

**Before  
the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Requests for Review of Decisions of the	)	
Universal Service Administrator by	)	
Hancock County School District	)	File Nos. SLD-459271, <i>et al.</i>
New Cumberland, West Virginia, <i>et al.</i>	)	
	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

**PETITION FOR RECONSIDERATION, or ALTERNATIVELY A WAIVER**

Hancock County School District, Holgate School District, Mel Blount Youth Home, and Pleasants County School District (Petitioners) file this Petition for Reconsideration of the Order of October 20, 2009, DA 09-2247, (Order).<sup>1</sup>

The Order, DA 09-2247, denied applications for discounted telecommunications services under the schools and libraries universal support mechanism because the applicants' did not purchase the services at issue, specifically cellular services and paging services from common carriers.

**Bases of the Petition for Reconsideration, or Alternatively a Waiver**

**I. The Order Violates the Telecommunications Act of 1996**

The Order is unreasonable and unlawful, and in violation of the Telecommunications Act of 1996 (Act), as it amended the *Communications Act of 1934*, 47 U.S.C. 151, *et seq.*

The Act provides, in relevant part, for competition in the "provision of telecommunications service." *Title IV, Regulatory Reform, Sec 410.* The thrust of Title IV is that "the Commission shall forebear from applying any regulation or any provision of this Act to \*\*\*telecommunications service, or

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<sup>1</sup> This Petition is filed only on behalf of Hancock County School District, Holgate School District, Mel Blount Youth Home, and Pleasants County School District.

class of telecommunications carriers or telecommunications services\*\*\*\*

Since the Order denies Petitioners from benefiting from competition for discounted telecommunications services under the schools and libraries universal support mechanism the Order violates the Act.

But that's not the only violation of the Act. To begin, the Act sets forth the following definitions relevant to the Order:

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(43) Telecommunications: \*\*\* "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

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(46) Telecommunications service: \*\*\* "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

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(49) Telecommunications Carrier: \*\*\*\*'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services \*\*\*. A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

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Sec. 101. Establishment of Part II of Title II.

a) Amendment- Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part:

(b) Obligations of All Local Exchange Carriers- Each local exchange carrier has the following duties:

1) Resale- The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

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PART II--Development of Competitive Markets Sec. 254. Universal Service.

(a) Procedures to Review Universal Service Requirements-

(b) Universal Service Principles- \*\*\*the Commission shall base policies for the preservation and advancement of universal service on the following principles:

1) Quality and Rates- Quality services should be available at just, reasonable, and affordable rates.

(c) Definition- (1) In General- Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--A) are essential to education, public health, or public safety; \*\*\* (C) are being deployed in public telecommunications networks by telecommunications carriers; and D) are consistent with the public interest, convenience, and necessity.

\*\*\*

(B) Educational Providers and Libraries: All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. \*\*\*

\*\*\*

(a) Elimination of Barriers: \*\*\*the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act \*\*\*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services. b) National Policy- In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological

advancement, and promotion of the public interest, convenience, and necessity. [emphases added]

**The Order violates the Act because:**

- i. The "service" purchased by Petitioners fits the definition of "Telecommunications" under the Act;
- ii. The Petitioners purchased "Telecommunications Services" from its "resale vendors" as defined by the Act;
- iii. Petitioners' vendors fit the definition of "Telecommunications Carriers" as under the Act; actually, the Act states that a "telecommunications carrier" shall be treated as common carrier;
- iv. The Act established an affirmative duty upon the FCC to promote resale of telecommunications services (ALL telecommunications services) because it enhanced competition in the telecom industry; the FCC is charged with neither prohibiting nor imposing unreasonable or discriminatory conditions on resale;
- v. The Act charged the FCC with eliminating market entry barriers; interestingly, the Order imposes a barrier upon the petitioners vendors because the vendors cannot provide discounted telecommunications services under the schools and libraries universal support mechanism;
- vi. The Act specifically states that the "ability of the K-12 classrooms, libraries \*\*\*to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. \*\*\*[this] will help open new worlds of knowledge, learning and education to all Americans-rich and poor, rural and urban." *Conference Report 104-230, Report to accompany S .652, pgs. 132-133* The Order is counter to this Congressional directive; and,
- vii. The Act "requires that any telecommunications carrier shall, upon bona fide request, provide services for educational purposes included in the definition of universal service\*\*\*for elementary and secondary schools and libraries at rates that are less than the amounts charged for similar services to other parties\*\*\*" *Conference Report 104-230, Report to accompany S*

.652, pgs. 132-133 The Order is counter to this Congressional directive.

