

Liberty Brief

Wyoming Liberty Group

Weak Connections In Telecommunications

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Introduction

By Bruce Edward Walker

The Universal Service Fund – established by Congress as part of the Telecommunications Act of 1996 – expanded from an initial 3.1-percent tax added to customers' phone bills to its current 15.5 percent rate. This nearly 300-percent increase occurred simultaneously with a 26-percent decrease in the landline services for which the USF was established. The Federal Communications Commission, which administers the USF, determined it possessed the authority to redefine telecommunications to include Internet services, and began appropriating USF monies for Internet services for hospitals and schools. In 2012, the FCC began awarding USF cash to private companies to build out Internet infrastructure for rural and low-population areas in partial fulfillment of its 2010 National Broadband Plan.

The Wyoming Liberty Group opposes imposition of the USF tax, and expansion of its use to include Internet services. In this paper, we recommend updating the Wyoming Telecommunications Act of 1995 to define telecommunications as separate from Internet service. Additionally, more specificity is required in statute definitions of broadband, information services and advanced telecommunications services to eliminate current ambiguity until the WTA sunsets in 2015. Finally, the Wyoming Attorney General should consider joining lawsuits filed against the FCC that challenge the agency's expansion of the USF and related programs.

Executive Summary

By Jason C. Gay

The Wyoming Liberty Group believes in the values of individual dignity and personal liberty. Central to this belief is limited government best serves its people, and economic, personal and political freedoms are indivisible. The people of Wyoming benefit most from a government that avoids interfering in the market whenever possible, because markets are the most efficient way to meet public demands. The telecommunications industry is one area of the economy that suffers from government intervention. We must look at new technology not as an opportunity to assert government regulation; rather, we must initiate policies that facilitate new market growth. Careful review of the history of telecommunications policy will foster effective legislation and regulation with fewer unintended consequences.



The telecommunications industry has a long history of both government regulation and government subsidization—both at the state and federal level. As technology has improved, telecom fees have constantly increased as government seeks to fund upgrades throughout the country. Recently, there has been concern that the level of federal support will decline leaving many industry advocates and elected officials claiming this will increase the financial burden on states. Their reasoning is twofold: (1) we must extend technologically advanced telecommunications and information services to all citizens and (2) this can only be achieved if government subsidizes the costs of providing services to high cost areas. Both of these premises are debatable. We will discuss the major events leading to our current situation and provide recommendations as to how Wyoming can avoid greater subsidy requirements in the future.

In the mid-1990s there was a push—both at the state and federal levels—to update the Communications Act of 1934. Over the 60-year interim, telephone service evolved from a relative luxury to a common household utility viewed as being just as necessary as running water or electricity. The Universal Service Fund was adopted as part of the Telecommunications Act of 1996 to ensure that landline services were extended to regions that carriers had not yet served because the revenues generated would not justify the cost of constructing the necessary infrastructure—these high-cost areas are generally rural, low-population density areas. Congress and the Federal Communications Commission came up with support schemes to facilitate the buildout of infrastructure to achieve universal landline service, and the USF fee on customers' monthly long-distance bill grew from an initial 3.1-percent in 1996 to a current 15.5-percent in 2013.¹ The federal funds were not, however, used directly to construct infrastructure. Instead the High Cost program subsidizes service providers, resulting in an increase in cost for the High Cost program from \$1.7 billion in 1999 to \$4.15 billion in 2012. Over that same period, landline phones went from ubiquitous in 1999² to just over 64 percent of households in 2012³, with nearly 36 percent of households opting for wireless phone service only.⁴ In constant 2012 dollars, this cost went from approximately \$11.86 per household to \$35.31 per household (a 295 percent increase) despite a decrease of nearly 26 percent in total number of households receiving landline service.⁵

After these efforts began, access to the Internet grew significantly in both quantity and capability. Connectivity evolved from dial-up access to high-speed Internet connections such as DSL (digital subscriber line), broadband, satellite, and 3G and 4G wireless. In 2009 Congress directed the Federal Communications Commission to examine access to high-speed Internet and develop a plan for ubiquitous connectivity. Despite Congress taking no further action after its initial directive, the FCC adopted its National Broadband Plan and issued order FCC 11-161.

