶⁶ *Id.*, at para. 289.

²⁶⁷ 47 U.S.C. § 254(d).

²⁶⁸ *Universal Service Order*, 12 FCC Rcd at 9187, para. 802 citing *Recommended Decision*, 12 FCC Rcd at 489.

²⁶⁹ *Id.*, 12 FCC Rcd at 9187, para. 802.

²⁷⁰ See 47 C.F.R. § 64.604(c)(4)(iii)(B).

²⁷¹ *Universal Service Order*, 12 FCC Rcd at 9187-9188, para. 803.

²⁷² *Fourth Order on Reconsideration* at paras. 295-297.

²⁷³ *Universal Service Order*, 12 FCC Rcd at 9188, para. 804 citing *Recommended Decision*, 12 FCC Rcd at 490.

²⁷⁴ *Id.*, 12 FCC Rcd at 9188-9189, para. 805 citing 47 U.S.C. § 254(d).

for carriers that are ineligible for support.²⁷⁵ The Commission reaffirmed this conclusion in its *Fourth Order on Reconsideration*. Rejecting arguments from paging companies, the Commission reiterated that section 254(d) does not limit the class of carriers that must contribute to those that are eligible to receive universal service support.²⁷⁶

C. Discussion

1. Mandatory and Permissive Authority

123. The Commission's approach to determining who should contribute to universal service support mechanisms is guided by the plain language of section 254(d). The first clause in this section unequivocally requires that "[e]very telecommunications carrier that provides interstate *telecommunications services* shall contribute . . . to the . . . mechanisms established by the Commission" [emphasis added]. The third sentence gives the Commission the discretion to determine whether requiring "[a]ny other provider of *telecommunications*" to contribute is consistent with the public interest [emphasis added]. An analysis of the statutory definitions of the terms "telecommunications services" and "telecommunications" identifies those entities that must contribute to universal service and those entities over which the Commission may exercise its permissive authority. The statutory language offers no exceptions to these rules, aside from the *de minimis* exemption that is also found in section 254(d). The Commission has adhered to the statutory mandate that "all" providers of interstate telecommunications services contribute to universal service mechanisms, and has ensured that a broad class of telecommunications providers contribute as well.

a. Mandatory Contribution Requirement.

124. Section 153(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."²⁷⁷ The Commission has determined that inclusion of the term "directly to the public" is intended to encompass only telecommunications provided on a common carrier basis.²⁷⁸ Common carriers can be distinguished from private network operators, which serve the internal telecommunications needs of, for example, a large corporation, rather than selling telecommunications to the general public. The Commission explained that federal precedent holds that a carrier may be a common carrier if it holds itself out "to service indifferently all potential users."²⁷⁹

²⁷⁵ *Id.*, 12 FCC Rcd at 9188, para. 804.

²⁷⁶ *Fourth Order on Reconsideration* at para. 263.

²⁷⁷ 47 U.S.C. § 153(46).

²⁷⁸ *Universal Service Order*, 12 FCC Rcd at 9177-9178, para. 785.

²⁷⁹ *Id.*, 12 FCC Rcd at 9178, para. 786 citing *National Association of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601 (D.C. Cir. 1976).

125. The 1996 Act does not use the term "common carrier." This term is defined in the 1934 Communications Act and encompasses the entities that are governed by that Act's Title II regulation. The statutory language in the 1996 Act refers to "telecommunications carriers." Specifically, section 153(44) states that "a telecommunications carrier shall be treated as common carrier only to the extent that it is engaged in providing telecommunications services" ²⁸⁰

126. There is some dispute as to whether the term "telecommunications carrier" means substantially the same as the pre-1996 Act term "common carrier."²⁸¹ The Commission's conclusion that the phrase "directly to the public" means only telecommunications provided on a common carrier basis is based on the legislative history. The Joint Explanatory Statement explains that the term telecommunications service "is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public . . . and private services."²⁸² Several commenters generally contend that the Commission's interpretation and implementation of the statutory terms were consistent with the letter and intent of the 1996 Act.²⁸³ Senator McCain states: "The provision of telecommunications on a common carrier basis -- that is, to all users indifferently or to such segments of the public as to be effectively available to the public indifferently -- is 'telecommunications service.'²⁸⁴ Senators Stevens and Burns, however, argue that Congress intended the term "'telecommunications carrier' to define a class broader than the pre-Telecommunications Act 'common carrier' regime."²⁸⁵

127. We are aware of the concerns of Senators Stevens and Burns that providers of Internet service should be among the pool of universal service contributors.²⁸⁶ The concerns expressed by Senators Stevens and Burns go largely to the Commission's determination that telecommunications services and information services are distinct categories.²⁸⁷ Considering universal service contributions in more general terms, we note that the Commission has repeatedly stated,²⁸⁸ and several commenters agree,²⁸⁹ that section 254(d) should be construed

²⁸⁰ 47 U.S.C. § 153(44).

²⁸¹ See section III.C, above.

²⁸² Joint Explanatory Statement at 115.

²⁸³ See, e.g., TCG comments at 2; State Members comments at 3; Comcast comments at 8; Colorado PUC comments at 2; Texas PUC comments at 2.

