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

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

FIFTH ORDER ON RECONSIDERATION in CC Docket No. 97-21
ELEVENTH ORDER ON RECONSIDERATION in CC Docket No. 96-45
AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 18, 1999 **Released:** May 28, 1999

Comment Date: June 30, 1999

By the Commission: Chairman Kennard and Commissioners Ness and Tristani issuing separate statements; Commissioner Furchtgott-Roth dissenting in part and issuing a statement.

I. INTRODUCTION

1. In this Order, we clarify certain portions of the Commission's funding priority rules for the schools and libraries universal service support mechanism to remove any ambiguity that may exist in the application of such rules. Specifically, we clarify that, when a filing window is in effect, and demand exceeds total authorized support, the Administrator of the universal service support mechanisms (the Universal Service Administrative Company or USAC), shall allocate funds for discounts to schools and libraries for internal connections beginning with those applicants at the highest discount level, i.e., ninety percent, and to the extent funds remain, continue to allocate funds for discounts to applicants at each descending single discount percentage.

2. In this Order, we also reconsider, on our own motion,[1] the Commission's rule that prohibits the disbursement of funds during the pendency of an appeal of a decision issued by the Administrator. We find that, if the appeal relates to a request for additional support by the applicant or involves a challenge by a third party to only a portion of the approved support, and the application is not otherwise the subject of an appeal, the Administrator may disburse, during the pendency of the appeal, those funds that have been approved by the Administrator.

[1] In light of pending petitions for reconsideration in this proceeding, the Commission retains jurisdiction to reconsider its own rules on its own motion. *See* 47 U.S.C. § 405, 47 C.F.R. § 1.108. *See also Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

3. In the attached Further Notice of Proposed Rulemaking (Further Notice), we propose a method for allocating funds in the event that the Administrator's initial denial of a request for support is reversed by the Administrator or the Commission. Specifically, we propose a method for allocating support when there is sufficient funding to support all telecommunications service and Internet access (priority one services) appeals, but not sufficient funding to support all internal connection appeals. We also propose a method for allocating support in the unlikely event that sufficient funds are not available for all priority one service appeals.

II. RULES OF FUNDING PRIORITY

4. In the *Fifth Reconsideration Order*, the Commission adopted new rules of funding priority that would apply when a filing window is in effect and demand exceeds total authorized support.[2] In establishing these rules of priority, the Commission sought to ensure that funds are directed to the most economically disadvantaged schools and libraries and that every eligible school and library that filed within the window would receive some assistance.[3] Consistent with these goals, the rules of priority provide that requests for telecommunications services and Internet access for all discount categories shall receive first priority for the available funding (priority one services).[4] The remaining funds are allocated to requests for support for internal connections, beginning with the most economically disadvantaged schools and libraries, as determined by the schools and libraries discount matrix, i.e., schools and libraries eligible for a ninety percent discount.[5] To the extent funds remain, the rules provide that the Administrator shall allocate funds to the requests for support for internal connections submitted by schools and libraries eligible for an eighty percent discount, then for a seventy percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending discount level until there are no funds remaining.[6] The rules further provide that, if the remaining funds are not sufficient to support all funding requests within a particular discount level, the Administrator shall allocate the total amount of remaining support on a pro rata basis to that particular discount level.[7]

5. Although the Commission's rules prioritize funding requests on the basis of broad discount categories, e.g., ninety percent or eighty percent, the Commission's rules also

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[2] *Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14815 (1998) (*Fifth Reconsideration Order*).

[3] *Id.* at 14936-38, paras. 34-35 (1998).

[4] 47 C.F.R. § 54.507(g)(1)(i); *see also Fifth Reconsideration Order*, 13 FCC Rcd at 14938, para. 36. We note that the funding priority rules assume that sufficient funds will be available in each funding year for all priority one service requests.

[5] 47 C.F.R. § 54.507(g)(1)(ii); *see also Fifth Reconsideration Order*, 13 FCC Rcd at 14938, para. 36.

[6] 47 C.F.R. § 54.507(g)(1)(iii); *see also Fifth Reconsideration Order*, 13 FCC Rcd at 14938, para. 36.

[7] 47 C.F.R. § 54.507(g)(1)(iv); *see also Fifth Reconsideration Order*, 13 FCC Rcd at 14938, para. 36.

specifically recognize that not all discounts calculated under the schools and libraries support mechanism will fall within these broad discount categories. In the *Fourth Reconsideration Order*, the Commission revised the rules regarding how to calculate the appropriate discount level when schools and libraries aggregate their demand with others to create a consortium.[8] The Commission determined, *inter alia*, that, for services that are shared by two or more schools, libraries, or consortia members, i.e., "shared services," the discount level should be calculated by averaging the applicable discounts of all member schools and libraries.[9] As a result, the discount levels for "shared service" requests, which typically are internal connection requests, are single discount level percentages, e.g., eighty-nine percent, eighty-eight percent, and so on.

6. While the Commission's funding priority rules do not specifically address the single discount percentage levels associated with "shared service" requests, the rules on "shared services" and the funding priority rules must be read in concert. We clarify, therefore, that, when sufficient funds are not available to fund all internal connection requests, the Administrator shall allocate funds for discounts to schools and libraries beginning with those applicants at the ninety percent discount level and, to the extent funds remain, continue to allocate funds for discounts to applicants at each descending single discount percentage, e.g., eighty-nine percent, eighty-eight percent, and so on.[10] We believe that this method of allocating funds is consistent with the Commission's goal of ensuring that support for internal connections is directed first toward the most economically disadvantaged schools.[11] We also note that allocating funds at each descending discount level will enable the Administrator to distribute funds sooner than it could if it were required to determine the pro rata amount for the entire discount category before distributing support. As set forth in Appendix A attached

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[8] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5433-39, paras. 199-207 (1997) (*Fourth Reconsideration Order*).

[9] *Id.* at 5438, para. 206; *see also* 47 C.F.R. § 54.505(b)(4). For schools that submit "shared service" requests, the average discount is a weighted average of the applicable discount of all schools sharing a portion of the shared services, with the weighting based on the number of students in each school. 47 C.F.R. § 54.505(b)(4). For libraries that submit "shared service" requests, the average discount is a simple average of the applicable discounts to which the libraries sharing a portion of the shared services are entitled. *Id.*

[10] We note that, in a letter from Lisa M. Zaina, Acting Deputy Bureau Chief, Common Carrier Bureau, to Kate Moore, President, Schools and Libraries Division of USAC, dated January 22, 1999, the Common Carrier Bureau provided similar guidance to the Schools and Libraries Division of USAC regarding the application of the funding priority rules to single discount percentages associated with "shared service" requests.

