

ORIGINAL

Washington Association of
Independent Colleges and Universities



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November 19, 1999 **FCC MAIL ROOM**

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas, Secretary
Federal Communications Commissions
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Meeting,
CC Docket No. 96-45

Dear Ms. Sala:

Yesterday I met with Dorothy Attwood, Legal Advisor to the Chairman, Office of the Chairman.

We discussed the eligibility of private non-profit colleges in statewide education networks. We discussed the federal government's language (attached) defining higher education in section 101 (a) of the Higher Education Act of 1965 (20 U.S.C. 1001 (a)). There is a long-standing tradition in the Department of Education and other federal agencies recognizing non-profit higher education as one category, and providing a bright line distinction between this definition of non-profit higher education and the definition of for-profit schools and colleges.

In addition, we discussed communications from members of congress (also attached) supporting the petition, highlighting the unintended effect the implementation rules for the Telecommunications Act of 1996 would have on private non-profit colleges.

For your convenience, I have also attached a copy of the petition. In accordance with Commission Rules, I am submitting two copies of this notice. Kindly stamp the additional return copy provided.

Sincerely,

Violet A. Boyer
President and CEO

Attachments

CC: D. Attwood

No. of Copies rec'd
List ABCDE

* Gonzaga University * Heritage College * Pacific Lutheran University * Saint Martin's College * Seattle Pacific University
* Seattle University * University of Puget Sound * Walla Walla College * Whitman College * Whitworth College

UNITED STATES CODE ANNOTATED

Title 20
Education
§§ 1001 to 1240

1999
Supplementary Pamphlet
Covering Years 1991 to 1998

Replacing 1998 Supplementary Pamphlet

Includes the Laws of the
105th CONGRESS, Second Session (1998)

For close of Notes of Decisions
See page III

For Later Laws and Cases
Consult
USCA
Interim Pamphlet Service



EDUCATION

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- 1142a, 1142b. Repealed.
- 1143, 1144. Repealed.
- 1144a to 1145g. Repealed.
- 1145h. Repealed.
- 1146. Transferred.
- 1146a. Transferred.
- 1147 to 1150. Repealed.

SUBCHAPTER VIII—MISCELLANEOUS

- 1151. Grants to States for workplace and community transition training for incarcerated youth offenders.
- 1152. Grants to combat violent crimes against women on campuses.
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- 1154. Contract authority.
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REFERENCES

ni-

-GENERAL PROVISIONS

ND STATUTORY NOTES

- 30; Pub.L. 93-380, Aug. 21, 1974, 88 Stat. 484;
- 55, Pub.L. 93-644, Jan. 4, 1975, 88 Stat. 2291;
- ct- Pub.L. 94-135, Nov. 28, 1975, 89 Stat. 713;
- 79 Pub.L. 94-482, Oct. 12, 1976, 90 Stat. 2081;
- vt. Pub.L. 95-43, June 15, 1977, 91 Stat. 213;
- 13, Pub.L. 96-49, Aug. 13, 1979, 93 Stat. 351;
- 72, Pub.L. 96-96, Oct. 31, 1979, 93 Stat. 729; Pub.L.
- at. 96-374, Oct. 3, 1980, 94 Stat. 1367; Pub.L.

EDUCATION

97-300, Oct. 13, 1982, 96 Stat. 1322; Pub.L. 98-524, Oct. 19, 1984, 98 Stat. 2435; Pub.L. 99-386, Aug. 22, 1986, 100 Stat. 821; Pub.L. 99-498, Oct. 17, 1986, 100 Stat. 1278; Pub.L. 100-418, Aug. 23, 1988, 102 Stat. 1107; Pub.L. 101-305, May 30, 1990, 104 Stat. 253; Pub.L. 101-610, Nov. 16, 1990, 104 Stat. 3127; Pub.L. 102-54, June 13, 1991, 105 Stat. 267; Pub.L. 102-325, Title I, § 101, July 23, 1992, 106 Stat. 459. Such title is shown herein, however, as having been added by Pub.L. 105-244, Title I, § 101(a), Oct. 7, 1998, 112 Stat. 1585, without

reference to such intervening amendments because of the extensive revision of the title's provisions by Pub.L. 105-244.

