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Federal Communications Law Journal

Volume 50 | Issue 1 Article 9

12-1997

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Universal Service, Section 254 of the Telecommunications Act of 1996: A Hidden Tax?

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I. INTRODUCTION

Article I of the United States Constitution expressly gives Congress the exclusive power to levy and collect taxes.[1] However, on February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 (Act or 1996 Act), of which section 254 delegates this authority to the Federal Communications Commission (FCC or Commission) and state regulators with respect to universal service.[2]

Universal service, the subject of section 254, is one of the foremost goals of the 1996 Act. Through this section, Congress has given the FCC and state regulators the discretion to define the basic telecommunications services necessary to consumers, thus determining the boundaries of universal service.[3] Congress has placed a high priority on ensuring that everyone in the nation has "quality services . . . at just, reasonable, and affordable rates."[4] The implications of this charge are that consumers in rural and high cost areas should receive the same services at the same rates as urban consumers, and that low-income consumers should receive discounted rates so that they can afford telecommunications services. Moreover, for the first time in the history of universal service, Congress has decided that another goal of universal service is ensuring that our nation's future is not plagued with "technology haves and have-nots."[5] Therefore, section 254 mandates that schools, libraries, and health care providers be afforded advanced telecommunications services at discounted rates.[6]

While these goals are well-meaning, and if given life will greatly improve access to quality services for many who were previously cost-prohibited from such services, they come at the expense to the majority of consumers. The 1996 Act states that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."[7] In practice, this means that all such providers must contribute to a fund, the universal service fund, based on their revenues from telecommunications services. It also means that these expenses will be passed on to consumers,

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1. U.S. CONST. art. I, § 8, cl. 1.

2. Telecommunications Act of 1996, sec. 101(a) § 254, 47 U.S.C.A. § 254 (West Supp. 1997).

3. 47 U.S.C.A. § 254(a)(2).

4. *Id.* § 254(b)(1).

5. Federal-State Joint Board on Universal Serv., *Recommended Decision*, 12 FCC Rcd. 87, 542, 5 Comm. Reg. (P & F) 1, 217 (1996) [hereinafter *Universal Serv. Recommended Decision*] (statement of FCC Chairman Reed Hundt), *amended and adopted by Report and Order*, 7 Comm. Reg. (P & F) 109 (1997).

6. 47 U.S.C.A. § 254(b)(6), (h)(1)(B).

7. *Id.* § 254(b)(4).

either in the form of higher long-distance rates or a flat service charge in order to recoup the providers' costs of contributing to the universal service fund.

In sum, Congress has given the FCC and state regulators the power to decide the boundaries of universal service and the authority to require the majority of telecommunications consumers to foot the bill for these services on behalf of others who, because of geographic confines would be charged higher rates, or because of poverty could not afford these services. This power, delegated by Congress to federal and state regulators, is the power to tax because it entails determining what is best for the general welfare of the United States and then spreading the costs among its citizens. The power to tax, however, is a nondelegable duty reserved exclusively for Congress.[8] The framers of the U.S. Constitution felt strongly that government decisions regarding how much money should be taken from the pockets of its citizens and how to spend that money should be entrusted only to elected representatives. Therefore, it is unconstitutional for the FCC to mandate consumer support of the commissioners' grand plans for universal service.

Part II of this Note discusses the origin of the FCC's power to regulate the telecommunications industry and examines the evolution of universal service from a national policy to the federal law. Part III outlines the major provisions of section 254 of the 1996 Act, as well as the Federal-State Joint Board's recommendations and the FCC's *Report and Order* for the implementation of universal service. Finally, Part IV argues two points: First, that universal service is a tax because it is a contribution forced upon consumers of telecommunications services in order to subsidize these services for the public. Second, section 254 is an unconstitutional delegation of the legislative authority to tax because the section fails to provide the FCC with any guidelines for administering universal service.