[11] *Fifth Reconsideration Order*, 13 FCC Rcd at 14939, para. 38. We also note that allocating funds for discounts to schools and libraries beginning with those applicants at the ninety percent discount level and continuing to allocate funds for discounts to applicants at each descending discount percentage will ensure that, to the extent possible, applicants receiving discounts at each percentage level will receive support sufficient to permit completion of a useful system of internal connections. Were applicants to receive only a pro rata portion of the support they requested, school and libraries would be in a position of hiring contractors to perform only a portion of an internal connection project.

hereto, we add a Note to section 54.507(g)(1)(iii) to reflect the clarification made in this Order. We also clarify that, to the extent sufficient funds do not exist to fund all requests within a single discount percentage, the Administrator shall allocate the remaining support on a pro rata basis over that single discount percentage level, as provided in section 54.505(g)(1)(iv) of the Commission's rules.[12]

III. DISBURSEMENT OF FUNDING DURING PENDENCY OF A REQUEST FOR REVIEW OF AN ADMINISTRATOR DECISION

7. The Commission's rules provide that, during the pendency of a request for review of a decision by the Administrator, a service provider shall not be reimbursed for the provision of discounted services under the schools and libraries or rural health care support mechanisms, or receive support under the high cost and low income support mechanism, until a final decision has been issued either by the Administrator or by the Commission.[13] In adopting this rule, we reasoned that withholding support during the pendency of an appeal would reduce the likelihood that support is disbursed in error.[14] We did not intend, however, to require that funds be withheld where an applicant claims on appeal that it was eligible for more support than that which was approved by the Administrator or where a third party challenges only a portion of the support approved by the Administrator. In such a case, assuming the application is not otherwise the subject of an appeal, there is no reason to withhold the disbursement of those funds that the Administrator has approved. Moreover, we believe that withholding funds under such circumstances might also have the unintended result of discouraging applicants from filing legitimate appeals. Such a result would undermine one function of our appeal procedures, which is to help ensure that the universal service support mechanisms are operating consistent with Commission rules and policies. Accordingly, we find that, where a pending appeal involves a request for additional support or a third party challenge to only a portion of the approved support, and the application is not otherwise the subject of an appeal, the Administrator may disburse, during the pendency of that appeal, the unchallenged portion of the approved support. Accordingly, section 54.725 of the Commission's rules is revised as set forth in Appendix A hereto.

IV. EFFECTIVE DATE OF RULES

8. In this Order, we revise section 54.725 of the Commission's rules to provide that, where an applicant seeks review of a decision of the Administrator on the grounds that the applicant was eligible for additional support or a third party challenges only a portion of

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[12] *See* 47 C.F.R. § 54.507(g)(1)(iv).

[13] *See* 47 C.F.R. § 54.725. Any person aggrieved by an action of the Administrator may file a request for review with the Administrator or the Commission. *See* 47 C.F.R. § 54.719.

[14] *Changes to the Board of Directors of the National Exchange Carrier Associations, Inc., Federal-State Joint Board on Universal Service*, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306, para. 74 (rel. November 20, 1998).

the approved support, and the application is not otherwise the subject of an appeal, the Administrator may disburse the funds that it has approved. Some applicants already have filed appeals seeking additional support, but, under our current rules, they are unable to receive the support that the Administrator has approved. Receipt of support is particularly crucial with regard to internal connections in light of the Commission's requirement that applicants complete implementation of their internal connections by a date certain for this funding year. To ensure that the disbursement of support to these applicants is not further delayed, this revised rule must take effect upon publication in the Federal Register. We therefore find good cause to depart in the manner described above from the general requirement of 5 U.S.C. § 553(d) that final rules take effect not less than thirty (30) days after their publication in the Federal Register. Accordingly, section 54.725 of the Commission's rules, as revised in Appendix A attached hereto, shall become effective upon release of this Order.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

9. The Commission's rules provide that an applicant may file a request for review with the Administrator or the Commission in connection with the Administrator's denial of an application.[15] Although the Administrator has taken all reasonable and appropriate steps to ensure that it will be able to fund fully all appeals that may be granted, we conclude that it is necessary to adopt additional funding priority rules setting forth how funds will be allocated in the unlikely event that sufficient funds are not available at the appeal phase.[16] Consistent with the Commission's funding priority rules, as clarified above, we propose that, when a filing window is in effect, the Administrator shall first fund all priority one service appeals that have been granted and, if sufficient funds remain, shall allocate funds to internal connection appeals at each descending single discount percentage, e.g., ninety percent, eighty-nine percent, and so on.[17] In no case, however, would an applicant be able to receive support for internal connections below the discount level for which an applicant received support in the original application process. That is, if the Administrator were only able to provide support during the original application process to applicants at a discount level of seventy percent or above, an applicant would not be able to receive support on appeal for an internal

[15] *See* 47 C.F.R. § 54.719.

[16] We note that the Schools and Libraries Division has established a reserve fund to ensure that sufficient funds will be available for any appeals that may be granted by the Administrator or the Commission. We reiterate that, while the Commission and the SLD are confident that sufficient funds will be available to fund all appeals, we believe that it is necessary to adopt additional funding priority rules setting forth how funds will be allocated in the unlikely event that sufficient funds are not available at the appeal phase.

[17] We note that, in the *Third Report and Order*, the Commission adopted a "window" period whereby all applications filed during the window would be treated as if simultaneously received. *Federal-State Joint Board on Universal Service*, Third Report and Order, CC Docket No. 96-45, 12 FCC Rcd 22485 at 22486, para. 2 (1997). Previously, the application process was to be conducted on a "first-come first-served" basis only. *Id.* Under the Commission's rules, the Administrator has the authority to establish additional filing periods as it deems necessary. 47 C.F.R. § 54.507(c). The Administrator, however, may determine in a particular funding year that a filing window is not necessary.

connection request at a sixty-nine percent discount level. To the extent funds do not exist to fund all appeals granted within a single discount percentage, we propose that the Administrator allocate the remaining support on a pro rata basis within that single discount percentage. We seek comment on this proposal.

10. If the Administrator determines that sufficient funds are not available to fund all priority one service appeals, we propose that the Administrator allocate the available funds to all appeals for priority one services, i.e., telecommunications services and Internet access on a pro rata basis, irrespective of the discount level associated with the request. We believe that this is the best approach in light of both the funding priority rules, which grant first priority to requests for telecommunications services and Internet access, and the Commission's goal of ensuring that every eligible school and library receive some assistance.[18] We seek comment on this proposal. In particular, we seek comment on how this proposed allocation method should be implemented in light of our appeal procedures, which permit applicants to seek review of decisions issued by the Administrator from either the Administrator or the Commission. We tentatively conclude that, to ensure an equitable distribution of funds to all priority one service appeals, the Administrator should wait until a final decision has been issued on all priority one service appeals before it allocates funds on a pro rata basis. We seek comment on this tentative conclusion. We also seek comment on whether it would be more appropriate for the Commission to permit the Administrator to use funds collected in the next funding year to fund priority one service appeals for the prior year. While we recognize that using funds collected for the next funding year may deplete the available funds for that year, we nevertheless seek comment on whether there are any advantages to such an approach. We also invite parties to submit alternative proposals that would enable the Administrator to distribute fairly funds for appeals in the event that sufficient funds are not available to fund all priority one service appeals.

11. We recognize that applicants must complete the installation of internal connections by a date certain for each funding year. We tentatively conclude that an applicant would be required to complete the installation of internal connections that received support pursuant to an appeal within six months from the date that the final decision on appeal is issued. We seek comment on this tentative conclusion.

12. Finally, pending the outcome of this Further Notice, we find that, if the Administrator is able to determine that sufficient funds are available to provide support for all priority one service appeals that may be granted for the first funding year, the Administrator may allocate support immediately to such appeals. To the extent funds remain, and the Administrator is able to determine that sufficient funds are available to allocate funds to all internal connection appeals down to the seventy percent discount level, i.e., the lowest discount level for which applicants received support during the original funding period, the Administrator may allocate support immediately to such internal connection appeals that may be granted.

[18] *See Fifth Reconsideration Order*, 13 FCC Rcd at 14937-38, para. 35, 14939, para. 38; *see also* 47 C.F.R. § 54.507(g)(1)(i).

VI. FILING PROCEDURES

13. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments by **June 30, 1999**. Pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, we find good cause to waive section 1.415(c) of the Commission's rules, which provides for the submission of replies to original comments. Dispensing with reply comments is crucial in light of the urgent need to provide definitive guidance to the Administrator regarding the priorities for allocating funds to applications whose initial denials are reversed by the Administrator or the Commission.

14. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

15. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Sheryl Todd, Federal Communications Commission, Common Carrier Bureau, Accounting Policy Division, 445 12th Street, S.W., Room 5A-523, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the lead docket number in this case (97-21)), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 445 12th Street, S.W., Room CY-B400, Washington, D.C. 20554. For further information, please contact: Sharon Webber, Common Carrier Bureau, Accounting Policy Division, (202) 418-7400.

16. Pursuant to section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this

proceeding will be conducted as a permit-but-disclose proceeding in which *ex parte* communications are permitted subject to disclosure.

VII. REGULATORY FLEXIBILITY ANALYSIS

A. Supplemental Final Regulatory Flexibility Analysis

17. In compliance with the Regulatory Flexibility Act (RFA),[19] this Supplemental Final Regulatory Flexibility Analysis (SFRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *Universal Service Order*,[20] and the Supplemental Final Regulatory Flexibility Analyses in the *Fifth Reconsideration Order*[21] and the *Eighth Order on Reconsideration*,[22] only to the extent that changes to the Order adopted here on reconsideration require changes in the conclusions reached in the FRFA in the *Universal Service Order* and the Supplemental Final Regulatory Flexibility Analyses in the *Fifth Reconsideration Order* and *Eighth Order on Reconsideration*. This FRFA was preceded by an Initial Regulatory Flexibility Analysis (IRFA)[23] incorporated in the Notice of Proposed Rulemaking and Order Establishing the Joint Board (NPRM), prepared in connection with the Recommended Decision, which sought written public comment on the proposals in the NPRM and the Recommended Decision.[24]

18. To the extent that any statement contained in this Supplemental Final Regulatory Flexibility Analysis is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

1. Need for and Objectives of this Report and Order

19. The Commission is required by section 254 of the Act to promulgate rules to implement promptly the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules intended, *inter alia*, to reform our system of universal service

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[19] *See* 5 U.S.C. § 604. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, was amended by the Small Business Regulatory Enforcement Act of 1996 (SBREFA), Title II of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

[20] *Universal Service Order*, 12 FCC Rcd at 9219-9260, paras. 870-983.

[21] *Fifth Reconsideration Order*, 13 FCC Rcd at 14948.

[22] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306 (rel. November 20, 1998).

[23] *See generally* 5 U.S.C. § 603.

[24] 61 Fed. Reg. 63,778, 63,796 (1996).

support mechanisms so that universal service is preserved and advanced as markets move toward competition. In this Order, we clarify one aspect of those rules and reconsider another aspect of those rules. First, we clarify that, when a filing window is in effect, and demand exceeds total authorized support, the Administrator shall allocate funds for discounts to schools and libraries for internal connections beginning with those applicants at the highest discount level, i.e., ninety percent, and to the extent funds remain, continue to allocate funds for discounts to applicants at each descending single discount percentage. Second, we find that, if an appeal of a decision by the Administrator relates to a request for additional support by the applicant or involves a challenge by a third party to only a portion of the approved support, and the application is not otherwise the subject of an appeal, the Administrator may disburse, during the pendency of the appeal, those funds that have been approved by the Administrator.

2. Summary and Analysis of the Significant Issues Raised by Public Comments in Response to the IRFA

20. In this Order, the Commission clarifies certain portions of the Commission's funding priority rules for the schools and libraries universal service support mechanism to remove any ambiguity that may exist in the application of such rules. In doing so, the Commission affirms similar guidance that was provided by the Common Carrier Bureau to the Schools and Libraries Division of USAC.[25] In this Order, the Commission also reconsiders, on its own motion, the rule that prohibits the disbursement of funds during the pendency of an appeal from a decision of the Administrator. The Order modifies the rule to provide that, where a pending appeal involves a request for additional support or a third party challenge to only a portion of the approved support, and the application is not otherwise the subject of an appeal, the Administrator may disburse, during the pendency of that appeal, the funds that it has approved.

3. Description and Estimates of the Number of Small Entities to Which the Rules Adopted in This Order will Apply

21. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[26] The RFA generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[27] In addition, the term "small business" has the same meaning as the term "small business concern"

[25] Letter from Lisa M. Zaina, Acting Deputy Bureau Chief, Common Carrier Bureau, to Kate Moore, President, Schools and Libraries Division of USAC, dated January 22, 1999, regarding the application of the funding priority rules to single discount percentages associated with "shared service" requests..

[26] 5 U.S.C. § 603(b)(3).

[27] 5 U.S.C. § 601(6).

under the Small Business Act.[28] 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). [29] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[30] Nationwide, as of 1992, there were approximately 275,801 small organizations.[31] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[32] As of 1992, there were approximately 85,006 such jurisdictions in the United States.[33] This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.[34] The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

22. As noted in the FRFA at paragraphs 890-925 of the *Universal Service Order*, there are a number of small entities that would be affected by the new universal service rules. The rules adopted in this Order, however, would affect primarily schools and libraries. Moreover, because the rules would allow schools and libraries to benefit more fully from the schools and libraries universal service support mechanism, would not have a significant impact on these small entities. We further describe and estimate, however, the number of small governmental jurisdictions, small businesses, and small organizations that may potentially be affected by the rules adopted in this Order.

23. The Commission specifically noted in the *Universal Service Order* that the SBA defined small elementary and secondary schools and small libraries as those with under $5 million in annual revenues.[35] The Commission further estimated that there are fewer than

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[28] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, 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." 5 U.S.C. § 601(3).

[29] Small Business Act, 15 U.S.C. § 632 (1996).

[30] 5 U.S.C. § 601(4).

[31] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[32] 5 U.S.C. § 601(5).

[33] U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

[34] U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

[35] *See Universal Service Order*, 12 FCC Rcd at 9242, para. 925.

86,221 public and 26,093 private schools and fewer than 15,904 libraries that may be affected by the decisions and rules adopted in the Universal Service Order.[36] We believe that these same small entities may be affected potentially by the rules adopted in this Order.

24. In addition, the Commission noted in the *Universal Service Order* that neither the Commission nor the SBA has developed a definition of small, rural health care providers. Section 254(h)(5)(B) defines the term "health care provider" and sets forth the seven categories of health care providers eligible to receive universal service support.[37] We estimated that there are fewer than 12,296 health care providers potentially affected by the rules in the *Universal Service Order*.[38] We note that these small entities may potentially be affected by the rules adopted in this Order.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements. Both the clarification and modification to the Commission's rules that are set forth in this Order relate only to actions that need to be taken by the Administrator of the universal service support mechanisms. As a result, we do not anticipate any additional burdens or costs associated with these proposed rules on any entities, including on small entities.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

25. In the FRFA to the *Universal Service Order*, the Commission described the steps taken to minimize the significant economic impact on a substantial number of small entities consistent with stated objectives associated with the Schools and Libraries section, the Rural Health Care Provider section, and the Administration section of the *Universal Service Order*.[39] As described above, our current action to amend our rules will benefit schools, libraries, and rural health care providers, by ensuring that funds are allocated first to the neediest schools and libraries and that schools, libraries, and rural health care providers will be able to receive any support approved by the Administrator that is not the subject of an appeal. We believe that these amended rules fulfill the statutory mandate to enhance access to telecommunications services for schools, libraries, and rural health care providers, and fulfill the statutory principle of providing quality services at "just, reasonable, and affordable rates,"[40] without imposing unnecessary burdens on schools, libraries, rural health care providers, or service providers, including small entities.

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[36] *See Universal Service Order*, 12 FCC Rcd at 9243, para. 925.

[37] *See* 47 U.S.C. § 254(h)(5)(B).

