

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE FUNDING )  
REQUIREMENT AND PROPOSED )  
ASSESSMENT FACTOR FOR THE JULY )  
2011 TO JUNE 2012 FISCAL YEAR OF THE )  
WYOMING UNIVERSAL SERVICE FUND )

Docket No. 90072-35-XO-11  
(Record No. 12814)

ORDER ESTABLISHING THE WYOMING  
UNIVERSAL SERVICE FUND ASSESSMENT LEVEL  
AND RELATED FUND PARAMETERS

(Issued May 13, 2011)

This matter is before the Wyoming Public Service Commission (Commission) for the purpose of establishing the Wyoming Universal Service Fund (WUSF or Fund) parameters, for the upcoming 2011-2012 fiscal year of the Fund as required by W.S. § 37-15-501 and Section 500(l) of the Commission's Rules.

The Commission, having reviewed the written comments of [i] the Office of Consumer Advocate (OCA); [ii] Qwest Corporation (Qwest); and [iii] Range Telephone Cooperative, Inc.; RT Communications, Inc.; Dubois Telephone Exchange, Inc.; Advanced Communications Technology, Inc.; Silver Star Communications, Inc.; Project Telephone, Inc.; All West Telephone; and All West Wyoming, Inc. (collectively, the Independent Companies); having heard the oral comments of Qwest and the Independent Companies; and having reviewed its files concerning the Fund; the documents filed by the WUSF Manager, and applicable Wyoming and federal telecommunications law and rules; FINDS and CONCLUDES:

1. The above-captioned matter was initiated by the Commission on April 1, 2011, with the filing of a Confidential Report of the Wyoming Universal Service Fund Manager (Report). This proceeding is required to establish [i] the weighted statewide average essential local exchange service price (the weighted statewide average); [ii] the 130% benchmark; [iii] the WUSF disbursement amounts for qualifying telecommunication companies; and [iv] the corresponding WUSF assessment level to be effective for the twelve-month period beginning July 1, 2011. The assessment level is determined under Section 500(l) of the Commission's Rules. Because of the highly sensitive, competitively valuable company-specific information in the Report, it is kept strictly confidential to protect carriers' proprietary information. Throughout the process, each carrier is allowed access only to that portion of the confidential material containing or applying its own company-specific information.

2. As required under Section 500(k) of the Commission's Rules, the Report details the computation of a recommended assessment level based upon the estimated amount of disbursements to be paid out of the WUSF. The Report also contains detailed summaries and supporting schedules relating to the calculation of the statewide average and the associated support benchmark. Pursuant to W.S. § 37-15-501 and as discussed in Section 500(p) of the Commission's Rules, the support benchmark is one hundred thirty percent (130%) of the statewide average. Under Section 500(h), the Fund Manager "shall apply the provisions of

subsections (g) and (p) in determining required Universal Service Fund distributions under W.S. § 37-15-501(d).”

3. On April 1, 2011, the Commission issued a *Notice of Filing and Procedural Notice and Order Setting Hearing (Notice and Order)*. Copies of the *Notice and Order* were sent to each telecommunications company doing business in Wyoming with a copy of the non-confidential version of the Report and a spreadsheet containing confidential information pertaining only to the individual recipient telecommunications company’s proposed calculation and WUSF support (if it qualified for WUSF support). A Public Notice of the hearing was published once per week for two consecutive weeks in the *Casper Star Tribune*; and a public service announcement with regard to the hearing was broadcast on radio five times in one week on KTWO in Casper. The Public Notice and public service announcement stated the proposed weighted statewide average of \$25.36, the proposed 130% benchmark of \$32.96, and the proposed assessment level of 1.20%. In the *Notice and Order*, the Commission set the following procedural schedule:

April 29, 2011, at 4:00 p.m.	Deadline for comments
May 4, 2011, at 9:00 a.m.	Hearing commences in Cheyenne

4. On April 1, 2011, OCA filed its *Request for Access* to the Report and the corresponding confidential source data, which came before the Commission for consideration pursuant to due notice at its open meeting on April 7, 2011. Ivan Williams, Senior Counsel, argued for the OCA but acknowledged that the Commission was not statutorily or otherwise obligated to provide the confidential data to the OCA. Elizabeth Zerga, local counsel for the Range Companies and AllWest Communications, Inc., appeared on behalf of her clients. Blair Bales, Commission Counsel, appeared on behalf of the WUSF. The Commission denied OCA’s *Request for Access* based on the OCA’s representations, the comments of Zerga and Bales, and a review of applicable Wyoming law and rules, including W.S. § 37-2-402(b), which states:

In any commission docketed case initiated by the regulated company in which the consumer advocate is a party, the consumer advocate shall have the same access to books, maps, contracts, reports and records of every description as the commission. For all other instances, the consumer advocate shall have the same access as other parties.

The Commission’s denial was memorialized in its *Order Denying the Request of the Wyoming Office of Consumer Advocate for Access to Company Specific Confidential Data*, which issued May 11, 2011.

5. After the Fund conducted an internal audit, the Fund Manager issued an Amended Confidential Report of the Wyoming Universal Service Fund Manager Report (Amended Report) on April 21, 2011. The Amended Report proposed a weighted statewide average of \$25.76 (\$0.30 more than the April 1, 2011 proposal), a 130% benchmark of \$33.49 (\$0.53 more than the April 1, 2011, proposal), and an assessment level of 1.20% (unchanged from the April 1, 2011, proposal). All affected telecommunications companies were sent a non-confidential version of the Amended Report and a revised spreadsheet containing confidential information

pertaining only to the individual recipient telecommunications company's proposed calculation and WUSF support (if it qualified).

