

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

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

**ORDER AND
 ORDER ON RECONSIDERATION**

Adopted: July 13, 1998

Released: July 17, 1998

By the Commission; Commissioner Furchtgott-Roth concurring and issuing a statement.

I. INTRODUCTION

1. Section 254 of the Communications Act codified the Commission's long-standing commitment to ensuring the preservation and advancement of universal service in rural, high cost, and insular areas.¹ As section 254 required, the Commission convened a Federal-State Joint Board on Universal Service² and, in light of the Joint Board's recommendations,³ the Commission on May 8, 1997, released the *Universal Service Order*, which, among other things, identified the services included within the definition of universal service and established a specific timetable for implementation of revised universal service support programs.⁴ The

¹ 47 U.S.C. § 254, added to the Communications Act of 1934 (47 U.S.C. §§ 151 *et seq.*) by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Section 254 also addresses universal service support for educational providers, libraries, and rural health care providers. *See* 47 U.S.C. § 254(h).

² Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, CC Docket No. 96-45, FCC 96-93, 11 FCC Rcd 18092 (rel. March 8, 1996).

³ Federal-State Joint Board on Universal Service, *Recommended Decision*, CC Docket No. 96-45, FCC 96J-3, 12 FCC Rcd 87 (Jt. Bd. 1996).

⁴ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (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*, 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); Federal-State Joint Board on Universal Service, *Third Report and Order*, CC Docket No. 96-45, (rel. Oct. 14, 1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Docket No. 96-45, FCC 97-411 (rel. Dec. 16, 1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure

Commission determined that carriers should receive support for serving rural and high cost areas based on the forward-looking cost of providing the supported services.⁵ Non-rural carriers would begin to receive high cost support based on forward-looking costs on January 1, 1999, while rural carriers would continue to receive high cost support based on existing support levels pending further review by the Commission, the Joint Board, and a Joint Board-appointed Rural Task Force, but at least until January 1, 2001.⁶

2. The Commission determined that non-rural carriers' high cost support should be determined by computing the forward-looking cost of providing the supported services and subtracting from it a revenue benchmark amount,⁷ and that the share of support provided by federal mechanisms initially should be set at 25 percent.⁸ The Commission acknowledged that this share of support was based on the need to avoid double-recovery by carriers pending reform of state rates and support mechanisms, and stated that the federal share of support would be subject to review in light of state proceedings, the development of competition, and other relevant factors.⁹ The Commission's determination relating to the federal share of support generated several petitions for reconsideration¹⁰ and significant comment.¹¹ Recently, the Commission committed to completing a proceeding reconsidering the federal share of support before revised support mechanisms are implemented for non-rural carriers.¹²

3. On March 11, 1998, the state members of the Joint Board filed a request that certain issues related to the determination of high cost support, including issues regarding the share of federal high cost support, be referred to the Joint Board.¹³ Shortly after an en banc

and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420, 13 FCC Rcd 5318 (1997).

⁵ *Universal Service Order*, 12 FCC Rcd at 8899 para. 224.

⁶ *Universal Service Order*, 12 FCC Rcd at 8910 para. 254, 8917-18 paras. 252-56.

⁷ *Universal Service Order*, 12 FCC Rcd at 8899 para. 223.

⁸ *Universal Service Order*, 12 FCC Rcd at 8925 para. 269.

⁹ *Universal Service Order* at 8925-26 paras. 268-72. *See also* Federal-State Joint Board on Universal Service, *Report to Congress*, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998) at paras. 219-234.

¹⁰ *See, e.g.*, Alaska PUC petition at 5-6; Arkansas PSC petition at 1-3; U S West Petition at 6; Western Alliance petition at 18-19; Texas PUC petition at 2; Rural Telephone Coalition petition at 1-6.

¹¹ *See, e.g.*, *Report to Congress* at paras. 222-223 and associated notes.

¹² *Report to Congress* at para. 224.

¹³ Formal Request for Referral of Designated Items by the State Members of the § 254 Federal-State Joint Board on

hearing on these issues convened by the Commission with the participation of the state Joint Board commissioners, the state members filed a letter requesting referral of two additional issues.¹⁴

4. In this Order, the Commission refers to the Joint Board, as clarified, expanded, and reorganized below, the issues on which referral was sought, and requests that the Joint Board issue a Recommended Decision on these issues by November 23, 1998. The Commission will then issue an order on the issues addressed in the Joint Board recommended decision in time to implement the revised mechanism for non-rural carriers by July 1, 1999.