[38] *See Universal Service Order*, 12 FCC Rcd at 9242, para. 924.

[39] *Id.*

[40] 47 U.S.C. § 254(b)(1).

26. *Report to Congress.* The Commission will send a copy of the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

B. Initial Regulatory Flexibility Analysis

27. As required by the Regulatory Flexibility Act (RFA),[41] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking provided above in Section VI. The Commission will send a copy of the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking and IRFA (or summaries thereof) will be published in the Federal Register. See id.

28. *Need for an Objectives of the Proposed Rules.* The Commission's rules provide that an applicant may file a request for review with the Administrator or the Commission in connection with the Administrator's denial of an application. Although the Administrator has taken all reasonable and appropriate steps to ensure that it will be able to fund fully all appeals that may be granted, we conclude that it is necessary to adopt additional funding priority rules setting forth how funds will be allocated in the unlikely event that sufficient funds are not available at the appeal phase. Accordingly, the Further Notice proposes that, when a filing window is in effect, the Administrator shall first fund all priority one service appeals that have been granted and, if sufficient funds remain, shall allocate funds to internal connection appeals at each descending single discount percentage, e.g., ninety percent, eighty-nine percent, and so on. To the extent funds do not exist to fund all appeals

[41] See 5 U.S.C. § 603. 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).

granted within a single discount percentage, we propose that the Administrator allocate the remaining support on a pro rata basis within that single discount percentage. If the Administrator determines that sufficient funds are not available to fund all priority one service appeals, the Further Notice proposes that the Administrator allocate the available funds to all appeals for priority one services, i.e., telecommunications services and Internet access on a pro rata basis, irrespective of the discount level associated with the request.

29. *Legal Basis.* The proposed action is supported by sections 4(i), 4(j), 201-205, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 254, and 403.

30. *Description and Estimate of the Number of Small Entities to which the proposed rules will Apply.* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[42] The RFA generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[43] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[44] 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). [45] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[46] Nationwide, as of 1992, there were approximately 275,801 small organizations.[47] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[48] As of 1992, there were approximately 85,006 such jurisdictions in the United States.[49] This number includes 38,978 counties, cities,

[42] 5 U.S.C. § 603(b)(3).

[43] 5 U.S.C. § 601(6).

[44] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, 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." 5 U.S.C. § 601(3).

[45] Small Business Act, 15 U.S.C. § 632 (1996).

[46] 5 U.S.C. § 601(4).

[47] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[48] 5 U.S.C. § 601(5).

[49] U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.[50] The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

31. Schools and Libraries. The Commission specifically noted in the *Universal Service Order* that the SBA defined small elementary and secondary schools and small libraries as those with under $5 million in annual revenues. The Commission further estimated that there are fewer than 86,221 public and 26,093 private schools and fewer than 15,904 libraries that may be affected by the decisions and rules adopted in the Universal Service Order.[51] We believe that these same small entities may be affected potentially by the rules proposed in this Further Notice.

32. Rural Health Care Providers. The Commission noted in the *Universal Service Order* that neither the Commission nor the SBA has developed a definition of small, rural health care providers. Section 254(h)(5)(B) defines the term "health care provider" and sets forth the seven categories of health care providers eligible to receive universal service support.[52] We estimated that there are fewer than 12,296 health care providers potentially affected by the rules in the *Universal Service Order*.[53] We note that these small entities may potentially be affected by the rules proposed in this Further Notice.

33. *Description of Projected Reporting, Record keeping, and Other Compliance Requirements.* Both the clarification and modification to the Commission's rules that are set forth in this Order relate only to actions that need to be taken by the Administrator of the universal service support mechanisms. As a result, we tentatively conclude that there will not be any additional burdens or costs associated with these proposed rules on any entities, including on small entities. We seek comment on this tentative conclusion.

34. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered.* In the FRFA to the *Universal Service Order*, the Commission described the steps taken to minimize the significant economic impact on a substantial number of small entities consistent with stated objectives associated with the Schools and Libraries section, the Rural Health Care Provider section, and the Administration section of the *Universal Service Order*.[54] As described above, our current action to amend our rules will benefit schools, libraries, and rural health care providers, by ensuring that funds are allocated first to the neediest schools and libraries and that schools, libraries, and rural health

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[50] U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

[51] *See Universal Service Order*, 12 FCC Rcd at 9243, para. 925.

[52] *See* 47 U.S.C. § 254(h)(5)(B).

[53] *See Universal Service Order*, 12 FCC Rcd at 9242, para. 924.

[54] *Id.*

care providers will be able to receive any support approved by the Administrator that is not the subject of an appeal. We believe that these amended rules fulfill the statutory mandate to enhance access to telecommunications services for schools, libraries, and rural health care providers, and fulfill the statutory principle of providing quality services at "just, reasonable, and affordable rates,"[55] without imposing unnecessary burdens on schools, libraries, rural health care providers, or service providers, including small entities.

35. *Federal Rules That May Overlap, Duplicate, or Conflict with the Proposed Rule.* None.

VIII. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), 403 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 218-220, 254, 303(r), 403 and 405, section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and section 1.108 of the Commission's rules, 47 C.F.R. § 1.108, the Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45 and Further Notice of Proposed Rulemaking IS ADOPTED.

37. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), 403 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 218-220, 254, 303(r), 403 and 405, section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and section 1.108 of the Commission's rules, 47 C.F.R. § 1.108, sections 54.507(g)((1)(iii) and 54.725 of the Commission's rules, 47 C.F.R. §§ 54.507(g)(1)(iii), 54.725 ARE AMENDED, as set forth in Appendix A attached hereto.

38. IT IS FURTHER ORDERED that, if the Administrator determines that sufficient funds are available to provide support for all priority one service appeals that may be granted for the first funding year, the Administrator may allocate support immediately to such appeals.

39. IT IS FURTHER ORDERED that, to the extent funds remain after the Administrator has allocated support to all priority one services, and the Administrator has determined that sufficient funds are available to allocate support to all internal connection appeals down to the seventy percent discount level, the Administrator may allocate support immediately to such internal connection appeals that may be granted.

40. IT IS FURTHER ORDERED that, because the Commission has found good cause, this Order and 47 C.F.R. § 54.725, as amended and set forth in Appendix A, IS EFFECTIVE upon publication in the Federal Register.

41. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs,

[55] 47 U.S.C. § 254(b)(1).

Reference Operations Division, SHALL SEND a copy of this Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking, including the Supplemental Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

Appendix A -- Rule Changes

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

Part 54 -- UNIVERSAL SERVICE

1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. §§ 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

§ 54.507 Cap.

2. Add a Note to paragraph (g)(1)(iii) to read as follows:

Note 1: To the extent that there are single discount percentage levels associated with "shared services" under section 54.505(b)(4), the Administrator shall allocate funds for internal connections beginning at the ninety percent discount level, then for the eighty-nine percent discount, then for the eighty-eight percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending discount level until there are no funds remaining.

§ 54.725 Universal service disbursements during pendency of a request for review and Administrator decision.

3. Revise section 54.725 to read as follows:

(a) When a party has sought review of an Administrator decision under § 54.719(a)-(c) in connection with the schools and libraries support mechanism or the rural health care support mechanism, the Administrator shall not reimburse a service provider for the provision of discounted services until a final decision has been issued either by the Administrator or by the Federal Communications Commission; provided, however, that the Administrator may disburse funds for any amount of support that is not the subject of an appeal .

(b) When a party has sought review of an Administrator decision under § 54.719(a)-(c) in connection with the high cost and low income support mechanisms, the Administrator shall not disburse support to a service provider until a final decision has been issued either by the Administrator or by the Federal Communications Commission; provided, however, that the Administrator may disburse funds for any amount of support that is not the subject of an appeal.

