

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

In the Matter of
Federal-State Joint Board on
Universal Service
CC Docket No. 96-45

FIFTH ORDER ON RECONSIDERATION and FOURTH REPORT AND ORDER
IN CC DOCKET NO. 96-45

Adopted: June 12, 1998

Released: June 22, 1998

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

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I. INTRODUCTION

1. In this Order, we reconsider, on our own motion, the Commission's decision regarding the funding year for the schools and libraries universal service support mechanism. We conclude that it is in the public interest to change the funding year for the schools and libraries universal service support mechanism from a calendar year cycle (January 1 -December 31) to a fiscal year cycle (July 1 - June 30). Moreover, we conclude that the transition to a fiscal year approach should be implemented immediately. Applications submitted during the initial 75-day filing window and approved for funding will, therefore, be funded through June 30, 1999, within the funding limitations adopted herein.

2. In this Order, we also reconsider, on our own motion, the Commission's decisions governing the amount of money that may be collected during the second six months of 1998 and the first six months of 1999 for the federal universal service support mechanisms for schools, libraries, and rural health care providers.¹ For the reasons set forth below, we find that we should modify the collection rate for the schools and libraries and rural health care support mechanisms for the third and fourth quarters of 1998 and the first and second quarters of 1999. We do not

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).

revise the annual caps adopted in the *Universal Service Order*.² Rather, we adjust the maximum amounts that may be collected and spent during 1998 and the first six months of 1999.

3. In this Order, we direct the Universal Service Administrative Company (USAC)³ to collect only as much money as is required by demand, but in no event more than \$25 million per quarter for the third and fourth quarters of 1998 to support the rural health care universal service support mechanism, and no more than \$325 million per quarter for the third and fourth quarters of 1998 and the first and second quarters of 1999 to support the schools and libraries universal service support mechanism. Furthermore, we direct the administrative corporations (USAC, the Schools and Libraries Corporation, and the Rural Health Care Corporation) neither

² See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 9002, 9054-62, 9139-45 (1997) (*Universal Service Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); 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, *Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 18400 (1997) (*NECA Report and Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12444 (1997); Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 97-160, *Third Report and Order*, 12 FCC Rcd 22485 (1997) (*Third Report and Order*), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket No. 97-21, *Report and Order and Second Order on Reconsideration in CC Docket 97-21*, 12 FCC Rcd 22423 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-24, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997) (*Third Reconsideration Order*); 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, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, *Fourth Order on Reconsideration*, 13 FCC Rcd 5318 (1997) (*Fourth Reconsideration Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998), *appeal pending in Alenco Communications, Inc., et al. v. FCC and USA*, No. 98-60213 (5th Cir. 1998).

³ In the *NECA Report and Order*, the Commission established the administrative structure of the federal universal service support mechanisms, directing the National Exchange Carrier Association (NECA), as a condition of becoming temporary administrator of universal service, to create the Universal Service Administrative Company, the Rural Health Care Corporation, and the Schools and Libraries Corporation. *NECA Report and Order*, 12 FCC Rcd 18402. Among other functions, USAC collects funds from contributors and disburses those funds in accordance with the instructions of RHCC and SLC. 47 C.F.R. § 69.616. RHCC and SLC, in contrast, collect requests for support from applicants, commit funds to applicants, and monitor demand to ensure that the support mechanisms' annual monetary caps are not exceeded. 47 C.F.R. § 69.618-.619. We have directed USAC, RHCC, and SLC to prepare and submit a joint plan of reorganization for approval by the Commission. See Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, *Report to Congress*, FCC 98-85 at 7, para. 10 (rel. May 8, 1998) (*May 8 Report*).

to commit nor disburse more than \$100 million during 1998 for the rural health care support mechanism, or more than \$1.925 billion for the schools and libraries support mechanism during 1998 and the first two quarters of 1999. Although these revised collection rates will not fully satisfy the estimated support requested by schools and libraries, we anticipate that the collection rates will ensure full support for telecommunications services and Internet access, and will also provide support for internal connections for the neediest applicants.

4. Consistent with this decision and in response to commenters' suggestions,⁴ we also adopt new rules of priority for the schools and libraries mechanism to ensure further that schools and libraries with the greatest level of economic disadvantage will have priority for support and will receive the level of support established in the *Universal Service Order*.⁵ In addition, we adopt a rule to pro-rate the distribution of support to health care providers if demand by health care providers exceeds the total fund allocated for a given funding year. Our decisions in this Order minimize burdens on subscribers, provide substantial support to schools, libraries, and health care providers, and enhance the Commission's previous efforts to ensure that the most disadvantaged schools and libraries receive funding priority.

5. In this Order, we also reconsider, consistent with the will of Congress, the level of compensation for the officers and employees of the Schools and Libraries Corporation (SLC) and the Rural Health Care Corporation (RHCC). We conclude that, as a condition of its continued

⁴ See Great City Schools comments at 4 (proposing priority rules that would permit full funding for schools and libraries eligible for 80 percent and 90 percent discounts and a proportional scale back of discounts for all other eligible schools and libraries). See also Anchorage School Dist. Sept. 10 Public Notice comments at 1 (stating that, if sufficient funds are not available to meet all approved applications in subsequent filing periods, the Commission should apply an equal percentage reduction to all approved applicants during period); Mississippi Council for Ed. Tech. Sept. 10 Public Notice comments at 4 (asserting that funds should be available first to the most disadvantaged schools and libraries); Montana School Boards Ass'n Sept. 10 Public Notice comments at 3 (supporting a mechanism similar to the rules of priority should be applied to all funds, not just \$250 million); New York City Dept. of IT&T Sept. 10 Public Notice comments at 3 (stating that, if funds are exhausted within the window filing period, distribution of funds should be subject to a pro-rata reduction based on economic disadvantage, obviating need of a \$250 million trigger); New York Pub. Library Sept. 10 Public Notice comments at 1 (advocating a filing window and pro-rata allocation of funds when only \$500 million remains for the year). But see RUPRI comments at 3-4 (stating that sole reliance on poverty and urban/rural status is not the proper approach, but emphasis should be on total relative price after discount); Colorado Dept. of Ed. Sept. 10 Public Notice comments at 2 (opposing any proposal that limits the funds available to schools and libraries in the first six months because the Commission has chosen to collect only \$1 billion in the first six months); DataCast Sept. 10 Public Notice comments at 2 (favoring rules of priority that allocate 1/4 of all funds to rural, high cost schools and take into account "relative economic advantage" in allocating support); Illinois State Board of Dirs. Sept. 10 Public Notice comments at 10-12 (favoring granting states greater authority in implementing rules of priority, favors granting priority to schools with the least amount of infrastructure, and favoring a higher trigger level because current 10 percent trigger represents insufficient funds); Maine Dept. of Ed. Sept. 10 Public Notice comments at 2 (favoring allocation of support according to the Technology Literacy Challenge Grants formula).

⁵ See generally *Universal Service Order*, 12 FCC Rcd 8776 et seq..

service, the Administrator must compensate all officers and employees of the two independent corporations at an annual rate of pay, including any non-regular payments, bonuses, or other compensation, that does not exceed the rate of basic pay in effect for level I of the Executive Schedule under section 5312 of Title 5 of the United States Code.⁶ This rule will take effect on July 1, 1998. Finally, we reconsider, on our own motion, section 54.709 of the Commission's rules, which governs the date on which proposed universal service contribution factors become effective and eliminates the requirement that proposed contribution factors be published in the Federal Register. We conclude that, in the absence of further Commission action, the proposed contribution factors set forth in a Public Notice will be deemed approved 14 days after release of the Public Notice in which they are announced.

II. ADJUSTMENT IN FUNDING YEAR FOR SCHOOLS AND LIBRARIES SUPPORT MECHANISM

A. BACKGROUND

6. In the *Universal Service Order*, the Commission, among other things, established the federal universal service support mechanism for schools and libraries.⁷ Consistent with the recommendations of the Federal-State Joint Board on Universal Service (Joint Board), the Commission concluded that all telecommunications services, Internet access, and internal connections would be provided at discounts ranging from 20 percent to 90 percent to eligible schools and libraries.⁸ The Commission took these actions pursuant to and consistent with section 254 of the Communications Act, as amended by the Telecommunications Act of 1996,⁹ and its accompanying legislative history.¹⁰ For example, Congress explained that "[n]ew subsection (h) of Section 254 is intended to ensure that . . . elementary and secondary school *classrooms* and libraries have affordable *access* to modern telecommunications services."¹¹ Congress further stated that "[t]he ability of K-12 [kindergarten to 12th grade] *classrooms*, [and]

⁶ That pay rate is currently capped at \$151,800. See Exec. Order No. 13,071, 62 Fed. Reg. 68,521 (1997).

⁷ *Universal Service Order*, 12 FCC Rcd at 9002-92.

⁸ *Universal Service Order*, 12 FCC Rcd at 9002.

⁹ Section 254 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), codified at 47 U.S.C. §§ 151 et seq. (Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.) The 1996 Act amended the Communications Act of 1934 (the Act).

¹⁰ See, e.g., S. Rep. No. 230, 104th Cong., 2d Sess. 131 (1996) (Joint Explanatory Statement).

¹¹ Joint Explanatory Statement at 132.

libraries . . . to obtain *access* to advanced telecommunications services is critical to ensuring that these services are available on a universal basis."¹²

7. In the *Universal Service Order*, the Commission concluded that the funding year for schools and libraries would be the calendar year, and that applications for support would be accepted beginning on July 1 for the following year.¹³ Schools and libraries are required to reapply for universal service support each year.¹⁴ Moreover, for the first year of the support mechanism only, the Commission stated that requests for support would be accepted as soon as the schools and libraries website was opened and the applications were available.¹⁵ In the *Third Report and Order*, the Commission adopted a filing window that would give equal funding priority to all schools, libraries, and health care providers filing during that window period and directed SLC and RHCC to determine the length of their filing windows.¹⁶ Consistent with Commission direction, SLC adopted a filing window of 75 days,¹⁷ which opened on January 30, 1998 and closed on April 15, 1998.¹⁸

B. DISCUSSION

8. Upon reconsideration on our own motion, we find that it is in the public interest to change the funding year for the schools and libraries universal service support mechanism from a calendar year cycle (January 1 - December 31) to a fiscal year cycle that will run from July 1 - June 30. Moreover, we conclude that the transition to a fiscal year should be implemented immediately. In order to accommodate the transition to a fiscal year funding cycle, the first funding period will be the 18-month period that runs from January 1, 1998 through June 30, 1999. The second funding cycle, therefore, will begin on July 1, 1999. Applications submitted during the initial 75-day filing window and approved for funding by SLC, therefore, will be

¹² Joint Explanatory Statement at 132-33 (emphasis added).

¹³ *Universal Service Order*, 12 FCC Rcd at 9057.

¹⁴ *Universal Service Order*, 12 FCC Rcd at 9062.

¹⁵ *Universal Service Order*, 12 FCC Rcd at 9057.

¹⁶ *Third Report and Order*, 12 FCC Rcd at 22486.

¹⁷ Schools and Libraries Corporation and Health Care Corporation Adopt Length of Filing Windows, *Public Notice*, CC Docket No. 96-45, DA 97-2349 (rel. Nov. 6, 1997) (*Windows Public Notice*).

¹⁸ Also consistent with Commission direction to determine the length of its filing window, the Rural Health Care Corporation adopted a 75-day initial filing window. *See Windows Public Notice*. The rural health care filing window opened on May 1, 1998 and will close on July 14, 1998. We note that, consistent with the schools and libraries support mechanism, discounts on eligible services for eligible health care providers will be effective January 1, 1998 or the date services begin pursuant to the contract, whichever is later. *See infra* para. 9.

funded through June 30, 1999, to the extent permitted by funding constraints. Parties seeking support for the following fiscal year may begin to file applications on October 1, 1998. We direct SLC, in consultation with the Common Carrier Bureau, to establish a filing window for the next fiscal year, to open no later than October 1, 1998. We also conclude that SLC should determine the length of that window and resolve other administrative matters necessary to implement a filing window.¹⁹

9. We decide to implement a fiscal year funding cycle for schools and libraries, and to transition to this approach immediately, for several reasons. The immediate transition to a fiscal year approach will ameliorate the concerns of applicants seeking support for internal connections that they will be unable to complete installation before December 31, 1998, which marks the end of the funding year if determined on a calendar year basis.²⁰ We recognize that, because of the delay in issuing funding commitments to schools and libraries, many applicants may not be able to complete by this date the internal connections for which they have sought universal service support. The delay may be attributed to a variety of factors, including the Commission's decision to implement an initial filing window, and the Chairman's request to SLC to conduct an independent audit before disbursing any funds, in order to protect against waste, fraud, and abuse.²¹ In short, the schools and libraries support mechanism is being implemented for the first time, and the Commission was not fully aware of the amount of time necessary to establish administrative systems that ensure program integrity and fair and orderly administration. Applicants could not have anticipated these delays at the time they conducted their technology needs assessments. Moreover, applicants understandably have been reluctant to begin service or initiate the installation of internal connections before receipt of a funding commitment. Nevertheless, schools and libraries that have worked diligently to comply with the Commission's requirements should not be burdened unnecessarily by this delay. To further accommodate schools and libraries affected by the delay in implementation, we note that discounts will be available on eligible services effective January 1, 1998 or the date services begin pursuant to the contract, whichever is later. Moreover, the transition to the fiscal year funding cycle adopted herein will afford applicants that will receive support for internal connections the flexibility to complete the installation of internal connections through June of 1999.²²

¹⁹ This is consistent with previous directions to the administrative corporations. *See Third Report and Order*, 12 FCC Rcd at 22488.

²⁰ *See Santa Maria-Bonita School District, Request for Waiver* (dated Feb. 11, 1998) (*Santa Maria-Bonita Request for Waiver*).

²¹ *See, e.g.*, Letter from the Honorable William E. Kennard, Federal Communications Commission, to the Honorable John McCain, Chairman, Senate Committee on Commerce.

²² *Santa Maria-Bonita Request for Waiver* at 1-2 (stating that, without an extension of time beyond December 31, 1998 to complete the installation of internal connections, "plans and specifications will have to be redrawn and rewritten . . . [t]he district would also need to cancel the current bid process and reissue bid documents starting a

10. Furthermore, adopting a fiscal year funding cycle will synchronize the schools and libraries universal service support mechanism with the budgetary and planning cycles of most schools and libraries. This coordination of the support mechanism with the applicants' internal administrative processes will enable schools and libraries to plan their technology needs in a more efficient and organized manner. In addition, using a fiscal year funding cycle will align universal service contribution levels with the local exchange carrier annual access tariff filing schedule. Under our rules, local exchange carriers file their annual tariffs to be effective July 1 of each year.²³ One piece of information these companies require in order to file their tariffs is the universal service contribution factors.

11. We recognize that, under the approach adopted herein, some schools and libraries that did not file within the initial window in 1998 will not be eligible to receive funding until July 1999, rather than January 1999. We find, however, that on balance, the benefits that will be conferred on the approximately 30,000 applicants that filed within the initial window outweigh the hardship caused by the potential six-month delay in funding for some applicants. We also find that this approach strikes the best balance between fulfilling the statutory mandate to enhance access to advanced telecommunications and information services for schools and libraries, and fulfilling the statutory principle that "[q]uality services should be available at just, reasonable, and affordable rates."²⁴

12. To accomplish this change, we conclude that the following revisions in the funding cycle must be implemented. First, for applications filed within the initial 75-day filing window seeking discounts on telecommunications services and Internet access, the Administrator shall make funding commitments effective for services provided no earlier than January 1, 1998. These services will be funded at the approved monthly level, consistent with the information included on the school's or library's application, through June 30, 1999. We conclude that this approach is reasonable because telecommunications services and Internet access are generally provided at regular, monthly intervals and are billed on a monthly, recurring basis.

13. Second, for applications filed within the initial 75-day filing window seeking discounts on internal connections, the Administrator shall commit the approved amount of support, but these funds may be utilized during the remainder of 1998 as well as during the transition period through June 30, 1999. We conclude that this approach is reasonable because, unlike telecommunications services and Internet access, internal connections generally entail

new bid cycle").

²³ See 47 C.F.R. § 69.3(a).

²⁴ 47 U.S.C. § 254(b)(1).

nonrecurring rather than recurring costs.²⁵ Moreover, installation of internal connections frequently requires that the projects be timed to occur during periods when school is out of session and students are not present in instructional buildings. Thus, the installation of internal wiring might be completed in stages during winter and summer vacation periods. Accordingly, we amend section 54.507(b) of our rules, as provided in Appendix A.

14. The transition to a fiscal year funding cycle adopted herein requires that we reconsider on our own motion the limitation on the exemption from competitive bidding for voluntary extensions of contracts. Our rules currently provide that voluntary extensions of existing contracts are not exempt from the competitive bidding rules.²⁶ In order to accomplish an orderly transition to the fiscal year funding cycle, however, we conclude that we must allow existing contracts that have a termination date between December 31, 1998 and June 30, 1999 to be voluntarily extended to a date no later than June 30, 1999. Although voluntary extensions of contracts generally are not exempt from the competitive bidding requirement,²⁷ we adopt this limited exception for voluntary extensions of contracts up to June 30, 1999. To hold otherwise would result in schools and libraries either having to participate in competitive bidding for only a six month service period or not being eligible for support for that six month period. We conclude that either result would be both administratively and financially unworkable for schools and libraries. We find, therefore, that it is in the public interest to amend the exemption (in section 54.511 of our rules) from the competitive bidding requirements, to allow schools and libraries that filed applications within the 75-day initial filing window to extend voluntarily, to a date no later than June 30, 1999, existing contracts that otherwise would terminate between December 31, 1998 and June 30, 1999.

III. COLLECTIONS DURING 1998 AND THE FIRST SIX MONTHS OF 1999

A. BACKGROUND

15. Because these newly-created support mechanisms had no historical data of their own upon which to estimate with certainty the demand for services in the initial months of the support mechanisms,²⁸ the Federal-State Joint Board on Universal Service and the Commission relied on the figures submitted on the record in the Universal Service proceeding to project

²⁵ See McKinsey and Company, *Connecting K-12 Schools to the Information Superhighway* at Appendix A.

²⁶ See 47 C.F.R. § 54.511(d); see also 47 C.F.R. § 54.504. Our rules state that the following contracts are exempt from our competitive bidding requirements: contracts signed on or before July 10, 1997 are exempt for the life of the contract; and contracts signed after July 10, 1997 but before January 30, 1998 are exempt only with respect to services provided between January 1, 1998 and December 31, 1998. 47 C.F.R. § 54.511(c)(1).

²⁷ See *Universal Service Order*, 12 FCC Rcd at 9062-63, para. 545.

²⁸ *Universal Service Order*, 12 FCC Rcd at 9054-56, 9140-41.

demand for the schools and libraries and rural health care universal service support mechanisms.²⁹ Based on extensive public comment and the unanimous recommendation of the bipartisan Joint Board,³⁰ the Commission instituted annual caps on both support mechanisms -- \$2.25 billion for the schools and libraries support mechanism,³¹ and \$400 million for the rural health care support mechanism.³² In addition, the Commission specified that the Administrator should collect \$100 million per month for the first three months of 1998 for the schools and libraries support mechanism,³³ and held that, between January 1, 1998 and June 30, 1998, the Administrator "will only collect as much as required by demand, but in no case more than \$1 billion."³⁴ For the rural health care support mechanism, the Commission directed the Administrator to collect \$100 million for the first three months of 1998.³⁵ On December 16, 1997, the Commission adopted the *Third Reconsideration Order*. The *Third Reconsideration Order* revised the collection amounts, directing the administrator to collect and spend no more than \$50 million for the first six months of 1998 to support the rural health care universal service support mechanism and no more than \$625 million for the first six months of 1998 to support the schools and libraries universal service support mechanism.³⁶ The Commission took this action because it did not want to impose unnecessary financial requirements on service provider contributors to universal service by requiring the collection of funds that were not needed to meet demand for universal service assistance.³⁷

²⁹ See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 87, 368-71 (1996); *Universal Service Order*, 12 FCC Rcd at 9054-57.

³⁰ See *Recommended Decision*, 12 FCC Rcd at 368-71.

³¹ *Universal Service Order*, 12 FCC Rcd at 9054.

³² *Universal Service Order*, 12 FCC Rcd at 9141.

³³ *Universal Service Order*, 12 FCC Rcd at 9056.

³⁴ *Universal Service Order*, 12 FCC Rcd at 9054. The Commission further directed the administrator to "adjust future contribution assessments quarterly based on its evaluation of schools and library demand for funds, within the limits of the spending caps . . ." *Id.* at 9055-56.

³⁵ *Universal Service Order*, 12 FCC Rcd at 9145.

³⁶ *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997).

³⁷ *Third Reconsideration Order*, 12 FCC Rcd at 22803-04. Based on what it learned about the status of preparatory arrangements being made by schools and libraries to obtain the benefit of the universal service support mechanism, the Commission concluded that demand for the schools and libraries support mechanism would not exceed \$625 million in the first and second quarters of 1998. *Id.*

16. When it adopted the annual funding caps in the *Universal Service Order* in May 1997, the Commission anticipated that funds would begin to flow on January 1, 1998.³⁸ In making that estimate, the Commission did not take fully into account the amount of time necessary for the administrative corporations to establish administrative systems that not only will provide the highest level of service to eligible schools, libraries, and health care providers, but that will ensure that federal universal service funds are not subject to waste, fraud, and abuse. Due to those efforts to maximize the adequacy, efficiency, and accountability of the support mechanisms, and due to the filing window that the Commission adopted to ensure equitable treatment of schools, libraries, and health care providers, eligible entities could not begin to receive commitments for funding until after mid-April 1998, when the initial filing window closed.³⁹ Funds for the schools and libraries support mechanism will not begin to be disbursed until July 1998, at the earliest, and funds for the rural health care support mechanism likely will not begin to be disbursed before the third quarter of 1998.

