I. INTRODUCTION

For years, universal service has meant affordable telephone service for all United States residences, regardless of geographic location.1 This goal was achieved through a series of subsidization mechanisms imposed upon telephone companies by state and federal regulators.2 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.3 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.4 The ISPs will be compensated for these discounts through a universal service fund ("USF").5 The USF, in turn, will be supported by telecommunications carriers such as long distance phone companies.6

However, some of the major telecommunications carriers believe they have a better idea.7 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.8 Instead, they assert that ISPs, because they compete to some extent with traditional tele-
communications carriers, should have to make contributions to the universal service fund.\footnote{\textsuperscript{9}}

To many traditional telecommunications carriers, the idea of subsidizing ISPs is not particularly appealing.\footnote{\textsuperscript{10}} They contend that it violates the pro-competitive precepts of the 1996 Act (\textquotedblleft 1996 Act\textquotedblright) to force one group of market players to support another.\footnote{\textsuperscript{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.\footnote{\textsuperscript{12}} After all, ISPs offer a telecommunications-like service that could pose serious competition to traditional telecommunications providers in the near future.\footnote{\textsuperscript{13}} In fairness, shouldn't they too have to bear the burden of universal service?\footnote{\textsuperscript{14}}

At the center of this debate is Section 254 of the Telecommunications Act of 1996.\footnote{\textsuperscript{15}} Congress directly addressed the goals of universal service for the first time in the 1996 Act.\footnote{\textsuperscript{16}} What was merely

\begin{verbatim}
eral-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45, at 1 [Jan. 30, 1998] [hereinafter SBC Comments]; see also Reply Comments of GTE Service Corp., In re Federal-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45, at 19 (Feb. 6, 1998) [hereinafter GTE Reply Comments].

\footnote{\textsuperscript{9}} See AT&T Reply Comments, supra note 7, at 11 (asserting that ISPs pose real competition to providers of long distance service, especially in the areas of real-time fax and voice transmissions).

\footnote{\textsuperscript{10}} The 1996 act states that only \textquotedblleft telecommunications carrier(s)\textquotedblright will support universal service. 47 U.S.C. § 254(d) (Supp. 1997); see generally Catherine Yang, Telecom: Congress Should Reform Its Reform, Bus. Wk., Jan. 12, 1998, at 40.

\footnote{\textsuperscript{11}} See AT&T Reply Comments, supra note 7, at ii-iii.

\footnote{\textsuperscript{12}} See id.

\footnote{\textsuperscript{13}} Soon, businesses like Qwest Communications Corp. will make serious grabs at long distance market share by offering Internet-based calling to U.S. customers. See Steven V. Brull, At Seven And A Half Cents A Minute, Who Cares If You Can't Hear A Pin Drop?, Bus. Wk., Dec. 29, 1997, at 46. This idea has come even closer to fruition with Qwest Corp.'s proposed merger with LCI. See Mike Mills, LCI to be Acquired in $4.4 billion Deal, Wash. Post, March 10, 1998, at Cl.

\footnote{\textsuperscript{14}} See Airtouch Comments, supra note 7, at 27 (arguing that ISPs should have to contribute to the USF); But cf. Comments of America Online, Inc., In re Federal-State Joint Board on Universal Service (Report to Congress), CC. Dkt. No. 96-45, at 21 [Jan. 26, 1998] [hereinafter AOL Comments] (contending that the 1996 Act does not allow the Commission to require ISPs to contribute to the USF).


\footnote{\textsuperscript{16}} Section 254 of the 1996 Act is thus appropriately entitled, "Universal Service." Id.


\footnote{\textsuperscript{18}} See id.; see also Reply Comments of The Education and Library Networks Coalition, In re Federal-State Joint Board On Universal Service (Report to Congress), CC Dkt. No. 96-

\footnote{\textsuperscript{19}} See Mike Mills, Florida Seeks Higher Phone Rates to Expand Market, Wash. Post, March 8, 1998, at A8 (reporting that state and federal regulators are "puzzling" over universal service).

\footnote{\textsuperscript{20}} Senators Burns and Stevens warn: "Although some members of industry may support the Commission's approach in a shortsighted effort to obtain relief from access charges and other outdated regulatory structures, they are likely to be disappointed with the long-term result." Comments of Senators Burns and Stevens, In re Federal-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45, at 5 [Jan. 28, 1998] [hereinafter Burns and Stevens Comments].

