

B. Discussion**1. General Eligibility under section 254(e).**

155. As noted above, section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."³⁷⁴ Section 214(e), in turn, provides that:

[a] common carrier designated as an eligible telecommunications carrier under [subsection 214(e)(2)] or [subsection 214(e)(3)] 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 support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and (B) advertise the availability of such services and the charges therefor using media of general distribution.³⁷⁵

156. In the *Universal Service Order*, the Commission, consistent with the recommendation of the Joint Board, found that these sections constitute the entirety of the rules governing eligibility for universal service support generally, and that the statute does not permit the Commission or states to adopt any additional criteria. We believe that the plain language of the statute fully supports the Commission's conclusion in this regard, and that the Commission properly construed the statute with respect to each of the rules set forth in sections 254(e) and 214(e).

a. The "Eligible Telecommunications Carrier" Requirement.

157. The Commission first concluded that, under section 254(e), only a carrier that is designated an "eligible telecommunications carrier" pursuant to section 214(e) can be eligible for the receipt of universal service support.³⁷⁶ The relevant language of the statute, which states that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support,"³⁷⁷ is plain on its face and fully supports the Commission's conclusion.

158. The Commission also found that only a common carrier may be designated as an "eligible telecommunications carrier" for purposes of section 254(e). We find that this,

³⁷⁴ 47 U.S.C. § 254(e).

³⁷⁵ 47 U.S.C. § 214(e)(1).

³⁷⁶ 47 C.F.R. § 54.201(a).

³⁷⁷ 47 U.S.C. § 254(e).

too, is consistent with the language of the statute. For example, section 214(e)(2) directs state commissions to designate "common carrier[s]" as eligible telecommunications carriers for receipt of support.³⁷⁸ Similarly, section 214(e)(1) refers only to "[a] common carrier" as eligible for support in accordance with section 254.³⁷⁹ These provisions, we believe, clearly indicate Congress's intention that only a common carrier may be designated as an "eligible telecommunications carrier."

b. The "Facilities" Requirement.

159. Section 214(e)(1) requires each eligible carrier, throughout its service area: (1) to offer the services that are supported by federal universal service support mechanisms under section 254(c); (2) to offer such services using its own facilities or a combination of its own facilities and resale of another carrier's services, including the services offered by another eligible telecommunications carrier; and (3) to advertise the availability of and charges for such services using media of general distribution.³⁸⁰ The 1996 Act, however, does not define the term "facilities." Accordingly, the Commission, in an effort to effectuate the intent of Congress, established a definition of "facilities" for purposes of determining the eligibility requirements of section 214(e)(1).

160. The Commission interpreted the term "facilities" in section 214(e)(1) to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for universal service support.³⁸¹ This interpretation is mandated by the statutory language which requires that at least some portion of the supported services offered by a carrier be offered using the carrier's "own facilities."³⁸² Although the Joint Board made no recommendation regarding the type of facilities that an eligible carrier must provide, it recommended that carriers who offer universal service exclusively through the resale of another carrier's service should not be eligible for universal service support.³⁸³ Because resold services are not physical components of the network, the Commission's interpretation of the term "facilities" excludes pure resellers from eligibility for universal service support and therefore fulfills the aim of both Congress and the Joint Board.

161. We note, however, that the Commission's interpretation does not dictate the specific facilities that a carrier must provide and, therefore, does not impose entry barriers that would unduly restrict the class of carriers that may be designated as eligible for universal service support. In our view, therefore, the Commission's interpretation of "facilities" strikes

³⁷⁸ 47 U.S.C. § 254(e)(2).

³⁷⁹ 47 U.S.C. § 214(e)(1).

³⁸⁰ See 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.201(d).

³⁸¹ See 47 C.F.R. § 54.201(e).

³⁸² 47 U.S.C. § 214(e)(1)(A).

³⁸³ See *Recommended Decision*, 12 FCC Rcd at 173, para. 161.

an appropriate balance that gives the facilities requirement sufficient meaning to exclude pure resellers from eligibility, but remains competitively neutral insofar as it does not dictate the specific facilities or entry strategy that any other carrier must use.³⁸⁴

c. Unbundled Network Elements as "Own Facilities".

162. As noted above, section 214(e)(1) requires an eligible carrier to provide supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services"³⁸⁵ An issue that arises in interpreting this language is the treatment of the use of unbundled network elements; specifically, whether use of unbundled elements constitutes a carrier's "own facilities." In addressing this issue, the Commission concluded that unbundled network elements qualify as a carrier's "own facilities" for purposes of section 214(e)(1).³⁸⁶ Under this interpretation, a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) satisfies the facilities requirement of section 214(e)(1)(A). Although Congress did not expressly refer to unbundled network elements in section 214(e)(1)(A), we find that the Commission's conclusion is consistent with both the language and overall purposes of the statute.³⁸⁷

163. The principal purpose of the 1996 Act was to increase competition in the local telephone markets.³⁸⁸ To this end, Congress sought to allow potential competitors to enter local telephone markets by using the incumbent carriers' own networks in three ways: (1) interconnection of the competitor's network to that of an incumbent, (2) use of unbundled

³⁸⁴ Although the Commission defined "facilities" to require physical components of the network, it did not construe section 214(e) to require that those facilities be physically located in the service area at issue. We believe that this is an appropriate construction of the statute. First, nothing in the statute mandates that the facilities be located in the service area. See 47 U.S.C. § 214(e). Second, where a carrier can offer supported services in one area through the use of facilities in another area, it is most economically efficient to afford the carrier flexibility to offer its services in this manner. To hold otherwise would require the addition of redundant facilities within the service area for no purpose related to the effective provision of universal service. Moreover, the Commission's interpretation is competitively neutral, as it accommodates various technologies and entry strategies that carriers may employ to compete in high-cost areas.

³⁸⁵ 47 U.S.C. § 214(e)(1)(A).

³⁸⁶ 47 C.F.R. § 54.201(f).

³⁸⁷ We note that, based on the text of section 271(c)(1)(A), the legislative history of that provision, and the overall statutory scheme of the 1996 Act, the Commission interpreted the phrase "own telephone exchange service facilities" in section 271(c)(1)(A) to include unbundled network elements that a competing provider has obtained from a Bell Operating Company. See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Order, CC Docket No. 97-137, 12 FCC Rcd 20543, 20589-20598, paras. 86-101 (1997), *petitions for recon. pending*.

³⁸⁸ See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2337-2338 (1997) (the 1996 Act is "an unusually important legislative enactment" whose "major components . . . were designed to promote competition in the local telephone service market.").

elements of the incumbent's network, and (3) resale of the incumbent's retail services.³⁸⁹ The use of unbundled network elements, as one of only three primary paths of entry into local markets, clearly lies at the heart of the 1996 Act. Given this central role assigned to the use of unbundled network elements in the 1996 Act as a whole, it seems highly unlikely that Congress intended, in section 214(e)(1)(A), to deny universal service support to a carrier that relies on unbundled network elements, whether in whole or in part, to provide supported services, when it excluded only those carriers relying entirely on "resale" -- a separate entry strategy.

164. Indeed, Congress has made clear that all three forms of local entry must be treated in a competitively neutral manner, notwithstanding section 214(e)(1)(A), which prevents pure resellers from becoming eligible telecommunications carriers.³⁹⁰ If the "own facilities" requirement were interpreted to preclude services provided through unbundled network elements from eligibility for universal service support, carriers using unbundled network elements would be at a competitive disadvantage to carriers using other entry strategies, as only those carriers employing other entry strategies would be eligible for support, even if the carriers were all providing the same services. Such a result would be at variance with the principles of competitive neutrality underlying the Act and would serve as a significant disincentive for entry into high-cost areas through the use of unbundled elements, thus defeating Congress's intent to bring the fullest range of telecommunications services "to all regions of the Nation."³⁹¹

165. Moreover, the use of unbundled network elements falls within the definition of a carrier's "own facilities," in the ordinary sense of the term. For example, when a carrier obtains an unbundled network element from an incumbent carrier, the requesting carrier obtains exclusive use of that element for a period of time and pays the full cost of its use to the incumbent.³⁹² Because the ordinary meaning of the word "own" includes not only title holders, but those enjoying beneficial use of property,³⁹³ a user of unbundled network elements is fairly viewed under these circumstances to be using his "own facilities" to provide service. The Commission's decision to include unbundled network elements within the scope of a carrier's "own facilities," therefore, comports with this common understanding of the

³⁸⁹ See 47 U.S.C. § 251(c).