- viii. The Act imposed an affirmative duty on this Commission to not only promote the resale of telecommunications services but to also eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services

The FCC'S position on whether schools and libraries may purchase cellular/paging telecommunications services, like the ones that sold telecommunications services to Petitioners, is set forth in its *Report and Order, FCC 97-157, Rel May 8, 1997.*

We adopt the \*\*\* recommendation\*\*\*to provide schools and libraries with the maximum flexibility to purchase from telecommunications carriers<sup>2</sup> whatever package of commercially available telecommunications services<sup>3</sup> they believe will meet their telecommunications service needs most effectively and efficiently. We also agree with the Ohio PUC and DOE that our actions should not disadvantage schools and libraries in states that have already aggressively invested in telecommunications technologies in their state schools and libraries. *Id.* 431, 432

A footnote states that:

Congress imposed no limits whatsoever on the telecommunications services for which eligible schools and libraries could arrange to receive discounts. We see no reason for limiting the nature of the telecommunications services \*\*\*\* or the role they play in the operations of the institution. Eligible schools and libraries are equally free to obtain support under section 254(h)(1)(B) for plain old telephone service (POTS) lines to enable teachers to receive calls in the classroom, ISDN services that connect classroom

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<sup>2</sup> "(49)Telecommunications Carrier: \*\*\*\*'telecommunications carrier' [is] any provider of telecommunications services, \*\*\*\*"

<sup>3</sup> "(46) Telecommunications service: \*\*\*\*'telecommunications service' [is] the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

and library computers with information services, private lines for connecting two school libraries to each other, or paging services to enable school security officials promptly to respond to hallway disturbances. *Id.*, Para. 432, Footnote 1117

Any confusion about what is fundable was resolved when the *Report and Order, FCC 97-157*, stated:

We reject SBC's arguments that authorizing discounts for all telecommunications services would be "arbitrary, unreasonable, and otherwise unlawful," and would abdicate our responsibility to select a single set of services for schools and libraries. We limit section 254(c)(3) telecommunications services to those that are commercially available, and we find no reason to interpret section 254(c)(3) to require us to adopt a more narrow definition of eligible services. We also reject New York DPS's assertion that our approach limits state flexibility to adopt intrastate programs. We observe that a state preferring a program that targets a narrower or broader set of services may make state funds available to schools or libraries that purchase those services. *Id.* at Para. 434.

And, regarding cellular service, this Commission concluded:

\*\*\* that these support mechanisms will enhance access to advanced telecommunications and information services for all public and nonprofit health care providers in a competitively neutral, technically feasible, and economically reasonable way, \*\*\* these support mechanisms are competitively neutral, because, **as with schools and libraries**, health care providers may request wireline or wireless telecommunications links -- **including cellular** and satellite -- at local calling rates to obtain access to an Internet service provider. *Id.* at Para 748

Consistent with the Act, *Report and Order, FCC 97-157*, focus is clearly telecommunications services [cellular/paging] regardless of whether such services are provided by a "common carrier."<sup>4</sup>

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<sup>4</sup> Under the Act a telecommunications carrier, like the Petitioners' vendors, shall be treated as a common carrier\*\*\*to the extent that Petitioners are engaged in providing telecommunications services. *Act, Sec. 3 Definitions, Conference Report 104-230, Report to accompany S .652,pg.5-6*

A requirement that cellular/paging service be provided ONLY by common carriers in order for schools libraries to participate in e-rate is contrary to the letter and intent of the Act and contrary to the historical position of this Commission; this Commission has long favored competition in the telecom industry markets, including the resale of telecom products and services. It is unreasonable to now say that the FCC does not favor competition (low prices) in e-rate.

