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OFFICE OF THE SECRETARY

February 26, 1999

Ex Parte Notice

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Re: Notice of Written Ex Parte Presentation
CC Docket No. 96-45
Denial of Petition for Reconsideration of Fourth Reconsideration Order

Dear Ms. Salas:

The United States Telephone Association ("USTA") writes to urge the Commission to deny the pending petition for reconsideration of the Fourth Reconsideration Order in the above-captioned universal service docket (the "Washington petition") filed by the Washington State Department of Information Services ("Washington DIS") and others on February 12, 1998.^{1/}

The Washington Network Is Not A Telecommunications Carrier

The Commission should deny the Washington petition in light of the Commission's recent declaratory ruling regarding the universal service treatment of the Iowa

^{1/} The Washington petition was filed by Washington DIS, the Washington State Library, the Office of the Superintendent of Public Instruction, North Thurston County School District No. 3, Yakima Valley Regional Library, and Educational Service District No. 112. USTA opposed the Washington petition on March 25, 1998. See USTA opposition to petitions for reconsideration, CC Docket No. 96-45 (filed Mar. 25, 1998) at 5.

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Communications Network (the "ICN Order").^{2/} Because Washington DIS serves only Washington's state and local governmental agencies, such as public schools and libraries, Washington DIS, like ICN, is not a "telecommunications carrier" as defined in the Communications Act (the "Act") and therefore is not eligible for direct reimbursement for the provision of discounted services to schools, libraries, and rural health care providers pursuant to section 254(h)(1) of the Act.

As the Commission found in the case of ICN,^{3/} Washington DIS does not hold itself out to serve indifferently all potential users. Accordingly, Washington DIS is not a telecommunications carrier because it does not offer telecommunications "directly to the public or to such classes of users as to be available directly to the public," as the Act requires.^{4/}

Washington DIS does not "hold itself out indiscriminately," or otherwise offer telecommunications to the public. Like ICN, Washington DIS serves only an established and stable clientele that has previously been selected by the ... legislature."^{5/} The Washington petition states that Washington DIS has focused on providing services

specifically tailored to the needs of the educational community, including public universities and colleges, educational service districts, and libraries. *By law, DIS does not provide services to the private sector.*^{6/}

Service to this closed group is not common carriage, and thus Washington DIS is not a telecommunications carrier. The Washington statute that established the Washington DIS network provides that the "K-20 education network" is to serve "kindergarten through higher education" and to "provide citizens access to quality primary, secondary, and postsecondary [education] courses state-wide through distance education."^{7/}

^{2/} See *Federal-State Joint Board on Universal Services*, CC Docket No. 96-45, AAD/USB File No. 98-37, Declaratory Ruling, FCC 99-10 (rel. Feb. 18, 1999).

^{3/} See *id.* ¶ 22.

^{4/} See 47 U.S.C. § 153(46).

^{5/} See ICN Order ¶ 22, citing *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) at 643.

^{6/} Washington petition at 4 (emphasis added).

^{7/} Wash. Rev. Code § 28D.02.005. The K-20 network is the network operated by Washington DIS that serves educational institutions.

(continued...)

Highlighting the closed nature of Washington DIS operations, Washington DIS adopted in December 1998 "Conditions of Use" for the K-20 network.^{8/} The first condition is that, "[o]nly institutions authorized by statute and approved by the Telecommunications Oversight and Policy Committee may maintain connections to the state-funded K-20 network," with a narrow exception to permit some network-to-network connections.^{9/} The second condition provides that "[o]nly traffic to or from legitimate K-20 members may be transmitted over the K-20 network."^{10/}

The legal analysis of the ICN Order applies *a fortiori* to the Washington network, which appears to have an even narrower client basis than the ICN, which served some private health clinics and federal agencies. Unlike a common carrier, Washington DIS apparently deals with its clients on an individualized basis. The Washington State School Directors' Association and the Washington Association of School Administrators describe the Washington network as one that "leases services from private carriers and integrates and *customizes those services to better meet schools' needs*."^{11/} Such individualized treatment is a hallmark of non-common carriage.^{12/}

The Washington petition offers no support for a Commission finding that the Washington DIS is a telecommunications carrier. Indeed, the Washington petition requests that the Commission "waive" the statutory classification of "telecommunications carrier" for

^{2/}(...continued)

The Washington statute also specifically provides for network location plans for "higher education delivery sites" and "public education delivery sites," *see id.* §§ 28D.02.030, 28D.02.040, not for general offerings to the public. The relevant sections of the Revised Code of Washington are available on the Washington DIS website, <http://www.wa.gov.dis/k20topc/RCW28D02.htm>.

^{8/} See <http://www.wa.gov/dis/ktopc/>.

^{9/} The Conditions of Use are available at <http://www.wa.gov/dis/k20topc/k20cond.htm>.

^{10/} *Id.*

^{11/} See comments of Washington State School Directors' Association and the Washington Association of School Administrators, CC Docket No. 96-45 (filed Mar. 25, 1998) at 2 (emphasis added).

^{12/} See ICN Order ¶ 23, citing *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) at 609.

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regulatory purposes.^{13/} As the ICN Order holds, "Congress did not give the Commission discretion to allow non-common carriers to receive direct reimbursement of universal service support pursuant to section 254(h)(1)."^{14/}

The Services Provided By The Washington Network Are Not "Advanced Services" Under Sections 254(c)(3) or (h)(2), Nor Are There Other Grounds For Granting The Washington Petition

Even if the Commission had authority to waive the definition of "telecommunications carrier" in favor of Washington DIS, which it does not, USTA already has explained in earlier *ex parte* presentations^{15/} that there are no other grounds for providing direct universal service support to Washington DIS.