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: *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)

I wish to commend the staff of the Common Carrier Bureau for the sterling efforts they have made, and the great success they have achieved, in their wise and prudent exercise of the authority delegated to them to "issue orders interpreting our rules as necessary to ensure that support for services provided to the schools and libraries and rural healthcare providers operate to further our universal service goals."[1] I especially wish to cite the fine work of Irene Flannery and her staff in the Accounting Policy Division, Lisa Zaina and Katherine Schroder in the Bureau Front Office, and Larry Strickling, the Bureau Chief. Their work has been exemplary.

The order we release today clarifies one aspect of the method by which funds are to be distributed to schools and libraries that are eligible for universal service support under section 254 of the Communications Act of 1934, as amended. Eligible schools and libraries are entitled to discounts in a range of between 20% and 90% off of the rate for eligible services. Needier schools and libraries get larger discounts, with need determined based on the percentage of students in the school or school district that are eligible for the federal school lunch program. In addition, rural schools are eligible for greater discounts than urban schools.

While each individual school or library is assigned a discount level that is divisible by 10 (e.g., 90%, 80%, 70%, etc.), schools and libraries can aggregate their demand and file a joint application for which the discount level is set at the average discount of all the schools and libraries joining in that application. Because the discount level for a joint application is an average, it is quite possible that the discount level will not be divisible by 10.

The Commission adopted a specific rule, section 54.507(g)(1)(iv), to govern when the amount of demand by schools and libraries within a specific discount level exceeds the amount of funding available. That rule provides:

> If the remaining funds are not sufficient to support all of the funding requests within a particular discount level, Schools and Libraries Corporation shall divide the total amount of remaining support available by the amount of support requested within the particular discount level to produce a pro-rate factor. Schools and Libraries Corporation shall reduce the support level for each applicant within the particular discount level, by multiplying each applicant's requested amount of support by the pro-rate factor.[2]

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[1] *In the Matter of Federal-State Joint Board on Universal Service*, Third Report and Order, 12 FCC Rcd 22485, para. 6 (Oct. 10, 1997). Consistent with the Communications Act, the Commission found that this delegation was "'necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business.'" *Id.*, quoting 5 U.S.C. 155(c)(1).

[2] 47 C.F.R. § 54.507(g)(1)(iv).

The rule does not distinguish between discount levels that are divisible by 10 and discount levels that are not divisible by 10. Thus, if there is sufficient funding to support fully all of the schools and libraries in the 74% discount level, but the remaining funds are insufficient to support fully all of the applicants in the 73% discount level, then the remaining funds are allocated proportionately among the applicants in the 73% discount level. This is the precise issue addressed previously, and properly, by the Common Carrier Bureau in its January 22, 1999 letter to the Schools and Libraries Division of the Universal Service Administrative Company.

When the Bureau made this clarification in January, Commissioner Furchtgott-Roth quickly objected by sending a letter to the Universal Service Administrative Company, instructing it to disregard the Bureau's action.[3] Despite my disagreement with Commissioner Furchtgott-Roth's legal and policy arguments, I elected to place the matter before the full Commission to eliminate any confusion or doubt, thus culminating in the order we release today.

In their separate statements, Commissioners Furchtgott-Roth and Tristani make clear their views concerning the scope of the Bureau's delegated authority under current rules. While I am not persuaded by all of their arguments, I certainly appreciate their concerns and will work to accomodate them.

I do wish to note that, contrary to Commissioner Furchtgott-Roth's suggestion, there is no requirement that the Bureau seek pre-clearance from individual commissioners, or all of the commissioners, when exercising delegated authority. That would be a recipe for gridlock.

Delegated authority permits the Bureaus to clarify and implement the policies and rules adopted by the full Commission, thus greatly expediting the resolution of the countless disputes and inquiries that are presented to us. Pre-clearance by the full Commission of Bureau-level items would undermine the very efficiency that delegated authority is designed to promote, and would interfere with my statutory obligation "to promote the prompt and efficient disposition of all matters within the jurisdiction of the Commission."[4]

I do not question the right of individual commissioners to voice their disagreement with a Bureau decision and to exercise their vote accordingly when presented with that decision for review. And I have instructed the Bureaus to keep the commissioners apprised of actions taken on delegated authority. But requiring the full Commission to pre-approve the exercise by the Bureaus of their lawfully delegated authority is flatly inconsistent with the very concept and purpose of delegated authority and would bring the work of the Commission to a virtual halt. I will not permit that to happen.

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[3] I note that the Communications Act prohibits a single commissioner from overriding the proper exercise by the Bureau of its delegated authority. 47 U.S.C. § 155(c)(1).

[4] 47 U.S.C. § 155(a).

Separate Statement
of
Commissioner Susan Ness

Re: 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)

I support today's decision that funds for discounts to schools and libraries for internal connections be distributed to applicants at each descending single discount percentage. I believe that today's decision is consistent with our rules and is the better policy result, for the following reasons: (1) the funds are distributed first to the most economically disadvantaged schools, as Congress and the Commission directed; (2) funding commitments will arrive more quickly than if the Administrator must first determine the *pro rata* amount for the entire category before distribution; and (3) the probability that a small amount of remaining funds will have to be split among a large number of applications is reduced and, thus, schools are less likely to receive a sliver wholly inadequate to do the job.

I applaud the Universal Service Administration Company for its excellent work. Commitment letters for $1.66 billion have been issued, and funds are now being disbursed for services performed. The Common Carrier Bureau is to be commended as well for its responsive oversight of the program.

I write separately, however, to address a larger matter -- the Bureau's role in ensuring the efficient management of the schools and libraries and rural health care programs, consistent with the Telecommunications Act of 1996 and Commission orders issued pursuant to that legislation. In October, 1997, the Commission issued the Third Report and Order,[1] which included a special delegation of authority to the Bureau to oversee the schools and libraries and rural health care programs.[2] That delegation was broader than the general delegation of authority under 47 C.F.R. § 0.291. The special delegation has been neither rescinded nor eviscerated.[3]

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[1] *In the Matter of Federal-State Joint Board on Universal Service, Third Report and Order*, 12 FCC Rcd 22485 (1997).

[2] *See id.* at 22488-89, para. 6.

[3] In a subsequent order, the Commission made a slight modification to one aspect of the delegated authority issue. *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket 97-21; Federal-State Joint Board on Universal Service, CC Docket 96-45; Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45*, FCC No. 98-306, (rel. Nov. 20, 1998), 63 FR 70564 (Dec. 21, 1998) (*USAC Reorganization Order*). The USAC Reorganization Order states explicitly that the Commission delegates to the Bureau the authority to rule on "petitions for review of appeals of USAC division, Committee, or Board decisions" that do not raise novel questions of fact, law, or policy. *USAC Reorganization Order* at para. 68. Thus, the USAC Reorganization Order appears to rescind certain existing authority, but only with respect to action on appeals of USAC decisions. Notably, the USAC Reorganization Order does not rescind the Bureau's authority "to issue orders interpreting [Commission] rules as necessary to ensure that support for services

I voted for that order because I recognized that the USAC administrator needs to have timely guidance on many issues, and that necessarily, Commission orders take far more staff and Commissioner time than do Bureau responses.[4] Moreover, the Commission is always able to reverse a Bureau order, should we desire to substitute our judgment for that of the Bureau. By delegating to the Bureau, we avoid the pitfall of micromanagement which could easily hamper the efficient operation of the program.

