

Public Hearing on Telecommunications Policy
Room 119, University of Washington School of Law
June 3rd 4:00-6:00 pm

Second Interim Report Pursuant to House Bill 2601

The Technology Law and Public Policy Clinic
University of Washington Law School

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0 Introduction and Overview

0.1 The Second Interim Report

On March 4, 2011, the University of Washington Law School's, Technology Law and Public Policy Clinic (Tech-Law Clinic) made a presentation to the Technology, Energy and Communications Committee of the Washington State Legislature. This report, mandated by House Bill 2601, identified nine issues which the Tech-Law Clinic's members think important. This Second Interim Report refines and in some cases alters the findings and recommendations made earlier. On June 3rd (4:00-6:00 pm, Room 119, University of Washington Law School) a public hearing is scheduled to take place. This Second Interim Report contains issues clinic members hope to have discussed.

0.2 Methodology

Each issue in this report contains the following subject matter headings:

- Title/Name of the issue;
- Statement of the problem (including identification of: currently applicable laws, stakeholders and policy goals);
- Justification for government action;
- Description of solution;
- Glide path to resolution; (how the proposed solution can be reached);
- Description of final product; and
- Identification of any remaining steps to be taken and/or questions to be asked.

December 1, 2011, is the final due date for this report. Over the next six months the Tech-Law Clinic will continue: seeking input from stakeholders; refining established ideas; where necessary pursuing new policies and if practical crafting actual legislation.

0.3 Abbreviations

The following abbreviations are used throughout this report:

“FCC” means Federal Communications Commission.

“ILEC(s)” means incumbent local exchange company(ies).

“IP” means internet protocol.

“PUD(s)” means public utility district(s).

“USF” means universal service fund.

“UTC” means the Washington State Utilities and Transportation Commission.

“Washington” means the state of Washington.

1 Increasing Access to Communications Services in Washington

1.1 Issue Summary

Universal service is the long standing policy of the United States and Washington to enable every American, regardless of location, to have access to affordable high-quality telecommunications and, more recently, broadband service. The focus has shifted to the support of broadband services because technology advances in recent years have changed the way we live, learn, communicate, and do business. Because broadband has become central to the needs of our families, health of our economy, and the vitality of our communities, Washington must ensure that all of its citizens have access to broadband services.

Four primary barriers to universal broadband access in Washington exist. First, many of Washington's rural areas have no access to broadband services or only have access to broadband speeds that are not sufficient for business, health, civic, and educational opportunities. Second, for those in both rural and urban areas with broadband available, cost is a barrier. Third, many Washington residents lack the necessary digital literacy skills to take advantage of broadband services. Finally, broadband services are inaccessible to some individuals with disabilities.

To overcome these barriers, Washington should adopt a state USF modeled on the federal USF. This fund will be primarily utilized by providers intending to extend broadband service to rural and underserved areas of Washington. Revenue for the state USF can be collected via a "box fee," which would impose a small fee on network devices that access the broadband infrastructure.

Problem Statement

1.2.1 The Problem

At the federal level, universal service support is provided primarily through the federal USF, which directly supports construction and maintenance of extensive telecommunications infrastructure that provides nearly ubiquitous, high-quality local voice telecommunications service to some of the nation's most remote and difficult to serve areas. As part of its National Broadband Plan, the FCC contemplates a substantial overhaul of the federal USF to retarget funds from voice support to broadband deployment. It is currently unclear whether, under the FCC's Plan, Washington regulatory authorities will retain sufficient control over the state's telecommunications infrastructure to address the problems identified above.

Creating a state USF will ensure that rural communities have access to high-quality broadband services by incentivizing providers to build out in areas where no business case currently exists. A state USF would similarly help to keep the price of broadband affordable for everyone, both through direct subsidy and improvement of competition. State universal service funds also can be used to subsidize assistive technologies to enable individuals with disabilities to access broadband services. Digital literacy can likewise be increased by providing more funding for community-based training programs.

The legislature should enact legislation creating a state USF Program and authorizing the UTC to administer the program. To fund the program the legislation should enable collection of a “box fee” on the increasing array of products able to connect to communications networks..

1.2.2 Current Law

To date, Washington has not established a state USF although the creation of one is contemplated by RCW 80.36.600 and RCW 80.36.610(2). The UTC cannot establish a state universal service program or adopt new rules to preserve and advance universal service under the Federal Act without the approval of the state legislature. See Wash. Rev. Code §§ 80.36.600, 80.36.610.

The goals of the federal USF are codified under 47 U.S.C. § 254, which will be used as a model for Washington’s USF.

1.2.3 Stakeholders

The successful implementation of a state USF involves a number of stake holders including:

- Telecommunication providers applying to the state USF to fund broadband access projects
- Incumbent providers resistant to a state USF concept
- UTC, the proposed administrators of the state USF.
- Retail industries impacted by the proposed “box fee”
- Underserved Washington residents

1.2.4 Policy Goals

The primary goal of the proposed state USF will be to connect all rural and underserved areas to the broadband capabilities enjoyed by other state residents. We understand “universal” to mean providing some form of broadband access to 99% of Washington residents.

