I. INTRODUCTION

For years, universal service has meant affordable telephone service for all United States residences, regardless of geographic location. This goal was achieved through a series of subsidized mechanisms imposed upon telephone companies by state and federal regulators. In a recent ruling, the Federal Communications Commission, in conjunction with a federal-state joint board, developed a variation on traditional universal service concepts: because the Internet has become such an extraordinary modern tool, all schools, libraries and rural health care providers should have access to the Internet at subsidized rates. On the surface, the plan appears quite simple. Internet service providers ("ISPs") will offer Internet access to schools, libraries and rural health care providers at prices well below retail. The ISPs will be compensated for these discounts through a universal service fund ("USF"). The USF, in turn, will be supported by telecommunications carriers such as long distance phone companies.

However, some of the major telecommunications carriers believe they have a better idea. Alternatively, they argue that providers of enhanced services, such as ISPs, should not be supported by the universal service fund, despite the FCC's good intentions. Instead, they assert that ISPs, because they compete to some extent with traditional tele-

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2 See Livia Slonage West, Deregulating Telecommunications: The Conflict Between Competition and Universal Service, 9 DEPAUL Bus. L.J. 159, 167 (1996) (explaining that the FCC brought local telephone rates to a reasonable level by implementing a complex system of subsidy flows in which long distance rates subsidized local rates, business rates subsidized residential rates, and urban rates subsidized rural rates).

3 The Commission found that all eligible schools and libraries should receive discounts of between twenty percent and ninety percent below retail on all telecommunications services, Internet access, and Internet connections provided by telecommunications carriers, subject to a $2.25 billion annual cap. See In re Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, 9002 para. 425 (1997) (hereinafter Universal Service Order).


5 See Universal Service Order, 12 FCC Rcd. at 9002 para. 425, 9015 para. 449. The federal Universal Service Fund for schools and libraries was designed to bring these institutions advanced telecommunications services, such as access to the Internet. See Mike Mills, D.C. Schools Seek Internet Funding, Wash. Post, Mar. 21, 1998, at D1. Subject to a $2.25 billion cap, schools and libraries nationwide can purchase subsidized telecommunications services and inside wiring from 10 percent to 90 percent of the actual cost. See id. The degree of the discount depends upon how many children participate in the federal school lunch program. See id. The USF is paid for by telecommunications carriers, primarily long distance providers, and administered by the School's and Libraries Corp., established by the FCC. See id. But see, John Simmons, Internet-Hookup Group Draws Political Fire, Wall St. J., Mar. 20, 1998, at A16. The General Accounting Office recently concluded that the FCC exceeded its authority in establishing the Schools and Libraries Corp. See id. Senator John McCain plans to hold hearings to consider terminating the new quasiprivate corporation. See id.


7 See Reply Comments of AT&T Corp., In re Federal-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45, at 9 (Feb. 6, 1998) (hereinafter AT&T Reply Comments); see also Comments of Airtouch Communications, Inc., In re Federal-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45 (Jan. 26, 1998) (hereinafter Airtouch Comments) [arguing that the universal service fund should be supported through general tax revenues].

8 See Comments of SBC Communications Inc., In re Fed-
communications carriers, should have to make contributions to the universal service fund.9

To many traditional telecommunications carriers, the idea of subsidizing ISPs is not particularly appealing.10 They contend that it violates the pro-competitive precepts of the 1996 Act ("1996 Act") to force one group of market players to support another.11 They argue that the relevant provisions of the 1996 Act do not give the FCC carte blanche to play regulatory Robin Hood with their universal service contributions.12 After all, ISPs offer a telecommunications-like service that could pose serious competition to traditional telecommunications providers in the near future.13 In fairness, shouldn't they too have to bear the burden of universal service.14

At the center of this debate is Section 254 of the Telecommunications Act of 1996.15 Congress directly addressed the goals of universal service for the first time in the 1996 Act.16 What was merely

[Text continues with detailed legal argument and analysis related to the Telecommunications Act of 1996 and the debate over universal service contributions.]
A. The Controversy

The battle lines have been drawn. ISPs are thrilled with the FCC's interpretation of Section 254.23 They undoubtedly look forward to receiving universal service support and expanding their market base at the expense of traditional telecommunications carriers.24 Indeed, they have nothing to lose and everything to gain.25 Many traditional telecommunications providers, on the other hand, are incensed by the FCC's proposed scheme.26 Never before have the beneficiaries of universal service been anything but the providers of plain old telephone service ("POTS").27 They assert that ISPs, who do not fit under the FCC's definition of "telecommunications carrier" and who offer a competitive alternative to traditional telecommunications services, should have to contribute their fair share to the universal service fund in the spirit of competitive neutrality, one of the central goals of the 1996 Act.28

Part I of this note will provide a brief background on universal service and trace the dramatic evolution of this social policy to its present state. Part II illuminates the regulatory definitions the Commission has chosen to apply to Section 254. Part III discusses Section 254 and the FCC's plan to implement this section in its Universal Service Order.29 Part IV sets forth the statutory arguments both for and against the FCC's universal service plan as it affects ISPs. Finally, part V contends there are only two acceptable interpretations of Section 254. The first option applies old regulatory terminology developed over decades of regulation, the result being that ISPs can neither take from, nor contribute to, the universal service fund. The second option incorporates a more up to date interpretation that sheds certain regulatory distinctions that have become irrelevant. Under this application, ISPs could benefit from the USF, but they would also be required to contribute to the USF in the same manner as other telecommunications carriers.30

II. AN EVOLVING DEFINITION OF UNIVERSAL SERVICE

The concept of universal service has come a long way since the term was coined in 1907 by Theodore Vail, then president of AT&T.31 In Vail's time, universal service meant interconnectivity.32 The essential goal was that no matter what telephone company to which one subscribed, all subscribers of all companies would be able to talk to one another.33 This definition of order for the universal service mechanism to be competitively neutral).

