

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

NOV 20 1998

MAIL ROOM

In the Matters of)	
)	
Changes to the Board of)	
Directors of the National Exchange)	CC Docket No. 97-21
Carrier Association, Inc.)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45 ✓
Universal Service)	

**SECOND REPORT and ORDER in CC Docket No. 97-21
THIRD ORDER on RECONSIDERATION in CC Docket No. 97-21
SIXTH ORDER ON RECONSIDERATION in CC Docket No. 96-45**

Adopted: November 4, 1998 Released: November 17, 1998

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

I. Introduction

1. In this Order, we reconsider the Commission's July 18, 1997 order to the extent that the Universal Service Worksheet attached as an appendix to that order required universal service contributors to report as end-user telecommunications revenues those revenues derived from the provision of inside wiring maintenance.¹ We also adopt amendments to the Commission's Part 54 and Part 64 rules to permit the Administrator² of

¹ Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Dockets No. 97-21, 96-45, FCC 97-253, 12 FCC Rcd 18400 (rel. July 18, 1997) (*NECA Order*). The Office of Management and Budget approved the final Worksheet on July 31, 1997, and the Commission announced the release of the final Worksheet on August 4, 1997. See *FCC Announces Release of Universal Service Worksheet*, FCC Form 457, *Public Notice*, DA 97-1671 (rel. Aug. 4, 1997). The Commission announced revisions to the Worksheet on July 31, 1998. See *Division Announces Release of Revised Universal Service Worksheet*, FCC Form 457, *Public Notice*, DA 98-1519 (rel. July 31, 1998).

² The Universal Service Administrative Company (USAC) is the entity currently responsible for performing the billing, collection, and disbursement functions for all of the universal service support mechanisms. See *NECA Order*, 12 FCC Rcd at 18423-18428. In its May 8, 1998 Report to Congress, the Commission proposed merging the Schools and Libraries Corporation and Rural Health Care Corporation into USAC as the single entity responsible for administering all of the universal service support mechanisms on a permanent basis. Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, *Report to Congress*, FCC 98-85,

the federal universal service support mechanisms to utilize Telecommunications Relay Services (TRS) Fund³ data to verify the accuracy of revenue information provided on the Universal Service Worksheet by contributors to the universal service support mechanisms. In addition, we amend section 54.515 of our rules to clarify that a telecommunications carrier seeking reimbursement from the Administrator for the provision of services to a school or library may request that the amount of the discount afforded to that school or library be applied either as an offset to the carrier's universal service contribution obligation or reimbursed to the carrier from the universal service support mechanisms. We find, however, that a carrier that fails to remit its monthly universal service obligation is not entitled to choose direct reimbursement under the universal service support mechanism for schools and libraries. Rather, any support amounts owed to such a carrier under the support mechanism for schools and libraries must first be applied as an offset to the carrier's contribution obligation.

II. Inside Wiring Maintenance

A. Background

2. In the *Universal Service Order*, the Commission concluded that contributions to the universal service support mechanisms will be based on end-user telecommunications revenues.⁴ Universal service contributors must report semi-annually their end-user telecommunications revenues on the Worksheet. Line 34 of the current Worksheet requires contributors to include as end-user telecommunications revenues, among other things, revenues derived from the provision of inside wiring maintenance.⁵

3. Under the Communications Act of 1934, as amended (the Act), the term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."⁶ The Act defines "telecommunications service" as "the

para. 8 (rel. May 8, 1998).

³ The TRS Fund supports telephone transmission services that allow people with hearing or speech disabilities to communicate by wire or radio with hearing individuals. All carriers providing interstate telecommunications services must contribute to the TRS Fund. See 47 C.F.R. § 64.604(c)(4)(iii)(A).

⁴ *Universal Service Order*, 12 FCC Rcd 8776, 9206-07.

⁵ Inside wiring refers to the customer premises portion of the telephone plant that connects station components to each other and to the telephone network. See *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd 1190, 1197 n.1 (rel. Nov. 21, 1986) (*Inside Wiring Order*).

⁶ 47 U.S.C. § 153(43).

offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁷

B. Discussion

4. We reconsider the *NECA Order* to the extent that the Worksheet attached as an appendix to that order required universal service contributors to include as end-user telecommunications revenues those revenues derived from the provision of inside wiring maintenance. We are persuaded by petitioners that the provision of inside wiring maintenance does not constitute "telecommunications" or a "telecommunications service" and we therefore conclude that revenues derived from this activity should not be included as end-user telecommunications revenues on the Worksheet.⁸ As the Commission stated in the *Inside Wiring Order*, inside wiring is severable from underlying common carrier transmission services and includes all telephone plant located on the customer's side of the demarcation point marking the end of the telephone network.⁹

5. We conclude that inside wiring maintenance -- the maintenance of telephone plant -- does not constitute telecommunications or a telecommunications service because it does not involve the "transmission" of information.¹⁰ MCI, the only party asking us to include in the universal service contribution base revenues derived from the provision of inside wiring maintenance, correctly points out that internal connections make possible the transmission of information.¹¹ Consistent with the rationale set forth in the *Inside Wiring Order*, however, we note that inside wiring maintenance does not itself constitute

⁷ 47 U.S.C. § 153(46).