²⁸⁴ Senator McCain letter at 3.

²⁸⁵ Senators Stevens and Burns comments at 3.

²⁸⁶ See section IV.D, above.

²⁸⁷ We discuss these terms in section III.C, above.

²⁸⁸ See *Universal Service Order*, 12 FCC Rcd at 9177, 9183, paras. 783, 795; *Fourth Order on Reconsideration* at para. 263.

broadly to encompass an expansive class of contributors. Because we endorse this approach, it is clear that we concur fully with Senators Stevens and Burns when they state: "The statutory language of section 254(d) is unambiguous and clear -- all telecommunications carriers must contribute."²⁹⁰

128. The Commission's implementation of the mandatory contribution clause of section 254(d) has adhered to the tenet that the class of entities required to contribute to universal service should be broad. For example, the Commission, agreeing with the conclusion of the Joint Board, found that the international revenues generated by carriers of interstate telecommunications should be included in the base of mandatory contributors to universal service.²⁹¹ The Commission concluded that contributors that provide international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the domestic PSTN.²⁹² This rationale demonstrates the Commission's agreement with Senators Stevens and Burns, who state: "Congress intended to cast this net widely in order to ensure that all of those who make use of the network, and in particular the physical infrastructure needed to provide universal service, contribute to its upkeep."²⁹³ In fact, the Commission sought a legislative change that would allow it to reach the international revenues of all carriers providing service in the United States who benefit from universal service.²⁹⁴ The Commission found that section 254(d) does not permit us to require carriers that provide only international telecommunications services to contribute because these carriers are not providing "interstate telecommunications services."²⁹⁵ Providers of purely international telecommunications compete against carriers that provide interstate as well as international telecommunications services, and, thus, benefit competitively by incurring no universal service contribution obligation. We would prefer to include these telecommunications carriers within the class of mandatory contributors in order to treat all providers of international telecommunications similarly and to further broaden the class of contributors.

129. Some parties have urged the Commission to exempt certain entities from contributing to universal service.²⁹⁶ The plain language of section 254(d), however, affords

²⁸⁹ See, e.g., PA PUC comments at 7; RTC comments at 9; GVNW reply comments at 4.

²⁹⁰ Senators Stevens and Burns comments at 10.

²⁹¹ *Universal Service Order*, 12 FCC Rcd at 9173-9174, para. 779 citing *Recommended Decision* at 12 FCC 481. Accord AT&T reply comments at 8.

²⁹² *Id.*, 12 FCC Rcd at 9173-9175, para. 779.

²⁹³ Senators Stevens and Burns comments at 10.

²⁹⁴ *Universal Service Order*, 12 FCC Rcd at 9173-9175, para. 779.

²⁹⁵ *Id.*, 12 FCC Rcd at 9173-9175, para. 779.

²⁹⁶ See, e.g., TRA comments at 11 (non-facilities based resale carriers should be relieved of the obligation to contribute to universal service).

the Commission no discretionary authority to exempt any telecommunications carriers that provide interstate telecommunications services, and several commenters agree with this conclusion.²⁹⁷ Section 254(d) provides a limited exemption for mandatory contributors whose contributions would be *de minimis*.²⁹⁸ The Commission has consistently rejected arguments that attempt to create a broader exemption.²⁹⁹ For example, the Commission determined that paging carriers fall within the section 254(d) class of mandatory contributors and, thus, must contribute to universal service, regardless of their ability to receive universal service support.³⁰⁰ Senators Stevens and Burns concur with the Commission's conclusion that CMRS and paging service providers are telecommunications carriers and, thus, are required to contribute.³⁰¹ We agree that paging companies have failed to advance arguments that overcome the Congressional requirement that the Commission create a broad base of support for universal service mechanisms.³⁰² Similarly, we find no basis for exempting non-facilities-based resale carriers, as advocated by TRA.³⁰³ To the extent they are telecommunications carriers that provide interstate telecommunications services, resellers are mandatory contributors under section 254(d).³⁰⁴

²⁹⁷ See USTA comments at 5-6 (the Commission lacks authority to exempt any provider that otherwise meets the section 3 definition of a telecommunications provider); Bell Atlantic comments at 12-13; Bell Atlantic reply comments at 2, 6 (the Commission properly rejected claims of exemptions from contribution requirements). See also AT&T comments at 8 (objects to all claims for exemption).

²⁹⁸ See section V.C.2, *infra* for a discussion of the *de minimis* exemption.

²⁹⁹ See, e.g., *Universal Service Order*, 12 FCC Rcd at 9179, para. 787 (we "find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides interstate telecommunications services, including satellite operators, resellers, wholesalers, paging companies, utility companies, or carriers that serve rural or high cost areas. . .").

³⁰⁰ *Fourth Order on Reconsideration* at paras. 262-254. As a general matter, several wireless carriers raise concerns that the mechanisms used for determining which revenues are derived from intrastate service and which are derived from interstate service are not appropriate for allocating the revenues of wireless carriers. See, e.g., CTIA comments at n.6; Vanguard comments at 4; AMTA reply comments at 5-6; Nextel reply comments at 5-6. We will address such issues in the petitions for reconsideration pertaining to this issue that are pending before the Commission.