23 See AOL Comments, supra note 14, at 18.
24 See, e.g., Kelley Holland, Phone Subsidies Get an Overhaul, Bus. Wk., May 19, 1997, at 46; see also Yang, supra note 10.
25 Again, this is due to the fact that, under the FCC's plan, Internet access will be subsidized by the USF, but ISPs will not have to contribute to the USF. See AOL Comments, supra note 14, at 21; see also Universal Service Order, 12 FCC Rcd. at 9179 para. 788.
26 Roxana E. Cook, All Wired Up: An Analysis of the FCC's Order to Internally Connect Schools, 50 Fed. Comm. L.J. 215, 217 (Dec. 1997) (citing that critics have, "denounced the subsidy as unsupported by the Act's language and outside the FCC's authority").

Before the passage of the 1996 Act, only long distance carriers supported universal service. As of January 1998, the federal USF will be supported by all interstate telecommunications carriers, including long distance companies, local telephone companies, cellular telephone companies, paging companies, and pay-phone service providers. See Consumer Information: The FCC's Universal Service Support Mechanisms, (visited Mar. 18, 1998) <Fact Sheet: http://www.fcc.gov/Bureaus/CommonCarrier/Factsheets/universe.html>

27 Doug Abrams, AT&T Seeks Lower Fee to Reach Customers, Wash. Times, Feb. 5, 1997, at B6 (quoting Rep. W.J. "Billy" Tauzin stating: "What I'm suggesting is keeping the universal phone fund for what it is supposed to do—provide universal phone service").
28 See GTE Reply Comments, supra note 8, at 21 (arguing that the Commission must find a more equitable approach in...
universal service lasted from 1907 to about 1965; a period some refer to as the “first generation” of universal service.\textsuperscript{34}

A second generation of universal service policy emerged around the same time the Bell monopoly began to feel the threat of competition in the long distance market.\textsuperscript{35} From 1965-1996,\textsuperscript{36} during the second generation, the concept of universal service grew to mean telephone service in every home at reasonable charges, regardless of geographic location.\textsuperscript{37} Telephone service was considered an essential need, a utility, much like water or electric power service.\textsuperscript{38} Universal service thus became social policy, a state of affairs that thrived under the Bell monopoly, and which survives to this day.\textsuperscript{39}

Regulators during the second generation thought that the market alone could not ensure that the goals of second generation universal service policy would be achieved.\textsuperscript{40} Providing telecommunications services to sparsely populated rural areas was simply not profitable.\textsuperscript{41} Even if a local exchange carrier (“LEC”) merely charged enough to recover its cost of providing service in rural regions, its rates still would have been economically prohibitive to most customers.\textsuperscript{42} Other telecommunications markets provided for better opportunities for a carrier. For example, a LEC could profit far more by serving large concentrated business customers than by serving scattered residential customers.\textsuperscript{43} The newly competitive long-distance market also proved to be tremendously lucrative.\textsuperscript{44} Consequently, in order to meet the new universal service goals, regulators manipulated rates through a series of subsidization mechanisms to ensure that the price of local phone service would be comparable nationwide.\textsuperscript{45} Regulators authorized carriers to raise prices far above cost in the more profitable (low cost) areas of the telecommunications market so prices in the less profitable (high cost) markets could be kept down.\textsuperscript{46} As a result of the new universal service policy, long-distance and business users submi-
We are currently in the midst of the third generation of universal service policy. This era began with the passing of the 1996 Act. The basic tenants of the previous regime remain. Regulators and legislators are as concerned as ever with ensuring that all people have access to telecommunications service at reasonable rates. There are, however, a few twists. First, universal service is no longer an intangible overarching policy goal. Congress condoned the years of implicit subsidies by codifying universal service policy in its very own section within the 1996 Act. Second, the Act demands that universal service goals no longer be achieved via implicit cross-subsidies. Under the new regime, the Act requires that universal service be funded through explicit contributions that will go into a universal service fund. Third, unlike second generation universal service policy, there is no longer unanimity as to what carriers should contribute to, and what carriers should benefit from, the universal service fund. Some would limit those beneficiaries to the providers of POTS as under the previous regime. Others would extend universal service support to providers of what the FCC calls enhanced services, such as ISPs. The final, and most striking characteristic of third generation universal service policy is its glaring incompatibility with the competitive precepts of the Telecommunications Act. The primary purpose of the Act was deregulation and the introduction of competition to local telephone markets. Meanwhile, the FCC is expected to keep the market in check through regulation to ensure affordable access to telecommunications for all Americans. This only serves to fuel the current controversy over third generation universal service policy.