6. On April 29, 2011, the Commission received written comments from OCA and Qwest. Additionally, OCA filed a *Notice of Intervention*, which was denied at the May 4, 2011, public hearing. The comments are summarized as follows:

a. The *Comments and Recommendations of the Wyoming Office of Consumer Advocate (OCA's Comments)* discuss the OCA's continuing concerns with [i] the accuracy and appropriateness of the reported line counts associated with essential services; [ii] the price associated with the essential service portion of packaged (or bundled) services, [iii] inconsistent application of surrogate prices; and [iv] the treatment of incremental federal Universal Service Funds (FUSF) within the WUSF calculation.

b. Qwest's *Comments to the Fund Manager's Recommended Wyoming Universal Service Fund Distribution for the 2011-2012 Fiscal Year (Qwest's Comments)* discuss the treatment of Qwest's FUSF support in the WUSF support calculation. Qwest indicates it was not financially disadvantaged this year by the method applied by the current Fund Manager, but filed the comments to urge the Commission to employ the methodology used by the predecessors of the current Fund Manager, unsuccessfully advocated by Qwest for several years.

7. On May 4, 2011, the Commission held its duly-noticed legislative hearing on this matter. Art Schmidt, Fund Manager, summarized his Report, noting the calculations had included some inapplicable information, the removal of which resulted in a revised weighted statewide average of \$25.74 (\$0.02 less than the April 21, 2011, proposal) and 130% benchmark of \$33.46 (\$0.03 less than the April 21, 2011, proposal). This revised information came to his attention on April 28, 2011, and was not sent to the telecommunications companies since it could be presented at the hearing. Schmidt discussed an Ernst & Young audit that showed Qwest had a reserve of federal universal service funds of about \$7 million; he suggested that the Commission could direct Qwest to draw from this FUSF reserve fund instead of receiving WUSF distribution calculated as specified in the Report. If this suggestion were adopted by the Commission, the proposed assessment could be lowered to 1.0% (as opposed to 1.2%) thereby reducing the assessment paid by all telecommunications consumers in Wyoming. (Transcript of May 4, 2011, legislative hearing, hereinafter Tr., pp. 6-12.)

8. In connection with the Commission's full consideration of the Report and the Fund Manager's suggestion, Bales asked that public versions of the following documents be placed in the record:

[i] WUSF Audits by McBride, Lock & Associates:

[a] WPSC Report on Agreed Upon Procedures for the Four Years (2004-2007) Ended December 31, 2007;

[b] WPSC Report on Agreed Upon Procedures for the Year (2008) Ended December 31, 2008;

[ii] Ernst & Young Audit of Qwest dated April 14, 2009; and

[iii] a Commission white paper entitled, "A Report on the Pricing of Basic Telecommunications Service under the Wyoming Telecommunications Act of 1995," dated December 2, 2002.

The Commission approved inclusion of the documents in the record. (Tr., pp. 16-17.)

9. OCA did not make an oral presentation but indicated that it was available to answer any questions about the *OCA's Comments*. There were no questions. (Tr. pp. 21-22.)

10. In response to Schmidt's suggestion, Todd Lundy, Qwest/CenturyLink Associate General Counsel - Regulatory, commented on the Report and on the Fund Manager's suggestion. (Tr., pp. 22-33.) Kristin H. Lee, Qwest/CenturyLink's Director of Regulatory and Legislative Affairs for Wyoming, and Tim Kunkleman, Qwest/CenturyLink, were also present at the hearing.

11. Elizabeth Zerga stated, for the Independent Companies, that they had no problem with the benchmark. She asked for an explanation of the policy used in determining the price used for Bresnan, since it differed from the use of the Qwest surrogate price. She voiced her concern about Schmidt's comment that Dubois Telephone Exchange, Inc. (Dubois) was not receiving any WUSF support. She believed this was in error. In regard to the Fund Manager's suggestion, she urged the Commission to study this issue carefully and make sure all implications are understood. (Tr., pp. 38-44.) The Commission recessed the hearing to allow Zerga and Schmidt to discuss the confidential data specific to Dubois. They determined Dubois was eligible for WUSF support. Upon reconvening, Schmidt reported this result and stated there would not be a change in the \$25.74 weighted statewide average, \$33.46 130% benchmark or 1.2% assessment level. (Tr., pp. 45-47.)

12. Those appearing before the Commission expressed a desire to comment on the suggestion. Therefore, Commission Staff was directed to put the Fund Manager's suggestion in writing, e-mail it to the individuals present at the hearing and post it on the Commission's website by noon that day, and any responsive comments be filed with the Commission by noon on May 6, 2011. The text of the Fund Manager's suggestion was:

**Notice of Fund Manager suggestion made at the Wyoming Universal Service Fund legislative public comment meeting on May 4, 2011:**

1. That Qwest be required to draw its monthly WUSF support for fiscal year 2011-2012 from its federal Universal Service Fund (FUSF) reserve instead of receiving a distribution from Wyoming Universal Service Fund (WUSF). Amount would be that determined by Fund Manager for Qwest's fiscal year 2011-2012 WUSF support.

2. Qwest would report quarterly to the Commission on FUSF credits applied by zone from its FUSF reserve and its FUSF reserve balance.

3. If suggestion adopted, Fund Manager advocates reducing the fiscal year 2011-2012 assessment from 1.20% to 1.00% for all Wyoming telecommunications subscribers.

13. Transcripts of the legislative hearing were filed with the Commission on May 5, 2011.

14. On May 6, 2011, the Commission received Qwest's *Petition for Leave to Intervene and Request for Hearing (Petition)*, which reiterated that Qwest had not been financially disadvantaged by the Fund Manager's method of determining WUSF support this year and argued that the Fund Manager's suggestion would require the Commission to determine adjudicative facts. On that day, the Commission received Qwest's *Comments to Fund Manager's Suggestions Made at the Wyoming Universal Service Fund Public Comment Meeting on May 4, 2011 (Qwest's Supplemental Comments)*, *Supplemental Comments and Recommendations of the Wyoming Office of Consumer Advocate (OCA's Supplemental Comments)*, and *Comments of Range Telephone Cooperative, Inc.; RT Communications, Inc.; Dubois Telephone Exchange, Inc.; Advanced Communications Technology, Inc.; Silver Star Communications, Inc.; Project Telephone, Inc.; All West Telephone; and All West Wyoming, Inc. (The Independent Companies' Comments)*. A summary of the filed comments follows:

a. *Qwest's Supplemental Comments* advanced five reasons the Commission should not adopt the Fund Manager's suggestion: [i] the Manager's proposed method conflicts with and is not authorized by the existing rules governing the distribution of state USF funds; [ii] the suggestion includes the exercise of discretion that the Commission's Rules do not delegate to the Fund Manager; [iii] the Fund Manager's proposal constitutes an amendment to the Commission's USF rules, and thus the Commission must undertake the prescribed process for a rulemaking, which has not occurred here; [iv] the Fund Manager's proposal incorrectly assumes as fact that Qwest has a "reserve" of FUSF monies, and at the very least, there is no administrative record supporting that factual assumption; and [v] because this new method proposed by the Fund Manager may have broad implications for the WUSF program as a whole, this type of dramatic change requires further study and analysis. Qwest stated such changes could negatively impact Wyoming consumers and lead to "reduced investment" in the state.