\footnote{\textsuperscript{21}} Burns and Stevens Comments, supra note 20, at 8. In expressing their disagreements with the FCC's implementation of Section 254, the Senators state, "Our greatest concern is that the Commission continues to apply concepts developed in an inflexible monopoly environment to the flexible, post-local-monopoly world that the Telecommunications Act was intended to create." Id.

\footnote{\textsuperscript{22}} Less than six weeks after the FCC released its Universal Service Order, SBC Communications, Inc. filed suit in the Eighth Circuit requesting that the court "hold unlawful, vacate, enjoin, and set aside" the Commission's Order, or at least stay those portions that provide federal support to schools and libraries for Internet access... and other non-telecommunications providers. See SBC Asks FCC to Stay Universal Service Order, Comm. Today, July 18, 1997, at 14. On March 9, 1998, America's Carriers Telecommunication Association (ACTA) asked a district court in the Fifth Circuit to hold the FCC's Universal Service Order unconstitutional in its entirety. ACTA contends that if Congress wants to raise funds for universal service purposes, it must do so by creating an explicit new tax, a power outside of the scope of the Commission's authority. See ACTA Challenges Constitutionality of Universal Service (visited Mar. 12, 1998) <http://www.prnewswire.com:80/cgi-bin/sto. .04&STORY=www/story/3-9-98/431149&EDATE>>.
\end{verbatim}
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 effects 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").
\(^{27}\) 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 service 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

\(^{29}\) See generally Universal Service Order, 12 FCC Rcd. at 8776.
\(^{30}\) This paper does not analyze whether subsidized Internet access for schools and libraries is sound policy. Rather, it distills the only two acceptable interpretations of Section 254, neither of which has been adopted by the Commission. However, for an illuminating discussion of this topic, see generally West, supra note 2. West contends that universal service subsidies are fundamentally incompatible in what is supposed to be a competitive deregulatory regime under the 1996 Act. Id.

\(^{33}\) During Vail's time many local exchange markets had several carriers that offered basic telephone service. See Milton L. Mueller, Jr., Universal Service: Competition, Interconnection, and Monopoly in the Making of the American Telephone System, 4-13 (1997). These carriers, however, could not interconnect with one another. See id. A subscriber to phone company A, could not pick up the phone and call a subscriber to phone company B. See id. Consequently, many businesses owned not just one, but several phones, and several phone company subscriptions. See id. Many, especially proponents of AT&T, argued that this
universal service lasted from 1907 to about 1965; a period some refer to as the "first generation" of universal service.3

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.5 From 1965-1996,6 during the second generation, the concept of universal service grew to mean telephone service in every home at reasonable charges, regardless of geographic location.7 Telephone service was considered an essential need, a utility, much like water or electric power service.8 Universal service thus became social policy, a state of affairs that thrived under the Bell monopoly, and which survives to this day.9

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.10 Providing telecommunications services to sparsely populated rural areas was simply not profitable.11 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.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.43 The newly competitive long-distance market also proved to be tremendously lucrative.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.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.46 As a result of the new universal service policy, long-distance and business users subj-
dized rural and residential users.\textsuperscript{47}

We are currently in the midst of the third generation of universal service policy.\textsuperscript{48} This era began with the passing of the 1996 Act.\textsuperscript{49} The basic tenants of the previous regime remain.\textsuperscript{50} Regulators and legislators are as concerned as ever with ensuring that all people have access to telecommunications service at reasonable rates.\textsuperscript{51} There are, however, a few twists. First, universal service is no longer an intangible overarching policy goal.\textsuperscript{52} Congress condoned the years of implicit subsidies by codifying universal service policy in its very own section within the 1996 Act.\textsuperscript{53} Second, the Act demands that universal service goals no longer be achieved via implicit cross-subsidies.\textsuperscript{54} Under the new regime, the Act requires that universal service be funded through explicit contributions that will go into a universal service fund.\textsuperscript{55} 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.\textsuperscript{56} Some would limit those beneficiaries to the providers of POTS as under the previous regime.\textsuperscript{57} Others would extend universal service support to providers of what the FCC calls enhanced services, such as ISPs.\textsuperscript{58} The final, and most striking characteristic of third generation universal service policy is its glaring incompatibility with the competitive precepts of the Telecommunications Act.\textsuperscript{59} The primary purpose of the Act was deregulation and the introduction of competition to local telephone markets.\textsuperscript{60} Meanwhile, the FCC is expected to keep the market in check through regulation to ensure affordable access to telecommunications for all Americans.\textsuperscript{61} This only serves to fuel the current controversy over third generation universal service policy.\textsuperscript{62}

