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August 25, 2023

Senator Ben Ray Luján, Chairman  
Senator John Thune, Ranking Member  
Subcommittee on Communications, Media, and Broadband  
United States Senate  
Washington, DC

**RE: Public Comments of the Free State Foundation in Response to  
Universal Service Fund Working Group Request for Comment**

Dear Senators Luján and Thune and Members of the Universal Service Working Group,

As Free State Foundation scholars, we thank you for your request for public comments regarding the state of universal service and the need for universal service fund (USF) reform. The Free State Foundation (FSF) is a free market-oriented think tank that focuses heavily on communications and Internet law and policy as well as administrative law and sound governance. Since its founding in 2006, the Free State Foundation has studied the universal service system and frequently published papers recommending meaningful reforms to the system. The substantive comments and many citations and links contained herein to relevant Free State Foundation scholarly papers reflect our widely acknowledged expertise on law and policy issues surrounding universal service.

**Introduction and Summary**

The blunt reality is that the universal service regime is tied to an outdated voice-centric view of the communications marketplace. The existing subsidy system is not fiscally sustainable, efficient, or accountable to Congress or the public. Congress should

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fundamentally reform the universal service regime into a broadband-centric system that is sustainable, efficient, effective, and accountable – not tinker around the edges of the existing system.

To achieve this, the reformed Universal Service Fund's (USF) annual subsidies should be reduced in light of the significant improvements in broadband access enabled by recent massive congressionally-appropriated subsidies, already over \$140 billion. These subsidies address existing gaps in deployment. Instead of assessments on Internet service providers that are passed through to consumers, any necessary future universal service subsidy funding should come from direct congressional appropriations. To the extent this is not done, or not exclusively, assessments on service providers should be funded from a widened contribution base that includes, in some way, major web platform providers that are the heaviest users and greatest beneficiaries of the Internet service providers' broadband networks.

A reformed universal service regime should consist exclusively, or at least primarily, of a voucher or voucher-like program for low-income individuals to obtain access from participating broadband providers of their choice. The existing Affordable Connectivity Program (ACP) is a good model for a program designed to support affordable access to broadband for low-income persons. Congress should extend the program. At the same time, Congress should consider moving the eligibility threshold closer to the federal poverty line to make the program more fiscally sustainable so that it serves those low-income persons truly in need. And it should implement additional safeguards to prevent waste, fraud, and abuse. Going forward, an ACP voucher-like program should replace the existing Lifeline program, which the U.S. Government Accountability Office has determined to be a "rather inefficient and costly mechanism" to support access by low-income persons.

Congress should direct the Federal Communications Commission (FCC) to plan for a date-specific sunset of legacy programs such as the High Cost Program and for the elimination of the eligible telecommunications carrier requirement (ETC) for universal service program participation. That transition should commence in a coordinated way, as the massive subsidies recently appropriated by Congress are expended on new broadband deployments.

When Congress enacted the Telecommunications Act of 1996 and initiated the present universal service regime, it primarily had in mind voice services, not broadband services. Due to dramatically changed market conditions, the existing universal service system is fiscally unsustainable. The USF contribution base is shrinking while program expenditures total around \$8 billion per year. Voice consumers are subject to a 25%-to-30% surcharge rate that has climbed exponentially over the last two decades. That rate could climb higher, and the system most likely will collapse unless it is fixed.

Fundamental reform of the USF program should be required in light of the considerably improved broadband access that will follow Congress's unprecedented appropriations of billions of dollars. Congress already has authorized roughly more than \$140 billion for

the federal government to spend on broadband deployment and subscription subsidies over the next few years. (These subsidies are on top of annual subsidies under the existing universal service program of \$7.5 billion-to-\$8 billion.) Once those enormous sums of money are ultimately distributed through the Infrastructure Investment and Jobs Act, American Rescue Plan Act, Rural Utility Service, and other spending vehicles directed towards closing the remaining deployment gaps, the amount needed for any ongoing subsidies to providers should be reduced dramatically.

Regarding remaining coverage gaps, Congress should provide guidance to the FCC, NTIA, and other federal agencies to ensure that these agencies do not adopt pie-in-the-sky definitions of "broadband" divorced from realistic use cases and economic and technological realities. Subsidy reductions also are warranted by the fact that private sector providers already have expended approximately \$2 trillion of their own capital in the last two decades building out broadband networks. For many years they have expended in the range of \$70-80 billion on an annual basis in further deployments.

Whatever the actual needs are determined to be after Congress's unprecedented appropriations are expended, the USF should be funded primarily through regular, preferably multi-year, congressional appropriations rather than through a surcharge (functionally, a tax) on consumers' telecommunications bills. The appropriations process would provide needed transparency and political accountability regarding the uses and amount of universal service spending. The present system delegates major policy decisions regarding universal service to the FCC, the Universal Service Administrative Company (USAC), and the Federal-State Joint Board on Universal Service.

Appropriations also are superior to line-item surcharges because surcharges limit price increases that pose barriers to access for some low-income consumers. Under an appropriations-funded Affordable Connectivity Program model, low-income consumers would pay lower overall prices with the surcharges removed.

If Congress does not fund future universal service subsidies exclusively through the appropriations process but continues a regime which relies in part on assessments on service providers, Congress should consider widening the base of contributors to include major Internet platforms that derive so much benefit from their use of broadband networks and that benefit immensely from their ubiquitous availability.