b. *OCA's Supplemental Comments* argued reasons why the Fund Manager's suggestion should be rejected.

c. *The Independent Companies' Comments* generally agreed that the Commission's procedure in this WUSF matter was correct and discussed counsel's view as to why the Fund Manager's suggestion should be examined in a contested case.

15. On May 9, 2011, the Commission deliberated the establishment of the 2011-2012 Fund parameters, and rendered a decision.

16. On May 11, 2011, the Commission received *Qwest's Motion to Withdraw as Moot Its Petition to Intervene and Request for Hearing*, in which it stated that the issues in *Petition* have been rendered moot by the disposition of the above-captioned proceeding in deliberations.

## COMMISSION DISCUSSION OF COMMENTS

17. At the May 9, 2011, deliberations, Commission Counsel Bales responded to the comments received on May 6, 2011. She discussed the five reasons offered by Qwest as grounds for rejecting the Fund Manager's suggestion. She offered legal reasons which would, in her view, allow the Commission to adopt the Fund Manager's suggestion. Referring to W.S. § 37-15-501(c), she pointed out that the WUSF should be administered:

. . . to assist only those customers of telecommunications companies located in areas of this state with relatively high rates for essential services. . . . The commission shall ensure that the method shall promote the emergence of competition in providing local exchange service.

She illustrated the context in which federal Universal Service Fund support must be considered in Wyoming under W.S. § 37-15-501(d), which states,

In accordance with the method of distribution determined by the commission, a telecommunications company shall receive funds under this section to the extent that its essential local exchange service prices, **after consideration of any contributions from the federal universal service fund**, exceed one hundred thirty percent (130%) of the weighted statewide average essential local exchange service prices. (Emphasis added.)

She emphasized the language that allows the Commission to consider "any contributions" from the FUSF.

18. Bales explained that Commission Rule 500(p) uses the same terminology as W.S. § 37-15-501(d) when referring to "any contributions" from the FUSF. Rule 500(p) states, in part,

. . . telecommunications companies shall receive funds to the extent that their essential local exchange service prices or supported wireless service price(s), **after consideration of any contributions from the Federal Universal Service Fund**, exceed one hundred thirty percent (130%) of the weighted statewide average essential local exchange service prices. (Emphasis added.)

19. Bales stated that, in addition to the Wyoming statutes and rules, federal law allows for the Commission's consideration of the Fund Manager's suggestion. 47 U.S.C. Section 254(e) states, in part:

A carrier that receives such [federal Universal Service Fund] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purpose of this section.

In light of this, she pointed out that the Federal Communications Commission's (FCC) Order *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth

Report and Order and Eighteenth Order on Reconsideration, (released November 2, 1999), states at paragraph 96,

As long as the uses prescribed by the state are consistent with section 254(e), we believe that **the states should have flexibility to decide how carriers use support provided by the federal mechanism.** (Emphasis added.)

20. Bales stated that U S WEST Communications, Qwest's predecessor, agreed to credit the entire amount of FUSF to its customers in its 1999 Stipulation and Agreement (Stipulation) with Commission's Consumer Advocate Staff (CAS, OCA's predecessor), filed on June 14, 1999, in its Price Plan in Docket No. 70000-TR-99-480 (Qwest Sub 480). The Stipulation was approved in the Commission's *Order Approving Price Plan*, issued on September 16, 1999. The Stipulation states at paragraph 21:

The FUSF draw for 1999 is projected to be approximately \$4.4M, and **U S WEST agreed to target this entire amount to their customers located in the rural zones in this 1999 Price Plan.**

Bales stated that the Commission petitioned the FCC to have FUSF targeted to the rural zones in the *Petition of the Wyoming Public Service Commission for a Waiver of the Federal Communications Commission's Targeting Rules as Found in § 54.309 and § 54.311* dated March 30, 2000, in CC Docket No. 96-45. The Commission obtained the waiver to allow Qwest to credit its FUSF and to target its credits. It was through the Commission's efforts that Qwest obtained the ability to credit its customers, but it was Qwest who committed to credit the entire amount of its FUSF to benefit the customers in its high cost zones.

21. Bales summarized her response to Qwest's reason number 1 by saying federal and state law support, coupled with Qwest's contractual commitment, allow [i] for the Fund Manager to make his suggestion and [ii] for the Commission to consider it. The action proposed by the Fund Manager does not conflict with federal or state law; rather, it is in specific accord with federal and state law.

22. Bales responded to Qwest's four remaining reasons. Discussing reason 4 (the idea that the reserve of federal USF monies does not exist and there is no administrative record supporting that factual assumption), she stated that the "reserve" does exist. She noted it may be better explained as funds consisting of the FUSF credits not applied to customer bills. The balance of FUSF not credited to customers was addressed in the Ernst & Young Audit from Qwest's 2010 eligible telecommunications carrier certification filing in Docket No. 70000-1387-TA-08 (Qwest Sub 1387). The audit is a part of the record of this proceeding.

a. Bales stated that Qwest, in arguing the reserve issue, refers to its "entitlement" to WUSF. She said there was some discussion between Qwest and Chairman Minier in the 2009 proceeding in Docket No. 90072-29-XO-09 regarding when the right to a state distribution vests. She noted that no Commission determination was made on this issue. In her opinion, as Commission attorney advising with respect to the Wyoming Universal Service Fund, the right never vests with the telecommunications company but with its customers for

whose benefit the Fund exists. To wit: the Fund exists “to assist only those customers of telecommunications companies located in areas of this state with relatively high rates for essential services,” and “[t]he commission shall ensure that the method shall promote the emergence of competition in providing local exchange service.” She opined any right to a WUSF distribution vests with the customer, not with the company receiving and passing on the distribution.

b. Bales reiterated that Qwest committed to crediting the entire amount of its FUSF support to customers and it has not done so as proven in the Ernst & Young audit. The factual support for the Fund Manager’s suggestion exists in the Ernst & Young audit. The Commission has considered the audit in this proceeding and has it available to aid it in further determinations on the issue.