Although Congress had not specifically authorized the FCC

to support the building of high-speed Internet infrastructure, the FCC, of its own accord, determined high-speed Internet was simply another form of telecommunications. The effect of this determination was to allow the FCC to apply existing provisions of the Telecommunications Act of 1996 to Internet infrastructure. While this determination is currently being challenged in the courts, it remains current regulation and has the force of law.

The impact of the FCC's order has the potential to affect far more than the federal government's programs and policies. For example, the Wyoming Telecommunications Act of 1995⁶ establishes a support scheme similar to that of the federal government and other states. The WTA does not, however, specifically define telecommunications. It is very likely that a court would determine that Wyoming either intended to use the federal definition or that common usage is reflected in the federal definition—in either case extending the Wyoming Act to high-speed Internet as well. In addition to this, federal law requires the states to encourage universal service—though it does not require the states to provide financial support. The FCC's order would necessarily extend this requirement to high-speed Internet as well.

Wyoming can take action to counter the FCC's order. Options include updating the WTA to more clearly define what is covered, allowing the WTA to sunset and deregulate telecommunications within the state and directly challenging the FCC.

2.

Telecommunications Act of 1996

- Creates Universal Service Fund
- Serve High Cost Rural Areas
- Subsidize Low Income
- Subsidize Rural Health Care

Source: Dept. of Justice

1.

Communications Act of 1934

- Updated Regulation of Radio
- Consolidates Regulation of Telephone, Telegraph and Radio
- Creates the FCC

Source: Dept. of Justice

This would limit wasteful government participation in the marketplace and allow the market to deliver cost-effective, accessible

and flexible communication services. While it may be true some current technology services are not available in certain areas – and certain people in areas with limited options might not be able to afford the services available in those areas (e.g., satellite Internet service providers) – government interference through subsidies only discourages development of services that are effective, efficient and affordable in those areas. Economic freedom not only ensures political freedom, but encourages efficient market solutions.

Background

Wyoming and Federal Universal Service Funds (USF).

The Wyoming USF was created by the Wyoming Telecommunications Act of 1995 “(1) to promote availability of services at just, reasonable, and affordable rates; (2) to increase access to advanced telecommunications services throughout the nation; and (3) to advance the availability of such services to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those

tion services,¹¹ and so expands government reach over newer technologies.

National Broadband Plan. Part of the America Recovery and Reinvestment Act of 2009 (ARRA, also commonly known as Stimulus) requires the FCC to develop a plan to provide broadband¹² services to rural and low-population density areas.¹³ In fact, Title VI of Division B of ARRA describes the “Broadband Technology Opportunities Program.” (Division A also includes broadband-related appropriations).¹⁴ The Broadband Technology Opportunities Program required the Assistant Secretary of Commerce for Communications and Information to work with the FCC to develop a national broadband-access program.

The FCC produced “Connecting America: The National Broadband Plan”¹⁵ in 2010. The FCC, without a specific congressional mandate or authorization, decided to initiate execution of its National Broadband Plan through order FCC 11-161.¹⁶ The FCC based its rule on the “universal service principles” listed in section 254(b) of the Telecommunications Act of 1996.¹⁷

As noted by Balhoff & Williams, LLC, a professional services company specializing in consulting and analytical research in the telecommunications and energy industries¹⁸, the Telecommunications Act of 1996 creates obligations for both the federal and state governments.¹⁹ Section 254 of the Telecommunications Act deals with universal service, and section 254(b)(5) states “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”²⁰ As states have followed through on this mandate, any changes to the definition of “universal service” should be of concern to the states.

Title 47 of the United States Code (USC)—the part of the USC dealing with telecommunications and in which the telecommunications acts are codified—contains some definitions of great significance to this discussion:

47 USC § 153(24): “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

47 USC § 153(50): “The term ‘telecommunications’ 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.”

47 USC § 153(52): “The term ‘telecommunications service’ means the offering of telecommunications for a fee

4.