17. As of May 1, 1998, SLC estimated that \$2.02 billion in discounts had been requested by applicants that had filed for schools and libraries discounts through April 28, 1998.⁴⁰ RHCC projected that the rural health care support mechanism will require \$25 million for the third quarter.⁴¹ On May 13, 1998, the Common Carrier Bureau released a Public Notice seeking comment on a proposed revision of the 1998 collection amounts for the schools and libraries and rural health care universal service support mechanisms.⁴² In the *Collection Public Notice*, the Common Carrier Bureau sought comment on a proposal to direct USAC to collect only as much money as is required by demand, but in no event more than \$25 million per quarter for the third and fourth quarters of 1998 to support the rural health care universal service support mechanism, and no more than \$524 million per quarter for the third and fourth quarters of 1998 to support the

³⁸ *Universal Service Order*, 12 FCC Rcd at 9092.

³⁹ In the *Third Report and Order*, the Commission adopted a filing window that will give equal funding priority to all schools, libraries, and health care providers that file during that window period. *Third Report and Order*, 12 FCC Rcd 22485. Consistent with Commission direction to determine the length of the filing windows, SLC and RHCC adopted windows of 75 days. Schools and Libraries Corporation and Health Care Corporation Adopt Length of Filing Windows, CC Docket No. 96-45, *Public Notice*, DA 97-2349 (rel. Nov. 6, 1997). The schools and libraries filing window opened on January 30, 1998 and closed on April 15, 1998. The rural health care filing window opened on May 1, 1998 and will close on July 14, 1998.

⁴⁰ Third Quarter 1998 Fund Size Requirements for the Schools and Libraries Universal Service Program, dated May 1, 1998, at 2 (filed by SLC).

⁴¹ Third Quarter 1998 Projected Demand and Expenses for the Rural Health Care Universal Service Support Program, dated May 1, 1998, at 1 (filed by RHCC).

⁴² Common Carrier Bureau Seeks Comment on Proposed Revision of 1998 Collection Amounts for Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, *Public Notice*, CC Docket No. 96-45, DA 98-872 (rel. May 13, 1998) (*Collection Public Notice*).

schools and libraries universal service support mechanism. The Common Carrier Bureau also sought comment on whether to direct the administrative corporations neither to commit nor disburse more than \$100 million for the health care support mechanism and \$1.67 billion for the schools and libraries support mechanism during the 1998 funding year.⁴³

B. DISCUSSION

18. Consistent with section 254 of the Act, and the recommendations of the Federal-State Joint Board on Universal Service,⁴⁴ we remain committed to providing support to eligible schools and libraries for telecommunications services, Internet access, and internal connections.⁴⁵ We share the concerns of commenters that curtailing collections may have adverse impacts on schools and libraries, particularly the neediest of those entities.⁴⁶ We, therefore, remain dedicated to providing support in a manner that targets the most economically disadvantaged schools and libraries. At the same time, we are cognizant of the concerns of many legislators that we must balance the need to provide support for schools and libraries against the need to continue to provide support for high cost carriers, and to keep telephone rates affordable throughout the

⁴³ *Collection Public Notice* at 4.

⁴⁴ *See Recommended Decision*, 12 FCC Rcd 87.

⁴⁵ We note that Secretary Riley of the United States Department of Education (Department of Education) recently responded to a General Accounting Office (GAO) report that identified 40 programs in nine federal agencies, funded at more than \$10 billion, that support the acquisition of telecommunications technologies for schools and libraries. *See* Letter from Secretary Richard W. Riley, United States Department of Education to James F. Hinchman, Acting Comptroller General, GAO, dated June 8, 1998 (citing GAO, Telecommunications: Court Challenges to FCC's Universal Service Order and Federal Support for Telecommunications for Schools and Libraries (rel. May 7, 1998)). Secretary Riley characterized the GAO report as "very misleading," stating that "[o]f the \$8.2 billion identified from Department of Education programs, we estimate that only about \$590 million is available specifically for education technology-related programs, and that only a very small percentage of that amount is used to support telecommunications." *Id.* at 1. Secretary Riley also noted that "[t]he Technology Literacy Challenge Fund and other, smaller sources of Federal funding for technology would work in conjunction with the E-Rate discounts to help schools use the Internet effectively, but by no means could they take the place of the E-Rate in providing and maintaining Internet access." *Id.* at 2.

⁴⁶ *See, e.g.*, Letter from the Honorable Ted Kennedy, the Honorable Jay Rockefeller, the Honorable Bob Kerrey, the Honorable Chris Dodd, the Honorable Jim Jeffords, the Honorable Rick Santorum, the Honorable John Chafee, and the Honorable Olympia Snowe, dated May 22, 1998, at 1 (stating that "modern technology can level the playing field"); NTIA comments at 2 (stating that "[n]o school or child must be excluded from the benefits of the information age because of income or geographical area"); Letter from the Honorable Jay Rockefeller, the Honorable Bob Kerrey, and 32 Senators, United States Senate, dated June 10, 1998, at 1 (stating that "[u]niversal means just that -- urban, suburban and rural; poor and rich; public and private; all races and ethnic groups . . . [n]o child or family should be left behind").

country.⁴⁷ We note that, pursuant to the 1996 Act, the Commission has taken significant action to implement the universal service provisions of the Act. At the present time, the rural, insular, and high cost telephone subscribers continue to receive high cost support at the same level that they have received for years. In addition, one of the first steps in universal service reform was to make existing high cost support explicit.⁴⁸ Moreover, we have expanded the Commission's low-income programs, Lifeline Assistance (Lifeline) and Lifeline Connection Assistance (Link Up).⁴⁹ For example, we adopted the Joint Board's recommendation that Lifeline service should be provided to low-income consumers nationwide, even in states that had not previously participated in Lifeline, and that all eligible telecommunications carriers should be required to provide Lifeline service.⁵⁰ The Commission remains committed, pursuant to section 254, to implementing all parts of universal service.

19. We find, therefore, that it is prudent to begin funding collections for a new mechanism at a reduced level, and allow for the possibility of increased collections in the future. We note that this phase-in approach to funding is consistent with the decision in the *Universal Service Order*, and with the initial funding for high cost support when NECA began its high cost collection and distribution efforts in 1986.⁵¹ In providing support for schools, libraries, and rural health care providers, we strive to ensure a smooth transition to the new universal service support mechanisms and to minimize disruption to consumers. We find that our decision to adjust the maximum amounts that may be collected or spent in 1998 is consistent with these goals.

⁴⁷ See Letter from the Honorable Tom Bliley, Chairman, House Committee on Commerce, the Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce, the Honorable John McCain, Chairman, Senate Committee on Commerce, and the Honorable Ernest F. Hollings, Ranking Minority Member, Senate Committee on Commerce, to the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated June 4, 1998; Letter from the Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce, to the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated June 4, 1998.

⁴⁸ See, e.g., *Universal Service Order*, 12 FCC Rcd at 9165 (removing Long Term Support (LTS) from access charges); 12 FCC Rcd at 8940-41 (stating that "[w]e adopt the Joint Board's recommendation that a subsidy corresponding in amount to that generated formerly by DEM [dial equipment minutes] weighting be recovered from the new universal service support mechanisms").

⁴⁹ See generally *Universal Service Order*, 12 FCC Rcd at 8952-94.

⁵⁰ *Universal Service Order*, 12 FCC Rcd at 8952. In late February 1998, eligible telecommunications carriers began submitting to USAC requests for reimbursement for offering Lifeline service to low-income consumers. Federal Universal Service Programs Fund Size Projections & Contribution Base for Third Quarter 1998, filed by USAC, dated May 1, 1998, at 12.

⁵¹ See 47 C.F.R. §§ 36.631 and 36.64.

20. We therefore find that we should not increase the quarterly collection amounts at this time with respect to the schools and libraries and rural health care support mechanisms. We therefore conclude that establishing quarterly collection rates for the schools and libraries support mechanism of \$325 million for each of the third and fourth quarters of 1998 and the first and second quarters of 1999 will preserve the dual statutory mandates to maintain affordable rates throughout the country and to "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms . . . and libraries."⁵² These collection rates maintain current collection rate levels and will not increase interstate telecommunications carriers' costs of providing service. Moreover, these collection rate levels should ensure that long distance rates, overall, will continue to decline.⁵³ At the same time, based on the estimated demand for support by schools and libraries that filed applications during the initial 75-day filing window, these collection rates will be sufficient to fully fund requests for support for telecommunications services, and Internet access, and to fully fund requests by the neediest schools and libraries for support for internal connections. The remaining requests for support for internal connections would be funded in the manner set forth in Section III, herein.

21. We further conclude that we should establish maximum collection rates for the rural health care support mechanism at \$25 million for each of the third and fourth quarters of 1998. These collection rates are consistent with projected demand and there is no evidence that eligible health care providers will require additional funding this year. Consistent with the *Universal Service Order*, we do not want USAC to collect funds that exceed demand.⁵⁴ Because the rural health care support mechanism will continue to be funded on a calendar, rather than a fiscal, year basis, and because the mechanism is still in the very early stages, we find that we should not adopt maximum collection rates beyond 1998. Instead, we will evaluate the 1999 collection rates for the rural health care support mechanism in the future.

22. The universal service support mechanisms will provide substantial support to schools, libraries, and health care providers without imposing unnecessary burdens on consumers,

⁵² 47 U.S.C. § 254(h)(2).

⁵³ On June 16, 1998, incumbent local exchange carriers will file new access tariffs with rates to become effective on July 1, 1998. Based on preliminary information filed by these carriers on April 2, 1998, we estimate their total access charge revenues to decline by approximately \$720 million below current levels, measured on an annualized basis at current demand levels. The *Third Quarter Contribution Factors Public Notice*, released by the Common Carrier Bureau upon adoption of this Order, will produce a reduction in total interexchange carrier payments of approximately \$85 million. See Third Quarter 1998 Universal Service Contribution Factors Revised and Approved, CC Docket No. 96-45, *Public Notice*, DA 98-1130 (rel. June 12, 1998). Based on this, total interexchange carrier payments for access services and universal service contributions should decrease by approximately \$800 million on July 1, 1998.

⁵⁴ See *Universal Service Order*, 12 FCC Rcd at 9145 (stating that collection for the rural health care universal service support mechanism would be based on demand).

and the most economically disadvantaged schools and libraries will receive the greatest share of support, consistent with the discount matrix contained in the *Universal Service Order*.⁵⁵ We seek to provide support to schools, libraries, and rural health care providers in a manner that does not require consumers' rates to rise and without causing rate churn. Some commenters assert that a certain amount of rate churn is to be expected in a competitive marketplace.⁵⁶ That may be true, but we remain committed to ensuring that universal service does not exacerbate any rate churn that may already exist in the marketplace. Excessive and unnecessary rate churn would be disruptive to consumers, a result we wish to avoid.

23. Numerous commenters take issue with the Commission's proposal to revise collections for the schools and libraries and rural health care universal service support mechanisms consistent with anticipated reductions in access charges.⁵⁷ We agree with the Alaska Commission that funding for the new universal service support mechanisms "must be balanced against potential impact on rates and universal service,"⁵⁸ and that is precisely the approach we are adopting. We conclude, therefore, that a gradual phase-in of the schools, libraries, and rural health care universal service support mechanisms that takes advantage, and reflects the timing, of access charge reductions will provide substantial support for eligible services ordered by eligible schools, libraries and rural health care providers, and at the same time will avoid disruption to consumers.

24. Many commenters note that schools and libraries have expended substantial resources, in terms of both time and money, in applying for discounted services, all with the expectation that a maximum of \$2.25 billion in funding would be available.⁵⁹ We share the

⁵⁵ *Universal Service Order*, 12 FCC Rcd at 9050.

⁵⁶ *See, e.g.*, AirTouch comments at 5 n.10 (stating that changing rates are to be expected in a competitive marketplace); Nassau BOCES comments at 3-4 (asserting that rate churn is a fact of life under competitive conditions).

⁵⁷ *See, e.g.*, Bell Atlantic comments at 3-4 (asserting that, because access charges are dictated by a price cap formula, the Commission cannot impose additional reductions in access charges to fund universal service); EdLiNC comments at 1-3 (stating that linking access charge reductions to universal service funding is inconsistent with section 254's mandate to establish a discount mechanism adequate to meet the congressional goal of providing all schools and libraries will affordable access to advanced telecommunications and information services); NC DPI comments at 4 (stating that the law does not require that access charges and universal service funding be linked and that the Commission should not act to make that happen); Time Warner comments at 3-4 (asserting that the Commission should establish a universal service fund that is sufficient to address the policy goals of affordability for basic telecommunications services and support of eligible services for schools, libraries, and rural health care provider but that is not tied to access charge reductions).

⁵⁸ Alaska Commission comments at 4.

⁵⁹ *See, e.g.*, Funds for Learning comments at 2 (stating that schools and libraries have spent time completing applications and designing technology plans and have modified or delayed installation schedules, all in reliance on

concern of the U.S. Department of Education and other commenters that schools and libraries require predictability of funding to facilitate long-range technology planning, and that our actions here should not discourage schools and libraries from seeking universal service support.⁶⁰ We agree that the submission of over 30,000 applications demonstrates substantial demand for universal service support for schools and libraries,⁶¹ and we applaud the entities that have worked diligently to comply with our rules. We are troubled by the disruption imposed on schools and libraries and we hope to avoid this situation in the future. At the same time, we must be mindful of the effects of the schools and libraries and rural health care support mechanisms on consumers. If we were to fund these support mechanisms to the full amount of the caps adopted in the *Universal Service Order*, there would be negative consequences for consumers. Congress mandated that universal service has many components, including support for schools, libraries,

the availability of \$2.25 billion); NC Governor comments at 1-2 (supporting full funding because of tremendous effort, especially in terms of human resources, to participate in universal service); EdLiNC comments at 3-5 (stating that schools and libraries have devoted substantial resources, made contractual commitments, and issued bonds with the expectation that universal service would be funded up to the amount recommended by the Joint Board and adopted a year ago by the Commission); Great City Schools comments at 3 (stating that the submission of over 30,000 applications is evidence that schools and libraries have relied upon the expectation of full funding and have had to devote substantial resources toward applying for universal service discounts).

⁶⁰ See U.S. Department of Education comments at 1. See also Letter from Richard W. Riley, Secretary of Education, William M. Daley, Secretary of Commerce, Daniel R. Glickman, Secretary of Agriculture, and Donna E. Shalala, Secretary of Health and Human Services to William E. Kennard, Chairman of the Federal Communications Commission, dated June 8, 1998 (stating that the Commission should "strongly support the e-rate" because "delaying or undermining its effectiveness will heighten the risk of economic inequality and social division"); DTG comments at 4-5 (stating that "[t]he proposed revision of support collections after the initial round of applications is final imposes new risk and unpredictability on the process at a time when it should become more predictable if the goal of access to advanced telecommunications for all schools is to be met"); NC DPI comments at 3 (changing the rules at this point causes mistrust and economic hardship); Funds for Learning comments at 2 (asserting that schools and libraries need predictability, not more frustration, and that service providers may become disenchanted with the changing rules and potential loss of business as schools and libraries have to delay projects for which they anticipated receiving support). We note here that the Santa Maria-Bonita School District proposed an alternative to the proposed collection amounts described in the *Collection Public Notice*, under which an additional \$350 million would be collected in 1998, followed by a \$350 million reduction in collections in 1999. See Santa Maria-Bonita School District comments at 2-3. Because this proposal would not mitigate the problem of rate churn that it would impose upon consumers, we must reject it.

⁶¹ See, e.g., Letter from the Honorable Ted Kennedy, the Honorable Jay Rockefeller, the Honorable Bob Kerrey, the Honorable Chris Dodd, the Honorable Jim Jeffords, the Honorable Rick Santorum, the Honorable John Chafee, and the Honorable Olympia Snowe, United States Senate, dated May 22, 1998 (stating that the number of applications submitted demonstrates the "importance of the program and the nationwide need for this financial assistance"). New Jersey Library Association comments at 2 (stating that initial response demonstrates the need for the schools and libraries support mechanism); EdLiNC comments at 4 (stating that the submission of over 30,000 applications validates the need for and the importance of universal service for schools and libraries).

and rural health care providers, as well as the directive to maintain rates at an affordable level.⁶² We conclude, therefore, that reducing the collection rates for the schools and libraries and rural health care support mechanisms during the initial implementation is consistent with the Act and is the most prudent course to take at this time.

25. Several commenters maintain that revising collections levels for the schools and libraries and rural health care support mechanisms to match projected reductions in access charges would impose an unreasonable and disproportionate burden on CMRS and other wireless providers that do not pay access charges,⁶³ and that such an approach would not be competitively neutral.⁶⁴ One of the dissenting statements similarly suggests that wireless carriers are being disproportionately burdened because they do not pay access charges.⁶⁵ We note first that we are not here adopting our proposal in the *Collection Public Notice* to increase schools and libraries funding to levels that match projected reductions in access charges paid by long-distance carriers. We are instead freezing for the next four quarters the contribution levels in place during the second quarter of 1998. Thus, no carrier will experience increased universal service obligations as a result of an increase in funding for the schools and libraries support mechanism. Second, we find that CMRS and other wireless carriers are not disproportionately burdened because they pay universal service obligations even though they do not benefit from access charge reductions. Before passage of the 1996 Act, only interstate long-distance carriers paid for universal service in the interstate jurisdiction, either directly or through access charges. The 1996 Act, however changed that by requiring universal service to be supported by all interstate telecommunications carriers, whether or not they had previously paid access charges. The point of the 1996 Act in this respect was to end the existing discriminatory treatment of long-distance carriers, and impose universal service obligations as well on other interstate carriers, including CMRS carriers. The 1996 Act also established that universal service be funded in a competitively neutral manner. To implement that, we have required that all interstate telecommunications carriers contribute to

⁶² 47 U.S.C. § 254(b)(1) (stating that "[q]uality services should be available at just, reasonable, and affordable rates").

⁶³ See, e.g., AirTouch comments at 2 (stating that the proposed revision in collection amounts would "unlawfully discriminate against wireless carriers and others who do not accrue any benefits from access charge reductions"); CTIA comments at 4-5 (asserting that the proposed revision imposes an unreasonable burden on CMRS and other providers that do not pay access charges); PCIA comments at 2-3 (stating that the proposed revision will disproportionately impact CMRS providers); MACTel comments at 2-3 (stating that the proposed revision will disproportionately increase the universal service burden on CMRS providers and will reduce CMRS penetration rates in rural and insular areas because the cost of CMRS service will increase).

⁶⁴ GTE comments at 7 (stating that the proposed revision in collection amounts would not be competitively neutral because wireless and paging carriers that do not pay access charges will not enjoy the benefits of reduced access charges and will, therefore, have to increase their charges to offset increased universal service contribution obligations).

⁶⁵ Statement of Commissioner Harold Furchtgott-Roth, dated June 22, 1998, at 4.

universal service based on end-user revenues.⁶⁶ We continue to believe that to be a reasonable approach to implementing the competitive neutrality requirements of the Act. Finally, to the extent that the *Collection Public Notice* noted the relation between universal service obligations and access charge reductions, it was simply to note that overall the Commission's actions have reduced the cost of providing long distance service -- an issue of significant public interest. We note similarly here that, since passage of the 1996 Act, competition and changes in reciprocal compensation arrangements between CMRS providers and local exchange carriers (LECs) have helped provide for the lowest wireless prices for consumers in history, despite wireless carriers' contributions to universal service.

26. The contention in one of the dissents that universal service contributions, at least to the extent used to provide support for non-telecommunications services, constitute an unlawful tax is neither new nor correct.⁶⁷ As the Commission has found previously, contributions to the universal service mechanisms do not represent taxes enacted under Congress's taxing authority. Rather, they constitute fees enacted pursuant to Congress's Commerce power. We noted previously that the contribution requirements do not violate the Origination Clause of the Constitution because "universal service contributions are not commingled with government revenues raised through taxes,"⁶⁸ and universal service support mechanisms therefore are not a "general welfare scheme" of the type found by courts to be taxes.⁶⁹ In *United States v. Munoz-Flores* and elsewhere, the Supreme Court has held that Congress does not exercise its taxing powers when funds are raised for a specific government program. Universal service contributions are deposited into a specific fund established as part of the universal service mechanisms to provide money support for those mechanisms and therefore do not constitute taxes.

27. Our conclusion that universal service contributions are not a tax is not changed by the citation to *Thomas v. Network Solutions, Inc.*⁷⁰ There, the court found that part of the charge

⁶⁶ See *Universal Service Order*, 12 FCC Rcd at 9206.

⁶⁷ Statement of Commissioner Harold Furchtgott-Roth, dated June 22, 1998, at 13-16.

⁶⁸ *Fourth Reconsideration Order*, 13 FCC Rcd at 5465.

⁶⁹ *Universal Service Order*, 12 FCC Rcd at 9188-89. See *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) ("special assessment" on any person convicted of a federal misdemeanor to be deposited into a Crime Victim's Fund was not a tax); see also Response of Federal Communications Commission to Motion for Stay of Celpage, Inc., *Texas Office of Public Utility Counsel v. FCC and USA, No 97-60241* (5th Cir.) (*Texas Public Utility Counsel Stay Opposition*) at 14-17, and cases cited therein. On delegation issues, see, e.g., *Universal Service Order*, 12 FCC Rcd at 9003-23, 9084-90, 9203-05; Brief for Federal Communications Commission in *Texas Public Utility Counsel (Texas Public Utility Counsel Brief)* at 165-172, 173-177, 183-188.

