

May 13, 1998

STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Proposed Third Quarter 1998 Universal Service Contribution Factors Announced; Common Carrier Bureau Seeks Comment On Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health care Universal Service Support Mechanisms; (CC Docket No 96-45) .

Introduction and Summary

Today, the Common Carrier Bureau releases a Public Notice announcing the proposed universal service contribution factors for the third quarter of 1998 that will automatically go into effect if the Federal Communications Commission takes no action within 14 days of publication in the Federal Register. In addition, the Bureau releases a Public Notice seeking comment on adjusting the maximum amount that may be collected and spent during this initial year of the schools and libraries program.

For the reasons described below, I object to the current proposals. I also note that the full Commission must take action to adjust the collection rate for the remainder of this year, and I encourage parties to comment on my concerns and make other suggestions regarding the Commission's plans for universal service.

Specifically, I hope that the parties address at least the following issues:

- The overall size of the schools and libraries fund, whether it needs to be reduced, and the effect on local and long distance telecommunications ratepayers of all of access charge reductions being used for schools and libraries.
- Whether wireless carriers and others who do not pay access charges should still be required to pay proportionately higher universal service fees, despite the fact that they have received no benefits from the proposed access charge reductions.
- Whether it would be in the taxpayers' interest for the Commission to postpone the schools and library program until January 1, 1999, providing time to reevaluate its scope and scale while also finishing what should have been its first priority, namely, the establishment and funding of the rural and high-cost program.
- The amount of consumer benefit that would ensue by reducing the schools and libraries funding to provide only discounts in telecommunications services.
- Whether the Commission should fund 100% of the requests for telecommunications service discounts first.

- Whether, under the Telecommunications Act, the Commission has the discretion to prioritize among bona fide applications.
- The District of Columbia District Court decision that held a similar mandatory contribution to the Intellectual Infrastructure Fund -- known as the "Preservation Assessment" -- to be an illegal tax, not ratified by Congress.
- The effect of Virginia ordering MCI to stop applying federal surcharges on intrastate bills and revenues.
- Whether any rule that the Commission might adopt regarding the schools and library program and the third quarter contribution factors related thereto will trigger the mandatory procedural requirements of the Congressional Review Act.

I. The Bureau's Proposal Denies Consumers All the Benefits of Deregulation And Will Place Increased Pressure on Local Rates

First, I have become increasingly convinced that we are implementing this new program in a way that will increase the rates that some telecommunications consumers must pay. As I have stated previously, the size and scope of the current schools and libraries program is far in excess of what was envisioned by Congress and thus beyond the Commission's authority to establish. The Schools and Libraries Corporation projected that, as of May 1, 1998, \$2.02 billion in discounts has been requested by applicants. The Contribution Factor Public Notice proposes a fully funded schools and libraries program, with an increase of \$365 million for a total third quarter contribution of \$690 million and a contribution factor that more than doubles. I cannot support such a dramatic increase when the current contribution rate has already raised many consumers' rates.

A separate Bureau Public Notice proposes revisions of the amount collected. That Notice indicates that the entire \$700 million in access charge reductions estimated for July should be used to increase the quarterly contributions to the schools and libraries program from \$325 million to approximately \$524 million.¹ I cannot support this proposal. I remain troubled by the Bureau's assumption that *all* reductions in access charges should be used for funding the schools and libraries program, as this presumption denies consumers all the benefits of deregulation and places upward pressure on local rates. 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,

¹ Such a quarterly contribution would result in a fund of \$1.67 billion for 1998.

IXCs have no net differences in costs. The issue should be whether, absent massive new taxes, consumers would be better off.

II. The Proposal Will Increase Rates for Wireless and Other Telecommunications Services That Do Not Pay Access Charges

Not only does the plan outlined in the Bureau Notice use every cent of access charge reduction for new universal service programs, but it will cause an *increase* in fees for other telecommunication services. The Public Notice calculates that a \$700 million reduction in access charges will yield \$848 million in additional funds for schools and libraries.² How is this possible? Because the majority anticipates increasing all contribution rates equally, even though almost 20% of the schools and libraries contributors will not benefit from reduced access charges. Thus, for example, wireless carriers will be required to pay proportionately higher fees, despite the fact that they have received no access charge reduction. I encourage parties to comment on the equity of this approach and the effect it will have on consumers.

III. The Commission Continues to Place a Higher Priority on the Schools and Libraries Program Than on the Rural High-Cost Program

I am also concerned that the majority continues to use all access reductions for new universal service fees while the high-cost program has not been fully implemented. As I argued in previous reports to Congress, "the potential pot of revenue that the FCC can collect for universal service from fees on interstate services is limited."³ Some potential universal service beneficiaries have been "promised" enormous and unending benefits, long before there are actual revenues for these programs and long before other potential universal service beneficiaries (rural, high-cost programs) have voiced all of their concerns. It would be in the taxpayers' interest for the Commission to postpone the schools and library program until January 1, 1999, thereby providing time to reevaluate the scope and scale of that program while also finishing what should have been its first priority, namely, the rural and high-cost program.

IV. The Commission has Already Mandated that Sufficient Funds be Collected to Meet the Entire Demand for Telecommunications Services, and Discounts For Other Services or Facilities Should Be Postponed

² Common Carrier Bureau Public Notice Seeking Comment on Proposed Revision of 1998 Collection Amounts for Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998, nt. 16.

³ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

Significantly, this entire dilemma has been caused, at least in part, by the Commission's misguided and unlawful decision to fund inside wiring and other non-telecommunications services. 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. According to the Schools and Libraries Corporation's own estimates, the vast majority of the program's demand is for non-telecommunications services and facilities.⁴ The vast majority of demand is for funds to provide inside wiring -- what should be an ineligible facility. Indeed, the amount *already* collected this year would almost fully fund the demand for telecom services.

Instead, as I suggested in our May 8, 1998 Report to Congress, I favor dramatically decreasing the schools and libraries contribution for the third and fourth quarter, thus allowing the benefits of the reduced access charges implemented last year and those planned for this July to flow directly to consumers. I believe the Commission should reduce the current quarterly contribution rate for schools and libraries from \$325 million to a mere \$25 million, and I specifically request parties to comment on this proposal. Such a reduction would allow previous access charge reductions and those contemplated for this July to flow to consumers directly, while still providing more than sufficient funds -- \$675 million for 1998 -- to pay for *all* of the telecommunications services that have been requested by any school this year.

In contrast to the Bureau's proposal to provide "the greatest level of support to the most economically disadvantaged schools and libraries,"⁵ I ask parties to comment on whether the Commission should fund 100% of the requests for telecommunications service discounts first. I believe that any funding for internal connections and Internet access is prohibited; even the majority, however, argues that such funding is not required by Section 254(h) but rather is merely permitted. Wouldn't it make more sense to postpone -- or at least make a lesser priority -- the funding of services that if not legally questionable are certainly not statutorily required? This proposal would ensure that at least some portion of every schools' request would be eligible for support.

In effect, the Bureau's proposal disadvantages some schools twice. The Commission's rules already consider a schools' economic status in determining the level of support to which they may qualify. Now the Commission is proposing to take economic status into account to determine whether the schools are even eligible for participation, despite the fact that the schools have submitted a bona fide request under our rules. If the Commission's rules already addressed

⁴ Federal-State Joint Board Report to Congress, rel. April 10, 1998, Attachment D; total demand for telecom services is only \$655,688,020, while total demand for Internet services is \$88,208,299 and total demand for internal connections is \$1,275,399,870.

⁵ Common Carrier Bureau Public Notice Seeking Comment on Proposed Revision of 1998 Collection Amounts for Schools and Libraries and Rural Health Care universal Service Support Mechanisms, rel. May 13, 1998, at 2.

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 bona fide applications. The universal service provisions mandate that "upon a bona fide request" the "telecommunications carriers . . . shall" provide a discount.⁶ All of the applications that meet our previous rules are bona fide requests, and I encourage commenters to address the propriety and legality of differentiating among them.

V. Administrative Expenses for the Schools and Libraries Corporation Are Exorbitant and Have Not Been Justified

This Public Notice also establishes the administrative expenses for the Schools and Libraries Corporation. In objecting to the second quarter contribution factors, I noted that SLC 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, in their latest filing, the Schools and Libraries Corporation indicates that it still cannot provide an accurate estimate of all its administrative costs for the first quarter.⁷ I cannot endorse this 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.

VI. Recent Decisions That Contradict the Commission's Legal Determinations Need To Be Addressed

In addition to commenting on the effect of GAO's conclusions, I hope that some parties will comment on two recent legal developments. First, as I have previously indicated, 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."⁸

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

⁶ 47 U.S.C.A. section 254(h)(1)(B).

⁷ Third Quarter 1998 Fund Size Requirements for the Schools and Libraries universal Service Program, dated May 1, 1998.

⁸ *Thomas v. Network Solutions*, 1998 WL 191205 (D.D.C. 1998).

"Preservation Assessment" -- to be an illegal tax, not ratified by Congress.⁹ 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."¹⁰ 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."¹¹ I encourage parties to comment on the implications that this case may have for the Commission's universal service program.

Second, 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.¹² As I read the Communications Act, it does not permit the 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.

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.¹³ Specifically, the Virginia State Corp. Commission ordered that: MCI stop billing "federal universal service fee" (FUSF) and usage-based "national access fee" (NAF) on intrastate calls placed by business customers in the state; MCI cease future application of FUSF to intrastate portion of residential bills; MCI refund, with interest, all fees that have been collected so far. I would also encourage parties to comment on this development and how it will effect the contribution factors as proposed by the Bureau.

VII. Any Action taken By The Commission Triggers the Congressional Review Act, and Congress Must be Given 60 Days to Review the Agency Action Prior To Any Commission Order Taking Effect.

⁹ 1998 WL 191205 (D.D.C. 1998).

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 5.

¹² 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.

¹³ Communications Daily, May 11, 1998.

It should not be forgotten that any ultimate Commission decision may trigger the procedural requirements of the Congressional Review Act. 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.¹⁴ Thus, I believe that whatever rule this Commission ultimately adopts regarding universal service contributions, it cannot take effect until 60 days after publication or submission, providing Congress with an opportunity to express its disapproval of the agency determination through resolutions. I encourage parties to comment on whether any rule that the Commission might adopt regarding universal service and the third quarter contribution factors will trigger this requirement, and whether that is an additional reason to delay implementation of the schools and libraries program.

Conclusion

With so many general concerns and specific questions about the legality of this new program, I cannot support the allocation of an additional \$365 million or an additional \$200 million to the Schools and Libraries Corporation under either proposal submitted for public comment. I reiterate my desire that the Commission delay further implementation of this new universal service program until we have addressed all aspects of universal service -- including rural and high cost issues -- at the end of this year. Such a delay will provide us the opportunity to reconsider some of our legal conclusions related to the implementation of this new program, as I believe we must do.

¹⁴ 5 U.S.C.A. section 801, et seq.