Amendments

1998 Amendments. Pub.L. 105-244, Title I, § 101(a), Oct. 7, 1998, 112 Stat. 1585, generally revised this subchapter and substituted "GENERAL PROVISIONS" for "PARTNERSHIPS FOR EDUCATIONAL EXCELLENCE" in the heading.

PART A—DEFINITIONS

HISTORICAL AND STATUTORY NOTES

Codifications

Pub.L. 105-244, Title I, § 101(a), Oct. 7, 1998, 112 Stat. 1585, extensively revised this subchapter which resulted in the omission of the former Part A heading which read "School, College, and University Partnerships".

Amendments

1998 Amendments. Pub.L. 105-244, Title I, § 101(a), Oct. 7, 1998, 112 Stat. 1585, generally

revised this subchapter and substituted "Definitions" for "School, College, and University Partnerships" in part heading.

Pub.L. 102-325, Title I, § 101, July 23, 1992, 106 Stat. 459, extensively revised this subchapter and substituted "School, College, and University Partnerships" for "Program and Planning Grants" in part heading.

CROSS REFERENCES

Confidentiality and disclosure of tax returns and information, see 26 USCA § 6103.

Coordination with School-to-Work Opportunities Act, see 20 USCA § 6143.

Law Enforcement Scholarship Program local applications priority, see 42 USCA § 14117.

Powers and duties of the CEO of the Corporation for National and Community Service, see 42 USCA § 12651d.

§ 1001. General definition of institution of higher education

(a) Institution of higher education

For purposes of this chapter [20 U.S.C.A. § 1001 et seq.], other than subchapter IV [20 U.S.C.A. § 1070 et seq.] and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.], the term "institution of higher education" means an educational institution in any State that—

(1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(2) is legally authorized within such State to provide a program of education beyond secondary education;

(3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) Additional institutions included

For purposes of this chapter [20 U.S.C.A. § 1001 et seq.], other than subchapter IV [20 U.S.C.A. § 1070 et seq.] and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.], the term "institution of higher education" also includes—

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a); and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students persons who are

beyond the age of compulsory school attendance in the State in which the institution is located.

(c) List of accrediting agencies

For purposes of this section and section 1002 of this title, the Secretary shall publish a list of nationally recognized accrediting agencies or associations that the Secretary determines, pursuant to subpart 2 of part G of subchapter IV of this chapter [20 U.S.C.A. § 1099a et seq.], to be reliable authority as to the quality of the education or training offered.

(Pub.L. 89-329, Title I, § 101, as added Pub.L. 105-244, Title I, § 101(a), Oct. 7, 1998, 112 Stat. 1585.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. House Conference Report No. 105-750, see 1998 U.S. Code Cong. and Adm. News, p. 417.

Effective Dates

1998 Acts. Pub.L. 105-244, § 3, Oct. 7, 1998, 112 Stat. 1585, provided that: "Except as otherwise provided in this Act [Pub.L. 105-244, Oct. 7, 1998, 112 Stat. 1581; for complete classification of which, see Tables] or the amendments made by this Act, the amendments made by this Act shall take effect on October 1, 1998."

1992 Acts. Section 2 of Pub.L. 102-325 provided that: "Except as otherwise provided in this Act (20 U.S.C.A. § 1001 et seq.), the amendments made by this Act [see Short Title of 1992 Amendments note set out under this section] shall take effect on October 1, 1992."

1986 Acts. Pub.L. 99-498, § 2, Oct. 17, 1986, 100 Stat. 1277, provided that: "Except as otherwise provided in this Act [see Tables for classification], the amendments made by this Act shall take effect on the date of enactment of this Act [Oct. 17, 1986]."