⁷⁰ 1998 WL 191205 (D.D.C.).

made by the National Science Foundation's contractor for the registration of internet domain names was a tax rather than a fee because it provided "revenue for the government for projects that did not directly benefit the payees or otherwise apply to the purposes furthered by the [agreement between the NSF and its contractor]." ⁷¹ Here, by contrast, universal service contributions are not intended to raise general revenue as they are placed in a segregated fund dedicated for a specific regulatory purpose, and, as we have noted previously, all telecommunications carriers required to contribute benefit from the ubiquitous telecommunications network that universal service makes possible. ⁷² Even if this were not the case, *Munoz-Flores* rejects the proposition that a charge is a tax unless the payees benefit from its payment. ⁷³

28. Finally, we note that the argument that universal service contributions for the schools and libraries mechanisms constitutes an unlawful tax can be and has been made with respect to the entire universal service program. ⁷⁴ This argument proves too much. If that interpretation were correct, the entire universal service program, including support for service to rural and high cost areas, would constitute an unlawful tax. This interpretation is incorrect because, as noted above, Congress need not exercise its taxing powers to fund a specific government program through fees. This is precisely what Congress has done with respect to universal service.

29. We find, therefore, that it serves the public interest to adjust the amounts that the Commission directed the Administrator to collect and spend for the second six months of 1998, as described herein. We amend our previous decision, and direct USAC to collect only as much as required by demand, but in no event more than \$25 million per quarter for the third and fourth quarters of 1998 for the rural health care universal service support mechanism. We direct USAC to collect only as much as required by demand, but in no event more than \$325 million per quarter for the third and fourth quarters of 1998 and the first and second quarters of 1999 to support the schools and libraries universal service support mechanism. We also direct RHCC to commit to applicants no more than \$100 million for disbursement during 1998, and direct SLC to commit to applicants no more than \$1.925 billion for disbursement during 1998 and the first half of 1999.

⁷¹ *Id.*

⁷² *Universal Service Order*, 12 FCC Rcd at 9188-89.

⁷³ 495 U.S. at 400; *see also* cases cited in *Texas Public Utility Counsel Stay Opposition* at 13-16; *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884).

⁷⁴ *See* Brief of Celpage, *Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997) (appeal pending).

The adoption of these limits on disbursements supersedes any prior restrictions on expenditures during 1998.⁷⁵

30. Furthermore, we conclude that the carryover of unused funding authority will not apply for the funding period January 1, 1998 through June 30, 1999. That is, to the extent that the amounts collected in the funding period January 1, 1998 through June 30, 1999 are less than \$2.25 billion, the difference will not be carried over to subsequent funding years. Consistent with the phased-in approach to funding for the schools and libraries and rural health care support mechanisms that we have adopted herein, we find it unnecessary to carry over unused funding authority. To the extent that funds are collected but not disbursed in the funding period January 1, 1998 through June 30, 1999, however, those collected funds would be carried over to the next funding period. Accordingly, we amend section 54.507(a) and section 54.623(a) of our rules, as provided in Appendix A.

IV. RULES OF PRIORITY FOR THE SCHOOLS AND LIBRARIES AND RURAL HEALTH CARE SUPPORT MECHANISMS

A. BACKGROUND

31. In the *Universal Service Order*, the Commission initially concluded that schools and libraries would receive universal service discounts on a first-come, first-served basis.⁷⁶ Discounts for schools and libraries are allocated according to a discount matrix which assigns discount levels to schools and libraries based on whether a school or library is located in a rural area and on the percentage of students who are eligible for the national school lunch program in a given school or school district.⁷⁷ For example, schools in which at least 75 percent of the students are eligible for the school lunch program receive a 90 percent discount on rates for telecommunications services, Internet access, and internal connections. The discount rate falls as low as 20 percent in the case of an urban school with fewer than 1 percent of its students eligible for the lunch program. To protect the most disadvantaged schools and libraries, the Commission adopted rules of priority that go into effect when only \$250 million remains available for allocation toward school and library discounts.⁷⁸ As adopted, the rules of priority require SLC to

⁷⁵ Prior to adoption of this Order, sections 54.507(a) and 54.623(a) of our rules provided that no more than a specified monetary amount could be collected or spent during the first six months of 1998. *See* Appendix A.

⁷⁶ *Universal Service Order*, 12 FCC Rcd at 9057; 47 C.F.R. §§ 54.507(c), 54.623.

⁷⁷ *See Universal Service Order*, 12 FCC Rcd at 9050. *See also* 47 C.F.R. § 54.505(c). The discount matrix is reproduced at Appendix D.

⁷⁸ *Universal Service Order*, 12 FCC Rcd at 9059-60; 47 C.F.R. § 54.507(g).

allocate remaining funds to provide discounts to the most economically disadvantaged schools and libraries in accordance with the procedures set forth in section 54.709(g) of our rules.⁷⁹

32. On September 10, 1997, the Common Carrier Bureau sought comment on several issues with respect to the application process and the distribution of universal service support for schools, libraries, and health care providers.⁸⁰ Among other things, the Bureau sought comment on whether the Commission should establish a filing window period, and what methods would "ensure a broad and fair distribution of funds, particularly at the earliest stages of these support programs."⁸¹ The Bureau also sought comment on "whether a mechanism to prioritize requests from rural health care providers should be adopted in the event that requests exceed available funds."⁸² In the *Third Report and Order*, the Commission adopted an initial filing window in order to give equal funding priority to all schools, libraries, and health care providers that apply for support at any time during the filing window, replacing the first-come, first-served approach for the first application filing period.⁸³ The Commission adopted the filing window to provide more time for schools, libraries, and health care providers to complete the necessary forms and to negotiate contracts in accordance with our competitive bidding requirement, as well as to reduce disparities among applicants with varied administrative resources.⁸⁴

33. In addition to commenting on the adoption of a filing window, parties presented a wide range of suggestions for altering the rules of priority to ensure a broad and fair distribution of funds in response to the *September 10 Public Notice*.⁸⁵ In the *Third Report and Order*, the

⁷⁹ 47 C.F.R. § 54.507(g). Pursuant to section 54.507(g), when only \$250 million remains to be allocated, the SLC will notify the public and, during a 30-day period or the remainder of the funding year, whichever is shorter, will commit funds only to the schools and libraries in the two most economically disadvantaged categories. During the period, SLC will grant priority to the most economically disadvantaged schools and libraries that have not yet received universal service discounts. If funds remain after the 30-day period, the funds once again will be allocated according to the Commission's rules. *See id.*

⁸⁰ Common Carrier Bureau Seeks Comment on Universal Service Support Distribution Options for Schools, Libraries, and Health Care providers, CC Docket 96-45, *Public Notice*, DA 97-1957 (1997) (*September 10 Public Notice*). This Public Notice was published in the Federal Register on September 15, 1997. 62 Fed. Reg. 48280 (Sept. 15, 1997). Comments were filed on September 25, 1997.

⁸¹ *September 10 Public Notice* at 2.

⁸² *September 10 Public Notice* at 2.

⁸³ *Third Report and Order*, 12 FCC Rcd at 22486. In addition, the Commission concluded that SLC and RHCC may implement such additional filing periods as they deem necessary. 47 C.F.R. §§ 54.507, 54.623.

⁸⁴ *Third Report and Order*, 12 FCC Rcd at 22486.

⁸⁵ These commenters are listed in Appendix C.

Commission clarified that, in the event that the \$250 million trigger was reached during the filing window, SLC, consistent with its function as Administrator, would be responsible for allocating funds in accordance with the Commission's rules of priority.⁸⁶ The Commission did not make any modifications to its rules of priority at that time. In the *Collection Public Notice*, the Common Carrier Bureau sought additional comment on ways to ensure that the most economically disadvantaged schools and libraries receive adequate universal service support.⁸⁷

B. DISCUSSION

34. *Schools and Libraries Support Mechanism.* Upon further consideration, we find that we must adopt additional new rules of priority to ensure that, when a filing window period is in effect, support is directed toward the most economically disadvantaged schools and libraries, as well as toward those located in rural areas. Consistent with the statute and the recommendations of the Joint Board, we have consistently focused on ensuring that the services eligible for universal service support are affordable for all eligible schools and libraries. Under the discount matrix, the most economically disadvantaged schools and libraries are eligible for the greatest levels of discount. For example, schools with between 75 and 100 percent of their students eligible for the national school lunch program are eligible for 90 percent discounts on all eligible services.⁸⁸ In the *Universal Service Order*, we established a priority system under which the most economically disadvantaged schools and libraries, those with over 50 percent of their student populations eligible for the national school lunch program, would have priority when only \$250 million available to be committed in a given funding year.⁸⁹ The rules of priority adopted in the *Universal Service Order*, however, were premised on the assumption that support would be distributed on a first come, first served basis. That is, the \$250 million trigger was established before the Commission adopted a window filing period. We conclude that we must adopt additional new rules of priority premised on the existence of a filing window period during which all applications received within the window are treated as if filed simultaneously. We also

⁸⁶ *Third Report and Order*, 12 FCC Rcd at 22487-88.

⁸⁷ We note that several parties commented in response to the *Collection Public Notice* on certain administrative and access charge reform issues. Because these issues have no substantive bearing on the issues addressed in this Order, we do not respond substantively to those comments. See, e.g., AirTouch comments at 3 (end-user surcharges); GTE comments at 8 (same); Sprint comments at 3 (same); SBC comments at 2-4 (fundamental changes to schools and libraries universal service support mechanism); API comments at 3-4 (access charge reform and the productivity factor); RUPRI comments at 5 (high cost fund); USTA comments at 5 (high cost fund, SLC administrative expenses, support for telecommunications carriers only); Nassau BOCES comments at 2-3 (retroactive payments); NTIA comments at 2 (truth-in-billing, local plans for Internet use); CTIA comments at 1-4 (calculation of universal service contributions for wireless providers); ICA comments at 2 (access charge reform).

⁸⁸ See *Universal Service Order*, 12 FCC Rcd at 9050.

⁸⁹ *Universal Service Order*, 12 FCC Rcd at 9059-60.

conclude that new rules of priority are necessary to account for the fact that the support requested by schools and libraries during the initial filing window exceeds the total authorized support available for the funding period January 1, 1998 through June 30, 1999. Moreover, there is the possibility that support requested by schools and libraries during subsequent filing windows may exceed the total authorized support available in subsequent funding years. Therefore, we adopt new rules of priority that will operate when a filing window is in effect. We do not, however, alter the rules of priority for applicants that request support when a filing window is not in effect.⁹⁰ Although, in this initial 18-month funding period, only the applications filed during the initial 75-day filing window will receive support, it is possible that in future funding years support could be provided for applications filed outside of a filing window period.

35. The additional new rules of priority described below will equitably provide the greatest assurance of support to the schools and libraries with the greatest levels of economic disadvantage while ensuring that all applicants filing during a window receive at least some support in the event that the amounts requested for support submitted during the filing window exceed the total support available in a funding year. 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.⁹¹ Further, these rules of priority are consistent with the suggestions of several commenters.⁹² Upon further consideration, we conclude that these new rules of priority will best

⁹⁰ These rules are preserved in section 54.507(g)(2), as amended in this Order. *See* Appendix A.

⁹¹ *See, e.g., Third Report and Order*, 12 FCC Rcd at 22486, 22487-88; *Universal Service Order*, 12 FCC Rcd at 9057-60.

⁹² *See* Great City Schools comments at 4 (proposing priority rules that would permit full funding for schools and libraries eligible for 80 percent and 90 percent discounts and a proportional scale back of discounts for all other eligible schools and libraries). *See also* Anchorage School Dist. Sept. 10 Public Notice comments at 1 (stating that, if sufficient funds are not available to meet all approved applications in subsequent filing periods, the Commission should apply an equal percentage reduction to all approved applicants during period); Mississippi Council for Ed. Tech. Sept. 10 Public Notice comments at 4 (asserting that funds should be available first to the most disadvantaged schools and libraries); Montana School Boards Ass'n Sept. 10 Public Notice comments at 3 (supporting a mechanism similar to the rules of priority should be applied to all funds, not just \$250 million); New York City Dept. of IT&T Sept. 10 Public Notice comments at 3 (stating that, if funds are exhausted within the window filing period, distribution of funds should be subject to a pro-rata reduction based on economic disadvantage, obviating need of a \$250 million trigger); New York Pub. Library Sept. 10 Public Notice comments at 1 (advocating a filing window and pro-rata allocation of funds when only \$500 million remains for the year). *But see* RUPRI comments at 3-4 (stating that sole reliance on poverty and urban/rural status is not the proper approach, but emphasis should be on total relative price after discount); Colorado Dept. of Ed. Sept. 10 Public Notice comments at 2 (opposing any proposal that limits the funds available to schools and libraries in the first six

promote the universal service goals of the Communications Act.⁹³ Accordingly, we amend section 54.507(g) of our rules as indicated in Appendix A.

36. The additional new rules of priority for the schools and libraries universal service support mechanism shall operate as described herein for applicants that submit a request for support within an established filing window.⁹⁴ When the filing window closes, SLC shall calculate the total demand for support submitted by applicants during the filing window. If total demand exceeds the total support available in that funding year, SLC shall take the following steps. SLC shall first calculate the demand for telecommunications services and Internet access for all discount categories. These services shall receive first priority for the available funding. SLC shall then calculate the amount of available funding remaining after providing support for all requests for telecommunications services and Internet access. SLC shall allocate the remaining funds to the requests for support for internal connections,⁹⁵ beginning with the most economically disadvantaged schools and libraries, as determined by the schools and libraries discount matrix.⁹⁶ That is, schools and libraries eligible for a 90 percent discount shall receive first priority for the remaining funds, and those funds will be applied to their requests for internal connections. To the extent that funds remain, SLC shall next allocate funds toward 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.

37. 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,

months because the Commission has chosen to collect only \$1 billion in the first six months); DataCast Sept. 10 Public Notice comments at 2 (favoring rules of priority that allocate 1/4 of all funds to rural, high cost schools and take into account "relative economic advantage" in allocating support); Illinois State Board of Dirs. Sept. 10 Public Notice comments at 10-12 (favoring granting states greater authority in implementing rules of priority, granting priority to schools with the least amount of infrastructure, and implementing a higher trigger level because current 10 percent trigger represents insufficient funds); Maine Dept. of Ed. Sept. 10 Public Notice comments at 2 (favoring allocation of support according to the Technology Literacy Challenge Grants formula).

⁹³ 47 U.S.C. §§ 151 *et seq.*

⁹⁴ We note this request will be submitted using FCC Form 471.

⁹⁵ In his dissent, Commissioner Furchtgott-Roth argues that we lack authority under section 254(h)(2) of the Act to provide discounts for internal connections. Statement of Commissioner Harold Furchtgott-Roth, dated June 22, 1998, at 9-11. As we have discussed at length in our prior orders, analysis of section 254(h)(2), in conjunction with other provisions of the Act, clearly demonstrates that such discounts are authorized. *See, e.g., Universal Service Order*, 12 FCC Rcd at 9084-90. *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, FCC 98-67, at 89, para. 185 (rel. April 10, 1998) (*April 10th Report*).

⁹⁶ See Appendix D, which reproduces the discount matrix adopted in section 54.505(c) of our rules.

SLC shall divide the total amount of remaining support available by the amount of support requested within the particular discount level to produce a pro-rata factor.⁹⁷ Thus, for example, if all applicants eligible for discounts of 90 percent may be fully funded, but there are not sufficient funds remaining to fully fund internal connections for applicants eligible for discounts of 80 percent, SLC shall reduce the support level for each applicant that is eligible for an 80 percent 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 percent discount category based on this reduced discount level. SLC shall commit support to all applicants consistent with the calculations described herein. We expect that, for the initial 18-month funding period, the collection levels established in this Order will enable all of the applicants eligible for discounts of 90 percent to receive full support for internal connections, and that at least a substantial portion, if not all, of the support requested for internal connections by applicants eligible for discounts of 80 percent will be provided.

38. In light of our decision to reduce the collection levels for schools and libraries at this time, we find that our revised method of prioritization is the best way to provide substantial and predictable support for schools and libraries.⁹⁸ We conclude that, to the extent that we are unable at this time to fund demand fully, the best approach is to provide full support for recurring services, and to direct support for internal connections to the neediest schools and libraries. We agree with commenters who state that it would be the most economically disadvantaged schools and libraries that would suffer the most if internal connections were not funded.⁹⁹ The data

⁹⁷ The pro-rata factor is calculated based on the amount of support requested that complies with the Commission's rules and eligibility requirements.

⁹⁸ See, e.g., U.S. Department of Education comments at 1 (stating that schools and libraries require predictability of funding to facilitate long-range technology planning); DTG comments at 4-5 (stating that "[t]he proposed revision of support collections after the initial round of applications is final imposes new risk and unpredictability on the process at a time when it should become more predictable if the goal of access to advanced telecommunications for all schools is to be met"); NC DPI comments at 3 (changing the rules at this point causes mistrust and economic hardship); Funds for Learning comments at 2 (asserting that schools and libraries need predictability, not more frustration, and that service providers may become disenchanted with the changing rules and potential loss of business has schools and libraries have to delay projects for which they anticipated receiving support).

⁹⁹ See, e.g., Great City Schools comments at 3-4 (stating that unless the neediest schools and libraries receive support for internal connections, support for other services will have little value and the digital divide will be perpetuated); WinStar comments at 2-4 (stating that internal connections are important for all schools and libraries, but especially so for those in low-income areas); Cisco Systems comments at 1 (asserting that it is the poorest and most rural schools and libraries, those that are not currently connected, that are seeking support for internal connections); EdLiNC comments at 4, n.2 (stating that support for internal connections is essential of the goals of section 254 are to be met, especially for the neediest schools and libraries).

received from the applications submitted during the initial filing window also support this revision in our rules of priority.¹⁰⁰

39. *Rural Health Care Support Mechanism.* The Commission concluded in the *Universal Service Order* that support for health care providers should be allocated on a first-come, first-served basis.¹⁰¹ Unlike the schools and libraries support mechanism, however, the Commission did not adopt rules that allocate support among health care providers on the basis of their economic circumstances. We determine that we should adopt rules that will take effect in the event that the support requested by health care providers during a filing window exceeds the total authorized support in a funding year. As with the schools and libraries mechanism, our decisions to adjust the maximum collection amounts during 1998 and to adopt a filing window for the rural health care support mechanism lead us to conclude that we should establish rules to allocate funds in the event that all of the available funds will be requested before the window period closes. Several commenters suggested various means by which to prioritize the need of health care providers.¹⁰² We conclude, however, that the complexity of the proposals outweighs their utility. We are not convinced that the administrative burden and the costs associated with any of the proposals outweighs the benefits that would accrue to health care providers.

40. We conclude, therefore, that we should not adopt, at this time, a method by which to prioritize health care providers in the event that demand requested during a filing window exceeds available support. We conclude instead that we should adopt a pro-rata rule that will reduce each applicant's level of support by an equal amount in the event that demand exceeds the total fund allocated for a given funding year. This approach will ensure fairness and equity to each health care provider applying for universal service support and will not impose an undue administrative burden upon either the applicants or the Administrator. If, however, parties submit specific prioritization methods that can be implemented without substantial expense, administrative burden, or complexity, and that ensure equitable distribution of funds as well or

¹⁰⁰ See Letter from Ira Fishman, CEO, SLC to the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated May 7, 1998. A chart attached to the letter contains a funding request analysis for telecommunications services, Internet access, and internal connections by discount level, based on the applications received within the initial 75-day filing window period.

¹⁰¹ *Universal Service Order*, 12 FCC Rcd at 9143. See also 47 C.F.R. § 54.623(c).

¹⁰² Robert Clark Sept. 10 Public Notice comments (supporting adoption of a staged allocation approach that avoids granting all support to metro-based state hospital networks); CNMI Sept. 10 Public Notice comments at 2-3 (stating that priority should be given to health care providers with the greatest costs); NYSDPS/NYSED Sept. 10 Public Notice comments at 5-7 (stating that priority should be based on current participation in state or federal rural network development programs and/or number of persons served by particular providers); RUPRI Sept. 10 Public Notice comments at 2-3 (asserting that priority should be given to health care providers located in Health Professional Shortage Areas and rurality should be evaluated by the Beale code or other rurality index).

better than the pro-rata rule we adopt herein, we will consider modifying this approach in the future.

41. When the filing window closes, RHCC shall calculate the total demand for support submitted by all eligible applicants. If the total demand submitted during the filing window exceeds the total funding available for the funding year, RHCC shall take the following steps. RHCC shall divide the total funds available for the funding year by the total amount of support requested to produce a pro-rata factor. RHCC shall multiply the pro-rata factor by the total amount of support requested by each applicant that has filed during the filing window. RHCC shall then commit funds to each applicant consistent with this calculation. For example, if at the close of the filing window \$125 million has been requested in 1998, RHCC would calculate the pro-rata factor by dividing \$100 million by \$125 million to produce a factor of four-fifths (.8). RHCC would then multiply the total dollar amount requested by each applicant by .8 and would commit such reduced dollar amount to each applicant. We, therefore, add section 54.623(f) to our rules as provided in Appendix A to reflect the procedure described herein.

42. We conclude that the amendments to our rules adopted herein shall be effective upon publication in the Federal Register.¹⁰³ We find that we have good cause to take such action, pursuant to the Administrative Procedure Act,¹⁰⁴ because compliance with these amendments requires preparation only by USAC, SLC, and RHCC, each of which is able to comply with these amendments in a short amount of time. Compliance with these amendments does not require preparation by other affected entities, such as schools, libraries, or health care providers. To the extent that contributors are affected, their burdens are lessened.