### III. DEFINING OUR TERMS: SECOND GENERATION HOLDOVERS

Just as certain policies survived from second generation universal service into the third, certain terms were transplanted as well. An understanding of how a few of these terms endured is critical to an appreciation of the current controversy.

#### A. The Basic/Enhanced Distinction

Under the second generation of universal service, telephone companies that held themselves out as common carriers both supported and benefitted from the overall mechanism. During the fund and that the providers of Internet access should nevertheless have to make USF contributions because they compete, to some extent, with phone companies. See id. See id., supra note 27. See Ford, supra note 4 (arguing that giving school children access to the Internet is a prerequisite to their being able to stay afloat in the information age).

57 But see Chairman William Kenard, FCC, Address to the Practicing Law Institute (Dec. 11, 1997, Washington, D.C.). “There have always been those who have said that you can’t have competition and universal service. That’s simply wrong. Quite to the contrary, we can have competition and have universal service. And we will.” Id.

58 See Alex J. Mandl, Telecom Competition is Coming Sooner Than You Think, Wall St. J., Jan. 26, 1998, at A18 (criticizing the delays in meeting the 1996 Act’s objectives); see generally Mills, supra note 13.

59 See West, supra note 2, at 159.


61 See generally Burns and Stevens Comments, supra note 20, at 5-6 (criticizing the Commission for using an outdated definition of the term “telecommunications carrier”).

62 See id. The Senators point out that the term “telecommunications carrier” which Congress employs in the 1996 Act is derived from the term “common carrier” as set forth in the NARUC II decision. See id. at 6. In NARUC II, the court defined a common carrier as a service provider which, “holds
this period, universal service funds supported only “basic services.” Under the FCC’s interpretation, basic services constituted, “common carrier offering(s) of transmission capacity for the movement of information.” This primarily encompassed plain old telephone service or POTS.

The FCC designated another class of services as “enhanced services.” According to the regulatory definition, enhanced services combined basic services with “computer processing applications that act on the format, content, code, protocol, or other similar aspects of the subscriber’s information.” Internet transmissions can involve both computer processing and protocol conversion.

Consequently, under the FCC's definition of enhanced service, an ISP would be considered an enhanced service provider, and thus Internet access would constitute an enhanced service.

B. The Telecommunications/Information Distinction

This second generation basic/enhanced distinction crept into third generation universal service policy. The Commission has substituted the terms “basic” and “enhanced” with “telecommunications” and “information,” respectively. It appears that basic service, under the old regime, is now considered telecommunications service, and much of what was previously considered enhanced service is now information service. An example of a telecommunications service under the FCC’s current scheme would be POTS. Accordingly, the provider of this service is classified as a “telecommunications carrier.”

In contrast, an example of an information service under the third generation regime would be Internet access. The provider of Internet access, therefore, is an ISP. Whether the FCC’s decision to distinguish between Internet services and telecommunications services is appropriate will be addressed later. For now, it is important to recognize that the Commission distinguishes between the two.

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66 Id.

67 See id. at 418 para. 90.

68 See 47 C.F.R. § 64.702 (1997). The rule states in relevant part: “the term enhanced services shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.” Id.

69 Id.; see also Computer II, 77 F.C.C. 2d, at 498 app. 1(a).

70 See Universal Service Order, 12 FCC Rcd., at 9321 app. I.

71 See id.

72 See Burns and Stevens Comments, supra note 20, at 5 (noting that, “The Commission’s continued classification of services as ‘enhanced’ or ‘basic’ could seriously undermine the competitive regime Congress sought to create”).


74 See Burns and Stevens Comments, supra note 20, at 8. The Senators assert that Congress did not intend this to be the case. Id.
IV. SECTION 254 AND THE COMMISSION’S UNIVERSAL SERVICE ORDER

A. Section 254

Section 254 is the embodiment of third generation universal service policy.\(^{81}\) It is also the battlefield for the current controversy over ISPs and the USF.\(^{82}\) Problems arise when determining exactly what entities and what services Congress intended would support the USF, and what entities and services would be the beneficiaries of the USF.\(^{83}\) This state of affairs is primarily due to the fact that Section 254 is an almost cruel exercise in legislative doublespeak. Understanding this dilemma requires a close and somewhat tedious look at Section 254.

1. 254(b)(6) and 254(c)(3)

Section 254(b)(6) is entitled: “Access to Advanced Telecommunications Services for Schools, Health Care, and Libraries.”\(^{84}\) This provision states that, “Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).”\(^{85}\) Similarly, subsection (c)(3) states that, “[T]he Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).”\(^{86}\)

2. 254(h)(1)(B)

Proceeding dutifully to subsection (h) one would expect to find some explanation of what Congress means when it uses terms such as “advanced telecommunications services” and “additional services.”\(^{87}\) This, of course, would be all too easy. Instead, one finds subsections (h)(1)(B) and (h)(2)(A).\(^{88}\) Subsection (h)(1)(b) informs that, “All telecommunications carriers shall provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.”\(^{89}\) In order to decipher what Congress meant by “such services,” the reader is almost mockingly referred back to subsection (c)(3), the provision that got them there in the first place.\(^{90}\)