Prior Provisions

Provisions similar to those comprising this section were contained in section 1141 of this title prior to repeal by sections 101(b) and 702 of Pub.L. 105-244.

A prior section 1001, Pub.L. 89-329, Title I, § 101, as added Pub.L. 102-325, Title I, § 101, July 23, 1992, 106 Stat. 459, which related to encouraging partnerships between State higher education agencies or institutions of higher education and secondary schools serving low-income and disadvantaged students, was omitted in the general revision of this subchapter by Pub.L. 105-244, Title I, § 101(a), Oct. 7, 1998, 112 Stat. 1585.

Another prior section 1001, Pub.L. 89-329, Title I, § 101, as added Pub.L. 99-498, Title I, § 101, Oct. 17, 1986, 100 Stat. 1278, which stated the Congressional findings with respect to postsecondary programs for nontraditional students, was omitted in the general revision of this subchapter by section 101 of Pub.L. 102-325.

Another prior section 1001, Pub.L. 89-329, Title I, § 101, as added Pub.L. 96-374, Title I, § 101(a), Oct. 3, 1980, 94 Stat. 1373, which stated the Congressional findings with respect to continuing postsecondary education program and planning, was omitted in the general revision of this subchapter by section 101 of Pub.L. 102-325.

sion of this subchapter by section 101 of Pub.L. 99-498.

Short Title

1998 Amendments. Pub.L. 105-244, § 1(a), Oct. 7, 1998, 112 Stat. 1581, provided that: "This Act [Pub.L. 105-244, Oct. 7, 1998, 112 Stat. 1581; for complete classification of which, see Tables] may be cited as the 'Higher Education Amendments of 1998.'"

1997 Amendments. Pub.L. 105-78, Title VI, § 609(a), Nov. 13, 1997, 111 Stat. 1522, provided in part that: "This section [amending sections 1078-3, 1087, 1087oo, 1087pp, 1087qq, and 1087vv of this title and enacting provisions set out as notes under sections 1078-3 and 1087h of this title] may be cited as the 'Emergency Student Loan Consolidation Act of 1997.'"

1996 Amendments. Pub.L. 104-208, Div. A, Title I, § 101(e) [Title VI, § 601], Sept. 30, 1996, 110 Stat. 3009-275, provided that: "This title [enacting sections 1087-3, 1087-4, and 1132f-10 of this title, amending sections 1078-3, 1085, and 1087-2 of this title, repealing sections 1087-2, 1087-3, and 1132f to 1132f-9 of this title, and enacting provisions set out as notes under sections 1087-2, and 1078-3 of this title] may be cited as the 'Student Loan Marketing Association Reorganization Act of 1996.'"

1994 Amendments. Pub.L. 103-382, Title III, § 360B(a), Oct. 20, 1994, 108 Stat. 3969, provided that: "This section [amending section 1092 of this title and enacting provisions set out as a note under section 1092 of this title] may be cited as the 'Equity in Athletics Disclosure Act.'"

1993 Amendments. Pub.L. 103-208, § 1(a), Dec. 20, 1993, 107 Stat. 2457, provided that: "This Act [amending sections 1003, 1004, 1047, 1051, 1058, 1059, 1059c, 1062, 1063b, 1065, 1070a, 1070a-11, 1070a-13, 1070a-14, 1070a-21 through 1070a-27, 1070a-51, 1070b-2, 1070b-3, 1070c-2, 1070d-33, 1070d-34, 1070d-37, 1072, 1075, 1077, 1077a, 1078, 1078-1, 1078-3, 1078-6 through 1078-10, 1080a, 1082, 1083, 1085, 1087, 1087-0, 1087-2, 1087c, 1087bb, 1087cc, 1087cc-1, 1087dd through 1087ff, 1087ff, 1087oo through 1087tt, 1087vv, 1088 through 1091, 1091b, 1092, 1092b, 1094, 1096, 1098, 1099a-3, 1099b, 1099c, 1099c-1, 1102d, 1104d, 1104j, 1105d, 1105f, 1106d, 1112e, 1113, 1117a, 1122, 1123, 1125a, 1132b-3, 1132b-4, 1132c-4, 1132c-5, 1132d, 1132d-3, 1132i, 1132i-1, 1132i-2, 1133a, 1133b, 1134, 1134e through 1134j, 1134l, 1134n, 1134p, 1134q, 1134r, 1135a-2, 1135a-11, 1135f, 1136e, 1138a, 1141, 1144a, 1145, 1145d, 1145f, 1145h, 2311a, 2341a