A secondary goal is to increase digital literacy among Washington citizens. Universal service funds will be available to programs focused on helping citizens understand the benefits of broadband access. Another secondary goal is to ensure the state USF is administered as efficiently as possible to maximize funds available to expand broadband access – both through build-out and education.

1.3 Justification of Need for Government Action

For a variety of reasons, primarily cost and lack of digital literacy, the market is unable to provide broadband access to a significant number of Washington residents. As broadband access is becoming an increasingly necessary tool for engaging in society, there is a need for government action to bridge the gap between the business case and social need.

Just as the original USF was premised on the idea that a dial tone constituted a vital connection to society at large, Washington’s proposed USF will be built on the recognition that broadband access has become the dial tone of the 21st century.

1.4 Description of Proposed Solution

Given the total lack of broadband access by a quarter of a million Washington residents, and estimates of nearly an additional million residents who are underserved, there is a real need for a state USF to help broadband providers close this gap. Numerous authorities have found that local economic growth is correlated with broadband expansion. Moreover, the ability to exchange information quickly and easily opens the door for tele-medicine, expands educational opportunities, and connects rural business with a global market.

The state USF will be driven by a box fee, a one-time fee on the purchase of network devices that access broadband infrastructure. This includes everything from cellular phones and computers to televisions designed to access the Internet. The nominal fee will be imposed at point of sale and will ideally be designed to capture both Internet and “brick and mortar” sales. As noted below, this is a large unknown, and is our primary research focus. We are currently working with the Washington Department of Revenue to explore the feasibility of the box fee concept.

Oversight for the state USF fund will be in the hands of the UTC, in accordance with the broad policy goals for the fund outlined by the legislation. Our research has suggested that using a reverse auction system of bidding for funds has proven the most cost-effective in other states, and will be among our suggestions for administering the fund.

1.5 Glide Path to Resolution

The Washington Legislature should evaluate the state USF proposal with two goals in mind. First, ensure that the analysis of the clinic's proposed box fee is correct and viable. Second, consider whether the implementation the State USF would be more effective if rolled out in a phased approach – such as focusing on the least served portions of Washington first.

1.6 Final Product

Ultimately, the clinic will produce white paper outlining the state USF. The white paper will include proposed legislation to implement the project.

1.7 Remaining Steps/Questions

Currently, the largest outstanding question is also the most critical. We are working with the Washington Department of Revenue to determine the viability of the box fee. The state USF must have a steady and significant source of funding in order to be effective. At the same time, the fee must be nominal to avoid chilling the sale of networked devices, as this would undermine our goal of expanding broadband use.

2 Centralizing Control over Cable Franchises

2.1 Issue Summary

In Washington, each local government has the right to negotiate cable franchise agreements with video (cable TV) providers. Franchising allows governments to set the requirements for providing cable service to the areas they control, as well as obtain fees from the providers. In return, the companies are granted the right to use municipal right of way to build their networks and bill consumers for their services. The grant of a franchise can also benefit non-cable service providers who wish to avoid securing leases on private property and make use of what is frequently lower cost right of way access.

2.2 Problem Statement

2.2.1 The Problem

The issue to be explored is whether it would be beneficial to centralize control over these agreements, and what modifications to the current system could make it more efficient or provide better or cheaper services to citizens of Washington. The goal of this policy should be to allow localities to get money from cable and other companies in exchange for rights to access and use their right of way in an efficient way. Where possible, the policy should encourage competition as much as possible. For the reasons set out below, our current position is that the franchising authority should not be centralized at the state level.

2.2.2 Current Law

Existing federal law in this area includes the Cable Act¹ and a pair of FCC Orders.² The Cable Act requires build out provisions and prohibits “redlining” (a failure to provide service to certain areas of a community, frequently these areas are occupied by persons with lower incomes) and exclusive franchises. It also provides required formal negotiating procedures in case informal procedures break down, though very few negotiations end up going this direction. The Cable Act also sets the maximum franchise fee at 5% of gross revenues. The FCC orders, to some degree, remove incentives to centralizing franchising power by requiring that municipalities provide a franchise agreement to potential franchisees within 90 days (or 180 for new entrants). They require reasonable build out terms and allow existing companies to build without a franchise as long as the technology they deploy can provide IP services and the company provides retail services.

¹ Cable Communications Act of 1984 (47 U.S.C. § 521 et. seq.) and its 1992 and 1996 amendments

² FCC 06-180 and FCC 07-190

Most franchise agreements are very similar and provide the municipality the maximum 5% franchise fee. They provide benefits in the form of PEG (Public, Educational and Governmental) services and set out the requirements for the build out process. Almost universally, each municipality has a single franchised cable provider (Tacoma is the outlier with its Click! Service). Some of these agreements are available online, some are written into municipal ordinance, and those not otherwise publicly available should be made available upon request under Washington disclosure standards. Because there are many municipalities to negotiate these agreements with (Comcast, for example, has 179 franchise agreements in our State), there are significant transactional costs involved. This is the source of proposals to centralize the process at the state level.

There are approximately 20 states that have centralized franchising authority at the state level, and others who have considered the idea and decided against it. A study conducted by the University of Minnesota³ (which focused mostly on Texas, California and Michigan as examples of states that have centralized) has illustrated that states that have centralized this authority have not seen significant benefits in penetration, competition, or price.

