Challenges and Opportunities for Universal Service Reform

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Executive Summary

The United States needs to take decisive action to reform how it approaches the goal of universal service—or making Internet connectivity available to all Americans. Under the current model, adopted by Congress pursuant to the 1996 amendments to the Communications Act, the Federal Communications Commission ("FCC") collects fees derived from a dwindling revenue base associated with traditional telephone services to subsidize expanding and evolving broadband Internet networks. While these contributions are assessed on telephone providers, almost all providers elect to pass the costs onto consumers, which amounts to a regressive payment that increases each quarter to keep pace with the FCC's universal service funding needs. Meanwhile, the principal beneficiaries of modern broadband networks—technology companies that rely on high-speed connectivity to transmit massive amounts of data to enable cloud computing, streaming, artificial intelligence, and other applications—freeride on these consumer-funded universal service subsidies.

Congress should update the Communications Act to reflect the reality of today's Internet ecosystem. Congress could, for example, move to a direct appropriations model for universal service programs, or it could modernize the contribution base to include specified revenue streams from technology companies. There is broad, bipartisan support at Congress for exploring universal service reform, and the time is ripe to do so, as the current contribution model is unsustainable.

But in the absence of new legislation, the FCC should use its existing authority to broaden the contribution base. Contrary to conventional wisdom, the FCC has sufficient authority under current law to require contributions from technology companies, at least in part. Specifically, Congress required the FCC to assess contributions from traditional telephone companies (or "telecommunications carriers" in the Act's parlance), but also provided the FCC with discretionary or permissive authority to assess contributions from any "provider of telecommunications"—a broader category that includes any provider with some transmission component to their business. Technology companies provide telecommunications, for example, when they use fiber or other network capabilities to transmit data between server farms to enhance the user experience on their websites. The FCC could use these transmission components as a jurisdictional hook to assess revenue that technology companies obtain through cloud computing services, streaming subscriptions, digital advertising, or other sources. The FCC should conduct a rulemaking to obtain public input on the legal and policy decisions involved in determining how best to expand the contribution base—which in turn could spur Congress to build on the agency's efforts.

While contribution reform is important, Congress and the FCC must also take steps to reform existing universal service programs to ensure that money is distributed in an efficient manner without needless and duplicative spending. Historically, universal service programs have been vulnerable to waste, fraud, and abuse, so it is imperative that any expansion to the contribution base provide relief to consumers, not increase government bloat.

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I. Introduction

For too long, the government has advanced the goal of connecting every American to the Internet (or universal service) primarily via an assessment on the diminishing revenue associated with legacy voice telephone services that consumers see on their phone bills. The FCC collects this assessment from carriers (who in turn pass through the costs to customers) to line the coffers of the agency's Universal Service Fund ("USF" or the "Fund"), which subsidizes connectivity in high-cost and rural areas, schools and libraries, and among lower-income Americans. This current approach is unsustainable, as the FCC has had to hike the fees it needs to collect to fund these programs each year, given increasing demand for broadband deployment and the shrinking revenue base associated with voice telephony. And because USF fees represent a fixed percentage of revenue, like sales taxes, they disproportionately burden lower-income Americans. These regressive payments have come under political scrutiny, as has the perennial problem of waste, fraud, and abuse with how subsidies are distributed.

Notwithstanding widespread recognition of the problem, policymakers have been slow to address it. This stems in part from the difficulties inherent in reforming a complex, multifaceted program that impacts a diverse coalition of stakeholders. In addition, in recent years, the USF has operated under a legal cloud, as cases have wound their way through the courts challenging the program's constitutionality. Last Term, in *FCC v. Consumers' Research*, the U.S. Supreme Court rejected constitutional challenges to the USF, clearing the way for a robust debate over the program's future.

With legal challenges mainly in the rearview, now is the perfect opportunity to reflect on and reevaluate the federal government's approach to subsidizing Internet broadband connectivity, with the twin goals of empowering rural and low-income communities with Internet access while reducing the bloat associated with dozens of overlapping and duplicative broadband subsidy programs that currently litter the regulatory landscape. Ideally, Congress would view these challenges as an opportunity to institute comprehensive reform to the universal service framework. Congress could, for example, switch from the current contribution-based approach to direct appropriations, which would be more transparent and draw from a broader contribution base. Alternatively, or in addition, Congress could cap the amount that the FCC could spend on USF programs, forcing the agency to weigh carefully where to direct limited federal dollars to do the most good.

Congress could also elect to expand the existing contribution base beyond providers of traditional telephony. Of note, Congress could require contributions from the principal beneficiaries of today's high-speed Internet networks—the technology companies that produce apps, websites, and other online content that benefit financially from wide distribution to millions of online users. These companies' revenues, derived from online ads, cloud storage, subscription fees, and other sources, dwarf the existing contribution base. Requiring contributions from such companies could both keep USF solvent and reduce the burdens placed on consumers who primarily fund USF under the current system. Tech companies could also benefit from both the perception and reality that they are supporting universal connectivity and appreciate its role in driving their profitability.

While Congressional action would be ideal, it is not the only possible solution. The FCC could also expand the contribution base under its existing authority. Specifically, the FCC could

use the "permissive authority" that Congress provided under Section 254 of the Communications Act to assess technology companies that are "providers of telecommunications" in the language of the statute—that is, companies that make use of fiber or similar transmission capabilities to power their online content. The FCC could also amend its current regulations that allow providers to "pass through" the costs of USF programs to consumers to enable carriers to collect fees directly from their enterprise customers, including technology companies that negotiate with carriers for Internet peering, traffic exchange, interconnection, and other agreements. Under this approach, the FCC could switch from a revenue-based model to one based on Internet traffic or another metric that would fairly reflect the demands placed on the network by a specific technology company or the benefits that company derived from network access. In exercising its permissive authority, the FCC should solicit public comment on several important subsidiary questions that bear on what policies would best serve the public interest—including what technology companies to include, how to define the contribution base, and how to calculate each company's contributions. FCC action in this space could serve as a prod to Congress to step into the breach and enact reforms, as often happens when the FCC acts as the first mover in a complex and technical area of communications policy.

Regardless of whether reform comes from Congress or the FCC or both, the government should remain vigilant in ensuring that federal programs are rigorously monitored to protect against waste, fraud, and abuse. Expanding the *contribution* base, however much needed, cannot create a moral hazard to expand *distribution* to include duplicative or unnecessary subsidies in areas where competitive forces are already supplying high-speed Internet at affordable prices. Only when both sides of the universal service coin are addressed are reforms likely to be effective, efficient, and broadly acceptable to the public that funds USF programs.

II. The Current Landscape and Challenges

A. Background on FCC's Commitment to Universal Service

For nearly a century, from the time of the landline telephone to today's modern broadband Internet networks, Congress has declared it the policy of the United States that its citizens should have access to critical communications services. As part of the original Communications Act of 1934, one of Congress's stated goals was to "make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and worldwide wire and radio communication service with adequate facilities at reasonable charges."[1] That goal continued unabated during Congress's most significant overhaul of the Communications Act in 1996, where Congress declared that then-emerging Internet access services "should be provided in all regions of the Nation," including to "low-income consumers and those in rural, insular, and high cost areas."[2]

While the goal of universal service has been constant, how the FCC has sought to accomplish the objective has changed over time. For the first fifty years after the Act's adoption, the FCC used rate regulation to implicitly subsidize telephone service in high-cost parts of the

[1] 47 U.S.C. § 151.