³⁹⁰ 47 U.S.C. § 214(e)(1)(A) (An eligible telecommunications carrier must "offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services . . .").

³⁹¹ 47 U.S.C. § 254(b)(3).

³⁹² See *Local Competition Order*, 11 FCC Rcd 15499, 15635 para. 268 (1996).

³⁹³ See *Universal Service Order*, 12 FCC Rcd at 8865, para. 158 n.405(citing Black's Law Dictionary, 1105 (6th ed. 1990)); *id.* at 8865 n.407, para. 158 (citing cases).

term.³⁹⁴ We note, however, that this issue is the subject of substantial disagreement and is currently before the Commission on petitions for reconsideration.³⁹⁵ Thus, while we report here that we believe the Commission's interpretation of the "own facilities" requirement to be reasonable, we do not wish to prejudge the pending petitions for reconsideration and remain open to the arguments of those who disagree.

d. Eligibility of All Technologies.

166. The Commission concluded that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support, provided that it meets the criteria set forth in section 214(e).³⁹⁶ We find that this conclusion, which the Joint Board recommended, is the proper reading of the statute. Neither section 254(e) nor 214(e) contains language that would favor one technology over another for purposes of eligibility for support. To the contrary, the statute mandates eligibility for any common carrier that meets the requirements of 214(e), without reference to the type of technology employed. Any wholesale exclusion of a class of carriers from eligibility for support, therefore, would be inconsistent with the plain language of the statute as well as the principle of competitive neutrality embodied in the Act. The Commission's decision to allow any technology as eligible for support is thus fully supported by the language and purpose of the statute.

e. Ineligibility of Resellers.

167. The Commission determined that a carrier that provides supported services exclusively through the resale of another carrier's services cannot be designated an eligible telecommunications provider for purposes of section 214(e).³⁹⁷ This, too, in our view, is a reasonable reading of the statute. As noted above, both Congress and the Joint Board expressed an intention to exclude pure resellers from universal service support.³⁹⁸ In

³⁹⁴ See, e.g., *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (quoting *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993)).

³⁹⁵ See, e.g., RTC comments at 7-8, 24-25 (allowing unbundled network elements to satisfy "own facilities" test guts statutory safeguard against giving high cost support to a carrier that does not incur high costs or invest in infrastructure of the high cost area); NARUC comments at 6-7 (Commission had no authority to define "owned facilities" and service area considerations, as these roles are clearly assigned to states under section 214(e)(5)); TDS comments at 10 (allowing use of unbundled network elements where underlying carrier's facilities are not high cost or located in high cost area conflicts with section 254(e)); State Members comments at 7 (states, not Commission, have authority under section 214(e) to define "own facilities" and to establish geographic areas).

³⁹⁶ 47 C.F.R. § 54.201(h).

³⁹⁷ See 47 C.F.R. § 54.201(i).

³⁹⁸ See *Recommended Decision*, 12 FCC Rcd at 173, para. 161; 47 U.S.C. § 214(e)(1)(A).

particular, section 214(e)(1)(A) requires an eligible carrier to provide supported services only "either using its own facilities or a combination of its own facilities and resale of another carrier's services" ³⁹⁹ Because pure resale is not an option under this provision, the Commission's rule denying eligibility to pure resellers comports with the plain language of the statute.

168. Moreover, pure resellers already receive the benefit of universal service support when they purchase wholesale services at a price based on the retail price, a price that already includes the universal service support received by the incumbent provider. If pure resellers were eligible for additional support payments directly to themselves, they would effectively receive a "double recovery" of support. ⁴⁰⁰ Such a result would not only be inefficient, but it would violate the principle of competitive neutrality by favoring resellers over other carriers. We believe, therefore, that the Commission's interpretation is a reasonable construction of the statute. We note, however, that this issue is also before the Commission on petitions for reconsideration. ⁴⁰¹ To avoid prejudging those petitions, we underscore that, based upon our review of the record in this proceeding, our opinion on this issue is simply that the Commission's decision to exclude pure resellers is a reasonable interpretation of the statute.

f. Exclusivity of Statutory Rules.

169. Section 214(e)(2) states that "[a] state commission *shall* . . . designate a common carrier that meets the [eligibility] requirements of [section 214(e)(1)] as an eligible telecommunications carrier" 47 U.S.C. § 214(e)(2) (emphasis added). Similarly, section 214(e)(1) provides that carriers designated as eligible telecommunications carriers pursuant to the statute "*shall* be eligible to receive universal service support" 47 U.S.C. § 214(e)(1) (emphasis added). These provisions clearly leave no room for discretion and require that carriers meeting the statutory eligibility requirements be provided with universal service support. We agree, therefore, that the statute does not permit the Commission to impose additional criteria for eligibility.

170. Furthermore, even if the statute permitted the imposition of additional conditions on eligibility, such conditions would be unnecessary. Although some commenters in the initial rulemaking proceeding argued that additional criteria are needed to prevent unreasonable practices by other carriers, the statutory rules are sufficient to protect against

³⁹⁹ 47 U.S.C. § 214(e)(1)(A).

⁴⁰⁰ AMSC contends that resellers should not be excluded from eligibility where their services were not obtained from carriers that are already receiving universal service support for the same facilities. *See* AMSC comments at 4. In such cases, AMSC contends, support for the reseller does not create a "double recovery." *Id.* Regardless, AMSC's point cannot overcome the statutory language of section 214(e)(1)(A), which does not allow universal service support for the pure resale of supported services.

⁴⁰¹ *See, e.g.,* BellSouth Petition for Reconsideration at 3-4 (filed); RTC Petition for Reconsideration at 5-6 (filed).

such practices.⁴⁰² For example, by limiting eligibility to only common carriers, section 214(e) prevents eligible carriers from cherry-picking only the most desirable customers. The requirement that eligible carriers must serve their entire service area similarly protects against such practices. Moreover, the imposition of additional criteria for eligibility would raise potential market participants' costs of entry, thereby discouraging the competition intended by the 1996 Act. In addition to the plain language of the statute, therefore, these practical concerns justify the Commission's decision to adopt the statutory criteria for eligibility without additional criteria.⁴⁰³

2. Eligibility for Support for Providing Service to Schools and Libraries under section 254(h)

171. The Commission concluded that, pursuant to section 254(h)(1)(B), all telecommunications carriers may receive support for providing eligible schools and libraries with any commercially available telecommunications service they need⁴⁰⁴ as well as for providing them with basic "conduit" Internet access and the installation and maintenance of internal connections.⁴⁰⁵ The Commission also determined that, pursuant to sections 4(i) and 254(h)(2)(A), firms other than telecommunications carriers can receive support for providing eligible schools and libraries with basic conduit Internet access and the installation and maintenance of internal connections.⁴⁰⁶

a. Telecommunications Carriers

172. The Commission concluded that section 254(h)(1)(B)(ii) allows any telecommunications carrier, not just those designated as "eligible telecommunications carriers" under section 214(e), to receive universal service support for providing supported services to schools and libraries.⁴⁰⁷ This interpretation is, in our view, well-grounded in the plain language of the statute.

173. As noted above, section 254(e) provides that only a carrier designated as an "eligible telecommunications carrier" under section 214(e) may receive universal service

⁴⁰² See *Universal Service Order*, 12 FCC Rcd at 8856, para. 143 n.347 (citing comments).