The subsection then goes on to say that any telecommunications carrier that provides service under (h)(1)(B) should either be reimbursed through universal service mechanisms or have their universal service contribution reduced accordingly.\(^{91}\) Unfortunately, however, (h)(1)(B) makes no reference to Internet service providers, or providers of advanced services.\(^{92}\) It speaks only of telecommunications carriers.\(^{93}\) Again, according to the Commission’s interpretation, ISPs are considered to be enhanced service providers or information service providers, not telecommunications carriers.\(^{94}\) Thus, subsection (h)(1)(B)’s applicability to ISPs appears a bit tenuous under the Commission’s current classification of that term.\(^{95}\)

3. 254(h)(2)(A)

It is much easier to find a place for ISPs in subsection (h)(2)(A), entitled, “Advanced Services.”\(^{96}\) This provision instructs the Commission

\(^{81}\) See Mueller, supra note 32, at 658.
\(^{82}\) See generally SBC Comments, supra note 8 (arguing that Section 254 does not allow ISPs to receive federal universal service support).
\(^{83}\) See Airtouch Comments, supra note 7, at 20. Airtouch lays out the two issues of universal service policy design rather concisely: “(a) Which consumers and carriers, and which services, are eligible for support? and (b) Which consumers and carriers have to bear the costs of universal service programs?” Id.
\(^{85}\) Id.
\(^{86}\) Id. at (c)(3).
\(^{87}\) Section 153, the provision that defines the terms used in the Act, does not define either term. 47 U.S.C. § 153 (Supp. 1997).
\(^{89}\) Id. at (h)(1)(B).
\(^{90}\) Id. at (c)(3).
\(^{91}\) Id. at (h)(1)(B)(i), (ii)
\(^{92}\) Id.; see also SBC Comments, supra note 8, at 4.
\(^{95}\) See SBC Comments, supra note 8, at 4 (arguing that the services supported under 254(h)(1)(A) and (h)(1)(B) are limited to telecommunications services, thereby excluding Internet service).
to, "enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries." ISPs fit comfortably into the definition of information services because Internet access allows one to "generate, store, retrieve, and utilize information via telecommunications." But unlike subsection (h)(2)(B), this paragraph does not stipulate any type of universal service mechanism through which access to advanced services should be enhanced. Nowhere in subsection (h)(1)(A) is there any reference to support for advanced services, contributions for such support, or any sort of reimbursement process in return for discounting those services. Subsection (h)(2)(A) merely sets forth a rather ambiguous policy statement that access to advanced services should be enhanced in a competitively neutral manner.

4. 254(e)

To complicate matters just a tad more, Section 254(e) states, "only an eligible telecommunications carrier shall be eligible to receive specific Federal universal service support." If only telecommunications carriers are eligible for universal service support, and Internet service providers are not telecommunications carriers, then could Congress have intended that ISPs be supported by the universal service fund?

B. The Universal Service Order

Congress left the onerous burden of implementing these provisions to a federal-state joint board and the FCC. Not only did the joint board, and ultimately the Commission, have to interpret the legislative labyrinth that is Section 254, it also had to devise a scheme by which the goals of third generation universal service policy would be realized within a competitive deregulatory context. Based on the recommendations of a federal-state joint board, the Commission was to ensure that universal service contributions would be made through explicit and predictable mechanisms and that those contributions would be equitable and non-discriminatory.

In its Universal Service Order, the Commission established the $2.5 billion federal USF for the benefit of schools and libraries. It ordered all telecommunications carriers to make contributions to the fund based on their gross revenues. Only carriers whose contributions would be de minimis could be exempt from the contribution requirement. As for the beneficiaries of the newly established universal service fund, the Commission concluded that the language of Section 254 authorized it to designate Internet access to schools and libraries for universal service fund support.
THE Commission found that service providers would be eligible for discounts for Internet access whether or not the entity provided only Internet access or offered Internet access as one of its service options.\textsuperscript{111} The Commission limited contributors, on the other hand, to providers of telecommunications services.\textsuperscript{112}

V. THE DEBATE BETWEEN THE AOL CAMP AND THE AT&T CAMP

A. The Sides

The Commission is in the midst of preparing a Report to Congress on the implementation of Section 254.\textsuperscript{118} It has requested comments from interested parties regarding the overall universal service scheme set forth in the \textit{Universal Service Order}.\textsuperscript{114} The comments demonstrate that two distinct factions exist, one for and the other against the Commission's treatment of ISPs in the \textit{Universal Service Order}.

For simplicity's sake, the supporters of the Commission's \textit{Universal Service Order} will be referred to herein as the AOL camp.\textsuperscript{115} The opponents of the \textit{Universal Service Order}, as it effects ISPs, will be referred to herein as the AT&T camp.\textsuperscript{116}

