



Universal Service Fund: Background and Options for Reform

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Summary

The concept that all Americans should be able to afford access to the telecommunications network, commonly called the “universal service concept” can trace its origins back to the 1934 Communications Act. Since then, the preservation and advancement of universal service has been a basic tenet of federal communications policy, and Congress has historically played an active role in helping to preserve and advance universal service goals. The passage of the Telecommunications Act of 1996 (P.L. 104-104) not only codified the universal service concept, but also led to the establishment, in 1997, of a federal Universal Service Fund (USF or Fund) to meet the universal service objectives and principles contained in the 1996 Act. According to Fund administrators, from 1998 through end of year 2008, over \$58 billion was distributed, or committed, by the USF, with all 50 states, the District of Columbia and all territories receiving some benefit.

The Federal Communications Commission (FCC) is required to ensure that there be “specific, predictable and sufficient ... mechanisms to preserve and advance universal service.” However, changes in telecommunications technology and the marketplace, while often leading to positive benefits for consumers and providers, have had a negative impact on the health and viability of the USF, as presently designed. These changes have led to a growing imbalance between the entities and revenue stream contributing to the fund and the growth in the entities and programs eligible to receive funding. The desire to expand access to broadband and address what some perceive as a “digital divide” has also placed focus on what role, if any, the USF should take to address this issue.

There is a growing consensus among policy makers, including some in Congress, that significant action is needed not only to ensure the viability and stability of the USF, but also to address the numerous issues surrounding its appropriate role in a changing marketplace. How this concept should be defined, how these policies should be funded, who should receive the funding, and how to ensure proper management and oversight of the Fund are among the issues expected to frame the debate.

The current policy debate has focused on four major concerns: the scope of the program; who should contribute and what methodology should be used to fund the program; eligibility criteria for benefits; and concerns over possible program fraud, waste, and abuse. A separate and more narrowly focused issue, the impact of the Antideficiency Act (ADA) on the USF, has also become an issue of concern.

The House Subcommittee on Communications, Technology, and the Internet held a hearing, March 2009, on reforming the USF High Cost Fund. The FY2009 omnibus appropriations bill, which was enacted into law (P.L. 111-8) contained a provision to extend the USF ADA exemption until December 31, 2009. S. 348, introduced January 29, 2009, by Senate Commerce Committee Chairman Rockefeller, and H.R. 2135, introduced April 28, 2009, by Representative Rehberg, provide for a permanent ADA exemption for the USF.

This report will be updated as events warrant.

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Introduction

The concept that all Americans should be able to afford access to the telecommunications network is commonly called the “universal service concept.” This concept can trace its origins back to the 1934 Communications Act.¹ Since then the preservation and advancement of universal service has been a basic tenet of federal communications policy, and Congress has historically played an active role in helping to preserve and advance universal service goals. In 1996 Congress passed the Telecommunications Act of 1996 (P.L. 104-104), which not only codified the universal service concept, but also led to the establishment of a federal Universal Service Fund (USF or the Fund) to meet the universal service objectives and principles contained in the 1996 Act. According to Fund administrators, since 1998 over \$58 billion in support has been disbursed by the USF, with all 50 states, the District of Columbia, and all territories receiving some benefit.²

Over the past decade the telecommunications sector has undergone a vast transformation fueled by rapid technological growth and subsequent evolution of the marketplace. A wide range of new services have become available, offered by a growing list of traditional as well as nontraditional providers. One of the results of this transformation is that the nation’s expectations for communications services have also grown. In the past, access to the public switched network through a single wireline connection, enabling voice service, was the standard of communications. Today the desire for simple voice connectivity has been replaced by the demand, on the part of consumers, business, and government, for access to a vast array of multifaceted fixed and mobile services. Consumers are also demanding greater flexibility and may choose to gain access to the same content over a variety of technologies, whether it be a computer, a television, or a mobile telephone. The trend towards sharing information, such as music, movies, or photographs, is also growing, making it necessary to ensure that network upload speeds match download capabilities. These advances require that networks transition into converged next-generation wireline and wireless broadband networks capable of meeting these demands. One of the challenges facing this transition is the desire to ensure that all citizens have access to an affordable and advanced telecommunications infrastructure so that all members of American society may derive the benefits.³

Technological advances such as the ability of the Internet to provide data, voice, and video, the bundling of service offerings, the advancement of wireless services, and the growing convergence of the telecommunications sector have, according to many policy makers, made it necessary to reexamine traditional policy goals such as the advancement of universal service mandates. These changes in technology and the marketplace, a declining funding base, and significant increases in the amount of support disbursed by the Fund, have led to concerns that the USF is in need of reform. There is a growing consensus among policy makers, including some in Congress, that significant action is needed not only to ensure the viability and stability of the USF, but also to address the numerous issues surrounding such reform. The 111th Congress may take a prominent role in this debate. How this concept should be defined, how these policies should be funded, who

¹ Communications Act of 1934, as amended [47 U.S.C.151 *et seq.*].

² See <http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx>.

³ For a discussion of issues relating to broadband deployment, access, and regulation see CRS Report R40230, *The Evolving Broadband Infrastructure: Expansion, Applications, and Regulation*, by Patricia Moloney Figliola, Angele A. Gilroy, and Lennard G. Kruger.

should receive the funding, and how to ensure proper management and oversight of the Fund are among the issues expected to frame the policy debate.

The Universal Service Concept

Since its creation in 1934 the Federal Communications Commission (FCC, or Commission) has been tasked with “mak[ing] available, so far as possible, to all the people of the United States, ... a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges....”⁴ This mandate led to the development of what has come to be known as the universal service concept.

The universal service concept, as originally designed, called for the establishment of policies to ensure that telecommunications services are available to all Americans, including those in rural, insular and high cost areas, by ensuring that rates remain affordable. During the twentieth century, government and industry efforts to expand telephone service led to the development of a complex system of cross subsidies to expand the network and address universal service goals. The underlying goal of the cross-subsidization policy was to increase the number of subscribers to the network by shifting costs among network providers and subscribers. Profits from more densely populated, lower cost urbanized areas helped to subsidize wiring and operation costs for the less populous, higher cost rural areas. Higher rates and equipment charges for business and long distance customers helped to subsidize the charges for residential local calling. The funding for universal service objectives was built into the rate structure, and effectively most telephone subscribers have contributed to universal service goals for decades.⁵

With the advent of competition and the breakup of the Bell System, the complex system of cross subsidies that evolved to support universal service goals was no longer tenable. The Telecommunications Act of 1996 (P.L. 104-104; 47 USC) codified the long-standing commitment by U.S. policymakers to ensure universal service in the provision of telecommunications services (Sec. 254). The 1996 Act also required that every telecommunications carrier that provides interstate telecommunications services be responsible for universal service support [Sec. 254(d)] and that such charges be made explicit [Sec. 254(e)].⁶ The 1996 Act also expanded the concept of universal service to include, among other principles, that elementary and secondary schools and classrooms, libraries, and rural health care providers have access to telecommunications services for specific purposes at discounted rates [Sec. 254(b)(6) and 254(h).]

The Federal Universal Service Fund

Over the years this concept fostered the development of various FCC policies and programs to meet this goal. A new federal Universal Service Fund (USF or Fund) was established in 1997 to meet the specific objectives and principles contained in the 1996 Act. The USF is administered by the Universal Service Administrative Company (USAC), an independent-not-for-profit

⁴ Communications Act of 1934, as amended, Title I sec.1[47 U.S.C. 151].

⁵ Specific federal programs such as the Rural Telephone Bank and Rural Utilities Service loan programs were also developed to assist high cost rural areas.

⁶ Sec. 254 (d) also states that other providers of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if it is in the public interest.

organization, under the direction of the FCC. The FCC, through the USF, offers universal service support through a number of direct mechanisms that target both providers of and subscribers to telecommunications services.⁷ The USF provides support and discounts for providers and subscribers through four programs: high-cost support; low-income support; schools and libraries support; and rural health care support.⁸

High-Cost Program

High-cost support, provided through the high cost program, is an example of provider-targeted support. Under the high cost program, eligible telecommunications carriers, usually those serving rural, insular, and high cost areas, are able to obtain funds to help offset the higher than average costs of providing telephone service.⁹ This mechanism has been particularly important to rural America where the lack of subscriber density leads to significant costs.

Low-Income Program

FCC universal service policies have been expanded to target low-income subscribers. Two income-based programs, Lifeline and Link-Up, established in the mid-1980s, were developed to assist economically needy individuals. The Link-Up program, established in 1987, assists low-income subscribers pay the costs associated with the initiation of telephone service, and the Lifeline program, established in 1984, assists low-income subscribers pay the recurring monthly service charges incurred by telephone subscribers.¹⁰

Schools and Libraries or “E-Rate” Program

Under universal service provisions contained in the 1996 Act, elementary and secondary schools and classrooms, and libraries are designated as beneficiaries of universal service discounts. Universal service principles detailed in Section 254(b)(6) state that “Elementary and secondary schools and classrooms ... and libraries should have access to advanced telecommunications services....” The act further requires in Section 254(h)(1)(B) that services within the definition of universal service be provided to elementary and secondary schools and libraries for education purposes at discounts, that is at “rates less than the amounts charged for similar services to other parties.”