To be sure, the Commission has a vital role to play in overseeing the schools and libraries program, but we cannot afford to become mired in the details of program administration. I am happy to work with my colleagues to ensure that process issues do not inhibit or delay the ability of America's schools and libraries to reap the benefits that Congress envisioned.

provided to schools and libraries and rural health care providers operate to further [the Commission's] universal service goals." Thus, the Bureau's delegated authority to interpret Commission rules remains intact.

[4] Indeed, many weeks have expired since the discount issue first was raised.

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH DISSENTING IN PART

Re: In the Matters of: Changes to the Board of Directors of the National Exchange Carrier Association; Federal-State Joint Board on Universal Service; (CC Docket Nos. 97-21, 96-45).

I dissent in part from today's Order on Reconsideration requiring that funds for discounts to schools and libraries for internal connections be distributed to applicants at each single descending discount percentage. As I have stated previously, I am concerned that distributing funds at each single discount percentage may inadvertently disadvantage individual school applicants in comparison to school consortia applicants.[1] Instead, when funds are running short, I would prefer that funds be allocated on a pro-rata basis to all qualifying applicants in a given discount range, thus providing more schools with a piece of the universal service pie.

In addition, depending upon exact levels of demand and funding, prioritizing consortia applicants at single discount percentages could adversely effect rural schools. For example, this year the 79%, 78%, and 77% applications were predominantly urban in nature.[2] The 70% discount, however, is one for which only "rural" schools may qualify. Thus, by favoring single discounts above 70%, the Commission would have favored consortia applicants who were predominantly urban over individual applicants that the Commission knew were entirely rural. This year the Commission was fortunate to be able to avoid this issue by finding sufficient funds to fully grant all of the applications with at least a 70% discount. I remain concerned, however, that this issue could arise again next year or in the future.

I am pleased, however, that this issue is before the Commission for a decision. Indeed, there are several important reasons why today's decision must be made by the full Commission. First, today's decision is not a mere "clarification" of our rules of priority. Rather, it is a change in our rules of priority and as such requires this Commission vote.

Last June the Commission adopted new rules of priority for the distribution of schools and libraries funds. These rules ensured that all requests for telecommunications and internet access receive first priority. These rules then provide that the remaining funds should be allocated to requests for internal connections, beginning with the most economically disadvantaged schools and libraries "as determined by the schools and libraries discount

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1 *See* Attachment I, February 9, 1999 letter to Cheryl Parrino, President Universal Service Administrative Company.

2 Indeed, the Schools and Libraries Division estimated that the wave of commitment letters funding schools between 77%-79% resulted in funds flowing to schools that were almost 90% urban. National Overview: Wave VII.

matrix."[3] That discount matrix provides a series of steps or levels of discount that are available. The Commission's rules of priority for funding internal connections are very specific; they provide that schools eligible for a 90% discount should receive first priority. Then they provide that:

> To the extent funds remain, SLC shall next allocate funds toward the requests for internal connection submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending level until there are no funds remaining.[4]

Thus, the FCC rules are very clear that requests for internal connection should be examined in steps that correspond to our own discount matrix. These rules of priority clearly envision discount levels that correspond to the discount levels provided for in the discount matrix -- 90, 80, 70, etc.. Today's Order changes those rules to allocate funds at individual discount levels. As proof, "Rule Changes" are attached as Appendix A to the Commission's Order.

In addition, I would take the opportunity to note that (i) the Common Carrier Bureau was never delegated the authority to deal with any new or novel issues of fact, law or policy, and (ii) it is unclear whether any Bureau-level authority remains pursuant to the October 1997 Third Report and Order, 12 FCC Rcd 22485, after the Commission's subsequent modification of the universal service corporation's authority and adoption of specific procedures for the review of universal decisions in the Eighth Order on Reconsideration, CC Docket No. 96-45, rel. November 20, 1998. In the 1997 Order, the Commission had determined that the "administrative corporations general authority to administer support mechanisms should largely enable them to resolve these [unanticipated] problems," such as the rules with respect to websites. In that context, the Commission also encouraged the Common Carrier Bureau to work with the administrative corporations to "clarify" Commission rules. The Commission did not delegate to the Bureau the authority to determine any new or novel issues of fact, law or policy, as would be required for such an unusual delegation.

Subsequently, section 2005(b)(2)(A) of Senate Bill 1768 prompted several universal service structural revisions and provided for an extremely limited administrative entity:

> [T]he entity proposed by the Commission to administer the programs -- (i) is limited to implementation of the FCC rules for applications for discounts and processing the applications necessary to determine eligibility for discounts under section 254(h) of the Communications ct of 1934 (47 U.S.C. 254(h)) as determined by the Commission; (ii) may not administer the program in any manner that requires that entity to interpret the intent of Congress in establishing the programs or interpret any rule promulgated by the Commission in carrying out the programs, without appropriate consultation and guidance from the Commission.

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3 Fourth Report and Order, CC Docket No. 96-45, at par. 36. Matrix attached as Attachment II.

4 Fourth Report and Order, CC Docket No. 96-45, at par. 36.

In light of this more limited administrative function, the Commission revised its corporate structures and procedures for reviewing universal service decisions. In that context, the Commission concluded that it would "limit the Bureau's review function solely to the review of issues that raise no novel questions of fact, law, or policy."[5] Thus, the Commission ensured that "novel questions of fact, law, or policy shall be brought before the full Commission."[6] Thus, it is clear that the full Commission must determine new and novel issues of fact, law and policy. It is not within the Common Carrier Bureau's discretion to determine the best policy when new or novel questions arise. Rather, that authority remains, appropriately and solely, with the full Commission.

Finally, I would note that the October 1997 Order is clear in one regard. It requires the Common Carrier Bureau "to issue *orders*" whenever it acts to clarify Commission rules.[7] Even under the broadest interpretation of the Bureau's authority, the word "orders" must be given meaning. In the context of this issue, no bureau order was issued. Rather, a *letter* was sent by the Common Carrier Bureau "interpreting" -- or more accurately misinterpreting -- our prior rules and providing guidance in response to an inquiry from the Schools and Libraries Division. But such a "letter" cannot substitute for an "order." Particularly since Bureau-level orders have a specific internal process -- requiring that they be provided to the Commissioners for a period of review -- that was not followed here.[8] Thus, the only thing that is clear with regard to the October 1997 Order is that if any authority remains with the Common Carrier Bureau to "clarify" anything, the Bureau failed to follow the only procedural mechanism available for them -- issuing an order. By failing to issue an "order" and instead attempting to clarify an issue through an informal letter, the Bureau failed to follow the appropriate procedures explicitly required by the Third Report and Order.

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5 Eighth Order on Reconsideration, CC Docket No. 96-45, at para. 64 & 68, rel. November 20, 1998.

6 Id.

7 Third Report and Order, 12 FCC Rcd 22485, at para. 6.

8 The Chairman mischaracterizes my statement as indicating that Commissioners "pre-approve" of bureau actions taken on delegated authority. To the contrary, I am merely referring to our internal process that provides Commissioners with pre-notification of bureau level actions and also provides Commissioners with an opportunity to attach a separate statement objecting to such bureau level decisions. It is this process that the bureau failed to follow here.

Attachment I

February 9, 1999

Cheryl Parrino
President
Universal Service Administrative Company
2120 L Street, N.W., Suite 600
Washington, D.C. 20037

Dear Ms. Parrino:

I write this letter and urge immediate action on behalf of numerous schools across the country -- and particularly the rural schools at the 70% discount level -- that are in danger of being unfairly excluded from recent Schools and Libraries Division (SLD) distributions that are inconsistent with Federal Communications Commission Orders. Schools with discounts of between 70% and 76% should have been included in the most recent distributions.[1] These excluded schools include many rural schools, in large part because the 70% discount level is only available to rural applicants.