[2] *Id.* §§ 254(b)(2), (3)

country and for low-income families.[3] For example, telephone companies could charge more for long-distance calls to recover the relatively higher costs associated with providing local service, which helped keep local service affordable.[4] The FCC also allowed telephone companies to charge below-cost rates in rural areas, while allowing them to recoup those costs through above-cost rates in urban areas.[5] In other words, rural service was made more affordable because urban consumers "were charged subsidizing premiums over the marginal costs of providing their own service."[6]

This system was premised on the idea that telephone companies "formed natural monopolies" in local markets, enabling companies to charge higher revenue from their easy-to-reach customers in cities to subsidize more remote customers in rural areas.[7] But in 1996, Congress overhauled the Communications Act to introduce more competition in local telephone markets, thereby eliminating the monopolies and the conditions under which carriers could recoup above-market prices from consumers.[8]

Congress therefore needed to put in place a new framework for universal service under the 1996 Act.[9] It did so by placing certain obligations on eligible telecommunications carriers ("ETCs") to maintain landline services for high-cost, hard to reach areas and indigent households, among other things.[10] Congress then directed the FCC to establish a set of support mechanisms collectively known as the Universal Service Fund to support those critical services.[11] Rather than rely on implicit subsidies and cost-shifting to accomplish universal service objectives, Congress decreed that "[a]ny such [universal service] support should be explicit and sufficient to achieve the purposes of this section."[12] Pursuant to its authority under the Act, the Commission has over time developed four universal service programs paid out of the Fund, which support (1) deployment in high-cost areas, (2) low-income consumers, (3) schools and libraries, and (4) rural healthcare providers.[13]

To support the Fund, Congress directed that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[14] The Commission could exempt a specific carrier from these assessments "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement

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[3] *See, e.g.*, *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 480 (2002).

[4] *See, e.g.*, *Nat'l Ass'n of State Utility Consumer Advocates v. FCC*, 372 F.3d 454, 456-57 (D.C. Cir. 2004).

[5] *See Verizon*, 535 U.S. at 480.

[6] *Id.*

[7] *See AT&T, Inc. v. FCC*, 886 F.3d 1236, 1242 (D.C. Cir. 2018).

[8] *See id.*

[9] *See* 47 U.S.C. § 254.

[10] *AT&T*, 886 F.3d at 1242.

[11] *See* 47 U.S.C. § 254(a).

[12] *Id.* § 254(e).

[13] *See* 47 C.F.R. §§ 54.302-54.322, 54.400-54.424, 54.500-54.523, 54.600-54.633, 54.801-54.1524.

[14] 47 U.S.C. § 254(d).

of universal service would be de minimis."[15] Congress also gave the Commission discretionary authority to require "[a]ny other provider of interstate telecommunications . . . to contribute to the preservation of advancement of universal service if the public interest so requires."[16]

While contributions to these programs have historically been assessed on legacy telecommunications carriers, those payments have increasingly come to support networks capable of providing broadband Internet access service—the principal way that Americans connect online.[17] Today, all four universal service programs administered by the FCC support both voice service and broadband Internet access service.[18]

Since shortly after the adoption of the 1996 amendments to the Act, the FCC enlisted a private, not-for-profit corporation called the Universal Service Administrative Company ("USAC") to help it administer the Fund.[19] The FCC's rules provide a process for computing each eligible carrier's contribution to the Fund on a quarterly basis.[20] In advance of each quarter, USAC must submit to the FCC projections of the expenses that the four current universal service programs will incur.[21] USAC must also submit a projection of the total revenues that eligible carriers will earn from interstate and international telecommunications services, based on financial projections that those carriers must provide.[22]

The FCC then takes those calculations into account to calculate a "contribution factor," which is a percentage reflecting the ratio of the projected expenses to the projected revenues.[23] Once the FCC approves the contribution factor, USAC calculates each carrier's contribution by applying the factor to that carrier's "contribution base," understood generally as the carrier's combined end-user interstate and international telecommunications revenues.[24]

While the Act's contribution scheme envisions that carriers will contribute to universal service mechanisms, in reality consumers have borne the brunt of these programs' costs. The statute itself is silent on whether a "telecommunications carrier" that is obligated to "contribute" to universal service support "mechanisms established by the Commission to preserve and advance universal service" may pass those costs on to consumers.[25] But the FCC established from an early date in its regulations that carriers could indeed "pass through" these expenses to consumers.

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[15] 47 U.S.C. § 254(d).

[16] *Id.*

[17] *See, e.g.*, *Modernizing the E-Rate Program for Schools and Libraries*, 29 FCC Rcd 8870, 8895-95 (2014); *Rural Health Care Support Mechanism*,27 FCC Rcd 16678, 16700-01, 16704, 16715 (2012); *USF/ICC Transformation Order*, 26 FCC Rcd 17663, 17683-91 (2011).

[18] *See* 47 C.F.R. § 54.101.

[19] *See Changes to the Board of Directors of the National Exchange Carrier Ass'n, Inc.*, 12 FCC Rcd 18,400, 18,418-18,419 (1997).

[20] *See* 47 C.F.R. § 54.709.

[21] 47 C.F.R. 54.709(a)(3)

[22] *See id.*

[23] 47 C.F.R. § 54.709(a)(2).

[24] *Id.* § 54.709(a)(3).

[25] 47 U.S.C. § 254(d).

In the *First Universal Service Order* adopted by the FCC in the wake of the 1996 amendments to the Communications Act, carriers were permitted to recover their USF contribution amounts from consumers.[26] In doing so, the FCC credited commenters who argued that an explicit recovery mechanism was more transparent and was consistent with the 1996 Act's focus on specific and predictable funding mechanisms and rejection of implicit subsidies.[27] The FCC also ruled in its order that carriers could amend their existing tariffs or contracts to make clear that they were charging USF fees to consumers—as it would otherwise be unlawful under the "filed-rate" doctrine for carriers to charge consumers undisclosed fees.[28]

Under the current "pass through" rule, "[f]ederal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users . . . through a line item on a customer's bill . . . [that] may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor."[29] In other words, the FCC explicitly allows providers to collect USF fees from consumers who are not themselves "telecommunications carriers" bound to contribute to the USF under Section 254.

B. Challenges Under the Current Framework

This approach to universal service now stands at a crossroads, with economic and political forces combining to force a reexamination of how the USF should operate and what it is designed to accomplish—or even whether it should continue to exist at all.

From an economic perspective, the USF is currently on a collision course with insolvency. Because legacy telephone services constitute a dwindling fraction of the nation's consumption of communications services, the revenue associated with such services has been in free fall. Accordingly, the FCC has had to increase the amount that carriers need to pay into the USF each quarter (the "contribution factor") dramatically to keep up with the changing technological landscape.