Congress of the United States

Washington, DC 20515

May 3, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th St. SW, Ste. 8B201
Washington, D.C. 20554

Dear Chairman Kennard:

We write to urge your prompt and favorable consideration of Washington state's petition (CC Docket 96-45) pending before you. We also attach a resolution recently passed by the Washington State Legislature urging the same. We are all united behind including independent colleges in the ground-breaking K-20 telecommunications network.

We are not asking that higher education institutions be eligible for the Universal Service discount. Current law precludes colleges (public and private) from participating in the E-rate program. We firmly believe, however, the singular exclusion of private colleges from the telecommunications network is above and beyond the requirements of the law. It is our belief that including independent colleges in the consortia, without penalty to the K-12 participants, will enhance the network. Washington's telecommunications network is on the cutting edge, and clearly the type of activity Congress had in mind when we passed the Telecommunications Act of 1996.

The federal government generally treats eligibility for all qualified higher education institutions the same. Distinctions are not made between public non-profit and private non-profit institutions. Application of this arbitrary distinction for the E-rate program is contrary to federal practice in all other areas.

FCC rules use the example of excluding a commercial bank from the consortia. It is completely understandable to exclude private for-profit entities from benefitting from the consortial arrangement. We urge you to make a distinction between private *for-profit* entities and private *non-profit* entities (such as the rural health providers currently allowed) and colleges.

We hope you will give prompt and careful consideration to the State of Washington's petition.

Sincerely,



The Honorable William Kennard
May 3, 1999
Page Two

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COURTNEY:
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November 24, 1997

The Honorable Michael Powell
Federal Communications Commission
1919 M St., N.W.
Suite 844
Washington, D.C. 20554

Re: Support of Petition for Reconsideration Filed by Washington Department of Information Services in CC Docket No. 96-45

Dear Commissioner Powell:

I am writing to direct your attention to a matter currently pending before the FCC that is of great importance to public and private schools and colleges in Washington state.

In the Telecommunications Act of 1996, Congress provided for subsidies to develop telecommunications and computing infrastructure for schools and libraries. As the implementing rules are currently written, however, it appears that the FCC could deny discounts to schools and libraries that acquire services through consortia, if those consortia buy services at less than a tariffed rate and the consortia include private colleges and other private entities.

These rules put Washington state in a terrible predicament. The state has already invested over \$50 million to design and begin construction of a state-wide network that will link all Washington public universities, community and technical colleges, educational service districts, school districts, public libraries, and private non-profit baccalaureate institutions. This network, known as the "K-20 Educational Telecommunications Network" seeks to create a statewide consortium to obtain economies of scale, reduce costs, and to expand educational opportunities at both public and private educational institutions.

It appears, however, that Washington's educational network is at risk, since by including private colleges, the K-20 network could lose eligibility for universal service discounts and forfeit millions of dollars each year for services directed at public K-12 schools and libraries. In essence, the FCC's current rules force Washington state to choose between sacrificing subsidies it cannot afford to lose, and denying services to private colleges that are a critical part of the state's educational and economic development equation.

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PRINTED ON RECYCLED PAPER

I am aware that the Washington State Department of Information Services filed a petition in CC Docket 96-45 requesting that you reconsider and clarify your rules regarding consortia involving private colleges. I urge your careful consideration of this petition, and underscore my grave concern on this matter.