FCC 11-161 (2011)

- FCC Unilaterally Decides to Enact National Broadband Plan
- Redesigns USF as Connect America Fund
- Regulations Require Expanded High Speed Internet Services
- Creates Subsidies for High Speed Internet

Source: ARRA; National Broadband Plan

3.

Stimulus & National Broadband Plan (2009)

- Congress Mandates FCC Develop Plan for Nationwide High Speed Internet
- FCC Produces National Broadband Plan
 - High Speed Internet Evolves Into Basic Need

Source: ARRA; National Broadband Plan

charged in urban areas.”⁷

Through its USF, the state collects a tax from telephone subscribers—landline and mobile—and uses the funds to build infrastructure in rural or low-population areas, as well as to subsidize low-income users. Supporters justify this system by asserting that access to telecommunications, as well as to emergency services, is an essential government service—an idea that goes back to Section 254 of the Communications Act of 1934.⁸ Wyoming updated its 1995 WTA telecom legislation in 2007 with the Wyoming Telecommunications Act; this has a sunset date of July 1, 2015.⁹

The U.S. Congress created a federal USF with the passage of the Telecommunications Act of 1996.¹⁰ Section 254 of this Act specifies access to advanced telecommunications and informa-

directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

Meanwhile, the FCC includes the term “advanced telecommunications capability” in FCC 11-161, which was included in 47 USC § 1302(d)(1) as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” However, Congress did not redefine telecommunications service to include providing advanced telecommunications capability, and this definition applies solely to the broadband subsection—47 USC Chapter 12—not all of Title 47.²¹ Universal service is covered in Chapter 5 of Title 47—Wire or Radio Communication. Currently *In re: FCC 11-161* is being heard in the 10th Circuit. Among the challenges being heard by the Court is the reclassification of broadband as a telecommunications service—which referred solely to wired and wireless telephone prior to this change—rather than an information service. The rationale for this particular challenge is that classification of broadband impacts universal service.

Effect of Changes

The wide-ranging National Broadband Plan covers technical areas, infrastructure development, and suggestions for policy and legislation. When the FCC promulgated Rule FCC 11-161, the Commission sought to implicate the areas of the National Broadband Plan it believes to be within its control. Although the rule is being challenged, it is current policy and is controlling unless and until the challenge is ultimately successful. For this reason, this paper examines the impact that FCC 11-161 and the National Broadband Plan have.

Any changes made by the FCC or Congress are significant in Wyoming for many reasons, not the least of which is that Wyoming law does not define any of the relevant terms. Without a specific definition, a court may look to federal or other sources to determine common usage. Alternatively, the court may simply determine that Wyoming has left it to the federal government to define telecommunications, telecommunications service and advanced telecommunications capability. As a result, a Wyoming statute intended to deal with landline telephone service may be interpreted to cover broadband as well—statutes and regulations intended to regulate, tax or fund telephone service would immediately expand in scope, and Wyoming taxpayers will likely see significant cost increases for these services.

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While the Wyoming and federal Universal Service Funds are relatively new, Title 47 of the United States Code (USC) dates back to the Telecommunications Act of 1934. From 1934 through 1996 the term “telecommunications,” as used in statutes, referred exclusively to the Public Switched Telephone Network (PSTN)—what is now commonly referred to as landline phones. In 1996, the definition of telecommunications was updated to include wireless telephone service. However, the FCC envisions an eventual evolution from the current infrastructure to a network composed solely of Internet Protocol (IP) services²² including Voice over Internet Protocol (VoIP) phone services. This vision of the future is significant because it serves as a justification for including broadband as a telecommunications service. Were it not for the existence of IP services like VoIP, broadband would clearly be qualified as an information service and not a telecommunications service.

The Wyoming Telecommunications Act was enacted at a time when landline and wireless-telephone services were the only forms of telecommunications available. By redefining telecommunications, the FCC can significantly impact the Wyoming USF. For instance, the requirement that “[a]ll telecommunications companies shall contribute to the universal service fund”²³ becomes a significantly wider mandate that is more difficult to enforce. It becomes wider because it would include any company providing broadband services—including not only telephone and mobile phone service providers already covered by the law but cable, satellite, fiber optic and other providers of broadband.