⁴⁰³ Although one commenter in the initial proceeding sought modification of section 214(e)(1)'s requirement that eligible carriers provide service to, and advertise throughout, their entire service areas, the terms of section 214(e) clearly do not allow us to alter these duties. We cannot, therefore, modify the requirements of section 214(e) to accommodate those carriers whose technology limits their ability to provide service throughout a state-wide service area. See *Universal Service Order*, 12 FCC Rcd at 8855, para. 141.

⁴⁰⁴ See 47 C.F.R. §§ 54.501(a), 54.502.

⁴⁰⁵ See 47 C.F.R. § 54.503.

⁴⁰⁶ See 47 C.F.R. §§ 54.503, 54.517(b); *Universal Service Order*, 12 FCC Rcd at 9013, para. 444.

⁴⁰⁷ See 47 C.F.R. § 54.501(a); *Universal Service Order*, 12 FCC Rcd at 9015, para. 449.

support.⁴⁰⁸ Section 254(h)(1)(B)(ii), however, contains an express exemption from this limitation, allowing telecommunications carriers to receive universal support for providing eligible services to schools and libraries, "notwithstanding the provisions of [section 254(e)] . . ."⁴⁰⁹ We find that, as Senators Stevens and Burns have observed, Congress intended section 254(h)(1)(B) to "waive the statutory limitation in section 254(e) so that any telecommunications carrier could receive support for universal service to schools and libraries."⁴¹⁰ We believe that the language of the statute thus fully supports the Commission's conclusion that any telecommunications carrier, whether or not designated as an "eligible telecommunications carrier," is eligible for support for providing telecommunications services to schools and libraries.⁴¹¹

174. Moreover, as the Commission explained in its *Fourth Order on Reconsideration*, the term "telecommunications carrier" in section 254(h)(1)(B) includes only those carriers that provide telecommunications services on a common carrier basis.⁴¹² In turn, this means that only those carriers who hold themselves out "to service indifferently all potential users" can be considered telecommunications carriers.⁴¹³ Therefore, notwithstanding the objections of some commenters,⁴¹⁴ the plain language of the statute appears to render state telecommunications networks ineligible to receive universal service support for providing telecommunications services to eligible schools and libraries.⁴¹⁵ Because the evidence in the record indicates that state telecommunications networks offer services to a specified class of users rather than directly to the public, these entities do not service all potential users indifferently and thus would not qualify as telecommunications carriers. Because, as noted above, section 254(h)(1)(B) provides that only telecommunications carriers may receive support for providing schools and libraries with telecommunications services, we believe that the Commission correctly concluded that state telecommunications networks are not eligible for universal service support under section 254(h)(1)(B). We note, however, that the Iowa

⁴⁰⁸ 47 U.S.C. § 254(e).

⁴⁰⁹ 47 U.S.C. § 254(h)(1)(B)(ii).

⁴¹⁰ Senators Stevens and Burns comments at 10.

⁴¹¹ See also NCTA comments at 14-15 (section 254(h)(1)(B) specifically authorizes support for non-common carriers).

⁴¹² *Fourth Order on Reconsideration* at paras. 187-188.

⁴¹³ *Universal Service Order*, 12 FCC Rcd at 9177-78, paras. 784-786.

⁴¹⁴ See, e.g., Washington DIS reply comments at 1-3 (ineligibility of state networks providing services to public entities to receive discounts directly precludes schools and libraries from obtaining discounts on significant administrative costs included in state-provided services and creates disincentives to use state-aggregated telecommunications services); NASTD reply comments at 1-3 (state networks should be permitted to receive support for costs "not directly attributable to readily identifiable costs" of providing local and long distance voice telecommunications to schools and libraries). See also Washington State Department of Information Services, Petition for Reconsideration, CC Docket No. 96-45 (filed Feb. 12, 1998).

⁴¹⁵ *Fourth Order on Reconsideration* at paras. 187-189.

Telecommunications and Technology Commission filed with the Commission a request for determination that the Iowa Communications Network it operates is a provider of telecommunications services to schools, libraries and rural health care providers and, thus, should be eligible to receive universal service support for serving these entities.⁴¹⁶ We will consider this request in an upcoming proceeding.

b. Firms Other Than Telecommunications Carriers Providing Internet Access and Internal Connections

175. We have attempted to interpret sections 254(h)(2) and 254(e) in a manner most consistent with the context provided by other statutory language and the Congressional intent expressed in that language.⁴¹⁷ Under such analysis below, which is similar to the analysis provided by the Commission in the *Universal Service Order*, we conclude that, despite some statutory ambiguity, the stronger position is that section 254 authorizes the Commission to provide support to firms other than telecommunications carriers under section 254(h)(2).⁴¹⁸ We recognize that some would find it incongruous that entities that do not contribute to universal service support mechanisms may draw funds from those mechanisms if those entities provide competitively priced Internet access or internal connections to eligible schools and libraries. We reach this interpretation of section 254(h)(2), however, because we find that the consequences of reading the statute to deny support to firms other than telecommunications carriers creates more apparent statutory inconsistencies than reading the statute to permit such support.

176. At the outset, we note that the Commission interpreted section 254(h)(2) to permit support not only for telecommunications services, but also for internal connections in schools and libraries, which are not telecommunications services. This conclusion was premised on the statute's specific requirement that "classrooms," as opposed to "schools," have access to advanced telecommunications and information services.⁴¹⁹ If the Commission had found that the statute did not permit support for internal connections, only wireless telecommunications service providers would have been eligible to receive support for the provision of telecommunications and information services to classrooms. Because limiting eligibility solely to wireless carriers would have been contrary to the Commission's obligations to "establish competitively neutral rules to enhance . . . access to advanced

⁴¹⁶ Iowa Communications Network Eligibility for Universal Service Payments, CC Docket 96-45 (filed Feb. 4, 1998); Iowa Telecommunications and Technology Commission Seeks Determination that the Iowa Communications Network is a Provider of Telecommunications Services to Schools, Libraries, and Rural Health Care Providers, *Public Notice*, DA 98-294 (rel. Feb. 13, 1998).

⁴¹⁷ *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

⁴¹⁸ We note that this issue is the subject of a pending appeal. See Brief for Petitioners GTE Entities, Southwestern Bell Tel. Co. and BellSouth Corp., *Texas Office of Pub. Util. Counsel v. FCC*, No. 97-60421 (5th Cir.) at 85-88.

⁴¹⁹ See 47 U.S.C. § 254(h)(2)(A).

telecommunications and information services for all . . . classrooms,⁴²⁰ we concluded that Congress intended to permit support for internal connections in schools and libraries.

177. Further, at least three major inconsistencies arise from interpreting section 254(e) to limit our authority under section 254(h)(2). First, reading section 254(e) to limit section 254(h)(2), when it does not apply to section 254(h)(1)(B), appears inconsistent with the relative directives of those provisions. Congress explicitly chose to permit the Commission to provide support to all telecommunications carriers -- including those that were not designated under section 214(e) -- for services eligible for support under section 254(h)(1)(B). While 254(h)(1)(B) did not emphasize competitive neutrality, the exemption from section 254(e) implicitly provided competitive neutrality among all telecommunications carriers. Reading section 254(e) to limit section 254(h)(2), however, would imply that Congress intended section 254(h)(2) to be less competitively neutral than section 254(h)(1)(B), for Congress would be prohibiting competitive neutrality between all telecommunications carriers: those designated under section 214(e) would be preferred to those that were not. That is, that while Congress explicitly required "competitive neutrality" under section 254(h)(2), it intended to prohibit even the lesser form of competitive neutrality that it adopted implicitly in section 254(h)(1)(B). This does not appear to be a tenable conclusion.