II. DISCUSSION

5. The state Joint Board members' referral request, as supplemented by their June 18 letter, requested referral of six issues: (1) Whether the FCC should take responsibility only for 25% of the high cost subsidy calculated by the new soon-to-be-adopted federal funding model and leave the remaining 75% for States to support; (2) Whether to apply federal universal service funds to reduce the cost of interstate access charges; (3) An appropriate method for formulating and distributing high cost funds among the States; (4) Whether and to what extent the FCC should have a role in making intrastate support systems explicit, and, as part and parcel of any such examination, a referral of the § 254(k) issue concerning recovery of joint and common costs; (5) The revenue base upon which the FCC should assess and recover providers' contributions for universal service; and (6) Whether, to what extent, and in what manner providers should recover contributions to universal service through their rates.

6. Although we recognize that the Joint Board has considered and given recommendations on many of these issues previously and has been consulted on an ongoing basis regarding matters in this docket, we find that further Joint Board input will be beneficial as we move forward on implementing universal service and high cost support. We find that further coordination between state and federal regulators on these issues will enhance the development of universal service and competition policy. We also find that a recommendation from the Joint Board on these issues will assist us in our review of the pending petitions for reconsideration on these issues. In consultation with the state members of the Joint Board, we have clarified, expanded, and reorganized the issues to be referred. Accordingly, we refer to the Joint Board the following issues:

(1) An appropriate methodology for determining support amounts, including a method for

Universal Service, CC Docket No. 96-45, filed March 11, 1998.

¹⁴ Letter from the State Members of the Joint Board to William Kennard, Chairman, FCC, CC Docket No. 96-45 (filed June 18, 1998).

distributing support among the states and, if applicable, the share of total support to be provided by federal mechanisms. If the Commission were to maintain the current 25/75 division as a baseline, the Commission also requests the Joint Board's recommendation on the circumstances under which a state or carrier would qualify to receive more than 25 percent from federal support mechanisms.

(2) The extent to which federal universal service support should be applied to the intrastate jurisdiction. In its recommendation on this issue, the Commission requests the Joint Board's recommendation on the following topics:

- (a) To the extent that federal universal service reform removes subsidies that are currently implicit in interstate access charges, whether interstate access charges should be reduced concomitantly to reflect this transition from implicit to explicit support, and whether other approaches would be consistent with the statutory goal of making federal universal service support explicit. The Commission also requests a recommendation on how it can avoid "windfalls" to carriers if federal funds are applied to the intrastate jurisdiction before states reform intrastate rate structures and support mechanisms.
- (b) Whether and to what extent federal universal service policy should support state efforts to make intrastate support mechanisms explicit. The Commission recognizes that section 254(k) envisions separate state and federal measures related to the recovery of joint and common costs, but nevertheless welcomes the Joint Board's input on how section 254(k) may relate to the Commission's role in making intrastate support systems explicit.
- (c) The relationship between the jurisdiction to which funds are applied and the appropriate revenue base upon which the Commission should assess and recover providers' universal service contributions and, if support for federal mechanisms continues to be collected solely in the interstate jurisdiction, whether the application of federal support to costs incurred in the intrastate jurisdiction would create or further implicit subsidies, barriers to entry, a lack of competitive neutrality, or other undesirable economic consequences.

(3) To what extent, and in what manner, is it reasonable for providers to recover universal service contributions through rates, surcharges, or other means.

7. We request that the Joint Board provide a recommended decision on these issues by November 23, 1998. We will then consider the Joint Board's recommendations and issue an order specifying the methodology for determining high cost support for non-rural carriers so that the new mechanism can be implemented by July 1, 1999.