The difficulty arises in that Wyoming very likely cannot simply base the USF contribution on what the customer is billed by the service provider. In 2001, AT&T Communications sued the Public Utility Commission of Oregon over required contributions to Oregon’s USF.²⁴ Oregon had determined that it would calculate the amount of the surcharge for universal service based not only upon intrastate local and long-distance calls, but upon any call originating in the state—including interstate and international calls. In other words, Oregon would calculate the surcharge based upon the total amount billed for telecommunications services instead of solely intrastate calls. The court found for AT&T, noting:

Section 254(f) [of Title 47 USC] also forbids state regulations concerning universal service from burdening federal universal support mechanisms. . . . allowing a state to assess services already assessed by the federal government increases [the] burden [on service providers] This could indeed have an impact on a carrier’s decision to provide interstate

telecommunications Because the Oregon surcharge relies on interstate revenues also assessed to contribute to the federal universal support fund, it burdens universal support mechanisms.²⁵

Current law retains the Title 47 USC §254(f) restriction mentioned by the court in the case, but it further states “[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.”

Therefore, Wyoming cannot simply choose to only require contributions to the USF from certain types of telecommunications service providers. If broadband is a telecommunications service, Wyoming must require broadband service providers contribute to the USF. But, as noted above, Wyoming cannot base those contributions upon interstate services. Wyoming would have to determine whether the broadband services provided are interstate or intrastate, and determine a mechanism for assessing contributions to the USF based solely upon intrastate broadband services. The costs associated with developing a system for monitoring, measuring and levying fees on intrastate broadband service while excluding interstate broadband service would certainly be high.

Should the FCC’s prediction that landlines will be completely replaced by Internet Protocol (IP) communications come true, there will be even further complications. Not only will Wyoming need to determine if the service is interstate or intrastate, but rural residents will face additional challenges. In the event of a power outage, IP communications will not function. Even if the homeowner owns a battery backup or uninterrupted power

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supply (UPS), the length of time power will be available from a UPS is generally short in duration—intended to allow the user to power equipment down normally. In the event of an extended power outage mobile phones can similarly run out of power; assuming that the rural resident lives in an area with wireless coverage. Elderly, young, infirm or pregnant residents may have an

urgent need for emergency services they can currently reach using landline phones that continue to function in a power outage.

Transition

Interestingly, the FCC has determined it has legal authority to enact the National Broadband Plan based not upon additional legislation passed by Congress since requiring the development of the plan in ARRA, but instead based upon the Telecommunications Act of 1996—passed 13 years prior to ARRA. The FCC looks to section 706 of the 1996 Act (codified as 47 USC 1302) which deals with advanced telecommunications incentives and states²⁶:

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall ***encourage the deployment*** on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by ***utilizing***, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, ***measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.***

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. ***If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.***²⁷(emphasis added)

This reasoning is interesting as subsection (a) provides a list of regulatory methods available to the FCC and states while subsection (b) simply requires the FCC annually review the availability of advanced telecommunications capabilities to inform its use of these regulatory methods. Neither provides authorization for creating an additional fund, alters the purpose of the USF or provides for government spending on infrastructure development. It is also interesting because the FCC acknowledges in its reasoning that section 254²⁸ of the 1996 Act only provides authority to financially support universal telecommunications ser-

VICES, not universal advanced telecommunications services or universal information services.²⁹ What makes this noteworthy is that section 254 is the section covering universal service and the section which creates state obligations.³⁰ This is one of the grounds on which FCC 11-161 has been challenged.

Nevertheless, the Connect America Fund (CAF) was established by the FCC in Section VII of FCC 11-161 to replace parts of USF; CAF is funded through a portion of the taxes previously directed to USF. The FCC established CAF in two phases (CAF Phase I and CAF Phase II), the first redirecting universal service payments and the second phase targeting areas determined to be without broadband services.³¹ As part of rolling out CAF, the FCC decided to create a budget for the high-cost program, something the FCC had not previously done.³² The \$4.5 billion budget provided for \$500 million for the Mobility Fund,³³ at least \$100 million for service in highest cost areas, and \$4 billion to be divided among carriers.³⁴ The FCC budget is not an actual budget, but instead more of a guideline as the FCC expects distributions can be more or less than planned in any given year. An additional \$300 million was allocated for CAF Phase I.