The FCC established the Schools and Libraries Division within the Universal Service Administrative Company (USAC) to administer the schools and libraries or “E (education)-rate” program to comply with these provisions. Under this program, which became effective, January 1, 1998, eligible schools and libraries receive discounts ranging from 20 to 90 percent for telecommunications services depending on the poverty level of the school’s (or school district’s)

⁷ Many states participate in or have programs that mirror FCC universal service mechanisms to help promote universal service goals within their individual states.

⁸ For further information on the FCC’s universal service support mechanisms see <http://www.fcc.gov/cgb/consumerfacts/universalservice.html>.

⁹ The High-Cost Fund consists of five sub-funds which address specific needs: High-Cost Loop Support; High-Cost Model Support; Local Switching Support; Interstate Common Line Support; and Interstate Access Support.

¹⁰ Support is not given directly to the subscriber but to their designated telecommunications service provider, who in turn charge these subscribers lower rates.

population and its location in a high cost telecommunications area. Three categories of services are eligible for discounts: internal connections (e.g., wiring, routers and servers); Internet access; and telecommunications and dedicated services, with the third category receiving funding priority. Unlike the high-cost and low-income programs, the FCC established a yearly ceiling, or cap, of \$2.25 billion for this program.

Rural Health Care Program

Section 254(h) of the 1996 Act requires that public and non-profit rural health care providers have access to telecommunications services necessary for the provision of health care services at rates comparable to those paid for similar services in urban areas. Subsection 254(h)(1) further specifies that “to the extent technically feasible and economically reasonable” health care providers should have access to advanced telecommunications and information services. The FCC established the Rural Health Care Division (RHCD) within the USAC to administer the universal support program to comply with these provisions. Under FCC-established rules only public or non-profit health care providers are eligible to receive funding. Eligible health care providers, with the exception of those requesting only access to the Internet, must also be located in a rural area.¹¹ Similar to the Schools and Libraries program, this support program went into effect on January 1, 1998, and a funding ceiling, or cap, was established, in this case at \$400 million annually. The primary use of the funding is to provide reduced rates for telecommunications and information services necessary for the provision of health care.¹²

Funding

The USF receives no federal monies but is funded by mandatory contributions from telecommunications carriers that provide interstate service.¹³ Under current rules, a carrier’s contributions are assessed based on a percentage of its interstate and international end-user telecommunications revenues. This percentage is called the contribution factor. The FCC calculates the contribution factor based on anticipated funding needs of the USF in the upcoming quarter. This information is submitted quarterly, to the FCC, by USAC’s universal service administrator. The contribution factor is calculated four times a year, on a quarterly basis, and may increase, decrease, or remain the same depending on the needs of the universal service programs drawing on the USF. The FCC’s Wireline Competition Bureau releases a public notice stating the proposed factor. After 14 days, absent any FCC action, the factor becomes final. As shown in **Table A-1**, from 2002 to the first half of 2005 the contribution factor generally saw a steady increase. During that period the contribution factor varied from a low of 6.8% in the first quarter of 2002 to a high of 11.1% in the second quarter of 2005. Since reaching that high, the factor had begun to moderate; however, the contribution factors for the second and third quarters of 2007, at 11.7% and 11.3% respectively, were a strong reversal of this trend, resulting in a significant increase from the first quarter 2007 contribution factor of 9.7%. Since reaching a high

¹¹ Any health care provider that does not have toll-free access to the Internet can receive support. Support is available for limited long distance charges for accessing the Internet. This has become an increasingly rare occurrence, however, and the last time such support was given was in 2001.

¹² For additional information on this program, including funding commitments, see the RHCD website: <http://www.universalservice.org/rhc/>.

¹³ These companies include wireline telephone companies, wireless telephone companies, paging service providers and interconnected Voice over Internet Protocol (VoIP) providers.

of 11.7% the contribution factor began to moderate with a first quarter 2008 factor of 10.2%. However the contribution factor has once again begun to climb reaching an historic high of 12.9% for the third quarter of 2009. The overall growth in the factor over this decade remains a significant policy concern. (See the “Policy Options” section of this report for a discussion of some of the reasons attributed to this increase.)

There are some exceptions to this funding process. Under the FCC’s rules telecommunications providers are not required to contribute in a given year to universal service if their annual contributions to the program would be de minimis, that is less than \$10,000 in that year, or if they provide only international services. Filers are also not required to contribute based on international revenues if their interstate end-user revenues meet the 12% rule, that is, if their interstate end-user revenues represent less than 12% of their combined interstate and international end-user revenues. In other cases the FCC has determined that selected categories of providers, for example, wireless carriers and interconnected VoIP providers, may, but are not required to, base their contributions on an FCC-established revenue percentage, or “safe harbor,” that attempts to estimate the percentage of the provider’s total revenues that are interstate and international end-user revenues.¹⁴ The current (effective June 2006) safe harbor for wireless carriers and VoIP providers is set at 37.1% and 64.9% of total revenues, respectively.¹⁵

Many assessed providers have chosen, but are not required, to recover USF contributions directly from their customers. They pass through universal service payments directly to consumers and earmark a universal service charge on subscriber’s bills. This is legal and a common industry practice. However, if an assessed provider does choose to collect USF fees directly from their customers the provider is not permitted to recover, through a federal universal service line item on a customer’s bill, an amount that exceeds the universal service charge contribution factor.¹⁶

Disbursements

According to USAC, universal service support disbursements for calendar year 2008 totaled \$7.1 billion.¹⁷ **Figure 1**, below, shows the breakdown of calendar year 2008 USF disbursements as a percentage by individual program. High Cost support accounted for 63.0% of total disbursements, or \$4.5 billion. Schools and Libraries support represented 24.8% of disbursements, totaling \$1.8 billion. Low Income support was 11.5% of disbursements, totaling \$819.3 million. Commitments for Rural Health Care support were \$49.5 million, or 0.7% of disbursements. (It should be noted that disbursements for the schools and libraries support program and the rural health care program operate on a school year calendar and represent commitments as of December 31, 2008, for the funding year which runs from July 1-June 30. Therefore, these figures do not represent the full

¹⁴These providers have expressed concern over their inability to distinguish between their interstate and intrastate revenues. However, in lieu of using the safe harbor percentage they do have the option to submit traffic study data to show that they should contribute less.

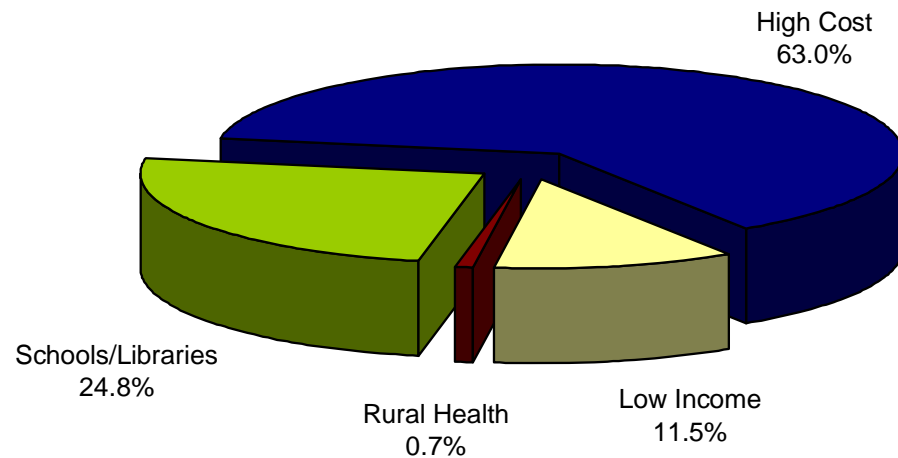
¹⁵ *FCC Updates Approach for Assessing Contributions to the Federal Universal Service Fund*. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266030A1.pdf.

¹⁶ It should also be noted that an assessed provider is not permitted to collect any fees from a lifeline or link-up subscriber, unless that subscriber has incurred long-distance charges.

¹⁷ These figures are based on USAC 2008 unaudited financial data. Detailed data, including state-specific information, on USF support can be found in the Universal Service Company 2008 Annual Report at http://www.usac.org/_res/documents/about/pdf/USAC-annual-report-2008.pdf.

yearly commitment made to these programs.) Although subscribers benefit from the USF, only companies that provide the services draw money directly from the fund.

Figure I. USF Disbursements by Program 2008



Source: Data from USAC 2008 Annual Report (unaudited data).

Table A-2 provides data on USF payments and contributions broken down by state and program for 2007. The data show that service providers (and their subscribers) in every state, territory, and commonwealth received, to varying degrees, some 2007 USF payments. For example, all received at least some payments from the Low Income program, all with the exception of the District of Columbia received support from the High Cost program, and all, with the exception of American Samoa and Guam, received support from the Schools and Libraries program. The allocation of benefits vary depending on which individual program is examined. However, when overall net dollar flow¹⁸ is examined 24 states and the District of Columbia were net contributors to the 2007 USF program as a whole. The service providers in the remaining 26 states and 5 territories were net receivers, that is they received more payments from the USF, for 2007, than estimated contributions. Although there is some variation within programs and among states in any given year, on the whole whether a particular state is a net receiver of, or contributor to, the USF program, is a fairly stable pattern.¹⁹ In general, rural states with low population density typically tend to benefit most as they receive significant funding from the High Cost program, but

¹⁸ Contribution allocation among states is an FCC staff estimate. Net dollar flow is annual payments minus estimated contributions.