23. Bales’ responded to the *OCA’s Supplemental Comments*, noting the OCA aligned itself with Qwest by asking that the Commission reject the Fund Manager’s suggestion. Nowhere in *OCA’s Supplemental Comments* does it engage in advocacy for the consumer. This may be the result of OCA conceiving of itself as a Commission watchdog, even though a review of OCA’s enabling statutes describes no such power. Further, OCA admitted in the past it was aware that Qwest has on occasion received more FUSF than it credited to customers. As one OCA employee suggested in February 2001, the excess support money not credited to customers should be used to fund something else. The May 15, 2001, *Order* in Docket No. 70000-TA-99-482 states, in part, at paragraph 43:

[OCA, then CAS, witness Parrish] noted that [Qwest-] Wyoming is receiving more funds than it is currently crediting on customers' bills, and if this were to continue for January through April of 2001, that would provide a start of a funding mechanism of approximately \$500,000.

Bales surmised that Parrish could suggest an alternative method of using the FUSF not properly credited to customers, but that this would not be proper for the Fund Manager, whose WUSF parameter calculations must rely on accurate representations of FUSF.

24. Bales discussed *The Independent Companies’ Comments*, noting they argue that the Fund Manager’s suggestion must be examined in a contested case proceeding. Bales disagreed with that assertion. She again stated that the Fund statutes and Commission Rule 500 allow for, and, in fact, require consideration of “any FUSF” and that Qwest committed to crediting all of its FUSF to its high cost zone customers. She said the Fund Manager and, in turn, the Commission, have the ability and obligation to consider “any contributions from the federal universal service fund.” The amounts of FUSF not credited to customers are a legitimate offset to the amount of WUSF distributions that should be or should have been distributed to Qwest. *The Independent Companies’ Comments* refer to the Wyoming Supreme Court’s decision in *Sheridan County Commission v. V.O. Gold Properties, LLC.*, **2011 WY 16**, 247 P.3d 48 (Wyo. 2011) and particularly persons having a property interest. Bales reiterated that she did not believe Qwest has a property interest in the WUSF distributions. The distributions are applied to the customers; and it is they who have a property interest in the WUSF distributions, not the company passing on those distributions. Bales also stated Zerga did not discuss the fact

that the Commission previously stopped Qwest's WUSF distributions at an open meeting held October 12, 1999, in the Qwest Sub 480 Price Plan proceeding due to billing errors. *See*, Order on Billing Errors and Related Problems, issued on October 22, 1999.

25. Commissioner Lewis responded directly to the five arguments proffered in *Qwest's Supplemental Comments*. In response to argument 1, she reiterated that the Commission may consider "any FUSF contributions" as stated in W.S. § 37-15-501(d) and Rule 500(p). In response to argument 2, she stated that the WUSF Manager does not abuse his discretion by [i] advising the Commission of FUSF contributions held by a carrier; or [ii] suggesting various methods to take consideration of "any FUSF contributions" to determine the proper amount of WUSF support a carrier may be eligible to receive; or [iii] by stating the assessment that results from his computations. She found this to be exactly the kind of analysis and reporting the Fund Manager is supposed to do. Thereafter, it is up to the Commission to evaluate the Fund Manager's Report and properly consider and apply the statutes and rules.

26. Commissioner Lewis responded to Qwest's argument 4 (that the Fund Manager erroneously assumes a "fact" that Qwest has a "reserve" of FUSF). She stated that at the May 4, 2011, hearing, for Qwest, Lundy and Kunkleman discounted the existence of any "reserve" or fund of FUSF monies retained by Qwest. (Tr., pp. 26-27.) She stated that *Qwest's Supplemental Comments*, on page 1, asserts the Fund Manager's suggestion "assumes a fact - that Qwest has a 'reserve' of [FUSF] monies - that is patently incorrect and . . . there is no administrative record supporting that factual assumption." Lundy indicated at hearing that not all FUSF was issued as bill credits to customers because some money was held in the general account to support, maintain and repair lines. . However, he subsequently stated that all FUSF was issued as bill credits to customers for the high cost lines to which Kunkleman agreed. (Tr., p. 29) She stated that these two descriptions of Qwest's application of FUSF are inconsistent.

27. In reference to the Ernst & Young Audit Report filed in Qwest Sub 1387, Commissioner Lewis noted that in [*Qwest's*] *Notice of Filing Final Audit Report of Independent Auditor (Notice of Filing)* filed on April 15, 2009, Qwest requested the Commission approve the Ernst & Young Audit Report dated April 14, 2009. She stated that Attachment G to the Audit Report identifies a very large cumulative balance of unexpended FUSF of \$8,452,820 through November 2008. Further, Commissioner Lewis stated Qwest's *Notice of Filing* explicitly acknowledges at paragraph 31 that a significant "imbalance" had accrued because of the difference between the FUSF received and the amount credited to customers and that no Commission order to date had required a process for truing up or distribution of this imbalance.