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.\textsuperscript{63} 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.\textsuperscript{64} During...
this period, universal service funds supported only "basic services."65 Under the FCC’s interpretation, basic services constituted, “common carrier offering(s) of transmission capacity for the movement of information.”66 This primarily encompassed plain old telephone service or POTS.67

The FCC designated another class of services as “enhanced services.”68 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.”69 Internet transmissions can involve both computer processing and protocol conversion.70 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.71

B. The Telecommunications/Information Distinction

This second generation basic/enhanced distinction crept into third generation universal service policy.72 The Commission has substituted the terms “basic” and “enhanced” with “telecommunications” and “information,” respectively.73 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.74 An example of a telecommunications service under the FCC’s current scheme would be POTS.75 Accordingly, the provider of this service is classified as a “telecommunications carrier.”76 In contrast, an example of an information service under the third generation regime would be Internet access.77 The provider of Internet access, therefore, is an ISP.78 Whether the FCC’s decision to distinguish between Internet services and telecommunications services is appropriate will be addressed later.79 For now, it is important to recognize that the Commission distinguishes between the two.80

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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.


78 See In re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 11 FCC Rcd. 21354, 21364 para. 19 (1996) (stating: “we also discuss possible changes to our existing treatment of the use by interstate information service providers, such as Internet service providers”)(emphasis added).

79 The author contends that this distinction is an unfortunate policy choice based on out-dated regulatory terminology.

80 See Universal Service Order, 12 FCC Rcd. at 9178 para. 785, 9180 para. 789. The distinguishing factor between a telecommunications service and an information service is what is known as protocol conversion. Id. at para. 439. Protocol conversion is a functional capability of an information service that allows for communication to take place between disparate terminals or networks. See In re Petition for a Claratory Ruling That AT&T’s Frame Relay Service is a Basic Service, Memorandum Opinion and Order, 10 FCC Rcd. 13, 717 n.5 (1995).
IV. SECTION 254 AND THE COMMISSION’S UNIVERSAL SERVICE ORDER

A. Section 254

Section 254 is the embodiment of third generation universal service policy. It is also the battlefield for the current controversy over ISPs and the USF. 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. 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.” 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).” 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).”

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.” This, of course, would be all too easy. Instead, one finds subsections (h)(1)(B) and (h)(2)(A). 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.” 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.

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. Unfortunately, however, (h)(1)(B) makes no reference to Internet service providers, or providers of advanced services. It speaks only of telecommunications carriers. Again, according to the Commission’s interpretation, ISPs are considered to be enhanced service providers or information service providers, not telecommunications carriers. Thus, subsection (h)(1)(B)’s applicability to ISPs appears a bit tenuous under the Commission’s current classification of that term.

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

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

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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.
94 See In re Access Charge Reform, First Report and Order, 12 FCC Rcd. 15982, 16165 para. 430 (1997); see also The FCC, Internet Service Providers, and Access Charges (visited Feb. 19, 1998)
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.\textsuperscript{997} ISPs fit comfortably into the definition of information services because Internet access allows one to "generate, store, retrieve, and utilize information via telecommunications."\textsuperscript{998} 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.\textsuperscript{999} 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.\textsuperscript{100} 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.\textsuperscript{101}

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."\textsuperscript{102} 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?\textsuperscript{103}

B. The Universal Service Order

Congress left the onerous burden of implementing these provisions to a federal-state joint board and the FCC.\textsuperscript{104} 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.\textsuperscript{105} 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.\textsuperscript{106}

In its \textit{Universal Service Order}, the Commission established the $2.5 billion federal USF for the benefit of schools and libraries.\textsuperscript{107} It ordered all telecommunications carriers to make contributions to the fund based on their gross revenues.\textsuperscript{108} Only carriers whose contributions would be de minimis could be exempt from the contribution requirement.\textsuperscript{109} 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.\textsuperscript{110}
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. The Commission limited contributors, on the other hand, to providers of telecommunications services.