V. LEVEL OF COMPENSATION FOR OFFICERS AND EMPLOYEES OF THE ADMINISTRATIVE CORPORATIONS

¹⁰³ Prior to their publication in the Federal Register, the Commission will submit a report on the amended rules adopted herein to Congress and the GAO, as required by the Contract with America Advancement Act (CWAAA), 5 U.S.C. § 801. Pursuant to the CWAAA, the amended rules may take effect following that submission. 5 U.S.C. §801(a)(4). Contrary to the suggestion in Commissioner Furchtgott-Roth's dissent (at 7), the CWAAA does not require that the Commission wait 60 days after this submission is made for the rules to go into effect. Such a delay in the effective date is required only for major rules, and by definition "major rules" do "not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act." 5 U.S.C. §804(2). We have confirmed with the Office of Management and Budget, which is responsible for determining whether or not a rule is major, 5 U.S.C. §804(2), that the amended rules adopted herein are promulgated under the Telecommunications Act of 1996 because they are part of the Commission's continuing implementation of section 254 as added by the 1996 Act and therefore are non-major rules. Despite the Order's citation in the ordering paragraphs to other provisions of the Communications Act as subsidiary sources of authority, it could not be clearer that the amended rules adopted herein implement the 1996 Act because explicit statutory authorization for the universal service mechanism for schools and libraries did not exist prior to addition of section 254 by the 1996 Act.

¹⁰⁴ 5 U.S.C. § 553(d)(3).

A. BACKGROUND

43. In connection with supplemental appropriations legislation enacted on May 1, 1998, Congress requested that the Commission propose a single entity to administer the universal service support mechanisms for schools and libraries and rural health care providers.¹⁰⁵ The Conference Report for the emergency supplemental appropriations bill noted that the House-Senate conferees concurred with the salary limitations contained in section 2005(c) of the Senate bill.¹⁰⁶ Those limitations related to compensation for officers and employees of the unified entity proposed by the Commission to administer the support mechanisms for schools, libraries, and rural health care providers. Specifically, section 2005(c) of the Senate bill provided that no such officer or employee may be compensated at an annual rate of pay, including any non-regular payments, bonuses, or other compensation in an amount exceeding the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of title 5 of the United States Code.¹⁰⁷

44. On May 8, 1998, the Commission issued a Report to Congress that proposed merging SLC and RHCC into USAC and vesting the consolidated USAC with the administrative responsibilities for all of the universal service support mechanisms, including the support mechanisms for schools, libraries, and rural health care providers.¹⁰⁸ The *May 8th Report* proposed that the functions, assets, employees, rights, and liabilities of SLC and RHCC be transferred to USAC by January 1, 1999.¹⁰⁹ To implement this transfer, the Commission stated that USAC, SLC, and RHCC would be required jointly to prepare and submit a plan of reorganization for approval by the Commission. Moreover, the Commission requested from Congress specific statutory authority to create or designate one or more entities, such as USAC, to administer the federal universal service support mechanisms.¹¹⁰ In the *May 8th Report*, the

¹⁰⁵ H.R. 3579, which makes emergency supplemental appropriations for fiscal year 1998, was signed into law on May 1, 1998. The Conference Report on H.R. 3579 eliminated from the final bill specific legislative language contained in S. 1768, the supplemental appropriations bill adopted by the Senate on March 31, 1998 (the Senate bill). Section 2005 of the Senate bill had directed the Commission to prepare and submit to Congress by May 8, 1998, a two-part report on universal service. The statement of the House-Senate conferees accompanying the final bill nevertheless expresses the expectation that, among other things, "the FCC will comply with the reporting requirement in the Senate bill, respond to inquiries regarding the universal service contribution mechanisms, access charges and cost data, and propose a new structure for the implementation of the universal service programs." Conference Report on H.R. 3579, H. Rept. 105-504.

¹⁰⁶ Conference Report on H.R. 3579, H. Rept. 105-504.

¹⁰⁷ S. 1768, sec. 2005(c).

¹⁰⁸ *May 8th Report*, FCC 98-85, at para. 8.

¹⁰⁹ *May 8th Report*, FCC 98-85, at para. 10.

¹¹⁰ *May 8th Report*, FCC 98-85, at para. 15.

Commission also stated that it would address in a forthcoming reconsideration order the salary limitations provided in the Senate bill.¹¹¹ The Commission further stated its intent to seek comment on whether the salary limitations provided in the Senate bill should apply to the officers and employees of USAC and NECA as well.¹¹²

45. On May 15, 1998, the Commission sent a letter to USAC, SLC, and RHCC requesting that the administrative corporations jointly prepare and submit for Commission approval a plan of reorganization that is consistent with the language of section 2005 of the Senate bill, the Conference Report on H.R. 3579, the Commission's *May 8th Report*, and established principles and requirements of corporate law.¹¹³ In particular, the Commission directed the administrative corporations to address in the reorganization plan "the transfer of employees' contractual rights and other benefits, and obligations of SLC and RHCC."¹¹⁴ As set forth in the May 15, 1998 letter, the administrative corporations are directed to file with the Commission a joint plan of reorganization addressing these issues by July 1, 1998.

B. DISCUSSION

46. We conclude that Congress's intent regarding the level of compensation for officers and employees of SLC and RHCC was clearly stated in both section 2005(c) of the Senate bill and in the Conference Report. The Senate and the House-Senate conferees expressly stated that there should be limits on the level of compensation afforded to the officers and employees of the two independent corporations. We conclude, therefore, consistent with the will of Congress, that, effective July 1, 1998, the administrator must, as a condition of its continued service, compensate all officers and employees of SLC and RHCC at an annual rate of pay, including any non-regular payments, bonuses, or other compensation, that does not exceed the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of Title 5 of the United States Code. This level of compensation will apply to all officers and employees of SLC and RHCC, as currently organized, as well as to all such officers and employees in the consolidated administrative corporation following reorganization on July 1, 1998.¹¹⁵ Accordingly, we amend section 69.620(a) of our rules, as provided in Appendix A.

¹¹¹ *May 8th Report*, FCC 98-85, at para. 11 n.34.

¹¹² *May 8th Report*, FCC 98-85, at para. 11 n.34.

¹¹³ Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to the USAC, SLC, and RHCC Boards of Directors, dated May 15, 1998 (*May 15, 1998 letter*).

¹¹⁴ *May 15, 1998 letter* at 2.

¹¹⁵ We note that, following submission of the joint plan for reorganization by USAC, SLC, and RHCC, the Commission will seek comment on whether the salary limitations provided in the Senate bill should apply to the officers and employees of USAC and NECA as well.

VI. PUBLICATION OF QUARTERLY CONTRIBUTION FACTORS IN THE FEDERAL REGISTER

A. BACKGROUND

47. In the *NECA Report and Order*, the Commission established an administrative process by which quarterly universal service contribution factors will be calculated.¹¹⁶ The Commission stated that USAC would be responsible for processing Universal Service Worksheets, FCC Form 457s, which are the forms that require contributors to list their end-user telecommunications revenues.¹¹⁷ The Commission also stated that USAC, SLC, and RHCC must submit their quarterly projections of demand and administrative expenses for their respective support mechanisms to the Commission at least sixty days before the start of each quarter.¹¹⁸ The Commission further stated that it would publish those projections and the proposed quarterly contribution factors in a Public Notice and that USAC could not use those contribution factors to calculate individual contributions until those factors were deemed approved by the Commission.¹¹⁹

48. Specifically, section 54.709(a) of the Commission's rules requires that the proposed contribution factors appear in the Federal Register when it states that "[t]he projections of demand and administrative expenses and the contribution factors shall be announced by the Commission in a Public Notice published in the Federal Register and shall be made available on the Commission's website."¹²⁰ Also in section 54.709(a), however, the Commission's rules state that the proposed contribution factors will be deemed approved "[i]f the Commission takes no action *within 14 days of the date of the Public Notice* announcing the projections of demand and administrative expenses."¹²¹

B. DISCUSSION

49. The existing rule has caused some confusion because it requires publication of the proposed contribution factors in the Federal Register, but at the same time states that those

¹¹⁶ *NECA Report and Order*, 12 FCC Rcd at 18426-27.

¹¹⁷ *NECA Report and Order*, 12 FCC Rcd at 18424.

¹¹⁸ *NECA Report and Order*, 12 FCC Rcd at 18426-27.

¹¹⁹ *NECA Report and Order*, 12 FCC Rcd at 18427. In the *Fourth Reconsideration Order*, the Commission clarified that "the Commission, not USAC, shall be responsible for calculating the quarterly universal service contribution factors." *Fourth Reconsideration Order*, 13 FCC Rcd at 5490.

¹²⁰ 47 C.F.R. § 54.709(a)(3).

¹²¹ 47 C.F.R. § 54.709(a) (emphasis added).

proposed factors will become effective within 14 days of the date on which the Public Notice is released. Because an item is not published in the Federal Register immediately upon release, and because it is not possible to predict with certainty when an item will be published in the Federal Register, the existing rule creates uncertainty about the date on which the contribution factors are deemed approved.

50. We, therefore, amend our rule to clarify that the proposed contribution factors will be deemed approved, in the absence of further Commission action, 14 days after release of the Public Notice in which they are announced. We conclude that the public is given adequate notice of release of the proposed contribution factors because they are posted on the Commission's website immediately upon release. Moreover, this change will eliminate any ambiguity in the rules and will create certainty about when the proposed contribution factors are deemed approved. Accordingly, we amend section 54.709(a)(3) of our rules, as provided in Appendix A.¹²²

VII. CONCLUSION

51. In conclusion, we note that our colleagues' statements dissenting from this Order raise several issues that are well beyond the scope of this Order. Although we believe it would be inappropriate to include here a point-by-point analysis of issues that are not presented in the matters before the Commission in this Order, we do not wish our silence to be construed as acquiescence. We are, therefore, compelled to note that several of the issues raised in dissent have been addressed at length in the context of prior Commission orders, after due consideration and based on complete records. For example, although one of the dissenting statements questions the legal basis for providing support to schools and libraries for internal connections,¹²³ the legal basis for that decision was thoroughly established in both the *Universal Service Order*¹²⁴ and the *April 10, 1998 Report to Congress*.¹²⁵ It was further addressed in the Joint Board's

¹²² We note that several parties commented in response to the *Collection Public Notice* on certain administrative and access charge reform issues. Because these issues have no substantive bearing on the issues addressed in this Order, we do not respond substantively to those comments. See, e.g., AirTouch comments at 3 (end-user surcharges); GTE comments at 8 (same); Sprint comments at 3 (same); SBC comments at 2-4 (fundamental changes to schools and libraries universal service support mechanism); API comments at 3-4 (access charge reform and the productivity factor); RUPRI comments at 5 (high cost fund); USTA comments at 5 (high cost fund, SLC administrative expenses, support for telecommunications carriers only); Nassau BOCES comments at 2-3 (retroactive payments); NTIA comments at 2 (truth-in-billing, local plans for Internet use); CTIA comments at 1-4 (calculation of universal service contributions for wireless providers); USCC comments at 6 (limitation on contributions by CMRS providers); ICA comments at 2 (access charge reform); MCI comments at 4 (pending petition for declaratory ruling); AT&T comments at 1 (support for telecommunications services only).

¹²³ Statement of Commissioner Harold Furchtgott-Roth, dated June 22, 1998, at 9-11.

¹²⁴ 12 FCC Rcd at 9084-90 .

¹²⁵ *April 10 Report to Congress*, FCC 98-67, at 89, para. 185.

Recommended Decision in which the Joint Board unanimously recommended that universal service support be provided to schools and libraries for internal connections.¹²⁶ Similarly, as noted above, the Commission previously has established that universal service contributions do not constitute an unlawful tax.¹²⁷

52. One of the dissenting statements also remarks on proposed regulation of carriers' billing practices.¹²⁸ We are indeed concerned that, when the Commission takes action to reduce carriers' costs of providing service, carriers' bills are creating the false impression that the opposite is true. We note that these matters are not pending before the Commission, and therefore we do not find it practical or appropriate to comment in this context on specific proposals. We do intend to issue in the near future a notice of proposed rulemaking seeking comment on issues relating to the manner in which carriers include billing statements regarding charges relating to universal service support mechanisms. We intend to use that proceeding to develop a complete record on all the relevant issues, including those raised by our dissenting colleague. Only then, after full consideration, would the Commission be able to determine whether it is necessary and appropriate to take any action on these issues, and if so, what action should be taken. Although we remain committed to ensure that carriers include complete and truthful information regarding the contribution amount, we await further consideration of these matters.

53. Finally, our dissenting colleagues suggest that the Commission has not acted to fulfill the Act's requirements regarding support for high cost carriers and low-income consumers.¹²⁹ Pursuant to the 1996 Act, the Commission has taken significant action to implement the universal service provisions of the Act.¹³⁰ As we noted earlier, rural, insular, and high cost telephone subscribers continue to receive high cost support at the same level that they have received for years. In addition, one of the first steps in universal service reform was to make

¹²⁶ *Recommended Decision*, 12 FCC Rcd at 330.

¹²⁷ *See supra* section III.B.

¹²⁸ *See* Statement of Commissioner Harold Furchtgott-Roth, dated June 22, 1998, at 4-5.

¹²⁹ *See generally* Separate Statement of Commissioner Michael K. Powell, Dissenting in Part, dated June 22, 1998; Statement of Commissioner Harold Furchtgott-Roth, dated June 22, 1998, at 2-3, 12, 17.

¹³⁰ Section 254(a)(2) directed the Commission to complete a proceeding to implement the recommendations from the universal service Joint Board within 15 months after enactment of the 1996 Act (i.e. by May 1997) that would include a "timetable for implementation" of the rules to be adopted. The Commission satisfied this directive when it released its May 8, 1997 *Universal Service Order*, including a definition of supported services and a timetable for implementation. *See* Brief of FCC, *Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997) (*appeal pending*) pp. 48-51.

existing high cost support explicit.¹³¹ With respect to low-income consumers, we substantially expanded the reach of the Commission's Lifeline and Link Up programs.¹³² We are considering petitions for reconsideration of some aspects of our actions, as well as requests from the Joint Board that we refer some issues to it, including the so-called "25/75" issue.¹³³ We believe that a second referral to the Joint Board, if clearly defined in terms of issues and timing, could be extremely valuable. We are also actively developing an economic model that will assist us in determining the level of high cost support due to carriers in a way that produces neither a windfall for carriers at the expense of consumers nor a spike in local telephone rates. We are confident that in this manner we will fulfill Congress's goals embodied in section 254. These actions demonstrate the Commission's firm commitment to implementing all parts of universal service. We look forward to working with Congress, the States, the industry, consumers, and our dissenting colleagues, as we move forward in achieving this goal.

VIII. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

54. In compliance with the Regulatory Flexibility Act (RFA)¹³⁴ and the Initial Regulatory Flexibility Analysis (IRFA) that accompanied the *Collection Public Notice* in the Federal Register,¹³⁵ this Supplemental Final Regulatory Flexibility Analysis (SFRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *Universal Service Order*,¹³⁶ only to the extent that changes to that Order adopted here on reconsideration require changes in the conclusions reached in the FRFA. As required by section 603 RFA, 5 U.S.C. § 603, the FRFA was preceded by an Initial Regulatory Flexibility Analysis (IRFA) incorporated in the Notice of

¹³¹ See, e.g., *Universal Service Order*, 12 FCC Rcd at 9165 (removing Long Term Support (LTS) from access charges); 12 FCC Rcd at 8940-41 (stating that "[w]e adopt the Joint Board's recommendation that a subsidy corresponding in amount to that generated formerly by DEM [dial equipment minutes] weighting be recovered from the new universal service support mechanisms").

¹³² See generally *Universal Service Order*, 12 FCC Rcd at 8952-94; see also *supra* discussion at para. 18.

¹³³ See, e.g., Letter from the Honorable Julia Johnson, Chairman, Florida Public Service Commission, the Honorable Laska Schoenfelder, Commissioner, South Dakota Public Utilities Commission, the Honorable Martha Hogerty, Missouri Public Counsel, the Honorable David Baker, Commissioner, Georgia Public Service Commission, and the Honorable Pat Wood, III, Chairman, Texas Public Utilities Commission to the Honorable William E. Kennard, Chairman, Federal Communications Commission, dated June 18, 1998 (*State Joint Board letter*).

¹³⁴ 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), Subtitle II of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).

¹³⁵ 63 Fed. Reg. 27,524 (May 19, 1998).

¹³⁶ *Universal Service Order*, 12 FCC Rcd at 9219.

Proposed Rulemaking and Order Establishing the Joint Board (NPRM), and an IRFA, prepared in connection with the Recommended Decision, which sought written public comment on the proposals in the NPRM and the Recommended Decision.¹³⁷

A. NEED FOR AND OBJECTIVES OF THIS REPORT AND ORDER AND THE RULES ADOPTED HEREIN

55. 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 whose principle goal is to reform our system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. In this Order, we reconsider five aspects of those rules. First, to ameliorate the concerns of applicants seeking support for internal connections that they will be unable to complete installation before December 31, 1998, we reconsider, on our own motion, the funding cycle for schools and libraries. We conclude that it is in the public interest to change the funding year for the schools and libraries universal service support mechanism from a calendar year cycle to a fiscal year cycle running from July 1 to June 30. Moreover, this change to a fiscal year funding cycle will synchronize the schools and libraries universal service support mechanism with the budgetary and planning cycles of most schools and libraries and will align universal service contribution levels with projected reductions in access charges. Second, in order to reduce financial burdens on all contributors to universal service, we reconsider, on our own motion, the amounts that will be collected during the second six months of 1998 and the first six months of 1999 for the schools and libraries support mechanism, and the amounts that will be collected during the second six months of 1998 for the rural health care support mechanism. Third, we modify the rules of priority for the schools and libraries mechanism to provide for the greatest assurance of support to schools and libraries with the greatest levels of economic disadvantage while ensuring that all applicants filing during a filing window period receive at least some support in the event that the amounts requested for support submitted during the filing window exceed the total support available in a funding year. In addition, we adopt a rule to pro-rate the distribution of support to health care providers if demand by health care providers exceeds the total support allocated for a given funding year. Fourth, we conclude, consistent with the will of Congress, that the universal service administrator must, as a condition of continued service, compensate all officers and employees of SLC and RHCC at an annual rate of pay, including any non-regular payments, bonuses, or other compensation, that does not exceed the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of Title 5 of the United States Code, effective July 1, 1998. Fifth, we amend our rule regarding publication of the proposed universal service contribution factors to state that the proposed contribution factors will be deemed approved, in the absence of further Commission action, 14 days after release of the Public Notice

¹³⁷ 61 Fed. Reg. 63,778, 63,796 (1996).

in which they are announced. We conclude that this rule change will eliminate ambiguity regarding publication requirements currently existing in our rules.

B. SUMMARY AND ANALYSIS OF THE SIGNIFICANT ISSUES RAISED BY PUBLIC COMMENTS IN RESPONSE TO THE IRFA

56. No entities commented directly in response to either the *September 10 Public Notice*¹³⁸ or the *Collection Public Notice*,¹³⁹ although some commenters urged the Commission to modify the rules of priority to ensure that applicants in all states, including small applicants, would receive some opportunity to receive funding.¹⁴⁰ In response to the *Collection Public Notice*,¹⁴¹ some commenters urged the Commission to ensure that schools and libraries that filed applications within the initial 75-day filing window are fully funded,¹⁴² and to ensure that schools

¹³⁸ *September 10 Public Notice*. This Public Notice was published in the Federal Register on September 15, 1997. 62 Fed. Reg. 48280 (Sept. 15, 1997).

¹³⁹ See Great City Schools comments at 4 (proposing priority rules that would permit full funding for schools and libraries eligible for 80 percent and 90 percent discounts and a proportional scale back of discounts for all other eligible schools and libraries).

¹⁴⁰ See Anchorage School Dist. Sept. 10 Public Notice comments at 1 (stating that if sufficient funds are not available to meet all approved applications in subsequent filing periods, the Commission should apply an equal percentage reduction to all approved applicants during period); Mississippi Council for Ed. Tech. Sept. 10 Public Notice comments at 4 (stating that funds should be available first to the most disadvantaged schools and libraries); Montana School Boards Ass'n Sept. 10 Public Notice comments at 3 (asserting that a mechanism similar to the rules of priority should be applied to all funds, not just \$250 million); New York City Dept. of IT&T Sept. 10 Public Notice comments at 3 (stating that, if funds are exhausted within the window filing period, distribution of funds should be subject to a pro-rata reduction based on economic disadvantage, obviating need of a \$250 million trigger); New York Pub. Library Sept. 10 Public Notice comments at 1 (advocating a filing window and pro-rata allocation of funds when only \$500 million remains for the year). *But see* Colorado Dept. of Ed. Spet. 10 Public Notice comments at 2 (opposing any proposal that limits the funds available to schools and libraries in the first six months because the Commission has chosen to collect only \$1 billion in the first six months); DataCast Sept. 10 Public Notice comments at 2 (favoring rules of priority that allocate 1/4 of all funds to rural, high cost schools and takes into account "relative economic advantage" in allocating support); Illinois State Board of Dirs. Sept. 10 Public Notice comments at 10-12 (favoring granting states greater authority in implementing rules of priority, favors granting priority to schools with the least amount of infrastructure, and favors a higher trigger level because current 10 percent trigger represents insufficient funds); Maine Dept. of Ed. Sept. 10 Public Notice comments at 2 (favoring allocation of support according to the Technology Literacy Challenge Grants formula).

¹⁴¹ *Collection Public Notice*. This Public Notice was published in the Federal Register on May 19, 1998. 63 Fed. Reg. 27,542 (May 19, 1998).