Sincerely,



Slade Gorton
United States Senator

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

)	
In the Matter of)	
)	CC Docket 96-45
Federal-State Joint Board on)	
Universal Service)	
)	

PETITION FOR RECONSIDERATION

The Washington State Department of Information Services (DIS)(1) seeks reconsideration of the Commission's May 8, 1997, Report and Order (Order) in the above-captioned proceeding as it relates to universal service discounts for schools and libraries which participate in consortia for purchasing telecommunications services. DIS is pleased that the Commission's Order recognizes the importance of state telecommunications consortia in schools' and libraries' technology planning and implementation for educational purposes. However, DIS is concerned that the Order prohibits subsidies to schools and libraries for services provided through consortia which include private non-profit baccalaureate institutions and which receive services at less than tariffed rates. DIS requests that the Commission amend its May 8, 1997, Order, to clarify that schools and libraries may participate in educational network consortia which include private non-profit baccalaureate institutions without losing eligibility for universal services subsidies based on competitively bid rates.

Section 54.501(d) of the Commission's Final Rules states:

(1) For purposes of seeking competitive bids for telecommunications services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with [eligible] health care providers ..., and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives from [an incumbent local exchange carrier] are generally tariffed rates.(2)

Washington State is home to several small and medium-sized private non-profit baccalaureate institutions,(3) which are not "public sector (governmental) entities," and may be considered "ineligible private sector entities" for purposes of this section. As DIS understands this language, the Commission would require that where schools and libraries connect to a statewide educational network the members of which include one or more of these independent baccalaureate institutions, services provided to the consortium must be purchased based on tariffed rates, and may not take advantage of leveraged purchasing or economies of scale which are the very rationale for such consortia.

In addition, the Commission states that state networks are not required to contribute to the universal service fund so long as their services are used for government purposes, including services to public schools and libraries. It states:

government entities that purchase telecommunications services in bulk on behalf of themselves, e.g., state networks for schools and libraries, will not be considered 'other providers of telecommunications' that will be required to contribute [to the universal service fund]. Such government entities would be purchasing services for local or state governments or related agencies. Therefore we find that such government agencies serve only their internal needs and should not be required to contribute.(4)

However, where a "lead participant" which operates its own telecommunications network makes service available to non-governmental agencies, the Commission suggests that it may be deemed a "provider of telecommunications" obligated to pay into the fund. DIS is concerned that this language would require a state-run network which makes service available to private non-profit educational institutions to contribute to the fund, and asks the Commission to clarify that this is not its intent.

The Commission's Order May Adversely Affect Washington State's K-20 Educational Telecommunications Network Project

In its current form, the Commission's language may adversely affect schools and libraries in Washington State. In 1996, the Washington State Legislature established and authorized funding for the "K-20 Educational Telecommunications Network," a statewide high-bandwidth backbone network that will eventually serve each of the state's 296 public K-12 school districts, the technical and community colleges, the public baccalaureate institutions, state and local libraries, as well as private K-12 and baccalaureate institutions. The network will provide opportunities for distance learning, administration, and resource sharing through data transport, Internet and Intranet services, videoconferencing, and satellite-delivered full motion video.(5) During the past year, DIS has been involved in more than 50 competitive bids to acquire services for this statewide consortium. By statute, construction involves at least two phases. Phase 1 of the K-20 network has been completed, and planning and construction of Phase 2, the design of which includes each of the private non-profit baccalaureate institutions identified above, is already underway.