³⁰¹ Senators Stevens and Burns comments at 3 n.8.

³⁰² *Fourth Order on Reconsideration* at para. 263. See also PA Agencies comments at 11; PA PUC comments at 7 (the Commission must ensure that all telecommunications carriers, especially CMRS providers, contribute to universal service).

³⁰³ TRA comments at 11. To the extent a resale carrier's contribution would not exceed the *de minimis* threshold, however, it would be exempted from the requirement to contribute. See the discussion of the *de minimis* exemption, Section V.C.2, *infra*.

³⁰⁴ Both the Joint Board and the Commission have found that resellers are mandatory contributors. See *Recommended Decision* at para. 787; *Universal Service Order*, 12 FCC Rcd at 9175, para. 780. To the extent that a resale carrier is not offering telecommunications on a common carrier basis or offering interstate telecommunications services and, thus, does not fall within section 254(d)'s mandatory contribution requirement, the Commission would determine whether, pursuant to its permissive authority, it would be in the public interest for the reseller to contribute. See the discussion of permissive contributors, below.

130. We view the mandatory contribution requirement set forth in section 254(d) as absolute and find that the Commission has consistently abided by this mandate. We agree with AT&T's statement that "if the Commission exempts a class of contributors, then the obligations of all remaining contributors increase."³⁰⁵ In instances where telecommunications carriers derive revenues from certain activities that fall outside the definition of "telecommunications services," the Commission has not exempted these entities from their contribution requirements, but, instead, has simply excluded those revenues from the contribution base. For example, entities providing OVS, cable leased access, and DBS services, as well as satellite providers leasing bare transponder capacity are excluded from contributing on the basis of revenues derived from those services, but are not exempted to the extent they otherwise provide interstate telecommunications services.³⁰⁶ This approach recognizes that the statute does not permit any mandatory contributors to be exempted from the contribution requirement.

b. Permissive Contribution Authority.

131. The third sentence of section 254(d) conveys what the Commission refers to as its "permissive" contribution authority. In contrast to the mandate that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute," this sentence authorizes the Commission to determine whether the public interest requires that "other providers of interstate *telecommunications*" should contribute [emphasis added].³⁰⁷ Section 153(43) defines "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."³⁰⁸ This definition is significantly broader than that of "telecommunications services," which are provided "for a fee directly to the public."³⁰⁹ As discussed above, this distinction represents the difference between carriers that offer their services on a common carrier basis (i.e., "for a fee directly to the public") and private network operators.³¹⁰ Private network operators do not sell their services to the public. Traditionally, non-common carriers such as private network operators have not been the

³⁰⁵ AT&T comments at 8.

³⁰⁶ See *Universal Service Order*, 12 FCC Rcd at 9176, para. 781; *Fourth Order on Reconsideration* at para. 290.

³⁰⁷ 47 U.S.C. § 254(d).

³⁰⁸ 47 U.S.C. § 153(43).

³⁰⁹ See 47 U.S.C. § 153(46).

³¹⁰ The Joint Explanatory Statement explains that the term telecommunications service "is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public . . . and private services." Joint Explanatory Statement at 115. See also UTC comments at 5-6 (in light of the plain language of the Act, as well as the Joint Explanatory Statement, "[t]he FCC correctly recognized that the inclusion of this requirement that the service be provided directly to the public evidenced clear Congressional intent that telecommunications services only encompass services provided on a 'common carrier' basis.>").

subject of regulation. Because these service providers do not serve the public, there is no need to ensure that they offer services based on just, reasonable and nondiscriminatory rates and conditions, as Title II regulations applicable to common carriers are designed to accomplish. The language of section 254(d), however, is unique among the other provisions of the 1996 Act because it permits the Commission to require, if a public interest standard is met, that non-common carriers should contribute to universal service mechanisms along with common carriers.

132. We conclude that the Commission's decisions concerning which telecommunications providers should contribute to universal service mechanisms, and which ones should be spared from contributing, are consistent with the intent of Congress. Section 254(d) requires the Commission to consider the public interest when determining which providers of interstate telecommunications should contribute to universal service. We reaffirm the rationales the Commission has established for weighing public interest considerations. First, the public interest requires a broad contribution base so that the burden on each contributor will be lessened.³¹¹ As discussed above with respect to mandatory contributors, Congress intended that section 254(d) would be broadly construed. Requiring certain providers of interstate telecommunications to contribute broadens the funding base, which lessens the impact of the contribution obligation imposed on mandatory contributors. We also reaffirm the conclusion that the public interest requires private service providers and payphone aggregators to contribute in order to broaden the funding base.³¹²

133. Second, the public interest requires that, to the extent possible, carriers with universal service contribution obligations should not be at a competitive disadvantage in relation to providers on the basis that they do not have such obligations.³¹³ This approach is consistent with the Commission's principle of competitive neutrality, which states in part: "universal service support mechanisms and rules [should] neither unfairly advantage nor disadvantage one provider over another . . ."³¹⁴ It may be appropriate to require certain providers of telecommunications to contribute in order to reduce the possibility that carriers with universal service obligations will compete directly with carriers without such obligations. For example, the Commission held that operators of interstate private networks that lease

³¹¹ See, e.g., *Universal Service Order*, 12 FCC Rcd at 9177, 9183, paras. 783, 795; *Fourth Order on Reconsideration* at para. 263.