28. Commission Lewis stated that it does not matter what the imbalance/reserve/unexpended or uncredited FUSF monies is called because it has been expressly acknowledged by Qwest's own filings and request to this Commission that the Audit Report identifying the unexpended FUSF monies be approved. She further stated the existence of these funds is also apparent on page 9 and 10 of the WUSF Audit by McBride, Lock & Associates for the Fund years 2004-2007. She stated that, during the hearing, Kunkleman said he did not know about this audit even though it was attached to the WUSF Activity Report dated September 30, 2009, and was sent to all telecommunications carriers. She stated the McBride and Lock Audit has been a matter of public record for years despite what less informed

individuals might understand. She stated the current balance needs to be determined and the Commission needs to issue an order establishing a true-up process as requested by Qwest's attorneys in the April 14, 2009, *Notice of Filing*.

29. Commissioner Lewis stated that *The Independent Companies' Comments* were articulate and provided good food for thought as were the responses provided by Bales. She declined to address the question of what the appropriate procedure might be to deal with the Fund Manager's suggestion. She stated more notice and time is necessary to properly consider the issues raised and provide a forum for those who want to make public comment on the issues.

30. Commissioner Lewis stated that the FUSF reserve has had an impact on WUSF at a minimum with regard to the assessment. She stated there are certainly broader implications at stake beyond the impact on Qwest customers.

31. With regard to the *OCA Supplemental Comments*, Commissioner Lewis disagreed with the statements related to the alleged cash fund that is not fully investigated. She believes the two audits discussed above have identified Qwest's FUSF imbalance. She referred to the statement made by OCA on page 2, that "The incremental FUSF actually appears as a credit on the bills of customers" and the Commission approved that method. Commissioner Lewis again noted the conflict with remarks made by Lundy at hearing regarding how Qwest applies the FUSF distributions it receives. She did not know if Qwest was actually applying FUSF credits to customer bills and her concern is greater after hearing Lundy and Kunkleman's comments at hearing.

32. Commissioner Lewis stated the Fund Manger's suggestion, although needing more complete review and vetting, may be a reasonable method to reduce Qwest's reserve consistent with the purposes of WUSF and FUSF with the potential positive effect of reducing the current assessment paid by all of Wyoming telecommunications customers. She stated that the assessment is not paid by the companies, it is paid by the customers and some of those customers do not even use landline telephones. She does not believe the Fund Manager's suggestion is ripe for a decision at this point and more notice and consideration is needed.

33. Deputy Chairman Oxley stated he agreed with Commissioner Lewis' points. He stated that Qwest's comments regarding decreased investment on page 2 in Wyoming is a distressing threat made by other utilities from time to time. When a company feels it might not promptly receive every cent it wants, hints of reduced investment in Wyoming appear in an effort to spur the Commission to give the company what it wants. Oxley stated that, if Qwest were to reduce investment in Wyoming, he would expect that to have no impact on the Anaconda systems which have been in place for decades too long.

34. Oxley stated that Qwest's observation that a doubtful Commission power should not be considered to exist is a sound bit of general administrative agency law. He said that the Commission must at the same time, however, obey the Wyoming statutory requirement to consider any contributions of FUSF, and this leads to a power to require disgorgement of excess WUSF monies retained because of incomplete application of FUSF support.

35. Oxley does not believe following the Fund Manager's suggestion would require a general rule. He stated the suggestion does not require creation of a general rule, but only relies on existing rules and statutes which the Commission already follows. Qwest argues regarding the cash reserve at page 7 of the *Qwest Supplemental Comments*:

But, the Suggestion, coupled with the Commission's demands that Qwest show that it spends the equivalent of the federal funds in high cost areas, results in a scenario where Qwest is expected to both spend money on investment and at the same time retain it in an account to offset receipt of state funds; clearly an impossible task.

He stated he does not believe the Commission has such an expectation of Qwest to retain federal monies in an account to offset receipt of state funds. In the context of the WUSF, the Commission has not demanded that Qwest spend an "equivalent" but that it credit FUSF properly. The task of proper application of FUSF may be impossible as conceived and argued by Qwest, not otherwise.

36. On page 8 where Qwest states, "the Fund Manager cites nothing in the factual record to support his assumption that the 'reserve' is in the form of cash or money capable of supplanting or offsetting the distribution of cash from the state fund," Oxley indicated that argument said to him that when Qwest puts FUSF money in its general account, it loses its FUSF identity and is no longer "cash or money capable of supplanting" simply because it is not tracked in Qwest's accounting system. He said that Qwest has additionally never said whether or not the cash account referred to bears interest. Since federal law allows state commissions to consider interest on FUSF, he believes interest should be considered. He would like to hear a cogent reason for keeping large sums of money in a cash account not bearing interest, if that is what Qwest is doing.

37. Responding to *The Independent Companies' Comments*, Oxley agreed with Commissioner Lewis, stating the comments were articulate and presented plenty of food for thought. He stated that Zerga observed on page 2, "The WUSF Manager also recommended that the amount of the Qwest monthly drawdown be determined by the WUSF Manager." He did not believe this was a compelling argument against the suggestion, considering that the Fund Manager's determinations are a routine part of his work and, to the extent the Commission accepts the Fund Manager's determination, it becomes a Commission determination. The Commission does not make independent determinations, but examines the Fund Manager's work carefully prior to acting on it and adjusting it as needed.

38. Oxley noted there is sufficient discussion in *Sheridan County Commission* case that it is possible to see different directions in it depending on the situation at issue. Regarding the "property right" issue, *The Independent Companies' Comments* state on page 5,

It is the position of these Companies that if the Commission were to deny a company a distribution from the State Universal Service Fund it otherwise would have received in derogation of the ordinary application of the Wyoming Statutes and the Commission's duly adopted rules and policies, the Company would have been denied a legitimate state

backed expectation in a property interest which requires due process and the opportunity for a contested case proceeding under the Wyoming [Administrative Procedures Act].

Oxley stated that, if WUSF distributions are a property right, they are less than a fee simple entitlement or the ownership of personalty provable by a receipt. If it is a property right, it is a *terminable* property right which can be suspended by Commission action under W.S. § 37-15-501(e):

The operation of the universal service fund may be suspended by the commission, based upon a public interest finding, after notice and an opportunity for a hearing, that the fund is not then serving its intended purpose.

He stated that, if the Fund is not serving the public interest, it is because it is not serving the people (i.e., the consumers the Fund was intended to help).