¹⁴² See, e.g., Funds for Learning comments at 2 (stating that schools and libraries have spent time completing applications and designing technology plans and have modified or delayed installation schedules, all in reliance on the availability of \$2.25 billion); NC Governor comments at 1-2 (supporting full funding because of tremendous effort, especially in terms of human resources, to participate in universal service); EdLiNC comments at 3-5

and libraries have a predictable level of funding.¹⁴³ Other commenters disagreed with the Commission's proposal to link access charge reductions with universal service funding for schools, libraries, and rural health care providers.¹⁴⁴

C. DESCRIPTION AND ESTIMATES OF THE NUMBER OF SMALL ENTITIES TO WHICH THE RULES ADOPTED IN THIS REPORT AND ORDER WILL APPLY

57. In the FRFA at paragraphs 890-925 of the *Universal Service Order*, we described and estimated the number of small entities that would be affected by the new universal service rules. The rules adopted herein may apply to the same entities affected by the universal service rules. We therefore incorporate by reference paragraphs 890-925 of the *Universal Service Order*.¹⁴⁵

D. SUMMARY ANALYSIS OF THE PROJECTED REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS AND SIGNIFICANT ALTERNATIVES

(stating that schools and libraries have devoted substantial resources, made contractual commitments, and issued bonds with the expectation that universal service would be funded up to the amount recommended by the Joint Board and adopted a year ago by the Commission); Great City Schools comments at 3 (stating that the submission of over 30,000 applications is evidence that schools and libraries have relied upon the expectation of full funding and have had to devote substantial resources toward applying for universal service discounts).

¹⁴³ See, e.g., U.S. Department of Education comments at 1 (stating that schools and libraries require predictability of funding to facilitate long-range technology planning); DTG comments at 4-5 (stating that "[t]he proposed revision of support collections after the initial round of applications is final imposes new risk and unpredictability on the process at a time when it should become more predictable if the goal of access to advanced telecommunications for all schools is to be met"); NC DPI comments at 3 (changing the rules at this point causes mistrust and economic hardship); Funds for Learning comments at 2 (asserting that schools and libraries need predictability, not more frustration, and that service providers may become disenchanted with the changing rules and potential loss of business has schools and libraries have to delay projects for which they anticipated receiving support).

¹⁴⁴ See, e.g., AirTouch comments at 8 (stating that the Commission should not link access charge reductions to funding for schools, libraries, and rural health care providers); USTA comments at 2 (stating that "[t]here is no legal basis for the Commission to arbitrarily reduce access charges in order to reflect contributions to u.s. or to determine the appropriate level of funding for the schools, libraries and rural health care programs based on the level of access charge reductions"); Time Warner comments at 3-4 (stating that the Commission should establish a universal service fund that is sufficient to address the policy goals of affordability of basic telecommunications services and support of eligible services for schools, libraries, and rural health care providers, but should not be tied into access charge reduction; access reform policy should instead be based on efficiency principles).

¹⁴⁵ *Universal Service Order*, 12 FCC Rcd at 9227-43.

58. In the FRFA to the *Universal Service Order*, we described the projected reporting, recordkeeping, and other compliance requirements and significant alternatives associated with the Schools and Libraries section, the Rural Health Care Provider section, and the Administration section of the *Universal Service Order*. Because the rules adopted herein may only affect those requirements in a marginal way, we incorporate by reference paragraphs 956-60, 968-71, and 980 of the *Universal Service Order*, which describe those requirements and provide the following analysis of the new requirements adopted herein.¹⁴⁶

59. Under the rules adopted herein, we revise the funding year for the schools and libraries support mechanism from a calendar year cycle (January 1 - December 31) to a fiscal year cycle (July 1 - June 30). This revision will benefit schools and libraries in three ways: (1) it will ameliorate the concerns of applicants seeking support for internal connections that they will be unable to complete installation before December 31, 1998; (2) it will synchronize the schools and libraries support mechanism with the budgetary and planning cycles of most schools and libraries; and (3) it will align universal service contribution levels with projected reductions in access charges. These changes will not have a significant impact on the reporting, recordkeeping, and other compliance requirements for the schools and libraries and rural health care universal service support mechanisms.

60. In addition, we do not revise the annual caps adopted in the *Universal Service Order*, but we do adjust the maximum amounts that may be collected and spent during the initial eighteen months of implementation for the schools and libraries support mechanism and during the initial year of implementation for the rural health care provider support mechanism. The Administrator is instructed to collect only as much as required by demand, but in no event more than \$25 million per quarter for the third and fourth quarters of 1998 to support the rural health care universal service support mechanism and no more than \$325 million per quarter for the third and fourth quarters of 1998 and the first and second quarters of 1999 to support the schools and libraries universal service support mechanism. We also direct the Administrator neither to commit nor disburse more than \$100 million for the rural health care support mechanism for 1998 and no more than \$1.925 billion for the schools and libraries support mechanism for the eighteen month period from January 1, 1998 through June 30, 1999. These changes will not have a significant impact on the reporting, recordkeeping, and other compliance requirements for the schools and libraries and rural health care universal service support mechanisms.

61. In addition, we modify the rules of priority for the schools and libraries support mechanism to equitably provide the greatest assurance of support to the schools and libraries with the greatest level of economic disadvantage while ensuring that all applicants filing during a filing window period receive at least some support in the event that the amounts requested for support submitted during the filing window exceed the total support available in a funding year. We also

¹⁴⁶ *Universal Service Order*, 12 FCC Rcd at 9259.

adopt a rule to pro-rate the distribution of support to health care providers if demand by health care providers exceeds the total fund allocated for a given funding year. These changes will not have a significant impact on the reporting, recordkeeping, and other compliance requirements for the schools and libraries and rural health care universal service support mechanisms.

62. Moreover, consistent with the will of Congress, we conclude that the universal service Administrator must, as a condition of continued service, compensate all officers and employees of SLC and RHCC at an annual rate of pay, including any non-regular payments, bonuses, or other compensation, that does not exceed the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of Title 5 of the United States Code, effective July 1, 1998. We also amend our rule regarding publication of the proposed universal service contribution factors to state that the proposed contribution factors will be deemed approved, in the absence of further Commission action, 14 days after release of the Public Notice in which they are announced. Neither of these changes will have a significant impact on the reporting, recordkeeping, and other compliance requirements for the schools and libraries and rural health care universal service support mechanisms.

E. STEPS TAKEN TO MINIMIZE THE SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES, AND SIGNIFICANT ALTERNATIVES CONSIDERED

63. In the FRFA to the *Universal Service Order*, we 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*. Because the rules adopted herein may only affect those requirements in a marginal way, we incorporate by reference paragraphs 961-67, 972-76, and 981-82 of the *Universal Service Order*, which describe those requirements and provide the following analysis of the new requirements adopted herein.¹⁴⁷

64. As described above, our decision to change to a fiscal year funding cycle will benefit schools and libraries, as well as their chosen service providers, who may be small entities, by equitably providing the greatest assurance of support to the schools and libraries with the greatest levels of economic disadvantage while ensuring that all applicants filing during a window receive at least some support in the event that the amounts requested for support submitted during the filing window exceed the total support available in a funding year. Some schools and libraries that did not file within the initial window in 1998 will not be eligible to receive funding until July 1999, rather than January 1999. We find, however, that on balance, the benefits that will be conferred on the approximately 30,000 applicants that filed within the initial window outweigh this potential six-month delay in funding for some applicants. We also find that this

¹⁴⁷ *Universal Service Order*, 12 FCC Rcd at 9259.

approach strikes the best balance between fulfilling the statutory mandate to enhance access to advanced telecommunications and information services for schools and libraries, and fulfilling the statutory principle of providing quality services at "just, reasonable, and affordable rates,"¹⁴⁸ without imposing unnecessary burdens on schools and libraries or service providers, including small entities.

65. As described above, we adopt the decision to adjust the amount of money to be collected in 1998 and the first and second quarters of 1999 for the schools and libraries universal service support mechanism and in 1998 for the rural health care support mechanism because we do not want to impose unnecessary financial requirements on service provider contributors to universal service, including contributors that are small entities. We find that our decision to adjust the maximum collectible amounts provides substantial support to schools, libraries, and rural health care providers without imposing unnecessary burdens on carriers or subscribers, including small entities.

66. Moreover, our conclusion that the universal service Administrator must, as a condition of continued service, compensate all officers and employees of SLC and RHCC at an annual rate of pay that does not exceed the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of Title 5 of the United States Code, effective July 1, 1998 will not have a significant impact on the reporting, recordkeeping, and other compliance requirements for the schools and libraries and rural health care universal service support mechanisms on any entities other than SLC and RHCC. For those entities, compliance with the amended rule will have a significant impact on the level of compensation afforded some of their employees, but we conclude that this decision is consistent with the intent of Congress. Our decision to amend our rule regarding publication of the proposed universal service contribution factors will not have a significant impact on the reporting, recordkeeping, and other compliance requirements for the schools and libraries and rural health care universal service support mechanisms.

IX. ORDERING CLAUSES

67. 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 1.108 of the Commission's rules, 47 C.F.R. § 1.108, the FIFTH ORDER ON RECONSIDERATION IN CC DOCKET NO. 96-45 IS ADOPTED.

68. 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 1.108 of

¹⁴⁸ 47 U.S.C. § 254(b)(1).

the Commission's rules, 47 C.F.R. § 1.108, the FOURTH REPORT AND ORDER IN CC DOCKET NO. 96-45 IS ADOPTED.

69. 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 1.108 of the Commission's rules, 47 C.F.R. § 1.108, Part 54 of the Commission's rules, 47 C.F.R. Part 54, and Part 69 of the Commission's rules, 47 C.F.R. Part 69, ARE AMENDED as set forth in Appendix A attached hereto.

70. 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 1.108 of the Commission's rules, 47 C.F.R. § 1.108, effective July 1, 1998, Universal Service Administrative Company shall compensate all officers and employees of Schools and Libraries Corporation and Rural Health Care Corporation at an annual rate of pay, including any non-regular payments, bonuses, or other compensation, that does not exceed the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of Title 5 of the United States Code.

71. IT IS FURTHER ORDERED that, because the Commission has found good cause, the rule changes set forth in Appendix A ARE EFFECTIVE immediately upon publication in the Federal Register.

72. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Fifth Order on Reconsideration and Fourth Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A -- Rule Changes

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

Part 54 -- UNIVERSAL SERVICE

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

Authority: 47 USC Secs. 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

§ 54.507 Cap.

2. Revise section 54.507(a) and add subsections 54.507(a)(1) and (2) to read as follows:

(a) Amount of the annual cap. The annual cap on federal universal service support for schools and libraries shall be \$2.25 billion per funding year, and all funding authority for a given funding year that is unused in that funding year shall be carried forward into subsequent funding years for use in accordance with demand, with the following exceptions:

(1) No more than \$625 million shall be collected or spent for the funding period from January 1, 1998 through June 30, 1998. No more than \$325 million shall be collected for the funding period from July 1, 1998 through September 30, 1998. No more than \$325 million shall be collected for the funding period from October 1, 1998 through December 31, 1998. No more than \$325 million shall be collected for the funding period from January 1, 1999 through March 31, 1999. No more than \$325 million shall be collected for the funding period from April 1, 1999 through June 30, 1999. No more than \$1.925 billion shall be collected or disbursed during the eighteen month period from January 1, 1998 through June 30, 1999.

(2) The carryover of unused funding authority will not apply for the funding period January 1, 1998 through June 30, 1999. To the extent that the amounts collected in the funding period January 1, 1998 through June 30, 1999 are less than \$2.25 billion, the difference will not be carried over to subsequent funding years. Carryover of funds will occur only to the extent that funds are collected but not disbursed in the funding period January 1, 1998 through June 30, 1999.

3. Revise section 54.507(b) to read as follows:

* * * * *

(b) Funding year. A funding year for purposes of the schools and libraries cap shall be the period July 1 through June 30. For the initiation of the mechanism only, the eighteen month period from January 1, 1998 to June 30, 1999 shall be considered a funding year. Schools and

libraries filing applications within the initial 75-day filing window shall receive funding for requested services through June 30, 1999.

* * * * *

4. Amend section 54.507(g) by redesignating the introductory text as 54.507(g)(2), redesignating subparagraphs 54.507(g)(1)-(4) as 54.507(g)(2)(i)-(iv), adding new introductory text to section 54.507(g) and adding new subparagraphs 54.507(g)(1)(i)-(iv), to read as follows:

(g) Rules of priority. Schools and Libraries Corporation shall act in accordance with subparagraph (1) of this section with respect to applicants that file a Form 471, as described in section 54.504(c) of this part, when a filing period described in paragraph (c) of this section is in effect. Schools and Libraries Corporation shall act in accordance with subparagraph (2) of this section with respect to applicants that file a Form 471, as described in section 54.504(c) of this part, at all times other than within a filing period described in paragraph (c) of this section.

(1) When the filing period described in paragraph (c) of this section closes, Schools and Libraries Corporation shall calculate the total demand for support submitted by applicants during the filing period. If total demand exceeds the total support available for that funding year, Schools and Libraries Corporation shall take the following steps:

(i) Schools and Libraries Corporation shall first calculate the demand for telecommunications services and Internet access for all discount categories, as determined by the schools and libraries discount matrix in section 54.505(c) of this part. These services shall receive first priority for the available funding.

(ii) Schools and Libraries Corporation shall then calculate the amount of available funding remaining after providing support for all telecommunications services and Internet access for all discount categories. Schools and Libraries Corporation shall allocate the remaining funds to the requests for support for internal connections, beginning with the most economically disadvantaged schools and libraries, as determined by the schools and libraries discount matrix in section 54.505(c) of this part. Schools and libraries eligible for a 90 percent discount shall receive first priority for the remaining funds, and those funds will be applied to their requests for internal connections.

(iii) To the extent that funds remain after the allocation described in sections 54.507(g)(1)(i) and (ii), Schools and Libraries Corporation shall next allocate funds toward 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.

(iv) 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-rata 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-rata factor.

(v) Schools and Libraries Corporation shall commit funds to all applicants consistent with the calculations described herein.

(2) When a filing period described in paragraph (c) of this section is not in effect, and when expenditures in any funding year reach the level where only \$250 million remains before the cap will be reached, funds shall be distributed in accordance with the following rules of priority:

* * * * *

§ 54.511 Ordering Services.

5. Revise section 54.511(d) to read as follows:

* * * * *

(d) The exemption from the competitive bid requirements set forth in paragraph (c) shall not apply to voluntary extensions of existing contracts, with the exception that an eligible school or library as defined under § 54.501 or consortium that includes an eligible school or library, that filed an application within the 75-day initial filing window (January 30, 1998 - April 15, 1998) may voluntarily extend, to a date no later than June 30, 1999, an existing contract that otherwise would terminate between December 31, 1998 and June 30, 1999.

§ 54.623 Cap.

6. Amend section 54.623 by revising paragraph 54.623(a) and adding paragraph 54.623(f) to read as follows:

(a) Amount of the annual cap. The annual cap on federal universal service support for health care providers shall be \$400 million per funding year, with the following exceptions. No more than \$50 million shall be collected for the funding period from January 1, 1998 through June 30, 1998. No more than \$25 million shall be collected for the funding period from July 1, 1998 through September 31, 1998. No more than \$25 million shall be collected for the funding period

from October 1, 1998 through December 31, 1998. No more than \$100 million shall be committed or disbursed for the 1998 funding year.

* * * * *

(f) Pro-rata reductions. Rural Health Care Corporation shall act in accordance with this paragraph when a filing period described in paragraph (c) of this section is in effect. When a filing period described in paragraph (c) of this section closes, Rural Health Care Corporation shall calculate the total demand for support submitted by all applicants during the filing window. If the total demand exceeds the total support available for the funding year, Rural Health Care Corporation shall take the following steps:

(1) Rural Health Care Corporation shall divide the total funds available for the funding year by the total amount of support requested to produce a pro-rata factor.

(2) Rural Health Care Corporation shall calculate the amount of support requested by each applicant that has filed during the filing window.

(3) Rural Health Care Corporation shall multiply the pro-rata factor by the total dollar amount requested by each applicant. Rural Health Care Corporation shall then commit funds to each applicant consistent with this calculation.

§ 54.709(A)(3) Computations of required contributions to universal service support mechanisms.

7. Revise section 54.709(a)(3) to read as follows:

(a) * * *

(1) * * *

(2) * * *

(3) Total projected expenses for universal service support programs for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factors and individual contribution. For each quarter, the High Cost and Low Income Committee or the permanent Administrator once the permanent Administrator is chosen and the Schools and Libraries and Rural Health Care Corporations must submit their projections of demand for the high cost and low-income programs, the school and libraries program, and rural health care program, respectively, and the basis for those projections, to the Commission and the Common Carrier Bureau at least 60 calendar days prior to the start of that quarter. For each quarter, the Administrator and the Schools and Libraries and Rural Health Care Corporations must submit their projections of administrative expenses for the high cost and low-income programs, the schools and libraries program and the rural health care program, respectively, and

the basis for those projections to the Commission and the Common Carrier Bureau at least 60 calendar days prior to the start of that quarter. Based on data submitted to the Administrator on the Universal Service Worksheets, the Administrator must submit the total contribution bases to the Common Carrier Bureau at least 60 days before the start of each quarter. The projections of demand and administrative expenses and the contribution factors shall be announced by the Commission in a Public Notice and shall be made available on the Commission's website. The Commission reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest at any time within the 14-day period following release of the Commission's Public Notice. If the Commission takes no action within 14 days of the date of release of the Public Notice announcing the projections of demand and administrative expenses, the projections of demand and administrative expenses, and contribution factors shall be deemed approved by the Commission. Once the projections and contribution factors are approved, the Administrator shall apply the quarterly contribution factors to determine individual contributions.

* * * * *

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

Part 69 -- ACCESS CHARGES

§ 69.620 Administrative expenses of independent subsidiary, Schools and Libraries Corporation, and Rural Health Care Corporation.

1. Amend section 69.620 by revising the text of section 69.620(a) as indicated and by adding subparagraphs 69.620(a)(1) and (2), to read as follows:

(a) The annual administrative expenses of the independent subsidiary, Schools and Libraries Corporation and Rural Health Care Corporation, should be commensurate with the administrative expenses of programs of similar size, with the exception of the salary levels for officers and employees of the corporations. The annual administrative expenses may include, but are not limited to, salaries of officers and operations personnel, the costs of borrowing funds, equipment costs, operating expenses, directors' expenses, and costs associated with auditing contributors of support recipients.

(1) All officers and employees of the independent subsidiary, Schools and Libraries Corporation and Rural Health Care Corporation, may be compensated at an annual rate of pay, including any non-regular payments, bonuses, or other compensation, in an amount not to exceed the rate of basic pay in effect for Level I of the Executive Schedule under section 5312 of title 5 of the United States Code.

(2) The level of compensation described in section 69.620(a)(1) shall be effective July 1, 1998.

* * * * *

Appendix B -- PARTIES FILING COMMENTS
ON UNIVERSAL SERVICE SUPPORT DISTRIBUTION OPTIONS FOR SCHOOLS,
LIBRARIES, AND RURAL HEALTH CARE PROVIDERS
(SEPTEMBER 10 PUBLIC NOTICE)

CC Docket 96-45

DA 97-1957

<u>Commenter</u>	<u>Abbreviation</u>
AG Communications Systems Corp.	AG Comm. Sys. Corp.
State of Alaska	Alaska
Anchorage School District	Anchorage School Dist.
Archdiocese of New York	
Clark, Robert (informal comment)	Robert Clark
Colorado Department of Education	Colorado Dept. of Ed.
DataCast Learning Network	DataCast
Delta-Schoolcraft Intermediate School District	Delta-Schoolcraft School Dist.
Education and Library Networks Coalition	Edline
Florida Department of Management Services	Florida DMS
The Council of the Great City Schools	Great City Schools Council
Illinois State Board of Directors	Illinois St. Bd. of Dirs.
Kansas Hospital Association	Kansas Hospital Ass'n
KM Broadcasting	
State of Maine Department of Education	Maine Dept. of Ed.
Missouri Public Service Commission	Missouri PSC
The Missouri Research and Education Network	Missouri Res. Ed. Net.
Missouri State Library	
The Mississippi Council for Education Technology	Mississippi Council for Ed. Tech.
The Montana Public Service Commission	Montana PSC
Montana School Boards Association	Montana School Boards Ass'n
New Hampshire State Library	NH State Library
New Jersey Division of the Ratepayer Advocate	NJ Ratepayer Advocate
New Jersey State Library	NJ State Library
New York Public Library	NY Pub. Library
The City of New York Department of Information Technology and Telecommunications	New York City Dept. of IT&T
New York State Department of Public Service and The New York State Education Department	NYDPS/NYSED
North Dakota Public Service Commission	North Dakota PSC
The Commonwealth of the Northern Mariana Islands	CNMI

Rural Policy Research Institute Rural Telecommunications

Task Force

South Carolina Area Health Education Consortium

South Carolina Budget and Control Board,

Office of Information Resources

The United States Telephone Association

Utah Education Network

Weisiger, Gregory

RUPRI

South Carolina AHEC

South Carolina OIR

USTA

Utah Ed. Net.