³¹² *Universal Service Order*, 12 FCC Rcd at 9183, para. 795. See also Reuters comments at 7-8 (requiring private network operators that offer services to others for a fee on a non-common carrier basis is consistent with the law).

³¹³ See, e.g., *Fourth Order on Reconsideration* at para. 276.

³¹⁴ *Universal Service Order*, 12 FCC Rcd at 8801, para. 47. In addition to the principles set forth in the 1996 Act, section 254(b)(7) permits the Joint Board and the Commission to base policies for the preservation and advancement of universal service on "such other principles as the Joint Board and Commission determine are necessary and appropriate for the protection of the public interest, convenience and necessity and are consistent with this Act." 47 U.S.C. § 254(b)(7). See also *Recommended Decision*, 12 FCC Rcd at 101, paras. 22-23; *Universal Service Order*, 12 FCC Rcd at 8801-8803, paras. 46-51.

excess capacity on a non-common carrier basis should contribute to universal service.³¹⁵ These private network operators compete against telecommunications carriers in the provision of interstate telecommunications. Similarly, the Commission determined that payphone aggregators should be contributors to universal service.³¹⁶ This conclusion is also justified by competitive concerns because interstate telecommunications carriers that also provide payphone services would have an incentive to alter their business structures by divesting their payphone operations in order to reduce their universal service contribution if payphone aggregators that provide only payphone services were not required to contribute.

134. Third, in some cases, absent the exercise of the permissive contribution authority, a service provider might choose to offer service on a non-common carrier basis solely to circumvent the obligation to contribute that is imposed on all telecommunications carriers providing interstate telecommunications service. In our view, the public interest dictates that universal service contributions should not cause providers to offer services on a non-common carrier basis.³¹⁷ We are convinced that the Commission's actions promote this important public interest concern.

135. Finally, the public interest suggests that certain telecommunications providers should contribute because they utilize the PSTN, which is supported by universal service mechanisms.³¹⁸ The Commission concluded, in general, that telecommunications carriers that are mandatory contributors should not be the sole supporters of the PSTN from which other telecommunications providers benefit.³¹⁹ Although there may be situations in which competing public interest reasons compel us to conclude that certain providers of interstate telecommunications that benefit from access to the PSTN should not contribute, we are persuaded that it is generally consistent with the public interest for those who benefit from the PSTN to contribute to support the network. We note that some parties argue that the public interest does not require contributions from telecommunications providers that are not interconnected with the public switched network.³²⁰ We find, however, that the statutory goal of a broad contribution base requires that these entities contribute to ensure the preservation and advancement of universal service mechanisms.

³¹⁵ *Id.*, 12 FCC Rcd at 9178, para. 786.

³¹⁶ *Id.*, 12 FCC Rcd at 9183-9185, paras. 795-797.

³¹⁷ *See Id.*, 12 FCC Rcd at 9183, para. 795.

³¹⁸ *See, e.g., Id.*, 12 FCC Rcd at 9184, para. 796.

³¹⁹ *See, e.g., Id.*, 12 FCC Rcd at 9184, para. 796 (private service providers that sell excess capacity should contribute because they benefit from access to the PSTN); *id.* at 9184-9185, para. 797 (payphone aggregators should contribute because they are connected to the PSTN).

³²⁰ Business Networks reply comments at 2 (providers of private line services generally are not connected to the public switched network and derive no benefit from it); US Satellite Companies reply comments at 1 (the public interest does not require contributions from telecommunications that are not interconnected with the public switched network); American Mobile Telecommunications Association reply comments at 3 (there is no public policy rationale for requiring commercial dispatch systems that have little nexus to the PSTN to contribute).

136. The Commission also determined that the public interest requires that several providers of interstate telecommunications should *not* contribute to universal service mechanisms. In some instances, the Commission determined that competitive neutrality concerns warrant refraining from imposing contribution requirements on certain providers that fall within the permissive contribution authority set forth in section 254(d).³²¹ For example, the Commission found that systems integrators that do not provide services over their own facilities, are not common carriers, and obtain a *de minimis* amount of their revenues from the resale of telecommunications are not required to contribute to universal service.³²² We note that commenters are divided over this conclusion,³²³ but we agree that systems integrators that derive less than five percent of their revenues relative to systems integration from the resale of telecommunications do not significantly compete with common carriers that are required to contribute to universal service.³²⁴ The provision of interstate telecommunications is generally only one of a wide range of services that systems integrators provide for their customers.³²⁵ Requiring systems integrators that obtain less than five percent of systems integration revenues from the sale of interstate telecommunications to contribute to universal service mechanisms could dissuade these companies from offering interstate telecommunications and we do not want the Commission's decisions to distort business decisions. Accordingly, we find no compelling public interest reason for including this limited category of telecommunications providers in the pool of contributors.³²⁶

³²¹ See, e.g., *Fourth Order on Reconsideration* at para. 283 (broadcasters that engage in non-common carrier interstate telecommunications should not contribute to universal service because broadcasters generally compete with cable, OVS and DBS providers, which are not required to contribute on the basis of the revenues derived from these services, rather than with common carriers).