39. Chairman Minier responded to Zerga's oral comments and the *OCA Comments*, which pertain to the price used for Bresnan in the WUSF calculations. The *OCA Comments* state on page 3,

. . . Chairman Minier spoke before the Joint Corporations, Elections, and Political Divisions Committee (Committee) on April 12, 2011, he indicated that another look had been taken as to the appropriate surrogate for the essential piece of the Bresnan package rate, and yet another method was to be used this year.

He stated the subtext of what OCA has to say is that when the author of the comments was employed by the Commission, the Fund was run a certain way and to run it any other way is a mistake. Chairman Minier explained that the Commission spent quite a bit of time over the last year looking into the Fund. An audit revealed several problems, including a carrier that essentially negotiates all of its tariffed prices to something below that. He indicated the situation has changed dramatically over the past decade as consumers have moved away from landlines to other communications technologies, particularly wireless. The Commission has reached some perspective on where the fund ought to be moving. He stated he had delivered a written version of his talking points to the Committee as part of their record and copies of the talking points are available from the Commission. He did not agree that there were ambiguities in the methods used by the Fund Manager and thought the Commission was clear on the methods used.

40. Noting that Bresnan presented a particular problem, Chairman Miner stated that he was quite clear on how Bresnan's rate was determined. Referring to his talking points, he stated, "This problem has grown as Bresnan's presence has grown, mostly in Qwest's core service areas." He said that was what he told the Committee. He stated that the problem becomes more acute as Bresnan's line count increases. The difficulty of finding a fair and accurate price for Bresnan's essential services becomes more important. He stated Commission records show that Bresnan initially reported all lines at the \$49.99 price per month with \$14.99 being the price for an additional line as listed on its price schedule in 2008. The telephone service at those prices included additional features beyond essential service. He stated that the way telecommunications service was priced for longstanding landline companies, there was

some tie to costs. There is no assurance that Bresnan telephone service similarly evolved from a cost basis, because it primarily provides telecommunications service as part of packages which evolved from a cable business model which now may include Internet and cable television services as well as telephone.

a. Chairman Minier explained that, prior to this year, the Commission handled the Bresnan pricing issue on review and in the Commission's records largely by utilizing Qwest's price in the base rate area (BRA) of \$23.10 as a surrogate for Bresnan's basic service price. Bresnan typically offers telecommunications service only in Qwest's BRAs without providing service in surrounding rural areas. He explained that mathematically, if the \$49.99 price were used in the WUSF calculations, the weighted statewide average would increase, WUSF funding to Qwest would decrease dramatically and WUSF distributions to Bresnan would be required even though it does not provide service in higher cost rural areas. The Commission has thought about this problem with Bresnan. This year, Bresnan provided the Fund with a breakout of some prices for bundled telecommunications services for its residential customers, but not its business customers. The Fund used those figures to calculate a local basic service price, and obtained a result indicating Bresnan's prices are above the market for other telecommunications services and resembled the results obtained from using \$49.99. He stated the Commission finally hit on an expedient that relies on a figure that correlates, on an average basis (an average basis is also used for all other providers), to the assessment Bresnan pays on its gross intrastate revenues. It is a higher number than used in previous years, and is in essence a compromise. However, this is a more sensible solution than relying exclusively on a Qwest BRA price, and it fits with other telecommunications companies, whose reported pricing correlates with the taxes they pay. He challenged others, including the OCA, to come up with a more reasonable solution given Bresnan's market expansion into Qwest's BRA and not into higher cost areas. He stated it may not be a perfect long term solution but it is the right solution for this year, with the information available to the Fund Manager.

b. Chairman Minier noted OCA's absence at the deliberations, and suggested that this may explain OCA's failure to appreciate that the Commission's approach to the Fund this year is based in part on a longer term perspective about the future of the Fund. This lends this year's determination an added dimension which takes the Commission beyond rehearsing past arguments. Specifically, there is little reason to revisit the Commission's disagreements with Qwest which have been addressed at great length in order of the past two years. He understood Qwest's comments to be little more than an affirmation that it wishes to maintain the positions it has staked out in previous years. At the same time, these positions have little to do with the Fund Manager's most difficult conceptual problem, which is Bresnan. He indicated that the record would include some of the materials which document the Commission's policy enquiries over the past year, such as the talking points with the Committee and confidential calculations of the result of using alternative Bresnan pricing, so that the actions taken by the Fund Manager and the Commission can be understood by a reviewing court if necessary, and the breadth of the Commission's considerations will be clear. He stated he remains comfortable with the Commission's explanations of Fund policies and issues, as related to the Committee.

41. Chairman Minier indicated that he believes the Commission conducts the WUSF proceedings as judiciously and transparently as it can, especially given the difficulties presented

by confidential data. He stated he thought the Commission intends to continue its discussions about the general course of the Fund. He stated the federal government policy may shortly change in a way that directly affects the operation and effectiveness of the Wyoming Fund. He anticipated a pronouncement or decision from the FCC in August regarding the future of federal universal service funds. In the meantime, there is no reason to change what the Fund Manager has done with respect to Qwest and those actions have been discussed in decisions for the past two years.

42. Chairman Minier stated there is an appropriate way to consider the Fund Manager's suggestion regarding Qwest's FUSF and that is to consider the suggestion in the future. Although Qwest is sitting on millions of dollars of federal universal service funds, but there are limits on how the Commission might remedy that situation. He prefers waiting until the FCC has made a determination.

43. Oxley stated he agrees the Qwest FUSF disgorgement needs to be looked at in the larger picture, including the pending federal action. He verified the suggested 2011-2012 Fund parameters, and stated he would generally accept the Fund Manager's Amended Confidential Report with the revised weighted statewide average of \$25.74, the 130% benchmark of \$33.46, and the assessment of 1.2%, including therein the revised distribution to Dubois which, he clarified, would not cause further changes to the Fund Manager's recommendations. He thought the Commission Staff should continue to work on the Qwest situation and the Commission should abide any action on that until it is known what the FCC will do. Commissioner Lewis offered that the Commission should add that action will not be taken until the Commission knows what the FCC will do "or as otherwise determined by Commission." Her concern was that in the past the FCC has taken quite a long time to act.