⁸ See, e.g., Nevada Bell, Pacific Bell, and Southwestern Bell Telephone Company joint petition ("SWBT joint petition") at 1-7; Bell Atlantic petition at 1-4; USTA comments at 1-4; Ameritech comments at 1-3; Bell South comments at 1-2. Given our disposition of the petitioners' statutory argument that the provision of inside wiring maintenance does not constitute telecommunications or telecommunications services as defined by the statute, we need not address the petitioners' remaining arguments in favor of excluding inside wiring maintenance revenues from the universal service contribution base.

⁹ See *Inside Wiring Order*, 1 FCC Rcd 1190, 1197 n.1 (rel. Nov. 21, 1986). In the *Inside Wiring Order*, the Commission stated that, "[l]ike CPE [customer premises equipment] services, inside wiring installation and maintenance are severable from underlying common carrier transmission services" The Commission further concluded that, because inside wiring installation and maintenance firms must provide individualized service to each of their customers and make individualized decisions with respect to the precise service provided to each customer, inside wiring and maintenance are not common carrier communications services. *Id.* at 1192 (citing *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (cert. denied)).

¹⁰ Accord, Nevada Bell, Pacific Bell, and Southwestern Bell Telephone Company joint reply ("SWBT joint reply") at 2-3; Bell Atlantic reply at 2.

¹¹ MCI opposition comments at 3-4.

"telecommunications" as that term is statutorily defined. MCI references language in paragraph 451 of the *Universal Service Order* as support for its proposition that the Commission has concluded, in the context of defining eligible services for schools and libraries, that the installation and maintenance of internal connections constitute telecommunications services.¹² Paragraph 451 and the surrounding discussion make clear, however, that the Commission determined only that the installation and maintenance of internal connections are among the additional *non-telecommunications* services for which eligible schools and libraries may receive discounts under section 254 of the Act. Neither this paragraph, nor the surrounding discussion, support MCI's assertion that the provision of inside wire maintenance constitutes telecommunications as that term is defined by the statute.

6. This change relieving contributors of their obligation to report as end-user telecommunications revenues those revenues derived from the provision of inside wiring maintenance will become effective 30 days after publication of this Order in the Federal Register. We note, however, that contributors are not required to file another Worksheet until March 31, 1999. Accordingly, we direct carriers to adjust the 1998 full-year data that they will report on the March 31, 1999 Worksheet to reflect this change starting from the effective date of this Order.¹³

III. The Use of TRS Data by the Universal Service Administrator

A. Background

7. In the *NECA II Further Notice*,¹⁴ the Commission proposed to amend section 64.604(c)(4)(iii)(I) of the Commission's rules¹⁵ to permit the TRS administrator to provide

¹² Specifically, MCI refers to the following statements: "We find that, as discussed above, the Act permits universal service support for an expanded range of services beyond telecommunications services. Specifically, we conclude that the installation and maintenance of internal connections fall within the broad scope of the universal service support provisions of sections 254(c)(3) and (h)(1)(B), in the context of the broad goals of section 254(h)(2)(A)." MCI opposition comments at 3 (quoting *Universal Service Order*, 12 FCC Rcd at 9016).

¹³ Because we calculate the contribution factors for the third and fourth quarters of each year by subtracting half-year data (contained on the Worksheets due on September 1) from full-year data (contained on the Worksheets due on March 31), the March 31 Worksheet gives carriers the opportunity to adjust or "true-up" the data reported for the January through June period.

¹⁴ Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, *Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12444 (1997) (*NECA II Further Notice*).

¹⁵ Section 64.604(c)(4)(iii)(I) of the Commission's rules provides that:

[t]he administrator [of the TRS Fund] shall keep all data obtained from contributors and TRS providers

TRS data to the universal service Administrator for purposes of verifying revenue information provided by contributors to the universal service fund.¹⁶ In the *NECA II Further Notice*, the Commission also proposed to amend section 54.711(b) of the Commission's rules to clarify that the Administrator's confidentiality obligations extend to data obtained from the TRS Fund.¹⁷ The Commission tentatively concluded that these proposed amendments would be sufficient to maintain the confidentiality of the TRS Fund revenue data disclosed to the Administrator.¹⁸ On March 20, 1998, the Common Carrier Bureau (Bureau) waived, on a temporary basis, section 64.604(c)(4)(iii)(I) to the extent necessary to permit the TRS administrator to make available to the universal service Administrator certain TRS data for purposes of comparing revenue information provided by contributors on the Universal Service Worksheet.¹⁹

B. Discussion

confidential, and shall not disclose such data in company-specific form unless directed to do so by the Commission. The administrator shall not use such data except for purposes of administering the TRS Fund, calculating the regulatory fees of interstate common carriers, and aggregating such fee payments for submission to the Commission. . . .