Most notably, there is no basis for treating Washington DIS as enhancing access to advanced services pursuant to sections 254(c)(3) or 254(h)(2) of the Act.^{16/} The so-called "value added" services described in the Washington petition cannot be considered as "advanced," or as enhancing access to such services, for purposes of sections 254(c)(3) or 254(h)(2).^{17/} These functions do not promote Internet access or internal connections, for which

^{13/} See Washington petition at 3, 14. In its reply to the oppositions of USTA and others, Washington DIS merely states that it does "not concede" that state telecommunications networks are not a telecommunications carriers, and again asks for a "regulatory exception" of some sort. See Reply of Washington DIS, *et al.* to Opposition, CC Docket No. 96-45 (filed Apr. 6, 1998) at 3-4.

^{14/} See ICN Order ¶ 27.

^{15/} See, e.g., Attachment to Letter from Porter E. Childers, USTA, to Magalie Roman Salas, FCC, re *Ex Parte* Notice, CC Docket No. 96-45, AAD/USB File No. 96-45 (filed Feb. 3, 1999); Attachment to Letter from Porter E. Childers, USTA, to Magalie Roman Salas, FCC, re *Ex Parte* Notice, CC Docket No. 96-45 (filed Jan. 21, 1999).

^{16/} See Washington Petition at 3, 13.

^{17/} Indeed, the Washington petition should be dismissed in this regard as an untimely petition for reconsideration of the Commission's earlier determination that section 254(h)(2) permits schools and libraries to receive discounts specifically for Internet access and internal connections. See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997),

(continued...)

state networks such as Washington DIS already can secure direct reimbursement.^{18/} Instead, these functions are typical administrative services that carriers routinely offer in conjunction with their transmission services. Washington DIS should not receive direct universal service support for its administrative or other costs. Washington DIS is not subject to unique administrative burdens.

There is nothing in the record that credibly indicates that denial of the Washington petition would create unaffordable telecommunications services or inequitable conditions for Washington's schools and libraries.^{19/} USTA has demonstrated in its *ex parte* presentations that the Washington petition's comparative cost examples^{20/} are based on faulty assumptions and reasoning.^{21/} Instead, as in the ICN Order, denial of the Washington petition would be consistent with "the Commission's commitment to maintaining a support mechanism that is no larger than necessary to accomplish Congress' goal in enacting section 254(h)(1)(b) of the Act."^{22/}

Nor would granting the Washington petition be competitively neutral. To the contrary, the privately-owned carriers of Washington state which have paid taxes to support Washington DIS, should not be required to support through universal service contributions a state network that competes with them, but does not itself contribute to universal service.

The precedential effect of granting the Washington petition would be wholly negative. If direct universal service support was available to Washington, other state networks would rationally consider their options as well, and make every effort to take advantage of such support. Yet nowhere in the Act, the Telecommunications Act of 1996 (the "1996 Act"), or the accompanying legislative history is there any indication that state-owned networks are authorized or should be permitted to receive such direct support if they do not qualify as telecommunications carriers.

^{17/}(...continued)

appeal pending in Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. 1997).

^{18/} See ICN Order ¶ 4.

^{19/} See *id.* ¶ 28.

^{20/} See Washington Petition at 12-13 and attached charts.

^{21/} See Attachments to USTA *ex parte* presentations, *supra* note 15, at 10-11.

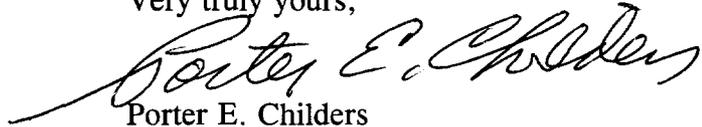
^{22/} See ICN Order ¶ 28.

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There is no indication in Section 254(h) of the Act that the drafters of the 1996 Act contemplated any expansion of the role of state-owned networks unless they qualify as telecommunications carriers. As the ICN Order notes, "Congress did not create the federal universal service support mechanisms for schools and libraries specifically in order to support or supplement these state networks."^{23/} But a reversal of the Fourth Reconsideration Order would have the unwarranted effect, without a basis in the Act, of providing incentives to state governments nationwide to create subsidized networks in competition with privately-owned carriers that are sources of those subsidies.

Accordingly, based on the non-common carrier operations of the Washington network and the precedent set in the ICN Order, the Washington petition should be denied. Pursuant to section 1.1206 of the Commission's rules, two copies of this written *ex parte* presentation are being submitted to the office of the Secretary of the Commission today. Copies also are being sent to the individuals listed below. This filing is to be included in the public record of this proceeding. Please do not hesitate to call if any questions arise in connection with these matters.

Very truly yours,



Porter E. Childers
Executive Director of
Legal and Regulatory Affairs

cc: Hon. William E. Kennard
Hon. Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael K. Powell
Hon. Gloria Tristani
Thomas Power
Linda Kinney
Kyle D. Dixon
Kevin J. Martin
Paul Gallant
Kathryn C. Brown
Lawrence Strickling
Lisa Zaina
Melissa Waksman
Amy Nathan
Irene Flannery
Jane Whang
Valerie Yates

^{23/} See *id.* ¶ 27.