Gregory Weisiger

**Appendix C -- PARTIES FILING COMMENTS ON PROPOSED REVISION OF 1998
COLLECTION AMOUNTS FOR SCHOOLS AND LIBRARIES AND RURAL
HEALTH CARE PROVIDERS
(COLLECTION PUBLIC NOTICE)**

CC Docket 96-45

DA 98-872

05/22/98

Commenter

Abbreviation

Airtouch Communications	Airtouch
Alaska Public Utilities Commission	Alaska Commission
American Electronics Association	AEA
American Petroleum Institute	API
American Public Communications Council	APCC
AT&T AT&T	
Bell Atlantic	
California School Boards Association	CSBA
Cellular Telecommunications Industry Association	CTIA
Cisco Systems, Inc.	Cisco Systems
Council of the Great City Schools	Great City Schools
Dakota Telecommunications Group, Inc.	DTG
Education and Library Networks Coalition	EDLINC
Educational Technology Services	ETS
Funds for Learning, LLC	Funds for Learning
GTE Service Corporation	GTE
IBM	
Illinois State Library Advisory Committee	
Information Technology Industry Council	ITI
International Communications Association	ICA
Mactel, Inc.	Mactel
Maryland Public Service Commission	Maryland Commission
MCI Telecommunications Corporation	MCI
Menino, Thomas (Mayor of Boston)	Mayor of Boston
National Telecommunications and Information Administration	NTIA
New Jersey Division of the Ratepayer Advocate	NJ Ratepayer Advocate
New Jersey Library Association	NJ Library Association

**Appendix C -- PARTIES FILING COMMENTS ON PROPOSED REVISION OF 1998
COLLECTION AMOUNTS FOR SCHOOLS AND LIBRARIES AND RURAL
HEALTH CARE PROVIDERS
(COLLECTION PUBLIC NOTICE)**

CC Docket 96-45

DA 98-872

05/22/98

Commenter

Abbreviation

North Carolina Department of Public Instruction and the State Telecommunications Services Division of the Department of Commerce	NC DPI
North Carolina Office of the Governor	NC Governor
Personal Communications Industry Association	PCIA
Rural Policy Research Institute	RUPRI
San Diego Unified School District	
Santa Maria-Bonita School District	
Southwestern Bell Telephone, Pacific Bell, & Nevada Bell	SBC
Sprint Corporation	Sprint
Sprint PCS	
Time Warner Communications Holdings Inc.	Time Warner
United States Cellular Corporation	USCC
United States Department of Education	
United States Telephone Association	USTA
United States Telephone Association (Corrected Filing)	USTA
Wisconsin Department of Public Instruction	Wisconsin DPI
Winstar Communications, Inc.	WinStar

Appendix D -- SCHOOLS AND LIBRARIES DISCOUNT MATRIX
47 C.F.R. § 54.505(c)

SCHOOLS & LIBRARIES DISCOUNT MATRIX	DISCOUNT LEVEL	
	urban discount	rural discount
HOW DISADVANTAGED? ----- % of students eligible for national school lunch program		
< 1	20	25
1-19	40	50
20-34	50	60
35-49	60	70
50-74	80	80
75-100	90	90

June 22, 1998

**Separate Statement
of
Commissioner Susan Ness**

Re: Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service (CC Docket No. 96-45)

Today's decision is a difficult one. I regret the circumstances that compel the Commission to pare back universal service support for schools and libraries, but I believe these reductions hold some potential for lessening the intense controversy that has swirled about the issue for the past several weeks.

I am respectful of the sentiments that have been expressed by several of the leading Members of the United States Congress regarding the FCC's plans to provide universal service support for schools, libraries, and rural health care. We have taken their concerns to heart. In response, we are (1) addressing the organizational issues by moving to consolidate administrative structures, (2) capping executive salaries, (3) stretching out the initial funding year, and (4) limiting collections for each of the next four quarters.

These funding cutbacks will translate directly to reduced benefits for students, teachers, and library patrons. The inevitable result will be to postpone the day when a teacher can report a life-threatening situation from his classroom telephone, to defer the dream of a rural principal that her students can use distance learning to learn a foreign language, and to slow the connection of classrooms to the most extraordinary web of informational resources that has ever existed. I do not lightly or happily vote for these sacrifices, but current circumstances allow us no alternative.

I am keenly aware that numerous Senators and Representatives strongly believe in promoting telecommunications and information access for classrooms, libraries, and rural health care facilities and endorse the implementation plans devised by the Joint Board and the FCC. Scores of them have written to urge us not to jeopardize the interests of the thousands of institutions that are prepared to move forward. So have four Cabinet Secretaries and hundreds if not thousands of teachers, parents, and

students. I share their commitment to the vision embodied in the Snowe-Rockefeller-Exon-Kerrey provisions of the Telecommunications Act of 1996.

Unfortunately, that vision is jeopardized by the intentions of certain carriers to establish "line-item" charges on consumers' bills. The FCC does not regulate the prices charged by interexchange carriers, nor the number of lines on their bills. But it is an understandable concern for the Congress when a law that was intended to benefit consumers is perceived to be causing rates to rise.

Let me be clear: I am committed to bringing about the consumer benefits intended by Congress. In the long distance market, which was already substantially competitive, we have sought to drive down prices by reducing excessive access charges. These charges were reduced by \$1.7 billion last year, and they will decline by another \$800 million next month. These lowered costs should lead directly to lower rates for both business and residential users of these services.

The political problem results less from rate increases than from the *perception* of rate increases. Certain companies apparently plan to tell their customers about new costs resulting from government action -- such as universal service contributions and increases in flat-rated recovery of loop costs -- but not to be equally forthcoming in telling them about cost *reductions* resulting from those same government actions (reducing per-minute access charges by the amount of the flat-rated charges and backing out the previously embedded high-cost and low-income support) and others (e.g., price cap productivity factor-based reductions).

Our decisions today reduce the risk that consumers will be misled, since it is unlikely that carriers will try to raise rates at a time when their costs are declining. But it is clear that consumers are confused by all the changes that are underway. We need to ensure that consumers receive complete, accurate, and understandable information, and to this end I strongly support Chairman Kennard's "truth in billing" initiative. I have heard no good excuse for telling consumers less than half the story. If government reduces a carrier's costs by significantly more than it raises them, how can anyone defend telling the consumer only about the cost increases? I hope the Commission will promptly complete action on its pending Notice of Proposed Rulemaking on this subject, develop a record as quickly as possible, and then adopt whatever corrective measures are needed.

I embrace the universal service provisions of the Communications Act. For over two years, the FCC has worked diligently with our partners, the state commissions, to promote *all* of the universal service provisions of the law. Consumers in high-cost areas are continuing to receive subsidized service. Low-income consumers are likewise receiving support. Schools, libraries, and rural health care providers are poised to avail themselves of the opportunities contemplated by Section 254(h) of the Communications Act. We do not have to choose between meeting the traditional universal service responsibilities (for low-income and high-cost consumers) and the

newer ones (for schools, libraries, and rural health care); *all* of these needs can and must be met, even as the total cost of service continues to decline.

Much as I regret the cutbacks we adopt today, I hope they will help create a political environment that permits these vital programs to proceed. I am determined to do everything in my power to safeguard Snowe-Rockefeller, while squarely addressing the legitimate concerns of our critics. I pledge to continue to work with supporters and critics alike to ensure a solid funding base and proper disbursement system for universal service support to schools, libraries, and rural health care -- as well as to work with equal diligence on other universal service issues.

I recognize that there may be other ways to fulfill the demonstrated needs of schools, libraries, and rural health care providers. Some in Congress are exploring the notion of funding these needs with the funds currently raised through the federal excise tax on telephone service. This appears to be a constructive suggestion. I for one would be delighted to see this idea succeed, as it would provide a reliable and enduring source of funding, while reducing the overall burden on consumers. In the interim, however, we cannot properly put our implementation of Section 254(h) of the Communications Act on hold; the *possibility* of future legislative action does not permit us to defer implementing the provisions that are *already* in the law.

June 22, 1998

Separate Statement of Commissioner Gloria Tristani

Re: *Federal-State Joint Board on Universal Service, CC Docket No. 96-45*

I strongly support the goals of the schools and libraries program. It is with reluctance that I support today's decision to scale back funding for the program. I do so because I believe it fairly reflects the competing concerns that face us at this point.

It has become all too common in Washington to substitute the word "investment" for "spending." With respect to some types of expenditures, the word "investment" is truly misplaced, but I believe "investment" elegantly captures the nature of the schools and libraries program. The nation's economy is increasingly dependent on the technological competence of its workforce. A fully functioning program is a golden opportunity to help prepare our children for the global, information technology economy. When we make a decision to slow funding for schools and libraries program, as we do today, we decide that fewer children will experience the world of the Internet for the first time. We also decide that, in the near future, fewer young adults entering the workforce will be capable of performing jobs that American companies are desperate to fill. The schools and libraries program is competition policy, and while it will not singlehandedly create a workforce capable of growing our economy in the face of foreign competitors, it is an important step in that direction.

I recognize and respect Congress's wishes with regard to the universal service provisions. Congress speaks for the American people, who are the ultimate source of the FCC's authority. Many members of Congress have told the Commission that they intended high cost support to be the centerpiece of the universal service provisions of the Telecommunications Act of 1996. I do not disagree with that point. I take this opportunity to personally reaffirm my commitment to a high cost mechanism that complies with the letter and spirit of the universal service provisions of the 1996 Act. Coming from New Mexico, I have seen first hand the need for high cost support for rural areas. A new high cost mechanism that failed to "preserve and advance universal service" would be flatly at odds with both the Act and the unambiguous will of Congress. Thus, as a matter of both personal belief, as well as professional duty, I am firmly committed to creating a new system of high cost support that keeps local telephone service affordable in rural areas.

Some have argued that the FCC should freeze the schools and libraries program until we complete our work on a new mechanism for supporting local telephone rates in high cost areas. The argument is that the FCC has simply misunderstood Congress's relative priorities as between schools and libraries support and high cost support. I understand why some would feel that way. However, I do not believe we should postpone resolution of the schools and libraries program

simply because we have not completed our work on the far more complex high cost plan. Thus, I would reiterate that my support for implementing the schools and libraries program does not in any way affect my commitment to creating a high cost support system that fully complies with section 254 of the Act.

Implementing the schools and libraries portion of the 1996 Act was a very challenging task for the previous Commission, and it continues to present this Commission with difficult choices. But replacing the old system of high cost subsidies with explicit support flows is proving to be a far more difficult task. For one thing, any new mechanism is bound to affect the amounts currently paid and received by individual carriers and individual states. Many carriers and state commissions have devoted enormous resources to devising proposals that seek to accommodate the competing concerns. While some of these proposals are quite different, each has components that satisfy important objectives.

In addition, the new high cost mechanism is particularly important because it will directly affect Congress's goal of bringing consumers competitive choices in telecommunications markets. A system of explicit support that results in underfunding of high cost areas would, as a practical matter, restrict consumers in those areas to a single choice of provider -- the incumbent. Preserving universal service and promoting competition are the hallmarks of the 1996 Act. They are also two sides of the same coin. Thus, in addition to achieving the critical objective of preserving affordable telephone service, the new system of high cost support adopted by this Commission will go far in determining whether Congress's goal of competition is ever realized for millions of Americans. I view the ongoing struggle to implement the new high cost mechanism not as a lack of commitment on our part but as a sign of our commitment to getting it right with respect to high cost funding for rural areas.

I am also concerned that today's action will cause disruption to the education community. The public is not entitled to assume government policies will never change. The government is constantly adding to, modifying, or eliminating rules and regulations. It does so either because the conditions have changed, or because attitudes have changed even as the underlying conditions remain the same. I see no evidence that the conditions justifying the creation of the schools and libraries program have changed. Today, just as on May 8, 1997, there is no question that children will receive better educations if the immense resources of the Internet are made available to them and their teachers. What has changed is the attitude toward the program because of the realization that achieving this worthy goal will cost money. I welcome a thorough discussion of the extent to which consumers are willing to sacrifice to achieve this goal. I have little doubt that consumers are willing to pay for the schools and libraries program. I only regret that it has taken so long for this fundamental dialogue to occur.

Funding of internal connections has become a key focus of the program because it represents approximately 65 percent of the support requested for 1998. I believe the benefits of the schools and libraries program are critically dependent on funding internal connections.

Section 254(h)(1)(B) is about bringing the Internet to students. Students are located in classrooms. Therefore, the Internet connection must be brought to the classrooms. Funding basic telephone service and Internet access service for phone lines in principals' offices will not improve education for students.

In the past few months, this point was made clear to me when I visited schools in New Mexico and Puerto Rico. Although a few of the classrooms had computers, none had Internet access. Those visits crystallized for me the importance of inside wiring to the success of the schools and libraries program.

It is regrettable that we are funding internal connections for only the schools eligible for 80 and 90 percent discounts. This means the majority of schools that were eligible for discounts on inside wiring will get nothing. Many of the schools I visited did not fall into the 80 or 90 percent discount range, yet their facilities were quite modest and would not be considered wealthy by any measure. Under our decision today, they will receive no funding to connect their classrooms to the Internet. This is a true loss for those students and teachers.

In the end, I hope today's slowdown of the Schools and Libraries Program will prove to be only a detour for this vital program. I note with optimism that some in Congress are exploring the idea of using money collected through the current excise tax on phone bills to fund the Schools and Libraries Program. I hope this idea receives serious consideration.

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June 22, 1998

**SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL,
DISSENTING IN PART**

Re: Fifth Order on Reconsideration and Fourth Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45.

I write separately to explain why I am dissenting in part from this Order. In short, while I support the general direction of the changes made in this Order regarding funding for the Schools and Libraries program, I would prefer that the Commission take more significant steps toward resolving the funding questions that loom over all aspects of universal service simultaneously in an integrated proceeding.

I agree with the majority that this Order takes some important steps in response to growing criticism of the scope and timing of the Schools and Libraries program, as well as mounting concern regarding how some carriers have chosen to recover their universal service contributions from end user customers. The Order reduces funding below current estimated demand and essentially freezes the quarterly collection rate at the existing level. The Order gives priority to funding the neediest schools and will also concentrate funding on services, rather than internal connections and other equipment.

Nevertheless, I fear that the changes instituted in this Order do not go far enough in addressing the concerns that I and others inside and outside the Commission have raised over the past several months. In particular, as I have stated on multiple occasions since my confirmation last October, I am concerned that the Commission continues to implement and manage the Schools and Libraries program independently of its implementation of other universal service programs. It is my strong belief that a more comprehensive approach to implementing universal service would better reflect the fact that all of these programs are interrelated and would better comport with the intent of Congress.

Given the importance of *all* of our universal service statutory mandates, the complexity of the programs being spawned by these mandates and growing public criticism,¹⁴⁹ I am disappointed that the Commission has not fully utilized its discretion to revise the timing of implementation of the various universal service programs to ensure that universal service as a *whole* is preserved and advanced in keeping with the statutory mandate. Instead, following a rough timetable that was set before the current Commission was even constituted, we have proceeded with what amounts

¹⁴⁹ In particular, I note growing criticism of the Commission resulting from carriers' addition of universal service line items to their customers' long distance bills.

to a two-track implementation of the Act's universal service mandate: the Schools and Libraries and Rural Health Care programs chug along on the first track, while the program to provide support for high cost areas based on forward-looking economic cost idles in the station, awaiting much-needed servicing and critical moving parts that have been requested but have not yet been delivered.¹⁵⁰

The fact that the Commission's implementation of certain universal service programs remains largely incomplete becomes clear if we examine the previous Commission's stated intention in adopting the *Universal Service Order* last May:

We set in place rules that will identify and convert existing federal universal service support in the interstate high cost fund, the dial equipment minutes (DEM) weighting program, Long Term Support (LTS), Lifeline, Link Up and interstate access charges to explicit competitively neutral federal universal service support mechanisms. We will provide universal service support to [non-rural] carriers serving rural, insular, and high cost areas through a mechanism based on forward-looking economic cost beginning on January 1, 1999 . . .¹⁵¹

Subsequently, the current Commission has stated that aspects of the high cost support program adopted last May are mere "place holders" that we will continue to evaluate prior to implementation.¹⁵² In addition, as has become clear in recent days, the Commission may yet refer certain, complex issues critical to our implementation of the high cost support program to the Federal-State Joint Board for resolution, thereby making it less likely that we will be able to complete implementation of this aspect of universal service by the deadline the previous Commission imposed.

Let me be clear: I do *not* argue that the Commission's failure to implement the new high cost support program by this time evidences any lack of commitment to this aspect of universal service, *nor* do I suggest that there are not reasons why we are not further along in our

¹⁵⁰ In this statement, I use the term "high cost support program" to refer to the Commission's plan, announced in the May 1997 *Universal Service Order*, to calculate federal universal service support based on the difference between forward-looking economic cost and a nationwide revenue benchmark. *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*), ¶ 223. I do *not* refer to the *existing* mechanisms for supporting high cost and small telephone companies (*i.e.*, the high cost assistance fund, the dial equipment minutes (DEM) weighting program, and LTS), which were scheduled to continue in use until the Commission established a forward-looking cost methodology for providing support to non-rural carriers (*i.e.*, through December 31, 1998). *Id.* ¶ 273.

¹⁵¹ *Universal Service Order*, 12 FCC Rcd 8776, ¶ 6.

¹⁵² *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45 (rel. April 10, 1998), ¶ 18.

implementation of high cost support. Indeed, the task of converting the existing scheme of implicit universal service subsidies to explicit mechanisms is no doubt one of the most challenging tasks that Congress delegated to the Commission. But I believe a more comprehensive approach to implementing universal service -- one in which we do not allow the implementation of certain programs to out-pace the implementation of other programs -- is more in keeping with the statutory mandate.

I believe, furthermore, that a more comprehensive implementation of universal service need not be fatal to implementation of the Schools and Libraries program. I fully recognize that it is our duty to implement *all* of the universal service mandates of the 1996 Act, including the provisions of section 254 that pertain to enhancing access to telecommunications and advanced services by eligible schools and libraries. I consequently reject any suggestion that the Commission can, without further legislative action by Congress, halt *indefinitely* the implementation of the Schools and Libraries program or any other universal service provision of the statute. The Commission, however, has a statutory duty not just to implement the program, but to do so in a way that maximizes administrative efficiency and balances the beneficiaries' desire for funding against the need to ensure that we do not collect so much that we bankrupt our larger universal service efforts or derail our other efforts to implement the Act, such as promoting competition. I submit that the Commission must do more to balance the needs of *all* beneficiaries of our universal service programs, lest we allow critical support for these programs to wither or further eat away at itself through needless in-fighting.

Moreover, even if I were not duty-bound to implement all aspects of the universal service mandate, I would find that the goals of these programs are laudable, the Schools and Libraries program included. It is beyond question that access to advanced services, in particular, will be critical to training the workforce of the new millennium, and I, like my colleagues, believe it is imperative to the functioning of our democracy that our society make special effort to spread knowledge of and proficiency with advanced communications and computing technologies to populations that otherwise might lack access to such technologies.

As in any policy debate, however, the fact that we agree on the ends of the policy does not necessarily mean that we agree on the means of achieving those ends. For my part in the debate surrounding universal service implementation, I would prefer that the Commission place implementation of the Schools and Libraries, Rural Health Care and high cost support programs all squarely on the same track. Specifically, I believe the Commission, at a minimum, should temporarily suspend collections for the Schools and Libraries program until significant questions regarding the administration of the program, as well as the manner in which carriers recover their contributions to the program, can be fully resolved. Thereafter, I believe ultimate resolution of the questions surrounding the program's size and method of collection should be resolved at the same time as, and in coordination with, the resolution of the same questions with respect to the new high cost support program.

The language of the statute supports a more comprehensive approach to resolving questions regarding universal funding and collection. Section 254(a)(2) of the statute clearly contemplates "a single proceeding" by which the Commission implements the universal service provisions of section 254.¹⁵³ Conversely, I find nothing in the statute that evidences any Congressional favoritism for certain aspects of universal service that would justify implementation of certain programs, such as Schools and Libraries, prior to implementation of others.¹⁵⁴

More importantly, our experience in collecting funds for the first half of 1998 should have taught us that a piece-meal approach to funding the various universal service programs is likely to engender consumer ire and confusion. The simple truth is that universal service costs money. And as we follow the Act's instruction to move to a more competitive market paradigm in which universal service subsidies are converted from implicit to explicit, we should not be surprised that carriers will seek to recover such subsidies from their customers. Unless we are prepared to return to unenlightened days of strict price regulation in telecommunications, we should not be naive enough to presume that profit-maximizing firms will deduct their universal service contributions from their bottom lines, either out of the goodness of their hearts or because we somehow believe that they gave their word not to pass on these costs to their customers.¹⁵⁵

Under these circumstances, I believe the Commission does consumers, the carriers we regulate, the Congress and itself a disservice by continuing to dribble out aspects of the new universal service regime mandated by the Act in piece-meal fashion. While some of the universal service programs mandated by the Act are "new," they are all the same in the sense that they are explicit supports that will be paid for by carriers who will then seek to recover these costs, all at the same time the Commission seeks to remove existing implicit subsidies from access charges and the like. Implementing some programs independently, prior to implementation of other programs, will likely doom all of us to round after round of semiannual or quarterly "crises," in which carriers will announce new charges to recover their universal service obligations, Commission staff will scramble to determine whether the new charges violate any applicable

¹⁵³ 47 U.S.C. § 254(a)(2).

¹⁵⁴ *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 1997 WL 795376, CC Docket No. 96-45, FCC 97-420 (rel. Dec. 30, 1997) ("[B]ecause section 254 provides no basis for the Commission to favor certain classes of recipients over others with respect to the level or timing of universal service support flows, *see generally* 47 U.S.C. § 254, I believe that the various recipients of universal service support are all equally entitled to benefit from such support. I think it is imperative that we not allow some universal service programs to take priority over others.") (statement of Commissioner Powell).

¹⁵⁵ With respect to the notion that long distance carriers agreed to some deal that they would not pass on the costs of their universal service obligations in exchange for access charge reductions, I would point out that there is no mention of access charge reform or reductions in the statute and any such deal does nothing to address how carriers that generally do not pay large access charges, such as wireless providers, will pass on or otherwise recover the costs of their universal service obligations.

rule,¹⁵⁶ and consumers and the politicians representing them will get more and more confused and angry about what the Act has wrought. And each time this needless drill is repeated, I, for one, will feel a bit like comedian Bill Murray's character in the movie "Groundhog Day," hopelessly destined to live the same events over and over again.

