EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D C. 20503

GENERAL COUNSEL

April 28, 2000

Mr. Christopher Wright
General Counsel
Federal Communications Commission
Washington, D.C.

Dear Mr. Wright:

This letter sets forth the legal opinion of the Office of Management and Budget on the status of the Universal Service Fund (USF), and responds to your internal memo on this subject, dated March 7, 2000.

As you note, this fund has a long history and has, since its inception, been maintained outside the Treasury and managed by a non-governmental entity. The Telecommunications Act of 1996 amended the previously existing framework of the USF and added specific statutory provisions relating to the Fund. But, as your memo states, "There is, however, no indication that Congress intended fundamentally to change the manner in which the fund is maintained and administered."

After enactment of the 1996 Act, OMB displayed the USF in the budget for the first time. See Fiscal Year 1997 Budget, pp. 978-79. The determination to do so was based on the larger role of the Federal Government with respect to the USF program. However, inclusion of the account in budgets beginning in fiscal year 1997 does not, in our view, support reclassifying the Fund as "governmental" or "public money" for all purposes.

The question most basically at issue here is whether the funds collected for the Universal Service Fund pursuant to the Telecommunications Act of 1996 are "public moneys" received "for the use of the United States" (9 Stat. 398, R.S.§3617, codified at 31 U.S.C. 484, recodified in 1982 without substantive change at 31 U.S.C. 3302(b)). If the funds are for such use, then they are properly "public money" which, under 31 U.S.C. 3302, is to be deposited in the miscellaneous receipt account of the Treasury. Once in

this account, they are subject to a range of requirements that govern public money. If not public moneys "for the use of the United States", then these requirements do not apply. However, this question is distinct from the budget presentation of such funds. See *infra* for further discussion.

The legal guidance defining the phrase, "for the use of the United States," is not extensive. The most helpful guidance for purposes of this case is found in a few Comptroller General and Attorney General opinions.

The general principle has been articulated by the Comptroller General as follows: "Funds are received for the use of the United States only if they are to be used to bear the expenses of the Government or to pay the obligations of the United States." (1982 U.S. Comp. Gen. Lexis 1005, B0205901). The Comptroller General relied in this 1982 opinion on a 1922 opinion of the Attorney General. 33 Op. Atty. Gen. 316 (1922).

In the 1922 case, the Interstate Commerce Commission pursuant to statute established a fund of the ICC into which railroads were required to pay annually one-half of any net operating income in excess of 6 percent of the value of their property used for transportation. The statute provided that the carrier was to hold that amount "as trustee for the United States," and was to pay it to the United States. Id. at 317. It further provided that the fund was to be administered by the ICC to make loans to carriers for necessary capital expenditures, to purchase equipment and facilities to be leased to carriers, or to refund maturing securities originally issued for capital investments. Id. at 318. Further, the statute required that unused balances of the fund be invested in U.S. securities, but it did not require that these balances be deposited in the Treasury. Id. at 319.

In reviewing the cross-subsidy scheme established by the statute, the Attorney General noted that even though the contingent fund was "under the immediate supervision and control of the Interstate Commerce Commission", "when the entire section is read together it conclusively appears that the Government of the United States possesses no beneficial interest whatever in such fund and that it is held solely for the purposes therein prescribed" (i.e., to make loans and leases to carriers) (id. at 319). Therefore, the Attorney General concluded that to be subject to the Miscellaneous Receipts Statutes, funds "for the use of the United States" refers only to "funds to be used in bearing the expenses of the Administration of the Government and paying the obligations of the United States." Id. at 321.

The principle of the case is that a federal statute may establish a broad regulatory regime, and a federal agency be extensively involved in defining the parameters of and even in administering a program – in this 1922 case, one involving the redistribution of carrier assets for use by other carriers – and yet the funds involved would not be construed as public money subject to the Miscellaneous Receipts Statute.

A more recent example is the United Mine Workers of America Combined Benefit Fund. Established by the Coal Industry Retiree Health Benefit Act of 1992, the fund was intended to replace two insolvent private health benefit funds, which were merged into the new account.

The UMW Combined Benefit Fund has some characteristics normally associated with private entities, as well as those that appear governmental in nature. On the one hand, the statute designates the Combined Fund as "private". The Fund is managed by the private trustees selected by coal companies and the UMWA. The trustees choose the health care providers. Premiums are paid for current and former members of the coal operators' association directly to the Combined Fund (not to the Treasury), and the Fund trustees hold and distribute the funds.

On the other hand, there are also governmental features to the program – particularly the governmental nature of the activities undertaken by or on behalf of the Combined Fund. Coal companies can be compelled to pay premiums to the Fund, and the UMWA pension fund can also be compelled to make payments to Fund. The coal companies cannot withdraw from the Fund, and if a company refuses to pay its premiums, it can be fined $100 per day per beneficiary. The Government determines the premium amount, and assigns each company an amount of premiums to be paid. This amount, in many cases, is not related to services previously provided to the company by its retirees. The Government determines the type of delivery system that will be used to provide benefits.

Having weighed both the private and public characteristics of the Combined Benefit Fund, a decision was reached that this fund is not characterized as public money "for the use of the United States." As a result, it is not held in the Treasury, and is not subject to the usual requirements that apply to public monies.

In light of the above precedents, we conclude that the Universal Service Fund does not constitute public money pursuant to the Miscellaneous Receipts Statute, 31 U.S.C. 3302, and is appropriately maintained outside the Treasury by a non-governmental manager.

Further, we believe that this conclusion is consistent with legislative intent. As your memo notes, there was no evidence that in enacting the 1996 Act, Congress intended to change the manner in which the USF is administered. Faced with the opportunity when considering this legislation to revise the FCC's long-standing administrative practice, Congress was silent. In fact, subsequent action in the Senate indicates agreement that the funds are not public money. The Senate passed a "sense of the Senate" provision in 1997 that stated, "Federal and State universal contributions are administered by an independent, non-Federal entity and are not deposited into the Federal Treasury and therefore are not available for Federal appropriations." Section 614, H.R. 2267 (105th Congress).

Funds which are not "public money" within the definition of the Miscellaneous Receipts statute as a legal matter may, nonetheless, be appropriately included in the President's budget in order to convey the full scope of government activity. This is principally true in cases such as the USF and UMW Combined Fund. The budgetary treatment in such cases is distinct from, and not intended to resolve, the legal issue under 31 U.S.C. 3302.

Sincerely,

Robert G Damus

Robert G. Damus
General Counsel