Over the past 10 years, the Universal Service Fund contribution base declined from approximately $64.2 billion to $34.9 billion—more than a 45% percent reduction.[30] To account for the shrinking base, the FCC has more than doubled the contribution factor over that same time period from 16.4% to 34.5%.[31] This trend is poised to continue, as more American companies and individuals opt out of legacy landline communications services and use Internet-based platforms

[26] *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9199 (May 8, 1997) ("*First Universal Service Order*") ("Under our recovery mechanism, carriers will be permitted, but not required, to pass through their contributions to their interstate access and interexchange customers.").

[27] *See id.* at 9,604-05.

[28] *See id.* at 9,199.

[29] 47 C.F.R. § 54.712.

[30] *See* Federal-State Joint Board on Universal Service, Universal Service Monitoring Report, 2023, Table 1.5, https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports.

[31] *See id.*, Table 1.6.

to host meetings and connect with others. Indeed, the FCC announced late last year that the contribution factor for the first quarter of 2025 would be a whopping 36.3%.[32]

The current system also operates as a doubly regressive, and doubly unfair, assessment on lower income Americans. First, it increases costs associated with legacy telecommunications services (like landline telephone), whose consumers are disproportionately likely to be elderly and in lower income brackets. Second, because the contributions operate in similar fashion to a sales tax, based on a fixed percentage of revenue, they do not account for the relative burden placed on consumers based on income.

These economic realities have led to political challenges for the USF. Some lawmakers and analysts, for example, have called to reform the USF to replace the current contribution system with a simpler, appropriations-based model, along the lines of the Affordable Connectivity Program ("ACP") that Congress adopted to subsidize broadband in eligible low-income households in response to the Covid-19 pandemic.[33] These proposals argue that direct appropriations, drawn from a broad tax base, is a fairer, more transparent, and more accountable way of funding government subsidies than fees imposed on select consumer phone bills. These proposals also call for an audit of the USF's existing and expanding programs, which have often subsidized deployment even in areas with robust competition or paid for equipment or services under dubious statutory authority. Indeed, as FCC Chairman Brendan Carr has previously observed, there is ample evidence that broadband subsidy programs administered by the federal government are susceptible to waste, fraud, and abuse.[34]

III. Congressional Opportunities for Action

It can be unsettling when established institutions like the USF face potentially existential headwinds. But periods of disruption like ours also have the potential to be times of great creativity and opportunity. The time is ripe to reimagine the political, legal, and policy possibilities for how the federal government might approach Congress's longstanding goal of furthering universal service.

Ideally, Congress itself would make the principal public policy determinations about the future of universal service, leaving only details of implementation to the FCC. As noted above, one advantageous approach would be to repeal the contribution factor approach altogether and

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[32] *See* Public Notice, *Proposed First Quarter 2025 Universal Service Contribution Factor* (Dec. 12, 2024), *available at* https://docs.fcc.gov/public/attachments/DA-24-1245A1.pdf.

[33] *See, e.g.*, Ranking Member Ted Cruz, U.S. Senate Committee on Commerce, Science, and Transportation, *Protecting Americans from Hidden FCC Tax Hikes: A Blueprint for Universal Service Fund Reform* (Mar. 6, 2024) (hereinafter, "Blueprint for USF Reform," *available at* https://www.commerce.senate.gov/services/files/45983F37-2FA5-4586-BCCA-8E044955E3AF; American Consumer Institute, *Universal Service Fund: The Bad, Good, and Optimal* (Jun. 2024), *available at* https://www.theamericanconsumer.org/wp-content/uploads/2024/06/Universal-Service-Fund-The-Bad-Good-and-Optimal.pdf; Gregory L. Rosston and Scott Wallsten, *Overhauling the Universal Service Fund: Aligning Policy with Economic Reality* (Aug. 28, 2024), *available at* https://techpolicyinstitute.org/publications/broadband/overhauling-the-universal-service-fund-aligning-policy-with-economic-reality/?ref=broadbandbreakfast.com.

[34] *See* Carr Statement on FCC Inspector General's Report on Waste, Fraud, and Abuse, *available at* https://docs.fcc.gov/public/attachments/DOC-378120A1.pdf.

move to an appropriations-based model. Consistent with a bipartisan, bicameral proposal cosponsored by then-Senator (now Vice President) J.D. Vance and Senator Peter Welch last year, Congress could model such reforms after the ACP, which provided subsidies for broadband service and equipment for more than 20 million low-income Americans in the wake of the pandemic before it expired last May.[35] If Congress went in this direction, it would need to carefully evaluate what subsidy levels are appropriate to ensure that federal dollars were not being spent in a wasteful matter but were targeted only at those populations where the money would have a measurable impact on broadband adoption.[36] Placing a cap on annual expenditures under this approach and imposing transparency measures could help ensure accountability within the program. Congress could also use its established process of first adopting an authorization statute that sets forth its general strategic goals for universal service, followed later by an appropriations statute that sets a specific funding amount based on current fiscal needs and budget limitations.[37]

Alternatively, Congress could reform the USF by expanding the contribution base to encompass technology companies that benefit from the networks that serve as the chief conduit for driving user traffic to their websites.[38] This idea appears to have widespread support in Congress. For example, a bipartisan group of Senators led by Senators Luján and Wicker have cosponsored the Funding Affordable Internet with Reliable (FAIR) Contributions Act, which would require the FCC to conduct a study into the feasibility of collecting USF funds from Internet edge providers.[39]

Expanding the base would make contributions less regressive and reduce the burden on lower-income consumers. Unlike the current model, where carriers can pass on charges directly to consumers via their phone bills, it would be more difficult for technology companies to shift costs to consumers, especially those who rely heavily on advertising revenue for profitability and offer consumers at least one free tier of service (like many social media companies). This reform would also make the contribution system fairer as the burden on subsidizing networks would shift to include some of the largest beneficiaries of the modern Internet. Indeed, it is possible to imagine a contribution system along these lines that would no longer need to draw on legacy phone revenue for support, thus raising the possibility of eliminating fees on consumer bills altogether.

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[35] *See* Press Release, *Welch, Vance, Rosen, Cramer, Clarke and Fitzpatrick Introduce Bipartisan, Bicameral Extension of the Affordable Connectivity Program (ACP) to Continue Closing the Digital Divide* (Jan. 10, 2024), *available at* https://www.welch.senate.gov/lawmakers-introduce-bipartisan-bicameral-extension-of-the-affordable-connectivity-program-to-continue-closing-the-digital-divide/.

[36] *See, e.g.*, Jonathan Cannon, *The Value of $7 Billion: The Affordable Connectivity Program and the Future of Access and Adoption*, R Street Institute Analysis, *available at* https://www.rstreet.org/commentary/the-value-of-7-billion-the-affordable-connectivity-program-and-the-future-of-access-and-adoption/.

[37] *See generally* Congressional Research Service, *Authorizations and the Appropriations Process* (May 16, 2023), *available at* https://crsreports.congress.gov/product/pdf/R/R46497.