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. It has requested comments from interested parties regarding the overall universal service scheme set forth in the Universal Service Order. The comments demonstrate that two distinct factions exist, one for and the other against the Commission's treatment of ISPs in the Universal Service Order.

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

telecommunications services and internal connections provided by telecommunications carriers. See id.

111 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”).

112 See id. at 9179-81 para. 788-89.


115 The “AOL camp” includes: America Online, Inc., The Internet Service Provider Consortium (“ISP/C”), and The Education and Library Networks Coalition (“EDLINC”).

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 No. 96-45 (visited Mar. 16, 1998) <dhttp://www.fcc.gov/Bureaus/Common_Carrier/Comments/report2congress/rtccom.html>.

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. Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration, CC Dkt. No. 96-45, para. 255 (rel. Dec. 30, 1997).

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. 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).


120 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.

121 See Universal Service Order, 12 FCC Rcd., at 9008-09 para 436.

122 See id. at 9015 para. 449.
have their mandatory contribution to the fund, in the case of telecommunications/Internet providers, reduced accordingly. Because an ISP is not a telecommunications carrier, ISPs are exempt from USF contributions. 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.
128 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. H1115 (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.
(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.

Id.
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) as authorization to promulgate intrastate 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.134 They argue that the FCC’s new universal service scheme deviates substantially from what Section 254 allows.135 Understandably, providers of telecommunications services do not look forward to subsidizing discounts given by ISPs with their USF contributions.136

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,137 the statutory language cited by the opponents of subsidized Internet access for schools and libraries is quite clear.138

For instance, critics point out that Section 254(e) states unequivocally that “only an eligible telecommunications carrier” may receive universal service support.139 Considering that the FCC does not currently view ISPs as telecommunications carriers,140 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.141

Opponents also cite Sections 254(c)(1), (c)(3) and (h), all of which refer to “telecommunications services.”142 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.143 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].”144

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.145 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.”146 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.”147

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

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134 See SBC Comments, supra note 8, at 1 (arguing that Congress did not intend for ISPs to receive federal universal service support); see also AT&T Reply Comments, supra note 7, at 9 (contending that ISPs should have to contribute to the USF based on annual revenues); see also GTE Reply Comments, supra note 8, at 19 (asserting that the FCC should devise a system in which all telecommunications service providers are treated consistently).

135 See GTE Reply Comments, supra note 8, at 19.

136 See SBC Comments, supra note 8, at 1. These discounts also apply to inside wire services or internal connections. See Universal Service Order, 12 FCC Rcd. at 9002 para. 425.

137 See EDLINC Comments, supra note 18, at 2; see also Chevron v. Natural Resources Defense Council, 476 U.S. 857 (1984) (holding that a government agency can apply a reasonable interpretation to an ambiguous statute).

138 See SBC Comments, supra note 8, at 4 (citing Section 254(e) which limits universal service support to eligible telecommunications carriers).


140 See Universal Service Order, 12 FCC Rcd at 9180 para. 789; see also Burns and Stevens Comments, supra note 20, at 8 (stating that, “The Commission in the Universal Service Order concludes that Internet access services are information services and not telecommunications services”). Id.; but see In re Federal-State Joint Board on Universal Service, Report to Congress, CC Dkt. No. 96-45, FCC-98-67, at 4 (April 10, 1998). In its report to Congress, the Commission came very close to labeling one new Internet service as a telecommunications service, namely, IP (Internet Protocol) telephony. See id. The Commission, however, chose quite diplomatically to forego a definitive pronouncement on the issue until a more complete record is made. See id.

141 See Universal Service Order, 12 FCC Rcd. 9002 para. 425.

142 See SBC Comments, supra note 8, at 3-4.

143 See id. This would also exclude other non-telecommunications services that the FCC designated for support such as internal connections. See id.