II. THE COMMUNICATIONS ACT OF 1934

A. *The FCC's Power To Regulate*

In 1877, at the inception of commercial telephone service, the Bell Company (incorporated as AT&T in 1900) monopolized the industry because it owned all of the necessary patents.[9] Eventually, these patents expired and by 1907 AT&T was forced to compete with thousands of inde-

8. National Cable TV Ass'n, Inc. v. United States, 415 U.S. 336, 340-41 (1974).

9. Livia Solange West, *Deregulating Telecommunications: The Conflict Between Competition and Universal Service*, 9 DEPAUL BUS. L.J. 159, 162-63 (1996).

pendent telephone companies that had since flooded the market.[10] Competition increased the fixed costs for a single telephone wire network as well as the installation costs in sparsely populated regions which resulted in low returns on investment. No profit, in turn, led to no service for such areas.[11]

Congress responded to this competition by granting AT&T a legal monopoly through the Communications Act of 1934 (1934 Act).[12] In exchange, Congress intended for AT&T to serve *all* customers at reasonable rates, regardless of the cost of serving consumers in different regions.[13] Additionally, with this piece of legislation, Congress created the Commission and charged it with regulating the telecommunications industry.[14] In particular, Congress was concerned with competitive interstate and international telecommunications development and the universal provision of basic telecommunications services.[15] While Congress granted the FCC broad regulatory authority so that it could be a self-sufficient, expert agency, the FCC's jurisdiction was not meant to be unlimited.[16]

B. *Universal Service*

While the 1934 Act espoused the hope for a future where communication services would link the nation, it did not recognize any explicit universal service goal.[17] At that time, telecommunications services were rudimentary and geographically confined to well-populated areas. In fact, the basic service that the 1934 Act supported became known as "plain old telephone service" (POTS). Furthermore, while it was not unthinkable that some day every home and business would have a telephone, the degree of dependence that consumers of telecommunications services have since cultivated *was* beyond the imagination. Most importantly, however, the concept of public support for telecommunications services did not exist. Since the 1960s, however, publicly supported universal service has been a focus of telecommunications regulation.[18]

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10. *Id.* at 163.

11. *Id.* at 163-64.

12. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. (1994)).

13. West, *supra* note 9, at 166.

14. 47 U.S.C. § 151 (1994).

15. Miles W. Hughes, *Telecommunications Reform and the Death of the Local Exchange Monopoly*, 24 FLA. ST. U. L. REV. 179, 181 (1996).

16. *Id.*

17. Communications Act.

18. Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L. J. 1, 21 (1996) (citing Milton Mueller, *Universal Service in Telephone History*, TELECOMM. POL'Y, July 1993, at 355).

The conceptual definition of universal service is somewhat nebulous and had defied codification until the passage of the 1996 Act.[19] Primarily, the concept of universal service has typically focused on the goal of providing a telephone line to all U.S. residents at a uniform price, maintaining affordable costs for basic dial tone service to all residents, and discounting services for consumers with low incomes.[20] In order to pay for this service, the FCC designed a complex scheme of subsidization whereby long-distance rates subsidized local rates; business rates subsidized residential rates; and urban rates subsidized rural rates.[21]

III. THE TELECOMMUNICATIONS ACT OF 1996

Over sixty years after creating a regulatory body to oversee the telecommunications industry, the federal government had to face the challenge of redesigning the FCC's mandate in an era of deregulation while remaining mindful of the ever-present goal of promoting competition. The solution was the Telecommunications Act of 1996.[22] The 1996 Act claims to be "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[23]

A. *Section 254*

As mentioned above, the principle of universal service had never been statutorily codified until the passage of the 1996 Act. Section 254 requires the FCC to compose a Federal-State Joint Board (Joint Board) to recommend changes to the legislation, define the telecommunications services to be supported by federal universal service support mechanisms, and create a timetable for the implementation of its recommendations.[24] Furthermore, section 254 dictates that the FCC and the Joint Board base their decisions concerning universal service on the following principles: (1) Quality services should be available at just, reasonable, and affordable rates; (2) Access to advanced telecommunications and information services should be provided in all regions of the Nation; (3) Consumers in all regions of the Nation, including low-income consumers and those in rural,

19. *Id.*

20. *Id.*

21. West, *supra* note 9, at 167.

22. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

23. *Id.* 110 Stat. at 56.