[38] *See, e.g.*, S.3321 - Lowering Broadband Costs for Consumers Act of 2023 (introduced Nov. 15, 2023).

[39] *See* Press Release, *Luján, Wicker, Young, Kelly Reintroduce Bill to Explore Collecting USF Contributions from Big Tech* (Mar. 16, 2023), *available at* https://www.lujan.senate.gov/newsroom/press-releases/lujan-wicker-young-kelly-reintroduce-bill-to-explore-collecting-usf-contributions-from-big-tech/.

IV. FCC Authority to Expand The Contribution Base

Conventional wisdom holds that only Congress can implement USF reform by providing the FCC with additional legal authority to expand the contribution base. To be sure, Congressional action on such technical and complex questions of public policy is always preferable. But this conventional wisdom is wrong. Congress provided the FCC with explicit authority to expand the base beyond core contributors like telephone providers, the agency has done so in the past with respect to other services, and it can do so again in the future.

A. The FCC's Permissive Authority to Assess Tech Companies

Specifically, the Commission could use what has become known as its "permissive authority" under Section 254 of the Communications Act to expand the contribution base to include at least some technology companies that use network infrastructure like high-speed fiber or underseas cables as part of their provision of services to consumers. The FCC could rely on the text and purpose of Section 254, as well as key precedent interpreting that provision, to take this step to expand the base.

Textually, Section 254 identifies one class of providers where the FCC *must* assess contributions and another class of providers where the FCC *may* make such assessments. The category of mandatory contributors includes "[e]very telecommunications carrier that provides interstate telecommunications services."[40] These providers are defined, in relevant part, as "common carriers" who make an "offering to the public" that involves "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[41] (As noted above, the Commission may exempt a carrier who otherwise would be subject to this exemption if it finds "that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis."[42])

The paradigmatic example of a telecommunications service is voice telephone service, which is an "offering to the public" of a dedicated conduit for "transmission" of voice signals back and forth between callers. Historically, this service was heavily regulated because of concerns about the market power wielded by the monopolies that existed prior to the 1996 reforms to the Act, and it remains substantially regulated today.

While the FCC therefore must assess USF contributions on traditional voice providers, subject to the *de minimis* exemption, Section 254 also expressly provides the Commission with discretion to assess other types of providers: "Any other provider of interstate telecommunications may be required to contribute to the preservation of and advancement of universal service if the public interest so requires."[43] This language is broader in material respects from the mandatory contribution provision. It applies to all "provider[s]" of interstate communications, not merely a

[40] 47 U.S.C. § 254(d).

[41] *Id.* § 153(50), (53).

[42] *Id.* § 254(d).

[43] *Id.* § 254(d).

limited universe of common carriers. It also does not refer to "telecommunications service," and thus does not require an "offering" of transmission to the public.

This distinction matters, as the term "offering" in the Communications Act has long been understood to mean marketing and selling a single, integrated service to consumers. As the Supreme Court has observed, "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product."[44] For example, "[o]ne might well say that a car dealership 'offers' cars, but does not 'offer' the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis."[45] By contrast, the word "provision" is broader, as the verb "provide" is commonly defined as "[t]o make, procure or furnish for future use, prepare. To supply; to afford; to contribute."[46] In other words, as one court of appeals has noted, "the verb 'provide' is broad enough to include the act of supplying a good or service as a component of a larger, integrated product."[47]

Accordingly, the universe of suppliers who may "provide" telecommunications is broader than the universe that may "offer" telecommunications, as the former extends to components as well as complete, finished product or service offerings. The FCC itself has previously noted that carriers may "provide[]" telecommunications as part of a broader service offering without "offering" a telecommunications service.[48] In the FCC's words, "[m]any participants in today's marketplace do not separately offer telecommunications to end users, but instead offer integrated services that include both telecommunications (i.e., transmission) and non-telecommunications components."[49] In sum, the FCC's mandatory authority extends only to those common carriers that "offer" a standalone, integrated transmission service—like voice service, which merely transmits voice signals from point to point without change in the content of the information. But the FCC's permissive authority is broader, extending to services that *provide* transmission as one component of a broader offering that includes other capabilities as well.

As it happens, the Communications Act contains a term of art that captures non-common carrier, non-telecommunications services and is central to the operation of Section 254: "information services." An information service is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[50] Congress intended this definition to encompass the suite of Internet access services and applications that emerged in the years preceding the 1996 amendments to the

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[44] *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 990 (2005).

[45] *Id.*

[46] *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1238 (D.C. Cir. 2007) (quoting Black's Law Dictionary 1244 (6th ed. 1990)).

[47] *Id.*

[48] *See, e.g.*, *Universal Service Contribution Methodology; a National Broadband Plan for our Future*, 27 FCC Rcd 5357, 5377 (Apr. 30, 2012).

[49] *Id.*

[50] 47 U.S.C. § 153(24).

Communications Act and provided the user with additional capabilities beyond point to point voice communication, like email, chatrooms, or browsing the Internet.[51]

One principal purpose behind Section 254 was to subsidize and make universally available access to these "information services." For example, Congress provided that "[a]ccess to advanced telecommunications and information services should be provided to all regions of the Nation,"[52] and that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas."[53] The statute also recognizes that "universal service" is itself an "evolving" standard that must "tak[e] into account advances in telecommunications and information technologies and services."[54]

These broader statutory purposes help make sense of the textual distinctions Congress drew between mandatory and permissive authority, requiring contributions from providers of traditional "telecommunications services" but leaving to agency discretion whether to include other providers in the contribution base. In other words, while voice providers and other common carriers *must* contribute to universal service, the Commission may in its discretion choose to require other classes of providers to contribute to that goal as well.

The Commission has in the past used its permissive authority in precisely this manner. For example, in its *First Universal Service Order* in 1997, the Commission required payphone aggregators and certain private networks to contribute to universal service support mechanisms because they connected to the public switched telephone network, even though those companies did not themselves provide telecommunications services.[55] Elsewhere, the FCC has suggested that certain "enterprise services" that historically have not been regulated at common carriage (because these services are offered at arms' length to sophisticated bargaining parties, rather than the public at large) might nevertheless be assessed if they contain transmission components.[56]

The Commission has even used its permissive authority in cases where it has not explicitly decided whether the service at issue is a telecommunications or information service. Most prominently, the Commission has historically declined to classify interconnected voice over Internet protocol ("VoIP") services, which enable real-time, two-way voice communications over broadband networks. But the agency has nonetheless required interconnected VoIP providers to contribute to the USF under its Section 254 permissive authority.[57]

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[51] *See, e.g.*, *Brand X*, 545 U.S. at 975-76.

[52] 47 U.S.C. § 254(b)(2).

[53] *Id.* § 254(b)(3).

[54] *Id.* § 254(c)(1).

[55] *See First Universal Service Order*, 12 FCC Rcd at 9,184-85.

[56] *See Universal Service Contribution Methodology: A National Broadband Plan for our Future*, 27 FCC Rcd 5357, 5381-82 (Apr. 30, 2012) (seeking comment on assessment under permissive authority of "enterprise communications services such as Dedicated IP, VPNs, WANs, and other network services that are implemented with various protocols such as Frame Relay/ATM, MPLS and PBB"); *see also id.* at 5378 (seeking comment on assessment under permissive authority of text messaging services, one-way VoIP, and broadband).