8. In order to allow sufficient time for the Joint Board's deliberations and for the Commission to receive public comment on the Joint Board's recommendations, we hereby extend the implementation date for the revised high cost support mechanism for non-rural carriers specified in the *Universal Service Order* by six months from January 1, 1999, to July 1, 1999.¹⁵ We find that the potential benefits of a referral justify this limited extension of the implementation timeline specified in the *Universal Service Order*. During the extension period, non-rural carriers (as well as rural carriers) will continue to receive support flows based on historical support levels, which have been sufficient to produce rates that the Joint Board has previously characterized as generally affordable.¹⁶ No convincing evidence has been presented to the Commission to show that circumstances, such as the development of local exchange competition, will significantly affect support flows before the revised implementation date.¹⁷

9. In order to ensure that existing support flows continue until the revised implementation date, the Commission hereby amends section 36.601(c) of the Commission's rules to specify that non-rural carriers (as well as rural carriers) may continue to receive the expense adjustment for high cost loops specified in Subpart F of Part 36 of the Commission's Rules (the existing high cost loop fund) until July 1, 1999.¹⁸

10. In light of this change to the implementation timeline for high cost support for non-rural carriers, we believe that additional time may be necessary to complete our review of support mechanisms for rural carriers described in the *Universal Service Order*. In the *Universal Service Order*, the Commission stated that it intended to release a further notice of proposed rulemaking on forward-looking cost methodologies for rural carriers in October 1998.¹⁹ This projected date was premised on the assumption that the Commission's proceedings related to non-rural carriers would have been essentially completed by that time. Given the amended date for implementing revised support mechanisms for non-rural carriers, we hereby clarify that we do not expect to issue a further notice of proposed rulemaking related to high cost support for rural carriers until a later date, to be determined by the Commission once further proceedings

¹⁵ In light of pending petitions for reconsideration in this proceeding, the Commission retains jurisdiction to reconsider its 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).

¹⁶ *Recommended Decision*, 12 FCC Rcd at 154 para. 133.

¹⁷ See, e.g., AT&T testimony in En Banc Hearing on Methodology for Determining High Cost Universal Service Support, June 8, 1998.

¹⁸ 47 C.F.R. § 36.601(c).

¹⁹ *Universal Service Order*, 12 FCC Rcd at 8917 para. 253.

have been conducted by the Joint Board and its Rural Task Force. Rural carriers will continue to receive support based on historical support flows until the Commission adopts a forward-looking cost mechanism for rural carriers, which would become effective no earlier than January 1, 2001.

III. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Supplemental Final Regulatory Flexibility Analysis

11. This Supplemental Final Regulatory Flexibility Analysis (SFRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *Universal Service Order*,²⁰ 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. section 603, the FRFA was preceded by an Initial Regulatory Flexibility Analysis (IRFA) incorporated in the Notice of 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.²¹ The actions taken in this Order and Order on Reconsideration do not change the analysis included in the FRFA in the *Universal Service Order*²² because neither the referral of issues to the Joint Board nor the extension of the timetable for implementing a revised high cost support mechanism for non-rural carriers will affect reporting, recordkeeping, or other compliance requirements. Further, the actions taken in this Order and Order on Reconsideration only affect telecommunications carriers that are so large as not to meet the definition of a rural telephone company²³ by extending the date when they will begin to receive high cost support based on the forward-looking cost of providing the supported services.

B. Ordering Clauses

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i) and (j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 154(j), and 254, that this Order and Order on Reconsideration is adopted.

13. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i) and (j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 154(j), and 254, that

²⁰ *Universal Service Order*, 12 FCC Rcd at 9219.

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

²² *Universal Service Order*, 12 FCC Rcd at 9248-50 paras. 943-49.

²³ 47 U.S.C. § 153(37).

the issues specified herein are referred to the Federal-State Joint Board on Universal Service for a recommendation to be received by the Commission no later than November 23, 1998.

14. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i) and (j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 154(j), and 254, that section 36.601(c) of the Commission's rules, 47 C.F.R. section 36.601(c), is hereby amended as noted in Appendix A hereto. This rule change shall be effective 30 days from the date this Order is published in the *Federal Register*.

15. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i) and (j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 154(j), and 254, that the timetable established in the *Universal Service Order* for implementation of revised high cost support mechanisms for non-rural carriers is extended such that revised mechanisms for non-rural carriers will take effect July 1, 1999.

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**APPENDIX A
FINAL RULES**

Part 36 of the Title 47 of the Code of Federal Regulations is amended as follows:

PART 36 -- JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES.