If we acknowledge, then, that carriers' universal service obligations are likely to be reflected on consumers' bills, we must take steps to ensure that the imposition of these obligations does not inadvertently thwart achievement of the Act's goal of making quality telecommunications services available at "just, reasonable and affordable rates."¹⁵⁷ In particular, we have an obligation to make some effort to assess and manage how universal service programs, taken together, will impact consumers' bills. This obligation, I submit, will be very difficult, if not impossible, to satisfy if we continue to collect for certain universal service programs before we have a good sense of what we will need to collect for later programs, such as high cost support.

In short, I doubt seriously that the Commission will be able to manage effectively consumer expectations regarding how carriers recover their universal service contributions and effect a smooth transition to explicit support mechanisms if we continue to make collection and funding decisions regarding different universal service programs in isolation, without assessing the effect of those decisions on other programs and on consumers. I firmly believe that resolving the funding decisions for all universal service programs simultaneously in an integrated proceeding would better comport with the intent of Congress and more fully exploit what we have learned about the pitfalls of assessing the more explicit universal service obligations contemplated by the Act.

I reject the suggestion that, by continuing to collect for certain programs pending implementation of the high cost support program, we do no harm to consumers or the public interest simply because we allow existing high cost support levels to continue. First, as I have suggested, continuing to collect for some programs while others await implementation raises fears that problems in implementing the earlier programs will undermine support for later programs.

¹⁵⁶ In this regard, I have serious doubts about efforts to address consumer confusion and anger over the addition of universal service line items to their bills by requiring carriers to describe the line items in certain ways or in conjunction with other information about recent regulatory efforts that have lowered carriers' costs. While these efforts may have other merits, they amount to a mere "band-aid" rather than a solution to the fundamental problem of engineering a smooth transition to the new explicit support mechanisms. In particular, it seems likely that carriers will dispute whatever characterization of line items we seek to impose (if not our authority to do so), and I doubt seriously that consumer frustration will be alleviated by billing inserts that describe offsetting regulatory savings to their carriers. Further, as the proposed billing reforms focus primarily on whether long distance companies identify access charge reductions in conjunction with descriptions of universal service line items on consumers' bills, I note that such reductions do not benefit other carriers that also must recover the costs of their universal service obligations, such as wireless providers.

¹⁵⁷ 47 U.S.C. § 254(b)(1).

Such undermining of support could imperil our overall efforts to carry out the Act's universal service provisions.

Second, there are clear costs associated with delays in implementation of the new high cost support program. In passing the Act, Congress wisely recognized that reform of high cost universal service support is one of the linchpins for achieving some of the other procompetitive, deregulatory goals of the Act. As the previous Commission so eloquently stated, our implementation of universal service:

is part of a trilogy of actions [including the local competition and access charge reform proceedings] that are focused on achieving Congress' goal of establishing a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition."¹⁵⁸

Identifying and converting existing high cost support to explicit, competitively neutral support mechanisms will play a crucial role in this trilogy. Until we reform high cost support, we will not be able to remove the large implicit subsidies embedded in interstate access charges that distort competition in telephone markets and inhibit new entry into those markets.

In short, delay in completing the high cost support piece of universal service (no matter how understandable) will inhibit our efforts to promote competition in telecommunications. Consumers are not held harmless by this failure; rather, they are subjected to numerous *opportunity costs* resulting from having to wait for us to erect the new competitive regime mandated by Congress. Again, I do not mean to suggest that the Commission's failure to implement the new high cost support program by this time evidences any lack of commitment to this aspect of universal service. But the notion that there is no harm associated with that failure is, to my mind, implausible.

If we cannot bring ourselves to suspend collections for the Schools and Libraries program pending simultaneous resolution of the high cost support issues, I would prefer that the funding levels for the Schools and Libraries program be capped at an even lower quarterly rate than proposed in this Order until we are prepared to establish the new high cost support mechanism. First, reducing the collection rate further is supported by the language of the statute, which with respect to "advanced services" requires only that the Commission "enhance" not *guarantee* access to such services, and that we enhance access only "to the extent . . . economically reasonable."¹⁵⁹

¹⁵⁸ *Universal Service Order*, 12 FCC Rcd 8776, ¶ 4.

¹⁵⁹ 47 U.S.C. § 254(h)(2)(A).

In light of the growing concern over the manner in which carriers are recovering their universal service contributions from end users, I would submit that the more "economically reasonable" course at this time would be to reduce collections significantly until we can better assess the potential impact of other universal service programs on consumers' bills.

Second, given the legal controversy surrounding whether the Commission did or did not exceed its legal authority by designating internal connections for Schools and Libraries support, I think the prudent course would be to suspend temporarily collections for internal connections, at least until the Fifth Circuit has an opportunity to decide this question in response to appeals pending before it. Again, I do not believe that such temporary suspension need weaken or destroy the Schools and Libraries program. Indeed, I believe that such strategic retrenchment would, in the long run, better preserve and strengthen support for this important program.

Having lodged these criticisms, I would like again to voice my support for the Commission taking, in this Order, some important steps to modify our implementation of universal service, particularly with respect to the Schools and Libraries program. I fully recognize that school and library officials have devoted substantial time and effort to applying for funding and that delay in funding may force some institutions to postpone plans to provide access to advanced services for a few months. But other parties likewise have devoted substantial resources to other aspects of universal service implementation, such as development of the high cost support models. Simply put, the beneficiaries of the Schools and Libraries program do not comprise the Commission's only universal service constituency. Rather, the Act requires that we balance the interests of *all* constituencies that will benefit from our implementation of universal service, just as the Act requires that we balance the goals of universal service against the other procompetitive, deregulatory provisions of the Act.

In this statement, I have begun to sketch how I would strike a different balance than that struck by the majority. I reiterate, however, that I support the general direction of the changes made in this Order regarding the scope and timing for funding the Schools and Libraries program, in particular, and I commend the majority for having the courage to institute these changes.

June 22, 1998

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

Re: Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, (CC Docket No 96-45).

Introduction and Summary

If love could conquer all, if good intentions always led to good consequences, if hard work were always rewarded with good results, then this Order would be an impeccable work of art. It is the embodiment of immeasurable hard work, good intentions, and, dare I say, love. It embodies hope: hope for a better world in which more funding for new technologies is hoped to lead to better school facilities which are hoped to lead to better education which in turn is hoped to lead to a brighter future for the next generation of America.

Good intentions and hard work are not enough for this Order. It is the third in a series of Orders to impose new taxes to support schools and libraries and other partial implementations of Section 254. I have dissented from these earlier Orders,¹⁶⁰ and I unfortunately must dissent from this Order. In my view, the current Order does not accurately or even approximately reflect either the letter or the spirit of the law.

I dissent with the utmost respect for the efforts and hopes of my colleagues. But, I dissent also because of my utmost respect for the language of the Telecommunications Act of 1996 and Section 254 in particular.

The Telecommunications Act of 1996 embodies the hopes of many Americans: more innovation, more services, more consumer choices, lower consumer prices, less regulation, and universal service. I believe the Act can and will meet these hopes of the American people. But I believe that these hopes will only be met if the Commission is faithful to the language of the Act. I fear the current Order is not.

¹⁶⁰ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998.

Neither are the Commission's actions today faithful to the original intent of Congress -- or the current demands of Congressional leaders -- because as I stated only a month ago in this Commission's last report to Congress: priorities matter.¹⁶¹ I remain convinced that rural, high-cost universal service is not just one of many objectives of Section 254; it should be the *highest* priority. The federal government has had universal service programs for rural, high-cost areas and for low-income Americans for many years. Section 254 embodied these ideals and set forth goals that emphasize rural, high-cost support as well as low-income support and other objectives.

But, despite repeated Congressional demands that the FCC "suspend further collection of funding for its schools and libraries program, and proceed with a rulemaking that implements all universal service programs in a manner that reflects the priorities established by Congress in the Telecommunications Act of 1996,"¹⁶² the Commission continues to proceed with selected universal service programs while at the same time delaying these higher priority issues. Rural, high-cost universal service issues should not be resolved and implemented in some dim and distant future after all other universal service issues have been resolved; rural, high-cost universal service issues should be resolved and implemented *first*. Rural, high-cost universal service should not be viewed as the residual after enormous amounts for other federal universal service obligations have been promised; rural, high-cost universal service should receive the *lion's share* of any increase in the federal universal service fund.

To understand fully my other concerns about this Order, one need only read one of my several statements related to universal service.¹⁶³ My view of universal service is not universally

¹⁶¹ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8, 1998.

¹⁶² See, e.g., Letter from The Honorable John McCain, Chairman, Senate Committee on Commerce; The Honorable Ernest F. Hollings, Ranking Minority Member, Senate Committee on Commerce; The Honorable Tom Bliley, Chairman, House Committee on Commerce; The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce; to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998.

¹⁶³ See Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8, 1998; Statement of Commissioner Harold

shared. Not everyone here at the Commission or in the public agrees that Congress' universal service priority was the rural and high cost program. Not everyone here at the Commission agrees that the Telecommunications Act clearly contemplates "a single proceeding" to implement all of the universal service provisions, including both the schools and libraries and the rural, high-cost programs.¹⁶⁴ Others have different views. I would call many of these other views "myths." Perhaps others might call my views "myths" as well, or worse.

I describe these views as myths not in a pejorative sense, but in the sense of evolved folklore that has not been scrutinized. For, as we shall see, even the slightest scrutiny reveals the fiction of these stories. Below I list 15 of what I consider to be the myths most relevant to this Order. Doubtlessly, there are many more.

1. Long-distance rates have gone down; therefore, we need not worry about new taxes on long-distance services.

The real issue is not whether rates have gone up or down, but whether they would have been lower absent the new tax. Long-distance rates have gone down in recent years, but they would have gone down further without unnecessary fees and taxes for the Schools and Libraries Corporation.

Under current rules, most support for the Schools and Libraries Corporation is borne by long-distance customers. Phone taxes in general, and long-distance taxes in particular, are some of the most inefficient and punishing taxes faced by the American consumer. Prof. Jerry Hausman of MIT has estimated that consumers lose more than \$2 for every dollar in long-distance taxes.¹⁶⁵

Telephone services are already one of the more heavily taxed services based on

Furchtgott-Roth Regarding the Common Carrier Bureau's Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Clarification of "Services" Eligible for Discounts to Schools and Libraries, rel. June 11, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Third Quarter 1998 Universal Service Contribution Factors, rel. June 12, 1998.

¹⁶⁴ 47 U.S.C. Section 254(a)(2).

¹⁶⁵ Jerry Hausman, "Taxation by Telecommunications Regulation," National Bureau for Economic Research, Working Paper Series 6260, November 1997.

usage -- through federal excise taxes, federal universal service taxes, state and local excise taxes -- far more heavily taxed than the typical 5 percent sales tax that consumers pay for typical goods and services. These heavy excise taxes discourage use, weaken demand, stifle investment, and retard innovation.

Ironically, at a time when the federal government is contemplating stiff new taxes on tobacco products partly to reduce demand for what is perceived to be a harmful product, the federal government has also imposed new taxes on telecommunications services. Are telecommunications services perceived to be as harmful as tobacco?

2. Access charge reductions offset any increase in universal service fund contributions.

I remain concerned with recent attempts to tie reductions in access charges to the level of universal service contributions.¹⁶⁶ Even to the extent that federal-mandated access charges have been reduced to offset increases in universal service obligations, almost 20% of the schools and libraries contributors do not benefit from reduced access charges. Thus, for example, wireless carriers have paid proportionately higher fees, despite the fact that they have received no access charge reduction.

Moreover, there is no assurance that the consumers who benefit from access charge reductions will be the same consumers who will bear the new universal service burden. For example, business consumers could disproportionately benefit from the access charge reduction while residential consumers pay for new universal service fees. The issue should not be whether, despite massive tax increases that just offset decreases in federal access fee and charges, IXCs have no net differences in costs. The issue should be whether, absent massive new taxes, consumers would be better off.

3. Line items for new taxes related to universal service are simply a means to develop a "hidden rate increase."

This assertion defies economics and common sense. If long distance carriers could pad their profit margins by simply adding useless line items on their bills, companies would have already done it. But adding line items is not a means to higher profits.

¹⁶⁶ Today's Order does not use access charge reductions to increase universal service obligations. But, the Common Carrier Bureau had proposed using all access charge reductions to fund universal service, and this concept has been referenced when justifying previous funding increases. See, e.g., footnote 73 accompanying para. 24 of the *Collection Public Notice*.

In a competitive market, prices are determined by costs. If a business tries to raise prices above its actual costs, it will lose its customers to competitors that have not raised prices. Many economists believe that long-distance service is a relatively competitive market.

Simple economics and market realities dictate that competitive businesses must pass along new taxes to their customers. Competitive businesses take prices as given by costs not by the wishes of outside spectators. Those who claim that a business should not pass along a new tax to consumers are simply saying that the business is not competitive in the first place; only a non-competitive business has the luxury of not passing all of a tax along to consumers. In addition, a new tax and higher costs will likely reduce net market demand thereby reducing the number of firms that a competitive market can support.

Moreover, even if long-distance carriers were not competitive, they would still pass along part of a new tax to consumers. To the extent that taxes raise prices and thereby reduce market demand for a service, profits in an industry are likely to decrease as the result of a new tax. Consequently, a new tax cannot plausibly be a blessing to the long-distance industry, whether it is competitive or not.

Line items for new taxes are a means of letting customers understand why rates are not lower than they would be absent the new taxes. These line items are not a means of promoting "hidden rate increases." To the contrary, the only "hidden rate increases" would occur if rates were higher as the result of hidden and unexplained taxes.

Only a stupid and foolish firm -- destined for failure in the American telecommunications market -- could fantasize about profiting from a new tax. I have yet to meet a viable firm in any market that appeared to be stupid or foolish. I have also never met a stupid or foolish consumer. And I have yet to meet an American consumer who doesn't want to be told about a new tax.

4. The federal government should tell businesses to inform customers only about net new taxes, not about new taxes that are offset by decreases in existing taxes.

It would be easy to dismiss this myth as a flagrant violation of the First Amendment. But even if government should interfere with truthful communication between a business and its customer -- an interference that should never happen -- customers should always know about new taxes, even if other taxes have decreased substantially more. The issue for consumers is not just whether prices have gone up or down, but also whether prices would be lower absent a new tax. Only in Washington could disclosure of such a new tax be considered deceptive.

Depriving businesses of the opportunity to converse freely with their customers is a flagrant violation of the First Amendment. Depriving consumers of information about new taxes demoralizes a democratic society.

If the British government had successfully hidden new taxes from American colonists in the middle 18th Century, we might today still be saluting the Union Jack. Doubtlessly, the British government of that time may well have tried to hide the series of new taxes and regulation of commerce from the American colonists. Efforts by governments to hide information from the public may work in the short term, but never in the long term.

5. The new tax rates in this Order reflect a reduction in tax rates that would otherwise result.

Technically, absent Commission action, a higher tax rate would result on July 1, 1998 because of the automatic increase for funding the schools and libraries program that would otherwise take place. However, that increase in the tax rate has only been delayed for one year. The Commission does nothing to adjust the annual \$2.25 billion cap, which will instead go into effect next July. Thus, on July 1, 1999 there will be another increase in the quarterly contribution to the schools and libraries fund of almost \$240 million, or another 75% increase.

It should also be noted that -- while the Schools and Libraries Corporation has estimated \$2.02 billion in demand for the first year of the program¹⁶⁷ -- the Commission's Order today authorizes \$1.925 billion to be disbursed over the next 12 months (July 1, 1998 to July 1, 1999). While this amount does not fully meet demand and it precludes funding additional applications, I am not sure how much of the initial demand will go unmet by this "cut." Moreover, even the proposed tax rate for the remainder of 1998 is higher than the most responsible tax rate -- zero. The Schools and Libraries Corporation has already raised enough revenue to fund practically all requests for telecommunications services in 1998, the only item eligible for discounts under the Act.

The real issue is not whether the rate is higher or lower than it would be if an arbitrary deadline is not met; the real issue is whether tax rates are as low as they could be and as low as they should. The answer is a resounding "no!" Rates can and should be zero for the remainder of 1998.

6. There is great urgency to adopt this rule and proceed with wiring the schools immediately.

Enormous efforts have been made, probably entirely well intentioned, to rush this item through the Commission by mid-June. The rationale given is that carriers need time to adjust their July bills. Last December, rates were changed and carriers somehow managed to change their

¹⁶⁷ Third Quarter 1998 Fund Size Requirements for the Schools and Libraries Universal Service Program, dated May 1, 1998.

January bills. Moreover, the rates changed last December did not legally go into effect until February,¹⁶⁸ yet billing disasters did not ensue.

Further delays may yet occur. Most Senators at last week's hearing encouraged the Commission at least to freeze temporarily this program while the Commission revisits both the substance and the ramp-up period of these new universal service programs. Indeed, in response to Sen. Wyden's (D-Ore.) suggestion that FCC take 6-8 weeks to fix the universal service program, I stated that I would welcome the opportunity. I had hoped that the Commission would follow Sen. Wyden's counsel to suspend the program and make a public commitment to address the entire universal service dilemma -- including the rural, high-cost issues -- in the next 6-8 weeks. I have been disappointed.

I am not convinced that such a minor 6-8 week delay in a new program would cause great harm. Indeed, recent reports indicate that many schools will not even be able to spend the money allocated for inside wiring in 1998, even if the discounts were legal. Internal connections create substantial disruption to students, and schools typically have the work done during vacation periods. Because funding commitments cannot be made until sometime in June or July, many schools have realized that they cannot finish the installation of inside wiring before this summer ends. Thus, to minimize disruption, many schools would wait until the spring/summer of 1999 to provide internal connections in any event.

Finally, there is a reasonable question about whether this Order should be delayed as it is subject to the Congressional Review Act.¹⁶⁹ The Commission's response that it is acting under the 1996 Telecommunications Act exception seems insufficient, since this Order relies on several sections of the Communications Act of 1934 that were not amended by the Telecommunications

¹⁶⁸ The Commission's *Third Universal Service Reconsideration Order*, adopted in December, 1997, explicitly waived the APA's 30-day requirement because it was deemed critical to implement the new schools and library program on January 1, 1998. Thus, the rules that were necessary to calculate the lower universal service contribution factors were to be effective upon publication in the Federal Register. These rules were not published in the Federal Register until January 27, 1998. Moreover, as published, that Order clearly states that "[t]he rules adopted in this Order will become effective February 26, 1998." Thus, technically, the contribution rates were not legally in effect at least until January 27, if not until February 26.

¹⁶⁹ Current law requires that before any major agency rule -- defined as having an effect on the economy of \$100 million or more -- can take effect, the Federal agency promulgating the rule shall provide Congress with an opportunity to review the rule and express their disapproval. 5 U.S.C.A. section 801, et seq.

Act of 1996.¹⁷⁰ Thus, I remain convinced that this Commission's actions regarding universal service contributions cannot take effect until 60 days after submission to Congress, providing it with an opportunity to express its disapproval of the agency determination through resolutions.

7. Absent the FCC's Schools and Libraries Corporation, there is no federal support for infrastructure development in schools and libraries, and these institutions will not be connected to the Internet in a timely manner.

To the contrary, the General Accounting Office recently reported that federal programs supporting infrastructure for local schools and libraries exceed \$10 billion annually.¹⁷¹ The federal support does not include countless tens of billions of dollars from state and local governments and from the private sector. The addition of a few billion dollars from the Schools and Libraries Corporation will not materially affect the diffusion of internet access to American schools; indeed, the Department of Education has reported that eighty percent of American schools were connected to the Internet before receiving any money from the Schools and Libraries Corporation.

8. The universal service section of the 1996 Act was primarily intended to benefit the schools and libraries of America.

That is not the plain language of Section 254. That is not the plain language of recent correspondence from Members of Congress to the Federal Communications Commission.¹⁷² To the contrary, the universal service section of the Telecommunications Act of 1996 was primarily intended to aid rural America. Although the primary purpose of Section 254 is to provide support for high-cost, rural areas, "the potential pot of revenue that the FCC can collect for universal

¹⁷⁰ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at footnote 101.

¹⁷¹ Letter from Phyllis F. Scheinberg, Associate Director, transportation Issues, United States General Accounting Office (GAO), to The Honorable Ted Stevens, United States Senate, May 7, 1998.

¹⁷² *See, e.g.*, Letter from The Honorable John McCain, Chairman, Senate Committee on Commerce; The Honorable Ernest F. Hollings, Ranking Minority Member, Senate Committee on Commerce; The Honorable Tom Bliley, Chairman, House Committee on Commerce; The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce; to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998; Letter from The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce, to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998.

service from fees on interstate services is limited."¹⁷³ Thus, it is inconsistent with Congressional intent to promise some potential universal service beneficiaries enormous and unending benefits, while the primary universal service beneficiaries (rural, high-cost programs) have not even fully voiced all of their concerns.

9. The Schools and Libraries Corporation will disproportionately aid rural America.

This statement may or may not be true. I have asked the Schools and Libraries Corporation for information that will help determine the accuracy of this statement.¹⁷⁴ The Schools and Libraries Corporation responded in part on June 9, 1998, that they are "not able at this time to disaggregate those requests by urban and rural status because many requests are for services shared by a number of eligible entities, which may include any combination of schools and libraries in urban and rural areas." This inability is despite the fact that rural is a criterion for the level of support for which each school qualifies.