\begin{itemize}
\item telecommunication services and internal connections provided by telecommunications carriers. \textit{See id.}
\item \textsuperscript{111} \textit{See Universal Service Order, 12 FCC Rcd., at 9086-87 para. 594} (finding that “Section 254(h)(2), in conjunction with section 4(i), permits us to empower schools and libraries to take the fullest advantage of competition to select the most cost effective provider of Internet access and internal connection”).
\item \textsuperscript{112} \textit{See id. at 9179-81 para. 788-89.}
\item \textsuperscript{113} The Commission is required to conduct a thorough reevaluation of who is required to contribute to universal service. The due date for the report is April 10, 1998. \textit{In re Federal-State Joint Board on Universal Service, CC Dkt. No. 96-45, Fourth Order on Reconsideration, FCC 97-420, para. 255} (rel. Dec. 30, 1997).
\item \textsuperscript{115} The “AOL camp” includes: America Online, Inc., The Internet Service Provider Consortium (“ISP/C”), and The Education and Library Networks Coalition (“EDLINC”).
\item \textsuperscript{116} The “AT&T camp” includes AT&T Corp., Southern Bell Communications, Inc., GTE Service Corp., and Airtouch Communications, Inc. Neither the AT&T camp nor the AOL camp constitute a complete list of players involved in the current controversy. They represent a select list of major players on both sides of the issue. For a complete list of the interested parties in the Report to Congress on Universal Service, see Comments: Report to Congress on Universal Service, CC Docket
\item B. Statutory Arguments in Support of Extending USF Support for Discounts on Internet Access for Schools and Libraries: The AOL Camp

Both the FCC and supporters of its decision on Internet access for schools and libraries make detailed arguments in favor of the Commission's interpretation of Section 254.\textsuperscript{117} They base their contentions on what they believe to be Congress' intent and the discretion that should be given to the FCC in interpreting that intent.\textsuperscript{118} Quite naturally, the ISPs who will be providing Internet access to schools and libraries are pleased with the Commission's interpretation of Section 254.\textsuperscript{119} They undoubtedly look forward to taking a slice of the $2.5 billion that will be raised, courtesy of telecommunications carriers.\textsuperscript{120}

To reiterate, the FCC reasoned that Section 254 permitted it to extend USF support for Internet access to schools and libraries.\textsuperscript{121} According to this interpretation, a provider of Internet access, regardless of whether or not it is an ISP or a telecommunications carrier that provides basic services in addition to Internet services, will provide Internet access to schools and libraries at discounted rates.\textsuperscript{122} The providers of Internet services will then be reimbursed through the USF, or
\item \textsuperscript{117} There has been extensive opportunity to comment on the FCC's Joint Board decision through the submission of comments and reply comments by all interested parties. The Commission has requested these comments in preparation of its Report to Congress. The Report is due on April 10, 1998. \textit{Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration, CC Dkt. No. 96-45, para. 255} (rel. Dec. 30, 1997).
\item \textsuperscript{118} The legislative history indicated that Congress intended to ensure that eligible schools and libraries have affordable access to modern telecommunications and information services that will enable them to provide educational services to all parts of the nation. \textit{See Universal Service Order, 12 FCC Rcd. at 9002 para. 424; see also EDLINC Reply Comments, supra note 18, at 2; see also Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding in part that a federal agency has broad discretion where legislative language is subject to interpretation).}
\item \textsuperscript{119} \textit{See Conference Panelists Discuss Future of Subsidies, Regulation in Wake of Internet's Growth, Telecommunications Reports, Mar. 16, 1998, 1998 WL 4849963.}
\item \textsuperscript{120} \textit{See Mike Mills, FCC Approves Restructuring of Nation's Telephone Rates; Consumers See Cuts of About 8% on Long Distance Phone Bills, Wash. Post, May 8, 1997, at E1.}
\item \textsuperscript{121} \textit{See Universal Service Order, 12 FCC Rcd., at 9008-09 para 436.}
\item \textsuperscript{122} \textit{See id. at 9015 para. 449.}
Joint Board on Universal Service (Report to Congress), CC

evently reasonable." The Commission found such authority in sections 254(c)(3) and 254 (h)(2). The FCC reasoned that the language of Section 254(c)(3), giving it the authority to "designate additional services for support," permitted it to designate non-telecommunications services for support such as Internet access. Proponents of this interpretation contend that if Congress wanted to limit the range of possible services only to telecommunications services, it would have explicitly done so by incorporating the term, "additional telecommunications services" instead of using the term, "additional services" in Section 254(c)(3). They also cite to sections 254(h)(1)(B) and 254(h)(2)(A), arguing that the Commission could appropriately conclude that Congress intended for "advanced" and "information" services to be subsidized by the USF.

Proponents of the Universal Service Order also claim that the Commission acted within its statutory authority under section 4(i). This is the generic catch-all authority given to the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Consequently, commenters such as EDLINC argue that even though the language of Section 254 does not explicitly give the Commission authority to extend USF discounts for Internet access, the FCC stayed appropriately within its discretionary rulemaking boundaries in doing so.

123 See id.

124 See id. at 9498 para. 283 (noting PacTel's concern that allowing non-telecommunications carriers, such as ISPs, to draw from the USF without making them contribute creates an unfair subsidy for enhanced service providers).

125 Universal Service Order, 12 FCC Rcd., at 9002 para. 425. It is important to keep in mind that there is no statutory debate as to whether telecommunications service should be supported by the USF. Congress was quite clear in its intent to have telecommunications supported in Section 254(h)(1)(B). 47 U.S.C. § 254(h)(1)(B); see also Universal Service Order, 12 FCC Rcd., at 9003 para. 425.