³²² *Fourth Order on Reconsideration* at para. 278. In this context, the term *de minimis* is used by the Commission to describe the small amount of revenue a systems integrator can derive from telecommunications without having to contribute to universal service mechanisms. This term is also used in the statutory language to refer to contributors whose contributions would be less than the administrative costs of collecting them. We discuss this provision separately in Section V.C.2.

³²³ Compare AT&T comments at 6-7 (systems integrators with resale telecommunication revenues below five percent of the firm's total revenues and non-common carrier transponders potentially compete with carriers that are required to contribute because they all sell telecommunications services and, thus, they should be required to contribute) with Ad Hoc comments at 3 (systems integrators who obtain only a *de minimis* amount of revenues from the resale of telecommunications services should be exempted from contributing).

³²⁴ *Fourth Order on Reconsideration* at para. 279. The Commission concluded that systems integrators' telecommunications revenues will be considered *de minimis* if they constitute less than five percent of revenues derived from providing systems integration services. *Id.* at 280.

³²⁵ See *Fourth Order on Reconsideration* at para. 278 ("systems integrators provide integrated telecommunications packages of services and products that may include, for example, the provision of computer capabilities, data processing, and telecommunications.").

³²⁶ In its comments, Amtrak analogizes its situation to those of both non-profit educational and health institutions and systems integrators and argues that it should not be required to contribute to universal service mechanisms because the small amount of excess capacity for interstate telecommunications that it sells on a private carrier basis is only incidental to its core transportation business. Amtrak contends that it does not significantly compete with common carriers and obtains a *de minimis* amount of its revenues from the resale of

137. We note that Bell South asserts that the Commission's approach results in disparate treatment for carriers, for which the *de minimis* threshold is \$10,000,³²⁷ and non-carrier systems integrators, which can derive telecommunications revenues that would otherwise result in a universal service contribution in excess of \$10,000 and still be exempt if their telecommunications revenues are less than five percent of their total systems integration revenues.³²⁸ Because we determine that these systems integrators do not compete significantly with common carriers, however, we find that it is appropriate to require systems integrators to contribute only to the extent their telecommunications revenues exceed five percent of their total revenues derived from systems integration, even if five percent exceeds the \$10,000 threshold established for mandatory contributors. The Commission recognized that the primary business of such systems integrators is not providing interstate telecommunications, but rather performing services such as integrating their customers' computer and other informational systems.³²⁹ The Commission also recognized that customers chose systems integrators for their systems integration expertise, not for their competitive provision of telecommunications.³³⁰ Further, as the Commission has concluded, the limited nature of this exemption will ensure that systems integrators that are significantly engaged in the provision of telecommunications do not receive an unfair competitive advantage over common carriers or other carriers that are required to contribute to universal service.³³¹ Finally, we are unpersuaded that this approach will significantly reduce the contribution base because the Commission has determined that revenues received by common carriers for the minimal amounts of telecommunications provided to systems integrators will be included in the contribution base of underlying common carriers.³³²

138. In other cases, the public interest analysis requires a more expansive examination of the goals of universal service. For example, we have concluded that it would be contrary to the public interest to require colleges, universities, schools, libraries, and health care providers to contribute to universal service even though, in some instances, these

telecommunications. Moreover, Amtrak states that it must resell its excess capacity pursuant to Congress's mandate that it take measures to be self-supporting and non-reliant on federal operating support by the year 2002. See Amtrak comments at 2-9.

³²⁷ See discussion of the *de minimis* exemption, Section V.C.2, *infra*.

³²⁸ BellSouth comments at 7-8.

³²⁹ *Fourth Order on Reconsideration* at paras. 278-279.

³³⁰ *Id.*, at paras. 278-279.

³³¹ *Id.*, at para. 280.

³³² *Id.*, at para. 281. The record in the underlying universal service proceeding, CC Docket 96-45, indicates that including this small group of systems integrators in the contribution pool would reduce the per provider contribution percentage by less than 1/100th of one percent. See Ad Hoc reply comments at 3-4 *citing* comments of International Business Machines Corporation in Support of Petition for Reconsideration, at 12-13 (Aug. 18, 1997).

institutions could be considered providers of interstate telecommunications.³³³ Unlike other recipients of universal service such as carriers serving high cost areas, schools, libraries, and health care providers that receive the benefits of universal service are prohibited from reselling the supported services they receive.³³⁴ Thus, they are effectively prohibited from competing with common carriers with respect to the connections they purchase at supported rates. Although the record demonstrates some opposition to this conclusion,³³⁵ we are convinced that this approach is in the public interest. Further, we are persuaded that it would be inconsistent with the educational goals of universal service support mechanisms to require colleges and universities to contribute to universal service.³³⁶ Nevertheless, in order to maintain the sufficiency of universal service mechanisms, we will treat non-profit schools, colleges, universities, libraries, and health care providers as telecommunications end users for contribution purposes.³³⁷