47 C.F.R. § 64.604(c)(4)(iii)(I).

¹⁶ The Commission attached proposed rule amendments in Appendix A. Every carrier providing interstate telecommunications services must contribute to the TRS Fund on the basis of its gross interstate subject revenues. Carriers are required to complete the TRS Fund Worksheet, which requests information relating to their gross interstate telecommunications revenues. See 47 C.F.R. § 64.604(c)(4)(iii)(A).

¹⁷ Section 54.711(b) of the Commission's rules provides that:

[t]he Commission shall have access to all data reported to the Administrator, Rural Health Care Corporation, and Schools and Libraries Corporation. Contributors may make requests for Commission nondisclosure of company-specific information under § 0.459 at the time that the subject data are submitted to the Administrator. The Commission shall make all decisions regarding nondisclosure of company-specific information. The Administrator, Rural Health Care Corporation, and Schools and Libraries Corporation shall keep confidential all data obtained from contributors, shall not use such data except for purposes of administering the universal service support programs, and shall not disclose such data in company-specific form unless directed to do so by the Commission.

47 C.F.R. § 54.711(b).

¹⁸ *NECA II Further Notice*, 12 FCC Rcd at 12455.

¹⁹ Federal-State Joint Board on Universal Service, *Order*, CC Docket No. 96-45, DA 98-523 (Com. Car. Bur. 1998) (*Waiver Order*). The actions taken in the *Waiver Order* will be superseded by the rule amendments set forth in Appendix A hereto upon the effective date of those amendments (i.e., 30 days after publication in the Federal Register).

8. We amend section 64.604(c)(4)(iii)(I) as proposed in the *NECA II Further Notice* to permit the use of TRS data by the Administrator for purposes of verifying the accuracy of information reported by contributors on the Universal Service Worksheet.²⁰ We conclude that authorizing the Administrator to use TRS data for this purpose may assist the Administrator in monitoring contributors' compliance with the universal service contribution requirements by revealing potential inconsistencies between revenue data reported on the TRS Fund Worksheet and revenue data reported on the Universal Service Worksheet. As noted by NECA, the use of TRS data for this purpose will provide a more efficient method of monitoring contributors' compliance with the contribution requirements than if the universal service Administrator were forced to rely on audits alone.²¹ MCI, BellSouth, and NECA support the Commission's proposal to authorize the use of TRS data for this purpose.²² No parties filed comments opposing the Commission's proposal. We also amend section 54.711(a) to direct the TRS administrator to provide to the Administrator TRS data so that the Administrator may verify the accuracy of information reported by contributors on the Universal Service Worksheet. As an outgrowth of our decision to authorize the Administrator to use TRS data, we also amend section 69.616 to ensure that the Administrator exercises this authority in an equitable and non-discriminatory manner. We direct the Administrator, in comparing the revenue data filed by universal service contributors with that filed by TRS Fund contributors, to undertake company-by-company comparisons for all entities filing Universal Service Worksheets and TRS Fund Worksheets.

9. We also amend section 54.711(b) as proposed in the *NECA II Further Notice* to require the Administrator to keep confidential all TRS data obtained from the Administrator of the TRS Fund, prohibit the Administrator from using TRS data for purposes other than the administration of federal universal service support mechanisms, and prohibit the disclosure of TRS data in company-specific form unless directed to do so by the Commission.²³ We direct

²⁰ NECA suggests that the Commission consolidate TRS and universal service data collections. NECA comments at 2. On September 17, 1998, the Commission initiated a proceeding to reduce regulatory burdens on all telecommunications carriers by proposing to consolidate and streamline into one form up to six carrier reporting requirements, including TRS and universal service data collections. See Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, *Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 98-233, CC Docket No. 98-171 (rel. Sept. 25, 1998).

²¹ NECA comments at 2.

²² MCI petition and comments at 3; BellSouth comments at 1-2; NECA comments at 2. See also Letter from Kenneth Rust, Bell Atlantic, to Magalie Roman Salas, FCC, dated January 29, 1998.

²³ MCI, BellSouth, and NECA support the Commission's proposal to require the Administrator to keep TRS data confidential. MCI petition and comments at 3; BellSouth comments at 1-2; NECA comments at 2. Both MCI and BellSouth stress that TRS data should not be disclosed in company-specific form. MCI petition and

the Bureau to make decisions regarding disclosure of company-specific information.²⁴

10. We agree with NECA that section 54.711(b)'s prohibition on the disclosure of company-specific information does not prohibit the Administrator from releasing aggregate, non-company specific data.²⁵ In order to ensure that any report or document containing aggregate, non-company-specific data does not, by virtue of the manner in which particular data are organized, inadvertently reveal company-specific information, we require the Administrator to obtain the approval of the Bureau prior to release of such a report or document to persons outside of the Commission.

