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# Adjudication of Universal Funding in the Telecommunications Sector

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## INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act")[1] updated and changed the prior articulated goals of the Communications Act of 1934 ("1934 Act").[2] A key provision in the 1996 Act emphasizes the necessity for universal telecommunications service in rural, high-price, and low-population areas, creating a significant impact on telecommunications in the western states.[3] In the 1996 Act, the Federal Communications Commission ("FCC") took responsibility for discounting and even subsidizing telecommunication companies in furtherance of this goal.[4]

The stated purpose of the 1996 Telecommunications Act is, "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] In the 1996 Act, universal service is a key component of the stated purpose.[6]

This paper will explain some of the controversies surrounding universal service, focusing on the funding provisions associated with the 1996 Act. Specifically, this paper examines how recent decisions in the Tenth Circuit and Fifth Circuit regarding universal service funding provisions of the 1996 Telecommunications Act will impact future adjudication of universal service funding issues. Thus far, no other circuit has undertaken decisions regarding universal service funding provisions for telecommunications.

Part I provides a background by reviewing current scholarly literature on the topic of universality. Part II examines the Tenth Circuit's decision in *Qwest Corporation v. Federal Communications Commission.*[7] This case raises a question of sufficiency of federal funding for universal access.[8] Part III examines the Fifth Circuit's decision regarding the model used by the FCC to determine federal funding for universal service in *Alenco Communications, Inc. v. Federal Communications Com-*

1. Telecommunications Act of 1996, 47 U.S.C. § 254 (1996).
2. Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1934).
3. *See* 47 U.S.C. § 254.
4. *See* 47 U.S.C. § 254(c)(3)(d).
5. *Id.* at Preamble.
6. *See id.*
7. 258 F.3d 1191 (2001).
8. *See* Qwest Corp. v. FCC, 258 F.3d 1191 (2001).

*mission*.[9] Part IV provides a critical analysis of the materials presented. Finally, Part V provides conclusions and recommendations based on the foregoing materials, and a look towards the effects that the adjudication of these issues will have on future issues of funding for universal telecommunications service.

## I. REVIEW OF LITERATURE

President Clinton signed the Telecommunications Act of 1996[10] into law on February 8, 1996.[11] The 1996 Act came into being as a conglomeration of amendments to the Communications Act of 1934.[12] The 1996 Act both enhances and supplements the provisions of the 1934 Act.[13] After decades of amending the Communications Act to deal with emerging technologies e.g., cable, the Internet, cellular communication, digital television, etc., the FCC presented its recommendations to Congress.[14] Congress then passed the 1996 Act adopting new provisions and solidifying amendments to the 1934 Act.[15] Thomas Krattenmaker ascribes the FCC's interest in revising the regulations concerning telecommunication to the increasingly adaptable technology that allows people to communicate with each other more easily, across longer distances, and eliminating barriers to incorporating that technology into the telecommunications marketplace.[16]

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9. Alenco Communications, Inc. v. FCC, 201 F.3d 608 (2000).

10. 47 U.S.C. § 254.

11. Michael I. Myerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 252 (1997).

12. Myerson, *supra* note 11, at 252.

13. *Id.*

14. *Id.*

15. *Id.* "The goal of Congress was to create a legislative change as dramatic as the evolution of the old-fashioned telephone, carrying voices over distant wires, into telecommunications, the transmission of 'information,' including data and video, as well as aural communications." *Id.* at 253. *See also* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 3 (1996) ("The 1996 Act is a very lengthy and very detailed bill. Formally written as a series of amendments and additions to the Federal Communications Commission's basic charter, the Communications Act of 1934, the committee print of the law is 111 pages long."); Glen O. Robinson, *"The 'New' Communications Act: A Second Opinion,"* 29 CONN. L. REV. 289, 304 (1996) ("The driving force behind the 1996 Act was to legislate the conditions that would permit more competition into telecommunications markets. This was Congress' central ambition, and rightly central; next to it all other parts of the Act pale in importance.").

16. *See id.*

Telecommunications technology is largely regarded as an advancement over smoke signal technology because it can carry more information per second, carry it a greater distance, and provide more security against surreptitious monitoring . . . we are witnessing a convergence of devices accompanied by a plethora of transmission paths. The telecommunications receiver is a radio, computer, television, telephone, VCR, and fax machine all rolled into one.

*Id.* Krattenmaker suggests that prior to the 1996 Act:

Confronting, and obstructing, these technological developments were (and, to some extent, still are) a series of governmentally imposed entry barriers that sought to force the new and the old

The 1996 Act, in contrast to prior legislation, emphasizes the importance of competition in the telecommunications marketplace.[17] According to Michael Myerson, Professor of Law at the University of Baltimore:

> This law represents a vision of a telecommunications marketplace where the flexibility and innovation of competition replaces the heavy hand of regulation. It is based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers and programmers being made available to the American consumer.[18]

Prior to the 1996 Act, local telephone companies held monopolies over telephone service, but were not allowed to compete in long-distance or in cable markets.[19] The 1996 Act specifically aims to deregulate telecommunications, so as to increase the amount of competition in the telecommunications market, in direct contrast to prior legislation.[20] Prior to the 1996 Act, the FCC effectively separated the various telecommunications components:

> Balkanizing the industry, keeping one industry firmly secured to its own, specified piece of the telecommunications revenue pie, was a natural outcome of regulatory capture. Indeed, the Federal Communications Commission became a cartel-enforcement agency, one that could reliably be called on by incumbents to formulate rules that would make competitive entry economically impossible.[21]

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technologies into a Procrustean bed. These barriers attempted both to confine certain devices to certain limited uses and to limit the transmission paths telecommunications providers might employ. *Id. See also* Angela J. Campbell, "*Universal Service Provisions: The "Ugly Duckling" of the 1996 Act*," 29 CONN. L. REV. 187, 190 (1996).