126 See id. at 9009, para. 437.

127 47 U.S.C. § 254(c)(3). "In addition to the services included under the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and rural health care providers for the purpose of subsection (h)." Id. See Comments of America Online, Inc., In re Federal-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45, at 19 (Jan. 26, 1998) [hereinafter AOL Comments]. AOL further asserts that, "[i]n light of accompanying legislative history, this interpretation makes sense. For example, Congress noted that the FCC could include 'dedicated data links and the ability to gain access to educational materials, research information, statistics, information on government services, reports developed by Federal, State, and local governments, and information services which can be carried over the Internet.' (citing H.R. Conf. Rep. No. 104-458, at 133, reprinted in 142 Cong. Rec. H1113 (daily ed. Jan. 31, 1996))." AOL concludes that, "[G]iven this language, the inclusion of 'Internet access' among the supportable services is entirely reasonable." See AOL Comments, supra note 14, at 19 n. 72.

128 47 U.S.C. § 254(h)(1)(B): (B) Educational Providers and Libraries. All telecommunications carriers serving a geographic area shall, upon a bona fide request from for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. A telecommunications carrier providing service under this paragraph shall-(i) have an amount equal to the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or (ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

129 47 U.S.C. § 254(h)(2)(A): (2) Advanced Services.-The Commission shall establish competitively neutral rules-(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.

130 See AOL Comments, supra note 14, at 19.


133 See EDLINC Reply Comments, supra note 18 at 3; but see, Iowa Utilities Bd. v. FCC, 120 F 3d. 755 (8th Cir. 1997). In Iowa, the Eighth Circuit rejected the FCC's generic authority under 4(i) and 303(r) to authorization to promulgate intra-state pricing and contracting rules for interconnection agreements because this action went beyond the statutory language of sections 251 and 252 and conflicted with the language of section 2(b) of the Act. The Eighth Circuit found that, "these subsections merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC." Id. at 795. See also People of the State of California v. FCC, 905 F. 2d 1217, 1240 n.35 (9th Cir. 1990).
C. Arguments Against the FCC’s Interpretation of Section 254: The AT&T Camp

Telecommunications providers such as GTE, SBC Communications and AT&T point out serious flaws in the FCC’s decision to extend USF support for Internet access. They argue that the FCC’s new universal service scheme deviates substantially from what Section 254 allows. Understandably, providers of telecommunications services do not look forward to subsidizing discounts given by ISPs with their USF contributions.

While supporters of the FCC’s decision cite to the ambiguities of Section 254 and the Commission’s ability to interpret those ambiguities as it deems appropriate, the statutory language cited by the opponents of subsidized Internet access for schools and libraries is quite clear.

For instance, critics point out that Section 254(e) states unequivocally that “only an eligible telecommunications carrier” may receive universal service support. Considering that the FCC does not currently view ISPs as telecommunications carriers, it appears the Commission is ignoring, or at least stretching, the language of 254(e) by including ISPs as the beneficiaries of the USF in its Universal Service Order.

Opponents also cite Sections 254(c)(1), (c)(3) and (h), all of which refer to “telecommunications services.” They argue that any reference to “advanced services” must be viewed in the section’s proper context as an advanced telecommunications service, thus excluding Internet access. Accordingly, AT&T contends that “the expansive interpretation of ‘advanced services’ to include non-telecommunications services... simply cannot be sustained by the plain meaning, intent, or legislative history of [Section 254].”

Some of the most convincing evidence cited by the AT&T camp in arguing that Congress did not intend for Internet access to be supported by the USF comes from Congress itself. In a letter to Chairman Kennard, Senators Burns and Stevens observe that “[I]f Internet conduit service is not a telecommunications service, then that service can never be supported as part of universal service under the terms of Section 254.” Indeed, the Senators assert that they, “debated and decided in Section 254 whether or not information services would be directly supported by universal service, and the answer was clearly not... [t]he Commission cannot use its generic authority to trump the unambiguously expressed intent of Congress.”

D. Having Their Cake and Eating it Too: Arguments in Support of the FCC’s Decision to Exempt ISPs from USF Contributions

Of course, ISPs, such as AOL, who claim they...
should reap the benefits of the USF, are just as quick to hail the FCC's decision to exempt ISPs from having to make contributions to the fund.\textsuperscript{148} They find support in Section 254(d) entitled, "Telecommunications Carrier Contribution."\textsuperscript{149} They reason, "[B]ecause Internet access services are not telecommunications services, the FCC correctly excluded them [ISPs] from its list of 'contributing carriers'."\textsuperscript{151}

Alternatively, members of the AOL camp claim that ISPs do actually contribute to the USF through their purchases of necessary telecommunications services.\textsuperscript{152} They note the billions of dollars they pay in telecommunications services every year.\textsuperscript{153} They claim that with each purchase of telecommunications services, such as business lines, ISPs make an implicit, indirect contribution to the USF.\textsuperscript{154} AOL contends that if it were to have to make explicit contributions, in addition to having to buy telecommunications service for its operations, the end result would be a discriminatory double tax.\textsuperscript{155}

E. Competitive Neutrality: The AT&T Camp Argues That ISPs Should Make Explicit Contributions to the USF

Members of the AT&T camp contend that it is only fair for ISPs, who will be eligible for billions of dollars in USF support under the FCC's plan, to be required to contribute to the fund based on their annual retail revenues.\textsuperscript{156} They claim that indirect USF support paid for by ISPs through the purchase of telecommunications services is negligible compared to the contribution amount that would result if ISPs had to pay-in based on retail sales.\textsuperscript{157} The result is telecommunications carriers will pay more into the USF than they would have to if ISPs contributed on the same basis.\textsuperscript{158}