44. Chairman Minier indicated that the establishment of universal service fund policy which integrates federal and state principles is an ongoing process which may take unexpected turns. For example, some industry comments have focused on a concern that new FCC policy may prove hostile to small independent telecommunications carriers, which are numerous in Wyoming. Some policy issues may accordingly become more poignant for the Commission going forward, which in turn suggests that the Commission would be wise to abide federal developments. He indicated his understanding that the Committee had assumed a similar posture.

45. The Commission determined it would accept the Amended Confidential Report of the Wyoming Universal Service Fund Manager with the correction to the statewide average calculation revised at hearing and to the Dubois distribution calculation.

#### LEGAL AUTHORITY

46. The WUSF was created by the Wyoming Telecommunications Act of 1995. W.S. §§ 37-15-501 and 37-15-502 govern the WUSF:

W.S. § 37-15-501, Universal service fund created; contributions; administration, states:

(a) There is hereby established the universal service fund to be administered in accordance with this section. The fund shall be administered by the commission. All telecommunications companies shall contribute to the universal service fund. The dates for contributions to the fund and disbursements from the fund shall be set by the commission, after notice and opportunity for hearing, as necessary to accomplish the objectives of the fund as specified in subsections (c) and (d) of this section. The costs of administering the fund may be included in determining required contributions.

(b) The commission shall after notice and opportunity for hearing, designate the method by which the contributions shall be calculated, collected and distributed. The commission shall authorize an additional monthly charge to customers, in the amount specified by the commission, to recover each contributor's required payment to the universal service fund. Any charge related to mobile telecommunications service shall only apply if the customer's place of primary use is in this state as provided by the Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116 to 126. The provisions of the Mobile Telecommunications Sourcing Act shall apply to this subsection.

(c) The commission shall administer the monies in the universal service fund to assist only those customers of telecommunications companies located in areas of this state with relatively high rates for essential services. The commission, after notice and opportunity for hearing, shall determine a reasonable amount and a fair method of distributing monies. The commission may authorize a credit to customer bills, in the amount specified by the commission, to reflect distributions received by the local exchange company from the universal service fund. The commission shall ensure that the method shall promote the emergence of competition in providing local exchange service.

(d) In accordance with the method of distribution determined by the commission, a telecommunications company shall receive funds under this section to the extent that its essential local exchange service prices, after consideration of any contributions from the federal universal service fund, exceed one hundred thirty percent (130%) of the weighted statewide average essential local exchange service prices.

(e) The operation of the universal service fund may be suspended by the commission, based upon a public interest finding, after notice and an opportunity for a hearing, that the fund is not then serving its intended purpose.

(f) The commission's decisions under this section shall be subject to the provisions of the Wyoming Administrative Procedure Act.

W.S. § 37-15-502, Universal service fund eligibility and distribution to carriers, states:

(a) Telecommunications companies which use cellular, radio spectrum or other wireless technology to provide supported services to customers who are otherwise eligible to receive universal service support pursuant to W.S. 37-15-501, may establish eligibility to receive universal service fund distributions in an amount to be determined by the commission, provided that:

(i) The telecommunications company will offer and advertise all universal service fund supported services throughout the entire local exchange area;

(ii) The telecommunications company will provide unlimited local calling throughout an entire local exchange area for a flat fee;

(iii) The telecommunications company's bill to the customer reflects a credit for the amount of distribution the company receives from the state universal service fund for providing universal service fund supported services to that customer; and

(iv) The company and services meet such additional criteria, if any, the commission, after notice and opportunity for hearing, determines are necessary. During its consideration and determination, the commission shall consider technological and competitive neutrality.

47. Commission Rule 500 addresses the operation of the WUSF. Portions of Rule 500 are used for the determination of the weighted statewide average, 130% benchmark and WUSF distributions. They are set out below:

Rule 500(c) states:

(c) **No later than February 15th of each year**, all telecommunications companies shall provide the information required by the Commission and/or the Universal Service Fund manager to perform the computations necessary for collection and distribution of the Universal Service Fund. (Emphasis added.)

Rule 500(g) states, in pertinent part:

(g) The manager shall annually compute both the statewide weighted average essential local exchange service price and each telecommunications provider's essential local exchange service price in a consistent manner **based on end of calendar year** line counts and prices authorized by W.S. § 37-15-203 and W.S. § 37-15-204, taking into account the classification options available to telecommunications companies under paragraph (h) of this rule. (Emphasis added.)

The relevant portion of Rule 500(h) states:

(h) The fund manager shall apply the provisions of subsections (g) and (p) in determining required Universal Service Fund distributions under W.S. § 37-15-501(d).

Rule Subsections 500(i) through the first part of (m) state,

(i) Mid period revisions to a telecommunications company's essential local exchange service price or to a supported wireless service, for purposes of drawing from the fund, shall only be permitted upon application and approval by the Commission.

(j) Each company's incremental Federal Universal Service Fund receipts resulting from changes in the company's high cost loop fund support shall also be credited, monthly, to the bills of customers on a per line basis. The amount of the credit for each of the customers shall be computed and authorized by the Commission, in a manner consistent with federal receipt of such funds. The total amount of this credit shall equal the difference between the amount of Federal Universal Service Funds received in the most recent calendar year and the amount of Federal Universal Service Funds most recently used in the computation of rates.

(k) No later than April 1st of each year, the Universal Service Fund manager shall file with the Commission and with each affected telecommunications company, a report that details the computation of the recommended assessment rate that shall be applied to gross retail revenues. This recommended assessment rate shall be based on the computed amounts needed for payment to telecommunications companies, the prior year gross retail revenues, and any over or under collection in the fund from the previous year. Wyoming Universal Service Fund assessment charges shall appear as a separate line item on each customer's bill unless a specific waiver is requested and granted by the Commission.

(l) No later than May 15th of each year, the Commission shall by order set the Universal Service Fund assessment rate for the twelve-month period beginning July 1st of each year.