Traditionally, universal service had been concerned with POTs because that was all that was available. In recent years, with the wide variety of new telecommunications services becoming available, it became clear that it was time to re-examine the definition of universal service . . . . The 1996 Act is significant in that it ends the debate over whether universal service needs to be redefined by requiring the FCC to do so.

*Id.*

17. *See* Myerson, *supra* note 11, at 252.

18. *Id.*

19. *See id.* at 253. For example:

[A]ll of these assertions were true at the end of 1995 (and some still are): Television stations cannot operate local cable systems; but cable systems must carry television stations. On the other hand, firms sending multiple televisions signals to the home via satellite are effectively prevented from carrying network television stations. Telephone companies cannot offer cable television and cable television companies cannot offer telephony although both run wires for electronic communications in the same houses.

Krattemaker, *supra* note 15, at 7.

20. *See* Myerson, *supra* note 11, at 254.

21. Thomas W. Hazlett, "*Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*," 29 CONN. L. REV. 217, 221 (1996).

According to the FCC, the 1996 Act will, "remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition . . . ."[22] By removing the barriers, "[p]olicy makers believe (or profess to believe) that if the telephony, radio, and television are to merge—or not to merge—that result should be driven by consumers making choices in open markets that express their preferences."[23]

The FCC hopes to implement its goal of market competition, in part, by encouraging universal service for telecommunications patrons.[24] The 1934 Act also encouraged universal service, mandating regulation of electronic communications to make them available to all citizens of the United States.[25]

> Historically, the FCC has had special policies addressing these constituencies' unique telecommunications problems. At a minimum, this language ratifies these efforts. It makes it clear for the future, that "all the people of the United States" referenced in section 1 of the 1934 Communications Act really means all the people and that the FCC should make special efforts to ensure that some Americans are not underserved because of where they live or how much money they make.[26]

The 1996 Act, however, expands on the universal service mandate and includes provisions that will allow the Act to adapt to the ever-changing technological innovations that impact modern telecommunication services.[27]

The FCC included seven principles in the 1996 Telecommunications Act to justify and support universal service.[28] The specific provi-

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22. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Part II, Order, 61 Fed. Reg. 45,476, 45,479 (Aug. 29, 1996) (to be codified at 47 C.F.R. pts. 1, 20, 51, 90).

23. Krattenmaker, *supra* note 15, at 7. *But see* The Honorable Hullihen Williams Moore, Richard L. Cimerman, John L. Langhauser, Philip McClelland & Mark J. Mathis, "*Local Exchange Service In The Next Century—What Still Must Be Done To Bring Us Where We Want To Be?*", 4 RICH. J.L. & TECH. 5, 8 (1996) ("Effective competition is not around the corner, because there remains a tremendous amount of work to be done, both at the municipal, state, and the federal levels.").

24. The FCC defines universal service as, "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1).

25. *See* Myerson, *supra* note 11, at 266.

26. Campbell, *supra* note 16, at 196.

27. *See id.*

28. 47 U.S.C. § 254(b)(1)-(7).

(b) Universal Service Principles.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

Quality and rates.—Quality services should be available at just, reasonable, and affordable rates.

Access to advanced services.—Access to advanced telecommunications and information services should be provided in all regions of the Nation.

sions that are cogent to this discussion deal with "[a]ccess in rural and high cost areas,"[29] "[e]quitable and nondiscriminatory contributions,"[30] and "[s]pecific and predictable support mechanisms."[31] These are the provisions that cause great difficulty in determining the adequacy of funding for implementing universal service.[32] Professor Myerson raises two important questions that must be considered in order to understand the universal service requirement of the 1996 Act: (1) "what services

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Access in rural and high cost areas.—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Equitable and nondiscriminatory contributions.—All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

Specific and predictable support mechanisms.—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

Access to advanced telecommunications services for schools, health care, and libraries.—Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

Additional principles.—Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

*Id. See also* Krattenmaker, *supra* note 15, at 21 (discussing the definition of universal service). Campbell provides a useful explanation of the seven key provisions:

In developing universal service policies, the Joint Board and the FCC are to implement the seven principles articulated in section 254(b). The first three principles address the type and quality of services that should be available to consumers. The next two concern the mechanisms that will be used to support universal service. The sixth principle addresses the special needs of schools, libraries, and health care providers. The final principle permits consideration of any other principles necessary and appropriate for the protection of the public interest, convenience, and necessity.

Campbell, *supra* note 16, at 194.

29. Myerson, *supra* note 11, at 266.

30. *Id.*

31. *Id.*

32. Additionally, Krattenmaker argues that the focus on universal service allows the FCC to maintain control over entities that it claims should now be subject to the competitive conditions of the marketplace:

The conclusion is the continuing conviction that markets for telecommunications services ought to be governmentally managed so that they provide—and to some extent conceal—pro-social cross-subsidies. Baldly stated, nonpredatory competition is not good if it leads to higher residential subscription rates for basic telephone services.

Krattenmaker, *supra* note 15, at 9. Campbell notes that there are difficulties with the funding provisions, but notes:

The Act does not offer any details as to how the support mechanism will work. The NPRM does not either; it merely lists a number of options and asks a series of questions. Until the support mechanisms are developed and tested, it is too early to tell whether they will work as intended. Although the Commission may fail to develop the perfect solution, even a flawed new system will likely be an improvement over the present system.

Campbell, *supra* note 16, at 197. Similarly, Robinson notes that the universal service funding provisions in the 1996 Act sidestep economics in favor of public good policy, "The measure is no longer the measure of network value to telecommunications users, it is a general social welfare measure." Robinson, *supra* note 15, at 325.

must be provided?"[33]; and (2) "how universal must their provision be?"[34] Myerson does not answer the questions he raises; rather, he offers them as touchstones for policymakers to look to when beginning to implement the provisions of the 1996 Act.[35] Krattenmaker too asks, "Whence the money?"[36] The 1996 Act itself leaves the answer to these questions to the broad discretion of the FCC, providing that all telecommunications companies must contribute to the implementation of universal service.[37]

The FCC relies on both state and federal funding to support its universal service initiatives.[38] The FCC formulated a system of contributions by telecommunications companies and subsidies for instituting universal service programs.[39] Geography, income of consumers, and facilities (e.g., schools, healthcare facilities, etc.) are important factors in determining the amount and type of subsidies provided under the 1996 Act.[40] According to Dawson, "The 1996 Act expresses a fundamental commitment to encourage competition in rural and high-cost areas so that customers in these regions will receive the same benefits as their urban counterparts."[41]

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33. Myerson, *supra* note 11, at 267.