1. Section 36.601 is amended as follows: all references in paragraph (c) to "January 1, 1999" are replaced with "July 1, 1999".

July 16, 1998

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

Re: Federal-State Joint Board on Universal Service; (CC Docket No 96-45) .

I concur in today's decision to refer certain matters to the Federal-State Joint Board on Universal Service. For several months, I have advocated seeking Joint Board input for many of the difficult universal service issues that we face as a Commission,²⁴ and I support asking for such guidance here. I would have preferred seeking guidance on additional issues as well since this referral will necessitate missing the January 1, 1999 implementation deadline for a revised high-cost support mechanism anyway. I concur, however, because I disagree with some of the reasoning in today's Order.

First, it is unclear to me why we distinguish the 254(k) issues from the rest of the issues that are more officially "referred." The majority seems hesitant to refer the section 254(k) issues -- instead of an official recommendation the majority requests mere "input" -- concerning the recovery of joint and common costs, noting that section 254(k) "envisions separate state and federal measures related to the recovery of joint and common costs." Indeed in the original referral Order the Commission stated that: "the explicit use of the language 'the Commission, with respect to interstate services, and the States, with respect to intrastate services,' indicates that Congress intended to give the separate jurisdictions the flexibility to review these issues separately."²⁵ I do not disagree that section 254(k) envisions such a separation,²⁶ but similar language inferring such a separation can also be found in section 254(h)(1)(B) regarding the setting of the discount rate for schools and libraries.²⁷ And the language in 254(h)(1)(B) did not

²⁴ Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998.

²⁵ Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, 11 FCC Rcd 18092 (1996).

²⁶ Section 254(k) states that "[t]he Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that the services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." 47 USC Section 254(k).

²⁷ Section 254(h)(1)(B) states that "[t]he discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities."

prevent the Commission from referring that issue to the Joint Board, from seeking a "recommendation on how the respective State and Federal discount methodologies can be harmonized . . . ,"²⁸ or from requiring "states to establish intrastate discounts at least equal to the discounts on interstate services as a condition of federal universal service support for schools and libraries in that state."²⁹ While I see no meaningful distinction between providing an official "referral" and asking for "input," I fear that the majority may. I would prefer that the Commission be more consistent in its approach to referring issues with limiting statutory language.

In addition, I am concerned about the reorganization of the issues to be referred. For example, the Joint Board asked to review "the revenue base upon which the FCC should assess and recover provider's contributions."³⁰ But, in our reformulation of the issue we have limited it to the high-cost context, while the issue also arises for the schools and libraries and rural health care programs. The analysis of this issue necessarily has legal implications for more than just the high cost fund. Indeed, in reconsidering the issue, the Joint Board will need to decide whether the Commission has jurisdiction to assess on intrastate revenues -- regardless of whether it chooses to exercise that jurisdiction. This decision would obviously impact the schools and libraries and rural health care program's current assessment on intrastate revenues as well. Thus, I am concerned that we may have inadvertently limited the Joint Board's options to a one-way ratchet -- either leave the assessment for high cost on interstate revenues or assess on intrastate revenues as is done for the schools and libraries and rural health care programs. Nevertheless, I concur in today's Order because I believe the Joint Board is free to consider and make recommendations on any issue that they choose; the Joint Board is not bound or limited by this Commission's referral.

As I stated at the FCC's Reauthorization Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, I am disappointed that the Commission is referring some aspects of the high-cost program back to the Joint Board, precipitating a need to miss the January 1, 1999 implementation date, while at the same time moving full steam ahead on other new universal service programs. I am uncomfortable that we are again delaying the resolution of the high-cost universal service issues

47 USC Section 254(h)(1)(B).

²⁸ Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, 11 FCC Rcd 18092 (1996).

²⁹ Universal Service Order, CC Docket No. 96-45, 12 FCC Rcd 8776, at Para. 550 (1997).

³⁰ Letter from the State Members of the Joint Board to William Kennard, Chairman, FCC, CC Docket No. 96-45 (filed June 18, 1998).

even as we proceed with the implementation of the schools and libraries program. This discrepancy is not what congress intended or the 1996 Telecommunications Act required. Despite these concerns, however, I fully support referral of these issues to the States who alone may be in a position to find the best answers to the high-cost issues.