

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Proposed Revision of Maximum)
Collection Amounts for Schools)
and Libraries and Rural Health Care)
Providers, Public Notice)

CC Docket No. 96-45
DA Docket No. 98-872

TO: The Common Carrier Bureau

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COMMENTS OF SPRINT PCS

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SUMMARY

The Bureau's proposed increases to the maximum amount that may be collected and spent during 1998 for federal universal service support mechanisms for schools and libraries are astonishingly large and beyond the scope of the statute. The Bureau's stated rationale for the dramatic increases -- access charge reductions -- is wholly inapplicable to CMRS providers, who receive no benefit from reduced access charges. For CMRS providers, the Bureau's proposal correlates to a direct increase in fees. For CMRS customers and the public as a whole, the Bureau's proposal is a direct blow to affordable and innovative telecommunications services. The Commission's oft-stated principle of competitive neutrality, as well as good public policy, dictates that CMRS providers and CMRS consumers should not be so disproportionately impacted.

Not only is the Bureau's proposal illogical and unfair, but also it is unauthorized. *First*, the Bureau's proposal exceeds Congress's mandate by increasing contributions to support inside wiring and other ineligible facilities. As Commissioner Furchtgott-Roth recognizes, rather than raise contribution levels, the Bureau should reduce current quarterly contribution levels. Such reductions are necessary to bring the universal service fund mechanism within the parameters of the statute.

Second, the Bureau's proposal to increase universal service contributions amounts to an unlawful tax. Recently, in *Thomas v. Network Solutions*, the United States District Court for the District of Columbia determined that a similar type of mandatory contribution constituted an illegal tax. The Bureau cannot increase funding for schools and libraries when the Commission lacks authority to impose these funding requirements in the first place.

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COMMENTS OF SPRINT PCS

Sprint Spectrum L.P., d/b/a/ Sprint PCS ("Sprint PCS")¹ opposes the proposed universal service adjustments outlined in the *Public Notice* (the "*Notice*") issued by the Common Carrier Bureau (the "*Bureau*") that seek to increase the maximum amount that may be collected and spent during 1998 for the federal universal service support mechanisms for schools and libraries. The Bureau's proposed plan is based on a misguided rationale that threatens to impede competition in the CMRS market and to compromise the ability of consumers to receive affordable access to advanced telecommunications services. Sprint PCS urges the Bureau to reconsider its proposed adjustments in order to ensure an efficient and competitively sound universal service fund mechanism.

¹ Sprint Spectrum L.P. and its general partner, Sprint Spectrum Holding Company, L.P., are limited partnerships formed by non-publicly traded subsidiaries of Sprint Corporation, Telecommunications, Inc., Comcast Corporation, and Cox Communications, Inc.

I. CMRS Providers Will Bear A Disproportionate Share of the Increased Adjustments.

The *Notice* seeks to increase dramatically the quarterly contributions to the schools and libraries program from \$325 million to approximately \$524 million, resulting in a schools and libraries program fund of \$1.67 billion for 1998. The Bureau bases this enormous increase on anticipated July 1, 1998 access charge reductions of \$700 million.² Although reductions in access charges may ameliorate the burden of increased contributions on long-distance carriers, they will have no such beneficial impact on wireless carriers who are subject to termination charges rather than access charges.³ Thus, the Bureau's stated rationale is invalid as to CMRS providers.

If adopted, the Bureau's universal service proposal will directly and inequitably increase fees for CMRS providers. This increase will leave CMRS providers with two undesirable options: (1) pass the increase in fees to the consumer in the form of higher prices and/or (2) reduce expenditures on the deployment of their network. Under either scenario, the CMRS consumer is disserved and the development of this new telecommunications service is delayed. Commissioner Powell recently set out with clarity the interests at stake: "[E]very dollar we take out of carriers' hands is a dollar they

² *Notice* at 3.

³ *See In re Implementation of Local Competition Provisions in Telecommunications Act of 1996; Interconnection between local exchange carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16014 (rel. August 8, 1996) (noting that "traffic to or from a CMRS network that originates and terminations within the same MTA is subject to termination rates under Section 251(b)(5), rather than interstate and intrastate access charges.").

cannot use to enter new markets, bring new innovations to market and otherwise expand and energize competition."⁴

As Chairman Kennard recognizes, CMRS customers' rates have declined since passage of the 1996 Act.⁵ If, however, universal service fees for schools and libraries are kept artificially high, the rates that CMRS customers and/or the services that CMRS customers enjoy will be negatively impacted. The Bureau should not adopt a proposal that will make wireless telecommunication services less affordable or less desirable to the public.

II. The Bureau's Proposal Will Unlawfully Hamper Uses of Telecommunications Services To Fund Uses of Non-Telecommunications Services.