In establishing the network, the Legislature found that "in order to facilitate lifelong learning, educational technology systems must be coordinated among all educational sectors, with other entities of federal, state, and local government, and be readily accessible to the general population of the state. It is the intent of the legislature to make maximum use of a common telecommunications backbone network in building and expanding education technology systems. Therefore, coordinated policy and planning to ensure program quality, interoperability and efficient service delivery are the highest priority of the legislature."(6)

The Commission's eligibility criteria for consortia potentially undermine this project, and place Washington State policy makers in the untenable position of choosing between turning down subsidies for schools and libraries or removing Washington's private non-profit baccalaureate institutions from the network. If the state chooses the former, it stands to lose subsidies that it views as essential for building the network out to high-cost and traditionally underserved areas in a state that is largely rural with many smaller communities located in remote, rugged and mountainous regions. Digital transport leases alone for the K-20 network will exceed \$5 million annually, with

services to eligible libraries and K-12 schools accounting for nearly half of those costs. While the costs achieved through volume purchasing are significantly less than those available to schools and libraries purchasing separately, the potential loss of federal subsidies for these leveraged services may encourage schools and libraries to look elsewhere for services where subsidies apply, thereby undermining the user base on which the project's economies of scale are predicated. To make matters worse, if the state network includes private non-profit institutions, it may become obligated to pay into the universal service fund because it is no longer serving strictly "internal needs." (7)

To choose the latter creates equally significant problems. First, the participation of independent non-profit baccalaureate institutions serves important public purposes by allowing the exchange of educational programs and resources among private and public institutions at all levels. Washington's private colleges have modest endowments at best, and some are located in geographically isolated areas where public higher educational opportunities are limited. (8) These institutions prepare thousands of students each year for jobs in Washington State, and their graduates comprise more than 25 percent of the state's schoolteachers. With regard to these institutions, Washington's legislature has specifically "declare[d] it to be the policy of the state of Washington to enable the building, providing, and utilization of modern, well-equipped, efficient, and reasonably priced higher education facilities, as well as the improvement, expansion, and modernization of such facilities, in a manner that will minimize the capital cost of their construction, financing, and use." (9) The inclusion of independent non-profit baccalaureate institutions in the Washington State K-20 network is clearly consistent with articulated public policy. Second, inclusion of private non-profit baccalaureate institutions allows the state to enjoy larger economies of scale in the purchasing and utilization of information infrastructure for services provided to public entities. Inclusion of these entities increases the size of the "market basket," putting the state in a stronger position as a volume purchaser. Where goods and services can be shared, allowing costs to be apportioned among a larger consortium results in lower unit costs for all participants. To remove the private non-profit institutions from the K-20 Educational Network Project disserves the public interest.

The Commission's Justifications for Restricting Private Entities Do Not Apply To Private Non-Profit Colleges and Universities

The Commission's position requiring tariffed rates for consortia which include private sector entities lacks a compelling justification when applied to independent non-profit colleges and universities. The Commission states that it looks "to ineligible schools and libraries to assume leadership roles in network planning and implementation for educational purposes," and "encourage[s] universities and other repositories of information to make their online facilities available to other schools and libraries." (10) Indeed, it recognizes the benefits of collaboration among eligible schools and libraries and private educational entities, saying, "eligible schools and libraries will be eligible for discounts on any dedicated lines they purchase to connect themselves to card catalogues or databases of research materials maintained by religious institutions, and any art or related materials maintained by private museum archives. Connections between eligible and ineligible institutions can be purchased by an eligible institution subject to the discount as long as the connection is used for the educational purposes of the eligible institution." (11)

It is curious that the Commission should allow connections between eligible schools and libraries and ineligible private colleges and universities, yet restrict the use of such connections only to the eligible schools and libraries, and not to the private colleges connected. First, this is an inefficient use of resources in that it requires the private schools to unnecessarily duplicate costly infrastructure for their own use while denying public entities the larger economies of scale that come with volume

purchasing. Second, as discussed below, the Commission's apparent rationale for discouraging participation by private non-profit entities -- i.e., that it wanted to avoid allowing public consortia to act as resellers to the private sector -- is not warranted in the case of private colleges.