2.2.3 Stakeholders

Cities like the system as it is and fear that loss of control over these agreements will lead to decreased revenues, services, and benefits to public entities. Incumbent cable companies also like the system as it is as they have already made the investments in building relationships with local governments. Potential newcomers to markets (such as AT&T, Verizon and Qwest) would generally like to deal with a centralized authority to streamline their negotiation process. They would argue that centralizing control of franchising agreements would make the process more efficient on a statewide level, thereby reducing transactional costs as a barrier to entry, potentially increasing the number of providers in the state.

2.4 Policy goals

Our current policy direction is to leave the system as is. It appears that federal legislation, to a certain degree, addresses the major issues involved for a newcomer to the market. There is no evidence that the system is a barrier to entry and it appears that the transactional costs involved, while not insignificant in some cases, pale in comparison to the costs of building, operating and maintaining a cable network (in the tens of billions of dollars range). Evidence from other states that have centralized indicates that significant benefits are not realized from such decisions.

2.5 Glide Path to Resolution

Not applicable.

³ Available at <http://www.mactamn.org/Portals/0/Statewide%20Video%20Franchising%20Report%203-5-2009.pdf>

2.6 Final product

Not applicable.

2.7 Remaining Steps/Questions

The Clinic plans on taking no further action in this area unless an important but overlooked issue is raised by stakeholders or other interested parties.

3 Reforming Right of Way Agreements

3.1 Issue Summary

Local governments manage and maintain the shoulders of publicly owned roads. This area, known as “right of way” is frequently used by utilities to install infrastructure such as poles, subsurface pipes, equipment cabinets and similar above and underground facilities. The appropriate city, county or state agency may grant a “franchise” to an applicant conferring permission to make use of right of way. Franchises frequently cover a large geographic area; the franchise holder subsequently obtains right of way use permits for the individual projects in which it is engaged. Franchises in Washington are typically multi-year, non-exclusive and non transferable.

3.2 Problem Statement

3.2.1 The Problem

Obtaining a franchise can be a long and onerous process yet many providers of telecommunications services feel the costs are substantially less than the expense of securing property rental agreements from private parties. While the franchising process allows public input in setting terms and conditions for right of way use, the hearings, negotiations and negotiating language can consume so much time and expense that national providers may seek out states with less restrictive franchising requirements than those currently operational in Washington.

3.2.2 Current Law

Right of Way agreements are negotiated under the umbrella local franchising agreement each municipality negotiates with the cable service provider. Under the Cable Act of 1992 and 47 USC § 542, the franchise fee per annum cannot exceed 5% of the leaser’s gross revenue. However, under RCW 35.102, municipalities are exempt from statewide regulation when regulating and taxing utilities. The city of Seattle, for example, sets its franchising fee at 4.2% and a utility tax at 10% for a total annual fee of 14.2%. Under the local franchising agreement the municipality also negotiates the build-out of the providers’ network—granting right of way access to dense populated affluent areas in return for build-out to underserved areas. The benefit of this current system is its flexibility in allowing providers and municipalities to construct tailored agreements. The problem is that local franchise agreements are intrinsically narrow and also contribute to natural monopolies. California recently established a state-wide franchising authority but it has not significantly improved or streamlined the franchising process. However, moving forward in Washington there may be hybrid proposals that retain local autonomy while addressing access and build-out on a state level.

3.2.3 Stakeholders

Local governments tend to favor the status quo citing the need for public input into the process leading to the admission into the community of telecommunications service providers. Concerns cited by government and citizens include aesthetics, integrity of the streets, service offerings and customer service practices. Companies seeking to use the right of way are strongly interested in a franchising system that is generally uniform throughout the state, speedy and not subject to delays resulting from extralegal concerns. It should be noted that the providers we spoke to indicated Washington's franchising system is tolerable and business can be done without unreasonable effort.

3.2.4 Policy Goals

We favor retention of the status quo. The benefits of retaining local right-of-way and franchising agreements are such that consolidation into a state-wide authority is unwarranted. However, it would be beneficial to collect all franchising agreements into a state run database to be able to track trends and equity between municipalities and providers. This would allow agreements to become more unified and could provide the public with an easy access point for information.

3.3 Justification of Need for Government Action

Franchising is a uniquely governmental activity falling outside the marketplace and not subject to market forces.

3.4 Description of Proposed Solution

The UTC or some other state agency should collect and analyze all franchising agreements. Ideally the agreements should be publicly accessible through an online data base. Any study should examine among other things: franchise length; length of negotiations to reach agreement on the franchise; services provided; costs of those services and whether the franchise was renewed.

3.5 Glide Path to Resolution

Not applicable.

3.6 Final Product

Not applicable.

3.7 Remaining Steps/Questions

An interested stakeholder recently raised an issue concerning the obtaining of what were described as “environmental permits.” Apparently such permits are difficult to obtain and must be acquired by carriers seeking to install facilities in right of way. Clinic members are looking into this issue and shall share their findings.

4 Re-examining the Administration and Governance of Pole Attachments

4.1 Issue Summary

Pole attachment refers to the policy and procedures of attaching telecommunications cables and apparatus to poles. Poles are generally owned by municipalities, co-ops, or investors.