34. *Id.*

35. *See id.*

36. Krattenmaker, *supra* note 15, at 21. *See also* Robinson, *supra* note 15, at 323-24.

The value of the network to each subscriber is a function of the number of persons reached by the network; each additional subscriber to the network thus confers benefits to the other network subscribers; to the extent the benefit to the network as a whole--that is to the inframarginal user--is greater than the price that the marginal user is willing to pay to subscribe there is an externality. In such a case it is efficient to charge the inframarginal subscriber for some part of the costs of adding the marginal subscriber to the network.

*Id.*

37. *See* 47 U.S.C. § 254(4).

38. *See* Emily Dawson, *Universal Service High-Cost Subsidy Reform: Hindering Cable-Telephony and Other Technological Advancements in Rural and Insular Regions*, 53 FED. COMM. L.J. 117, 120 (2000).

The universal service program functions as a cooperative effort between the individual states and the federal government. The individual states may independently develop separate universal service programs as long as the provisions do not conflict with the FCC's general rules governing subsidy allocation and find support in "specific, predictable, and sufficient mechanisms . . . that do not rely on or burden federal universal service support mechanisms."

*Id.*

39. *See id.*

40. *See* Campbell, *supra* note 16, at 202-03.

The fact that low income and rural consumers are specifically mentioned in the Act gives further impetus to the FCC and states to make sure that people who might otherwise be left behind are included. In effect, the Act gives the federal and state regulatory commissions a mandate to ensure that the disparities between the haves and have-nots are not increased. The special attention paid to schools, libraries and health care providers also promises real benefits for society. Schools are training the next generation of American citizens and workers. Libraries are the traditional source of information in communities. Since schools and libraries are open to everyone, they are good places to begin to tackle the problem of the haves and have-nots.

*Id.*

41. Dawson, *supra* note 38, at 120.

Subsidies for telecommunications companies come in a variety of forms. One example is the cost-shifting mechanism that shifts a portion of the cost of service for high-cost areas to consumers in low-cost areas.[42] Additionally, the FCC uses forward-looking formulas to calculate the amount of federal support to grant to each company for its universal service activity:

> The new model will enable the FCC to design more efficient networks based upon the geographic location of customers and necessary upgrades in infrastructure. Using this model, the FCC can input cost variables, such as network components, into the system to estimate the forward-looking costs of providing telecommunications services to these high-cost areas. From these data, the FCC will determine in which geographic regions carriers will be eligible to receive subsidies.[43]

Unfortunately, the FCC's subsidy calculations have met with criticism from scholars.[44] One of the arguments raised is that uncertainty in the calculations may not provide an accurate determination of the amount of support necessary to provide universal service.[45] The uncertainty comes from the manner in which the FCC determines whether a carrier is eligible for the subsidies based solely on statewide calculations:

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42. *See id.* "[S]ubsidies support the programs, shifting some of the costs associated with providing service in high-cost areas to customers in lower-cost regions." *See also* Markenzy Lapointe, *Universal Service and the Digital Revolution: Beyond the Telecommunications Act of 1996*, 25 RUTGERS COMPUTER & TECH. L.J. 61, 74 (1999) ("[U]niversal service has been supported through a system of subsidization, which shifted costs from one group of high-cost customers to a low-cost group.").

43. Dawson, *supra* note 38, at 122. Earlier the author explains why rural and insular areas have higher telecommunications costs, "[r]egions that have fewer customers over which to spread fixed costs, and other factors such as less technologically advanced networks and rugged terrain, have inherently higher service costs. The universal service program provides subsidies to high-cost regions to ensure affordable telecommunications services to citizens in these areas." *Id.* at 118.

44. *See id. See also* Krattenmaker, *supra* note 15, at 21-22.

> Universal service is now an explicitly articulated goal of telecommunications regulation. It is to be achieved by levying a proportionate tax on all telecommunications service providers, which should make more visible both the nature and amounts of the cross-subsidies encompassed within the universal service program. . . . Exactly what services will be encompassed within the concept of universal service remains quite unclear, however, because no specific or fixed meaning may be ascribed to the list of items that make up "universal service"; it is an "evolving level" of services to be established "periodically" by the FCC, not just a basic dial tone.

*Id.*

45. *See* Dawson, *supra* note 38 at 122. *See also* Robinson, *supra* note 15, at 324.

> A more basic problem is determining where the benefit-cost ratio that justifies the subsidy ends. Though conventional economic theory says that the inframarginal subscriber gains from extending the network, no one with any economic sense at all would say that the net gain extends all the way to 100% participation. Although no one has found a means of calculating the cross-over point between benefits to the inframarginal user and the cost of adding marginal users, that point occurs well short of 100%.

*Id.*

> Therefore, a carrier can only receive high-cost subsidies for services rendered in a particular state if the "carrier's average cost of providing service in [that] state exceeds 135% of [the] national average per line." The problem is that calculating the cost of phone service in rural and high-cost areas is notoriously difficult, and the FCC has even acknowledged this potential uncertainty in the system.[46]

The following cases and analysis will examine these problems in further detail, and illuminate some of the issues that still remain to be resolved.