Balhoff & Williams noted federal support for universal service “is declining at sharp rates and/or being re-defined [sic] as support for broadband in select high cost areas...[,] reforms [in FCC 11-161] appear to be putting at risk the voice as well as broadband investment in many regions, if a carrier cannot accept the new broadband obligations at CAF funding levels.”³⁵ However, the analysis conducted assumed significant deviation from the FCC’s budget, stating “the funding available will fall far short—offering support for less than one-third—of the costs in meeting the new obligations”³⁶ based upon “exclusion of CAF [Phase] II from this analysis”.³⁷ In other words, their analysis excludes the \$4 billion annual budget³⁸ of CAF Phase II. The justification for ignoring the CAF budget was the initially slow acceptance by carriers of the \$300 million made immediately available in CAF Phase I, stating they “believe that, like the CAF [Phase] I funding, it is likely that a large percentage of the \$1.8 billion [for price cap carriers] will be rejected.”³⁹ Although it is questionable to assume that the response to a relatively small fund would predict participation in a fund six times larger, the adoption issue no longer exists.

At the time of the Balhoff & Williams white paper’s publishing only \$115 million of the \$300 million was made immediately available in CAF Phase I. Major carriers AT&T and Verizon turned down \$47.8 million and \$19.7 million respectively. AT&T stated a desire to determine its rural service strategy before participating in CAF and Verizon simply stated the offer was “relatively small.”⁴⁰ These statements do not indicate that either com-

pany is unwilling to participate in CAF. Additionally, AT&T has now accepted up to \$100 million in CAF Phase I funding and CenturyLink has accepted \$54 million in CAF Phase I in addition to the \$35 million it accepted last year.⁴¹ So, although only 38 percent of CAF Phase I funding was accepted in 2012 there are indications nearly all of the \$300 million offered this year will be accepted⁴² since carriers accepting funds can obtain more than was initially offered by accepting funds declined by other carriers.⁴³ Therefore, projecting acceptance of CAF Phase I funds to estimate CAF Phase II funding would suggest that we expect all funds made available by the FCC will be accepted by carriers to expand broadband coverage. Since the entire white paper is predicated on the assumption that federal funding will not be accepted, thereby allowing the authors to discount the \$4 billion annual CAF Phase II budget, many of the conclusions are invalid.

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However, Balhoff & Williams are correct in asserting that the cost of building a broadband infrastructure may cause smaller landline carriers to reject CAF funds. This would result in a loss of federal USF funds for serving high-cost (generally rural) areas and may cause them to exit those markets.⁴⁴ Despite the FCC’s claims, it remains to be seen if the courts will uphold their new advanced telecommunications incentives under 47 USC § 1302 (section 706 of the 1996 Act). The concern expressed by Balhoff & Williams is precisely why carriers are challenging FCC 11-161.⁴⁵ Current cost estimates for providing universal service assume broadband services are included; the costs for providing broadband are higher as this includes building out broadband infrastructure to areas that already have landline access.

Recommendations

Update Wyoming Statutes. Should the FCC prevail in *In Re: FCC 11-161*, the term “telecommunications” will include broadband Internet services and the Wyoming USF may be extended to broadband as well. Policymakers could take one simple action to eliminate confusion: update Wyoming Statutes §37-15-103 to include additional definitions. If Wyoming explicitly adopted the current federal definition of ‘telecommunications’—that is, to use the current text of the federal definition of telecom-

Wyoming’s Path Forward

1. **Review and Recognize The Limitations of Wyoming Telecommunications Act of 1995**

2. **Eliminate Legal Ambiguity in the Law and Define Specific Statues**

munications, rather than referring to the federal definition, since the federal definition could be changed by Congress—Wyoming could make it clear that broadband is not included in telecommunications as used in Wyoming Statutes.

Wyoming could further clarify the situation by explicitly defining ‘broadband,’ ‘information service,’ ‘telecommunications service’ and ‘advanced telecommunications service,’ similarly using the text of the current federal definitions of each of these terms while further noting that telecommunications service does not include advanced telecommunications service.