11. BellSouth requests that the Commission declare all commercial mobile radio service (CMRS) subscriber and financial data reported on TRS and Universal Service Worksheets confidential data subject to Exemption 4 of the Freedom of Information Act (FOIA).²⁶ BellSouth asserts that requiring each CMRS provider to request confidential treatment for such data creates unnecessary paperwork for contributors and the Commission.²⁷ On March 4, 1998 and July 31, 1998, the Bureau announced revisions to the Universal Service Worksheet.²⁸ The revised Worksheet provides a space for contributors to indicate that they wish to request confidential treatment of the data contained on the Worksheet. Contributors making such an election must certify that the information contained on the Worksheet is privileged or confidential commercial or financial information and that disclosure of such information would likely cause substantial harm to the competitive position of the company filing the Worksheet. If the Commission receives a request for, or proposes disclosure of, the information contained on the Worksheet, the carrier will be required to make the full showing required by our rules.²⁹ We anticipate that this revision will ease significantly the paperwork burden on all contributors, not just CMRS providers. Contributors to the TRS Fund shall continue to comply with sections 0.459 and 0.461 of the Commission's rules in order to request confidential treatment of the revenue data reported on the TRS

comments at 3; BellSouth comments at 1-2.

²⁴ 47 C.F.R. § 0.291.

²⁵ NECA comments at 2-3.

²⁶ BellSouth comments at 4-5.

²⁷ BellSouth comments at 4-5.

²⁸ See Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, *Public Notice*, DA 98-328 (rel. March 4, 1998); See also Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, *Public Notice*, DA 98-1519 (rel. July 31, 1998).

²⁹ 47 C.F.R. § 0.459, as amended in *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, FCC 98-184 (released Aug. 4, 1998).

Worksheet.³⁰ We do not believe that this poses a substantial burden on TRS contributors, because the TRS Worksheet, unlike the Universal Service Worksheet, is filed only annually, rather than semi-annually.

12. The Bureau will make the initial decision regarding disclosure of company-specific information derived from the Universal Service Worksheet or from the TRS Administrator.³¹ In the event that it directs disclosure of data for which confidential treatment was requested by the contributor, the Bureau will follow the procedures specified in sections 0.459 and 0.461 of the Commission's rules.³² Accordingly, the company will be given an opportunity to file an application for review by the Commission of any decision to release assertedly confidential data and, if it is denied, to seek a judicial stay before any assertedly confidential information is released.³³ Consequently, we do not find it necessary to conclude that all CMRS subscriber and financial data reported on the Worksheets is confidential.

13. BellSouth also asserts that the release of company-specific CMRS subscriber and revenue data should be prohibited under any circumstances and maintains that the Commission should be precluded from releasing such information.³⁴ Although we recognize the competitively sensitive nature of the CMRS data in question, we decline to foreclose altogether the Commission's or the Bureau's ability to disclose or direct the disclosure of company-specific subscriber or revenue data reported for purposes of determining TRS or universal service contributions. The Commission has no present intention to disclose company-specific subscriber or revenue data and, absent substantial justification, does not anticipate disclosing or directing the disclosure of such data. In view of the possibility, however, that an occasion may arise in which the Commission or the Bureau determines that disclosure would be in the public interest (e.g., in the context of an action brought against a contributor to enforce the contribution requirements, or after a long delay so that financial information would no longer be competitively sensitive), and the safeguards provided by sections 0.459 and 0.461 of our rules, we decline to amend our rules to preclude the disclosure of company-specific subscriber or revenue data under any circumstances.

³⁰ 47 C.F.R. §§ 0.459 and 0.461.

³¹ 47 C.F.R. §§ 64.604(c)(4)(iii)(I) (TRS), 54.711(b) (universal service). This is in accord with Commission rules prohibiting the TRS and universal service Administrators from disclosing data in company-specific form unless directed to do so by the Commission. As noted above, we direct the Bureau to make decisions regarding disclosure of company-specific information.

³² 47 C.F.R. §§ 0.459 and 0.461.

³³ 47 C.F.R. §§ 0.459(g) and 0.461(h),(i).

³⁴ BellSouth comments at 2.