## II. *QWEST CORPORATION V. FEDERAL COMMUNICATIONS COMMISSION*[47]

Qwest, along with other telecommunications companies,[48] brought suit to challenge the FCC's funding for universal service provisions, including "local telephone service and access to emergency, directory-assistance, and long distance services.[49] As discussed above, costs of providing universal service in a rural area are much higher than those for providing the same service in an urban center.[50] To offset these costs "states and the federal government have established policies that support access to basic services in high cost areas."[51] The 1996 Act requires:

> (d) Telecommunications Carrier Contribution—Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service . . . (f) State Authority—A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equal and nondiscriminatory ba-

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46. Dawson, *supra* note 38, at 122.

47. 258 F.3d 1191 (2001).

48. Other parties to the litigation are: AT&T Corp., Rural Telephone Coalition, Vermont Department of Public Service, State of California and the Public Utilities Commission of the State of California, The Maine Public Utilities Commission, Puerto Rico Telephone Company, Inc., WorldCom, Inc., Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Bell Atlantic-West Virginia, Inc., New York Telephone Company, New England Telephone and Telegraph Company, The Wyoming Public Service Commission, and GTE Service Corporation. *Qwest*, 258 F.3d at 1191.

49. *See id.* at 1195.

50. *See id. See also Alenco*, 201 F.3d at 617.

Rural LEC's face special obstacles. The cost of providing telephone service varies with population density, because dispersed populations require longer wires and permit lesser economies in installation, service, and maintenance. Also relevant are geographic characteristics, for climate and certain types of terrain make service calls and repairs more costly. Rural areas where telephone customers are dispersed and terrain is unaccommodating are therefore the most expensive to serve. *Id.*

51. *Qwest*, 258 F.3d at 1195.

> sis, in a manner determined by the State to the preservation and advancement of universal service in that State.[52]

Qwest did not challenge the theory behind universal service.[53] Rather, it questioned two of the universality principles in the 1996 Telecommunications Act that state:

> (3) Access in rural and high cost areas—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services, that are reasonably comparable to those provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas . . . (5) Specific and predictable support mechanisms—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.[54]

The FCC attempted to implement these provisions in a series of FCC Orders.[55] The Orders promulgated the methods the FCC will use to implement its policy directives.[56] This case is a direct challenge to the FCC's Ninth and Tenth Orders.[57]

Before implementing the principles contained in the 1996 Act, the FCC generated several orders and finally decided to follow the guidelines for funding contained in its Ninth Order.[58] The Tenth Circuit explained the funding mechanisms as follows:

> To determine the amount of money that a state may receive, the FCC employs a two-part method. First, using its cost model, it set a benchmark at 135% of the national average cost per line. Second, it computes the average cost per line within a given state. If the statewide average cost exceeds the benchmark, then the FCC provides funding for costs in excess of the benchmark.[59]

In its Tenth Order, the FCC figured out which "input values" it would use in the model and "anticipate[d] updating the model as technology and other conditions change."[60] The Tenth Circuit consolidated the claims of Qwest and the other telecommunications companies.[61] The consolidated claims can be summarized in three basic arguments: (1) the

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52. 47 U.S.C. § 254(c)(3)(d)-(f); *See also Qwest*, 258 F.3d at 1199.
53. *See* Qwest Corp. v. FCC, 258 F.3d 1191 (2001).
54. 47 U.S.C. § 254(2)(b)(3)-(5).
55. *See* Ninth Report & Order and Eighteenth Order on Reconsideration P 1, FCC 99-306, CC Docket No. 96-45 (Nov. 2, 1999). *See also* Tenth Report and Order, FCC 99-304, CC Docket Nos. 96-45, 97-160 (Nov. 2, 1999).
56. *See id.*
57. *See Qwest*, 258 F.3d at 1196.
58. *See id.* at 1197.
59. *Id.*
60. *Id.* at 1198.
61. *See id.*

FCC should not rely on the states to fund its universal service provisions;[62] (2) the FCC failed to appropriately and explicitly define the reasoning behind the adoption of the 135% benchmark, thereby making their calculations arbitrary and capricious;[63] (3) the funding mechanisms proposed by the FCC are inadequate to support the FCC's universal service vision.[64] These arguments in the consolidated claim deal specifically with the FCC's Ninth Order. Additionally, Qwest's final argument was that the funding model proposed in the FCC's Tenth order violates the Administrative Procedure Act.[65] Each of the arguments put forth by the telecommunications companies in the consolidated claim, and the Tenth Circuit's response to these arguments, will be examined in detail in the following sections.

### A. *States' Responsibility for the Funding of Universal Service Provisions*

According to the record, "The FCC acknowledges that the Ninth Order will result in reasonably comparable rates only if the states implement their own universal-service policies."[66] The Tenth Circuit partially based its decision, to reverse and remand this portion of the case for further proceedings, on the FCC's recognition of the necessity of state funding for universal service, and its failure to provide any inducements for the states to implement their own universal service policies, in compliance with the requirements of the 1996 Act.[67]

The Tenth Circuit did not fail to recognize that Congress intended to encourage a partnership between the states and the federal government in order to promote universal service across the United States.[68] Nor did it fail to recognize the FCC's necessary dependence on state support.[69] In reaching its decision, therefore, the Tenth Circuit rejected Qwest's argument that "the FCC must alone support the full costs of universal service."[70] However, the Court did not let the FCC off the hook, stating that, "the FCC may not simply assume that the states will act on their own to preserve and advance universal service. It remains obligated to create

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62. *See id.*

63. *See Qwest*, 259 F.3d at 1198.

64. *See id.*

65. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2001). *See also Qwest*, 258 F.3d at 1205.

66. *Qwest*, 258 F.3d at 1202-03.

67. *See id.*

68. *See id.* at 1203.

A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C. §254 (c)(3)(d). *See also* Ninth Order, *supra* note 55, at P 56.

69. *Qwest*, 258 F.3d at 1202-03.