The thrust and purpose of the relevant parts of the Act is to foster competition in the telecommunications market, **and to foster competition in the E-rate program.** This includes the cellular and paging services since they are telecommunications services. However, the Order herein **denies competition by not providing E-rate funds for the most cost effective providers of the services at issue when they are purchased from resellers.**

The Order, which is pursuant to 47 C.F.R. Sections 54.501(a) 54.503, 54.517(b), does not promote competition in the sale of cellular and paging services in the telecommunications market because it prevents petitioners from obtaining E-rate discounts for cellular and paging services provided by resellers of those services. The FCC's rule states clearly that cellular and paging service may only be purchased from a telecommunications carrier, not a reseller. *Order, Para 3*

While the FCC mandates that Petitioners select the most cost effective providers in order to qualify for Universal Service Fund (E-rate) discounts, the reality is that Petitioners are prevented from selecting the most cost effective cellular/pager provider where the most cost effective provider is a reseller of those services. And this is in direct conflict with the Act.

Each Petitioner that seeks Reconsideration here selected the most cost effective provider. This was required under the FCC's own mandate that E-rate applicants not engage in "waste, fraud, or abuse." By denying Petitioners access to cellular and paging services, the financial integrity of the funds is impacted because the Petitioners' vendors had the lowest cost based on the USAC's guidelines.

The following table is the USAC's criteria<sup>5</sup> for constructing a cost-effective evaluation of service providers. This was the criteria followed by the Petitioners.

Factor	Weight
Price of the ELIGIBLE goods and services	30%
Prior experience	25%
Personnel qualifications	20%
Management capability	15%
Environmental objectives	10%
Total	100%

There is nothing to indicate that Petitioners request was anything other than a bona fide **application** for services to be used for educational purposes. 47 U.S.C. § 254(h)(1)(B). The entire purpose of section 254(h) of the Act is **to ensure** that all eligible schools and libraries **who apply for Universal Service aid** receive discounts of between 20 and 90 percent on **all telecommunications services**\*\*\*\*" CC Docket 96-45 J-3 Para 9, [http://www.e-ratecentral.com/FCC/fcc\\_96J-3.pdf](http://www.e-ratecentral.com/FCC/fcc_96J-3.pdf)

## II. The Order Violates the Resale of Cellular/Paging Service Policies and practices of the Federal Communications Commission

While the Order places great emphases on the lack of Common Carrier status of the Petitioners, the term common carrier has been so severely eviscerated by the FCC's own policies that it is meaningless in the context of the Order. If the term common carrier, as used in the Order, means the absence of regulation [via filed tariffs] of Petitioners by the FCC, the Order is unreasonable because "it has long been recognized that "[a]s a practical matter, \*\*\*if AT&T were regulated, no one else could charge more and stay in the market, so, in effect all were regulated. *Communications Law and Practice, Hamburg and Bratman, Section 4-04[2][b]*

<sup>5</sup> <http://www.universalservice.org/sl/applicants/step04/construct-evaluation.aspx>

Said differently, if major common carriers of cellular/paging services are regulated no one else could charge more and stay in the market, then Petitioners are regulated. Id. It is the FCC's stated position to encourage competition in the "wireless" telecommunications marketplace. <http://wireless.fcc.gov/index.htm?job=scpd>

There is no question that this Commission has jurisdiction over telecommunications services, including cellular services/paging services. Further, the Commission can choose to regulate the sale **and or resale of all telecommunications services, and in fact has done so as previously stated.**

This Commission's policy to promote competition in all phases of the Telecommunications market is obvious.