This issue was recently raised by the Schools and Libraries Division of the Universal Service Company (USAC) regarding the method of distributing funds for discounts to schools and libraries. As I am sure you are aware, last June the Commission adopted new rules of priority for the distribution of those funds. These rules ensured that all requests for telecommunications and internet access receive first priority. These rules then provide that the remaining funds should be allocated to requests for internal connections, beginning with the most economically disadvantaged schools and libraries "as determined by the schools and libraries discount matrix."[2] That discount matrix provides a series of steps or levels of discount that are available. Our rules provide that schools eligible for a 90% discount should receive first priority. Our rules then provide that:

> To the extent funds remain, SLC shall next allocate funds toward the requests for internal connection submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending level until there are no funds remaining.[3]

Thus, the FCC rules are very clear that requests for internal connection should be examined in steps that correspond to our own discount matrix. Indeed, USAC seems to have interpreted

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1 A preliminary list of the schools that have qualified for a discount of between 70% and 76% is Attached to this letter as Attachment I.

2 Fourth Report and Order, CC Docket No. 96-45, at par. 36. Matrix attached as Attachment II.

3 Fourth Report and Order, CC Docket No. 96-45, at par. 36.

the Commission's rules in such a manner. Their own answers to frequently asked questions sheet seems to make this clear:

> 10. If funds are available for internal connections requests below the 90% discount level, how will SLC make these funding decisions?
>
> > Consistent with FCC rules, we will consider internal connections requests below the 90% discount level by ten-point discount "bands" - for example, 80-89%, 70-79%, and so on. If there are sufficient funds to grant all approved requests within a band, we will set aside funds for the approved requests in that band. A funding commitment letter will be issued for each applicant when we can fully respond to all requests in that application.[4]

To ensure that there was no confusion, the FCC clarified its rules last June with a hypothetical:

> If the remaining funds are not sufficient to support all of the funding requests that comply with the commission's rules and eligibility requirements within a particular discount level, SLC shall divide the total amount of remaining support available by the amount of support requested within a particular discount level to produce a pro rata factor. Thus, for example, if all applicants eligible for discounts of 90% may be fully funded, but there are not sufficient funds remaining to fully fund internal connections for applicants eligible for discounts of 80%, SLC shall reduce the support level for each applicant that is eligible for an 80% discount by multiplying the appropriate requested amount of support by the pro-rata factor. SLC shall then allocate funds to each applicant within the 80% discount category based on this reduced discount level.[5]

Recently, this very situation arose. The SLD advised the Commission that it would not be able to provide support for all requests for internal connections below the ninety percent discount level. Despite such previous guidance and explicit examples in the Commission's Order, "SLD propose[d] allocating funds for discounts to schools and libraries beginning with those applicants at the eighty-nine percent discount level and, to the extent funds remain, continuing to allocate funds for discounts to applicants at each descending single discount percentage."[6] Such a proposal, however, is inconsistent with the Commission's rules, the matrix the Commission has adopted, the Commission's own example that was meant to provide guidance to SLD, and SLD's own earlier interpretation.

Even more astonishing was the Common Carrier Bureau's response. Without consulting the Commission, the Common Carrier Bureau concluded that the proposal is

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[4] E-Rate Funding Commitments, 20 Questions and Answers for Understanding the "Waves" of funding Commitment Decisions Letters, November 17, 1998. Attachment III.

[5] Fourth Report and Order, CC Docket No. 96-45, at par. 37.

[6] Letter from Lisa Zaina, Acting Deputy Chief of the Common Carrier Bureau to Kate Moore, dated Jan. 22, 1999.

"consistent" with the Commission's direction.[7] To the contrary, this proposal is inconsistent with the Commission's explicit direction. Moreover, the Common Carrier Bureau's role is limited "to the review of issues that raise no novel questions of fact, law, or policy."[8] Thus, even if our rules were ambiguous and would have allowed for such an interpretation, which I question, it would clearly be a novel question of fact, law or policy and as such could only be decided by the full Commission. As such, you should disregard such informal advice provided by the Common Carrier Bureau until the full Commission provides further guidance. Moreover, to the extent that you rely upon such advice, USAC will remain liable for any application that would have received support that was denied because of this misinterpretation of a Commission Order by a Bureau that may not provide advice on new or novel issues. In other words, you should be on notice that such advice may not shield USAC from future liability by disadvantaged applicants.

In addition, I note that I am unpersuaded by the Office of General Counsels' arguments in support of this request by SLD. First, they argue that the rules of priority *must* include the particular percentage points that result form the calculation of average discounts for shared services pursuant to Section 54.505(b)(4). The Commission's rules, however, are very specific on this point and provide only for allocating funds for internal connections to disadvantaged schools and libraries "as determined by the schools and libraries discount matrix in section 54.505(c) of this part."[9] Indeed, there is no mention of Section 54.505(b)(4). Similarly, the next section of the rules provides for the continued allocation of funds "towards the requests for internal connections submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending discount level until there are no funds remaining."[10] Thus, these rules of priority clearly envision discount levels that correspond to the discount levels provided for in the discount matrix -- 90, 80, 70, etc..

Second, the Office of the General Counsel argues that, even if the rules are ambiguous, the Common Carrier Bureau's interpretation is reasonable. Again, I point out that the reasonableness of their interpretation is not the standard. Rather, the question is whether or not this is a new or novel question of fact, law or policy. There may be very good reasons why this should be the rule. There may, however, be equally or even more compelling reasons why it should not. For example, allowing consortia applications to receive funds prior to individual schools may result in some schools with a lower priority (e.g. 60%) receiving funds over other individual applicants with a higher priority (e.g. 70%) merely because they paired with a school with a higher priority (e.g. 90%). Regardless, it is not within the Common Carrier Bureau's discretion to determine the best policy when new or novel questions arise. Rather, that authority remains solely with the full Commission.

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7 Letter from Lisa Zaina, Acting Deputy Chief of the Common Carrier Bureau to Kate Moore, dated Jan. 22, 1999.

8 Eighth Order on Reconsideration in CC Docket No. 96-45, at par. 64.

9 47 CFR 54.507(g)(1)(ii).

10 47 CFR 54.507(g)(1)(iii).

I am very disturbed by the arbitrary nature of this decision and the effect it will have on numerous schools across the country. For illustrative purposes, I have attached a preliminary list of the schools that have been disadvantaged by this arbitrary interpretation. All applicants deserve to be treated in a fair and consistent manner. Changing the rules for distribution to favor some schools and disadvantage others in the middle of the distribution process hardly seems fair -- indeed, it seems rather arbitrary.

What is even more disturbing about this flagrant contradiction of clear Commission guidance, however, may be the detrimental effect that this decision is having on many rural applicants. Rural areas should always be the primary beneficiary of universal service programs. But under these revised rules, the rural applicants are the most likely to be disadvantaged. As you are aware, there have been sufficient funds to meet the requests of all applicants that qualify for an 80% discount and above. It appears, however, that there may be insufficient funds to meet all of the requests in the 70-79% range. So what difference does it make to rural America that the 79%, 78% and 77% consolidated applications have been provided 100% of their requests while the 70% applicants will get less and maybe nothing? The 79%, 78%, and 77% applications are predominantly urban in nature, but the 70% discount is one for which only "rural" schools may qualify. Thus, by favoring discounts above 70%, the Commission is favoring consortia applicants who are predominantly urban. Indeed, SLD estimates that the latest wave of commitment letters funding schools between 77%-79% results in funds flowing to schools that are almost 90% urban.[11] In contrast, we know that 100% of the applicants qualifying for a 70% discount are rural. But there may not be *any* money left for them.