4.2 Problem Statement

4.2.1 The Problem

The complexity of pole attachments makes it a formidable issue for new entrants and established providers. The multiple laws and regulations at state and federal levels apply different standards and rates to different pole attachment entities. This means that new pole pathways with several pole ownership entities would require different contracts, rates and regulations.

4.2.2 Current Law

There are many levels of regulation and rate calculation. 47 USC, Section 224 sets the federal standards and rate calculations for poles. However, 26 states certify that they self-regulate above or separately from the federal standards. Washington regulates poles under RCW 54.04.045. Under this regulation, municipalities are exempt and allowed to regulate themselves. For example, Seattle's pole attachment rates can be found in Chapter 15.32 of the municipal code. However, poles are also owned by public utility districts, investor owned utilities and co-ops and municipalities can only regulate poles they own or jointly own (usually with a telephone company). Investor owned poles, like Puget Sound Energy are regulated by Washington, but are given a degree of latitude. They voluntarily choose to follow the FCC standard. On April 7, 2011, the FCC released Order 11-50. The order revised several provisions of Section 224, including:

- Shorter implementation timeline of attachments
- Explanation of attachment rejection
- Rates. The order set all attachment rates at the lower cable bracket, eliminating the discrepancy between cable providers and ILECs.
- Provision to allow ILECs to complain about local rates.
- Insufficient space does not include a necessity to reconfigure attachments.
- The order is very advantageous to telecommunications companies particularly ILECs. It is extremely unpopular

with local utility companies and electrician's unions. The order does not affect Washington because this state self-certifies.

4.2.3 Stakeholders

The stakeholders for pole attachment issues are pole owners (public and private) and telecommunications providers. Pole owners have divergent interests. The pole owners of Puget Sound Energy are looking to provide pole attachments at competitive, FCC level rates. The City of Seattle is looking to maximize revenues for itself and capitalize on its geographic advantage.

4.2.4 Policy Goals

The ultimate goal of pole attachments would be a unified rate structure that satisfied municipalities. This seems, at this time, to be a remote possibility. The clear policy shift on a federal level is towards lower rates that are advantageous towards providers. This is argued to increased broadband access in rural areas. This is vehemently disputed by local utilities and electricians unions. Local municipalities like Seattle may charge almost three times more than the FCC standard rate, but they argue that there is no reason why they should not be able to take advantage of the free market and raise as much revenue as they can. We agree. We propose a solution of benign neglect. Pole attachment is a contentious and complicated issue. It makes up but a fraction of the cost of new and expanded broadband infrastructure. Currently the majority of Washington poles follow the FCC rate. Seattle's rates are more than three times higher. This is a source of consternation for many broadband providers. However, we do not think that the city of Seattle's desire and ability to maximize revenues requires government intervention on behalf of providers. Given the federal trend towards rate lowering and unification we see no reason to add to that on a state level.

4.3 Justification of Need for Government Action

None at this time

4.4 Description of Proposed Solution

See 4.2.4 above

4.5 Glide Path to Resolution

Not applicable

4.6 Final Product

Not applicable

4.7 Remaining Steps/Questions

Not applicable

5. Expanding Access through PUDs and Municipal Broadband

5.1 Issue Summary

Legislators in Washington, like their counterparts elsewhere, are debating whether public entities such as PUDs and municipalities should be allowed to provide retail broadband service. Tacoma’s CLICK! network; created and maintained by municipally owned Tacoma Power competes directly with private providers; costs for broadband services are lower in Tacoma than in other parts of the state which lack similar competition.

5.2 Problem Statement

5.2.1 The Problem

The connection between high speed broadband access and economic development is widely acknowledged. Growth and deployment of broadband infrastructure in Washington, like many parts of the United States, is stymied by outmoded regulatory schemes and concepts that evolved along with traditional telephone and cable technologies. Currently, largely because of this legacy conceptualization, private providers are unable to deliver high speed broadband access to many areas of Washington—both urban and rural. The high cost of deploying broadband infrastructure creates a high entry barrier into the marketplace, both deterring new players from entering the field and shielding incumbent providers from competition that would normally drive growth and expansion. In Washington, this has created a “digital divide” between communities that have access to broadband services and those that do not.

One method for expanding access to broadband would be to allow local governmental entities to build broadband infrastructure and, in limited situations, act as a broadband provider. To be successful, this method should seek to promote a competitive marketplace that will fuel the growth and innovation of broadband technologies.

5.2.2 Current Law

States have treated the public provision of broadband in different ways across the United States. A minority of states, such as Missouri⁴, Nebraska⁵, and Texas⁶ expressly ban PUDs and municipalities from becoming telecommunication providers.

⁴ [Mo. Rev. Stat. § 392.410\(7\)](#) and [Mo. Rev. Stat. § 71.970](#)

⁵ [Neb. Rev. Stat. Ann. § 86-594](#) and [Neb. Rev. Stat. Ann. § 86-575](#)

⁶ [Texas Utilities Code, § 54.201 et seq.](#)

Washington law currently allows PUDs to provide wholesale broadband, but that authority does not extend to retail sales. Less clear is the status of municipal broadband providers which lack express authority to provide broadband service. However, many Washington cities contend that they possess the authority to provide broadband to their citizens. The legal contours of this issue are currently being litigated.⁷

5.2.3 Stakeholders

- Incumbent telecommunications providers concerned with competing with public entities.
- Municipalities seeking to enter the telecommunications business and serve their citizens
- PUDs seeking to expand their current provider role
- Washington residents who lack broadband access or are otherwise underserved

5.2.4 Policy Goals

Broadband infrastructure is this century's interstate highway system: a public investment in an infrastructure that will rapidly connect Washington's citizens statewide, nationally, and internationally; fuelling growth, competition, and innovation. Like highway access, the path to universal broadband access varies with the needs of the local community.