¹⁹ For a breakdown of USF distributions and contributions by state for previous years see Table 1.12 of the FCC's Universal Service Monitoring Report. Monitoring reports issued since 1991 are available at <http://www.fcc.gov/wcb/iatd/monitor.html>.

tend to contribute less to the USF program overall, since they tend to generate lower telecommunications revenues.

Policy Options

The FCC is required to ensure that there be “specific, predictable and sufficient ... mechanisms to preserve and advance universal service.”²⁰ However, changes in telecommunications technology and the marketplace, while often leading to positive benefits for consumers and providers, have had a negative impact on the health and viability of the USF, as presently designed. These changes have led to a growing imbalance between the entities and revenue stream contributing to the fund and the growth in the entities and programs eligible to receive funding. The desire to expand access to broadband and address what some perceive as a “digital divide” has also placed focus on what role, if any, the USF should take to address this issue.²¹

The current policy debate surrounding USF reform has focused on four major concerns: the scope of the program; who should contribute and what methodology should be used to fund the program; eligibility criteria for benefits; and concerns over possible program fraud, waste, and abuse. A separate and more narrowly focused issue, the impact of the Antideficiency Act (ADA) on the USF, also has become an issue of concern.

Program Scope

One of the major policy debates surrounding universal service is whether access to advanced telecommunications services (i.e., broadband) should be incorporated into universal service objectives. The term universal service, when applied to telecommunications, refers to the ability to make available a basket of telecommunications services to the public, across the nation, at a reasonable price. As directed in the 1996 Telecommunications Act [Section 254(c)], a federal-state Joint Board was tasked with defining the services which should be included in the basket of services to be eligible for federal universal service support; in effect using and defining the term “universal service” for the first time. The Joint Board’s recommendation, which was subsequently adopted by the FCC in May 1997, included the following in its universal services package: voice grade access to, and some usage of, the public switched network; single line service; dual tone signaling; access to directory assistance; emergency service such as 911; operator services; access and interexchange (long distance) service.

Some policy makers have expressed concern that the FCC-adopted definition is too limited and does not take into consideration the importance and growing acceptance of advanced services such as broadband and Internet access. They point to a number of provisions contained in the Universal Service section of the 1996 Act to support their claim. Universal service principles contained in Section 254(b)(2) state that “Access to advanced telecommunications services should be provided to all regions of the Nation.” The subsequent principle (b)(3) calls for consumers in all regions of the Nation including “low-income” and those in “rural, insular, and high cost areas” to have access to telecommunications and information services including

²⁰ 47 U.S.C. Sec. 254 (b)(5).

²¹ For a discussion of the issues surrounding the “digital divide” see CRS Report RL30719, *Broadband Internet Access and the Digital Divide: Federal Assistance Programs*, by Lennard G. Kruger and Angele A. Gilroy.

“advanced services” at a comparable level and a comparable rate charged for similar services in urban areas. Such provisions, they state, dictate that the FCC expand its universal service definition.

The 1996 Act does take into consideration the changing nature of the telecommunications sector and allows for the universal service definition to be modified if future conditions warrant. Section 254(c) of the act states that “universal service is an evolving level of telecommunications services” and the FCC is tasked with “periodically” reevaluating this definition “taking into account advances in telecommunications and information technologies and services.”

Furthermore, the Joint Board is given specific authority to recommend “from time to time” to the FCC modification of the definition of the services to be included for federal universal service support. The Joint Board, in July 2002, concluded such an inquiry and recommended that at that time no changes be made in the list of services eligible for universal service support. The FCC, in a July 10, 2003 order (FCC 03-170) adopted the Joint Board’s recommendation, thereby leaving unchanged the list of services supported by Federal universal service. More recently, however, the Joint Board was once again called upon to reexamine this issue and came up with a different conclusion. The Joint Board, on November 19, 2007, recommended that the FCC change the mix of services eligible for universal service support and concluded that “the universal availability of broadband Internet services” be included in the Nation’s communications goals and hence be supported by Federal universal service funds.²² The FCC is not required to adopt Joint Board recommendations, but is given up to one year to complete a proceeding to consider them.²³ (See Joint Board Recommendation and the FCC Response section for a discussion of the Joint Board recommendation issued in November 2007 and the FCC’s response.)

Other policy makers caution that a more modest approach is appropriate given the “universal mandate” associated with this definition. Also at issue is the uncertainty and costs associated with mandating nationwide deployment of such advanced services as a universal service policy goal. Some have expressed concern that given the pressures currently facing the Fund, and their impact on the contribution factor, the inclusion of broadband services, at this time, is taking on too large a mandate. Current policy concerns regarding both the contribution and distribution mechanisms should be addressed first, they state, prior to any expansion of the USF definition. Furthermore, they state, the USF has already taken on limited broadband deployment responsibilities through the E-rate and Rural Health Care programs, and indirectly through the High Cost program, as funding is used to upgrade existing telephone networks. If ubiquitous broadband deployment is a national policy goal, they state, policymakers should not place further stress on the USF program but should seek out other means of achieving this goal which may be more effective, such as providing economic incentives, easing economic regulation, encouraging municipal ownership, expanding other existing programs or establishing a new program.²⁴

²² For a summary of the Joint Board’s recommendations see http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07J-4A1.pdf.

²³ It should be noted that the FCC is not required to implement the recommendations of the Federal-State Joint Board; however, the presence of three FCC commissioners on the Board gives much weight to their recommendations.

²⁴ For example, provisions contained in the American Recovery and Reinvestment Act (P.L. 111-5) call for the disbursement of \$7.2 billion in broadband funding, and the USDA’s Rural Utilities Service has a broadband loan and grant program for rural areas. For information on these programs see CRS Report R40436, *Broadband Infrastructure Programs in the American Recovery and Reinvestment Act*, by Lennard G. Kruger and CRS Report RL33816, *Broadband Loan and Grant Programs in the USDA’s Rural Utilities Service*, by Lennard G. Kruger.

Contribution Methodology

One of the major policy questions surrounding USF reform is to what degree, if any, there should be a change in the way the program is funded. A consensus has been forming that some reform to broaden the contribution base is needed. How this should be accomplished, however, remains open to debate. Proposals range from modest options to expand the existing funding base, to broadening the base to include *intrastate* revenues, to calling for a complete restructuring of the contribution methodology.

Expanding the Base

One option is to broaden the base of entities that must contribute to the Fund, by calling for technology neutral funding. The FCC has taken a number of actions, over the years, to expand the pool of contributors, thereby broadening the base of entities supporting the Fund.²⁵ For example, in 1998 the FCC established a revenue percentage, or safe harbor, of 15% of revenues for determining the USF contribution for wireless carriers. That percentage has been increased twice since and is currently set at 37.1%. In a June 2006 decision, the FCC further expanded the pool of contributors by requiring that providers of interconnected VoIP contribute to the USF.²⁶ Some policy makers have recommended that the list of providers be expanded to include broadband providers which were removed from the base when the FCC ruled that Internet access services are information services, not telecommunications services. However, they generally recommend that this expansion be contingent on the understanding that USF support be used to upgrade the telecommunications infrastructure to include broadband capabilities.

Intrastate Revenues

Another proposal calls for broadening the revenue base by assessing fees on *intrastate* as well as interstate/international revenues. Although this would provide an additional source for USF funds, many state that this option may not be available absent Congressional action to specifically designate intrastate revenues as a source for federal USF contributions. The recommendation for specific Congressional clarification is based, to a large part, on a successful court challenge of an earlier attempt by the FCC to collect support for the E-rate program based on combined interstate and intrastate revenues. In the case of *Texas Office of Public Utility Counsel v. FCC* (183F.3d; 393;1999) the United States Court of Appeals, 5th Circuit concluded that “the agency (FCC) exceeded its jurisdictional authority when it assessed contributions for sec. 254(h), ‘schools and libraries’ programs based on combined intrastate and interstate revenues of interstate telecommunications providers and when it asserted its jurisdictional authority to do the same on behalf of high-cost support.” Proponents of including intrastate revenues cite technological and marketplace changes which have eroded the distinction between interstate and intrastate services as well as the growth of combined calling plans in support of such action. Some, however, have expressed concern over the potential negative impact that the inclusion of intrastate revenues may

²⁵ However, it should be noted that in a reversal of this trend, the FCC, in an August 2005 decision, exempted digital subscriber line (DSL) service from USF assessments on the basis of its August 2005 “information service” classification.

²⁶ See *FCC Updates Approach For Assessing Contributions To The Federal Universal Service Fund*, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266030A1.pdf.

have on state-supported USF programs since many are funded by intrastate telecommunications revenues.

