

September 19, 2014

Comments Concerning Universal Service Policy and the Role of the Federal Communications Commission (“White Paper”)

The Small Company Coalition (SCC) appreciates Congress’s outreach in matters concerning Universal Service reform and the current interest in refurbishing the 1996 Telecommunications Act in order to better address the realities of modern technology; specifically, broadband Internet.

The SCC is a national group of telecommunications carriers and vendors, and has been involved in the process of USF reform on various levels, including Congressional testimony¹, participation in public proceedings at the Federal Communications Commission (“FCC” or “Commission”)², as well as developing and proposing alternative solutions to some of the problems arising from the Commission’s USF/ICC Transformation Order—solutions which have been grounded in the founding principles of Congress’s 1934 and 1996 Acts, as well as the American Recovery and Reinvestment Act of 2009, which called for the FCC to form a national broadband plan.

The SCC would like to submit for consideration the following responses to Congress’s questions posed in the White Paper.

1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

The original precepts of the Universal Service Fund (USF), established by Congress more than a decade and a half ago, bear as much relevance today as they did upon inception. While

¹ Available at the SCC’s website at www.smallcompanycoalition.com.

² Also available at the SCC’s website.

technology is ever-evolving, the necessity for such technology to be commonly available to all Americans remains constant.

Though the USF has not been immune to criticism since its implementation, by and large, the fund has been highly effective in fulfilling Congress's mandate to provide communications technology to all corners of our country.

With this in mind, Congress would be well-advised to retain the current goals of the USF, as they have proven to be effective and prudent as a whole. As noted in the White Paper itself, certain components of the USF have been subject to abuse; however, these aberrations are more indicative of faulty administration than flawed foundation.

In response to the inquiry as to whether or not Congress should codify the two principles proposed by the FCC, it is the SCC's general position that directing universal service support to networks that provide advanced services as well as voice services is a worthy endeavor. Naturally, though, the manner in which this non-voice support is distributed, as well as the matter of which parties will contribute to its funding, will necessitate further discussion once specific proposals are made in the future.

In any case, the directives issued by Congress would be well-served to stress the value of communications *networks*. While forms of communication rapidly change—voice, data, etc.—the networks that carry this information remain largely intact from one technological leap to the next. Even wireless technology, which is often perceived as being the technology of the future, ultimately relies on landline facilities; the same facilities, though updated and upgraded over time, that continue to provide traditional telephone service as well as VoIP technology.

In prescribing the underlying ideology which will fund continued communications build-out across the country, it is imperative that such policy be prudent, but not preclusive. In other words, implementing caps to such funds (as the FCC has done with the transition of uncapped USF to the capped Connect America Fund—“CAF”) laudably encourages responsible spending. However, as a general precaution, if such capping mechanisms adopted by the Commission presumptively disallow investment on the part of private enterprises due to arbitrary benchmarks, then the purpose of universal service is, in effect, stillborn.

To this end, the SCC encourages Congress to consider exercising greater oversight over the FCC to ensure that the specific programs implemented by the Commission do not preemptively stifle private entities’ efforts to provide all Americans with high-quality communications services.

2. Universal service was created to fund build-out in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately-funded networks in many parts of the country that currently receive support?

The issue of overlap among carriers must be addressed, but at the same time, Carrier-of-Last-Resort (“CoLR”) obligations must be taken into consideration. In many cases, larger carriers may indeed serve *portions* of territories also served by smaller carriers who receive USF support; however, these smaller carriers often serve customers in higher-cost, less-accessible portions of the territory—in other words, locations for which there is no justifiable business case for service absent USF.

This practice by the larger carrier of “cherry-picking” which customers are worth serving and which are not becomes problematic when funding for the smaller carrier—who uses said funding to serve less accessible customers—is categorically eliminated on the basis that there is *some* overlap within the given territory.

As also mentioned, CoLR obligations—which require the carrier to “furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company’s territory”—are often held by the smaller carrier. Eliminating support for the smaller carrier leaves no other provider in the territory with these obligations and presumably renders more remote/higher-cost customers without basic voice service, as there is no business case—and no obligation—for the larger carrier to serve them.

Finally, the SCC recommends that Congress explore further the definition of “overlap” in regard to “multiple privately-funded carriers serving a territory that also receives subsidized support.” As alluded to in the previous paragraph, the current definition declares an area to be in “overlap” even if a competing carrier serves only one customer in the area.

3. What is the appropriate role of states and state commissions with respect to universal service policy?

There is a necessity for states to indeed play a role in administering universal service policy, as a degree of localization—as opposed to the one-size-fits-all federal approach—which is generally beneficial to independent rural carriers. Along these lines, the states are in a better position to understand the unique geographical, socio-economical, and other challenges encountered by small companies charged with the task of building and maintaining the broadband network in the rural territories they serve. The states are also in a better position to assess the need for broadband services by their rural citizens and then take the appropriate action to help ensure that those needs are being met.

4. What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

The Federal-State Joint Board on Universal Service was established to make recommendations to implement the universal service provisions of the Telecommunications Act of 1996 (the “Act”). The Joint Board, which is comprised of FCC Commissioners, State Utility Commissioners, and a consumer advocate representative, should continue to play a role in providing recommendations concerning the universal service contribution methodology. While there have been many technological changes since the Act became law, the underlying business concepts and the importance of the universal service program remain the same. As mentioned in the previous response, it is important that the FCC work very closely with the states to develop solutions that address the unique circumstances of each state.

5. The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?

Rural Utility Service (“RUS”) programs are particularly vital to Tribal companies, as their status as sovereign nations, and subsequently disallowing collateralization of land, prevents them from borrowing from traditional banks. Furthermore, in addition to being “necessary,” RUS lending programs have been particularly successful, with a default rate of less than 1%³. These loans are paid back with interest, and as such, have provided revenue for the federal government.