Our primary goal is to expand broadband access. We believe allowing municipalities and PUDs to provide broadband services addresses the most significant hurdles to broadband expansion: the high cost of infrastructure. In conjunction with a state USF, PUDs and municipalities are well placed to address the needs of their consumers.

A secondary goal is to promote a competitive marketplace. We believe that empowering PUDs and municipalities will spur competition which will drive innovation and improved service.

5.3 Justification of Need for Government Action

To be successful private providers need to be able to generate profit for their shareholders. However, when an effective competitive marketplace does not exist, private providers only have a weak incentive to expand access to broadband services. In fact, the scarcity of service justifies the collection of high rates from users. In Washington's urban areas, the barriers to entry are so high that incumbent providers have little trouble keeping new providers from entering the marketplace. Qwest (soon to be CenturyLink) and Comcast, merely vie for existing users, rather than expanding the overall number of ratepayers. In contrast Washington's rural areas are characterized by low population density and large geographical distances between communities. The lack of concentrated business consumers in a given area translates into weak or non-existent business case for providers to build broadband infrastructure in rural areas. Arguably, rural areas are poised to reap the biggest rewards from broadband expansion, quickly integrating communities into existing networks of private and public service

⁷ In Re Limited Tax General Obligation Bonds of the City of Edmonds, No. 64492-1, (Wash. Ct. App. Div. 1 2011)

In sum, both the rural and urban settings need a means for bridging the gap between the need for broadband services and the reluctance of providers to invest in portions of the state that do not guarantee a profit.

5.4 Description of Proposed Solution

We propose making the necessary legislative changes to authorize PUDs and municipalities to provide retail broadband services.

5.5 Glide path to resolution

Legislation making changes to the applicable PUD and municipal laws.

5.6 Final product

The clinic will deliver proposed legislation that makes these changes. HB 2600 – 2009-10, which is currently under consideration, addresses changes necessary to authorize PUDs to offer retail broadband service. Another piece of legislation will be drafted to give municipalities the express authority to provide broadband to consumers.

5.7 Remaining Steps/Questions

None.

6. Interconnection and Intercarrier Compensation

6.1 Issue Summary

Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Intercarrier compensation is a system of payments between carriers to compensate each other for the origination, transport and termination of telecommunication traffic. Today, there are four major forms of intercarrier compensation: interstate access charges, intrastate access charges, reciprocal compensation, and other temporary compensation regimes applied to ISP bound traffic and wireless traffic. Access charges apply to long distance calls. The FCC regulates rates for interstate calls and states regulate rates for intrastate calls. Reciprocal compensation today primarily governs local calls, and rates are either negotiated by carriers or set by states using the FCC's pricing methodology

6.2 Problem Statement

6.2.1 The Problem

Evidence indicates that the current system of intercarrier compensation is hindering progress for all IP networks. For example, the current regime creates the perverse incentive to maintain and invest in legacy, circuit-switched-based, time-division multiplexing (TDM) networks to collect intercarrier compensation revenue, hindering the transformation of America's networks to broadband. One example is California's rural areas. In California, most of the rural areas are covered by broadband service, and most them are provided through DSL facilities. The rural carriers cannot have intercarrier compensation based upon DSL facilities. On the other hand, the end user numbers in rural areas are too small to provide enough revenue for the DSL service. So in most California rural areas, the Digital Service Line (DSL) price is significantly high. In order to have a low cost broad band service, the rural area end users have to buy traditional switch-based telephone service with the DSL service, so the rural carriers can earn intercarrier compensation from the telephone facilities.

Another example of regulatory arbitrage is referred to as "phantom traffic." Phantom traffic is caused by telephone calls that do not have enough information for the terminating carrier to determine where the call originated from hence this carrier cannot charge the appropriate originating carrier for compensation. Phantom traffic today causes carriers to devote substantial resource to resolving billing disputes that could be used to invest or innovate.

The difference between interstate access charge and intrastate access charge is also worth noticing. Payments for calls within a state are often higher than those that apply to calls across state. If we treat the difference as a necessary subsidy for rural carriers, it needs to and can be used more efficiently to promote broadband service in rural areas.

6.2.2 Current Law

This issue is governed by a combination of federal law and state law. On the federal level, the duty of interconnection is governed by 47 U.S.C. § 251. Particularly, intercarrier compensation is governed by § 251 (b) (5) Reciprocal Compensation. Additionally, the FCC can regulate intercarrier compensation using § 201 that prohibits carriers engaged in the delivery of interstate communications from charging rates that are not “just and reasonable,” and grants the FCC authority to prescribe regulations to implement the 1934 Act, which include all provisions of the 1996 Act. This is the case when FCC issued the ISP-bound traffic interim regulation.