(m) All telecommunications companies realizing intrastate revenue from operations in Wyoming are required to report such gross revenues to the fund manager and pay into the fund the assessment amount calculated by multiplying the company's gross revenue, less any wholesale transactions described in paragraph (n) by the assessment rate. Reports of revenue and payments of assessment are required no less often than quarterly. The due date of such reports and payments shall be determined for an individual telecommunications company as follows:

(i) If the assessment for the first or second month of the calendar quarter (plus any unpaid assessment amount of \$100 or less from any prior month of the calendar quarter) exceeds \$100, then the report of revenue and payment of assessment for such period is due on or before the last day of the month after the month in which the unpaid assessment exceeded \$100. If the assessment is \$100 or less, a report and payment is not required, and the unpaid assessment shall carry over to the next month. The report of revenue and payment of assessment whatever the amount, is required on or before the last day of the first month after the end of any calendar quarter in which a telecommunications company realizes any intrastate revenue from its operations in Wyoming.

(ii) Assessments not timely paid shall be subject to a late payment charge equal to one and one-half percent (1.5%) on the unpaid amount for each month, or part thereof, that the assessment remains unpaid.

Rule Subsections 500(o) through (p) state:

(o) Affected telecommunications providers subject to paragraph (k) of this rule include but are not limited to: local exchange companies; competitive access providers; interexchange companies; cable companies providing telephony; cellular providers; wireless providers; commercial radio common carriers; personal communications service providers; paging service providers; and pay telephone providers. All telecommunications companies as defined by W.S. § 37-15-103(a)(xi) and companies which provide telecommunications services as defined by W.S. § 37-15-103(a)(xii) shall report and pay into the fund as provided for in paragraph (m).

(p) Distributions from the fund shall be made monthly. Pursuant to W. S. § 37-15-501(d) and W.S. § 37-15-502, and consistent with the Commission's administration of the fund as specified in these rules, telecommunications companies shall receive funds to the extent that their essential local exchange service prices or supported wireless service price(s), after consideration of any contributions from the Federal Universal Service Fund, exceed one hundred thirty percent (130%) of the weighted statewide average essential local exchange service prices.

(i) Distributions to telecommunications companies shall equal: the sum of the products resulting from the difference, expressed in dollars, by which each essential local exchange service price or supported wireless service price exceeds one hundred thirty percent (130%) of the statewide weighted average essential local exchange service price multiplied by the total number of lines or subscribers to which that price applies.

(ii) Telecommunications companies receiving Wyoming Universal Service Fund support shall display the amount of such support as a separate line item credit on each affected customer's bill unless a specific waiver is requested and granted by the Commission.

48. Federal telecommunications law must also be considered in the determination of the WUSF since the amount of state distribution a company is eligible to receive is determined after consideration of FUSF. 47 U.S.C. 254(e) states, in part,

A carrier that receives such [federal Universal Service Fund] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purpose of this section. [Bracketed material added.]

49. The FCC's Order from *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, (released November 2, 1999), states at paragraph 96,

As long as the uses prescribed by the state are consistent with section 254(e), we believe that the states should have flexibility to decide how carriers use support provided by the federal mechanism.

## COMMISSION DETERMINATIONS

50. The Commission accepts the Amended Confidential Report of the Wyoming Universal Service Fund Manager with the noted corrections [i] to the statewide average calculation and [ii] to the error on Dubois' spreadsheet, and will allow the Wyoming Universal Service Fund assessment level for the twelve-month period beginning July 1, 2011, to remain one point two percent (1.20%). This takes into account, *inter alia*:

- the written comments received April, 29, 2011;
- the comments received at the May 4, 2011, hearing;
- the Commission's May 9, 2011, deliberations;
- the current Fund balance;
- the estimated Fund disbursements; and
- the estimated Fund receipts for the July 2011 -- June 2012 fiscal year.

51. For the twelve-month period beginning July 1, 2011, the weighted statewide average local exchange service rate is established at \$25.74. The associated 130% support benchmark is established at \$33.46. Therefore, no Wyoming customer should pay more than \$33.46 per month (excluding taxes, fees, surcharges, custom calling features and other optional services) for basic local exchange telephone service.

52. As required by Section 500(o) of the Commission's Rules, beginning July 1, 2011, telecommunications providers shall report and pay into the Fund the 1.20% assessment in conjunction with the monthly and quarterly reporting requirements of Section 500(m) of the Commission's Rules.

### IT IS THEREFORE ORDERED:

1. Pursuant to the May 4, 2011, hearing and its May 9, 2011, deliberations, the Commission accepts the Confidential Report of the Wyoming Universal Service Fund Manager, with the correction made to the weighted statewide average calculation and to Dubois Telephone Exchange, Inc.'s spreadsheet, and sets the Wyoming Universal Service Fund assessment level, effective for the twelve-month period beginning July 1, 2011, at 1.20 percent (1.20%) of gross intrastate retail telecommunications revenues. The assessment level will be applicable to all telecommunications customer billings rendered on and after July 1, 2011.

2. The Commission establishes the weighted statewide average local exchange service rate for the twelve-month period beginning July 1, 2010, at \$25.74. The associated support benchmark for the twelve-month period beginning July 1, 2011, is established at \$33.46. Therefore, no Wyoming customer should pay more than \$33.46 per month, excluding taxes, fees, surcharges, custom calling features and other optional services, for basic local exchange telephone service.

3. The Commission has provided to the twelve telecommunications companies eligible to receive Wyoming Universal Service Fund support a confidential spreadsheet showing the amount of WUSF support the company is eligible to receive. The aggregate amount of WUSF support proposed to be distributed monthly is \$218,801.55.

4. This *Order* is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on May 13, 2011.

PUBLIC SERVICE COMMISSION OF WYOMING

\_\_\_\_\_  
ALAN B. MINIER, Chairman

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STEVE OXLEY, Deputy Chairman

(SEAL)

\_\_\_\_\_  
KATHLEEN A. LEWIS, Commissioner

Attest:

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J. BLAIR BALES, Assistant Secretary