The Bureau's proposed adjustments seek to increase funding for inside wiring and other non-telecommunications services at the expense of consumers. Though well-intentioned, the Bureau's proposed adjustments reach well beyond the scope of the Commission's authority. As Commissioner Furchtgott-Roth recognizes, it certainly "make[s] more sense to postpone -- or at least make a lesser priority -- the funding of services that if not legally questionable are certainly not statutorily required."⁶

⁴ See Prepared Remarks of Commissioner Michael K. Powell, before the Douglass Policy Institute, Washington, D.C., February 17, 1998, at 3.

⁵ See May 7, 1998 Letter from Commissioner William E. Kennard to Representative Thomas J. Bliley, Jr. concerning a review of the impact on telephone ratepayers of the Commission's implementation of the universal service support mechanisms contained in the 1996 Act.

⁶ See May 13, 1998 Statement of Commissioner Furchtgott-Roth Concerning Proposed Third Quarter 1998 Universal Service Contribution Factors Announced, CC Docket 96-45, (hereinafter "Statement") at 4.

Section 254 of the Communications Act of 1934, as amended, (the "Communications Act"), requires the Commission to adopt policies that preserve and enhance "universal service", *i.e.*, basic telephone services that should be available to all Americans.⁷ Reflecting its determination that schools should be a gateway to more sophisticated telecommunications services, Congress enacted a special provision geared towards improving the services available to schools. Thus, Section 254(h)(2) directs the Commission to establish rules to enhance access to "advanced telecommunications and information services" for schools and libraries. However, there exists no statutory authority to extend universal service support to subsidize the purchase of inside wiring and CPE.

For the past thirty years, the Commission has drawn and maintained a line between "services" and "equipment."⁸ During that time the Commission has held that CPE, defined as products that interconnect with the telephone network and are on the customer's premises, is severable from the underlying common carrier transmission services and should be treated differently, *i.e.*, not regulated.⁹ Nothing in the text of Section 254 supports the conclusion that Congress erased that well-established line. Accordingly, the Commission's decision to include inside wiring and equipment such as

⁷ 47 U.S.C. § 254(a).

⁸ *See, e.g.*, Use of the Carterfone Device in Messaging Toll Telephone Services, 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968); Amendment of § 64.702 of the Commission's Rules & Regulations, 77 FCC 2d 384 (1980) ("*Computer II*"); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1977); Computer and Communications v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

⁹ *See Computer II*, 77 FCC 2d at 388.

routers, hubs, network file servers, and wireless LANs as "services" is without merit. These devices are plainly products that interconnect with the network and are on the customer's premises. The Commission is not authorized to adopt a plan that subsidizes other equipment used on a customer's premises to interconnect with the network, and the Bureau cannot increase contributions, as it proposes in the *Notice*, for these ineligible facilities.

Because the Commission improperly implemented Congress' statutory mandate, Sprint PCS endorses Commissioner Furchtgott-Roth's proposal to reduce the present quarterly contribution rate to the schools and libraries program from \$325 million to \$25 million.¹⁰ This figure would ensure that sufficient funds are available to pay for every type of telecommunications service needed by every school in the country in 1998. And it would ensure that schools and libraries receive support consistent with the congressional directive.

III. The Bureau's Proposal Amounts To An Unconstitutional Tax.¹¹

The Supreme Court requires that, to be valid, a delegation of taxing authority to an agency must be clearly intended. In *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), the Court invalidated a charge the Commission had imposed on cable television licensees, on the ground that the fee was set so as to recoup more than the costs directly incurred in licensing cable providers. *Id.* at 340. The Court

¹⁰ See Statement of Commissioner Furchtgott-Roth at p. 4.

¹¹ Commissioner Furchtgott-Roth requested comment on this issue. See Statement of Commissioner Furchtgott-Roth at 5.

concluded that it must read the statute narrowly, and thereby limit the Commission's authority to recoup on the basis of the public interest, so to avoid the constitutional problems inherent in a broader reading of the fee-authorizing statute at issue. *Id.* at 342.

The Court has followed *National Cable*, and explained that it stands for the principle that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties."¹² Congress, therefore, to delegate to an agency its plenary power to tax, must provide the agency with standards by which its compliance may be measured and explicate the boundaries of the agency's authority.¹³

The Commission's universal service rules¹⁴ raise serious questions about the validity and scope of the Commission's authority. In its universal service decision, the Commission asserts that it is authorized by Section 254(d) of the Communications Act, 47 U.S.C. § 254(d), to tax interstate telecommunications providers so that the

¹² *Skinner v. Mid America Pipeline Co.*, 490 U.S. 212, 224 (1989).