IV. Offset Versus Reimbursement

A. Background

14. Section 254(h)(1)(B) of the Act states that a telecommunications carrier applying for support for the provision of services to an eligible school or library shall apply the amount of the discount afforded to the school or library as an offset to its universal service contribution obligation or shall be reimbursed for that amount from the universal service support mechanisms.³⁵ In paragraph 586 of the *Universal Service Order*, the Commission concluded that section 254(h)(1)(B) requires that telecommunications carriers be permitted to choose either reimbursement or offset.³⁶ Section 54.515(a) of our rules, however, provides that: "[a] telecommunications carrier providing services eligible for support . . . to eligible schools and libraries shall treat the amount eligible for support . . . as an offset against the carrier's universal service support obligation for the year in which the costs for providing eligible services were incurred."³⁷ Section 54.515(b) states: "[i]f the total amount of support owed to a carrier . . . exceeds its universal service obligation, calculated on an annual basis, the carrier may receive a direct reimbursement in the amount of the difference."³⁸ Finally, section 54.515(c) states that: "[a]ny reimbursement due a carrier shall be made after the offset is credited against that carrier's universal service obligation."³⁹

15. On March 5, 1998, USAC filed a letter with the Commission identifying an apparent inconsistency between paragraph 586 of the *Universal Service Order* and section 54.515 of our rules.⁴⁰ USAC notes that paragraph 586 appears to give a carrier the choice of applying the amount of a discount afforded to a school or library as an offset to its universal service contribution obligation or receiving direct reimbursement for that amount from the Administrator.⁴¹ By contrast, USAC notes, section 54.515 appears to permit direct reimbursement only if the amount owed the carrier exceeds the amount of the carrier's universal service obligation and only for the difference that is owed the carrier after any offset has been credited against the carrier's universal service obligation. Thus, USAC asks the

³⁵ 47 U.S.C. § 254(h)(1)(B).

³⁶ Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776, 9083 (rel. May 8, 1997) (*Universal Service Order*).

³⁷ 47 C.F.R. § 54.515(a).

³⁸ 47 C.F.R. § 54.515(b).

³⁹ 47 C.F.R. § 54.515(c).

⁴⁰ Letter to Lisa Gelb, FCC, from Ed English, USAC (dated March 5, 1998) (*USAC March 5 letter*).

⁴¹ *USAC March 5 letter*.

Commission to reconcile section 54.515 with paragraph 586 of the *Universal Service Order* by providing carriers a choice between reimbursement or offset.⁴²

16. On March 20, 1998, the Common Carrier Bureau issued an order in response to USAC's March 5 letter.⁴³ In that order, the Bureau waived section 54.515 "to the extent necessary to permit telecommunications carriers a choice, consistent with section 254(h)(1)(B), of applying the amount of a discount afforded to a school or library as an offset to their contribution obligation or receiving direct reimbursement for that amount from the Administrator."⁴⁴ The Bureau took this action pending final action by the Commission reconciling any inconsistency between section 54.515 and paragraph 586 of the *Universal Service Order*.⁴⁵

17. On July 31, 1998, USAC filed a letter with the Commission seeking clarification regarding USAC's ability to withhold payment of support amounts from carriers that have failed to make their required monthly contribution to universal service.⁴⁶ In that letter USAC recommended that carriers that fail to remit their monthly universal service obligation should not be permitted to receive direct reimbursement from the federal universal service support mechanisms, but instead should receive reimbursement pursuant only to the offset option for an ensuing three-month period.⁴⁷ Adoption of such a policy, USAC reasoned, would reduce the potential of a funding shortfall resulting from contributors' failure to pay in a timely fashion. On September 16, 1998, USAC filed another letter with the Commission revising its earlier recommendation that carriers be subject to a reimbursement methodology for three months based on information it had collected subsequent to its July 31 letter.⁴⁸ USAC now recommends that carriers be required to elect on an annual basis either

⁴² *USAC March 5 ex parte*.

⁴³ *Waiver Order*, CC Docket No. 96-45, DA 98-523 (Com. Car. Bur. 1998).

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 5. The actions taken in the *Waiver Order* will be superseded by the rule amendments set forth in Appendix A hereto upon the effective date of those amendments (i.e., 30 days after publication in the Federal Register).

⁴⁶ Letter to Magalie Roman Salas, FCC, from Cheryl L. Parrino, USAC (dated July 31, 1998) (*USAC July 31 letter*).

⁴⁷ *Id.* at 1, 2.

⁴⁸ Letter to Magalie Roman Salas, FCC, from Cheryl L. Parrino, USAC (dated September 16, 1998) (*USAC September 16 letter*). USAC estimates that as many as 65 carriers may wish to switch reimbursement methods on a monthly basis. In addition, USAC estimates that, based on their payment history, approximately 160 carriers may be subject to mandatory offset and require monthly oversight by USAC to monitor their payment

the offset or direct reimbursement method. Additionally, USAC recommends that carriers that fail to pay their universal service contributions should receive any support amounts owed to them under the schools and libraries support mechanism pursuant to the offset option for the remainder of the year in which the carriers failed to pay. Those carriers with an outstanding balance at the end of the year would be required to continue receiving support under the offset option for the next year.⁴⁹

B. Discussion

18. In light of the inconsistency that USAC has brought to our attention between paragraph 586 of the *Universal Service Order* and section 54.515 of the Commission's rules, we conform section 54.515 to the text of paragraph 586 of the *Universal Service Order* by adopting the amendments reflected in Appendix A attached hereto. As amended, a telecommunications carrier applying for support under section 54.515 for services provided to an eligible school or library either may apply the amount of the discount afforded to a school or library as an offset to its universal service contribution obligation or be reimbursed for that amount from the universal service support mechanisms. We further find, however, that the statute does not provide carriers participating in the support mechanism for schools and libraries with an unconditional right to select between offset and direct reimbursement. As USAC explains in its September 16, 1998 letter, it may be costly and administratively burdensome if USAC is asked to alter on a frequent basis the method by which a carrier is reimbursed.⁵⁰ We therefore require carriers that are owed support under the universal service support mechanism for schools and libraries to elect on an annual basis the method by which they will receive payment. Such carriers shall elect a payment method in January of each year and shall remain subject to that method for the duration of the calendar year.

