

questions and confusion on the part of Congressional leaders, school applicants, and the public, then why would such a clarification or reiteration be necessary? It is this type of confusion surrounding what is and what is not covered by the program that compels me to follow the abundant Congressional advice that we place this program on hold temporarily.

12. The FCC's interpretation of universal service is consistent with the law.

As I have described in several statements,²⁰ the FCC's current interpretation of universal service is not consistent with Section 254 of the Communications Act. The divergence between Commission interpretation and the statute is not small and cannot be corrected with small and technical changes in existing Orders. Below I touch on a few of the ways in which I believe the Commission's interpretations violate the law.

First, as I have previously indicated, in its zeal to implement a new universal service program for schools and libraries, the Commission failed to meet its statutory mandate of developing an explicit and sufficient support system for rural and high cost telephone users in a timely manner.²¹ Under the 1996 Act, the Commission's primary universal service responsibility was to develop an "explicit and sufficient" support system that would ensure support for local telephone users in high cost and rural areas to replace the complex system of implicit subsidies that could exist in a world without local competition.²² The expeditious creation of a comprehensive new subsidy system was not only critical for preserving the

²⁰ See Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Clarification of "Services" Eligible for Discounts to Schools and Libraries, rel. June 11, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Third Quarter 1998 Universal Service Contribution Factors, rel. June 12, 1998.

²¹ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

²² See 47 U.S.C. Section 254(e) (establishing that universal service support devised by the Commission "should be explicit and sufficient to achieve the purposes of this section.")

goals of universal service, but also necessary to provide for a fair transition to competition in the local markets. As such, Congress set a strict time-frame for developing this plan -- the Joint Board was required to make a recommendation within 9 months of enactment, and the Commission was then required to complete "a *single* proceeding to implement the recommendations" within 15 months after enactment.²³

In this Order, the majority argues that the Commission has taken "significant action to implement the universal service provisions of the Act."²⁴ In support of that contention, the majority notes that ". . . one of the first steps in universal service reform was to make existing high cost support explicit," citing the removal of Long Term Support (LTS) from access charges, and the making of an explicit subsidy corresponding in amount to that generated formerly by DEM [dial equipment minutes].²⁵ While I do not dispute that these two initial steps were taken, they are hardly comprehensive or the type of "significant action" that would be sufficient to satisfy the Commission's responsibility to complete "a *single* proceeding"²⁶ to replace the *entire* complex system of implicit subsidies for high cost and rural telephone users with an "explicit and sufficient" support system. Indeed, in recent reports to Congress, the Commission has characterized its somewhat arbitrary decision to provide federal support for only 25% of these costs as merely a "placeholder."²⁷ While I support reexamination of this issue, I question whether establishing such a "placeholder" can fairly be characterized as "significant," especially in comparison to the extraordinary efforts that this agency has taken to establish the schools and libraries program on an expedited basis. Moreover, if we have completed such "significant action," and if all that was left from the May 8, 1997 Order was to fulfill the "timetable for implementation" as the majority suggests, then why is it now necessary again to refer issues to the Joint Board?²⁸

²³ 47 U.S.C. Section 254(a)(2) (emphasis added).

²⁴ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 18, and para. 53.

²⁵ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 18, and para. 53.

²⁶ 47 U.S.C. Section 254(a)(2) (emphasis added).

²⁷ Federal-State Joint Board Report to Congress, rel. April 10, 1998.

²⁸ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 53 ("We are considering petitions for reconsideration of some aspects of our actions, as well as requests from the Joint Board that we refer some issues to it, including the so-called "25/75" issue."); nt. 125 ("that would include a timetable for implementation of the rules to be adopted.").

Congress intended -- and the 1996 Act required -- that the Commission focus its efforts on resolving the rural, high cost issues *first*, as opposed to finding support for new programs. As Commissioner Powell states in his Separate Statement Dissenting in Part, "nothing in the statute . . . would justify implementation of certain programs, such as schools and libraries, prior to implementation of others."

Second, I believe that the universal service contributions, at least to the extent they are providing support for non-telecommunications services, may not be fairly characterized as mere "fees." In general, taxes can be distinguished from administrative fees by determining the recipient of the ultimate benefit: a tax is characterized by the fact that "it confers no special benefit on the payee," "is intended to raise general revenue," or is "imposed for some public purpose."²⁹ In contrast, a "fee" is a "payment for a voluntary act, such as obtaining a permit."³⁰ Here, all these factors point toward the category of a tax: the fund, which creates internet access for schools and libraries, confers no particular advantages upon telecommunications carriers in exchange for their contributions, such as a license or permit; the funds have not, as far as I can tell, been segregated from other government monies, *see infra*; the purpose of the fund is a broad, social one, purportedly to improve education for all Americans; and the payment requirement is not triggered by a voluntary act on the part of telecommunications carriers, such as the filing of an application, but is a flat mandate.