178. Second, denying support to firms other than telecommunications carriers would be inconsistent with Congress's goal, stated in section 254(h)(2)(A), to "enhance . . . access to advanced telecommunications and information services" for schools and libraries.⁴²¹ To allow support for Internet access and internal connections only when provided by a telecommunications carrier would reduce the sources from which schools and libraries could obtain these services at a discount which, in turn, would reduce competitive pressures on providers to lower their costs, potentially leaving schools and libraries to confront unduly high pre-discount prices. This would appear contrary to the statutory goal of providing schools and libraries with services in the most cost-effective manner possible, which would minimize the total cost and thus the total amount of universal service contributions that would need to be collected.⁴²²

179. Third, as the *Universal Service Order* recognized, limiting direct support to telecommunications carriers would not fully deny support to firms other than telecommunications carriers; it would only deny support to firms that did not affiliate with

⁴²⁰ 47 U.S.C. § 254(h)(2)(A).

⁴²¹ 47 U.S.C. § 254(h)(2)(A).

⁴²² See, e.g., Comcast reply comments at 5-7 (support for non-telecommunications carriers promotes competition and drives prices of Internet access down for schools and libraries); EDLINC comments at 4-5 (without competition from ISPs, ILECs will continue to charge schools and libraries high rates, thereby depleting universal service fund); NCTA comments at 13 (competitive neutrality requires support for all entities; cable is cost-effective choice for schools and libraries); CIX reply comments at 2-3 (schools and libraries should be permitted to select from a wide range of vendors); PA Agencies comments at 12-15 (support for non-telecommunications carriers promotes competition and technological neutrality).

telecommunications carriers.⁴²³ As the *Universal Service Order* noted, to take advantage of the discounts provided by section 254(h)(1), firms other than telecommunications carriers would be able to bid with telecommunications carriers through joint ventures, partnerships, or other business arrangements, and receive support indirectly. They would also have the option of establishing telecommunications carrier subsidiaries or affiliates, even if the scope of their telecommunications service activities was fairly limited. Thus, the Order found that limiting direct support to telecommunications carriers would not prevent support from going indirectly to other firms, but that it would frustrate the Commission's effort to achieve its goal of competitive neutrality,⁴²⁴ because it would treat firms other than telecommunications carriers less favorably than telecommunications carriers.

180. Therefore, the Commission concluded that firms that are not telecommunications carriers are eligible to compete to receive support under 254(h)(2) for providing Internet access and internal connections to schools and libraries, a position that a number of commenters have challenged.⁴²⁵ It bears emphasis that such firms would only receive such support if they were able to offer the requested services on more favorable terms than those offered by telecommunications carriers. Upon reexamination of this issue we observe that certain statutory provisions render the Act susceptible to more than one reasonable interpretation. Specifically, we find that there is tension between section 254(e)'s requirement that we limit support to telecommunications carriers and section 254(h)(2)'s command that we establish competitively neutral rules. Section 254(e) states that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific federal universal service support." Therefore, if we treated it as controlling, we would conclude that section 254(h)(2) can only authorize support for section 214(e) eligible telecommunications carriers. On the other hand, section 254(h)(2) states that "the Commission shall establish competitively neutral rules," under 254(h), and so if we treated it as controlling, we would read it to prohibit the Commission from establishing rules that are not competitively neutral, and thus require that we find that section 254(e)'s exclusion of broad classes of potential competitors does not apply to rules established under 254(h)(2).

181. As the *Universal Service Order* recognized, however, there is a reasonable statutory basis for concluding that section 254(e) does not apply to section 254(h)(2). Although sections 254(e) and 254(h)(1)(A) and (B) limit support only to eligible telecommunications carriers, the Commission's decision to allow support to firms other than telecommunications carriers was based on the broader provisions of section 254(h)(2)(A), in

⁴²³ *Universal Service Order*, 12 FCC Rcd at 9085, para. 590.

⁴²⁴ *Universal Service Order*, 12 FCC Rcd at 9085, para. 590. See also, e.g., CIX comments at 14-16 (limiting support only to telecommunications carriers would dissuade goal of competitive pricing and would favor a small number of Internet service providers that happen to be affiliated with telecommunications carriers); NCTA comments at 11-12 (cable companies can claim eligibility by virtue of ownership or affiliation with telecommunications carrier).

⁴²⁵ See e.g., BellSouth comments at 8; Senators Stevens and Burns comments at 10 (sections 254(c) and 254(e) limit support to telecommunications carriers); TCG comments at 3, 4-5, 7-8 (support for firms other than telecommunications carriers goes beyond plain language of statute); RTC reply comments at 12-14 (same).

conjunction with section 4(i), and is therefore not subject to this same restriction. Indeed, the structure of the Act indicates that section 254(h)(2)(A) operates as a separate grant of authority that is independent of the narrower provisions of sections 254(e) and 254(h)(1)(A) and (B). For example, section 254(e) limits eligibility of universal service support only to those carriers designated as "eligible telecommunications carriers" under section 214(e). Section 214(e), in turn, requires such carriers to offer the services that are designated for support under section 254(c). With respect to schools and libraries, the only incorporation of section 254(c) (and thus sections 254(e) and 214(e) by reference) is made by section 254(h)(1)(B). Section 254(h)(2)(A), which grants additional authority to the Commission with regard to schools and libraries, makes no reference to the support mechanisms established through section 254(c) and thus operates independently of them. We conclude that because section 254(h)(2)(A) makes no reference to section 254(c)(3), which in turn incorporates section 214(e)'s eligible telecommunications carrier limitation, support under section 254(h)(2)(A) is not restricted to eligible telecommunications carriers. The independence of section 254(h)(2)(A) from these narrower provisions is further demonstrated by the difference between section 254(h)(1)(A), which applies only to health care providers that serve "persons who reside in rural areas," and section 254(h)(2)(A),⁴²⁶ which applies to "all . . . health care providers"⁴²⁷

182. In contrast to the more limited provisions of sections 254(e) and 254(h)(1)(A) and (B), section 254(h)(2)(A) employs broader language that separately grants the Commission authority to establish rules to enhance access to advanced telecommunications and information services, constrained only by the principles of competitive neutrality, technical feasibility and economic reasonableness.⁴²⁸ Unlike the narrower provisions, section 254(h)(2)(A) does not refer to "telecommunications carriers" and, therefore, does not require us to exclude other firms from competing to provide eligible services.⁴²⁹ The Commission's reading of the statute, which permits firms that are not telecommunications carriers to compete to receive support under section 254(h)(2) for providing Internet access and internal connections, therefore, is, in our view, a reasonable interpretation of section 254(h)(2)(A), notwithstanding the objections of some commenters.⁴³⁰

183. Furthermore, section 4(i) of the Act permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."⁴³¹ Under this section, the

⁴²⁶ 47 U.S.C. § 254(h)(1)(A).

⁴²⁷ 47 U.S.C. § 254(h)(2)(A) (emphasis added). *See also, e.g.*, Comcast reply comments at 3 (restrictions of section 214 do not apply to section 254(h)(2)(A)'s mandate to promote access to advanced services).

⁴²⁸ *See* 47 U.S.C. § 254(h)(2)(A); *Universal Service Order*, 12 FCC Rcd at 9085, para. 591.

⁴²⁹ *See* 47 U.S.C. § 254(h)(2)(A).

⁴³⁰ *See* Senators Stevens and Burns comments at 12-13 (section 4(i) does not permit the Commission to waive explicit statutory restrictions of section 254(e)).

⁴³¹ 47 U.S.C. § 4(i).

Commission may take action that is not expressly permitted by the Communications Act, so long as the action is not expressly prohibited by the Act and is necessary to the Commission's effective performance of its statutorily specified functions.⁴³² Here, a rule that allows both telecommunications carriers and other firms to compete to receive support for providing eligible services under section 254(h)(2) is necessary to fulfill the Commission's explicit statutory obligation under that statutory provision to promulgate "competitively neutral" rules, as it allows all carriers to compete effectively in the market for providing Internet access and internal connections to schools and libraries. The Commission's decision, therefore, is authorized by section 4(i), as it is "necessary in the execution of [the Commission's] functions" under section 254(h)(2).