19. Additionally, consistent with USAC's July 31, 1998 letter, we find that any support amount that is owed to a carrier participating in the support mechanism for schools and libraries that fails to remit its monthly universal service obligation must first be applied as an offset to that carrier's contribution obligation. Thus, a carrier participating in the support mechanism for schools and libraries that has failed to make its required contribution to universal service in a given month is entitled to receive direct reimbursement from the universal service support mechanisms only to the extent that the amount owed the carrier under the schools and libraries support mechanism exceeds the amount of the carrier's total

history. USAC estimates that the administrative responsibilities associated with switching the reimbursement methods of these 225 carriers and monitoring the payment history of the 160 delinquent carriers would take approximately 22.5 hours per month, at a cost of approximately \$560 per month. *Id.*

⁴⁹ USAC September 16 letter.

⁵⁰ USAC September 16 letter.

universal service obligation.⁵¹ We find that this decision is reasonable because, to the extent that a carrier is in arrears on its universal service obligations, it has already effectively chosen an offset method of compensation. We are persuaded that requiring the use of an offsetting procedure as described above for a carrier that fails to make timely contributions serves the public interest by ensuring an appropriate universal service fund and minimizing the need for costly and time-consuming enforcement actions. Consistent with USAC's recommendation in its September 16, 1998 letter, carriers that are in arrears on their universal service contribution obligations will remain subject to the offsetting method for the remainder of the calendar year in which they failed to remit their monthly universal service obligation.⁵² A carrier with an outstanding balance at the end of a calendar year shall remain subject to the offsetting method for the next calendar year.⁵³ A carrier that has been subject to this mandatory offsetting procedure by USAC but that disputes its contribution obligation may bring this matter to the attention of the Commission through a request for declaratory ruling.

VI. Final Regulatory Flexibility Certification

20. The Regulatory Flexibility Act (RFA)⁵⁴ requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁵⁵ The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵⁶ In addition, the term "small business" has the same meaning as

⁵¹ Carriers providing service under the rural health care support mechanism are not included here insofar as the Commission has interpreted the Act to permit the receipt of support to such carriers only pursuant to the offset method. See 47 C.F.R. § 54.611. Unlike section 254(h)(1)(B), which affords carriers providing supported services to eligible schools or libraries a choice between offset or reimbursement, section 254(h)(1)(A) requires carriers providing supported services to eligible rural health care providers to receive any amounts eligible for support as an offset against carriers' universal service support obligation. See 47 U.S.C. § 254(h)(1)(A) and (B). In addition, we will address in another order the issue of mandatory offset for delinquent contributors that are owed support under the universal service support mechanisms for high cost areas and low-income consumers.

⁵² USAC September 16 letter.

⁵³ USAC September 16 letter.

⁵⁴ The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁵⁵ 5 U.S.C. § 605(b).

⁵⁶ *Id.* § 601(6).

the term "small business concern" under the Small Business Act.⁵⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵⁸

21. In the *NECA II Further Notice*, the Commission certified, pursuant to section 605(b) of the RFA, that the proposed rule amendments attached thereto, which would permit the Administrator to use TRS data to verify the accuracy of data provided on the Universal Service Worksheet, would not have a significant economic impact on a substantial number of small entities.⁵⁹ The Commission did not receive any comments on this tentative conclusion. The rules adopted in this order permit the Administrator to use TRS data to verify the accuracy of data provided by universal service contributors on the Worksheet. This Order therefore permits the transfer of already collected data. This exchange of information will enable the Administrator to verify the accuracy of universal service data, thus ensuring the sufficiency of the universal service support mechanisms. We conclude that the rules adopted in this order regarding the use of TRS data will not have a significant economic impact on small entities.

22. We find that our amendment to section 54.515, which clarifies that telecommunications carriers seeking reimbursement for the provision of services to a school or library may request either that the reimbursement amount be applied as an offset to the carrier's universal service contribution obligation or that it receive direct reimbursement from the universal service support mechanisms, will not have a significant economic impact on small entities. This amendment will provide telecommunications carriers providing services to schools and libraries with flexibility in structuring the manner in which they will be reimbursed. Additionally, we do not believe that small entities will experience a significant economic impact due to our determination that any support amount owed to a carrier that fails to remit its monthly universal service obligation should first be applied as an offset against that carrier's contribution obligation. We find that, to the extent that a carrier is in arrears on its universal service obligations, it has already effectively chosen an offset method of compensation. We also find that requiring carriers to select a reimbursement method on an annual basis, or be subject to mandatory offset for the remainder of the year during which they failed to pay their universal service contribution obligation, will not have a significant

⁵⁷ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

⁵⁸ Small Business Act, 15 U.S.C. § 632.