70. *Id.* at 1203-04.

some inducement—a 'carrot' or a 'stick,' . . . for the states to assist in implementing the goals of universal service."[71]

### B. *FCC's Failure to Define Key Terms and Justify 135% Benchmark*

#### 1. Defining "Reasonably Comparable" and "Sufficient"

Several of the terms used by the FCC in its discussion of its universal service provisions were at issue in this part of the court's opinion. First, the FCC provides a definition of "reasonably comparable" as, "a fair range of urban/rural rates both within a state's borders, and among states nationwide."[72] The Tenth Circuit found that this definition is too ambiguous to be useful to states attempting to implement universal service, even after further explanation by the FCC.[73] The court rejected the additional definitions as imprecise standards that are no more useful than the original definition.[74]

The second term that the FCC inadequately defined is "sufficient." The Tenth Circuit declared that the FCC asserted that the federal support would be sufficient.[75] The FCC's statement was a conclusion, not explanatory, and it was "inadequate to enable appellate review of the sufficiency of the federal mechanism and, if accepted, would provide only a circular argument in support of the FCC's position."[76]

Once again, in their review of the ambiguous terms, the Tenth Circuit gave the FCC the benefit of the doubt by attempting to figure out if the definitions were "reasonable constructions of the statute."[77] If the

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71. *Id.* at 1204.

72. Ninth Order, *supra* note 55, at P 54.

73. *Qwest*, 259 F.3d at 1201. The court examines the FCC's definition in the best light possible, examining several other definitions for reasonably comparable, before coming to its decision:

At least twice, the FCC has provided what purport[s] to be further definitions of "reasonably comparable":

(1) "Support levels must be sufficient to prevent pressure from high costs and the development of competition from causing unreasonable increases in rates above current, affordable levels."

(2) "Some reasonable level above the national average forward-looking cost per line." [internal cites omitted.]

*Id.*

74. *See id.*

75. Ninth Order, *supra* note 55, P 56.

76. *Qwest*, 258 F.3d at 1202.

77. *Id. See also* Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837, 842-43 (1984).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If, the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.*

definitions had fallen within a reasonable construction the ambiguity would be admissible; however, the Tenth Circuit found that "deference [to the FCC] is inappropriate" because the definitions are "[w]ithout a 'limiting standard, rationally related to the goals of the Act.'"[78] The court remanded the case, requiring the FCC to more precisely define "reasonably comparable" and "sufficient" in a way that is "reasonably related to the statutory principles."[79]

2. Justifying the 135% Benchmark

In examining whether the FCC sufficiently justified its 135% benchmark as a method of attaining reasonable comparability and sufficient funding for universal service, the court examined the FCC's justifications for choosing that benchmark, and other documents submitted by related parties.[80] Similar to the court's discussion of the definitions, the Tenth Circuit, in its discussion of the 135% benchmark, tried to give deference to the FCC's expertise as an administrative agency stating, "[i]f, however, the FCC's 135% benchmark actually produced urban and rural rates that were reasonably comparable, however those terms are defined, we would likely uphold the mechanism."[81] The FCC attempted to justify its benchmark by discussing the range of percentages from which it had chosen, and that it had chosen the midpoint between appropriate guidelines.[82]

The Tenth Circuit recognized that any determination by the FCC of a benchmark is likely to be at least partially arbitrary, but strongly denounced the FCC for failing to uphold its duty as an expert agency:

> We find these justifications insufficient to support the benchmark. The FCC is not a mediator whose job is to pick the "midpoint" of a range or to come to a "reasonable compromise" among competing positions. As an expert agency, its job is to make rational and informed decisions on the record before it in order to achieve the prin-

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78. *Qwest*, 258 F.3d at 1202 (internal cites omitted). "[T]he [1996] Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 388 (1999).

79. *Qwest*, 258 F.3d at 1202.

80. *See id.* at 1202.

81. *Id.* The court reached this argument after determining that instead of actually coming up with a comparison of rural and urban rates, the FCC substituted a comparison of nationwide and statewide averages, even though such empirical data had been presented to it by concerned parties. *Id.*

82. *See id.*

The FCC gave four justifications for setting the benchmark at 135%: (1) It "falls within the range recommended by the Joint Board," 115%-150%; (2) such a level is "consistent with the precedent of the existing support mechanism," which uses a range of 115-160%; (3) that level is "near the midpoint" of the current range; and (4) it is 'reasonable compromise of commenters' proposals. *See also* Ninth Order, *supra* note 55, at P 55.

> ciples set by Congress. Merely identifying some range and then picking a compromise figure is not rational decision-making.[83]

The court's decision to remand the case for more precise definition, and a better explanation of the benchmark, had ramifications on the rest of the case.[84]

C. *Sufficiency of Funding for Universal Service*

Because the Tenth Circuit determined that the FCC failed to adequately define "reasonably comparable" and "sufficient," and that the FCC did not adequately explain its benchmark, the court concluded that it was unable to "review the rationality of the Ninth Order."[85] The court also stated that, "[b]ecause we remand for further consideration, we need not address at this stage Petitioners' contention that the actual level of funding is too low to be 'sufficient' to support universal service."[86]

D. *Challenges to the Tenth Order*

Qwest's main challenge to the Tenth Order focused on the FCC's choice of computer language used in the computation of cost models.[87] Qwest also challenged several of the subroutines chosen for use by the FCC.[88] Subroutines are a sequence of programming instructions used internally by the computer to perform specific tasks – in this case generating cost models. The Tenth Circuit deferred to the FCC's expertise on the technical aspects of computer programming stating, "[a]bsent the most unusual circumstances, the FCC is far better situated than is this court to decide basic technical specifications. . . . While Qwest takes issue with the choice of Turbo Pascal, it has not convinced us that this choice was so manifestly unreasonable as to be unlawful."[89] Ultimately, in order to find in Qwest's favor on this point, Qwest would have to produce evidence that "the model overall produces such inaccurate results that it cannot form the basis of rational decision-making."[90] The telecommunications corporations use the computer programs at issue to determine rates and calculate costs of providing universal service in rural and high cost areas.[91]