10. The Schools and Libraries Corporation's program will only benefit education and the students of America.

If this myth were true, presumably only education interests would be lobbying for the current Schools and Libraries Corporation program. In fact, however, the computer industry, which will provide much of the "inside wiring," has lobbied intensively for the program. They know a great deal when they see it: minimally constrained by budgetary considerations, schools and libraries can be expected to purchase the best and most expensive networking equipment. Some manufacturers have brazenly suggested to the FCC that internal networks for schools should run at 100 Mbits/sec. This capacity is not just for students to exchange e-mail with other students in far away lands or for quickly surfing the Web to research term papers. Rather, this is sufficient capacity for students to send several dozen simultaneous television-quality video programs to one another around the school. Is this capability really necessary for a well-rounded education?

11. "Inside wiring" is fully required for inclusion under Section 254.

Section 254 speaks of discounts for "services." It is difficult to rationalize inclusion of plant and equipment for discounts under this section. While I support the majority's decision to fund requests for telecommunications service discounts first, I remain concerned with the continued funding of non-telecommunications services by any non-telecommunications carriers.

¹⁷³ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

¹⁷⁴ See Letter from Commissioner Harold Furchtgott-Roth to Ira Fishman, June 1, 1998.

As I explained in the April 10th report to Congress, the Commission has no statutory basis to provide direct financial support for non-telecommunications services and to non-telecommunications carriers.¹⁷⁵ To the contrary, Section 254(h)(1)(B) unambiguously limits recipients to "telecommunications carrier[s] providing service under this paragraph."¹⁷⁶ Moreover, in the context of the rural health care program, the Commission has acknowledged that Section 254(e)'s explicit requirement that only "eligible telecommunications carriers" receive support applies to Section 254(h)(1)(A).¹⁷⁷ If that is so, and I think it is, then I do not see how one could conclude that this requirement does not also apply to Section 254(h)(2), as the Commission does when it relies upon that provision to justify allowing non-telecommunication carriers to receive support for inside wiring. Thus, the requirements for receiving funds in conjunction with section 254(h)(2) are actually stricter than under section 254(h)(1)(B) -- that is, a recipient must be an "*eligible* telecommunications carrier."

Moreover, much of "inside wiring" turns out not to be copper wire or coaxial cable; instead, "inside wiring" is predominantly computers to support sophisticated ethernet. For example, this Commission would allow universal service "taxes" to support installation and maintenance of high-speed computer networks -- including "routers, hubs, network file servers, and wireless LANS" -- inside schools and libraries.¹⁷⁸ Such internal networks would rival those of the largest corporations and universities; most small businesses cannot afford the luxury of installing and maintaining expensive equipment like this.

How many schools have asked for such extensive and sophisticated networks? How much of the demand is for routers? For web servers and new switches? For that matter, how much of the \$2 billion in demand is for equipment that is not covered? I wish I knew. It would help this commission and Congress determine how much money we really need to continue this program and achieve its worthy goals. More important, however, I think the consumers who are footing the bill have a right to know. But, unfortunately nobody knows the answer to these questions. I also asked these questions of the Schools and Libraries Corporation, but to no avail. The Schools and Libraries Corporation responded in part on June 9, 1998, that they are "currently processing the more than 30,000 applications that we received by the close of the 75-day window on April

¹⁷⁵ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

¹⁷⁶ 47 U.S.C. Section 254(h)(1)(B).

¹⁷⁷ See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997).

¹⁷⁸ The Frequently Asked Questions on Universal Service section of the FCC's Web-page indicates that all "necessary software" is also eligible for discounts.

15, 1998. Until that process is completed, we will not be able to produce an electronic database of the information you requested for all the applications we have received." A perfectly reasonable explanation: that they have not had enough time to finish processing all of these applications for this new program. The problem, however, is that in this Order the FCC pushes ahead with funding of the program before such vital issues are addressed.

Just last week the Common Carrier Bureau found it necessary to issue a "reiteration" as to what "services" are eligible for discounts to schools and libraries. Did all the schools really understand that "the costs of tearing down walls to install wiring" is not a part of the "installation" and therefore not covered? How many schools have made such an error in their applications and how much is demand overstated? If there were not widespread questions and confusion on the part of Congressional leaders, school applicants, and the public, then why would such a clarification or reiteration be necessary? It is this type of confusion surrounding what is and what is not covered by the program that compels me to follow the abundant Congressional advice that we place this program on hold temporarily.

12. The FCC's interpretation of universal service is consistent with the law.

As I have described in several statements,¹⁷⁹ the FCC's current interpretation of universal service is not consistent with Section 254 of the Communications Act. The divergence between Commission interpretation and the statute is not small and cannot be corrected with small and technical changes in existing Orders. Below I touch on a few of the ways in which I believe the Commission's interpretations violate the law.

¹⁷⁹ See Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Clarification of "Services" Eligible for Discounts to Schools and Libraries, rel. June 11, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Third Quarter 1998 Universal Service Contribution Factors, rel. June 12, 1998.

First, as I have previously indicated, in its zeal to implement a new universal service program for schools and libraries, the Commission failed to meet its statutory mandate of developing an explicit and sufficient support system for rural and high cost telephone users in a timely manner.¹⁸⁰ Under the 1996 Act, the Commission's primary universal service responsibility was to develop an "explicit and sufficient" support system that would ensure support for local telephone users in high cost and rural areas to replace the complex system of implicit subsidies that could exist in a world without local competition.¹⁸¹ The expeditious creation of a comprehensive new subsidy system was not only critical for preserving the goals of universal service, but also necessary to provide for a fair transition to competition in the local markets. As such, Congress set a strict time-frame for developing this plan -- the Joint Board was required to make a recommendation within 9 months of enactment, and the Commission was then required to complete "a *single* proceeding to implement the recommendations" within 15 months after enactment.¹⁸²

In this Order, the majority argues that the Commission has taken "significant action to implement the universal service provisions of the Act."¹⁸³ In support of that contention, the majority notes that ". . . one of the first steps in universal service reform was to make existing high cost support explicit," citing the removal of Long Term Support (LTS) from access charges, and the making of an explicit subsidy corresponding in amount to that generated formerly by DEM [dial equipment minutes].¹⁸⁴ While I do not dispute that these two initial steps were taken, they are hardly comprehensive or the type of "significant action" that would be sufficient to satisfy the Commission's responsibility to complete "a *single* proceeding"¹⁸⁵ to replace the *entire* complex system of implicit subsidies for high cost and rural telephone users with an "explicit and sufficient" support system. Indeed, in recent reports to Congress, the Commission has characterized its somewhat arbitrary decision to provide federal support for only 25% of these costs as merely a

¹⁸⁰ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

¹⁸¹ See 47 U.S.C. Section 254(e) (establishing that universal service support devised by the Commission "should be explicit and sufficient to achieve the purposes of this section.")

¹⁸² 47 U.S.C. Section 254(a)(2) (emphasis added).

¹⁸³ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 18, and para. 53.

¹⁸⁴ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 18, and para. 53.

¹⁸⁵ 47 U.S.C. Section 254(a)(2) (emphasis added).

"placeholder."¹⁸⁶ While I support reexamination of this issue, I question whether establishing such a "placeholder" can fairly be characterized as "significant," especially in comparison to the extraordinary efforts that this agency has taken to establish the schools and libraries program on an expedited basis. Moreover, if we have completed such "significant action," and if all that was left from the May 8, 1997 Order was to fulfill the "timetable for implementation" as the majority suggests, then why is it now necessary again to refer issues to the Joint Board?¹⁸⁷

Congress intended -- and the 1996 Act required -- that the Commission focus its efforts on resolving the rural, high cost issues *first*, as opposed to finding support for new programs. As Commissioner Powell states in his Separate Statement Dissenting in Part, "nothing in the statute . . . would justify implementation of certain programs, such as schools and libraries, prior to implementation of others."

Second, I believe that the universal service contributions, at least to the extent they are providing support for non-telecommunications services, may not be fairly characterized as mere "fees." In general, taxes can be distinguished from administrative fees by determining the recipient of the ultimate benefit: a tax is characterized by the fact that "it confers no special benefit on the payee," "is intended to raise general revenue," or is "imposed for some public purpose."¹⁸⁸ In contrast, a "fee" is a "payment for a voluntary act, such as obtaining a permit."¹⁸⁹ Here, all these factors point toward the category of a tax: the fund, which creates internet access for schools and libraries, confers no particular advantages upon telecommunications carriers in exchange for their contributions, such as a license or permit; the funds have not, as far as I can tell, been segregated from other government monies, *see infra*; the purpose of the fund is a broad, social one, purportedly to improve education for all Americans; and the payment requirement is not triggered by a voluntary act on the part of telecommunications carriers, such as the filing of an application, but is a flat mandate.

In *Thomas v. Network Solutions*, the District of Columbia District Court recently found a similar mandatory contribution to the Intellectual Infrastructure Fund -- known as the

¹⁸⁶ Federal-State Joint Board Report to Congress, rel. April 10, 1998 .

¹⁸⁷ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 53 ("We are considering petitions for reconsideration of some aspects of our actions, as well as requests from the Joint Board that we refer some issues to it, including the so-called "25/75" issue."); nt. 125 ("that would include a timetable for implementation of the rules to be adopted.").

¹⁸⁸ *Thomas v. Network Solutions*, 1998 WL 191205 (D.D.C. 1998).

¹⁸⁹ *Id.*

"Preservation Assessment" -- to be an illegal tax, not ratified by Congress.¹⁹⁰ Money from that fund was used for the "Next Generation Project," a "program aimed primarily at upgrading the Internet infrastructure, improving the speed and accuracy of information delivery, and increasing access for schools."¹⁹¹ The Court held that the preservation assessment was "clearly a tax" as it was collected "for the government's use on public goals, and not in any way to defray regulatory costs."¹⁹²

I had encouraged parties to comment on the implications that this case may have for the Commission's universal service program, and several parties expressed concern that the Commission's implementation has resulted in an unconstitutional tax. As at least one commenter described, "nowhere in this authorization does there appear a grant of power to the Commission to impose a tax on interstate telecommunications providers to fund universal service."¹⁹³ Rather, as I have stated above, the legislation merely empowered the Commission to mandate discounts to schools and libraries. To the extent that Section 254 is the basis for this universal service tax, it may not have even followed appropriate Congressional procedures for a tax authorization.

The majority's reliance on *United States v. Munoz-Flores* does not fully address these issues. First, the majority misconstrues my concerns as limited to an Origination Clause challenge. My primary concern, however, is that in enacting a sweeping new welfare program for schools and libraries that went well beyond the more modest discount program Congress authorized, this agency exceeded the scope of its authority and thereby enacted a new tax that has not been ratified by Congress. Not only does this situation arguably present Origination Clause problems, it raises anti-delegation (i.e., Separation of Powers) questions as well.¹⁹⁴

The majority, however, argues that "contributions to the universal service mechanisms do not represent taxes enacted under Congress's taxing authority. Rather, they constitute fees enacted pursuant to Congress's Commerce power."¹⁹⁵ Although the majority repeatedly contends that the universal service contributions are not taxes but fees, they simply assert that this is true,

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 3-4.

¹⁹² *Id.* at 5.

¹⁹³ Comments of Sprint PCS, at 7.

¹⁹⁴ *Cf. National Cable Television Assn., Inc. v. United States*, 415 U.S. 336; *FPC v. New England Power Co.*, 415 U.S. 345.

¹⁹⁵ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 26.

without addressing the factors that traditionally distinguish a tax from a fee and how those factors apply here, as set forth above. Simply saying that this is not a tax cannot make it so, however.

Indeed, as discussed above, *Thomas v. Network Solutions* supports the proposition that the type of scheme developed by this agency to support the schools and libraries program may be more fairly characterized as a tax. The majority argues that the fee is not a tax because "all telecommunications carriers required to contribute benefit from the ubiquitous telecommunications network that universal service makes possible."¹⁹⁶ This statement, however, is simply not true with regard to the schools and libraries program. As I have previously stated, "to the extent that the telephone network can be considered a single telecommunications system, all users benefit from being capable of serving others. . . . There are no such direct benefits to telephone customers, however, from the provision of Internet services to and inside wiring of schools and libraries."¹⁹⁷ The obvious beneficiaries of this program are not telecommunications carriers, but the school and libraries who are entitled to free goods and services. I have yet to hear proponents of the current program cite telecommunications carriers as the object of their well-intentioned efforts.

In addition, in order for even an intentional delegation of Congress' power to tax to be judicially sustainable, Congress must provide the agency with standards by which its compliance with the delegation can be measured.¹⁹⁸ The Commission has misread Section 254 as providing a very broad authority to tax, disregarding the limitations that Congress carefully included in that provision: that there would be a single federal universal service fund based on interstate revenue; that discounts be provided to schools and libraries; that only telecommunications carriers may receive credit; and that support may only be used for telecommunications services. Given at least the possibility of a constitutional difficulty arising from the delegation under the Taxing Clause, the Commission should have interpreted Section 254 "narrowly to avoid constitutional problems."¹⁹⁹ In order to avoid delegation problems, the Commission should have read section 254 to authorize only what it says, and no more -- a discount for services, not a guaranteed entitlement to free goods as well as free services. The Origination Clause cases cited by the majority are, of course, irrelevant to this issue.

¹⁹⁶ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 26.

¹⁹⁷ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

¹⁹⁸ *Skinner v. Mid American Pipeline*, 490 US 212, 218-219 (1989).

¹⁹⁹ *NCTA v. United States*, 415 U.S. 336, at 342. (1974).

Second, the majority argues that the Origination Clause is not implicated here because "in *United States v. Munoz-Flores* and elsewhere, the Supreme Court has held that Congress does not exercise its taxing powers when funds are raised for a specific government program."²⁰⁰ In that case, however, the Supreme Court made clear that:

A different case might be presented if the program funded were entirely unrelated to the persons paying for the program. Here, [the program] targets people convicted of federal crimes, a group to which some part of the expenses associated with compensating and assisting victims of crime can fairly be attributed. Whether a bill would be "for raising Revenue" where the connection between payor and program was more attenuated is not now before us.²⁰¹

I remain concerned that -- again to the extent that telecommunications carriers alone are being assessed to pay for a computer network and Internet access program -- the agency has created a program "entirely unrelated to the persons paying" for it.

Finally, the majority also argues that "the contribution requirements do not violate the Origination Clause of the Constitution because "universal service contributions are not commingled with government revenues raised through taxes."²⁰² As several commenters noted, however, "[b]oth the Congressional Budget Office and the Office of Management and Budget count payments into the fund as federal revenues and payments out of the fund as federal outlays."²⁰³

Third, I continue to object to the fact that the contributions for the schools, libraries, and rural health care support mechanisms are based not only on *interstate* but also on *intrastate* revenues. As I have described on several occasions, the legality of this approach to calculating contributions is highly questionable.²⁰⁴ As I read the Communications Act, it does not permit the

²⁰⁰ Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 27.

²⁰¹ See *United States v. Munoz-Flores*, 495 U.S. 385, nt. 7 (1990).

²⁰² Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service, at para. 27.

²⁰³ Comments of Sprint PCS, at 7.

²⁰⁴ Separate Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

Commission to assess contributions for universal service support mechanisms based on intrastate revenues. Rather, the Act makes clear that the power to collect charges based on such revenues rests within the exclusive province of the States.²⁰⁵

Fourth, I fail to see how the Commission may lawfully differentiate among otherwise "bona fide requests." The Commission's rules already consider a schools' economic status in determining the level of support to which they may qualify. Now the Commission will take economic status into account to determine whether the schools are even eligible for participation - at least participation in funding for inside wiring, despite the fact that the schools have submitted an otherwise "bona fide request" under our rules. If the Commission's rules already addressed such discrepancies in economic advantage adequately, then the newest proposal seems, at best, unfair to schools that will now be prohibited from participating, if not altogether arbitrary. Indeed, I do not see how the Commission has the discretion to prioritize among such bona fide applications. The universal service provisions mandate that "upon a bona fide request" the "telecommunications carriers . . . shall" provide a discount.²⁰⁶ All of the applications that met our previous rules are bona fide requests, and the Commission has not determined that its previous rules were incorrect -- as I have urged. As such, I am concerned that the Commission has failed to establish a system that would fund all such bona fide requests as required. The statute does not endorse differentiating among such bona fide requests; the current plan to fund internal wiring based on need cannot be what Congress intended.

13. The Schools and Libraries Corporation is efficient.

The Common Carrier Bureau Public Notice regarding the third quarter contribution factors also established the administrative expenses for the Schools and Libraries Corporation. In objecting to the second quarter contribution factors, I noted that Schools and Libraries Corporation was allocated almost four times as much money for administrative expenses as the high-cost/low income funds and that the administrative budget increased from \$2.7 million to \$4.4 million or by 65% in just one quarter. These increased administrative expenses continue in the third quarter, despite the fact that the Schools and Libraries Corporation has still failed to provide an accurate estimate of all its administrative costs for the *first quarter*.²⁰⁷ In contrast the administrative expenses for both the High Cost and Low Income programs combined is only \$1.2

²⁰⁵ Indeed, it has been reported that at least one state -- Virginia -- has ordered that MCI stop applying federal surcharges on intrastate long distance calls made in that state and make appropriate refunds to customers. *Communications Daily*, May 11, 1998.

²⁰⁶ 47 U.S.C.A. section 254(h)(1)(B).

²⁰⁷ Third Quarter 1998 Fund Size Requirements for the Schools and Libraries Universal Service Program, dated May 1, 1998.

million. I cannot endorse such a disparity -- and certainly not one of this magnitude -- between the administrative expenses of the Schools and Libraries and those of the other universal service corporations, especially without more adequate safeguards against excessive spending by the schools and libraries program.

14. The FCC's interpretation of universal service reflects the intention of Congress.

As noted above, the FCC's interpretation of universal service does not follow the letter of the law. Based on the recent correspondence from Congress, it is clear that the FCC's interpretation of universal service does not follow the spirit of the law either.²⁰⁸ In particular, the Commission has failed to complete work on the highest Congressional priority, rural high-cost service, while creating massive new unintended grant programs for schools and libraries.

15. There is no good solution to the problem.

There is a good solution to the problem. It is to follow the intent of Congress. That advice is eloquently phrased in the recent letter from the leadership of the Commerce Committees of both the House and the Senate. If we follow the advice of Congress, we will set the collection rate for the schools and libraries program to zero until such time as we can resolve the highest universal service priority: rural, high-cost support.

Conclusion

Most observers of politics and telecommunications regulation in Washington would agree that the Commission's handling of universal service over the past two years has led to a great deal of hand-wringing. Some would say that we have made substantial progress, but no one would say that we solved all of the problems related to universal service. Some would say that we are not headed in the right direction; many go so far as to say that we should stop and start over again.

The problem with the FCC's implementation of Section 254 is not one of intent or effort. Many hard-working, well-intentioned people have dedicated the better part of two years of their

²⁰⁸ See, e.g., Letter from The Honorable John McCain, Chairman, Senate Committee on Commerce; The Honorable Ernest F. Hollings, Ranking Minority Member, Senate Committee on Commerce; The Honorable Tom Bliley, Chairman, House Committee on Commerce; The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce; to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998; Letter from The Honorable John D. Dingell, Ranking Minority Member, House Committee on Commerce, to The Honorable William Kennard, Chairman, Federal Communications Commission, June 4, 1998.

lives to working on the implementation of this section. Their efforts have not been in vain. We have learned much about both what is possible and not possible under Section 254; we have learned something about what is not sustainable; we have learned about concerns of consumers who thought that the Telecommunications Act would lead to changes in regulations that would allow rates go down, not merely stay the same or increase; we have learned about the fears and concerns of rural America when its understanding of Section 254 is not adequately addressed. Above all, we have learned that Section 254 is one of the most difficult and most important sections of the Act.

Despite good intentions and efforts, some mistakes have been made in the implementation of Section 254 over the past two years. The best outcome would be to learn from those mistakes; the worst outcome would be to ignore them.

Congressional leaders have demanded that the Commission suspend the schools and libraries program until all aspects of universal service are resolved. I believe the Congressional leaders are correct. It would be perhaps irresponsible to issue funding commitments, allow public money to be distributed, or to raise consumers rates -- which is undeniably necessary at least with respect to wireless rates if not overall -- to pay for these programs before Congressional concerns can be fully addressed.

America is a great nation not because we have the most advanced technologies in the world. We are a great nation because we are a nation whose People love liberty, whose government serves the People, and whose government is governed by laws written by the People. When government agencies follow the law as it is written, there is no greater investment in our future.

The proponents of the E-rate program often cite its educational value. The E-rate, we are told, is an "investment" in the future of America. I believe the FCC can and ought to make a contribution to the education of American children. Our greatest contribution, however, is not in serving as a tax collector, even for the most wonderful of programs. Our greatest contribution is in following the law, and being a showcase for democracy.

Some in America believe that all of the parts of Section 254 cannot be implemented, that the section is hopelessly complicated and self-contradictory. According to these skeptics, it is time to give up. It is time to rewrite the section, or worse, implement only part of it. The inevitability of defeat is palpable among the skeptics.

I believe the skeptics are wrong. I believe that Section 254 can be fully implemented. I believe that a strict and narrow reading of the law is not only what Congress intended but also the only way by which Section 254 can be fully implemented.

We at the FCC can and must rededicate ourselves to following the letter of the Communications Act, and Section 254 in particular, as written by Congress. We must, as Congressional leaders have suggested, start over. It will be a difficult process, but it is possible, and it is urgent. In the meantime, the American public can rest assured that no new taxes will be levied by the FCC, that universal service will remain accessible to all Americans under existing rules, and that schools and libraries will continue to receive ten billion of dollars of federal support annually for infrastructure in addition to countless billions of dollars from state and local governments and countless billions more from the private sector.

In the end, the FCC will have contributed far more to the education of American children than any amount of funds for any educational purpose. The FCC, building on its past good intentions and good efforts, will have taught a lesson that the greatest myths are the myth of inevitable defeat and the myth that government agencies cannot solve difficult problems.