⁵⁹ *NECA II Further Notice*, 12 FCC Rcd at 12456.

economic impact on small entities. Rather, we find that allowing carriers to elect annually the method by which they will be reimbursed provides carriers with a reasonable degree of flexibility in structuring their operations. Furthermore, we find that requiring nonpaying carriers to accept the offsetting procedure for the remainder of the calendar year in which they failed to pay their universal service contributions is reasonable in light of the need to establish a reliable payment history on the part of such carriers and to maintain the certainty and sufficiency of the universal service support mechanisms.

23. We also conclude that our determination in this Order to eliminate the requirement that contributors report as end-user telecommunications revenues those revenues derived from the provision of inside wiring maintenance will not have a significant economic impact on small entities. In fact, this determination will lessen contributors' reporting requirements and may lessen the contribution amount of some contributors.

VII. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 254, and 405 and section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, the adoption of this SECOND REPORT AND ORDER, THIRD ORDER ON RECONSIDERATION, and SIXTH ORDER ON RECONSIDERATION is effective 30 days after publication in the Federal Register.

25. IT IS FURTHER ORDERED that the amendments to Parts 54 and 64 of the Commission's rules, 47 C.F.R. Parts 54 and 64, attached in Appendix A hereto, are effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Second Report and Order and Third Order on Reconsideration regarding Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Sixth Order on Reconsideration regarding the Federal-State Joint Board on Universal Service; CC Docket Nos. 97-21, 96-45.

I support today's order clarifying that, while inside wiring and internal connections "make possible the transmission of information," the "provision of inside wiring maintenance does not constitute 'telecommunications' or a 'telecommunications service' and [] therefore conclude that revenues derived from this activity should not be included as end-user telecommunications revenues on the Worksheet."⁶⁰ I write separately, however, to point out that it is this distinction that the Commission had previously ignored in declaring that universal service support should be available for inside wiring.

Section 254 speaks of discounts for "services." It is difficult to rationalize inclusion of plant and equipment for discounts under this section. As I explained in the April 10th report to Congress, the Commission has no statutory basis to provide direct financial support for non-telecommunications services or other plant and equipment.⁶¹ To the contrary, Section 254(h)(1)(B) unambiguously limits recipients to "telecommunications carrier[s] providing service under this paragraph."⁶² The Commission has long recognized that "inside wiring installation and maintenance are severable from the underlying common carrier transmission services . . ."⁶³ Despite this traditional distinction, however, in the context of the schools and libraries program the Commission determined that internal connections were eligible for support to the extent that they were "an essential element in the transmission of information within the schools or library."⁶⁴

Indeed, much of the "inside wiring" turns out not even to be copper wire or coaxial cable; instead, "inside wiring" is predominantly computers to support sophisticated ethernet.

⁶⁰ Order at para. 4-5.

⁶¹ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

⁶² 47 U.S.C. Section 254(h)(1)(B).

⁶³ *Inside Wiring Order*, 1 FCC Rcd 1190, 1192.

⁶⁴ *Universal Service Order*, 12 FCC Rcd. 8776, 9021.

For example, the Commission has determined that it will allow universal service "taxes" to support installation and maintenance of high-speed computer networks -- including "routers, hubs, network file servers, and wireless LANS" -- inside schools and libraries.⁶⁵ Such internal networks would rival those of the largest corporations and universities; most small businesses cannot afford the luxury of installing and maintaining expensive equipment like this.

While today's order clarifies that inside wiring is not telecommunications, it perpetuates yet another example of a type of activity that is eligible for universal service support but that does not make its fair share of contributions. I would have preferred that the Commission take this opportunity to clarify that inside wiring does not constitute telecommunications for the purposes of either contributing to or receiving support from universal service. As I have cautioned the network equipment manufacturing industry, many have argued that it is unfair to allow a particular industry activity to take from a public fund without having the corresponding obligation to contribute to it.

⁶⁵ *Universal Service Order*, 12 FCC Rcd. 8776, 9021. The Frequently Asked Questions on Universal Service section of the FCC's Web-page indicates that all "necessary software" is also eligible for discounts.

Appendix A**Amendments to the Code of Federal Regulations**

Part 54 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 54 - UNIVERSAL SERVICE

Section 54.515 is amended by revising paragraph (a), deleting paragraphs (b) and (c), relettering paragraph (d) as paragraph (b), and revising new paragraph (b) as follows:

§ 54.515 Distributing support.