24. 47 U.S.C.A. § 254(a)(1) (West Supp. 1997).

insular, and high cost areas, should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; (4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service; (5) There should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service; and (6) Elementary and secondary schools and classrooms, healthcare providers, and libraries should have access to advanced telecommunications services.[25]

Section 254(c)(1) begins: "Universal service is an evolving level of telecommunications services . . . ."[26] The section attempts to define the never-before expressly limited concept of universal service. It charges the FCC with periodically reviewing the definition, giving credence to the current state of technology.[27] Additionally, the definition sets forth considerations for the Joint Board in determining which services should receive support.[28]

B. The Joint Board's Recommendations and the FCC's Report and Order

On November 7, 1996, the Federal-State Joint Board issued its recommendations to the FCC.[29] In addition to the principles enumerated in the 1996 Act, the Joint Board recommended basing the policies by which universal service should operate on the principle of competitive neutrality.[30] The essence of this principle, envisioned by the Joint Board, is that universal service support should not be biased toward any "recipient and contributor to the universal service support mechanisms," nor "toward any particular technologies."[31] Additionally, the Joint Board highlighted the fact that no one principle should outweigh the primary goal of providing all U.S. residents with quality telecommunications services at reasonable rates.[32]

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25. *Id.* § 254(b)(1)-(7).

26. *Id.* § 254(c)(1).

27. *Id.*

28. For a discussion of the four factors to be considered by the Joint Board, see infra text accompanying note 35.

29. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, 5 Comm. Reg. (P & F) 1 (1996), *amended and adopted by Report and Order*, 7 Comm. Reg. (P & F) 109 (1997).

30. *Id.* para. 23.

31. *Id.*

32. *Id.* para. 22.

On May 8, 1997, the FCC released a *Report and Order* regarding the Joint Board's recommendations on universal service.[33] In the *Report and Order*, the FCC concurred with the Joint Board's adoption of the principles for universal service that Congress set forth in the 1996 Act, as well as the additional principle of competitive neutrality.[34]

1. Definition of Universal Service

The 1996 Act identified the following four factors for the Joint Board to consider in deciding what services should be funded by universal service support mechanisms: (1) the necessity of services to "education, public health, or public safety;" (2) the popularity of services among residential consumers; (3) the availability of services provided by telecommunications carriers in public telecommunications networks; and (4) services which "are consistent with the public interest, convenience and necessity."[35]

The FCC interpreted this language broadly, enabling the Joint Board to include services that did not meet all four criteria.[36] The FCC based this interpretation on the word "consider," which is used both in section 254 of the 1996 Act and in the legislative history regarding the definition of universal service.[37] The Joint Board affirmed that while they were obligated to consider all four criteria before choosing a service for inclusion, that service need not meet all four criteria.[38]

Ultimately, the Joint Board recommended, and the FCC agreed in its *Report and Order*, that the following services be designated for universal service support: single-party service, voice grade access to the public switched telephone network (PSTN), Dual Tone Multifrequency (DTMF) or its functional digital equivalent, access to emergency services, access to operator services, access to interexchange services, access to directory assistance, and toll blocking for low-income consumers.[39]

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33. Federal-State Joint Bd. on Universal Serv., *Report and Order*, 7 Comm. Reg. (P & F) 109 (1997) [hereinafter *Universal Serv. Report and Order*].

34. *Id.* para. 43.

35. Telecommunications Act of 1996, sec. 101(a), § 254(c)(1)(A)-(D), 47 U.S.C.A. § 254(c)(1)(A)-(D) (West Supp. 1997).

36. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 46, 5 Comm. Reg. (P & F) 1.

37. *Id.*

38. *Id.*

39. *Id.* paras. 65, 67; *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 56.

2. Affordability

One of the most significant charges of the 1996 Act, and a new concept with respect to universal service, is that telecommunications services should be affordable. The Joint Board recommended that an evaluation of affordability include factors "such as local calling area size, income levels, cost of living, population density," and subscribership levels in addition to rates.[40] As a result of the need to examine socioeconomic factors in narrow geographic locales, the Joint Board concluded that the states should monitor rates to ensure affordability. Nonetheless, the 1996 Act requires that the FCC retain some control over ensuring affordable rates. Thus, the Joint Board recommended that in areas of decreased subscribership, the FCC work with the state to resolve the problem.[41] The Commission agreed with the Joint Board recommendations and ordered that states "by virtue of their local ratemaking authority, should exercise primary responsibility for determining the affordability of rates."[42] Furthermore, the Commission concurred with the Joint Board's recommended partnership between the FCC and states with respect to areas where subscribership levels are particularly low.[43]

3. Eligible Carriers

The 1996 Act articulates criteria which a telecommunications carrier must meet in order to receive universal service support. The Joint Board recommended that the statutory criteria of section 214(e)(1)[44] be used to determine eligible carriers.[45] Generally, universal service support will be available for any common carrier who: (1) offers and advertises the services (recommended for universal service support) and its rates; (2) in the general media throughout its service area; (3) through the use of "its own facilities or a combination of its own facilities and resale of another carrier's services."[46] Consequently, the FCC adopted "without expansion the statutory criteria set out in section 214(e) as the rules governing eligibil-

40. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 126, 5 Comm. Reg. (P & F) 1.