On the state level, major statutory authority comes from RCW 80.36.110, .320, .330, and .338. Based on these authorities, Washington has established regulations such as “access charge and universal service reporting” (WAC 480-120-399), “terminating access charges” (WAC 480-120-540), and “Washington Exchange Carrier Association” (WAC 480-120-352).

6.2.3 Stakeholders

Stakeholders in this area are numerous and include: all providers of telephone service especially the large and small wireline companies; VoIP service providers, the regulatory community (state regulating bodies), and representatives of consumers who are concerned about rates and service quality, particularly the end users in rural area.

6.2.4 Policy Goals

Current arbitrage schemes cost a significant amount of money that should be used to improve telecommunications service quality and quantity. We first propose to direct part of the intrastate access charge to promote broadband service in rural area. Second, we propose improving the quality of telecommunications services on the wholesale level by inserting certain clauses in the wholesale contract. Third, we propose to amend call signaling rules to address phantom traffic by ensuring that calls received by the terminating provider include sufficient signaling information for that provider to identify and bill the appropriate provider. Last, we will do further research on VoIP’s intercarrier compensation issue and decide what constitutes efficient VoIP regulation.

Currently, the FCC is also proposing to fundamentally modernize the intercarrier compensation system by eliminating waste and inefficiency and reorienting intercarrier compensation to increase the nation’s broadband availability. Since the intrastate access charge is regulated by the state, the state should cooperate with the federal agency and improve the uniformity of the compensation system in the nationwide.

6.3 Justification of Need for Government Action

Government action is necessary because of market failure. The market fails when end users' payments cannot cover the cost of the service provided to them. This is true in rural areas. In rural areas, a significant part of carriers' income comes from intercarrier compensation rather than end user's payments. A similar occurrence takes place with VoIP service, since currently some VoIP services' prices are significantly low because the providers do not need to pay intercarrier compensation. Sometimes market failure is inevitable or necessary but when the market fails in this manner, the government must also act to ensure that basic consumer and business needs are met.

6.4 Description of Proposed Solutions

The Clinic proposes three solutions:

6.4.1

Provide broadband to rural areas. As stated above, the intrastate access charge is higher than the interstate access charge. The difference between these two charges is sometimes used to subsidize intrastate traffic. There may be some areas that really need this money, and the development of broadband service in rural areas may require such a subsidy. An ad hoc fund can be built to establish the necessary facilities in rural areas. The fund's money could come from the intrastate access charge charged by carriers. One debatable argument would be that all current intrastate access charges are used efficiently to reimburse necessary cost. If this argument is true, the state may consider increasing the intrastate access charge rate to meet the need of rural broadband establishment.

6.4.2

Improve the quality of telecommunications wholesale services. Currently, in the area of telecommunication wholesale service, the end users need to deal with two carriers, which increase the carriers' likelihood of shirking obligations. The facilities belong to two carriers, which may also increase the problem of inter-operation. The result is the service quality of telephone wholesale is low. But telecommunication wholesale service is an important tool to ensure enough competition. While its coverage is limited, it has an entry potential that keeps the existing service rate low. Therefore, improving wholesale's quality is important to competition. One way to achieve this end is to add certain clauses in the wholesale agreement. For example, the retailer should have certain rights to manage and control enough facilities in the switch center to provide adequate maintenance, regardless of who is the owner of these facilities.

6.4.3

Phantom traffic. Phantom traffic is a nationwide problem which is being addressed on a national level. Washington should closely track what the FCC is doing in its current proceeding on this topic. The state through the UTC should track, comment upon and work to create a viable federal rule or rules.

6.5 Glide Path to Resolution

6.5.1.

Provide broadband to rural areas. The first step is to establish an ad hoc committee to do a survey in rural areas, and find out what potential broadband services and solutions are available in those areas along with associated costs. For example, many rural areas have traditional telephone service, so there will be no last-mile problem to provide DSL service. The cost of the Digital Service Line Access Multiplexer (“DSLAM”) is insignificant therefore the major cost comes from connecting the DSLAM to the nearest internet access point or the nearest backbone internet network. The committee should include engineers and accounting professionals to insure the potential solutions and their costs are practical and available.

The second step is to establish an ad hoc fund with the needed money coming from part of intrastate access charge. The state may adjust its intrastate access charge so that it can meet the demand of the cost of the chosen broadband solution. The fund should be quickly established and begin to accumulate funds in the next several months. When the fund is of sufficient size to finance the chosen proposal, the state or a selected third party will start the construction. Once all needed work begins and is seen as adequately financed, the state may again set the intrastate access charge back to the initial rate.

6.5.2

Improve the quality of telecommunications wholesale. The current problem of telecommunications wholesale service is complex and unclear; a survey may be necessary to determine important details governing the issues in this area. One approach to use is to interview the retail service providers and their consumers in order to identify common problems. On completion of these inquiries the appropriate state agency should take the steps needed to add new mandatory clauses to wholesale contracts.

6.5.3

Phantom traffic. Given the complex nature of this issue and the need for uniformity the appropriate state agency should track the activities of the FCC in this area.

6.6 Final Product

Major additions are needed to the Revised Code of Washington especially in RCW Chapter 80.36. These provisions should reflect the ideas contained above.