The Tenth Circuit's decision in this case revolved around balancing the FCC's expertise with the arbitrary nature of administrative decision-making. In a well-drawn opinion, the court gave appropriate deference to

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83. *Qwest*, 258 F.3d at 1202.
84. *See id.* at 1204.
85. *Id.* at 1205.
86. *Id.*
87. *Id.*
88. Tenth Order, *supra* note 55, at P 17.
89. *Qwest*, 258 F.3d at 1206.
90. *Id.*
91. *See id.*

the agency's expertise, while still requiring the FCC's decisions to fall within the rational reasoning test.[92] In the final result, the court reversed and remanded the Ninth Order for further proceedings, and affirmed the Tenth Order.[93] Thus, issues of sufficiency of funding remain open at this point. In *Alenco v. FCC*,[94] the Fifth Circuit also examined the issue of sufficiency.[95]

## III. *ALENCO COMMUNICATIONS, INC. V. FEDERAL COMMUNICATIONS COMMISSION*[96]

Similar to the challenges raised in *Qwest*, the Petitioners in *Alenco* challenged the definition and explanation of "sufficient."[97] However, these Petitioners, local telephone service providers, challenged the sufficiency requirement on different grounds.[98] Petitioners claim that the FCC orders[99] are, "inconsistent with the statutory requirements of the [1996] Act; arbitrary and capricious in violation of the Administrative Procedure Act; violative of the Takings Clause; and in noncompliance with the Regulatory Flexibility Act."[100]

The FCC's universal service provisions require funding,[101] therefore:

> [t]o meet its historic mandate of universal service, the FCC has established a universal service fund to subsidize high-cost rural LEC's to reduce the rates they must charge to their customers. A LEC is eligible for a subsidy if its operating expenses—its 'loop costs'—are fifteen percent or more above the national average.[102]

The administration of this universal service fund was at issue in this case, especially changes in the administrative procedures that limit subsidies and make funding portable, as well as the use of inflation indices instead of industry averages to adjust the benchmark.[103] Generally the

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92. *See* Qwest Corp. v. FCC, 259 F.3d 1191 (2001).
93. *See id.* at 1207.
94. 201 F.3d 608 (2000).
95. *See* Alenco Communications, Inc. v. FCC, 201 F.3d 608 (2000).
96. 201 F.3d 608 (2000).
97. *See Alenco*, 201 F.3d at 614.
98. *See id.*
99. Report and Order in CC Docket No. 96-45, 12 F.C.C. Rcd 8776 (1997). Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997).
100. *Id.* (internal cites omitted).
101. 47 U.S.C. §254 (c)(3)(d)-(e).
102. *Alenco*, 201 F.3d at 617.
103. *See id.* Petitioners' argue that:

*First*, they oppose the continued imposition of a cap on growth in fund expenditures, which cap limits total available support to the previous year's level, adjusted for growth in the number of working loops. *Second*, they object to a new cap on the amount of corporate operations expenses that can be included in the loop cost calculation. . . . *Third*, the Order makes the subsidy portable, following the customer who switches service from one LEC to another. Petitioners claim that portability violates the principle of predictable funding. *Fourth*, beginning January 1, 2000, the Order imposes an annual inflation index on the loop cost eligibility benchmark . . . replacing the

Petitioners' arguments against implementation of these standards and the benchmark fall into two categories: (1) a challenge to the FCC's expertise on the subject; and (2) the failure of the FCC Order to provide sufficient funding under the provisions of the 1996 Act.[104] Each of these challenges is examined separately below.

A. *Expertise of the FCC*

In order to determine whether an expert agency's methodology falls within its areas of expertise and discretion, the courts must decide whether Congress made intentional precise statements on the question at issue.[105] If Congress did not, then the court may only reverse the agency's decision if the construction falls outside of a "permissible construction" of the statute, or if it is "arbitrary and capricious."[106] Under a final standard of review, the court must decide if the agency's decision was reasonable and if there is a "rational relationship between the facts found and the choice made."[107] If the decision is within these specific confines, then the court must defer to the agency's expert opinion on the matter presented.[108]

According to the Fifth Circuit, "[w]e note that Congress obviously intended to rely primarily on FCC discretion, and not vigorous judicial review, to ensure satisfaction of the Act's dual mandates."[109] In an earlier decision, the court explained its position on universal service regulation further:

> To be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather, it is also trying to encourage local competition by setting the cost models at the "most efficient" level so that carriers will have the incentive to improve operations. As long as it can reasonably argue that the methodology will

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former approach of recalculating a fresh benchmark periodically, based on updated estimates of industry averages. *Finally*, the Order disallows additional service support when a rural LEC acquires and upgrades another exchange, despite petitioners' claim that such mergers are efficient and should be encouraged.

*Id.* (italics in original; internal cites omitted).

104. *See id.* at 620.

105. *See Chevron*, 467 U.S. at 842-44.

106. *Alenco*, 201 F.3d at 620.

107. *Id.*

108. *See id.*

109. *Id.*

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

are essential to education, public health, or public safety; have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

are being deployed in public telecommunications networks by telecommunications carriers; and

are consistent with the public interest, convenience, and necessity. 47 U.S.C. § 254(c)(1).

> provide sufficient support for universal service, however, it is free, under the deference we afford it under *Chevron* step-two, to adopt a methodology that serves its other goal of encouraging local competition.[110]

The *Chevron* test requires that when a court reviews the construction of an agency action it must first determine "whether Congress has directly spoken" on the issue,

> [i]f, however the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[111]

The court found that the petitioners failed to meet the "high evidentiary standard" necessary to show that the FCC's methodology was "arbitrary and capricious."[112]

B. *Petitioners Challenge to Sufficiency*

The Fifth Circuit also examined the Petitioners' challenge to sufficiency and concluded that the Petitioners were mistaken in their interpretation of the sufficiency requirements because they failed to recognize that universal service and local competition are dual goals, not mutually exclusive of one another.[113] Petitioners' arguments focused on the sufficiency of funding for companies providing universal service. However, the court first examined the provisions of the Act itself, stating:

> The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.[114]

The court then began its analysis of the Petitioners' argument regarding the specific funding provisions.[115] The Fifth Circuit concluded

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110. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 410 (5th Cir. 1999).