184. Some commenters contend that providing support to firms other than telecommunications carriers violates the competitive neutrality requirement of section 254(h)(2)(A) because firms other than telecommunications carriers can benefit from support while only telecommunications carriers are required to contribute to that support.⁴³³ According to these commenters, telecommunications carriers that contribute to the universal service fund cannot fairly compete with firms that bear no such burden.⁴³⁴ There is no requirement, however, that contributors to universal service mechanisms must also be permitted to receive support. Moreover, under the Commission's rules, contribution obligations are to be based solely on revenues from telecommunications services.⁴³⁵ Because neither Internet access nor internal connections are telecommunications services, no provider of these services -- whether a telecommunications carrier or not -- will be required to contribute to federal universal service support based on revenues they earn from providing these services. Contributions made by telecommunications carriers based on the telecommunications services they provide, therefore, will not place those carriers at a competitive disadvantage vis-a-vis the supported non-telecommunications services.⁴³⁶ On the other hand, if firms other than telecommunications carriers did not receive funding for Internet access and internal connections for schools and libraries, those service providers would be competitively disadvantaged, even if their services would be more cost-efficient. Contrary to the claim of these commenters, therefore, the principle of competitive neutrality

⁴³² See, e.g., *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-07 (D.C. Cir.), cert. denied, 117 S. Ct. 81 (1996).

⁴³³ See, e.g., GTE comments at 9-10, 21, 23 (objecting to inconsistency between those who contribute and those eligible to receive); Bell Atlantic reply comments at 2, 10-11 (objecting to unfairness of allowing ISPs to receive support without contribution); AT&T reply comments at 10-11 (ISPs should be required to contribute to the extent that they are eligible for support); USTA comments at 6 (requiring telecommunications carriers to contribute for the benefit and support of non-contributors is not competitively neutral).

⁴³⁴ *Id.*

⁴³⁵ See 47 C.F.R. § 54.703.

⁴³⁶ See, e.g., AOL comments at 21 (contribution obligations are clearly distinct from the right to participate in the universal service program); EDLINC comments at 6 (no competitive disparity as to provision of Internet access); cf. Comcast comments at 8-9 (analogizing to property taxes funding public schools, where some pay taxes without benefit and others benefit without paying taxes).

supports the Commission's decision to allow both telecommunications carriers and other firms to compete to receive support for providing Internet access and internal connections.⁴³⁷

185. In summary, we are faced with statutory directives that apparently both command and forbid us to provide support to firms other than telecommunications carriers who seek to provide schools and libraries with support to provide Internet access and installation and maintenance of internal connections. After a careful analysis of the consequences of providing and denying such support, however, we find that providing such support produces results more consistent with the statutory framework. In light of these results, we conclude that we should affirm the decision of both the Commission and the Federal-State Joint Board to provide support to firms other than telecommunications carriers who offer schools and libraries more cost effective Internet access or installation and maintenance of internal connections.

3. Eligibility for Support for Providing Service to Health Care Providers under section 254(h)

186. The Commission concluded in its *Universal Service Order* that, under section 254(h)(1)(A) of the Act, all public and non-profit health care providers that are located in rural areas and meet the statutory definition set forth in section 254(h)(5)(B) of the Act are eligible for universal service support.⁴³⁸ Based on the recommendation of health care experts, the Commission also determined that any telecommunications service of a bandwidth up to and including 1.544 Mbps that is necessary for the provision of health care services is eligible for support.⁴³⁹ Thus, where a carrier designated under section 214(e) as an "eligible telecommunications carrier" provides such services to rural health care providers at the comparable urban rate, the carrier may recover the difference, if any, between the rate for similar services provided to other customers in comparable rural areas of the state and the rate charged to the rural health care provider for such services. In addition to ensuring that rural health care providers benefit from universal service support, the Commission determined that, pursuant to section 254(h)(2)(A), all telecommunications carriers, whether or not designated as an "eligible telecommunications carrier" under section 214(e), that provide health care

⁴³⁷ *Accord, e.g.*, State Members comments at 4 (competitively neutral rules mandated under 254(h)(2)(A) are applicable to all service providers); AOL reply comments at 3, 20 (if telecommunications carriers receive universal support for providing information services, so too must firms other than telecommunications providers of the same services; support for ISPs fosters competitive neutrality and affords schools and libraries broader choices); CIX reply comments at 14-16 (limiting support only to telecommunications carriers would not be competitively neutral); USIPA comments at 4 (it would be illogical to assume that Congress did not intend that the entities that constructed the Internet would not be permitted to participate in a program designed to bring the Internet to schools and libraries).

⁴³⁸ *Universal Service Order*, 12 FCC Rcd at 9093, para. 608.

⁴³⁹ *See Id.*, 12 FCC Rcd at 9101, para. 620 n.1605 (citing FCC Advisory Committee on Telecommunications and Health Care, Finding and Recommendations at 1-2).

providers with toll-free access to an Internet service provider can receive a limited amount of universal service support.⁴⁴⁰

a. Eligible Providers of Telecommunications Services to Rural Health Care Providers

187. Eligible Telecommunications Carriers. The Commission concluded that only telecommunications services provided by "eligible telecommunications carriers," designated as such pursuant to section 254(e), should be eligible for universal service support under section 254(h)(1)(A). We recognize that this issue is the subject of substantial disagreement among commenters⁴⁴¹ and, indeed, is currently before the Commission on petitions for reconsideration of the *Universal Service Order*.⁴⁴² We do not wish to prejudice those petitions in this Report and remain committed to taking a fresh look at this issue in the reconsideration proceedings. Without expressing any opinion on the merits of the pending petitions for reconsideration, we believe that the Commission's conclusion was a reasonable construction of the statute. As noted above, section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e)" may receive universal service support.⁴⁴³ Although section 254(h)(1)(B)(ii) provides an exception to this eligibility requirement for carriers serving schools and libraries, no such exception appears in section 254(h)(1)(A).⁴⁴⁴ It appears from the plain language of the statute, therefore, that only "eligible telecommunications carriers" as defined in section 254(e) are eligible to receive universal service support for providing eligible services to health care providers under section 254(h)(1)(A). We note, however, that this statutory constraint will limit the flexibility of rural health care providers because they are limited to purchasing supported services from designated "eligible telecommunications carriers." It also appears that this section of the Act reduces competition in rural areas because only eligible telecommunications carriers can receive support for serving eligible rural health care providers. We would prefer a more competitive result. We will be considering this issue further in ruling on the petition for reconsideration filed with the Commission in which parties allege that in Alaska only telecommunications carriers that will not be designated as eligible telecommunications carriers are able to provide the services that are

⁴⁴⁰ See *Universal Service Order*, 12 FCC Rcd at 9106, para. 628; 47 C.F.R. § 54.621(b).

⁴⁴¹ See, e.g., GCI comments at 14-16 (all carriers, whether or not designated as "eligible telecommunications carriers," should be able to receive support under section 254(h)(1)(A)); Nebraska PSC comments at 1-2 (limiting support only to "eligible telecommunications carriers" will preclude support to rural health care providers that have already contracted with ineligible carriers); State Members comments at 8 (Congress should consider a "technical correction" to the statute to exempt health care providers from eligibility requirements of section 254(e)); Arizona CC reply comments at 4 (same); ALTS reply comments at 1-3 (same).

⁴⁴² See Alaska Petition for Reconsideration at 9-12; Alaska PUC Petition for Reconsideration at 9-10; GE Americom Petition for Reconsideration at 1-2; GCI Petition for Reconsideration at 1-4.

⁴⁴³ 47 U.S.C. § 254(e).

⁴⁴⁴ Compare 47 U.S.C. § 254(h)(1)(A) with 47 U.S.C. § 254(h)(1)(B)(ii).

needed by rural health care providers.⁴⁴⁵ We note that if the requirements of section 10 of the 1996 Act are met, the Commission could exercise forbearance authority in order to broaden the category of telecommunications carriers that may receive support for serving eligible rural health care providers as appropriate.