[57] *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006).

Upholding the Commission's interconnected VoIP order, the U.S. Court of Appeals for the D.C. Circuit deemed it textually significant that the statute did not require the Commission to limit contributions only to those providers who "offer" telecommunications services.[58] Rather, as explained above, the Court noted that the verb "provide" is broader, extending to the "act of supplying a good or service as a component of a larger, integrated product."[59] Accordingly, it is linguistically permissible to say that "McDonald's provides beef, as well as hamburgers, and The Washington Post provides ink, as well as newspapers."[60] The court also found support in the traditional canon of statutory interpretation that "[w]here different terms are used in a single piece of legislation," such as the terms "offer" and "provide" at issue here, "the court must presume that Congress intended the terms to have different meanings."[61]

To be sure, the Court in *Vonage* upheld the Commission's interpretation of Section 254 as reasonable under the now-overturned *Chevron* deference framework. Under *Chevron*, an agency's interpretation was upheld if it was a reasonable construction of the statutory text, even if not the better reading.[62] But now, under the new *Loper Bright* paradigm that replaced *Chevron*, courts must identify and enforce the best meaning of the statute.[63] That new framework undoubtedly will prevent many agencies from adopting aggressive readings of their statutory authority that would have been permissible under the old regime. But in this case, there remain strong textual arguments that the FCC *did* adopt the better reading of its permissive authority under Section 254 of the Communications Act.

Both the FCC in the interconnected VoIP order and the court in *Vonage* paid careful attention to differences in statutory language that textualists would heed when engaging in statutory interpretation, such as reading the terms "offer" and "provide" to have different meanings and finding it significant that Congress used the phrase "provider of interstate telecommunications" instead of "telecommunications *services*" (emphasis added). There are reasons to be optimistic a court would read the statute on a blank slate the same way the FCC did—as providing the agency with permissive authority to assess USF fees on providers other than pure telecommunications carriers.

The Supreme Court in *Loper Bright* also anticipated that there would be cases, like this one, where the statute's meaning indicates "that the agency is authorized to exercise a degree of discretion."[64] As relevant here, Congress has authorized the FCC "to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'"[65] In Section 254(d), Congress's decision to use the permissive term "'may' rather than a mandatory term such as 'shall' . . . suggests that Congress intends to confer some discretion

[58] *Vonage*, 489 F.3d at 1238 (comparing language in 47 U.S.C. §§ 153(20), (46) that describe information and telecommunications services as "offerings").

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1240 (quoting *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C.Cir.1984)).

[62] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2254 (2024).

[63] *See id.* at 2273.

[64] *Id.* at 2263.

[65] *Id.*

on the agency, and that courts should accordingly show deference to the agency's determination."[66] In addition, the phrase "if the public interest so requires" is a classic example of a phrase that Congress employs when it intends to provide an agency with some degree of policymaking discretion.[67] Indeed, in upholding the constitutionality of the USF this past Term, the U.S. Supreme Court noted that it had previously "affirmed authorizations to regulate in the 'public interest'" as conferring a degree of "discretion given" to agencies, informed by the surrounding statutory context.[68] The best reading of the statute, therefore, appears to be that Congress intended to provide the FCC with discretion to assess providers other than telecommunications carriers. *Loper Bright* should not alter that conclusion.

Any FCC order expanding the USF contribution base would likely also face a challenge under the "major questions doctrine." Under that doctrine, "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [courts] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there."[69] In such cases, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims."[70]

For example, in a related context, a panel of the U.S. Court of Appeals for the Sixth Circuit recently ruled that the FCC's decision during the Biden administration to classify broadband Internet access services as "telecommunications services"—giving rise to the so-called "net neutrality" rules—was likely unlawful under the "major questions doctrine."[71] The court explained that "[n]owhere does Congress clearly grant the Commission the discretion to classify broadband providers as common carriers," and that "[a]bsent a clear mandate to treat broadband as a common carrier, we cannot assume that Congress granted the Commission this sweeping power."[72] (Since then, a separate panel held on the merits that the FCC's decision to classify broadband as a telecommunications service conflicted with the plain language of the statute under *Loper Bright*, bracketing without deciding whether the decision separately raised a major question.[73])

Any technology company that challenged an FCC decision to expand the contribution base would have a plausible argument that the major questions doctrine applies here too because the FCC traditionally has not imposed regulatory obligations on such companies. But the FCC would have compelling counterarguments. Critically, the universal service issue here does not involve the question whether to treat technology companies as common carriers, with all the attendant

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[66] *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995).

[67] *See, e.g.*, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940) (describing the analogous phrase "public interest, convenience, or necessity" in the Communications Act as "the touchstone for the exercise of the Commission's authority").

[68] *See FCC v. Consumers' Research*, 145 S. Ct. 2482, 2503 (2025); *see also id.* at 2506-07.

[69] *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (cleaned up).

[70] *Id.* (cleaned up).

[71] *See Ohio Telecom Association et al. v. FCC*, 2024 WL 3650468 (6th Cir. Aug. 1, 2024).

[72] *Id.* at *3.

[73] *See Ohio Telecom Association et al. v. FCC*, 2025 WL 16388 (6th Cir. Jan, 2, 2025).

obligations that theoretically would apply under Title II of the Communications Act, such as the duty to charge fair and reasonable prices or provide non-discriminatory access to their facilities.[74] To the contrary, Section 254's permissive authority *presupposes* that the covered entities are *not* common carriers, which is why contributions are not mandatory. Accordingly, a provider designated under permissive authority would have only one discrete obligation—to contribute to universal service.

And that obligation flows from a policy choice that Congress made in the statute—to permit assessments from any company that provides some telecommunications component as part of its offering of an information service. This, too, differentiates this case from the decades-long battle over "net neutrality." In that debate, net neutrality advocates have had to make the textually and historically implausible assertion that broadband providers "offer" nothing more than mere transmission when they provide consumers access to the Internet. To the contrary, broadband Internet fits the Communications Act's definition of "information service" like a glove, as it offers the "capability" for "generating" social media content, "storing" emails, "acquiring" directions to travel destinations, "retrieving" websites through DNS and caching technologies, and "making available information" like news and sports, to name just a few examples. But in any event, it has been common ground in the net neutrality debate that, at minimum, there is a telecommunications *component* in the offering of broadband, namely, last-mile data transmission to the home.[75] Section 254(d) requires no more to establish the FCC's jurisdiction as a matter of permissive authority to assess USF contributions.

Moreover, unlike the decision to treat broadband as a common carrier, a decision to expand the contribution base would not be at war with the purposes of the statute. The 1996 amendments to the Communications Act make clear that its purposes include "to preserve the vibrant and competitive free market that presently exists for . . . interactive computer services, unfettered by Federal or State regulation," where "interactive computer services" in relevant part include "a service . . . that provides access to the Internet."[76] Treating Internet access providers as common carriers would not be consistent with keeping such providers unfettered from federal or state regulation. By contrast, as noted above, Section 254 repeatedly trumpets access to "information services" as a key purpose underlying universal service subsidies. It would not at all be incongruent with these purposes for some information services to contribute to the growth and development of the networks.