111. *Chevron*, 467 U.S. at 843.

112. 5 U.S.C. § 706(2)(A).

113. *See Alenco*, 201 F.3d at 620. "The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete." *Id.*

114. *Id.*

115. *See id.*

[E]xcessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers—and thus

that funding caps have been established by the FCC to promote efficiency and to "combat wasteful spending," and as such are not violative of the agency's discretion.[116] The Court stated, "The proposed 115% rule is thus a wholly reasonable exercise of the Commission's legitimate power to combat abusive spending; absent the proposed rule, the regulations provide no incentive to keep costs down."[117]

Petitioners argued that portability of funding, allowing the subsidies to move with the customer when they changed telecommunications providers, violated the "statutory principle of predictability."[118] The Court rejected this argument because predictability is only a principle in the Act, not a specific statutory command. Thus it is within the FCC's expert discretion to "ignore" predictability in implementing the 1996 Act's universal service and sufficiency provisions.[119] Additionally, the Court recognized that sufficiency of funding can be attained regardless of which carrier is serving the customer's needs, thus the Petitioners were not asking for predictability of funding, but trying to exempt themselves from market competition—the second prong of the Act's goals.[120]

The court rejected the Petitioners' final two arguments—regarding changing the calculation of the benchmark by using the inflation and failure to continue funding for telecommunications companies that merge—because both of these areas are within the FCC's discretion as measures instituted to assist in the transition from one funding model to another.[121] The Fifth Circuit rejected the petition for review, as a whole, because:

> . . . [the petitioners] fundamentally misunderstand a primary purpose of the Communications Act—to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service. They therefore confuse the requirement of sufficient support for universal service within a market in which telephone service providers compete for customers . . . with a guarantee of economic success for all providers, a guarantee that conflicts with competition.[122]

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indirectly by the customers—excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market. *Id.*

116. *Alenco*, 201 F.3d at 620.

117. Order, *supra* note 100, PP 283-85, 307.

118. 47 U.S.C. § 254(b)(5).

119. *Texas Office of Pub. Util. Counsel*, 183 F.3d at 411-12.

120. *See Alenco*, 201 F.3d at 622. "The methodology governing subsidy disbursements is plainly stated and made available to LEC's. What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act." *Id.*

121. *See id.* at 622.

122. *Id.* at 625.

In sum, the Fifth Circuit rejected the Petitioners' claims because all of the FCC Orders they challenged fell squarely within the discretion of the FCC as an administrative agency.

## IV. CRITICAL EVALUATION

Since 1996, the universal service funding mechanisms contained in the Telecommunications Act,[123] and a variety of FCC orders subsequent to the 1996 Act, have been subject to a variety of criticisms.[124] Most of the criticisms can be categorized as either dealing with the adequacy of funding, or mechanisms for establishing who gets funding, how much funding they receive, and how funding will be distributed.[125]

Thus far it seems as if the courts have been consistent in their rulings, and rightly so. It is true that the 1996 Act advocates the opening of local telephony markets to competition.[126] However, the 1996 Act does not leave telecommunications completely deregulated.[127] To do so would leave a vacuum and cause confusion for both the consumers and the telecommunications corporations because no one would have control over the implementation of the universal service provision of the 1996 Act. The FCC, in the 1996 Act, recognized and responded to 60 years of technological innovation, and provided a mechanism for continuing to monitor and respond to emerging technologies in the telecommunications field.[128] Congress granted universal service an elevated position in the 1996 Act, and by doing so, made great strides to act in the public interest, convenience, and necessity, especially for those in rural, high-cost areas.[129]

The funding provisions contained in the 1996 Act are not legislative perfection. However, both the Tenth Circuit and the Fifth Circuit examined sufficiency requirements, and recognized that the court is not the appropriate body to determine funding provisions for an administrative agency's regulation.[130] The FCC holds an interesting position in the universal service funding debate, in that, the FCC proposed the regulation, wrote the funding provisions, and yet advocates at least partial deregulation of the telecommunications industry.[131] If that seems conflicting, it is.

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123. 47 U.S.C. § 254.

124. *See* Myerson, *supra* note 11. *See also* Krattenmaker, *supra* note 15; and Campbell, *supra* note 16.

125. *See* Dawson, *supra* note 38. *See also* Lapointe, *supra* note 42; Robinson, *supra* note 15; and Myerson, *supra* note 11.

126. 47 U.S.C. § 254.

127. *See id.*

128. *See id.*

129. *See* 47 U.S.C. § 254.

130. *See* Qwest Corp. v. FCC, 258 F.3d 1191 (2001); Alenco Communications, Inc, v. FCC, 201 F.3d 620 (2000).

131. 47 U.S.C. §254. The 1996 Telecommunications Act was the product of FCC proposals, "An Act . . . to promote competition and reduce regulation in order to secure lower prices and higher

Thus, not only was it prudent of the courts to defer to the FCC's expertise in this area, it was absolutely necessary.

This is not to say that the FCC deserves, or that the courts provided absolute discretion in the application of its provisions. The Tenth Circuit left open the issue of whether the funding mechanisms provided sufficient funding for the promulgation of universal service across the United States for two reasons: (1) the FCC failed to adequately define its terms; and (2) it failed to justify its choice of benchmark values.[132] The court gave the FCC the opportunity to use its expertise to redefine its terms before the court stepped in and usurped the FCC's authority.[133] This decision was appropriate because it gave all parties involved the opportunity to continue discussing these issues. Since universal service is an evolving concept, it would be impractical for the courts to close the revolving door to the courthouse, foreclosing the opportunity for parties to obtain judicial review of these issues.