In *Thomas v. Network Solutions*, the District of Columbia District Court recently found a similar mandatory contribution to the Intellectual Infrastructure Fund -- known as the "Preservation Assessment" -- to be an illegal tax, not ratified by Congress.³¹ Money from that fund was used for the "Next Generation Project," a "program aimed primarily at upgrading the Internet infrastructure, improving the speed and accuracy of information delivery, and increasing access for schools."³² The Court held that the preservation assessment was "clearly a tax" as it was collected "for the government's use on public goals, and not in any way to defray regulatory costs."³³

I had encouraged parties to comment on the implications that this case may have for the Commission's universal service program, and several parties expressed concern that the Commission's implementation has resulted in an unconstitutional tax. As at least one commenter described, "nowhere in this authorization does there appear a grant of power to

²⁹ *Thomas v. Network Solutions*, 1998 WL 191205 (D.D.C. 1998).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 3-4.

³³ *Id.* at 5.

the Commission to impose a tax on interstate telecommunications providers to fund universal service."³⁴ Rather, as I have stated above, the legislation merely empowered the Commission to mandate discounts to schools and libraries. To the extent that Section 254 is the basis for this universal service tax, it may not have even followed appropriate Congressional procedures for a tax authorization.

The majority's reliance on *United States v. Munoz-Flores* does not fully address these issues. First, the majority misconstrues my concerns as limited to an Origination Clause challenge. My primary concern, however, is that in enacting a sweeping new welfare program for schools and libraries that went well beyond the more modest discount program Congress authorized, this agency exceeded the scope of its authority and thereby enacted a new tax that has not been ratified by Congress. Not only does this situation arguably present Origination Clause problems, it raises anti-delegation (i.e., Separation of Powers) questions as well.³⁵

The majority, however, argues that "contributions to the universal service mechanisms do not represent taxes enacted under Congress's taxing authority. Rather, they constitute fees enacted pursuant to Congress's Commerce power."³⁶ Although the majority repeatedly contends that the universal service contributions are not taxes but fees, they simply assert that this is true, without addressing the factors that traditionally distinguish a tax from a fee and how those factors apply here, as set forth above. Simply saying that this is not a tax cannot make it so, however.

Indeed, as discussed above, *Thomas v. Network Solutions* supports the proposition that the type of scheme developed by this agency to support the schools and libraries program may be more fairly characterized as a tax. The majority argues that the fee is not a tax because "all telecommunications carriers required to contribute benefit from the ubiquitous telecommunications network that universal service makes possible."³⁷ This statement, however, is simply not true with regard to the schools and libraries program. As I have previously stated, "to the extent that the telephone network can be considered a single telecommunications system, all users benefit from being capable of serving others. . . . There are no such direct benefits to telephone customers, however, from the provision of

³⁴ Comments of Sprint PCS, at 7.

³⁵ Cf. *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336; *FPC v. New England Power Co.*, 415 U.S. 345.

³⁶ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 26.

³⁷ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 26.

Internet services to and inside wiring of schools and libraries."³⁸ The obvious beneficiaries of this program are not telecommunications carriers, but the school and libraries who are entitled to free goods and services. I have yet to hear proponents of the current program cite telecommunications carriers as the object of their well-intentioned efforts.

In addition, in order for even an intentional delegation of Congress' power to tax to be judicially sustainable, Congress must provide the agency with standards by which its compliance with the delegation can be measured.³⁹ The Commission has misread Section 254 as providing a very broad authority to tax, disregarding the limitations that Congress carefully included in that provision: that there would be a single federal universal service fund based on interstate revenue; that discounts be provided to schools and libraries; that only telecommunications carriers may receive credit; and that support may only be used for telecommunications services. Given at least the possibility of a constitutional difficulty arising from the delegation under the Taxing Clause, the Commission should have interpreted Section 254 "narrowly to avoid constitutional problems."⁴⁰ In order to avoid delegation problems, the Commission should have read section 254 to authorize only what it says, and no more -- a discount for services, not a guaranteed entitlement to free goods as well as free services. The Origination Clause cases cited by the majority are, of course, irrelevant to this issue.