41. *Id.* para. 132.

42. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 108.

43. *Id.*

44. Telecommunications Act of 1996, sec. 101(a), § 214(e)(1), 47 U.S.C.A. § 214(e)(1) (West Supp. 1997).

45. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 134, 5 Comm. Reg. (P & F) 1.

46. *Id.* para. 155.

ity."[47]

Furthermore, the Joint Board recommended that the technology used by a carrier not be a criterion for receiving universal service support.[48] The FCC concurred with this recommendation.[49] Finally, the Joint Board recommended that the states exercise control regarding advertising. Specifically, the FCC should not promulgate any federal guidelines; it should be the individual state's prerogative to determine whether rules are needed to govern the advertising of services recommended for universal service support.[50] Again, the Commission agreed with the Joint Board's analysis and adopted this recommendation.[51]

4. High-Cost Support

One of the most fundamental and traditional goals of universal service has been the subsidization of services for consumers whose rates are higher because of where they live, namely rural, insular, and high-cost areas. The Joint Board recognized that calculation of the amount of support provided to telecommunications carriers who serve these consumers is based on the number of consumers supported in a given high-cost area, the cost of providing services to those consumers, and the portion of those costs that the carrier must recoup from sources other than federal support mechanisms.[52] In consideration of these factors, the Joint Board recommended that the FCC work with state commissions to develop a proxy cost model for calculating the future costs of serving a particular geographic area.[53] Based upon such a model, a benchmark amount of support which must be recovered from other sources can be subtracted to determine the amount of support a carrier would receive from universal support mechanisms.[54] A carrier would be eligible for such support only when the costs of providing the supported services, as measured by a proxy model, exceeded the benchmark.[55] The Joint Board declined to recommend any of the proxy models submitted for their consideration,[56] but recommended that such a

47. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 127.

48. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 155, 5 Comm. Reg. (P & F) 1.

49. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 145.

50. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 156, 5 Comm. Reg. (P & F) 1.

51. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 148.

52. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 183, 5 Comm. Reg. (P & F) 1.

53. *Id.* para. 184.

54. *Id.* para. 185.

55. *Id.* para. 309.

56. *Id.* para. 268.

model be developed by May 8, 1997 (the statutory deadline for implementation of the Joint Board's recommendations).[57]

The FCC agreed with the Joint Board that a cost methodology, based on forward-looking economic cost, should be used to calculate the cost of providing universal service for high cost areas.[58] The Commission further concluded that the models developed at that point were not sufficiently reliable to be used to determine universal service support. Therefore, the FCC will issue a *Further Notice of Proposed Rule Making* (*FNPRM*) to establish a forward-looking cost methodology to be used in determining universal service support.[59] The FCC anticipates that such a model will take effect for nonrural carriers on January 1, 1999.[60]

5. Low-Income Consumers

The provision of telecommunications services for low-income consumers is not a new goal of universal service. Titles I and II of the 1934 Act provided the authority for the FCC to initiate the Lifeline Assistance program (Lifeline) and the Lifeline Connection Assistance program (Link-Up).[61] These programs were designed to facilitate subscribership among low-income consumers.[62] Lifeline operates by waiving all or part of the federal subscriber line charge and requiring the state to match this discount, reducing qualifying consumers' telephone bills.[63] Through federal support, Link-Up cuts as much as one-half off of the initial connection charge for qualifying consumers.[64] The Joint Board recommended the continuation of the Lifeline and Link-Up programs, with modifications, to ensure availability to all low-income consumers, competitive neutrality, and guaranteed access to certain services and policies.[65]

The FCC adopted the Joint Board's recommendations for low-income consumers.[66] First, due to the fact that prior to the 1996 Act only forty-one states, the District of Columbia, and the U.S. Virgin Islands participated in

57. *Id.* para. 269.

58. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 199 (1997).

59. *Id.* para. 206.

60. *Id.* para. 203.

61. Communications Act of 1934, ch. 652, § 151, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (1994)).

62. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 357, 5 Comm. Reg. (P & F) 1.

63. *Id.*

64. *Id.*

65. *Id.* para. 358.

66. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 326 (1997).

Lifeline,[67] the Commission agreed with the Joint Board's recommendation to expand Lifeline assistance to all states.[68]

Second, the FCC adopted the Joint Board's recommendation "to make the collection and distribution of support for Lifeline and Link-Up competitively neutral."[69] Currently, these programs are funded exclusively by interexchange carriers and are not available to low-income consumers in areas where the state regulatory authority or local exchange carrier has chosen not to participate.[70] This recommendation requires equitable and nondiscriminatory contributions from all providers of interstate telecommunications services, consistent with the principle espoused in section 254(d) of the 1996 Act.[71]

Finally, the FCC agreed with the Joint Board that Lifeline consumers should have access to the same services as those supported in rural, insular, and high-cost areas, in addition to access to voluntary toll blocking.[72] Voluntary toll blocking allows consumers to budget for a limited amount of toll services per billing cycle as an aid in managing limited finances and to avoid service termination for bill nonpayment.[73] Likewise, the FCC concurred with the Joint Board's recommendations to prohibit carriers from disconnecting local service for failure to pay toll charges and to require service deposits from Lifeline consumers who elect toll blocking.[74]

6. Schools and Libraries

For the first time in the history of universal service, elementary and secondary schools and libraries are beneficiaries of the universal service support mechanisms. Not only does section 254 deem certain schools and libraries eligible for those telecommunications services included in the aforementioned definition of universal service, but the statutory language indicates that "additional services," as defined by the FCC, may also be included as supportable services.[75]

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67. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 417, 5 Comm. Reg. (P & F) 1.

68. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 326.

69. *Id.* para. 327.

70. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 381, 5 Comm. Reg. (P & F) 1.

71. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 327.

72. *Id.* para. 328.

73. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 384, 5 Comm. Reg. (P & F) 1.

74. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 328.

75. Telecommunications Act of 1996, sec. 101(a), § 254, 47 U.S.C.A. § 254(c)(3) (West Supp. 1997).

The 1996 Act further states that such services shall be provided at a discount.[76] The guiding principle behind this new policy is to ensure that all children have access to the same information. Congress holds that equal access to information available through the technology offered by the telecommunications industry is fundamental to the intellectual growth of today's youth.[77] By mentioning "classrooms" in addition to the more general term "schools," the 1996 Act evidences the intention that each student experience the Information Age.[78]

The Joint Board recommended that all eligible schools and libraries "receive discounts of between twenty and ninety percent on all telecommunications services, Internet access, and internal connection, subject to a 2.25 billion dollar annual cap."[79] Furthermore, the Joint Board recommended that the most economically disadvantaged schools and libraries, and those in high-cost areas, should receive greater discounts.[80] The Commission adopted these recommendations without exception.[81]

7. Health Care Providers

As with schools and libraries, universal service support never extended to health care providers until the 1996 Act. Section 254 provides that public and nonprofit health care providers that serve persons residing in rural areas within a state may receive telecommunications services necessary for the provision of health care services at rates that are reasonably comparable to urban rates for similar services.[82] Again, like the provision for schools and libraries, eligible health care providers may receive services in addition to the core services defined as supportable by universal service support mechanisms.[83] The FCC established a 400 million dollar annual cap to support all rural public and nonprofit health care providers that meet the statutory definition in section 254(h)(5)(B).[84] Furthermore, the Commission requires:

> [t]elecommunications carriers to charge rural health care providers a rate for a supported service that is no higher than the highest tariffed or

76. 47 U.S.C.A. § 254(h)(1)(B).

77. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 442, 5 Comm. Reg. (P & F) 1.

78. 47 U.S.C.A. § 254(b)(6).

79. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 440, 5 Comm. Reg. (P & F) 1.

80. *Id.*

81. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 425 (1997).

82. 47 U.S.C.A. § 254(b)(1)(A).