6.7 Remaining Steps/Questions

The Clinic shall spend time examining provisions of the RCW which are in need of change; linguistic changes are to be recommended. The activities of the FCC are to be closely tracked and suggestions made on incorporating the ideas forthcoming from this proceeding. One remaining question is the best intercarrier compensation scheme for VoIP traffic is. To answer this question, more research is needed. This question has federal implications and the state may be bound to follow requirements dictated by the FCC or Congress.

7. Taxation of Telecommunications Services that Provide the Same or Functionally Equivalent Services (Reserved)

8 Competition

8.1 Issue Summary

When discussing broadband, competition can be defined by method of service delivery (wire, wireless, Internet Protocol) or service type (voice, data or video). For purposes of this report's section the following definitions have been agreed upon:

8.1.1 Definitions

Digital Subscriber Line (DSL). DSL is data transmission technology over the wires of a local phone network. Major provider: Qwest. Approximate speed: 1.5-5 Mbps (12/20 Mbps available in only a few neighborhoods).

Cable. Cable is a form of broadband Internet access that uses the cable television infrastructure. Major provider: Comcast. Approximate speed: 1-50 Mbps.

Fixed Wireless. Fixed Wireless uses the technology of Motorola Canopy™, which is designed to provide wireless networks from 1000 feet to 25 miles and is the leading edge technology for high-speed, wireless Internet access. Approximate speed: 512 Kbps – 1.5 Mbps

Dial-up. Dial-up is a form of Internet access that uses the facilities of the public switched telephone network (PSTN) to establish a dialed connection to an Internet service provider (ISP) via telephone lines. Approximate speed: 40-50 Kbps (theoretically 56 Kbps).

Mobile Wireless. Mobile Wireless is the form of Internet access on a mobile device, such as cell phone. Approximate speed: 600 Kbps – 1.4 Mbps.

Satellite Internet. Satellite Internet access is Internet access provided through satellites. The service can be provided to users world-wide through Low Earth Orbit (LEO) satellites. Approximate speed: 512 Kbps – 1.5 Mbps

8.2 Problem Statement

Rural and urban areas face their own distinct problems which increased competition may cure. The problem in rural areas is the shortage of types of access. Rural residents have few choices and are usually limited to internet access via satellite interface; very limited areas are covered by fixed wireless or DSL. This lack of access can lead to low service quality. In most cases, satellite companies have a daily traffic allowance (typically 200MB) on consumers. When a user exceeds their allowances, the company may slow down their access, deprioritize their traffic or charge for excess bandwidth used. Satellite communications are also easily effected by weather leading to reliability problems. Often satellite internet service is slow and unstable. Low population density creates a difficult business case for those wishing to bring in a competitive service provider. Cost and a small customer base make it nearly economically impossible to extend a physical wired network to rural areas.

The problem in urban area is insufficiently robust competition. In other words, the problem stems from the shortage of competitive providers. Although nearly all types of Internet access are available in the urban areas, DSL and Cable Internet are the most popular options for most residents and business owners. Compared with other types of access, only DSL and cable can offer the relatively high speeds at low prices. Therefore, a reasonable person is highly likely to choose from the first two instead of the remaining four. Simply put the other four types of service delivery mechanisms are too weak to compete with DSL and cable where they are available.

In the DSL and cable market, Qwest and Comcast create a situation of oligopoly. These two companies occupy a very dominating position that allows them significant market influence. One of the results of a duopoly like market is higher price for services and lower quality of service provided than in those areas with more robust competition.

An example of competition beneficial to the customer is the publicly owned CLICK! network which serves Tacoma. CLICK! provides video services and Internet access and leases space to ISPs, this competition has resulted in an average price for Internet access being 30% lower than in Seattle.

The problem in the urban areas stems from the extremely high build out cost of the physical network and the incumbents' reluctance to open up their network to bring in potential competitors.

8.2.2 Current Law

Reserved

8.2.3 Stakeholders

The issue of competition has a nearly universal impact. It has been a basic tenant of American governing and business philosophy that competition can lead to lower prices, better service and innovation. However, an overly competitive market place may produce business failures, squandered investments and disappointed consumers. Two of the more difficult challenges for policy makers are: striking the proper balance between open and limited markets and determining appropriate regulatory mechanisms for situations of natural monopoly.

8.2.4 Policy Goals

Expansion of the number of service providers in rural and urban areas with an emphasis on access diversification in rural areas (can we add means of service delivery other than satellite?) and provider diversity (can we add more service providers besides the incumbent cable and wireline operator?) in urban areas.

8.3 Justification of Need for Government Action

Low population density in the rural area is a disincentive for DSL or cable providers to make large investments extending their networks into these areas. This market failure deprives the rural residents of the ability to access diverse broadband services. In urban areas the cost of overbuilding an incumbent provider combined with a likely “price war” dampens enthusiasm for providing competing wireline or cable service.

8.4 Description of Proposed Solutions

8.4.1

For rural areas: Incentivize Fixed Wireless Access. Fixed wireless technology has no need for costly last mile build-outs. Fixed wireless companies typically install their facilities on hill tops and areas of higher elevation allowing wide coverage; the build-out costs associated with this technology are much lower than creating and/or extending a wired or cable network.