To illustrate how this will adversely effect rural America, I have compared the applicants with a 77% to 79% discount, with those applicants qualifying for the 70% discount. Applicants with a 77% to 79% discount requested a total of $48 million, while applicants with a 70% discount similarly requested about $51 million. But the distribution among states is dramatically different, as urban schools receive the lion's share of the funds distributed with a 77% to 79% discount. Schools from predominantly rural states receive significantly less. For example, schools from such rural states as Alaska (1 school requesting $7,000), Montana (3 schools totaling $16,000), and Kansas (6 schools totaling $200,000) will receive relatively little money in the 77% to 79% discount distribution. Indeed, not a single school from North Dakota will receive any money in such a distribution. In the 70% discount category, however, there are eight schools in Alaska (for a total of over $200,000), 26 schools in Montana (for a total of more than $325,000), 48 schools in Kansas (for a total of almost $1.2 million), and 39 schools in North Dakota (for a total of $336,000) that would qualify. So who are the big winners in the upper brackets? Schools in urban areas such as New York (almost $8.5 million) and Washington, DC (almost $2.7 million). Thus, by excluding the 70% category from the most recent distributions, SLD has funnelled money away from rural areas and towards urban areas. This is not what the Commission intended. Instead, the Commission envisioned the rural schools that qualify for a 70% discount getting a pro-rata share of these remaining funds, not the leftovers after the predominantly urban schools in the

[11] National Overview: Wave VII.

77%-79% range have been fully funded.

Indeed, last June, the Commission recognized that our matrix system with its steps favored rural schools and praised that result:

> Because these rules of priority utilize the discount matrix, which provides higher discounts for schools and libraries in rural areas, they also equitably provide greater support to schools and libraries in rural areas. These rules, therefore, further implement the Commission's prior decisions to allocate support for schools and libraries in a manner that provides higher levels of support for rural areas and areas with greater economic disadvantage, while recognizing that every eligible school and library should receive some assistance.[12]

I cannot stand by and watch the Common Carrier Bureau re-interpret our rules arbitrarily benefitting some schools and harming others, and in particular I will not support interpreting these rules in a manner that harms those schools in rural America.

With these concerns in mind, I request that the SLD reallocate on a pro-rata basis the remaining funds to all qualifying applicants in the 70%-79% range. The inclusion of the schools in the 70%-76% range -- particularly those rural schools at the 70% discount level -- will provide them with the same opportunity for a share of the universal service pie that the urban schools in the 77%-79% range are currently receiving.

I would appreciate your prompt attention to these issues and request an official response by Thursday, February 11, 1999. Should you or your staff have any questions, please do not hesitate to contact Kevin Martin on my staff at 418-2000.

Sincerely,

Harold Furchtgott-Roth
Commissioner

[12] Fourth Report and Order, CC Docket No. 96-45, at par. 35.

Separate Statement of Commissioner Gloria Tristani

Re: 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).

I support the substance of the Commission's decision regarding the allocation of funding based on individual percentage discount levels. This result is compelled by the principle already adopted by this Commission that poor schools should be funded before wealthy schools.

Today's decision best comports with common sense as well. If there is a limited amount of money remaining for internal connections, it should be distributed in a manner that results in the greatest educational benefits for the most students. The instant order ensures that, when there is limited funding for internal connections, the poorest schools will be fully funded before moving on to other schools. In my view, it would be illogical to have a rule that could result in a group of schools receiving as little as five or ten percent of the money they requested for internal connections. Such an apportionment of limited funds for internal connections is a recipe for wasted funding. It makes far more sense to ensure that at least some schools get the money they need to install internal connections. Today's order does that.

I wish to register my concern with the views expressed elsewhere that we should encourage Bureau-level decisions over Commission-level decisions on important and novel questions. First, there is disagreement about whether a prior Commission decision expanded the Common Carrier Bureau's authority to address Schools and Libraries issues that exceeds the Bureau's traditional delegated authority. Some say the Bureau has authority to resolve novel School and Libraries questions based on an October 1997 order in which the Commission "included a special delegation of authority to the Bureau to oversee the schools and libraries and rural health care programs."[1] The alternative view is that the October 1997 order fails to grant any additional authority to the Bureau because it does not unambiguously expand the Bureau's longstanding authority to resolve issues under outstanding precedents and guidelines.[2]

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[1] See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service;* Fifth Order on Reconsideration, Eleventh Order on Reconsideration, and Further Notice of Proposed Rulemaking (rel. April 28, 1999)(Separate Statement of Commissioner Susan Ness)(*citing Federal-State Joint Board on Universal Service*, Third Report and Order, 12 FCC Rcd 22485, para. 6 (rel. Oct. 10, 1997)).

[2] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service;* Fifth Order on Reconsideration, Eleventh Order on Reconsideration, and Further Notice of Proposed Rulemaking (rel. April 28, 1999)(Separate Statement of Commissioner Harold Furchtgott-Roth, Dissenting in Part).

Even if the Commission did delegate additional authority to the Bureau in the October 1997 order, it is not clear to me where the dividing line lies between the Bureau's existing authority to resolve issues under outstanding precedents and the purportedly new authority to "oversee" the schools and libraries program. I expect that any undertaking to clarify our existing rules would be done with reference to established Commission principles and precedent.

Second, and perhaps more important than the legal issue, is the practical question of where decisions about the Schools and Libraries Program *should* get made. Some appear to favor a substantial role for the Bureau and a less active role for the full Commission. Those arguments are aimed at maintaining the forward progress of the Schools and Libraries Program by avoiding operational delays that could occur if the Commission micromanaged the Universal Service Administrative Company.

I could not agree more that we need to maintain the operational viability of the program. I have been an unwavering supporter of the program from my first day at the Commission, and I am committed to seeing this program become the success that Congress envisioned in the 1996 Act. And I agree that a variety of questions are appropriately resolved by the Common Carrier Bureau. But there are many questions that, in my view, must be resolved by the full Commission.

Today's decision, for instance, likely will determine whether or not some schools get funding for internal connections in next year's funding cycle. Apart from the legal issue of delegated authority, how could today's decision *not* be made by the full Commission? It would be difficult for me to answer a school principal or a Member of Congress who inquired of me, "Why did X school get no funding for wiring?" under the rule we adopt today. Having cast a vote in favor of today's decision, I take full responsibility for, and am able to defend, the way this rule impacts future applications for funding. It would be a very different matter if today's decision were one in which I did not participate.

I also believe that Congress wants the Chairman and Commissioners actively involved in overseeing the Schools and Libraries Program. Congress manifested this intention when it specifically limited the functioning of USAC to the implementation of FCC rules. Congress, in my view, was expressing a desire for greater accountability for the Schools and Libraries Program. I believe that request is best accommodated by the active involvement of the Chairman and Commissioners on important questions relating to the Schools and Libraries Program.

The order that gives rise to the legal question regarding delegated authority was adopted just weeks before the arrival of four new Commissioners. Given the significant developments surrounding the program since that time, and in light of today's public discussion of these issues, I believe *this* Commission should have the opportunity to put its stamp on the procedures that it will follow in this area.

Finally, I would add my voice to that of Chairman Kennard and Commissioner Ness in

applauding the work of the Common Carrier Bureau on the Schools and Libraries Program. They have done an outstanding job of advising us in this area, and they deserve a great deal of credit for getting this important and multifaceted program off the ground. I look forward to having the Bureau's continued counsel on matters before the Commission and to their handing of issues that are appropriately addressed at the Bureau level.