188. Rural Health Care Providers Only. Although section 254(h)(1)(A) authorizes support for the provision of telecommunications services to "any public or non-profit health care provider that serves persons who reside in rural areas of that state,"⁴⁴⁶ the statute does not specify whether the health care provider itself -- as opposed to the persons it serves -- must be physically located in a rural area to obtain the supported services. The Commission concluded, as did the Joint Board, that a health care provider must be located in a rural area in order for its service provider to be eligible for universal service support.⁴⁴⁷ We believe that this is a reasonable interpretation of the statute.

189. Although the statute is not explicit on this point, the discount provision in 254(h)(1)(A) provides strong evidence that Congress intended to limit the provision of supported services to rural health care providers only. Specifically, section 254(h)(1)(A) calculates the amount of support due a carrier as the difference between the "rates for services provided to health care providers for rural areas and the rates for similar services provided to other customers in comparable rural areas."⁴⁴⁸ If the health care provider were in an urban area, there would be no method of calculating the amount of support under this provision, as it contemplates a comparison only of the rates charged to customers in "rural areas." The Commission's decision to limit support only to providers of services to rural health care providers, therefore, follows logically from the language of the statute.

190. The legislative history also indicates that Congress, in enacting section 254(h)(1)(A), was concerned primarily with ensuring telecommunications access to health care providers located in rural areas. For example, in the Joint Explanatory Statement, Congress explained that section 254(h) was intended "to ensure that health care providers for *rural areas* . . . have affordable access to modern telecommunications services that will enable them to provide medical . . . services to all parts of the Nation."⁴⁴⁹ Similarly, Congress expressed particular concern for the ability of "*rural health care providers* to obtain access to advanced telecommunications services"⁴⁵⁰ and that "*the rural health care provider receive an affordable rate for the services necessary for the purposes of telemedicine and instruction relating to such*

⁴⁴⁵ See, e.g., Alaska comments to Petition for Reconsideration at 9-12; GCI comments to Petition for Reconsideration at 1-3.

⁴⁴⁶ 47 U.S.C. § 254(h)(1)(A).

⁴⁴⁷ See 47 C.F.R. § 54.601(a)(4).

⁴⁴⁸ *Universal Service Order*, 12 FCC Rcd at 9111, para. 641.

⁴⁴⁹ Joint Explanatory Statement at 132 (emphasis added).

⁴⁵⁰ *Id.* (emphasis added).

services."⁴⁵¹ These statements further support the Commission's interpretation of section 254(h)(1)(A) to limit the provision of supported services only to health care providers located in rural areas.

b. Providers of Toll-Free Internet Access to Health Care Providers Regardless of Location

191. Consistent with its authority to enhance access to advanced telecommunications and information services for health care providers pursuant to section 254(h)(2)(A), the Commission authorized support for toll charges incurred by health care providers that cannot obtain toll-free access to an Internet service provider. The Commission also concluded that any telecommunications carrier, whether or not designated as "eligible" pursuant to section 254(e), may receive universal service support for providing this service to any health care provider, regardless of location.

192. No Eligibility Restriction. We believe that the Commission properly concluded that both eligible and non-eligible telecommunications carriers under section 254(e) may receive universal service support for the provision of toll-free access to an Internet service provider to eligible health care providers. As noted above, section 254(h)(1)(A) is subject to the requirement in section 254(e) that, to receive support, a carrier must be designated as an "eligible telecommunications carrier" under section 214(e).⁴⁵² The Commission did not designate toll-free Internet access for support under section 254(h)(1)(A), however, but did so instead under section 254(h)(2)(A).⁴⁵³ As we explained above, section 254(h)(2)(A), unlike section 254(h)(1)(A), is an independent grant of authority and thus is not subject to section 254(e)'s eligibility requirement.⁴⁵⁴ In our view, therefore, the Commission's decision to allow both eligible and non-eligible telecommunications carriers to receive support for providing toll-free Internet access to eligible health care providers is consistent with the language of the statute and with the statutory requirement to develop competitively neutral rules to enhance access to advanced telecommunications and information services for health care providers.

193. Rural and Non-Rural Health Care Providers. We also find that the Commission's decision to allow support for providers of toll-free Internet access, regardless of whether the health care provider to which they provide this service is located in a rural or non-rural area, is a reasonable construction of the statute. As we discussed above, section 254(h)(1)(A) requires that a health care provider must be located in a rural area in order for its provider of telecommunications services to be eligible for universal service support.⁴⁵⁵ Again, however, the Commission did not rely on section 254(h)(1)(A) to authorize support for

⁴⁵¹ *Id.* (emphasis added).

⁴⁵² See 47 U.S.C. §§ 254(e) and (h)(1)(A).

⁴⁵³ See *Universal Service Order*, 12 FCC Rcd at 9157-9160, paras. 742-748.

⁴⁵⁴ See *supra* at section VI.B.2.b.

⁴⁵⁵ See *supra* at section VI.B.3.A.

toll-free Internet access; rather, it relied on section 254(h)(2)(A).⁴⁵⁶ Whereas section 254(h)(1)(A) is concerned with the provision of service to "persons who reside in rural areas,"⁴⁵⁷ section 254(h)(2)(A), in contrast, seeks to enhance access to advanced services for "all . . . health care providers . . ." ⁴⁵⁸ Section 254(h)(2)(A) is thus independent of section 254(h)(1)(A) and its limitations and, further, provides the broader authority to promulgate rules for the benefit of "all health care providers," not just rural ones. In our view, the Commission's decision to extend support for the provision of toll-free Internet access to non-rural health care providers is entirely consistent with this language.

VII. REVENUE BASE AND PERCENTAGE OF FEDERAL FUNDING

194. In this section, we examine first certain Commission decisions regarding the revenue base on which contributors' universal service contributions are assessed. After analyzing the Commission's conclusions regarding the jurisdictional parameters placed on the Commission and on the states, we agree that the Commission has the authority to assess universal service contributions on both telecommunications providers' interstate and intrastate revenues.

195. We examine, second, the Commission's previous decisions regarding the level of interstate high cost support. At the onset, we believe it is important to make two observations to place this issue in context. First, the discussion of the issue in this Report relates only to non-rural local exchange carriers. With respect to *rural* local exchange carriers, 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.

196. Second, we note that the pre-May 8, 1997 regulatory scheme created a *de facto* allocation of responsibility between the Commission and state commissions with respect to support for service to rural and high cost areas. That allocation of responsibility was defined by the separations rules, which placed 25 percent of booked loop costs in the interstate jurisdiction for most of the loop plant used by the non-rural LECs. In addition, the aggregate amount of LEC network investment in the interstate jurisdiction is approximately 25 percent. Through the operation of an explicit universal service support mechanism, however, greater than 25 percent of booked loop costs were placed in the interstate jurisdiction in those areas

⁴⁵⁶ See *Universal Service Order*, 12 FCC Rcd at 9157-9160, paras. 742-748; see note 434, *supra*.

⁴⁵⁷ 47 U.S.C. § 254(h)(1)(A).

⁴⁵⁸ 47 U.S.C. § 254(h)(2)(A) (emphasis added).

where loop costs were particularly high. As a result, some of the non-rural LECs did have slightly more than 25 percent of their booked loop costs in the interstate jurisdiction, and many rural LECs had substantially more than 25 percent in the federal jurisdiction.

197. As discussed below, 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 through aggregate implicit and explicit federal subsidies. 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. 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.

A. Revenue Base for Contributions

1. Background

198. Section 623(b)(5) of the Appropriations Act requires the Commission to review its "decisions regarding the percentage of universal service support provided by federal mechanisms and the revenue base from which such support is derived." This requirement implicates several important determinations made by the Commission, including what is referred to as the "25/75" approach to sharing responsibility for universal service support between the state and federal jurisdictions. In addition, we must address Commission decisions regarding: the scope of the Commission's jurisdiction in assessing and recovering contributions; the scope of the revenue base for, and the method of recovery of, contributions to the support mechanisms for high cost areas and low income consumers and for eligible schools, libraries, and rural health care providers; and the methodology for assessing contributions to the support mechanisms. We review each of these issues below.