Numbers or Connections

Another proposal calls for a shift in the basis of support away from revenues to a completely new methodology based on working numbers or connections. Under this proposal contributions for USF would be assessed based on a monthly flat fee, or charge, per working telephone number. Since users need a discrete number to connect to the public switched network, supporters claim this proposal would lead to a more stable assessment, would be technologically neutral, would spread contributions over a broader base, and would be easier to administer.²⁷ Opponents, however, state that using a numbers-based approach shifts the burden of USF from high volume users directly to all subscribers as a regressive fixed charge. This, they state, not only adds a financial burden on low volume subscribers, who may be elderly, and/or on low and fixed incomes, but could possibly lead to subscriber drop-off, thereby defeating the purpose of the USF program.²⁸

Distribution Methodology

Another major issue facing USF reform concerns the eligibility criteria used to distribute USF funds. Over the past decade (1998-2008) annual USF receipts have grown from \$2.3 billion to an estimated \$7.1 billion and the contribution factor needed to support this growth has more than doubled to reach 11.3 percent for the second quarter of 2009. This significant rise in the funding level, and subsequently the contribution factor, has led to an examination of the Fund's eligibility criteria and distribution methodology as concerns have been voiced over the long term sustainability of the Fund and the cost burden it imposes on contributors.

Examination of USF program revenue flows, since 2003, shows that three of the four programs, Low Income, Schools and Libraries, and Rural Health Care, have been relatively stable. However, the High Cost program has experienced significant growth (36.8%), with disbursements increasing from \$3,273.2 million to \$4,477.8 million over the five year (2003-2008) period; and as a result, is the major factor contributing to the USF's recent overall growth. Within the High Cost program the growth can be traced to support given to competitive eligible telecommunications carriers. For example, payments for competitive eligible telecommunications carriers, which are largely wireless carriers, increased from \$1 million in 2000, to \$126.7 million in 2003, but are estimated by USAC to total almost \$1.4 billion for 2008. On the other hand, while incumbent eligible telecommunications carriers still receive the majority of funds from the High Cost program, revenues disbursed in 2003 and 2008 decreased from \$3.2 billion to \$3.1 billion.²⁹

²⁷ For a more detailed discussion supporting this proposal see The USF by the Numbers Coalition, *The Benefits of a Numbers-Based Collection for Universal Service*. Available at http://files.ctia.org/pdf/PositionPaper_numberscoalition_USF.pdf.

²⁸ For a more detailed discussion opposing a numbers-based proposal see *Losing Numbers: How America's Most Vulnerable Consumers Could Suffer Under Universal Service Fund Reform*. Available at <http://keepusffair.org/KeepUSFFair/resources.html>.

²⁹ More specifically, High Cost program revenues disbursed between 2003 and 2008 to incumbents decreased from \$3,234.9 million to \$3,093.3 million. USF fund data taken from USAC annual reports available at <http://www.usac.org/about/governance/annual-reports/>.

Hence, most policy discussions regarding the distribution methodology focus on proposals to stem the growth of the High Cost Program by limiting eligibility criteria and/or controlling the amount of funding disbursed. A variety of proposals, to be used on their own or in combination, are being discussed including limiting USF support to a single line per household, eliminating the “identical support rule,” using reverse auctions to determine eligibility, placing a cap (or ceiling) on funds, and improving targeting.

Primary or Single Line Limitation

As presently designed, USF support is available to multiple lines per household. Some policy makers have proposed that one way to curb the increase in funding requirements is to limit eligibility criteria. USF funding, they state, should be limited to a single or primary line, not multiple access.³⁰ The universal service mandate, they claim, is not to artificially construct a competitive marketplace with multiple carriers in areas that are not able to support a single carrier, but to ensure that high cost areas receive service at a reasonable rate. The use of USF funds to support multiple carriers in high cost areas, they claim, is an abuse of funds and places unnecessary strain on those supporting the program. Others, however, have argued that limiting USF support to a single provider relegates those areas to a lower standard, which does not fulfill the universal service principle to afford consumers in rural, insular and high cost areas, access to telecommunications and information services that are “reasonably comparable to those services provided in urban areas ... ”(Sec. 254 [b] [3]). High cost areas, they state, should have the benefits and choices of competition and the opportunity to select from a variety of providers just like other regions of the nation. Line limitations, opponents state, will only discourage investment in rural infrastructure.

Reverse Auctions

One proposal under consideration for selecting an eligible carrier is the use of reverse auctions, or competitive bidding. Under this method a geographic area would be designated as high cost, providers interested in offering service would be asked how little universal service support they would need to provide service and the provider that submits the *lowest* bid, all else equal, would receive the funds.³¹ This approach, in theory, would result in a decrease in funding for High Cost support since it would be based on low bids submitted by providers instead of on the current method that is based on the embedded costs of the incumbent telecommunications provider in the area. This, supporters claim, will lead to the use of the most efficient technology and will relieve the growing pressure on USF funds. However, there is no single methodology that must be used and the reverse auction concept could be designed in a number of ways and impose a variety of requirements and obligations. For example, some support a phased-in approach to reverse auctions where it is used solely to select a competitive carrier for an area while the designated incumbent eligible telecommunications carrier remains under the present system indefinitely, or for a specific time period. Others suggest that an auction system could reward the lowest bidder

³⁰ It should be noted, however, that the 109th, 110th, and 111th Congresses enacted legislation prohibiting the FCC from using any of its appropriated funds to change its rules, or regulations, to limit USF support payments to a single connection, or primary line (P.L. 109-108, Title VI, Sec. 622; P.L. 110-161, Title V, Sec. 511; and P.L. 111-8, Title V, Sec. 502).

³¹ The provider would be required to meet certain “carrier of last resort” obligations, which would be detailed when the bids are solicited. For example, the carrier would be required to offer a specific package of services and provide that service to the entire designated service area (regardless of cost), and would have to meet interconnection mandates.

with the most support, but still give other participants some limited support. Still others suggest the establishment of a pilot program to test for successes and/or unintended consequences. On the other hand, others have expressed reservations about adopting reverse auctions stating that many questions remain about how to implement reverse auctions, how to administer the costs associated with their adoption, and the long term impact they would have on consumers as well as providers. Concerns were also expressed that a reverse auction would not create a favorable environment for network investment possibly resulting in stranded investment, erratic funding, and ultimately inferior networks.

Identical Support Rule

The criteria used for the distribution of funds for the High Cost program has also come under scrutiny. High Cost program fund distribution is based on what is known as the “identical support rule.” Under this rule funds are distributed to competitive eligible telecommunications carriers based on the embedded costs, or per line support, of the incumbent carrier. Typically the incumbent carrier is a wireline carrier while the competitive carrier is a wireless carrier. The infrastructure costs associated with the investment and maintenance of a wireline system are generally significantly higher than those associated with a wireless system. Therefore some have questioned whether basing funding levels on the incumbent carrier’s costs, particularly when support is based on a more expensive infrastructure, is reasonable, or even fair. Switching to a more refined distribution methodology, more reflective of a carrier’s actual costs they claim, would help to alleviate some of the pressure facing funding of the High Cost program. Furthermore they state, it is anticipated that the growth in competitive eligible telecommunications carriers will be increasing based on the number of applications pending at the FCC, and that therefore addressing this issue is of growing significance.

Capping

Some have also proposed placing a cap, as a temporary or permanent measure, on the funds available for distribution to competitive eligible telecommunications carriers through the High Cost program. Supporters of capping claim that it will prevent the uncontrolled growth of this part of the High Cost program, which is the major contributor to the overall growth in the USF. In turn they state, this will bring stability to the Fund and the USF contribution factor. They note that both the E-rate and the Rural Health Care programs operate under yearly caps, and with the exception of the Low Income program which has been relatively stable, the High Cost program is the only program with no built-in restraints on its growth. Others however are opposed to implementing a cap. They point out that placing a cap on an existing program, such as the High Cost program, could lead to confusion and be very disruptive. The dynamic, they state, is very different than capping programs, such as the E-rate and Rural Health Care, at their inception. The High Cost program, they claim, is an ongoing program responsible for providing basic voice service and connection to the network, a fundamental tenet of the universal service mandate. The placing of a cap on this program, they claim, could have significant unintended consequences which could undermine universal service goals.

The federal-state Joint Board recommended that the FCC immediately impose an interim cap on a portion of the high cost fund.³² More specifically the Joint Board, in a May 1, 2007 action, issued

³² *Joint Board Recommends Cap On High-Cost Fund*. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/ (continued...)

a recommendation that the FCC place an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers receive for each state from the High Cost program. The Joint Board recommended that the support be based on the average level of competitive eligible telecommunications carrier support distributed in that state in 2006 and that the interim cap apply until one year from the date that it makes its recommendation regarding comprehensive USF reform. This is seen as a temporary measure to curb the growth of the High Cost program until more permanent action can be taken to reform the USF. The FCC, in a May 11, 2007 action, adopted a notice of proposed rulemaking³³ seeking comment on this recommendation; comments and reply comments were received in June 2007.