Current Wyoming Statutes are ambiguous due to the lack of defining key terms such as telecommunications, broadband, information service and advanced telecommunications service (although telecommunications service currently is defined). As mentioned above, it is very likely that courts would determine Wyoming intended to defer to federal government definitions. This would remove power from the Wyoming legislature and place it in the hands of the FCC. Defining terms used in the Wyoming Statutes will return power to the state and remove any ambiguity as to the purpose of the Wyoming USF.

Allow Sunset of Title 37, Chapter 15. Allowing this sunset provision to take effect is an alternative to updating the Wyoming Statutes. The Wyoming Office of Consumer Advocate has evaluated the impact of allowing the Wyoming Telecommunications Act of 1995 to sunset on July 1, 2015.⁴⁶ The Office of Consumer Advocate (OCA) provides no opinion or recommendation in its analysis, and also does not delve into the extent to which current federal law would cover areas affected by the sunset provision.

One of the areas affected by the sunset provision is pricing restrictions and requirements. These restrictions and requirements only apply to local and intrastate long-distance services because interstate long distance is solely within the purview of the FCC. OCA notes that this—combined with the expiration of the Wyoming USF—could result in some customers paying 130 percent of the weighted state average. However, OCA also notes that the Telephone Assistance Program (TAP) will remain in place. The Wyoming Department of Family Services determines eligibility

for financial assistance in maintaining a primary home number. Similarly, the federal USF low-income programs, Link-Up America and Lifeline Assistance will remain in place. Link-Up America provides low-income families with financial assistance for installation of local telephone service while Lifeline Assistance, provides further discounts on telephone services in addition to TAP. Therefore, low-income families will continue to receive support via TAP and the federal USF.

It should also be noted that prices will not necessarily rise. In addition to the end of pricing restrictions and requirements, the sunset will result in reduced registration and certification requirements as well as a reduced cost associated with regulatory compliance at the state level. It is unclear to what extent this will

impact costs for telecommunications companies operating in Wyoming, but reduced costs will allow service providers to avoid raising prices. These companies will also face market pressures to keep costs down as deregulation removes barriers for new entrants while the federal government continues to promote expansion of wireless communication networks and telecommunications networks—which may or may not include broadband services pending the outcome of *In Re: FCC 11-161*.

Challenge the FCC. The Wyoming Attorney General may consider joining the dozens of entities that have filed briefs in *In Re: FCC 11-161*, or at least follow the litigation to determine whether filing a brief may be in the State’s interest upon further appeal. There are two aspects in particular of FCC 11-161 that should concern Wyoming: (1) the inclusion of broadband in telecommunications and (2) the redirection of USF funds and the creation of CAF. Both of these decisions were made without Congressional direction.

While the FCC declared broadband a form of telecommunications, 21 states between 2012 and 2012 passed laws deregulating telecommunications. Each state made clear their telecommunications regulatory body had no control over broadband deployment. It could be argued that broadband is not a telecommunications service, but an information service that is not supported by USF under current law. Therefore, redirection of USF funds to support broadband infrastructure is an unauthorized use of federal funds.

The FCC chose to go beyond simply redirecting USF funds, however. With FCC 11-161, the FCC unilaterally decided to replace the high-cost portion of the USF with CAF. Congress passed no legislation authorizing the creation of a new fund or the redirection of USF funds to services other than telecommunications. While the FCC sought to circumvent the latter by designating broadband as a telecommunications service instead of an information service, it has made no effort to explain the

“Allowing this sunset provision to take effect is an alternative to updating the Wyoming Statutes.”

ward

3.

Allow the WTA to Sunset in 2015 and Replace it with new Definitions and Reduced Regulations

4.

Wyoming Should Join Lawsuits Against FCC to Challenge the Expansion of the USF and Related Programs



legal authority for replacing a portion of the USF with CAF. This is more than simply renaming a fund as done by the FCC in its explicit statement of its intent to direct these funds to services not previously covered. Without an explanation of the legal authority for such a decision—and without an obvious authority being available—it is difficult to ascertain the FCC’s justification for this action. ■

Endnotes

¹ Hazlett, Thomas W. “Universal Service” Telephone Subsidies: What Does \$7 Billion Buy?, June 2006. <http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/19520.pdf>.