83. 47 U.S.C.A. § 254(c)(3).

84. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 608.

publicly available rate charged by a carrier to a commercial customer for a similar service in the state's closest city with a population of at least 50,000, taking distance charges into account.[85]

8. Administration

Pursuant to the universal service principle requiring that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service,"[86] the Joint Board recommended that all interstate telecommunications carriers make contributions to the universal service fund "based on their gross telecommunications revenues net of payments to other telecommunications carriers."[87] The FCC revised the Joint Board's recommendations by ordering that contributions be determined on the basis of end-user telecommunications revenues.[88]

The Commission pointed out that the Joint Board failed to recommend how carriers may recover universal service contributions. The FCC, therefore, decided to allow recovery through the contributing carriers' interstate rates.[89]

Finally, the Joint Board recommended exempting from contribution and reporting requirements those carriers whose contributions would be less than the cost of collection.[90] Additionally, the Joint Board recommended that the FCC "appoint a universal service advisory board to appoint . . . a neutral, third-party administrator" to monitor the universal support mechanisms.[91] The FCC adopted these recommendations.[92]

IV. THE FUNDING FOR UNIVERSAL SERVICE

A. Consumers Pay the Bill

Clearly, through section 254 of the 1996 Act, the Joint Board and the FCC have advanced the cause of universal service beyond many people's wildest dreams. Certainly, residents in rural or insular areas, as well as

85. *Id.*

86. 47 U.S.C.A. § 254(b)(4).

87. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 778, 5 Comm. Reg. (P & F) 1 (1996), *amended and adopted by Report and Order*, 7 Comm. Reg. (P & F) 109 (1997).

88. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 772.

89. *Id.* para. 773.

90. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 778, 5 Comm. Reg. (P & F) 1.

91. *Id.*

92. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 774.

low-income residents, should be pleased with the Commission's *Report and Order*. Likewise, schools, libraries, and rural health care providers, faced with the opportunity to receive advanced telecommunications services at enormous discounts, must be ecstatic. Yet, one must ask if the consumers receiving these basic and technologically advanced services are not paying the entire bill, who is funding universal service?

Reading the 1996 Act, the Joint Board recommendations, or the Commission's *Report and Order* would lead one to believe that the telecommunications carriers are supporting the entire program. The pages are replete with references to the "universal service support mechanisms,"[93] the telecommunications carriers' "universal service contribution obligations,"[94] and their duty to make "equitable and nondiscriminatory contributions"[95] to the universal service fund. However, these telecommunications carriers are not nonprofit organizations. They are competitive, for-profit businesses that are unlikely to discount consumers' bills for the sake of philanthropy.

The true funding for the grand plans that Congress and the FCC have for universal service will come from the consumers, many of whom will not reap the benefits conferred by this legislation because they live in urban or moderate- to low-cost regions of the nation and do not meet the statutory definition of "low-income" consumer. As confirmation of such, FCC Commissioner Chong said, "*[l]et us make no mistake about who will foot the bill for this universal service program. It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace.*"[96]

B. Is This a Tax?

Typically when the government compels individuals to pay for services that will be provided to the public at large, it is considered a tax. Black's Law Dictionary states that the "[e]ssential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution."[97] Furthermore, the objective of a tax assessment is defined as an

93. Telecommunications Act of 1996, sec. 101(a), § 254, 47 U.S.C.A. § 254(a)(2) (West Supp. 1997).

94. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 613, 5 Comm. Reg. (P & F) 1.

95. 47 U.S.C.A. § 254(b)(4).

96. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, 560, 5 Comm. Reg. (P & F) 1, 225 (separate statement of FCC Commissioner Rachelle B. Chong, concurring in part and dissenting in part).

97. BLACK'S LAW DICTIONARY 1457 (6th ed. 1990) (citing Michigan Employment Sec. Comm'n v. Patt, 144 N.W.2d 663, 665 (1966)).

effort to "generate revenue to be used for the needs of the public."[98] While section 254 does not expressly identify the subsidization of the universal service program as a tax, the goals of universal service are "to be achieved by levying a proportionate tax on all telecommunications service providers, which should make more visible both the nature and amounts of the cross-subsidies encompassed within the universal service program."[99] Section 254 gives the FCC and state commissions the power to develop a general welfare program for the country and, in requiring the telecommunications carriers to provide services at tremendous discounts to some, allows carriers to recoup their costs through charges passed on to the consumers of telecommunications services.