On May 1, 2008, the FCC adopted, by a 3-2 vote, an interim cap on payments to competitive eligible telecommunications carriers to the High Cost fund. Total annual support is capped, with some limited exceptions,³⁴ at the level of support received in each state, during March 2008, on an annualized basis. The decision went into effect August 1, 2008, and will remain in place only until the FCC adopts comprehensive high cost universal service reform.³⁵

Improved Targeting

An additional proposal calls for making a better effort to target areas of need by using better mapping technology (geographic information systems or GIS) or modeling to determine support for eligible telecommunications carriers. Some claim that the designated areas for support are too large and cover areas which might not be in need of USF support. Designating areas for USF support that do not need such subsidies only encourages the influx of eligible carriers into areas that they might choose to enter absent such support, they claim, and leads to the use of funds which may be more appropriately used elsewhere. Taking a more refined and precise approach, they state, will result in using funds more effectively in areas that truly need support. While most support such efforts, many see such proposals to be more long term efforts which are still under development.

Fraud, Waste, and Abuse

Directly related to the funding issue are concerns expressed by policy makers over the potential for possible fraud, waste, or abuse of the program. While all USF programs have the potential for mismanagement, the E-rate program, “due to its materiality and an initial assessment of its potential for waste, fraud, and abuse ...”³⁶ was initially singled out for particular attention. The ability to ensure that only eligible services are funded, that funding is disbursed at the proper

(...continued)

DOC-272806A1.pdf.

³³ *In the Matter of High-Cost Universal Service Support and Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, released May 14, 2007. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-88A1.pdf.

³⁴ Competitive eligible telecommunications carriers that serve tribal lands or Alaska Native regions and competitive telecommunications carriers that file their own cost data will not be subject to a cap.

³⁵ For further information see the FCC’s adopted order available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-122A1.pdf. For a summary and discussion of this order see *Federal Register*, Vol. 73, No. 128, July 2, 2008, p. 37882.

³⁶ Federal Communications Commission Office of the Inspector General, Semiannual Report to Congress, April 1, 2006—September 30, 2006, p.8. Available at <http://www.fcc.gov/oig/oigreportssemiannual.html>.

level of discount, that alleged services have been received, and the integrity of the competitive bidding process is upheld have been questioned. A series of Government Accountability Office (GAO) reports raising concerns about the financial oversight of the E-rate program prompted additional Congressional scrutiny.³⁷ The USAC, as the administrator responsible for the management and oversight of the USF, initiated a number of measures to address specific E-rate concerns and extended them to all USF programs. These measures include establishing a whistleblower hotline to report violations and conducting random and targeted audits of USF program participants and contributors.

In August 2007 the FCC adopted a series of measures to safeguard the USF to deter fraud, waste, and abuse. Included in the measures taken are those that extend the debarment rules (three years) and sanctions for criminal and civil violations beyond the Schools and Libraries Program to cover all four programs; tighten rules requiring timely payments and assessing penalties or interest for late payments on USF contributors; and increase record keeping requirements for both contributors and beneficiaries. In addition the FCC, as recommended by the GAO, adopted performance measures, for all four programs and for USAC.³⁸

A GAO report focusing on the USF's High Cost Program was released in July 2008. The report, *FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program*, noted that the "FCC has not established performance goals or measures [for the Program]." Furthermore, the GAO stated "In the absence of performance goals and measures, the Congress and the FCC are limited in their ability to make informed decisions about the future of the high-cost program." Although the GAO acknowledged that "the FCC has begun preliminary efforts to address these shortcomings," problems with these efforts still exist.³⁹

The FCC, in an August 15, 2008 action, adopted a Notice of Inquiry (NOI) seeking public "comment on ways to further strengthen management, administration, and oversight of the USF ... define more clearly the goals of the USF ... identify any additional quantifiable performance measures" and "comment on whether, and if so, to what extent the Commission's oversight of the USF can be improved."⁴⁰ Citing the steps the FCC has already taken to strengthen its oversight and management of the Fund, and the recent benefits and improvements that have been made, the FCC, however, acknowledged both the demand for "constant scrutiny and assessment of the Commission's oversight efforts" as well as the GAO's July 2008 recommendation that the FCC take steps to improve its oversight of the USF. This NOI has been initiated, according to the FCC, to continue to assess and solicit public input to develop additional rules and safeguards to protect the Fund.

The FCC's Office of the Inspector General (OIG) has also been active in pursuing oversight of the USF focusing initially on the E-rate program. Since 2002 the OIG has included in its semi-

³⁷ For example, see *Schools and Libraries Program: Actions Taken to Improve Operational Procedures Prior to Committing Funds* (March 1999) GAO/RCED-99-51; *Schools and Libraries Program: Application and Invoice Review Procedures Need Strengthening* (December 2000) GAO-01-105; *Schools and Libraries Program: Update on E-Rate Funding* (May 2001) GAO-01-672; *Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program* (February 2005) GAO-05-151. Available at <http://www.gao.gov/docsearch/topic.php>.

³⁸ For a summary of this final rule see *Federal Register*, Vol. 72, No.184, September 24, 2007, p. 54214.

³⁹ This report is available at <http://www.gao.gov/new.items/do8633.pdf>.

⁴⁰ See *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, released on September 12, 2008, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-189A1.pdf.

annual reports coverage of its specific efforts to oversee E-rate program activity, including audits, to ensure program integrity.⁴¹ More recently, however, the OIG has also expanded its audit efforts to include the remaining three USF programs and audits of USF contributors.

In 2006, USAC took additional action by initiating with the OIG “a large-scale beneficiary audit program” covering all four USF programs and planned to “conduct more than 450 audits of program beneficiaries and contributors.”⁴² The result of this audit, which was comprised of 459 audits of USF program participants for beneficiaries of all four programs and contributors to the USF, was released by the OIG in October 2007. According to the OIG analysis of the audits, which covered beneficiaries of all four programs as well as contributors,

in general the audits indicated compliance with the [FCC’s] rules, although erroneous payment rates exceeded 9% in most USF program segments. The audit resulted in the following erroneous payment rates: contributors payments, 5.5% (\$385,000,000); Low Income, 9.5% (\$75,500,000); Schools and Libraries, 12.9% (\$210,000,000); High Cost, 16.6% (\$618,000,000) and Rural Health Care, 20.6% (\$4,450,000).⁴³

It should be noted that an “erroneous payment” as defined by OMB, is “any payment that should not have been made or that was made in an incorrect amount ...” which includes overpayments, underpayments and the inappropriate denial of a payment or service.⁴⁴

Despite this activity, however, the OIG continues to cite the need for additional resources, stating that “Although we have made progress in achieving the goal of establishing a more effective oversight program, we need significant increases in audit, investigative, and legal resources to achieve the goal of having a truly effective oversight program.”⁴⁵ The FCC’s Enforcement Bureau is the primary entity within the FCC tasked with enforcing the provisions of the Communications Act, including those related to Section 254 (universal service). The Enforcement Bureau pursues violators and initiates enforcement actions including notices of liability, suspensions, consent decrees, and debarments.⁴⁶

The Department of Justice (DOJ) has also taken an active role in pursuing instances of deliberate fraud related, in particular, to the E-rate program. The Antitrust Division of the DOJ has established a task force to investigate E-rate fraud and has prosecuted a number of individuals and companies leading to fines, restitution, program debarments, and imprisonment.⁴⁷

⁴¹ Semiannual Reports issued by the FCC’s OIG are available at <http://www.fcc.gov/oig/oigreportssemiannual.html>.

⁴² USAC 2006 Annual Report, p.11. Available at http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2006.pdf.

⁴³ FCC Office of the Inspector General Semiannual Report to Congress, April 1, 2007 -September 30, 2007, p. 17. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278589A1.pdf. For a detailed analysis of the OIG audit see FCC Office of the Inspector General, *Initial Statistical Analysis of Data from the 2006/2007 Compliance Audits*, October 3, 2007. Available at <http://www.fcc.gov/oig/> under release date October 3, 2007.

⁴⁴ See p. 17, OIG Semiannual Report to Congress, April 1, 2007-September 30, 2007, for the full OMB definition of an “erroneous payment” Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278589A1.pdf.

⁴⁵ FCC Office of the Inspector General Semiannual Report to Congress, April 1, 2007 -September 30, 2007, p. 16. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278589A1.pdf.

⁴⁶ A brief overview of the Enforcement Bureau’s USF enforcement responsibilities and a list of recent enforcement actions is available at <http://www.fcc.gov/eb/usfc/>.

⁴⁷ For example, see *Six Corporations And Five Individuals Indicted In Connection With Schemes To Defraud The Federal E-Rate Program*. Available at http://www.usdoj.gov/opa/pr/2005/April/05_at_169.htm; and *Two New Jersey Executives Agree to Plead Guilty in Nationwide Scheme to Defraud the Federal E-Rate Program*. Available at (continued...)