Unfortunately for telecommunications carriers disaffected by the FCC's scheme, they are unable to overcome AOL camp's argument that Section 254(d) only requires telecommunications carriers to contribute to universal service.\textsuperscript{159} The language of Section 254(d) is quite clear.\textsuperscript{160} The AT&T camp's fairness argument, however, is rather strong, especially in light of the fact that ISPs do compete, to some extent, with telecommunications carriers.\textsuperscript{161} E-mail and Internet telephony are clear examples of such competition.\textsuperscript{162} Forcing one group of market players to subsidize another group of competing market players undoubtedly violates the precepts of competitive neutrality, a concept upon which the \textit{Universal Service Order} is supposedly based.\textsuperscript{163}

In sum, the AOL camp's interpretation of Section 254 applauds the FCC's \textit{Universal Service Order} contribution to the USF would be much higher if that contribution was based on the ISP's retail revenues. \textit{Id.} Because ISPs are currently exempt from making such contributions, Interexchange carriers, such as AT&T, are forced to make up the difference. \textit{Id.}

\textsuperscript{148} See \textit{AOL Comments, supra note 14, at 21 (claiming that the 1996 Act only requires telecommunications carriers to contribute to the USF)}.

\textsuperscript{149} 47 U.S.C. § 254(d).

\textsuperscript{150} See \textit{AOL Comments, supra note 14, at 21. "...[E]very telecommunications carrier that provides interstate telecommunications services shall contribute...to preserve and advance universal service." 47 U.S.C. § 254(d) (Supp. 1997).}

\textsuperscript{151} See \textit{AOL Comments, supra note 14, at 21 (citing \textit{Universal Service Order,} 12 FCC Rcd. at 9179 para 798, 9181 para. 790).}

\textsuperscript{152} See Reply Comments of America Online, Inc., \textit{In re Federal-State Joint Board on Universal Service (Report to Congress),} CC Dkt. No. 96-45, at 6 (Feb. 6, 1998) [hereinafter \textit{AOL Reply Comments}].

\textsuperscript{153} See \textit{id.}


\textsuperscript{155} See \textit{id.}

\textsuperscript{156} See \textit{AT&T Reply Comments, supra note 7, at 11.}

\textsuperscript{157} See \textit{id. at 12. AT&T vehemently contends that an ISP's purchase of interstate telecommunications services does not constitute a contribution to the USF. \textit{Id.} An ISP's}

\textsuperscript{158} BellSouth makes the point quite succinctly: "Having
They vigorously argue that Section 254 permits a scheme in which ISPs benefit from the USF while not having to contribute to the USF. In contrast, the crux of the AT&T camp's argument is that Section 254 does not allow ISPs to take from the fund, but fairness dictates that ISPs should contribute to the extent that they compete with traditional telecommunications carriers. As set forth below, both interpretations are wrong.

VI. THE ONLY ACCEPTABLE INTERPRETATIONS OF SECTION 254

There are only two statutorily palatable interpretations of Section 254 as it relates to ISPs. The logical outcome of either interpretation depends entirely upon the regulatory definitions the FCC chooses to apply. Under the first option, the Commission can continue to distinguish between telecommunications carriers, who are classified as offering a telecommunications service and ISPs, who are classified as offering an information service. Option 1 produces a lukewarm result that does little to further Congress' goal of bringing advanced services to schools and libraries.

Under option 2, the current distinction between telecommunications carriers and ISPs is dropped. It sheds the constraints of the FCC's second generation basic/enhanced distinction adopted competitive neutrality as a principle of universal service, the Commission under its Section 254 obligations should create rules that operate in a competitively neutral manner. To maintain rules that are not competitively neutral conflicts with Congress' admonition in Section 254 to adopt universal service policies that reflect the principles enumerated in the statute. See, e.g., Comments of Bell South, In re Federal-State Joint Board on Universal Service (Report to Congress) CC Dkt. No. 96-45, at 9 (Jan. 1998) [hereinafter BellSouth Comments].

See AOL Comments, supra note 14, at 18 (supporting the FCC's universal service scheme as consistent with the 1996 Act).

See id. at 20-21.

See AT&T Reply Comments, supra note 7, at 13 (asserting that, "to the extent that a provider offers both telecommunications and information services, the telecommunications portion must be assessed USF support obligations").

See Universal Service Order 12 FCC Rcd., at 8822 para. 85; see also Computer II, 77 F.C.C. 2d, at 387 para. 5.


Senators Burns and Stevens advocate dropping the telecommunications carrier/ISP distinction. See Burns and Stevens Comments, supra note 20, at 8.

This is precisely the type of broad definition that Senators Burns and Stevens recommend. See Burns and Stevens Comments, supra note 20, at 5.

A. Neither the AT&T Camp nor the AOL Camp Can Have Their Way: Option 1

If the FCC continues to distinguish between ISPs and telecommunications providers, neither the AT&T camp nor the AOL camp interpretation of Section 254 can stand. This, of course, means that the Commission must revisit the decision it made in the Universal Service Order.