199. In the *Universal Service Order*, the Commission analyzed the scope of the Commission's jurisdiction with respect to the assessment and recovery of universal service support mechanisms.⁴⁵⁹ The Commission concluded that it has jurisdiction to assess contributions for the universal service support mechanisms from intrastate as well as interstate revenues and to require carriers to seek state (and not federal) authority to recover a portion

⁴⁵⁹ *Universal Service Order*, 12 FCC Rcd at 9192, paras. 813-823.

of the contribution in intrastate rates.⁴⁶⁰ The Commission expressly declined to exercise the entirety of its jurisdiction with respect to the assessment and recovery of contributions to the universal service mechanisms for rural, insular, and high cost areas, and low income consumers.⁴⁶¹ Instead, the Commission assessed contributions to those mechanisms based solely on interstate revenues.⁴⁶² With respect to the recovery of those contributions, the Commission continued its historical approach to recovery of universal service support mechanisms, thereby permitting carriers to recover contributions to these universal service support mechanisms through rates for interstate services only.⁴⁶³

200. With respect to the universal service support mechanisms for schools and libraries and rural health care providers, the Commission adopted the Joint Board's recommendation that these mechanisms be funded by contributions based on both the intrastate and interstate revenues of providers of interstate telecommunications services.⁴⁶⁴ The Commission concluded, however, that it will permit recovery of the entirety of these contributions solely via rates for interstate services for the present time.⁴⁶⁵

201. In the *Universal Service Order*, the Commission concluded that, beginning January 1, 1999, the federal universal service mechanism for large local exchange carriers serving rural, insular, and high cost areas will support 25 percent of the difference between the forward-looking economic cost of providing the supported service and the revenue benchmark.⁴⁶⁶ After considering various methodologies for calculating contributions to the universal service mechanism, the Commission determined that carriers should calculate contributions to the universal service mechanisms using end-user telecommunications revenues.⁴⁶⁷

2. Discussion

- a. Commission Authority With Respect to the Assessment and Recovery of Contributions to Universal Service Support Mechanisms

⁴⁶⁰ *Id.* at 9192, para. 813.

⁴⁶¹ *Id.* at 9192, para. 813.

⁴⁶² *Id.* at 9200, para. 831.

⁴⁶³ *Id.* at 9198, para. 825.

⁴⁶⁴ *Id.* at 9203, para. 837.

⁴⁶⁵ *Id.* at 9203, paras. 837-838.

⁴⁶⁶ *Id.* at 9201, para. 833.

⁴⁶⁷ *Id.* at 9205-06, para. 842-843.

202. In the *Universal Service Order*, the Commission determined that Section 254 provides the Commission with the jurisdiction to assess contributions for universal service support mechanisms from both interstate and intrastate revenues, as well as to require carriers to seek authority from states to recover a portion of the contribution in intrastate rates.⁴⁶⁸ Some parties argue that the Commission's decisions overstep the traditional relationship between the federal and state jurisdictions.⁴⁶⁹ Other commenters argue that the Commission should exercise its full authority to assess contributions for high cost support mechanisms on both intrastate and interstate revenues.⁴⁷⁰ Our review of the issue for purposes of this Report, however, leads us to the conclusion that the Commission's jurisdictional analysis in the *Universal Service Order* is sound.

203. As the Commission stated in the *Universal Service Order*, the Commission's authority over universal service support mechanisms stems from the plain language of section 254.⁴⁷¹ Specifically, although the statute contemplates the establishment of federal and state high cost support mechanisms that are consistent with the objectives of section 254, that section imposes on the Commission the ultimate responsibility to implement the universal service mandate of section 254.⁴⁷² Section 254(c)(1) likewise authorizes the Commission to define the parameters of universal service.⁴⁷³ Moreover, section 254(b)(5) anticipates that the Commission will establish support mechanisms that are "specific, predictable and sufficient."⁴⁷⁴ These provisions indicate that the Commission has the primary responsibility and authority to ensure that universal service mechanisms are "specific, predictable, and sufficient" to meet the statutory principle of "just, reasonable, and affordable rates." This interpretation is complementary to the states' independent obligations to ensure that support mechanisms are "specific, predictable, and sufficient" and that rates are "just, reasonable, and affordable," because the statute provides that state universal service mechanisms must be consistent with, and may not conflict with, the federal mechanisms.⁴⁷⁵

⁴⁶⁸ *Id.* at 9197, para. 823.

⁴⁶⁹ *See, e.g.*, Iowa comments at 3; Nevada PUC comments at 3-8. This issue has also been raised on appeal. *See* Brief of Petitioner Cincinnati Bell Tel. Co., *Texas Office of Pub. Util. Counsel v. FCC*, No. 97-60421 (5th Cir.) at 11-25.

⁴⁷⁰ *See, e.g.*, GTE comments at 29; JSI comments at 6; RTC comments at 5-6.

⁴⁷¹ *Universal Service Order*, 12 FCC Rcd at 9192, para. 814.

⁴⁷² Section 254(a) provides that rules "to implement" the section are to be recommended by the Joint Board and those recommendations are to be implemented by the Commission. 47 U.S.C. § 254(a).

⁴⁷³ Section 254(c)(1) directs that the concept of universal service is an "evolving level of telecommunications that the Commission shall establish periodically." 47 U.S.C. § 254(c)(1).

⁴⁷⁴ 47 U.S.C. § 254(b)(5).

⁴⁷⁵ *See* 47 U.S.C. §§ 254(b)(5) & (f).

204. The Commission's conclusion regarding the scope of its jurisdiction is also supported by several provisions of section 254 that indicate that Congress intended universal service support mechanisms to include both intrastate and interstate services. Specifically, section 254(b)(3) establishes that the Commission's rules and policies must ensure that "consumers in all regions of the Nation . . . have access to telecommunications and information services."⁴⁷⁶ This language supports a finding that universal service should include more than access to interstate services, which previously has generally been the focus of federal telecommunications law. Moreover, because the traditional core goal of universal service is ensuring affordable basic residential telephone service, which is primarily an intrastate service, it is clear that section 254(b)'s goal of affordable basic service indicates that Congress intended that both intrastate and interstate services should be affordable. It is significant that the Joint Board agreed with this conclusion by recommending that the services eligible for universal service support pursuant to section 254(c) include intrastate services.⁴⁷⁷

205. As the Commission concluded in the *Universal Service Order*, the ability of states to create separate support mechanisms covering intrastate carriers pursuant to section 254(f) does not suggest that the amount of a carrier's contributions to such a support mechanism should be based on the type of telecommunications service, intrastate or interstate, provided by the carrier.⁴⁷⁸ We find no support for such an inference in the legislative history. Rather, the legislative history indicates that states continue to have jurisdiction over implementing universal service mechanisms for intrastate services supplemental to the federal mechanisms as long as "the level of universal service provided by each state meets the minimum definition of universal service established [under section 254] and a State does not take any action inconsistent with the obligation for all telecommunications carriers to contribute to the preservation and advancement of universal service" established under section 254.⁴⁷⁹

206. Similarly, section 2(b), which provides that nothing in the Act should be construed to give the Commission jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services by wire or radio," does not preclude the Commission from assessing contributions based on a percentage of a carrier's intrastate revenues.⁴⁸⁰ Determining such contributions for universal service support on intrastate, as well as interstate, revenues constitutes neither rate regulation of those services nor regulation of those services in violation of section 2(b). Rather, this method of assessment supports intrastate services, as expressly required by section 254 of the Act and as recommended by the Joint Board. Indeed, in assessing contributions in this way, the Commission is calculating a federal charge based on

⁴⁷⁶ 47 U.S.C. § 254(b)(3).