As was the case in the 110th Congress, it is anticipated that the 111th Congress will continue its review of the USF, and all four of the programs will be subject to oversight to prevent any fraud, waste, or abuse. (See “Congressional Activity,” below, for a discussion of Congressional oversight activities.) Concerns about fraud and abuse are shared by both critics and supporters of the program. For example, critics of the E-rate program have used examples of fraud, waste, and abuse to call for a halt to the program or at a minimum, its suspension until additional safeguards are in place. Supporters also want to ensure the integrity of all four programs since the misuse of funds or unreasonable administrative costs not only leave the program vulnerable to critics, but would only decrease available funding to meet the program’s goals.

Antideficiency Act Compliance

A more narrowly focused policy issue relating to the operation of the USF deals with Antideficiency Act (ADA) compliance. With the guidance of the Office of Management and Budget (OMB) the FCC decided, in August of 2004, that the accounting requirements contained in the ADA should be applied to the operation of the USF. Under this accounting methodology, the government is precluded from incurring obligations prior to the funds being available. E-rate fund commitment letters, which are issued far in advance of actual funds payment, were considered to be obligations. Therefore ADA compliance requires that the funds be on hand to cover obligations and the program was required to have the cash on hand to cover all of the commitment letters. USAC changed the timing of its funds distribution in order to meet this requirement, leading to a temporary four-month suspension (from August through November 2004) of E-rate funding commitments. The temporary halt in the disbursement of E-rate funding commitments, the concern that funding for other USF programs might be disrupted and that compliance might necessitate a significant increase in USF revenues, brought this issue to Congressional attention.

The 108th Congress enacted legislation to provide for a one-year exemption (through December 31, 2005) from the ADA for the USF (P.L. 108-494). Since then the temporary one-year exemption has been extended four times, once to December 31, 2006, in conjunction with the Science, State, Justice, and Commerce appropriations measure (P.L. 109-108); again for an additional one-year exemption (until December 31, 2007) as part of the CR2007 (H.J.Res. 20; P.L. 110-5); once again a one year extension (until December 31, 2008) as part of the Consolidated Appropriations Act of 2008 (H.R. 2764; P.L. 110-161); and most recently an extension until December 31, 2009, as part of the 2009 Omnibus Appropriations bill (H.R. 1105; P.L. 111-8). Whether the USF program should be required to comply with the accounting provisions contained in the ADA and if so what consequences that may have for USF programs is expected to continue to be an issue. Once again this exemption will expire at the close of the first session of the 111th Congress and Congress may choose to address this issue in a variety of ways. It may continue to enact legislation to provide short-term relief by extending the temporary exemption. Also it could choose to enact legislation, such as S. 348, to provide the USF program with a permanent exemption from ADA requirements, or it may choose to take no further action allowing the temporary exemption to expire, thereby requiring the FCC to ensure, through whatever steps it deems necessary, that the USF is in full compliance with ADA requirements.

(...continued)

http://www.usdoj.gov/opa/pr/2008/April/08_at_334.html

The FCC has resolved, at least temporarily, any compliance problems. Former FCC Chairman Martin, in response to questioning during his September 2006 Senate confirmation hearing, stated that the Commission has concluded that the ADA does apply to the USF. However, he assured Commerce Committee members that funds will be sufficient and that E-rate program commitment letters will not be delayed.⁴⁸ Some, however, have continued to express concern that the actions taken by the FCC are only temporary and that ADA compliance may jeopardize disbursements for not only the E-Rate program, but possibly other USF programs, and may cause a significant increase in the contribution factor.

Joint Board Recommendation and the FCC Response

In 2004 the FCC asked the Joint Board to review the FCC's rules relating to the high-cost universal support mechanisms for rural carriers. In May 2007, the Joint Board recommended that the FCC impose, as a temporary measure, an interim emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers receive for each state from the High Cost program to halt the increasing growth of the High Cost Fund. (See the Capping section for more details.) Concurrent with that action the Joint Board committed to forwarding a more comprehensive recommendation to the FCC within six months.

Joint Board Recommendation

The Joint Board, on November 20, 2007, forwarded its further recommendation for comprehensive high-cost universal service reform to the FCC.⁴⁹ Included among the Joint Board's recommendations are those which expand the scope of the universal service basket of services, and propose fundamental change to the USF High Cost Fund.

The Joint Board recommended that the definition of the basket of services eligible for universal service support be expanded beyond the current basic voice telecommunications services to include the universal availability of: mobility services (defined as wireless voice); and broadband Internet services, at affordable and comparable rates for all rural and non-rural areas. However, unlike currently where an eligible telecommunications carrier must provide all supported services to receive support, under the proposed system a carrier is not required to offer all three services (voice, mobility, and broadband) in order to receive any high-cost support.

The recommendation also calls for the High Cost Fund to be restructured and capped over an unspecified transition period. The current High Cost fund would be divided into three separate funds: a broadband fund, a wireless mobility fund, and a provider-of-last-resort fund. Each fund would have a separate distribution mechanism and a separate funding allocation. Combined funding for the three would be capped at \$4.5 billion, which is approximately equal to the 2007 level of high-cost funding, and would be distributed in the following manner: the broadband fund

⁴⁸ Remarks by former Chairman Martin during confirmation hearings before the Senate Commerce, Science and Transportation Committee, September 12, 2006.

⁴⁹ See *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service* released on November 20, 2007 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07J-4A1.pdf.

at \$300 million; the wireless fund at \$1.0 billion; and the provider-of-last-resort fund at \$3.2 billion.⁵⁰ The states, pursuant to federal rules, would be given a major role in the administering and awarding of funds from both the broadband and mobility funds; however, USAC would process and audit the funds. Funding grants for all three funds would be awarded to only one provider in any geographic area.

Recommendations regarding the provider-of-last-resort fund, which would replace the legacy support systems for incumbent local exchange carriers, were more general in nature as agreement among Board members on specific changes was not reached. However, the Board did recommend that this fund be comprised of the sum of all current incumbent local exchange carrier support systems and for the present, generally remain intact. The Board did recommend that the FCC establish a process and timetable to review and modernize the existing high-cost mechanisms and develop “a coherent system that can be applied to all incumbent carriers” (para. 23).

Furthermore, the Joint Board recommended that the identical cost rule be eliminated. The Joint Board concluded that “it is no longer in the public interest to use federal universal service support to subsidize competition and build duplicate networks in high-cost areas” (para. 35). It was noted that many of the wireless carriers currently receiving support through the identical support rule will be eligible to receive support from the mobility fund (para. 28). (See “Identical Support Rule” section for a further discussion.)

The Joint Board also recommended that the FCC seek further comment on changing the distribution methodology for high-cost funds to an auction mechanism. While not specifically endorsing the use of reverse auctions, the Joint Board did state that reverse auctions “may offer advantages over current high-cost distribution mechanisms” (para. 6). Details on how such a process should be implemented were left up to the FCC.

The Joint Board also recommended that the FCC seek further public comment on a host of additional issues. Those issues that the Joint Board felt needed additional comment include what the most effective mechanism is to determine the appropriate allocation of broadband and mobility funds among the states; the most effective method to determine unserved areas for broadband and wireless coverage; the appropriate level of broadband service for which universal service support would be eligible; whether Low-Income program participants will be negatively affected by these recommendations; how to implement and the appropriate number of years to transition to the new structure and when a review of the transition process should occur; and whether any aspects of the three funds approach would require reconciliation with federal law.

FCC Response

In response to the Joint Board recommendation the FCC, on January 29, 2008, released three notices of proposed rulemaking dealing with specific aspects of universal service. These notices request public comment⁵¹ on a host of issues facing universal service reform including elimination of the identical support rule, the use of reverse auctions for the distribution of high

⁵⁰ The Joint Board anticipates that over the long term total funding levels can and should be decreased as broadband and wireless infrastructure deployment becomes widespread (para. 26).

⁵¹ Comments were due May 5, 2008 with replies due June 2, 2008.

cost universal service funds; and the comprehensive reform of the high cost universal service support mechanism.

The identical support rule notice of proposed rulemaking (FCC 08-4) seeks public comment on the FCC's tentative conclusions that the identical support rule be eliminated; and that the current system of supporting competitive eligible telecommunications carriers based on the costs of incumbent wireline carriers be replaced by support based on the actual costs the competitive eligible carrier incurs by providing the supported services.⁵² Comment is also sought on the methodologies for determining relevant costs, and other matters relating to how the support should be calculated.

The reverse auctions notice of proposed rulemaking (FCC 08-5) seeks public comment on the merits of using reverse auctions to determine the amount of high-cost universal service support provided to eligible telecommunications carriers serving rural, insular, and high-cost areas.⁵³ The FCC tentatively concludes that "reverse auctions offer several potential advantages over current high-cost support mechanisms, and that the Commission should develop an auction mechanism to determine high-cost universal service support" (para. 1).⁵⁴ Comments are sought on the advantages of using a reverse auction mechanism as well as myriad issues relating to auction design and mechanics. Included among such issues are: eligibility requirements for participation; whether there should be a single winner versus multiple winners; how the subsidy should be computed and distributed; the appropriate design of the geographic service area; the definition of the universal service obligation; how to set the "reverse price" (i.e., maximum subsidy level) for the auctioned area; auction design issues such as whether to allow combined bidding, simultaneous round bidding, or a single round sealed bid format; the appropriate length of time between auctions; and whether the FCC should establish a pilot program to test the use of reverse auctions to replace the current high-cost program in a particular area and if so, how it should be implemented. Comment on whether a pilot program to disburse high-cost support targeted to broadband Internet access services is also sought.