² Universal Service Administrative Company. 1999 Annual Report. USAC, 2000. Web 17 October 2013. <http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-1999.pdf>.

³ Universal Service Administrative Company. 2012 Annual Report. USAC, 2013. Web 17 October 2013. <http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-1999.pdf>.

⁴ Freedman, Donna. “Why I’m Keeping a Landline.” MSN-Money. MSN, 28 Aug. 2013. Web. 17 Oct. 2013. <<http://money.msn.com/saving-money-tips/post-why-im-keeping-a-landline>>.

⁵ Infaltion data from Bureau of Labor Statistics; household data from US Census Bureau (2010 is the most recent year available); decrease in number of households reflects 36 percent of households using wireless only.

⁶ “The Wyoming Universal Service Fund.” The Wyoming Universal Service Fund. N.p., n.d. Web. 09 Sept. 2013. <<http://psc.state.wy.us/htdocs/wyusf/AccountantReport.htm>>.

⁷ “Wyoming Universal Service Fund - Consumers.” Wyoming Publics Service Commission. Wyoming Publics Service Commission, n.d. Web. 19 Aug. 2013. <http://psc.state.wy.us/htdocs/wyusf/usf_consumers_new.htm>.

⁸ Communications Act of 1934, United States Code § 47-254 (1934). Print. <<http://transition.fcc.gov/Reports/1934new.pdf>>.

⁹ Wyoming Telecommunications Act, Wyoming Statutes § 37-37-15-101 (2007). Print. <<http://legisweb.state.wy.us/2007/Bills/SF0078.pdf>>.

¹⁰ Telecommunications Act of 1996, United States Code § 47 (1996). Print. <<http://beta.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf>>.

¹¹ Telecommunications Act of 1996. United States Code § 47 (1996). Print.

¹² For the purposes of the National Broadband Plan and FCC 11-161, the FCC uses broadband as a generic term for high speed Internet services. The standard used as a benchmark for “advanced telecommunications capability” over 4MBPS download and 1 MBPS upload speeds—including broadband, DSL, 4G wireless,

and satellite.

¹³ Title II, Broadband Technology Opportunities Program. America Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (2009). <<http://beta.congress.gov/111/plaws/publ5/PLAW-111publ5.pdf>>.

¹⁴ ARRA, Pub. L. No. 111-5 (2009). The Act was divided into two divisions—Division A dealt with appropriations while Division B dealt with tax, unemployment, health, state fiscal relief, and other provisions.

¹⁵ Connecting America the National Broadband Plan. Washington, DC: Federal Communications Commission, 2010. Print. <<http://www.broadband.gov/download-plan/>>.

¹⁶ FCC 11-161, Federal Communications Commission (2011). Print. <http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0206/FCC-11-161A1.pdf>.

¹⁷ FCC 11-161, paragraphs 43-45.

¹⁸ “Balhoff & Williams, LLC.” Balhoff & Williams, LLC. Web. 20 Aug. 2013. <<http://www.balhoffrowe.com/>>.

¹⁹ Balhoff, Michael J., and Bradley P. Williams. State USF: White Paper: New Rural Investment Challenges. Working paper. N.p.: Balhoff & Williams, LLC, 2013. Balhoff & Williams, LLC. June 2013. Web. 20 Aug. 2013. <<http://www.balhoffrowe.com/pdf/BW%20State%20USF%20White%20Paper%20June%202013.pdf>>.

²⁰ Telecommunications Act of 1996. Title 47 United States Code (1996). Print.

²¹ 47 USC § 1302(d)(1).

²² FCC-11-161 I(15.) (p. 9-10).

²³ 37-15-501(a).

²⁴ AT&T Communications Inc. v. Eachus. 174 F.Supp.2d 1119. United States District Court, D. Oregon. 18 Oct. 2001. Print.

²⁵ 174 F.Supp.2d 1124.

²⁶ FCC 11-161, Section V.

²⁷ 47 U.S.C. § 1302.

²⁸ 47 USC § 254.