139. Further, in the *Universal Service Order*, the Commission found that entities that "provide telecommunications solely to meet their internal needs" as telecommunications providers are subject to our permissive contribution authority. The Commission concluded, however, that those entities "should not be required to contribute to the [universal service] support mechanisms at this time, because telecommunications do not comprise the core of their business."³³⁸ The Commission recognized that "it would be administratively burdensome to assess a special non-revenues-based contribution on these providers because they do not derive revenues from the provision of services to themselves."³³⁹ As discussed above,³⁴⁰ one could argue that an Internet service provider that owns transmission facilities and engages in data transport over those facilities in order to provide an information service is providing telecommunications to itself. As a theoretical matter, it may be advisable to exercise our discretion under the statute to require such providers to contribute to universal service. We recognize, however, that there are significant operational difficulties associated with determining the amount of such an Internet service provider's revenues to be assessed for

³³³ *Fourth Order on Reconsideration* at para. 284.

³³⁴ 47 U.S.C. § 254(h)(3).

³³⁵ See AT&T comments at 6-7 (educational institutions that are not K-12 schools are not recipients of support and are likely to resell telecommunications services to their students, thus competing with other providers of telecommunications; even educational institutions and health care providers potentially compete with carriers to the extent that they sell telecommunications services, and, thus, eligible schools and libraries, as recipients of support, should be not exempted from contributing).

³³⁶ See *Fourth Order on Reconsideration* at para. 284.

³³⁷ *Id.*, at para. 284.

³³⁸ *Universal Service Order*, 12 FCC Rcd at 9185, para. 799.

³³⁹ *Id.*

³⁴⁰ See section IV.D.1, *supra*.

universal service purposes and with enforcing such requirements. We intend to consider these issues in an upcoming proceeding.

2. The De Minimis Exemption

140. The second sentence of section 254(d) reads: "The Commission may exempt a carrier or class of carriers from this [contribution] requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*."³⁴¹ This clause provides the only statutory authority for exempting a carrier or class of carriers that would otherwise be required to contribute to universal service mechanisms.³⁴² The legislative history indicates that the *de minimis* exemption is extremely limited. Specifically, the Joint Explanatory Statement states that "this authority would only be used in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make under the formula for contributions selected by the Commission."³⁴³

141. We recently set a \$10,000.00 threshold for the *de minimis* exemption.³⁴⁴ Initially, the Commission had established a \$100.00 threshold, which was based on an estimate of the administrator's costs to collect the minimum contribution requirement used for the TRS program.³⁴⁵ It is appropriate, however, as we concluded, to consider the contributor's administrative costs, as well as the costs incurred by the administrator.³⁴⁶ In addition, exempting contributors whose annual contribution would be less than \$10,000.00 will significantly reduce the administrator's collection costs.³⁴⁷ Therefore, we conclude that entities whose contributions would be less than \$10,000.00 should be exempted from the contribution requirement. We recognize that some commenters object to the Commission's implementation of the *de minimis* exemption.³⁴⁸ Although we are mindful of the need to

³⁴¹ 47 U.S.C. § 254(d). Thus, AT&T's contention that "no carrier -- regardless of its size -- should be exempt" is inconsistent with the clear language of 254(d). See AT&T comments at 8.

³⁴² See SBC comments at 2-3 (the Commission's authority to exempt contributors is limited to *de minimis* contributors).

³⁴³ Joint Explanatory Statement at 131.

³⁴⁴ *Fourth Order on Reconsideration* at para. 295.

³⁴⁵ *Universal Service Order*, 12 FCC Rcd at 9187-9188, para. 803.

³⁴⁶ *Fourth Order on Reconsideration* at para. 295.

³⁴⁷ *Id.*, at para. 297.

³⁴⁸ See, e.g., PCIA comments at 7-11 (the decision to require underlying facilities-based carriers to consider resellers that qualify for the *de minimis* exemption as end users for contribution purposes places an untenable billing burden on facilities-based carriers); BellSouth comments at 7-8 (the reclassification of revenues is not competitively neutral because the Commission is shifting the reseller's universal service obligation to the underlying carrier). We note that the Commission has several petitions for reconsideration under consideration,

establish clear and competitively neutral rules, we nevertheless conclude that our implementation of the *de minimis* exemption is consistent with Congressional intent and with the goals of universal service in general.

142. The statute and legislative history support the conclusion that the *de minimis* exemption may not be used to exempt any other class of contributors. In addition, we find no evidence that exempting contributors whose contributions would be less than \$10,000.00 will result in a shortage of monies or otherwise strain the universal service support mechanisms. Further, we disagree with AT&T's contention that the \$10,000.00 *de minimis* threshold creates a loophole for customers of small carriers and creates unfair marketing advantages for small, new entrants.³⁴⁹ We are persuaded that the Commission's conclusion does not extend beyond the very limited parameters of this statutory exemption.