A third proposed rulemaking (FCC 08-22) is a broad-based proceeding that seeks comment on the overall Joint Board recommendation, released in November 2007, to amend the high-cost program.⁵⁵ This notice, which also incorporates the two other proposed rulemakings and their subsequent responses, is a comprehensive notice seeking comment on any and all aspects of the recommendation.

⁵² *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-4A1.pdf.

⁵³ *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-5A1.pdf.

⁵⁴ However it should be noted that FCC Commissioners Copps and Adelstein dissented from the tentative conclusion reached in the reverse auctions notice. See the statement of Commissioner Michael J. Copps and the statement of Commissioner Jonathan S. Adelstein attached to the cited notice of proposed rulemaking.

⁵⁵ *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-22A1.pdf.

Congressional Activity: 111th Congress

The House Subcommittee on Communications, Technology, and the Internet held a hearing in March 2009 on reforming the USF High Cost Fund and, according to Subcommittee Chairman Boucher, legislation to address comprehensive reform of the USF is being developed. House Energy and Commerce Committee Chairman Waxman and other Committee members have also indicated that the full Committee will likely examine USF reform. The Committee has requested that the FCC update and expand upon USF data, focusing on the High Cost Fund, that was formerly requested in the 110th Congress by Representative Waxman who at the time was Chairman of the House Oversight and Government Reform Committee.⁵⁶

Action to address the Antideficiency Act (ADA) exemption has also been undertaken. The FY2009 omnibus appropriations bill, which was enacted into law (P.L. 111-8), contained a provision to extend the USF ADA exemption until December 31, 2009. S. 348, introduced January 29, 2009, by Senate Commerce Committee Chairman Rockefeller, and H.R. 2135, introduced April 28, 2009, by Representative Rehberg, provide for a permanent ADA exemption for the USF.

Two additional provisions pertinent to the USF are also contained in P.L. 111-8. One provision prohibits the FCC from using its FY2009 funds to limit USF support to a primary, or single, line. The other provision permits the transfer of up to \$25,480,000 of FY2009 funds from the USF to monitor the USF to prevent and remedy fraud, waste, and abuse, and to conduct audits and investigations by the OIG.

⁵⁶ For a further discussion of this activity see **Appendix B**.

Appendix A. USF Contribution Factors and State Support

Table A-1. Universal Service Fund Contribution Factors

Year	Quarter	Factor
2002	First	6.8%
	Second	7.3
	Third	7.3
	Fourth	7.3
2003	First	7.3%
	Second	9.1
	Third	9.5
	Fourth	9.2
2004	First	8.7%
	Second	8.7
	Third	8.9
	Fourth	8.9
2005	First	10.7%
	Second	11.1
	Third	10.2
	Fourth	10.2
2006	First	10.2%
	Second	10.9
	Third	10.5
	Fourth	9.1
2007	First	9.7%
	Second	11.7
	Third	11.3
	Fourth	11.0
2008	First	10.2%
	Second	11.3
	Third	11.4
	Fourth	11.4
2009	First	9.5%
	Second	11.3
	Third	12.9
	Fourth	

Source: Quarterly Public Notices on universal service contribution factors. Federal Communications Commission.

Table A-2. USF Support by State 2007

Universal Service Support Mechanisms by State: 2007
(Annual Payments and Contributions in Thousands)

State or Jurisdiction	Payments from USF to Service Providers ¹						Estimated Contributions ²		Estimated Net Dollar Flow ³
	High-Cost Support	Low-Income Support	Schools & Libraries	Rural Health Care	Total		Amount	% of Total	
					Amount	% of Total			
Alabama	\$111,459	\$6,524	\$39,411	\$24	\$157,418	2.26%	\$106,499	1.51%	\$50,919
Alaska	161,356	17,305	14,135	19,875	212,671	3.06%	23,008	0.33%	189,663
American Samoa	3,370	59	0	0	3,429	0.05%	356	0.01%	3,073
Arizona	70,919	22,278	48,115	1,196	142,508	2.05%	139,264	1.97%	3,244
Arkansas	126,294	2,950	8,274	41	137,559	1.98%	64,558	0.91%	73,001
California	100,638	272,482	256,555	282	629,957	9.06%	774,218	10.97%	-144,261
Colorado	82,051	3,310	22,627	108	108,096	1.55%	128,698	1.82%	-20,602
Connecticut	1,264	4,645	19,405	0	25,314	0.36%	96,243	1.36%	-70,929
Delaware	245	230	740	0	1,215	0.02%	25,498	0.36%	-24,283
Dist. of Columbia	0	670	521	0	1,191	0.02%	33,588	0.48%	-32,397
Florida	82,308	20,912	79,955	207	183,382	2.64%	481,258	6.82%	-297,876
Georgia	112,636	9,375	63,973	718	186,702	2.68%	225,836	3.20%	-39,134
Guam	10,792	298	-44	0	11,046	0.16%	4,789	0.07%	6,257
Hawaii	51,864	574	2,282	182	54,902	0.79%	30,589	0.43%	24,313
Idaho	54,069	3,795	3,722	142	61,728	0.89%	35,537	0.50%	26,191
Illinois	67,267	10,414	73,681	447	151,809	2.18%	281,700	3.99%	-129,891
Indiana	71,734	5,705	21,279	275	98,993	1.42%	133,714	1.89%	-34,721
Iowa	126,109	6,033	9,911	412	142,465	2.05%	71,784	1.02%	70,681
Kansas	222,477	3,038	14,859	649	241,023	3.47%	64,030	0.91%	176,993
Kentucky	96,931	8,262	22,823	207	128,223	1.84%	90,313	1.28%	37,910
Louisiana	163,131	3,711	65,075	594	232,511	3.34%	100,521	1.42%	131,990
Maine	36,567	8,337	6,097	23	51,024	0.73%	31,389	0.44%	19,635
Maryland	4,207	628	9,000	0	13,835	0.20%	158,323	2.24%	-144,488
Massachusetts	2,299	11,933	25,140	52	39,424	0.57%	168,735	2.39%	-129,311
Michigan	67,241	15,385	44,793	593	128,012	1.84%	200,506	2.84%	-72,494
Minnesota	132,444	7,629	20,792	1,457	162,322	2.33%	114,208	1.62%	48,114
Mississippi	283,404	5,147	29,939	206	318,696	4.58%	63,150	0.89%	255,546
Missouri	98,235	7,416	26,894	144	132,689	1.91%	136,864	1.94%	-4,175
Montana	77,282	4,355	3,455	555	85,647	1.23%	24,017	0.34%	61,630
Nebraska	106,178	2,509	7,758	1,460	117,905	1.70%	40,073	0.57%	77,832
Nevada	29,634	3,102	5,253	62	38,051	0.55%	69,851	0.99%	-31,800
New Hampshire	9,365	580	1,472	7	11,424	0.16%	35,860	0.51%	-24,436
New Jersey	1,664	13,428	41,999	0	57,091	0.82%	240,613	3.41%	-183,522
New Mexico	67,388	14,864	29,521	350	112,123	1.61%	47,987	0.68%	64,136
New York	52,542	36,209	160,032	55	248,838	3.58%	445,600	6.31%	-196,762
North Carolina	77,872	13,973	51,277	189	143,311	2.06%	210,160	2.98%	-66,849
North Dakota	84,771	4,092	5,217	508	94,588	1.36%	15,498	0.22%	79,090
Northern Mariana Is.	1,630	116	868	0	2,614	0.04%	1,047	0.01%	1,567
Ohio	46,205	32,188	64,777	60	143,230	2.06%	242,186	3.43%	-98,956
Oklahoma	129,185	49,976	44,305	205	223,671	3.22%	77,565	1.10%	146,106
Oregon	80,970	5,705	11,102	68	97,845	1.41%	85,714	1.21%	12,131
Pennsylvania	55,552	15,944	57,382	74	128,952	1.85%	293,667	4.16%	-164,715
Puerto Rico	135,026	16,888	9,287	0	161,201	2.32%	62,900	0.89%	98,301
Rhode Island	31	4,076	6,138	0	10,245	0.15%	23,489	0.33%	-13,244
South Carolina	74,186	3,685	38,874	47	116,792	1.68%	102,110	1.45%	14,682
South Dakota	93,098	6,876	5,803	1,101	106,878	1.54%	18,397	0.26%	88,481
Tennessee	52,295	8,829	40,561	101	101,786	1.46%	143,843	2.04%	-42,057
Texas	245,735	89,411	184,370	940	520,456	7.48%	485,236	6.87%	35,220
Utah	24,454	3,733	14,100	770	43,057	0.62%	54,675	0.77%	-11,618
Vermont	31,408	3,081	1,453	130	36,072	0.52%	17,837	0.25%	18,235
Virgin Islands	25,685	29	6,335	54	32,103	0.46%	8,895	0.13%	23,208
Virginia	79,549	2,304	29,748	527	112,128	1.61%	201,062	2.85%	-88,934
Washington	97,505	16,062	20,324	53	133,944	1.93%	147,065	2.08%	-13,121
West Virginia	63,345	733	8,898	159	73,135	1.05%	44,778	0.63%	28,357
Wisconsin	141,853	10,096	20,042	1,900	173,891	2.50%	118,069	1.67%	55,822
Wyoming	61,014	873	7,656	172	69,715	1.00%	15,541	0.22%	54,174
Total	\$4,286,733	\$822,762	\$1,807,961	\$37,381	\$6,954,837	100.00%	\$7,058,910	100.00%	-\$104,073

Notes: Figures may not add due to rounding. Support payments do not include quarterly true-ups. USF is an abbreviation for the Universal Service Fund.