²⁹ The FCC stops short of determining whether VOIP qualifies as a telecommunications service or information service, stating “authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act.” FCC 11-161 para. 63. The FCC explains this statement with a footnote reasoning that section 254 provides their authorization to support telecommunications services whereas section 706 authorizes their support of broadband networks. As noted above, section 706 makes no statement regarding providing support for deployment of broadband networks, making this reasoning a bit dubious.

³⁰ 47 USC § 254.

³¹ FCC 11-161 para. 116.

³² The federal USF has four major programs: high-cost, low income, rural health care, and schools and libraries. For FY 2011 (the last year for which all data is available), disbursements for the high-cost program was \$4.0 billion, for the low income program was \$1.8 billion, for the rural health care program was \$121 million, and for the schools and libraries program was \$793 million. The high-cost

program is by far the largest of the four, accounting for nearly

60 percent of USF spending. U.S. Federal Communications Commission. Universal Service Monitoring Report 2012 (Supplementary Report Material). 2012. CC Docket No. 98-202. Federal-State Joint Board Monitoring Reports. Web. 21 Aug. 2013. <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/2012_MR_Supplementary_Material.zip>.

³³ The Mobility Fund is used to expand wireless networks. Of the \$500 million, \$100 million is earmarked for Tribal lands. FCC 11-161 para. 126.

³⁴ Of the \$4 billion, up to \$1.8 billion for price cap territories and up to \$2 billion for rate-of-return territories. FCC 11-161 para. 126. The FCC regulates interstate carriers under one of two schemes, price cap or rate of return. The FCC either limits the price carriers can charge for services or the rate of return a company earns on services depending on which regulation scheme covers a particular company. See: United States. Federal Communications Commission. Regulatory Type at the Holding Company Level by Study Area. Web. 21 Aug. 2013. <<http://www.fcc.gov/maps/regulatory-type-holding-company-level-study-area>>.

³⁵ Balhoff, p. 5.

³⁶ Balhoff, p. 2.

³⁷ Balhoff, p. 2, fn 3.

³⁸ The FCC budget is apparently going to be pegged to inflation. FCC 11-161 refers to page 150 of the National Broadband Plan noting “FCC should aim to keep the overall size of the fund close to its current size (in 2010 dollars).” Combined with the lack of a hard cap, actual spending in future years may be significantly higher than \$4.5 billion.

³⁹ Balhoff, p. 2, fn 3.

⁴⁰ Buckley, Sean. “AT&T, Verizon Pass on FCC’s Connect America Fund Phase 1 Funding.” FierceTelecom. 26 July 2012. Web. 21 Aug. 2013. <<http://www.fiercetelecom.com/story/att-verizon-pass-fccs-connect-america-fund-phase-1-funding/2012-07-26>>.

⁴¹ Buckley, Sean. “AT&T Accepts \$100M from FCC’s Connect America Fund to Expand Rural Broadband.” FierceTelecom. 20 Aug. 2013. Web. 21 Aug. 2013. <<http://www.fiercetelecom.com/story/att-accepts-100m-fccs-connect-america-fund-expand-rural-broadband/2013-08-20>>.

⁴² Engebretson, Joan. “Connect America Fund Could Be Fully Committed for 2013.” Telecompetitor. 21 Aug. 2013. Web. 21 Aug. 2013. <<http://www.telecompetitor.com/connect-america-fund-could-be-fully-committed-for-2013/>>.

⁴³ Engebretson, Joan. “Verizon Again Declines CAF Funding But AT&T Accepts.” Telecompetitor. 20 Aug. 2013. Web. 21 Aug. 2013. <<http://www.telecompetitor.com/verizon-again-declines-caf-funding-but-att-accepts/>>.

⁴⁴ Balhoff, p. 5.

⁴⁵ In re: FCC 11-161 (10th Cir).

⁴⁶ Wyoming. Public Service Commission. Office of Consumer Advocate. Sunset of Title 37, Chapter 15 of the Wyoming Statutes. Web. 22 Aug. 2013. <http://psc.state.wy.us/htdocs/oca/Sunset_of_Title_37.pdf>.

1902 Thomes Ave., Ste. 201 Cheyenne, WY 82001

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