Spokane provides a good model. The fixed wireless company AIR-PIPE Rural Broadband offers an affordable price and reasonable speeds (around 512 Kbps – 1 Mbps). Fixed wireless is a feasible solution for the rural Internet access. Fixed wireless while currently in rural areas does have the potential to expand into urban areas. The Clinic is studying methods by which government can subsidize and/or incentivize the expansion of this technology.

In addition government action should be considered for incentivizing the development of DSL broadband in rural areas. Therefore, we propose to use develop DSL broadband based on the landline phone network and spread the broadband network to the areas where landline telephone is already available.

8.4.2

For urban areas: Work with Competitive Local Exchange Carriers (CLECs). Competitive Local Exchange Carriers currently serve downtown businesses and areas where commercial establishments are clustered. During the 1990s there appear to have been more CLECs than the market could sustain. The uncontrolled formation of these CLECs, with easy financing from equipment vendors and IPOs, was a significant contributor to the "telecom bubble" of the late 1990s which then turned into the "bust" of 2001-2002. This proves that the CLEC model is feasible for bringing about competition. Government should explore solutions such as incentivizing their presence in urban areas; studying their successes and setbacks and developing a regulatory regime that encourages market entry that is viable and beneficial to both the service provider and the consumer.

8.5 Glide Path to Resolution

The Clinic recognizes additional study is needed to determine appropriate government incentives to foster expansion in both the urban and rural markets.

8.6 Final Product

To be determined

8.7 Remaining Steps/Questions

See 8.5 above.

9. Consumer Protection

9.1 Issue Summary

Interactions between customers and service providers should be clear, easy to understand and convenient. Consumer protection is the set of policies put in place to insure that customers are treated fairly and reasonably. Approaches to consumer protection can vary from “hands-off” to actual written standards. The wise provider is easily accessible, makes use of clear, easy to understand agreements and consistently demonstrates a commitment to maintaining the highest quality relations with those who purchase its products and services.

9.2 Problem Statement

9.2.1 The Problem

Customers complain about matters ranging from being unable to access their service provider to advertised Internet speeds which do not reflect the reality they experience. Billing errors, temporary service lapses and contracts containing detailed and difficult to understand information are other consumer related problems brought to the attention of the Clinic. Wireline service providers, cable television companies, ISPs and cellular telephone service providers are regulated differently or in some cases not at all. Consumers do not have one regulatory agency to approach for the handling of any broadband service related complaint.

9.2.2 Current Law

Washington’s Consumer Protection Act (RCW 19.86) does not cover many of the problems encountered by the users of broadband services. This law does not mandate solutions to commonly difficulties such as revealing restrictive contract terms such as early termination fees; dramatically higher roaming costs and Internet speeds which differ from those advertised. The FCC’s requirement of “truth in billing” has not adequately addressed these concerns.

9.2.3 Stakeholders

Stakeholders include all: service providers; customers and government agencies tasked with regulating broadband companies.

9.2.4 Policy Goals

Passage of legislation which addresses commonly encountered customer complaints and creates a centralized mechanism for addressing these concerns on a state wide basis.

9.3 Justification of Need for Government Action

Market solutions exist for the problems referenced above. However, market actors are motivated to maximize sales levels for their communications services. This often translates into an incentive to decrease presentation of material information regarding actual service costs and quality. As a result, market actors should not be relied on to ensure that Washington consumers are receiving sufficient information to make informed choices regarding their communications services.

9.4 Description of Proposed Solution

The legislature should enact a communications service consumer protection statute that provides for the following:

9.4.1

Clarity Regarding Cost of Service.

- Plain language presentation at the point of sale of all service charges and fees to be assessed by the service provider or third parties that may impact the cost of telecommunications service to the consumer.
- Plain language disclosure at the point of sale of any early termination fees associated with service.

9.4.2

Unexpected Cell Phone Service Cost Safe Harbor

- Communications service consumers subject to substantial unexpected costs for their telecommunications service, including but not limited to undisclosed early termination fees, may cancel their service without penalty within seven (7) calendar days after receipt of their first billing statement.

9.4.3

High Speed Internet Service Quality Reporting

- Require all high-speed Internet providers to track and report on each bill the “actual average daily speed” received by the consumer during the billing period. Actual average daily speed information may be audited by the appropriate state, county, or municipal authority. Fines may be levied if a provider fails to accurately report required service quality information.

9.4.4

Single Point for Consumer Complaints Regarding Communications Services

- Authorize creation of communications service consumer complaints office within the Attorney General's office and provide authority to collect complaints, punish lack of remedial action by providers, and publicly publish certain complaint related data (e.g. providers with greatest number of complaints).

To implement the above goals, the statute should authorize counties, municipalities and the UTC to promulgate ordinances and regulations and should authorize the Attorney General to take any necessary action. A consumer protection office with state wide jurisdiction should be established in the office of the Washington Attorney General.

9.5 Glide Path to Resolution

Introduction, consideration and passage of legislation incorporating the principles described above.

9.6 Final Product

Proposed legislation and justification statement.

9.7 Remaining Steps/Questions

Further study of consumer protection issues and crafting of a comprehensive bill for introduction to the Washington Legislature in its 2011-2012 session.