Nor would a decision to expand the base require the FCC "to discover in a long-extant statute an unheralded power," as some courts applying the major question doctrine have considered.[77] As explained above, shortly after the 1996 amendments to the Act, the FCC exercised its permissive authority to assess non-common carrier services like payphone aggregators and private networks. And the most famous example of the FCC's exercise of permissive authority, interconnected VoIP, involved an IP-based service and was upheld in court.

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[74] *See* 47 U.S.C. §§ 201, 202.

[75] *See, e.g.*, *Brand X*, 125 S. Ct. at 2705 (upholding FCC determination that Internet service providers "offer" Internet service, or "the finished services, though they do so using (or 'via') the discrete components composing the end product, including data transmission").

[76] *See* 47 U.S.C. § 230(a); *id.* § 230(f)(2).

[77] *See, e.g.*, *W. Virginia v EPA*, 597 U.S. 697, 724 (2022).

While the FCC would be assessing new categories of information services in any new rulemaking, it would be applying the same basic legal rationale as it has multiple times in the past.

B. Amending the Commission's Pass-Through Rules

Apart from exercising permissive authority, the Commission could also or in the alternative amend its rules to allow carriers who are currently required to contribute to the FCC's universal service programs to pass through these assessments through contractual arrangements with technology companies. Critically, this change would not require any new construction of Section 254 of the Communications Act. It would, instead, simply require expanding the FCC's well-established rules in this area.

Recall that current FCC regulations allow carriers to recover "[f]ederal universal service contribution costs . . . through interstate telecommunications-related charges to end users" that appear as a "line item on a customer's bill."[78] Pursuant to a future rulemaking, the FCC could expand this pass-through authority to make it clear that providers could also recover the costs of USF fees through their contractual arrangements with technology companies. Most content providers, for example, have Internet peering, traffic exchange, or interconnection agreements with large Internet service providers that provide users with more seamless streaming experiences by enabling more local, direct connections between the content creators' servers and the last-mile networks that reach our homes. Some Internet service providers, in turn, purchase or license content for distribution on their networks. In these and other scenarios, Internet service providers could negotiate a more reasonable and fair allocation of USF fee responsibility in their contractual agreements.

As part of this reform, the FCC could consider moving from a revenue-based contribution assessment system to one based on number of users, volume of traffic, or some other metric that captures the demands placed by a technology company on the network or the benefits the company derives from network connectivity. As the FCC has previously explained, "[n]othing in the Act requires contributions to be based on revenues[.]"[79] Accordingly, the FCC has repeatedly explored whether to adopt a connections-based model, where network providers "would contribute a set amount per connection" to consumers, "regardless of the revenues derived from that connection."[80] The Commission could adopt a similar contribution base for technology companies, such as users or traffic, that would marry the metric used to calculate the assessment with the contribution amount that carriers "pass through" to each company, much as consumers today pay a fee based on the amount of interstate revenue the consumers generate for their providers.

C. Important Public Policy Questions Remain

While Section 254(d) may provide the FCC with permissive authority to assess contributions from certain information services, difficult public policy questions remain about how such assessments should be calculated and on what basis. While the answers to these questions should be further developed based on a robust public record in the context of a full notice-and

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[78] 47 C.F.R. § 54.712.

[79] *National Broadband Plan for our Future*, 27 FCC Rcd at 5436.

[80] *Id.*

comment rulemaking, there are certain important decision points that should be part of any proposal.

First, the Commission must determine *what* technology companies should be included in any permissive contribution assessment. Recall that, at minimum, the companies need to provide some transmission component as part of their overall offering. That is because, while these providers need not be "telecommunications carrier[s]" (as required for mandatory assessments), they must still provide "interstate telecommunications" (defined in relevant part as "transmission" of information). Some technology companies will satisfy that requirement because they are themselves broadband network operators. Other technology companies rely on long-haul fiber networks or undersea cables to connect their far-flung data centers to enable their data-intensive social media apps or websites to operate.[81] While consumers may not be aware of these capabilities, technology companies nonetheless "provide" this transmission as part of their service, in the same way a car manufacturer provides an engine as part of a car. In any rulemaking, the FCC could exercise its technical expertise to determine what transmission capabilities would qualify for assessment.

While the FCC would have a jurisdictional basis to make assessments on any technology companies that have a transmission component as part of their offerings, the FCC must still show that the "public interest" requires an assessment. To this end, the FCC should develop some rubric for determining the extent to which such companies benefit from the deployment and advancement of broadband networks and thus should reasonably be expected to contribute to the goal of universal service. This calculus could involve an evaluation of revenue, amount of traffic, number of customers or users, or some other objective metric. The overarching goal should be to develop fair and neutral criteria that diversify and expand the contribution base to reduce the burden on any one provider, group of providers, or consumers.

The Commission must also determine the extent of contributions that would be advisable under an expanded base. The FCC could, for example, attribute some percentage of a technology company's revenue to its use of submarine cables, fiber backhaul, or similar network infrastructure, which these companies use to enable data transmission or to interconnect more efficiently to other broadband networks. Indeed, the FCC previously recognized in the *First Universal Service Order* that companies that provide telecommunications "solely to meet their internal needs" meet the statutory definition of "other providers of telecommunications" for purposes of permissive authority.[82] But the FCC historically has elected to exempt such internal provision of telecommunications from USF contributions, in part because such networks did not "comprise the core of [the companies'] businesses."[83] Importantly, however, this policy determination was made in the 1990s and applied at the time to payphone aggregators and private network operators—two classes of providers whose use of and benefit from telecommunications networks at that time was proportionately small.[84] This conclusion is ripe for reexamination in

[81] *See, e.g.*, PYMTS, *Big Tech's Undersea Cable Empire is Building Tomorrow's Digital Economy* (Oct. 1, 2024), *available at* https://www.pymnts.com/connectedeconomy/2024/big-techs-undersea-cable-empire-is-building-tomorrows-digital-economy/.

[82] *First Universal Service Order*, 12 FCC Rcd at 9,185.

[83] *Id.*

[84] *See Recommendations of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, 485 (Nov. 8, 1996) (concluding that private providers "do not substantially benefit from the" public-switched telephone network).

light of how technology companies today drive the Internet ecosystem and help power the market for broadband connectivity.

Even so, policy questions would remain about how and how much to assess internal network use. As the FCC has recognized, providers "do not derive revenues from the provision of services to themselves," at least not directly, and therefore any such assessment would present administrative challenges.[85] To that end, the FCC could consider a "non-revenues-based contribution" model,[86] as suggested above—one based on users or traffic or some other metric. Alternatively, the agency could attribute some percentage of a technology companies' principal sources of revenue to its provision of telecommunications—from cloud computing to streaming to digital advertising.