3. Exclusions and Exemptions

143. Congress directed us to explain "any exemption of providers or exclusion of any service that includes telecommunications" from universal service contribution requirements under section 254, or from existing universal service support mechanisms.³⁵⁰

144. Under section 254(d), only telecommunications carriers that provide "interstate telecommunications services" are required to contribute to federal universal service funding and other providers of interstate telecommunications may be required to contribute if the Commission finds that the public interest so requires.³⁵¹ We have noted above in our discussion of "telecommunications" and "information service" that all information services by definition are provided "via telecommunications." As we interpret the statute, that fact that an information service such as Internet access rides on top of telecommunications networks does not mean that the Internet access itself is a "telecommunications service." All information services "include telecommunications" in some sense, but we have "excluded" them from universal service contribution requirements based on the plain language of section 254(d). We do not consider this determination to be an "exemption," because we find no requirement in the Act that all services that "include telecommunications" be required to contribute to universal service.

145. For example, Microsoft's Expedia site allows customers to purchase airline tickets through the World Wide Web. Because access over telecommunications networks is necessary in order to reach the Expedia site, Microsoft can be said to offer a service that "includes telecommunications." We do not believe, however, that Congress intended Microsoft to contribute a portion of the revenues it receives for airline tickets to the universal

many of which address the implementation of the *de minimis* threshold. Rather than prejudice those petitions in this Report, we will address the specific issues they raise in a future reconsideration order.

³⁴⁹ AT&T comments at 8.

³⁵⁰ *Appropriations Act*, §623(b)(3).

³⁵¹ 47 U.S.C 254(d).

service fund. End users do not access Expedia in order to obtain telecommunications service. Rather, those users obtain telecommunications service from local exchange carriers, and then use information services provided by their Internet service provider and Microsoft in order to access Expedia. Phrased another way, Microsoft arguably offers a service that "includes telecommunications," but it does not "provide" telecommunications to customers.

146. We have also been asked to address exemptions or exclusions from existing universal service support mechanisms. Contributions to existing explicit mechanisms, such as long-term support and telecommunications relay service, have always been limited to carriers. Enhanced and information service providers have never been required to contribute to these mechanisms, and therefore no "exemption" or "exclusion" exists. Not all existing universal service support, however, is explicit. Interstate access charges, for instance, have traditionally been set above the economic cost of access, which has permitted ILECs to charge lower rates for local service in high-cost areas. At the state level, rates for business lines and vertical features also have often been set above cost in order to keep residential rates lower. When it established the interstate access charge regime in the early 1980s, the Commission determined that enhanced service providers, even though they used local exchange networks to originate and terminate interstate services, would not be subject to access charges. Instead, enhanced service providers pay local business rates to LECs for their connections to the LEC network. This exemption from interstate access charges thus might be construed as an "exemption" from an "existing federal universal service support mechanism."

147. We believe that permitting enhanced service providers to purchase these services from incumbent LECs under the same intrastate tariffs available to end users, rather than requiring them to pay interstate access charges, comports with the plain language of the 1996 Act and with the public interest. The 1996 Act makes a decisive break from the existing practice of implicit universal service subsidy structures. Rather than preserve the inefficient mechanisms designed for an industry characterized by local monopolies, the 1996 Act directs the Commission to make universal service funding explicit and competitively-neutral. We have implemented this Congressional requirement in our *Universal Service and Access Reform* proceedings. In particular, since January 1, 1998, high cost support has been collected through the new federal universal service support mechanism, funded by equitable and non-discriminatory contributions from all telecommunications providers. We have also restructured interstate access charges so that, after a transition, interstate non-traffic-sensitive local loop costs will no longer be recovered through per-minute long-distance rates.³⁵² We increased caps on end-user subscriber line charges, and created presubscribed interexchange carrier charges, to recover these costs in a more efficient manner.

VI. WHO RECEIVES UNIVERSAL SERVICE SUPPORT

A. Background

148. Section 623(b)(4) of the Appropriations Act directs the Commission to review "who is eligible under sections 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

³⁵² *Access Charge Reform Order*, 12 FCC Rcd 15982 (1997).

which the Commission has interpreted each of those provisions of section 254." With respect to these particular provisions of the 1996 Act, the Commission, after seeking public comment, issued a series of rules concerning the eligibility of telecommunications carriers and other providers of services to receive support under universal service mechanisms. As discussed in greater detail below, we believe that the Commission's interpretations of sections 254(e), 254(h)(1) and 254(h)(2) are consistent with the plain language of these provisions and with Congress's stated goals in passing the 1996 Act.

149. General Eligibility Under 254(e). Section 254(e) of the 1996 Act imposed a new set of eligibility criteria for the receipt of universal service support. Section 254(e) states in part, that "[a]fter the date on which Commission regulations regarding implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."³⁵³ Section 214(e)(1) provides that

[a] common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received - (A) offer the services that are supported by Federal universal service mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services . . . and (B) advertise the availability of such services and the charges therefor using media of general distribution.³⁵⁴

150. The Commission adopted without expansion the criteria set forth in section 254(e) as the rules governing eligibility for universal service support in general. Those rules, the Commission concluded, allow only carriers designated as "eligible telecommunications carriers" under section 214(e) to be eligible for universal service support, and allow only common carriers to be designated as eligible telecommunications carriers for this purpose.³⁵⁵ The Commission also concluded that, under section 254(e), any telecommunications carrier using any technology is eligible to receive support as long as it meets the criteria set forth in section 214(e).³⁵⁶ The Commission also found that carriers that use unbundled network elements, in whole or in part, to provide supported services meet the "facilities" requirement of subsection 214(e)(1)(A) and, therefore, can be eligible for universal service support.³⁵⁷ The Commission concluded, however, that carriers that provide their services entirely through resale of another carrier's services are not eligible for universal service support. The

³⁵³ 47 U.S.C. § 254(e).