144 See AT&T Reply Comments, supra note 7, at 10.

145 See GTE Comments, supra note 8, at 21.

146 Burns and Stevens Comments, supra note 20, at 9.

147 See Burns and Stevens Comments, supra note 20, at 14. In speaking of the Commission’s generic authority, the Senators are referring to section 4(i). "The Commission may perform any and all such 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." 47 U.S.C. § 154(i) (Supp. 1997).
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.148 They find support in Section 254(d) entitled, "Telecommunications Carrier Contribution."149 AOL aptly points out that the 1996 Act only appears to require universal service contributions from telecommunications carriers.150 They reason, "[B]ecause Internet access services are not from telecommunications lines, ISPs make an implicit, indirect contribution to the USF. They do actually contribute to the USF through their purchases of necessary telecommunication services, such as busines lines, ISPs make an implicit, indirect contribution to the USF.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.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

148 See AOL Comments, supra note 14, at 21 (claiming that the 1996 Act only requires telecommunications carriers to contribute to the USF).
151 See Reply Comments of America Online, Inc., In re Federal-State Joint Board on Universal Service (Report to Congress), CC Dkt. No. 96-45, at 6 (Feb. 6, 1998) [hereinafter AOL Reply Comments].
152 See id.
154 See id.
155 See AT&T Reply Comments, supra note 7, at 11.
156 See id. at 12. AT&T vehemently contends that an ISP's purchase of interstate telecommunications services does not constitute a contribution to the USF. Id. An ISP's 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.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.157 The result is telecommunications carriers will pay more into the USF than they would have to if ISPs contributed on the same basis.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.159 The language of Section 254(d) is quite clear.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.161 E-mail and Internet telephony are clear examples of such competition.102 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 Universal Service Order is supposedly based.165

In sum, the AOL camp's interpretation of Section 254 applauds the FCC's Universal Service Or-
They vigorously argue that Section 254 permits a scheme in which ISPs benefit from the USF while not having to contribute to the USF.\footnote{See AOL Comments, supra note 14, at 18 (supporting the FCC's universal service scheme as consistent with the 1996 Act).}

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.\footnote{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").}

As set forth below, both interpretations are wrong and adopts a much broader definition of the term "telecommunications service."\footnote{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.}

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.\footnote{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).}

The result of option 2 is more in tune with Congress' intent when it enacted Section 254.\footnote{See id. at (h)(2)(A).}

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.\footnote{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").}

Option 1 produces a lukewarm result that does little to further Congress' goal of bringing advanced services to schools and libraries.\footnote{See id. See Burns and Stevens Comments, supra note 20, at 5.}

Under option 2, the current distinction between telecommunications carriers and ISPs is dropped.\footnote{See Burns and Stevens Comments, supra note 20, at 14. See Universal Service Order, 12 FCC Rcd., at 9180 at para. 179. 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. 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").}

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."\footnote{See id. See Burns and Stevens Comments, supra note 20, at 5.}

The result of option 2 is more in tune with Congress' intent when it enacted Section 254.\footnote{See Burns and Stevens Comments, supra note 20, at 14.}
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 outmode 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-Telcommunications 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-

170 See id. at (e).
179 See generally Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that courts review an agency's construction of a statute with two questions in mind: first, the court must ask whether Congress has spoken directly to the precise question at issue; second, if the statute is silent or ambiguous with respect to the issue at hand, the court must determine whether the agency's interpretation is based on a permissible construction of the statute).
180 See AOL Comments, supra note 14, at 21; see also Universal Service Order, 12 FCC Rcd., at 9180 para. 789.
182 See generally Burns and Stevens Comments, supra note 20.
183 See id. at 12.
184 Denoting ISPs as telecommunications carriers may increase the class broader than the pre-Telecommunications Act "common carrier" regime. That intent is evident from the definition of a "telecommunications carrier" added by the Telecommunications Act.
185 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.\(^{197}\)

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.\(^{198}\) The FCC would no longer have to side step the language of 254(e) which limits the beneficiaries of universal service to telecommunications carriers.\(^{199}\) However, under 254(d), ISPs would also have to contribute to the fund as regular telecommunications carriers.\(^{200}\) 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.\(^{201}\)

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 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.

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\(^{197}\) See id. at 12.

\(^{198}\) See Burns and Stevens Comments, supra note 20, at 6.


\(^{200}\) The subsection specifically states, "all telecommunications carriers." Id. § 254(e).

\(^{201}\) It should be noted, however, that reclassifying ISPs as telecommunications carriers will only satisfy the dual goals of competitive neutrality and subsidized Internet access within the Commission's overall universal service plan. Whether universal service itself is compatible with competitive neutrality and a deregulatory environment has yet to be demonstrated. See, e.g., West, supra note 2.