¹ Data from USAC's Annual Report.

² Estimated contributions include administrative cost of approximately \$104 million, as shown in USAC's Annual Report.

Allocation of contributions among states is an FCC staff estimate.

³ Net dollar flow is positive when payments from USF to carriers exceed contributions to USF. Total is negative because of administrative expenses.

Source: Universal Service Monitoring Report, Table I.12, Federal Communications Commission. December 2008.

Appendix B. Congressional Activity: 110th Congress

The 110th Congress took an active role regarding USF oversight and reform. Legislative measures to address the reform, restructuring, and expansion into broadband of the USF were introduced (S. 101, S. 711, S. 3491, H.R. 42, H.R. 2054, H.R. 5806, H.R. 6320, H.R. 6356, H.R. 7000), but not enacted. The Senate Commerce Committee held a March 1, 2007 hearing on the challenges facing the USF and the House Telecommunications Subcommittee held a June 24, 2008 hearing focusing on the future of universal service including the role of broadband and its role in the future of the program. FCC oversight hearings held by the Senate Commerce Committee and the House Telecommunications Subcommittee, as well as hearings on broadband deployment held by the House Small Business Committee included examination of USF issues. Furthermore, the Senate Commerce Committee held a June 12, 2007 hearing to examine the federal-state Joint Board's recommendation that the FCC place an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers receive for each state from the High Cost program. (For a further discussion of this proposal see the section on "capping," above.)

The House Oversight and Government Reform Committee under the direction of then-Chairman Waxman requested information from industry recipients as part of an oversight investigation of the USF. The inquiry focused on the High Cost Fund portion of the program and requested information from 24 companies that, according to the FCC, are the top ten recipients of federal high cost funds from 2006 through 2008 as well as the those that have received the ten highest per-line subsidies, by location, for 2006 and 2007. According to a memorandum⁵⁷ Chairman Waxman sent to the Committee, he was not accusing any of these companies of wrongdoing, but felt that the gathering of additional information about and Committee oversight of the USF program will "benefit" the program and "may offer useful information to the state and federal policymakers as they formulate proposals for USF reform." This inquiry, he further stated, "is consistent with the Committee's strong interest in ensuring accountability in both the government and private sector...." ⁵⁸

A provision to extend for one year (until December 31, 2007) the USF exemption from the Antideficiency Act (ADA) was passed as part of the FY2007 continuing resolution (H.J.Res. 20) and was signed into law (P.L. 110-5). Another one year extension (until December 31, 2008) was passed as part of the Consolidated Appropriations Act of 2008 (H.R. 2764; P.L. 110-161). Two stand-alone measures (H.R. 278, S. 609) as well as provisions contained in S. 101 and H.R. 2054 calling for a permanent ADA exemption were introduced, but not enacted. Two additional provisions pertinent to the USF are also contained in P.L. 110-161. One provision prohibits the FCC from using its FY2008 funds to limit USF support to a primary, or single, line. The other provision permits the transfer of up to \$21,480,000 of FY2008 funds from the USF to monitor the USF to prevent and remedy fraud, waste, and abuse, and to conduct audits and investigations by the OIG.

⁵⁷ Memorandum to Members of the Committee on Oversight and Government Reform, from Chairman Henry A. Waxman, regarding Universal Service Fund High Cost Program Subsidies, July 28, 2008. Available at <http://oversight.house.gov/documents/20080728094856.pdf>.

⁵⁸ Examples of the letters sent to the companies are available at <http://oversight.house.gov/story.asp?ID=2123>.

P.L. 110-161 (H.R. 2764)

Consolidated Appropriations Act, 2008. For the USF extends for one year (until December 31, 2008) the USF exemption for the Antideficiency Act (Title V, Sec. 510); prohibits the FCC from using its FY2008 funds to limit USF support to a primary, or single, line (Title V, Sec. 511); permits the transfer of up to \$21,480,000 of FY2008 funds from the USF to monitor the Program to prevent and remedy fraud, waste, and abuse, and to conduct audits and investigations by the OIG (Title V, FCC Salaries and Expenses). Signed by President, December 26, 2007.

P.L. 110-5 (H.J.Res. 20)

Revised Continuing Appropriations Resolution, 2007. Extends for one year (until December 31, 2007) the USF exemption for the Antideficiency Act (Sec. 20946). Signed by President, February 15, 2007.

H.R. 42 (Velázquez)

The Serving Everyone with Reliable, Vital Internet, Communications, and Education Act of 2007. A bill to amend the Communications Act of 1934 to continue in effect and expand the Lifeline Assistance Program and the Link Up Program, and for other purposes. Introduced January 4, 2007; referred to the Subcommittee on Telecommunications and the Internet February 2, 2007.

H.R. 278 (Cubin)

A bill to amend section 254 of the Communications Act of 1934 to provide that the funds received as universal service contributions and the universal service support programs established pursuant to that section are not subject to certain provisions of Title 31, United States Code, commonly known as the Antideficiency Act. Introduced January 5, 2007; referred to the Subcommittee on Telecommunications and the Internet February 2, 2007.

H.R. 2054 (Boucher)

The Universal Service Reform Act of 2007. A bill to reform the universal service provisions of the Communications Act of 1934, and for other purposes. Introduced April 26, 2007; referred to the Committee on Energy and Commerce.

H.R. 2829 (Serrano)

The Financial Services and General Government Appropriations Bill, 2008. A bill to provide for FY2008 appropriations for selected agencies including the FCC.

The House-passed version contained a provision to authorize the FCC to transfer up to \$20.98 million from the USF to monitor and conduct audits of the USF to prevent fraud, waste, and abuse; passed (240-179) the House, June 28, 2007. The Senate Appropriations Committee-passed version contains language that extends for one year (December 31, 2008) the exemption of the USF from the Antideficiency Act (Title V, sec. 501) and prohibits limiting USF funding to a single, or primary line (Title V, sec. 502). Reported out of Committee July 13, 2007 (S.Rept. 110-129).

H.R. 5806 (Rush)

The School Emergency Notification Deployment Act. A bill to permit universal support (E-rate funds) to public and nonprofit elementary and secondary schools under the Communications Act of 1934 to be used for enhanced emergency notification services. Introduced April 15, 2008; referred to the Committee on Energy and Commerce.

H.R. 6320 (Markey)

The Twenty-first Century Communications and Video Accessibility Act of 2008. A bill to ensure that individuals with disabilities have access to emerging Internet Protocol-based communication and video programming technologies in the 21st Century. Introduced June 19, 2008; referred to the Committee on Energy and Commerce.

H.R. 6356 (Barton)

The Universal Service Reform, Accountability, and Efficiency Act of 2008. A bill to reform the collection and distribution of universal service support under the Communications Act of 1934. Introduced June 24, 2008; referred to the Committee on Energy and Commerce.

H.R. 7000 (Waxman)

The Universal Roaming Act of 2008. A bill to require any eligible carrier receiving universal service support for the provision of services for rural, insular, and high cost areas to offer automatic roaming services to any technically compatible carrier upon request. Introduced September 23, 2008; referred to the Committee on Energy and Commerce.

S. 101 (Stevens)

The Universal Service for Americans Act, or USA Act. A bill to update and reinvigorate universal service provided under the Communications Act of 1934 and to exempt universal service contributions and disbursements from the Antideficiency Act. Introduced January 4, 2007; referred to the Committee on Commerce, Science, and Transportation January 4, 2007.

S. 609 (Rockefeller)

A bill to amend Section 254 of the Communications Act of 1934 to provide that funds received as universal service contributions and the universal service support programs established pursuant to that section are not subject to certain provisions of Title 31, United States Code, commonly known as the Antideficiency Act. Introduced February 15, 2007; referred to the Committee on Commerce, Science, and Transportation February 15, 2007.

S. 711 (Smith)

The Universal Service for the 21st Century Act. A bill to amend the Communications Act of 1934 to expand the contribution base for universal service, establish a separate account within the universal service fund to support the deployment of broadband service in unserved areas of the United States, and for other purposes. Introduced February 28, 2007; referred to the Committee on Commerce, Science, and Transportation.

S. 3491 (Stevens)

The Telehealth for America Act of 2008. A bill to amend the Communications Act of 1934 to improve the effectiveness of rural health care support under section 254(h) of that act. Introduced September 16, 2008; referred to the Committee on Commerce, Science, and Transportation.

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