Similarly, the Fifth Circuit, in *Alenco,*[134] completely sidestepped the issue of whether funding for universal service provisions was adequate[135] by placing the burden on the FCC as an expert agency and deferring to its expertise.[136] The choice of benchmarks and calculation of who gets what funding, was justified based on the FCC's discretion, and the court chose not to interfere with the discretionary function of an administrative agency.[137] Sidestepping of the issue, however, does not constitute a flaw in judicial reasoning. The court essentially acknowledged its own limitations in making decisions regarding funding.[138] The court's function is only to oversee the agency to ensure that it does not exceed the authority granted to it by Congress.[139] It is not the court's job to interfere with the inner workings of the FCC or to make factual determinations that will influence the agency's ability to perform its duties.[140]

The sidestepping by the court of key issues in determining sufficiency appropriately leaves the determination of discretionary issues in the hands of the FCC, while retaining the court's ability to resolve these

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quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Subsequent clarifications and explanations came in the form of FCC orders dealing with administrative details, in this case universal service funding provisions. *See also* Order, *supra* note 99, PP 283-85, 307; and Report and Order in CC Docket No. 96-45, 12 FCC Rcd 8776 (1997). Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997).

132. *See Qwest*, 258 F.3d at 1201-02.
133. *See id.* at 1202.
134. 201 F.3d 620 (2000).
135. *See Alenco*, 201 F.3d at 619-20.
136. *See id.*
137. *See id.* at 620-24.
138. *See id.*
139. *See id.*
140. *See id.*

issues judicially issues if the FCC fails to do so, or oversteps its discretionary boundaries.

## V. WHAT COMES NEXT? UNRAISED AND UNRESOLVED FUNDING ISSUES

One issue that was not raised in either *Qwest* or *Alenco* is how technological innovations will effect the universal service provisions. One commentator believes that the new subsidy system, based on geographic location, will create a gap in universal service in direct opposition to what the 1996 Act intended:

> Technological advancements in the telecommunications industry continually challenge universal service and efforts to ensure that all Americans have access to comparable services at competitive prices. Implementing new technology generally reduces costs and provides higher-quality service for customers because updates make systems more efficient; consequently, carriers may pass these savings on to consumers. Technological advances executed in low-cost areas further polarize consumers' telecommunications access, as urban areas receive improved service at lower rates. Meanwhile, service in rural and insular areas deteriorates, creating a situation where the rich get richer, and the poor get poorer.[141]

The next challenge to the funding provisions for universal service will likely examine the equitable distribution of funds. Rather than simply looking at the sufficiency of funds, the courts will next have to look at the manner of distribution. Questions remain as to whether the FCC's funding criteria adequately assign the monies collected from LECs, and whether federal funding will reach the areas most in need of universal service subsidies. This is not a static examination. As new technology emerges, the FCC, or the courts if the FCC fails in its duty to do so, must re-evaluate universal service funding and distribution mechanisms to confirm that the goals of "reasonably comparable service" at "reasonably comparable rates" in "rural, insular, and high cost areas" are being attained, or at least attempted.[142]

In sum, the 1996 Telecommunications Act showcases the FCC's commitment to and Congressional support of universal service.[143] It is the first legislation in the history of telecommunications to definitively express this commitment and as such is a step in the right direction. The FCC has embarked on a journey into uncharted territory with this portion of the 1996 Act, therefore it is under enormous pressure to make sure that all of the provisions work as expected. Invariably, there will be litigation regarding the implementation of these regulations. Therefore it is

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141. Dawson, *supra* note 38, at 123.
142. 47 U.S.C. § 254(b)(3).
143. *See id.*

important for all parties involved i.e., litigators, telecommunications companies, the FCC, and consumers, to remember the spirit of the regulation, and to be vigilant in its administration and adjudication.

It is also important to recognize that conflict between competitors is a necessary component of integrating this legislation into the telecommunications environment. However, this conflict should be channeled into appropriate arenas, so as to further the goals of the 1996 Act. First, limitations on universal service must be recognized. It would be confusing and unrealistic to believe that in a market economy 100% of citizens will ever have universal service. Thus, the FCC, taking into account the research and recommendations of consumer groups, public interest groups, and telecommunications companies, should promulgate realistic goals. These goals should specifically target groups and facilities that have been neglected in the past, while recognizing that doing so will encumber established telecommunications companies. Secondly, the FCC should take heed of the courts' recommendations, in these cases, and provide inducements to the states and incumbent telecommunications companies for promoting universal service in their respective areas. Finally, the courts should continue examining each case and promote universal service by deferring as much as possible to the FCC's discretion.

## CONCLUSION

The 1996 Telecommunications Act opened the door for scholars, attorneys, telecommunications companies, and consumers to grapple with the conflicts arising from the emergence of new technology.[144] The cases and articles discussed throughout this paper are the keys to understanding and implementing the universal service funding provisions contained in the 1996 Act.[145] Whether the goal of universal service will ever be achieved remains to be seen. However, the 1996 Act elevated the status of universal service to a level where it can no longer be ignored.

*Jennifer Hargroves*

144. 47 U.S.C. § 254.
145. *See id.*

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# FROM THE EDITOR

As you have most likely noticed by now, this year's Symposium issue has quite an exciting, new look. We decided to revive our "magazine" format - something first tried approximately thirty years ago. Our goal with this issue is to present interesting and informative articles, in a reader-friendly format, on a timely subject: privacy. In the wake of the largest terrorist attack on American soil, and with war looming, privacy concerns abound.

We chose writers from diverse backgrounds: attorneys, a bookstore owner, a privacy activist, and a former governor, just to name a few. You may not agree with everything they have to say, but we think you will find their articles thought provoking and timely. I want to thank each author for writing a superb article - and also thank each author for their patience. The magazine issue took a little longer than our usual law review issues, but we think you will agree that it is well worth the wait.

We hope you enjoy this new format and the articles within.

Sincerely,

Tanya L. Thiessen
Symposium Editor

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