Second, the majority argues that the Origination Clause is not implicated here because "in *United States v. Munoz-Flores* and elsewhere, the Supreme Court has held that Congress does not exercise its taxing powers when funds are raised for a specific government program."⁴¹ In that case, however, the Supreme Court made clear that:

A different case might be presented if the program funded were entirely unrelated to the persons paying for the program. Here, [the program] targets people convicted of federal crimes, a group to which some part of the expenses associated with compensating and assisting victims of crime can fairly be attributed. Whether a bill would be "for raising Revenue" where the connection between payor and program was more attenuated is not now before us.⁴²

³⁸ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

³⁹ *Skinner v. Mid American Pipeline*, 490 US 212, 218-219 (1989).

⁴⁰ *NCTA v. United States*, 415 U.S. 336, at 342. (1974).

⁴¹ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 27.

⁴² See *United States v. Munoz-Flores*, 495 U.S. 385, nt. 7 (1990).

I remain concerned that -- again to the extent that telecommunications carriers alone are being assessed to pay for a computer network and Internet access program -- the agency has created a program "entirely unrelated to the persons paying" for it.

Finally, the majority also argues that "the contribution requirements do not violate the Origination Clause of the Constitution because "universal service contributions are not commingled with government revenues raised through taxes."⁴³ As several commenters noted, however, "[b]oth 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."⁴⁴

Third, I continue to object to the fact that the contributions for the schools, libraries, and rural health care support mechanisms are based not only on *interstate* but also on *intrastate* revenues. As I have described on several occasions, the legality of this approach to calculating contributions is highly questionable.⁴⁵ As I read the Communications Act, it does not permit the Commission to assess contributions for universal service support mechanisms based on intrastate revenues. Rather, the Act makes clear that the power to collect charges based on such revenues rests within the exclusive province of the States.⁴⁶

Fourth, I fail to see how the Commission may lawfully differentiate among otherwise "bona fide requests." The Commission's rules already consider a schools' economic status in determining the level of support to which they may qualify. Now the Commission will take economic status into account to determine whether the schools are even eligible for participation -- at least participation in funding for inside wiring, despite the fact that the schools have submitted an otherwise "bona fide request" under our rules. If the Commission's rules already addressed such discrepancies in economic advantage adequately, then the newest proposal seems, at best, unfair to schools that will now be prohibited from participating, if not altogether arbitrary. Indeed, I do not see how the Commission has the discretion to prioritize among such bona fide applications. The universal service provisions mandate that "upon a bona fide request" the "telecommunications carriers . . . shall" provide

⁴³ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 27.

⁴⁴ Comments of Sprint PCS, at 7.

⁴⁵ Separate Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

⁴⁶ Indeed, it has been reported that at least one state -- Virginia -- has ordered that MCI stop applying federal surcharges on intrastate long distance calls made in that state and make appropriate refunds to customers. Communications Daily, May 11, 1998.

a discount.⁴⁷ All of the applications that met our previous rules are bona fide requests, and the Commission has not determined that its previous rules were incorrect -- as I have urged. As such, I am concerned that the Commission has failed to establish a system that would fund all such bona fide requests as required. The statute does not endorse differentiating among such bona fide requests; the current plan to fund internal wiring based on need cannot be what Congress intended.

13. The Schools and Libraries Corporation is efficient.

The Common Carrier Bureau Public Notice regarding the third quarter contribution factors also established the administrative expenses for the Schools and Libraries Corporation. In objecting to the second quarter contribution factors, I noted that Schools and Libraries Corporation was allocated almost four times as much money for administrative expenses as the high-cost/low income funds and that the administrative budget increased from \$2.7 million to \$4.4 million or by 65% in just one quarter. These increased administrative expenses continue in the third quarter, despite the fact that the Schools and Libraries Corporation has still failed to provide an accurate estimate of all its administrative costs for the *first quarter*.⁴⁸ In contrast the administrative expenses for both the High Cost and Low Income programs combined is only \$1.2 million. I cannot endorse such a disparity -- and certainly not one of this magnitude -- between the administrative expenses of the Schools and Libraries and those of the other universal service corporations, especially without more adequate safeguards against excessive spending by the schools and libraries program.