Even members of the Joint Board recognize that the universal service program will operate as a tax. Laska Schoenfelder, of the South Dakota Public Utilities Commission, expressed some reservations about the potentially onerous size of the program when she stated:

> I believe that a federal universal service fund that *taxes* consumers billions of dollars a year is not only inconsistent with Congressional intent, but could be extremely harmful nationwide to consumers. By supporting services at this level, average rates for all consumers may increase and it may harm competition which is the principal objective of the law.[100]

The Supreme Court has considered the issue of congressional delegation of its taxing authority in other legislation. In such circumstances, the Court has confronted the problem by distinguishing a "tax" from a "fee."[101] A tax, the Court illustrated, can be levied arbitrarily and in disregard of the benefits it bestows on the taxpayers.[102] A fee, however, is assessed in response to a voluntary request and is "a grant which . . . bestows a benefit on the applicant, not shared by other members of society."[103]

Like a tax, section 254 of the 1996 Act mandates that consumers of telecommunications services pay for benefits that may or may not go to them. Such expenses cannot be considered fees. It seems obvious that no telecommunications consumers are going to call their carriers and ask that they be charged for other consumers' services. Furthermore, the vast majority of universal service benefits will be bestowed upon individuals and

98. *Id.*

99. Krattenmaker, *supra* note 18, at 22-23.

100. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, 577-78, 5 Comm. Reg. (P & F) 1, 229 (emphasis added) (separate statement of Laska Schoenfelder, Commissioner, South Dakota Public Utilities Commission, dissenting in part).

101. National Cable TV Ass'n v. United States, 415 U.S. 336, 340-41 (1974).

102. *Id.* at 340.

103. *Id.* at 340-41.

organizations whose basic services are already severely discounted. The benefits will also result in additional services allotted to schools, libraries, and health care providers. Thus, universal service charges are directly contrary to the fees that one would pay in exchange for an exclusive benefit.

C. *Congress Has the Exclusive Power To Tax*

Whence comes the power to compel some to pay for that which benefits others? Certainly Article I of the United States Constitution gives this power—the power to tax—to Congress.[104] However, Congress does not in turn have the power to delegate this enormous responsibility to regulatory agencies. The Supreme Court has held that "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes."[105]

Taxes are exacted by legislative authority.[106] Clearly, the 1996 Act is legislation. However, while federal agencies such as the FCC have the power, and in fact the mandate, to carry out the laws enacted by Congress and to oversee the conduct of the industries which the agencies were created to regulate, these powers are distinguishable from legislative authority.[107] Regulations are not legislation and "do not have the effect of the law in theory."[108] Furthermore, Congress cannot, by its legislative authority, delegate its sovereign duties, such as the power to make laws and levy taxes, to regulatory agencies. The Supreme Court, in addressing this issue, held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[109]

The framers of the Constitution took the idea of taxing seriously and, therefore, recognized that this awesome power should be entrusted only to elected representatives. Even Joint Board members Julia Johnson, of Florida, and Sharon L. Nelson, from the state of Washington, conceded this point in their separate statement regarding the recommendations: "As we all know, ratepayers are the ultimate supporters of any program, thus their respective representatives must be integrally involved in determinations that will affect them."[110]

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104. U.S. CONST. art. I, § 8, cl. 1.

105. *National Cable TV*, 415 U.S. at 340.

106. BLACK'S LAW DICTIONARY 1457 (6th ed. 1990) (citing *In re* Mytinger, 31 F. Supp. 977, 978-79 (1940)).

107. *Id.* at 45.

108. *Id.* at 1286.

109. *National Cable TV*, 415 U.S. at 342.

110. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, 568, 5 Comm. Reg. (P & F) 1, 225 (1996) (separate statement of Julia Johnson, Commissioner, Florida Public Service Commission, and Sharon L. Nelson, Chairman, Washington Utilities and Transportation

In response to the many challenges to Congress's delegation of constitutional duties, early in the twentieth century the Supreme Court set forth the following directive:

> Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.[111]

The Court will find that this nondelegation doctrine has been breached only if Congress has failed to provide an administrative agency with guidelines by which a court could "ascertain whether the will of Congress has been obeyed."[112]

The universal service provisions of the 1996 Act do not provide the FCC with a clear roadmap. Rather, Congress has completely handed over the reins and is letting the FCC steer the telecommunications industry. The Commission itself noted that "Congress imposed no limits whatsoever on the telecommunications services for which eligible schools and libraries could arrange to receive discounts."[113] The Joint Board, in recognizing this lack of directive and golden opportunity to exercise their charitable powers, recommended that schools and libraries be provided "the maximum flexibility to purchase whatever package of telecommunications services they believe will meet their telecommunications needs most effectively and efficiently."[114] This "maximum flexibility" was likewise suggested for health care providers in choosing the services they feel are necessary.[115] Moreover, the Joint Board and the FCC have ignored the Supreme Court's decision that such broad delegations be read "narrowly to avoid constitutional problems."[116] In light of the virtual free-for-all mentality of the Joint Board and Commission, it is clear why such unguided delegations are unconstitutional.

Furthermore, the 1996 Act is replete with references to rates that are "just, reasonable, and affordable"[117] and discounts that are "appropriate and

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Commission), *amended and adopted by Report and Order*, 7 Comm. Reg. (P & F) 109 (1997).

111. Interstate Commerce Comm'n v. Goodrich Transit Co., 224 U.S. 194, 214 (1912).

112. Yakus v. United States, 321 U.S. 414, 425 (1944).

113. *Universal Serv. Report and Order*, 7 Comm. Reg. (P & F) 109, para. 432 n.1117 (1997).

114. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, para. 458, 5 Comm. Reg. (P & F) 1.

115. *Id.* para. 631.

116. National Cable TV Ass'n v. United States, 415 U.S. 336, 342 (1974).

117. Telecommunications Act of 1996, sec. 101(a), § 254, 47 U.S.C.A. § 254(b)(1)

necessary,"[118] and yet Congress has provided no standards to guide the FCC, or a court, in determining "the will of Congress."[119] There is absolutely no indication in the 1996 Act of what Congress considers affordable or appropriate. Indeed, while the 1996 Act states that universal service support from obligated telecommunications carriers is to be "explicit," it neglects to extend this courtesy to telecommunications consumers. There is no provision requiring an explicit universal service charge on consumers' bills, thus easing the carriers' ability to pass on their universal service obligations. The FCC's ability to tax telecommunications consumers without their knowledge is thereby facilitated by the 1996 Act's shocking lack of directive. In creating the FCC in 1934, Congress certainly intended it to be an independent, expert agency. However, the 1996 Act has gone a step too far in delegating Congress's authority to tax to the FCC.

V. CONCLUSION

The concept of universal service, embodied in the 1996 Act, as well as the *Recommended Decision* and *Report and Order* for its implementation, are ambitious and noble endeavors. The long-standing ideal that all residents, in all regions of the nation, should have access to quality telecommunications services at comparable and affordable rates is, alone, an expensive proposition. However, the additional discounts for the advanced technological services to be given to schools, libraries, and rural health care providers could prove to be an onerous burden on the average ratepayer's bill.

This program, although costly, might be a program that consumers would be willing to fund. However, such an initiative must be cast in its true colors—as a tax. Consequently, if consumers did not wish to spend their money to provide basic telecommunications services universally and to provide discounted, advanced services for schools, libraries, and hospitals, they would not elect, or re-elect as the case may be, any representative who supported this tax. That is the way the system is supposed to work.

Unfortunately, it appears that Congress has attempted to hide a tax in this lengthy piece of legislation by authorizing the FCC and state regulators to determine the boundaries of universal service and its exact payment. While at the first level the regulatory agencies will collect support from telecommunications carriers for this program, as Commissioner Chong said, "*make no mistake about who will foot the bill for this universal service program*"—the consumers of telecommunications services

(West Supp. 1997).

118. 47 U.S.C.A. § 254(h)(1)(B).

119. Yakus v. United States, 321 U.S. 414, 425-26 (1944).

whose bills will include a passed-on charge from their carriers.[120]

120. *Universal Serv. Recommended Decision*, 12 FCC Rcd. 87, 560, 5 Comm. Reg. (P & F) 1, 220 (separate statement of FCC Commissioner Rachelle B. Chong, concurring in part and dissenting in part).