6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

This quandary may best be addressed by considering the concept of “trigger” mechanisms, which have been suggested to the FCC on numerous occasions. The premise of these “triggers” is to offer benchmarks for further review if a carrier’s costs appear to be

³ See remarks by Tom Vilsack, Secretary of the U.S. Department of Agriculture (USDA) and Jonathan S. Adelstein, Administrator, RUS, USDA, at: www.usda.gov/wps/portal/usda/usdahome?contentid=2010/08/0396.xml.

excessive; however, these costs are not presumptively disallowed by a hard, arbitrary cap. Such rigid capping mechanisms are a danger to build-out investment.

Additionally, this question touches upon the beginnings of contribution reform—that is to say, who contributes to universal service—and the SCC believes that all users of the network should pay for such usage. In bringing new entities into the contributions pool, the threat of irresponsible levels of spending is reduced.

7. Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?

The focus of any universal service funding mechanism must be placed on the desired end result, which is to help ensure that all Americans, regardless of where they may live, have access to high-quality communications services at affordable rates. The concept of Universal Service originates from the 1934 Communications Act, which states, in part, the goal of “regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges...” The founding of the FCC may also be found therein, under the obligation to “execute and enforce the provisions of this Act.”

The Act provides the first major overhaul of the initial 1934 Act and explicitly establishes the USF as a means of facilitating telecommunications and Internet expansion to reach rural and hard-to-serve Americans.

The FCC’s Order on USF/Intercarrier Compensation (ICC) Transformation, initially introduced in November of 2011, executes a phase-down and elimination process of USF programs, while transitioning to the new Connect America Fund (CAF). The explicit mechanisms contained in the USF are not replaced by similar cost recovery mechanisms in the

CAF, resulting in a net loss for rural-serving carriers previously receiving this vital support. Additionally, the utter lack of any grandfather clause to foster prior obligations held by these carriers jeopardizes both their ability to remain in business and the continuation of telecommunications and Internet service provided to rural and “hard-to-reach” consumers.

With the above in mind, any re-write of the Act should take into consideration the following:

- In purest theoretical terms and in practical application, the USF is not a tax, nor is it Congressionally-appropriated federal money, but a user fee. As the implement of an executive agency (the FCC), which does not possess constitutional authority to tax, the USF is a federally-*managed* pool of money.
- *Texas Public Utility Counsel, et al vs. FCC (1997)* voiced many of the initial, fundamental objections to the explicit USF, partially based upon these constitutional objections. On this matter, the 5th Circuit Court ruled in favor of the FCC, thereby establishing the mechanism as a user fee—*not* a tax. In a convenient reversal of ideology, the Commission has adopted a view of USF as “federal money,” which fuels the many calls for “accountability and transparency” one may find scattered about the USF/ICC Transformation Order. Note that the industry is not disputing the requirement for accountability and transparency, which has been in place since the beginning of the fund.
- Unlike taxpayer dollars, Universal Service funding is not and *cannot* be used for general purposes; neither does it contribute to or offset the national deficit. It is collected entirely from users of the national telecommunications and broadband network. It is directly reinvested into the continued expansion and maintenance of the network, with particular

emphasis on reaching those Americans who live in areas that would never be served (due to lack of a sound business case) without USF support.

- Contrary to the argument that some are making, eliminating this program will not reduce “government spending”. It will simply and effectively cripple small carriers across the nation, leaving Americans in rural high-cost, low-density areas hoping for urban-centered larger carriers to invest in the abandoned areas with no chance for cost recovery. In the improbable event that such charity may occur, one would reasonably expect service standards to hover at regulated minimums.
- The Universal Service precept directly answers the constitutional directive to “provide for the common Defence and general Welfare.” Similar to the interstate highway system, all Americans benefit individually or collectively from the national connectivity established through USF-driven development. However, unlike federal roadways, for which some money is taxed from the people whether or not they own an automobile, the USF is funded *entirely* by communications (Internet and telephone) users and providers.
- Telephones (cellular or landline) and internet modems are worthless without the network within which they operate. Therefore, purchasing a phone or modem entails paying for construction and maintenance of the existing network that gives value to such phone or modem. The federally-managed USF is the system of ensuring that payments are made for the appropriate availability and use of this network.
- As opposed to the misconception that urban customers “subsidize” the service of rural customers, the reality is that all consumers pay for a nationally-connected network. This network is available for originating or receiving calls (or enjoying Internet connection) to and from areas that, absent USF, would otherwise be unavailable. The economic

implications are tremendous, as it facilitates the interdependence between rural and urban America. While rural regions account for only 16% of the population, they produce our food, fiber, domestic energy and 88% of our renewable water resources. Our parks and forests are predominantly rural as well. The military gets 44% of its members from rural America. Add to this the individual benefits all Americans experience as a result of national connectivity, such as Internet/telecommunications capabilities while traveling or vacationing, as well as the ability to engage in interstate commerce, and the necessity for continued USF support is undeniable.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

- a. A state block grant program;*
- b. A consumer-focused voucher program;*
- c. A technology-neutral reverse auction; or,*
- d. Any other mechanism.*

To the extent possible, the USF support mechanisms should be based on sound business principles and should avoid artificial incentives such as state block grants, consumer vouchers, and reverse auctions. Simply stated, in order to help alleviate pressure on the universal service funding mechanism, consideration should be given to implementing a methodology whereby the carriers responsible for building and maintaining the rural broadband network receive some form of compensation from all users of such network. Stated another way, the Universal Service funding mechanisms should be based on the sound business concept that all users of the broadband network pay a user-fee based on the benefit derived from such use.