Last year, the Federal-State Joint Board on Universal Service recommended that schools and libraries be permitted "to aggregate with local customers, such as health care providers, community colleges, or commercial banks," even though aggregation of public and private entities may raise administrative difficulties in enforcing eligibility and resale limitations imposed by Congress. In the Joint Board's view, "the benefits of such aggregation outweigh the administrative difficulties."⁽¹²⁾ However, the Commission declined to accept this recommendation, expressing its concern that "permitting large private sector firms to join with eligible schools and libraries to seek prices below tariffed rates could compromise both the federal and state policies of non-discriminatory pricing."⁽¹³⁾ Instead, it held that schools and libraries will be eligible for universal service discounts and prices below tariffed rates "only if any consortia they join include only other eligible schools and libraries, rural health care providers, and public sector (governmental) customers."⁽¹⁴⁾

While DIS understands and accepts the Commission's position with regard to "commercial banks" and other for-profit entities, DIS questions whether the federal and state prohibitions on discriminatory pricing need apply with regard to non-profit educational institutions that attach to state government networks. First, 47 U.S.C. sec. 202, which prohibits price discrimination for like services, leaves the Commission some discretion in determining whether differences in prices among services are "undue or unreasonable." See, e.g., Associated Press v. F.C.C., 452 F.2d 1290 (D.C. Cir., 1971); National Association of Regulatory Utility Commissioners v. F.C.C., 737 F.2d 1095 (D.C. Cir.), cert. denied, 469 U.S. 1224, 1225 (1984). Indeed, the Commission's discussion in this proceeding has focused on the use of educational consortia to provide telecommunications services to for-profit private sector entities, i.e., the use of consortia by "large private sector firms"⁽¹⁵⁾ or a "for-profit business."⁽¹⁶⁾ Where the entities included in the consortia are not for-profit businesses but private non-profit educational institutions serving important public purposes identified by state statute, the considerations underlying the resale prohibition are different. In such cases, the private colleges are more akin to "related agencies" for which the state network administrators are not deemed to be "providers of telecommunications" for purposes of universal service fund contributions.⁽¹⁷⁾

In this regard, it is significant that Congress did not exclude private K-12 schools from the universal service subsidies. The Commission has pointed out that both public and non-public elementary and secondary schools are eligible for subsidies so long as they meet the statutory definition of an elementary or secondary school found in the Elementary and Secondary Education Act of 1965, do not operate as a for-profit business, and do not have an endowment of more \$50 million.⁽¹⁸⁾ It is inconceivable that Congress would have intended to allow private K-12 schools to enjoy federal subsidies, while denying private institutions of higher education even the ability to join in educational consortia to leverage the costs of telecommunications services.

Similarly, at the state level, it is unlikely that non-discriminatory pricing statutes would create an impediment to allowing private colleges to enjoy economies of scale by joining consortia with public educational institutions. Although the Legislature made clear that the Washington Utilities and Transportation Commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates the non-discrimination provision contained in state statute,⁽¹⁹⁾ the provision does not necessarily apply to competitively-bid services. In any event, the Washington State Legislature also specifically directed that the K-20 Educational

Telecommunications Network would extend the benefits of leveraged purchasing and coordinated planning – in other words, costs below tariffed rates -- to private non-profit baccalaureate institutions.(20)

DIS stresses that by allowing eligible schools and libraries to receive subsidies based on below-tariffed rates for services provided through the K-20 Educational Network in Washington, the Commission would not be directing federal tax dollars to subsidize private colleges or any other ineligible entity, either directly or indirectly. The network administrators will, as the Commission requires, "keep and retain careful records of how they have allocated the costs of shared facilities in order to charge eligible schools and libraries the appropriate amounts."(21) Nor will the inclusion of private colleges in Washington – as opposed to including "large private sector firms" -- significantly affect the private telecommunications companies' customer base or business opportunities. Digital transport services for the network are provided almost entirely by private companies through competitively bid contracts. The modest budgets of the private colleges in many cases preclude their acquisition of advanced telecommunications services except through a consortium that allows leveraged purchasing. The K-20 Educational Telecommunications Network allows aggregation of demand among private colleges where no demand may have existed before.