14. The FCC's interpretation of universal service reflects the intention of Congress.

As noted above, the FCC's interpretation of universal service does not follow the letter of the law. Based on the recent correspondence from Congress, it is clear that the FCC's interpretation of universal service does not follow the spirit of the law either.⁴⁹ In particular, the Commission has failed to complete work on the highest Congressional

⁴⁷ 47 U.S.C.A. section 254(h)(1)(B).

⁴⁸ Third Quarter 1998 Fund Size Requirements for the Schools and Libraries Universal Service Program, dated May 1, 1998.

⁴⁹ See, e.g., Letter from The Honorable John McCain, Chairman, Senate Committee on Commerce; The Honorable Ernest F. Hollings, Ranking Minority Member, Senate Committee on Commerce; The Honorable Tom Bliley, Chairman, House Committee on Commerce; The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce; to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998; Letter from The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce, to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998.

priority, rural high-cost service, while creating massive new unintended grant programs for schools and libraries.

15. There is no good solution to the problem.

There is a good solution to the problem. It is to follow the intent of Congress. That advice is eloquently phrased in the recent letter from the leadership of the Commerce Committees of both the House and the Senate. If we follow the advice of Congress, we will set the collection rate for the schools and libraries program to zero until such time as we can resolve the highest universal service priority: rural, high-cost support.

Conclusion

Most observers of politics and telecommunications regulation in Washington would agree that the Commission's handling of universal service over the past two years has led to a great deal of hand-wringing. Some would say that we have made substantial progress, but no one would say that we solved all of the problems related to universal service. Some would say that we are not headed in the right direction; many go so far as to say that we should stop and start over again.

The problem with the FCC's implementation of Section 254 is not one of intent or effort. Many hard-working, well-intentioned people have dedicated the better part of two years of their lives to working on the implementation of this section. Their efforts have not been in vain. We have learned much about both what is possible and not possible under Section 254; we have learned something about what is not sustainable; we have learned about concerns of consumers who thought that the Telecommunications Act would lead to changes in regulations that would allow rates go down, not merely stay the same or increase; we have learned about the fears and concerns of rural America when its understanding of Section 254 is not adequately addressed. Above all, we have learned that Section 254 is one of the most difficult and most important sections of the Act.

Despite good intentions and efforts, some mistakes have been made in the implementation of Section 254 over the past two years. The best outcome would be to learn from those mistakes; the worst outcome would be to ignore them.

Congressional leaders have demanded that the Commission suspend the schools and libraries program until all aspects of universal service are resolved. I believe the Congressional leaders are correct. It would be perhaps irresponsible to issue funding commitments, allow public money to be distributed, or to raise consumers rates -- which is undeniably necessary at least with respect to wireless rates if not overall -- to pay for these programs before Congressional concerns can be fully addressed.

America is a great nation not because we have the most advanced technologies in the world. We are a great nation because we are a nation whose People love liberty, whose government serves the People, and whose government is governed by laws written by the People. When government agencies follow the law as it is written, there is no greater investment in our future.

The proponents of the E-rate program often cite its educational value. The E-rate, we are told, is an "investment" in the future of America. I believe the FCC can and ought to make a contribution to the education of American children. Our greatest contribution, however, is not in serving as a tax collector, even for the most wonderful of programs. Our greatest contribution is in following the law, and being a showcase for democracy.

Some in America believe that all of the parts of Section 254 cannot be implemented, that the section is hopelessly complicated and self-contradictory. According to these skeptics, it is time to give up. It is time to rewrite the section, or worse, implement only part of it. The inevitability of defeat is palpable among the skeptics.

I believe the skeptics are wrong. I believe that Section 254 can be fully implemented. I believe that a strict and narrow reading of the law is not only what Congress intended but also the only way by which Section 254 can be fully implemented.

We at the FCC can and must rededicate ourselves to following the letter of the Communications Act, and Section 254 in particular, as written by Congress. We must, as Congressional leaders have suggested, start over. It will be a difficult process, but it is possible, and it is urgent. In the meantime, the American public can rest assured that no new taxes will be levied by the FCC, that universal service will remain accessible to all Americans under existing rules, and that schools and libraries will continue to receive ten billion of dollars of federal support annually for infrastructure in addition to countless billions of dollars from state and local governments and countless billions more from the private sector.

In the end, the FCC will have contributed far more to the education of American children than any amount of funds for any educational purpose. The FCC, building on its past good intentions and good efforts, will have taught a lesson that the greatest myths are the myth of inevitable defeat and the myth that government agencies cannot solve difficult problems.