¹³ *See id.* at 218-19. There are strong policy reasons for this "clear authorization" rule that derive from basic principles of representative government. The budget and appropriations processes provide incentives to agencies for efficient operation and create agency accountability to Congress. *See United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1274 (3d Cir. 1993). When an agency claims for itself the power to obtain funding for its desired activities, the discipline and accountability provided by the congressional budgeting process no longer have an effect on the agency. *See id.*

¹⁴ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, adopted May 7, 1997, Released May 9, 1997 (hereinafter "Universal Service Order").

providers so that the Commission may disburse these funds to a variety of entities and persons.¹⁵ Section 254(d) provides that

Every telecommunications carrier that provides interstate telecommunications service 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.

47 U.S.C. § 254(d). Nowhere in this authorization does there appear a grant of power to the Commission to impose a tax on interstate telecommunications providers to fund universal service.

Recently, as Commissioner Furchtgott-Roth highlights, the District of Columbia District Court found a mandatory contribution, similar to the Commission's universal service burden, to be an illegal tax.¹⁶ At issue before the district court was an "information infrastructure assessment" collected by Network Solutions, Inc. ("NSI") under its cooperative agreement with the National Science Foundation ("NSF"). NSF imposed a mandatory assessment on every domain name registration independent of and above the cost of domain name registration. The court, citing *National Cable*, distinguished between a tax -- defined as "a payment which is arbitrarily imposed for some public purpose" and a fee -- defined as a "payment for a voluntary act, such as

¹⁵ See Universal Service Order at ¶ 775. The Commission does not use the term "tax." Instead, it assesses contributions on the basis of interstate telecommunications revenue. See Universal Service Order at ¶ 775. However, they are labeled, the mandatory contributions are, in effect, a tax.

¹⁶ See Statement of Commissioner Furchtgott-Roth at 5 (citing *Thomas v. Network Solutions*, 1998 WL 191205 (D.D.C. April 6, 1998)).

obtaining a permit, that goes to defray the expenses of regulating that act."¹⁷ Finding that the assessment was involuntary, provided revenue to the government, and was used on projects that did not directly benefit the payees, the court concluded that, under any standard, the assessment "clearly" constituted a tax.¹⁸

The Commission has read into Section 254(d) a very broad authority to tax the revenues of interstate telecommunications providers.¹⁹ Not only does Section 254(d) not make clear that the Commission possesses this power, but the Section fails to delineate any meaningful boundaries for the scope of this power. The Commission, moreover, recognizes no limit to the revenue it may generate from this tax.²⁰

The only restrictions the Commission has acknowledged that Section 254(d) creates is that the revenue generated from the tax must go to the provision of universal service, which is plainly required by the statute. But the Commission has recognized few limitations on the scope of the term "universal service." For example, the Commission concluded that its power under Section 254(d) to "designate additional

¹⁷ The court noted that other courts "hold that a payment is a tax when it confers no special benefit on the payee, or when the assessment is intended to raise general revenue" and that others "hold that an assessment may be a tax if it is not fairly tied to both the value received by the payee and to the cost of the service to the agency." *Thomas*, 1998 WL 191205 at*5.

¹⁸ See *Thomas*, 1998 WL 191205 at * 5("The Preservation Assessment is an involuntary assessment, it provides revenue for the government, for use on projects that do not directly benefit the payees or otherwise apply to the purposes furthered by the NSF-NSI Agreement.").

¹⁹ See Universal Service Order at ¶¶ 843, 854.

²⁰ Both the Congressional Budget Office and the Office of Management and Budget count payments into the fund as federal revenues and payments out of the fund as Federal outlays. See *Congressional Budget Office, Federal Subsidies of Advanced Telecommunications for Schools, Libraries, and Health Care Providers* 3 (1998).

services for support" allows it to specify information services (such as Internet providers) that may be offered at a subsidized price to schools.²¹

Likewise, the Commission concluded that the services available to health-care providers at a subsidized rate should be very broad.²² The breadth of power thus assumed by the Commission suggests so broad a delegation of spending power as to raise constitutional doubts about the validity of the Order and Section 254(d). Because of this possible constitutional problem, the Commission's construction of Section 254(d) should be substantially narrowed,²³ and the Bureau's proposed increases to the amount that can be collected and spent during this initial year of the schools and libraries program should be rejected.

²¹ See Universal Service Order at ¶¶ 436-39.

²² See Universal Service Order at ¶ 617.

²³ See *National Cable*, 415 U.S. at 342.

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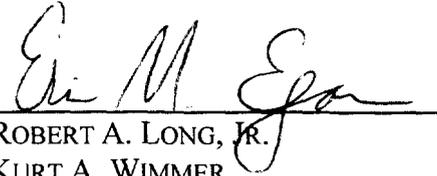
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CONCLUSION

For all of these reasons, Sprint PCS urges the Bureau not to adopt the proposed adjustments to the maximum amount that may be collected during 1998 for the schools and libraries program.

Respectfully submitted,

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