Conclusion

For the reasons set forth above, DIS asks the Commission to amend Section 54.501 of its final rules to allow eligible schools and libraries to participate in consortia which include private non-profit baccalaureate institutions without denying these consortia the benefits of leveraged purchasing at below tariffed rates. It also asks that the Commission amend paragraph 800 of its Order to clarify that state networks which provide services to private non-profit educational institutions are not required to contribute to the universal service fund. These amendments will serve the public interest by allowing public schools and entities to enjoy larger economies of scale while providing private colleges access to needed infrastructure and services. For Washington State in particular, these amendments will allow DIS to fulfill its legislative mandates to provide services to all higher education institutions in the state.

Respectfully submitted,

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Footnotes

(1) DIS is a cabinet-level Washington State agency responsible for providing computing and telecommunications services to state agencies and local governments, and for developing policies to promote the efficient use of information technology within Washington State. DIS operates pursuant to Rev. Code Wash. 43.105. Among its numerous activities, DIS convenes and provides staff support

to the K-20 Educational Telecommunications Network project, a statewide consortium created by the state legislature in 1996 to provide cost-effective advanced telecommunications services to K-12 schools, public and private colleges and universities, and libraries. This project is discussed more fully below.

(2) The Telecommunications Act of 1996 defines "incumbent local exchange carrier" as meaning "with respect to an area, the local exchange area that, (A) on the date of enactment [of the Act], provided telephone exchange service, and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to [47 C.F.R. 69.601(b)], or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign to a member described in clause (i)." Many of the transport services for the K-20 Educational Telecommunications Network are provided by "incumbent local exchange carriers."

(3) These include Antioch University, Bastyr University, City University, Cornish College of the Arts, Gonzaga University, Heritage College, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College. The state Higher Education Coordinating Board has identified these institutions as eligible for student financial aid.

(4) Order, at para. 800.

(5) Information about the K-20 Educational Telecommunications Network is available on the Internet at <http://www.wa.gov/dis/k-20topc>.

(6) E2SSB 6705, Sec. 1. (1996), codified at Rev. Code. Wash. Sec. 28D.02 (1996).

(7) Order, at para. 800.

(8) Heritage College, for example, sits within the Yakima Indian Reservation. Its director was recently recognized with a MacArthur grant for her work providing educational opportunities to Native Americans in central Washington.

(9) Rev. Code Wash. 28B.07.010.

(10) Order, at para. 562.

(11) Id.

(12) In the Matter of Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket 96-45 (Nov. 8, 1997), at para. 537.

(13) Order, at para. 477.

(14) Id. at para. 478. The Commission continued, "Eligible schools and libraries participating in consortia that ineligible private sector members will not be eligible to receive universal service discounts unless the pre-discount prices of any interstate services that such consortia receive from [incumbent local exchange carriers] are generally tariffed rates. We conclude that this approach satisfies both the purpose and the intent of the Joint Board's recommendation because it should allow the consortia containing eligible schools and libraries to aggregate sufficient demand to influence

existing carriers to lower their prices and should promote efficient use of shared facilities. This approach that state laws may differ from federal law with respect to non-discriminatory pricing requirements. We also recognize, however, that should states so choose, they may impose the same structures as detailed herein, on the basis of similar policies at the state level." Id.

(15) Order, at para. 477.

(16) 47 U.S.C. Sec. 254(h)(4).

(17) Order, at para. 800.

(18) FCC Public Notice DA-97-1374 (released July 2, 1997), p.1.

(19) Rev. Code Wash. 80.36.130, 80.36.180 (1996).

(20) Rev. Code Wash. 28D.02.070 (1996).

(21) Order, at para. 569.

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