Of these, cloud computing or streaming could potentially raise fewer administrative difficulties, as the FCC could create a usage-based metric to measure technology companies' reliance on broadband networks for these data-intensive activities. Cloud computing especially, given the enormous storage and retrieval functions required, is likely to drive network infrastructure development in coming years, and thus could be an appropriate benchmark of how technology companies benefit from universal service programs.[87] Digital advertising, similarly, increasingly places data-intensive demands on a network through the use of streaming media, and HTTP requests for impression and targeting trackers, among other things, with more popular websites inevitably attracting a proportionate amount of ad traffic. The tradeoffs involved in assessing these and other revenue streams again counsel that Congress would be the ideal body to resolve these public policy questions, although the FCC should not hesitate to step into the breach if Congress is unwilling to do so.

Finally, the FCC would have to consider in any rulemaking whether to assess broadband networks in addition to technology companies. There has long been a bipartisan consensus not to place universal service contribution requirements on broadband. Even on those two occasions when a Democrat-majority FCC classified broadband as a telecommunications service (and thus presumptively subject to mandatory contributions), the FCC exercised its general forbearance authority to exempt broadband from the contribution base.[88]

That said, the FCC can expect some commenters to argue for inclusion of broadband in the base.[89] But there are sound public policy reasons not to do so. First, assessing broadband as a

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[85] *First Universal Service Order*, 12 FCC Rcd at 9,185.

[86] *Id.*

[87] *See* Evan Swarztrauber, *Universal Service Fund Working Group Request for Comment*, Foundation for American Innovation (Aug. 25, 2023) (discussing companies' increasing reliance on cloud computing services), *available at* https://www.thefai.org/posts/universal-service-fund-working-group-request-for-comment.

[88] *See Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5617 (Apr. 3, 2015) ("We partially forbear from Section 254(d) and associated rules insofar as they would immediately require mandatory universal service contributions associated with broadband Internet access service"); *Safeguarding and Securing the Open Internet; Restoring Internet Freedom*, 39 FCC Rcd 4975, 5201-02 (May 22, 2024) ("We conclude that forbearing from imposing new universal service contribution requirements on [broadband providers] at this time is in the public interest.").

[89] *See, e.g.*, The Brattle Group, *The Economics of Universal Service Reform* (Aug. 24, 2023), *available at* https://membership.incompas.org/Files/filings/2023/The%20Economics%20of%20USF%20Reform%20Brattle_FINAL.pdf.

service would not solve the problem of regressive contributions; indeed, it might only make it worse, as more and more Americans regard Internet access as a critical service. American consumers often obtain phone and Internet service from the same provider, and including broadband in the contribution base would likely increase the regulatory fee that each consumer pays on a monthly basis.

Second, assessable broadband revenue is a mere fraction of the revenue that technology companies derive from services such as digital ads, cloud storage, and subscription services. By some estimates, expanding the contribution base to include broadband would increase the base by over $200 billion a year.[90] While this would have the short-term impact of reducing the contribution factor to four percent, assuming other variables hold steady, that change could be short-lived, as increased competition is resulting in declining broadband revenues, year after year.[91] By contrast, U.S. cloud services revenue alone in 2024 apparently reached approximately $388.5 billion.[92] Add to that annual revenue from online digital advertising, which has been estimated at another $259 billion, and streaming services, with non-advertising revenue estimated at $64 billion.[93] Drawing on this much broader revenue base could reduce the contribution factor to a negligible one percent or less.[94]

In short, including broadband providers alone would be unlikely to place the USF on sustainable footing on its current trajectory. At minimum, broadband should only be included in the base as part of a comprehensive solution that includes technology companies as well.

D. Continuing the Dialogue with Congress

There are reasons for the FCC to take action in this area even in the teeth of difficult questions of public policy. History shows that when the FCC takes steps to address an important universal service goal, it can encourage Congressional action to review, ratify, and build upon the FCC's efforts. For example, under former FCC Chairman Ajit Pai, the FCC adopted a rule that prohibited carriers from receiving universal service dollars if their networks contained equipment from manufacturers like Huawei and ZTE that posed a national-security risk to the United States.[95] The FCC grounded its authority to take this action in Section 254's policy that universal service funds must be used to promote "[q]uality services,"[96] as well as the Communications Act's general purposes of "national defense" and "promoting safety of life and property through the use of wire

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[90] *See* James E. Prieger, *An analysis of options for reforming the Universal Service Fund funding mechanism*, Digital Progress Institute (Jul. 31, 2025), *available at* https://digitalprogress.tech/wp-content/uploads/2025/07/USF-funding-reform-Prieger.pdf; Comments of USTelecom—The Broadband Association, *Report on the Future of the Universal Service Fund* (Feb. 17, 2022), *available at* https://www.fcc.gov/ecfs/document/10217088451098/1.

[91] *See* Comments of USTelecom, *supra*, at 9 (citing "Broadband Pricing Changes: 2016 to 2022," by Tyler Cooper & Jason Shevik (Feb. 7, 2022), *available at* https://broadbandnow.com/internet/broadband-pricing-changes).

[92] *See* Prieger, *supra*, at 13 & n.35 (citing Statista, *Cloud Computing in the United States*, *available at* https://www.statista.com/study/169085/cloud-computing-in-the-united-states/).

[93] *See id.* at 13-14.

[94] See Comments of USTelecom, *supra*, at 8-9.

[95] *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, 34 FCC Rcd 11423 (Nov. 26, 2019).

[96] 47 U.S.C. § 254(b)(1).

and radio communications."[97] The FCC's relatively novel use of its authority under Section 254 to promote national security objectives, however, drew a legal challenge from Huawei and ZTE on both statutory and constitutional grounds.[98]

The federal court of appeals for the Fifth Circuit nonetheless affirmed the FCC's exercise of its Section 254 authority.[99] The court relied in substantial part on actions that Congress took following the FCC's adoption of its national security order that ratified the FCC's public policy decisions. For example, shortly after the FCC's order was adopted, Congress enacted the Secure Networks Act ("SNA"), which provided specific parameters the FCC was to use in determining what equipment would be ineligible for USF funds (the "Covered List").[100] Even more to the point, Congress later amended the SNA to appropriate funds explicitly for the purpose of reimbursing providers for replacing equipment pursuant to the FCC's rule.[101] The court of appeals noted approvingly that these statutes reflected "Congress's approval of the FCC's assertion of authority in [its] rule."[102]

Following the court's decision, the dialogue between the FCC and Congress over policy to remove insecure equipment from American broadband networks has continued. In 2021, for example, the FCC proposed banning outright from networks any equipment that appeared on the Covered List.[103] Congress responded by enacting the Secure Equipment Act, which again made specific reference to the FCC's pending rulemaking and directed it to take specific implementing action in that docket to ban Covered List equipment.[104] The FCC's actions under this framework have again been largely upheld against legal challenges.[105]

This history shows that Congressional and FCC action do not always exist in a vacuum but often work hand in hand to accomplish public policy objectives. If the FCC were to take steps under its existing authority to expand the USF contribution base, Congress may use that as a springboard to ratify or modify the agency's decisions, taking due account of its technical expertise, and provide more robust authority in this area.