(a) A telecommunications carrier providing services eligible for support under this subpart to eligible schools and libraries may, at the election of the carrier, treat the amount eligible for support under this subpart as an offset against the carrier's universal service contribution obligation for the year in which the costs for providing eligible services were incurred or receive a direct reimbursement from the Administrator for that amount. Carriers shall elect in January of each year the method by which they will be reimbursed and shall remain subject to that method for the duration of the calendar year. Any support amount that is owed a carrier that fails to remit its monthly universal service contribution obligation, however, shall first be applied as an offset to that carrier's contribution obligation. Such a carrier shall remain subject to the offsetting method for the remainder of the calendar year in which it failed to remit their monthly universal service obligation. A carrier that continues to be in arrears on its universal service contribution obligations at the end of a calendar year shall remain subject to the offsetting method for the next calendar year.

(b) If a telecommunications carrier elects to treat the amount eligible for support under this subpart as an offset against the carrier's universal service contribution obligation and the total amount of support owed to the carrier exceeds its universal service obligation, calculated on an annual basis, the carrier shall receive a direct reimbursement in the amount of the difference. Any such reimbursement due a carrier shall be submitted to that carrier no later than the end of the first quarter of the calendar year following the year in which the costs were incurred and the offset against the carrier's universal service obligation was applied.

Section 54.711 is amended by revising paragraphs (a) and (b) to read as follows:

Section 54.711 Contributor reporting requirements.

(a) Contributions shall be calculated and filed in accordance with the Universal Service Worksheet. The Universal Service Worksheet sets forth information that the

contributor must submit to the Administrator on a semi-annual basis. The Commission shall announce by Public Notice published in the Federal Register and on its website the manner of payment and dates by which payments must be made. An officer of the contributor must certify to the truth and accuracy of the Universal Service Worksheet, and the Commission or the Administrator may verify any information contained in the Universal Service Worksheet at the discretion of the Commission. The administrator of the Telecommunications Relay Service Fund shall provide data reported on the Telecommunications Relay Service Worksheet to the Administrator so that the Administrator may verify information contained in the Universal Service Worksheet. Inaccurate or untruthful information contained in the Universal Service Worksheet may lead to prosecution under the criminal provisions of Title 18 of the United States Code. The Administrator shall advise the Commission of any enforcement issues that arise and provide any suggested response.

(b) The Commission shall have access to all data reported to the Administrator, Rural Health Care Corporation, and Schools and Libraries Corporation. Contributors may make requests for Commission nondisclosure of company-specific information by so indicating on the Universal Service Worksheet. The Commission shall make all decisions regarding nondisclosure of company-specific information. The Administrator, Rural Health Care Corporation, and Schools and Libraries Corporation shall keep confidential all data obtained from contributors, including all data obtained from the administrator of the Telecommunications Relay Service Fund, shall not use such data except for purposes of administering the universal service support programs, and shall not disclose such data in company-specific form unless directed to do so by the Commission.

* * * * *

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Section 64.604 is amended by revising paragraph (c)(4)(iii)(I) to read as follows:

Section 64.604 Mandatory minimum standards.

* * * * *

(c) * * *

(4) * * *

(iii) * * *

(I) *Information filed with the administrator.* The administrator shall keep all data obtained from contributors and TRS providers confidential and shall not

disclose such data in company-specific form unless directed to do so by the Commission. The administrator shall not use such data except for purposes of administering the TRS Fund, enabling the universal service Administrator to verify revenue information provided by contributors to the those mechanisms, calculating the regulatory fees of interstate common carriers, and aggregating such fee payments for submission to the Commission. The Commission shall have access to all data reported to the administrator, and shall have the authority to audit TRS providers.

* * * * *

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 69 -- ACCESS CHARGES

Section 69.616 is amended by adding paragraph (e) as follows:

Section 69.616 Independent subsidiary functions.

(a) * * * * *

(b) * * * * *

(c) * * * * *

(d) * * * * *

(e) Pursuant to its responsibility for billing and collecting contributions, the independent subsidiary shall compare periodically information collected by the Administrator of the TRS Fund from TRS Fund Worksheets with information submitted by contributors on Universal Service Worksheets in order to verify the accuracy of information submitted on Universal Service Worksheets. When performing a comparison of contributor information as provided by this subsection, the independent subsidiary must undertake company-by-company comparisons for all entities filing Universal Service and TRS Fund Worksheets.

Appendix B**Parties Filing Comments or Petitions for Reconsideration to *NECA Order***

	<u>Abbreviation</u>
AirTouch Communications, Inc.	AirTouch
Ameritech	
BellSouth	
Bell Atlantic	
MCI	
National Exchange Carrier Association, Inc.	NECA
Nevada Bell, Pacific Bell and Southwestern Bell	
United States Telephone Association	USTA

Parties Filing Comments to *NECA II Order*

BellSouth	
MCI	
National Exchange Carrier Association, Inc.	NECA