³⁵⁴ 47 U.S.C. § 214(e)(1).

³⁵⁵ *Universal Service Order*, 12 FCC Rcd at 8850-8851, para. 134.

³⁵⁶ *Id.* at 8858-8859, paras. 145-146.

³⁵⁷ *Id.* at 8862-8870, paras. 154-168.

Commission's rules regarding general eligibility are codified in Part 54, Subpart C of volume 47 of the Code of Federal Regulations.³⁵⁸

151. Providers of Services to Schools and Libraries. With section 254(h)(1)(B) of the 1996 Act, Congress created a new universal service support mechanism specifically for the benefit of schools and libraries. Section 254(h)(1)(B) states, in part, that a telecommunications carrier providing supported services to schools and libraries "shall - (i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or (ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service."³⁵⁹ Section 254(c)(3) of the Act provides that "[t]he Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h)."³⁶⁰ In addition, section 254(h)(2) states in part: "The Commission shall establish competitively neutral rules (A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries"³⁶¹

152. The Commission interpreted subsection 254(h)(1)(B) to allow any telecommunications carrier, not just eligible telecommunications carriers, to receive reimbursements from universal service mechanisms for providing telecommunications service, Internet access and the installation and maintenance of internal connections to eligible schools and libraries.³⁶² The Commission also found that firms other than telecommunications carriers can receive support under sections 254(h)(2) and 4(i) for providing Internet access and the installation and maintenance of internal connections.³⁶³ In its *Fourth Order on Reconsideration*, the Commission added that, because state telecommunications networks are not "telecommunications carriers," as defined by the statute, they are not eligible to receive direct reimbursement from universal service support mechanisms for providing telecommunications services to eligible schools and libraries.³⁶⁴ On the other hand, the Commission also found that, as firms other than telecommunications carriers, they are still eligible to receive direct reimbursement for providing Internet access and internal connections

³⁵⁸ 47 C.F.R. §§ 54.201-54.207.

³⁵⁹ 47 U.S.C. § 254(h)(1)(B).

³⁶⁰ 47 U.S.C. § 254(c)(3).

³⁶¹ 47 U.S.C. § 254(h)(2).

³⁶² *Universal Service Order*, 12 FCC Rcd at 9015, para. 449.

³⁶³ See 47 C.F.R. §§ 54.503, 54.517(b).

³⁶⁴ *Fourth Order on Reconsideration* at paras. 187-189.

to eligible schools and libraries under section 254(h)(2)(A).³⁶⁵ The Commission's rules regarding the eligibility of providers of services to schools and libraries are codified in Part 54, Subpart F of volume 47 of the Code of Federal Regulations.³⁶⁶

153. Providers of Services to Health Care Providers. With section 254(h)(1)(A), Congress also added a new universal service support mechanism for the benefit of health care providers. Section 254(h)(1)(A) provides, in part, that a telecommunications carrier providing supported services to health care providers in rural areas "shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service." As with the program for schools and libraries, however, section 254(c)(3) of the Act adds that "[t]he Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h)."³⁶⁷ Also, section 254(h)(2) directs the Commission to "establish competitively neutral rules (A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries"³⁶⁸

154. The Commission found that section 254(h)(1)(A) is explicitly limited to "telecommunications services."³⁶⁹ The Commission also determined that only carriers designated as "eligible telecommunications carriers" shall be eligible to receive support for providing services to health care providers under section 254(h)(1)(A).³⁷⁰ The Commission found further that these services include the telecommunications services that health care providers may purchase to gain access to an Internet service provider.³⁷¹ The Commission thus concluded that any telecommunications carrier can receive limited support for providing any health care provider, whether rural or not, with toll-free access to an Internet service.³⁷² The Commission's rules regarding eligibility of providers of services to health care providers are codified in Part 54, Subpart G of volume 47 of the Code of Federal Regulations.³⁷³

³⁶⁵ *Id.* at paras. 190-191.

³⁶⁶ 47 C.F.R. §§ 54.500-54.517.

³⁶⁷ 47 U.S.C. § 254(c)(3).

³⁶⁸ 47 U.S.C. § 254(h)(2).

³⁶⁹ *Universal Service Order*, 12 FCC Rcd at 9009, 9010, paras. 437, 439.

³⁷⁰ *Id.* at 9105, para. 627.

³⁷¹ *Id.* at 9106-9107, para. 630.

³⁷² *Id.* at 9087-9088, paras. 596; *id.* at 9157-9159, paras. 742-745.

³⁷³ 47 C.F.R. §§ 54.601-54.623.