⁴⁷⁷ *Recommended Decision*, 12 FCC Rcd at 112, para. 46.

⁴⁷⁸ *Universal Service Order*, 12 FCC Rcd at 9195, para. 819.

⁴⁷⁹ Joint Explanatory Statement at 128.

⁴⁸⁰ 47 U.S.C. § 152(b).

both interstate and intrastate revenues, but is in no way regulating the rates and conditions of intrastate service.

207. Further, section 254's express directive that universal service mechanisms be "sufficient" ameliorates any section 2(b) concerns. As a rule of statutory construction, section 2(b) only is implicated where the competing statutory provision is ambiguous.⁴⁸¹ As discussed above, section 254 unambiguously establishes that the services to be supported have intrastate as well as interstate characteristics and permits the Commission to establish regulations implementing federal support mechanisms for the supported intrastate services.

208. Moreover, various provisions of section 254, some of which are discussed above, have blurred the traditional distinction between the interstate and intrastate jurisdictional spheres. For example, although section 254 establishes a federal-state partnership, it grants the Commission primary responsibility for defining the parameters of universal service, and for ensuring that universal service mechanisms are "specific, predictable, and sufficient" to meet the statutory goal of "just, reasonable, and affordable rates." Indeed, section 254 envisions that the Commission would not be bound by the prior system of universal service mechanisms, which was based on the traditional jurisdictional spheres.⁴⁸²

209. For all of the foregoing reasons, we concur with the Commission's earlier conclusion that section 254 of the 1996 Act grants the Commission the authority to assess contributions to universal service support mechanisms from intrastate as well as interstate revenues and to refer carriers to seek state (and not federal) authorization to recover a portion of the contribution in intrastate rates, although the Commission has not exercised this authority. We note that this issue is the subject of pending petitions for reconsideration which we will address in a forthcoming order. Further, we have previously expressed willingness to work with states and we affirm that commitment.⁴⁸³

b. Revenue Base For, and Recovery of, Contributions to Support Mechanisms for Eligible Schools, Libraries and Rural Health Care Providers

210. Initially, we note that few parties commented on the issues of the assessment and recovery of contributions to the support mechanism for eligible schools, libraries and rural

⁴⁸¹ See *Universal Service Order*, 12 FCC Rcd at 9196, para. 822 n.2094 citing 47 U.S.C. § 601.

⁴⁸² See Joint Explanatory Statement at 131 (indicating against reliance on current methodologies by stating that support mechanisms should be "explicit, rather than implicit as many support mechanisms are today."); Senate Report on S. 652 (stating that "the bill does not presume that any particular existing mechanism for universal service support must be maintained or discontinued").

⁴⁸³ See, eg. *Universal Service Order*, 12 FCC Rcd at 9191, para. 809.

health care providers.⁴⁸⁴ After consideration of these important issues, we conclude that the Commission's decisions are consistent with the letter and spirit of the 1996 Act.

211. Assessment. With respect to the assessment of contributions, we conclude it was reasonable for the Commission to adopt the Joint Board's recommendation that "universal support mechanisms for schools and libraries and rural health care providers be funded by contributions based on both the intrastate and interstate revenues of providers of interstate telecommunications services."⁴⁸⁵ As the Commission concluded in the *Universal Service Order*, this approach is reasonable in light of the fact that the schools, libraries, and rural health care mechanisms are "new, unique support mechanisms that have not historically been supported through a universal service funding mechanism."⁴⁸⁶

212. Recovery. Similarly, we reaffirm the Commission's decision to permit carriers to recover contributions for the support mechanisms for eligible schools, libraries, and rural health care providers solely via rates for interstate services.⁴⁸⁷ Limiting recovery to the interstate jurisdiction for the support mechanism for the schools, libraries and rural health care providers will ameliorate the concern that carriers would recover the portion of their intrastate contributions attributable to intrastate services through increases in rates for basic residential dialtone service. The Commission's approach is consistent with the affordability principle contained in section 254(b)(1).⁴⁸⁸ Additionally, we are persuaded that the Commission's approach minimizes any perceived jurisdictional difficulties under section 2(b) because carriers are not required to seek state authorizations to recover contributions attributable to intrastate revenues.⁴⁸⁹ Therefore, we find that permitting recovery of contributions for the support mechanisms for eligible schools, libraries, and rural health care providers solely via rates for interstate services is consistent with section 254.⁴⁹⁰

c. Revenue Base For, and Recovery of, Contributions to Support Mechanisms for High Cost Areas and Low Income Consumers

213. Assessment. As stated above, the Commission declined to exercise its authority to assess contributions to the high cost and low income support mechanisms on both intrastate

⁴⁸⁴ TDS comments at 10 (supporting the decision to use total, unseparated interstate and intrastate end user revenues as the basis for support contributions designed to benefit schools, libraries and rural health care providers).

⁴⁸⁵ *Universal Service Order*, 12 FCC Rcd at 9203, para. 837 citing *Recommended Decision*, 12 FCC Rcd at 499, para. 817.

⁴⁸⁶ *Id.* at 9203, para. 837.

⁴⁸⁷ *Id.* at 9203, para. 838.

⁴⁸⁸ *Id.* at 9203, para. 838.

⁴⁸⁹ *Id.* at 9204, para. 839.

⁴⁹⁰ *Id.* at 9203-9204, paras. 838-840.

and interstate revenues. Instead, the Commission elected to base those contributions solely on interstate revenues.⁴⁹¹ We find that the Commission's decision was reasonable and appropriate in light of the statutory goals.

214. In its *Recommended Decision*, the Joint Board concluded that the "decision as to whether intrastate revenues should be used to support the high cost and low income assistance programs should be coordinated with the establishment of the scope and magnitude of the proxy-based fund, as well as with state universal service support mechanisms."⁴⁹² Thus, the Joint Board did not submit a recommendation as to whether intrastate revenues should be used to support the high cost and low income mechanisms.⁴⁹³ Rather, as the Commission noted in the *Universal Service Order*, the Joint Board's analysis essentially concluded that the determination of whether contributions should be based on intrastate as well as interstate revenues should be coordinated with the implementation of an appropriate forward-looking economic cost mechanism and revenue benchmark.⁴⁹⁴ Because the mechanism and benchmark were not established, and therefore, the total amount of support requirement was unknown, it would have been premature for the Commission to assess contributions on intrastate as well as interstate revenues.

215. In addition, shortly before the *Universal Service Order* was issued, the state members of the Joint Board filed a report in which the majority recommended that the Commission assess contributions for all support mechanisms on intrastate and interstate revenues.⁴⁹⁵ The majority report also supported the Commission's approach to assessing only interstate revenues for the high cost and low income support mechanisms on an interim basis until a forward-looking economic cost methodology is developed.⁴⁹⁶ Accordingly, the Commission's decision to base contributions to the high cost and low-income support mechanisms solely on interstate revenues was consistent with the Majority State Members' report.

216. Indeed, by declining to base those contributions on intrastate revenues, the Commission promoted comity between the federal and state regulators, and allowed the state commissions to continue to work together to reach consensus on this issue. Because we are still in the process of adopting a forward-looking economic cost mechanism and a revenue benchmark, we conclude that assessing contributions on interstate revenues alone, at least until

⁴⁹¹ *Id.* at 9200, para. 831.

⁴⁹² *Recommended Decision*, 12 FCC Rcd at 499, para. 817.

⁴⁹³ *Universal Service Order*, 12 FCC Rcd at 9198, para. 824.

⁴⁹⁴ *Id.* at 9200, para. 832 *citing* *Recommended Decision*, 12 FCC Rcd at 501, para. 821.

⁴⁹⁵ *Majority Opinion of the State Members of the Joint Board on the Funding of Universal Service*, filed April 23, 1997 ("Majority State Members' Report").

⁴⁹⁶ *Majority State Members' Report*.