To date, ISPs are defined by the Commission as providers of information services. Section 254(e) clearly states that only telecommunications providers are eligible for USF support. So long as Internet access constitutes an information service, ISPs cannot be supported by the USF. Combining the Commission's generic authority under section 4(i) with the hazy policy goal elicited in Section 254(h)(2)(a) does not sufficiently justify overcoming the crystal clear man-

170 See id.; The Senators point out that there would have been no need to include the definition of 'telecommunications carrier' in the 1996 act if Congress merely intended that definition to mirror the second generation of 'common carrier' which was limited to the providers of basic services. See id. at 5.

171 Otherwise, Congress's referrals to Internet access in the Conference Agreement would have been entirely superfluous. See 142 Cong. Rec. H1113 (daily ed. Jan. 31, 1996); but see McCain: No Common Carrier Regulation for ISPs, Multimedia Daily, Mar. 17, 1998, 1998 WL 6568980 (arguing that Congress never intended for ISPs to be brought under the veil of common carrier regulation, which would be precisely the case if ISPs were considered telecommunications carriers).

173 See Burns and Stevens Comments, supra note 20, at 14.

174 See Universal Service Order, 12 FCC Rcd., at 9180 at para. 789. The Commission reveals the telecommunications carrier/ISP distinction by noting: "We observe that ISPs alter the format of information through computer processing applications such as protocol conversion and interaction with stored data, while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent" (emphasis added). Id.


176 See Burns and Stevens Comments, supra note 20, at 9.

date of Section 254(e). The FCC cannot simply pile statutory ambiguity upon statutory ambiguity until it achieves the desired result, especially in the face of explicit statutory language.

Similarly, because ISPs are classified as information service providers, they cannot be made to contribute to the USF. Like 254(e), the language of 254(d) is quite clear. Only "telecommunications carriers" are required to contribute to the fund. Even in light of the AT&T camp's strong arguments regarding competitive neutrality, there is simply no way to bring an ISP, as currently defined, into the ambit of Section 254(d). A realistic reading of Section 254 demonstrates that, under the FCC's current regulatory framework, ISPs can neither take from, nor contribute to, the USF. Both the AOL camp and the AT&T camp lose out.

**B. Dropping the Telecommunications Carrier/ ISP Distinction: Option 2 (A Third Generation Interpretation)**

Surely in light of the legislative history, option 1 is a bit sour. Why would Congress have even bothered with including a section that discussed advanced services for schools if language within the very same section prohibited the formulation of mechanisms to support those services?

There is yet another outcome that the language of Section 254 can bear. This outcome, in fact, is probably more in tune with Congress' intent in enacting Section 254. It requires a revamping of the FCC's outmoded second generation terminology in a way that allows Internet access to constitute a telecommunications service and ISPs to be considered telecommunications carriers.

There is support for a broader definition of telecommunications carrier both in the Act and in recent comments made by Senators Burns and Stevens. "Telecommunications carrier" is a third generation term added to the 1996 Act. It was not meant to be limited to the FCC's second generation definition of "common carrier," a provider primarily of basic telephone services. As Senators Burns and Stevens point out:

If Congress had intended the term "telecommunications carrier" to mean "common carrier," there would have been no need to add this new term. Congress, though, did intend "telecommunications carrier" to define a class broader than the pre-Telcom Act "common carrier" regime. That intent is evident from the definition of a "telecommunications carrier" added by the Telecommunications Act.

Applying third generation terminology, an ISP can justifiably be considered a telecommunications carrier. According to the 1996 Act, "telecommunication" means "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Indeed, when one uses their ISP to access a web page on the Internet or to send an e-mail, information of the user's choosing is being transmitted among and between points specified by the user. Telecommunications have taken place. If Internet service consti-
tutes a telecommunications service, then ISPs must logically be telecommunications carriers.\textsuperscript{197} Under a third generation application, ISPs fit comfortably within the larger category of telecommunications carriers. In applying third generation terminology to Section 254, option 2 achieves a far more amicable result than that of option 1. Accordingly, it is necessary to reinterpret the statute using the new terms.

As newly defined telecommunications carriers, ISPs could receive universal service support for discounted Internet access.\textsuperscript{198} The FCC would no longer have to sidestep the language of 254(e) which limits the beneficiaries of universal service to telecommunications carriers.\textsuperscript{199} However, under 254(d), ISPs would also have to contribute to the fund as regular telecommunications carriers.\textsuperscript{200} Having ISPs both benefit from, and contribute to, the USF will satisfy the 1996 Act’s dual goals of bringing advanced telecommunications service to schools and libraries, and maintaining competitive neutrality in a third generation regulatory context.\textsuperscript{201}

\textbf{VII. CONCLUSION}

The current controversy over ISPs and the USF is a result of the FCC’s misapplication of second generation regulatory terms to a statute that is supposed to embody the third generation of universal service policy. The Commission cannot allow ISPs to have their cake and eat it too under Section 254. No matter what interpretation the FCC applies, the language of the statute does not allow for ISPs to take from, but not contribute to, the USF.

The FCC needs to re-evaluate its \textit{Universal Service Order}. In doing so, it should do away with the telecommunications carrier/ISP distinction and embrace the broader definition of a telecommunications service that the Act requires. A third generation statute should be interpreted using third generation terminology. Otherwise, the laudable new goals of third generation universal service policy will be sacrificed.