V. Eliminating Waste, Fraud, and Abuse

Regardless of whether Congress or the FCC takes steps to reform the USF, the universal service programs administered by the agency will continue to be liable to waste, fraud, and abuse. Both Congress and the FCC should be vigilant to ensure that consumer dollars are only being spent

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[97] *Id.* § 151.

[98] *See Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 440 (5th Cir. 2021).

[99] *See id.* at 447.

[100] *See id.* at 432 (discussing the Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 134 Stat. 158 (2020) (codified at 47 U.S.C. § 1601 et seq.)).

[101] *Id.* (citing Pub. L. No. 116-260, 134 Stat. 1182, 2120 (Dec. 27, 2020) (to be codified at 47 U.S.C. § 1603)).

[102] *Id.* at 445.

[103] *See generally Hikvision USA, Inc. v. FCC*, 97 F.4th 938, 942 (D.C. Cir. 2024) (discussing regulatory history).

[104] *Id.* (citing Pub. L. No. 117-55, 135 Stat. 423).

[105] *See id.* at 944-48.

where necessary to promote the goals of universal service in truly high-cost and low-income areas where competition and market forces are insufficient to connect all Americans.

Recent experience confirms this ever-present potential. For example, in 2021, the FCC's Inspector General released a report highlighting waste, fraud, and abuse in the agency's $3.2 billion Emergency Broadband Benefit ("EBB") program, which was adopted by the agency in response to the Covid-19 pandemic and later replaced by Congress by the longer-term, $14 billion ACP.[106] As then-Commissioner (now Chairman) Carr noted at the time, the IG's report highlighted examples of blatant fraud in the EBB program, including certain providers falsely reporting the number of students eligible for support at qualifying, low-income schools in six different states.[107]

Similarly, in recent years the Government Accountability Office has issued reports that criticize the current fragmentation of broadband funding programs across the federal government.[108] According to the GAO, "[f]ederal broadband efforts are fragmented and overlapping, with more than 133 funding programs administered by 15 agencies."[109] The report called for effective coordination among agencies to "help ensure that programs are complementary when possible and minimize the potential for wasteful duplicative support."[110] Responding to one such GAO report, then-Commissioner Carr criticized the "absence of adequate tracking, measurement, and accountability standards" in these federal programs, which he deemed "troubling given both the volume of taxpayer dollars at issue and the importance of delivering on the shared goal of connecting all Americans."[111]

There is growing bipartisan support within Congress to address the distribution side of the equation with an eye toward strengthening the USF for the future. Senators Luján and Thune, for example, announced in 2023 a bipartisan working group on USF reform that aims to identify ways to make USF administration more efficient and prudent, and lower fees for consumers, while ensuring the Fund's continued solvency.[112]

Given the sprawling and overlapping government spending on federal broadband subsidies, Senator Cruz has rightly called for "distribution reform" in how the USF administers

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[106] *See* Affordable Connectivity Program, *available at* https://www.fcc.gov/broadbandbenefit.

[107] *See* Carr Statement on FCC Inspector General's Report on Waste, Fraud, and Abuse, *available at* https://docs.fcc.gov/public/attachments/DOC-378120A1.pdf.

[108] *See, e.g.*, U.S. Government Accountability Office, National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide (May 2022), *available at* https://www.gao.gov/assets/gao-22-104611.pdf; U.S. Government Accountability Office, A National Strategy Needed to Coordinate Fragmented, Overlapping Federal Programs (May 10, 2023) ("2023 GAO Report"), *available at* https://www.gao.gov/assets/gao-23-106818.pdf.

[109] 2023 GAO Report, Highlights Page.

[110] 2023 GAO Report at 5.

[111] *See* FCC Press Release, *New GAO Watchdog Report Underscores Carr's Concerns About the Absence of a National Strategy Coordinating Billions in Broadband Infrastructure Spending* (Jun. 10, 2022), *available at* https://docs.fcc.gov/public/attachments/DOC-384164A1.pdf.

[112] *See* Press Release, *Luján, Thune Announce Bipartisan Working Group on the Universal Service Fund and Broadband Access* May 11, 2023), *available at* https://www.lujan.senate.gov/newsroom/press-releases/lujan-thune-announce-bipartisan-working-group-on-the-universal-service-fund-and-broadband-access/.

funds.[113] This means the FCC must "evaluate what the programs are paying for and to what extent they continue to be necessary."[114] The report notes instances of fraud across USF programs ranging from "bid-rigging, kickbacks, and false certifications" to "improper payments" "to duplicate subscribers and fake addresses."[115]

The White House, Congress, and the FCC all have important roles to play in tackling waste, fraud, and abuse in USF programs. The Trump administration has vowed to identify and eliminate inefficient spending and unnecessary regulations throughout the federal government—most notably, through its support of the new Department of Government Efficiency ("DOGE").[116] The Trump administration could, for example, take measures to centralize and coordinate national broadband policy within the White House, removing the disparate power centers scattered throughout the federal government, perhaps through the creation of a new entity within the Executive Office of the President modeled after the existing National Security Council and National Economic Council.[117] Congress, for its part, can conduct investigations to audit existing USF programs and make legislative changes to eliminate or circumscribe existing programs to the extent they are no longer necessary or duplicate efforts elsewhere within the federal government or at the state level. Congress could also set an inflation-adjusted annual cap on USF expenditures to impose a ceiling on the burdens imposed by USF, which will force introspection on how to dispense limited federal dollars where they are needed most. The FCC, in turn, could put additional procedural protections in place to ensure that its funding decisions are transparent and subject to meaningful review. And the agency could take targeted enforcement actions, as appropriate, to protect against and deter cases of genuine fraud.

Reining in wasteful spending on federal broadband programs, including USF programs, will require a whole-of-government effort. But it is an indispensable component of any conversation on USF reform. Unless the federal government is willing to monitor and rein in needless spending, contribution reform could become an excuse for maintaining or even expanding government bloat, with American consumers suffering the consequences.

VI. Conclusion

Universal service reform involves difficult tradeoffs and complex questions of public policy. But it should be common ground that the USF's current trajectory is unsustainable, and that continued inertia will harm consumers, especially lower-income Americans. With the Supreme Court recently affirming USF's constitutionality, the time to act is now. Congress can and should step up to chart a path forward. But in the absence of Congressional action, the FCC

[113] *See* Cruz, Blueprint for USF Reform, *supra* n.34.

[114] *Id.* at 3.

[115] *Id.* at 8.

[116] *See* Executive Order, *Establishing and Implementing the President's "Department of Government Efficiency"* (Jan. 20, 2025), *available at* https://www.whitehouse.gov/presidential-actions/2025/01/establishing-and-implementing-the-presidents-department-of-government-efficiency/.

[117] This suggestion draws on a proposal previously made by Jonathan Spalter, now President and CEO of USTelecom – The Broadband Association, for the White House to establish a National Technology Council, in an article on the online technology news site Protocol, whose archives are no longer publicly available.

should use its existing authority under the Communications Act to take decisive steps to expand the contribution base beyond existing legacy telephone services—relieving burdens on consumers while ensuring the continued solvency of the USF.