The Common Carrier Bureau of the FCC, which regulates rates, has grown rapidly since 1970. Much of this regulatory growth, ironically, is attributable to increased FCC efforts to promote competition, through regulation of new services and technologies. In 1970, the Bureau's Washington D.C. staff numbered 131 of a total FCC staff of 1,098, roughly 27%; in 1989, Common Carrier Bureau staff numbered 297 of a total staff of 1,236, or 24%. Similarly, the Common Carrier Bureau's 1970 budget of \$2.6 million was 10.57% of the Commission's \$24.6 million total budget; the 1989 Bureau budget of \$21.3 million was 21.47% of the Commission's budget. Communications Law and Practice, Hamburg and Bratman, Section 4-43[g]

Over a series of decisions begun in 1979, the FCC reinterpreted the Communications Act from the perspective of the modern telecommunications industry. The Commission shifted regulatory policy from a statutory focus to a competitive impact focus. Communications Law and Practice, Hamburg and Bratman, Section 404 [2] [a][emphases added]

Therefore, competition in all phases of the telecommunications market has been uppermost in the FCC's mind. However, the instant Order runs *contra* to that mindset. To not permit the Petitioners to purchase cellular/paging service from resellers (and is not in the best interest of the Universal Service Fund) is to deny them access to **the most** cost effective cellular/paging services.

The Order is contrary to the Commission's objective that applicant's choose the most cost effective provider of fundable services.

The Order means that even if the Petitioners selected the most cost effective cellular/paging provider, they would not be able to receive USF funds if that provider were a reseller of telecom service. This is totally unreasonable.

In 1974, the FCC considered limiting cellular service provision to established telephone companies. According to the Commission's inquiry, "the wireline carriers are the only organizations which have demonstrated that they possess the resources and expertise necessary to establish cellular systems which would have nation wide compatibility." The Commission soon changed its mind, however, deciding the next year **to permit non wireline providers into cellular system markets.**

At the time, the Commission planned to license only one non wireline per market. In 1981, however, the Commission decided to license two systems for every cellular service area, explaining that competition "will foster important public benefits of diversity of technology service and price, which should not be sacrificed absent some compelling reason. An *Inquiry into the Use of Bands 825-845 MHz and 890-890 MHz for Cellular Communications Systems* 86 F.C.C. 2d 4 69, 478 (1981)

The Commission decided on June 12, 1996, to: facilitate the growth of wireless telecommunications services and stimulate competition among providers of cellular, broadband personal communications (PCS) and covered specialized mobile radio (SMR) services, the Commission acted today to prohibit them from unreasonably restricting the resale of their services. *DC 96-53, Resale Obligations*

For purposes of competition, this Commission decided to promote the resale of cellular service; to make cellular service available to the mass public via its authority to prohibit "common carriers" from unreasonably restricting the resale of their services. That is, via competition, the FCC would drive prices down and prevent a monopoly of the provision of cellular services, except to schools and libraries that applied for e-rate funds. *DA 96-1245(1996)* Said differently, the general public can take advantage of competition by purchasing cellular service from resellers, but schools and libraries cannot **in the context of the E-rate program**. Nevertheless, this is not what congress intended by passing the Act.

### III. Waiver

**Alternatively, a waiver is an appropriate remedy in these circumstances.** It is unreasonable to rule that cellular and paging services cannot be purchased from resellers of those services by schools/libraries with universal service funds **if resellers are offering the most cost efficient version of those services.**

Cellular and paging services are telecommunications services that this Commission has the statutory authority to regulate but for forbearance. Comparatively speaking, this Commission has ruled that the provision of *internal connections* are telecommunications services and schools and libraries may purchase these services and hardware even though the providers need not be so called "common carriers". Apparently, the policy in that arena is to foster competition. Internal connections providers do not contribute to the universal service fund.

**For e-rate purposes, to grant a waiver to Petitioners would promote greater competition and more cost efficient choices in the cellular and paging markets.**

#### **Conclusion**

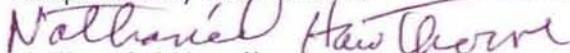
**Congress intended, by passage of the Act, to make state of the art telecommunications services available to schools at discount rates for educational purposes.** The Order violates the intent, purpose, spirit and the language of the Act.

Congressional intent under the Act is clear; that is, make low cost telecommunications services available to schools and libraries *via* resale regardless of whether the FCC has chosen to fore bare regulation of that service. **To make cellular and paging services available to schools and libraries *via* resellers is in keeping with Congressional intent under the Act.**

#### **Specific Relief Requested:**

**Petitioners ask that all cellular/paging services that are the subject matter of this Petition be funded in full.**

Respectfully submitted,

  
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