Consistent with these reforms, Congress also should eliminate the requirement that a provider must be an "Eligible Telecommunications Carrier" (ETC) to receive subsidies through the USF. ETC requirements established by Congress in 1996 do not effectively serve any constructive purpose in 2023. Instead, they discourage providers from participating in USF programs. Eliminating ETC requirements would expand the pool of provider participants and consumer choice.

## **The Existing USF Subsidy Regime Is Outdated and Fiscally Unsustainable**

Reform of the USF subsidy system is urgently needed because the system is outdated and no longer fiscally sustainable. When Congress enacted the Telecommunications Act of 1996 and initiated the existing universal service regime, it had voice services primarily in mind, not broadband services.

The USF's current \$7-to-\$8 billion annual subsidy distributions are a much larger amount than when the program began in 1996. Voice service consumers ultimately pay for USF in the form of surcharges (in effect, taxes) on their monthly bills. But the revenue base for universal service support is significantly lower than it was when the USF commenced. According to the Federal-State Joint Board's *2022 Universal Service Monitoring Report*, the USF contribution base declined from \$65.8 billion in 2012 to \$37.9 billion in 2021.<sup>1</sup> As a result of the dwindling of the contribution base, the USF surcharge rate has grown substantially over the last two decades, hovering now in the 25%-to-30% range. For the third quarter of 2023, the USF surcharge rate is 29.2%.<sup>2</sup> Those high rates are overburdening voice consumers. And there are credible concerns that the surcharge rate could soon rise dramatically – climbing possibly to 40% in the near future.<sup>3</sup>

For more from FSF scholars on this topic, please see the following:

- Seth L. Cooper, "[Consumers Still Burdened as FCC Sets USF Surcharge Rate at 29%](#)" *FSF Blog* (March 15, 2023).
- [Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (February 17, 2022).

## **Unprecedented Broadband Funding by Congress Should Require Major USF Reforms**

Once the expenditure of over \$140 billion dollars already appropriated by Congress for broadband programs is completed, the need for ongoing subsidies to providers should be significantly reduced. In its *2022 Report on the Future of the Universal Service Fund*,<sup>4</sup> the FCC acknowledged:

The Infrastructure Act and other legislation enacted in 2020 and 2021 provided unprecedented funding for broadband deployment, equity,

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<sup>1</sup> Federal-State Joint Board, *2022 Universal Service Monitoring Report*, CC Docket 96-45, WC Docket Nos. 02-6, 02-60, 06-122, 10-90, 11-42, 13-184, 14-58 (released February 13, 2023), at 17 (Table 1.5), at: <https://www.fcc.gov/document/oea-releases-2022-universal-service-monitoring-report>.

<sup>2</sup> FCC, Public Notice: "Proposed Third Quarter 2023 Universal Service Contribution Factor," DA 23-507 (released June 14, 2023), at: <https://docs.fcc.gov/public/attachments/DA-23-507A1.pdf>.

<sup>3</sup> See, e.g., Matthey Consulting, LLC, Report on the Future of the Universal Service Fund, WC Docket No. 21-476; Universal Service Contribution Methodology, WC Docket No. 06-122; Notice of Ex Parte Communication (June 8, 2022), at: <https://www.neca.org/docs/default-source/wwpdf/public/6922matthey.pdf>.

<sup>4</sup> FCC, Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (released August 15, 2022), at: <https://docs.fcc.gov/public/attachments/FCC-22-67A1.pdf>.

affordability, and adoption. The Infrastructure Act directed the National Telecommunications and Information Administration's (NTIA) to implement a \$42.45 billion Broadband Equity, Access, and Deployment (BEAD) Program that nearly matches the Commission's universal service High Cost program disbursements from 2011 to 2020. This level of funding is even more striking because these three examples represent only a portion of the new broadband funding authorized by the recent legislation – there are billions of dollars more that are available for broadband programs now being implemented by the Commission, NTIA, the Department of Treasury (Treasury), and Department of Agriculture (USDA).<sup>5</sup>

Among the billions more that Congress made available for broadband programs are nearly \$9 billion in Treasury Department subsidy grants. These one-time expenditures of several billions of dollars appropriated by Congress are on top of the approximately \$2 trillion in capital expended over the past two decades by private sector providers for building out broadband networks. And for many years, private sector providers have expended in the range of \$70-80 billion on an annual basis in further deployments.<sup>6</sup>

This "unprecedented" amount of funds already appropriated to support broadband deployment, if expended in an efficient manner, should result in a near-term reality in which virtually every location in America has access to a broadband connection. And in that near-term reality, the High Cost program should no longer be necessary, or at most should only be needed to provide support in discrete difficult-to-serve geographical areas. Congress should direct the FCC to plan now on transitioning to an "end-state" for universal service that, at least for the most part, sunsets the High Cost program and other legacy programs.

Given that many billions of dollars of appropriated funds have not yet been expended for broadband buildout, it is difficult, if not impossible, to predict with any reasonable degree of certainty what the future financial needs of a federal universal service system will be. If there is future need for any additional universal service subsidies after spending the presently allocated funds, a determination should be made at that time by Congress.

Moreover, for purposes of addressing remaining coverage gaps, Congress should provide guidance to the FCC, NTIA, and other federal agencies to ensure that these agencies do not adopt pie-in-the-sky definitions of "broadband" divorced from realistic use cases and economic and technological realities. The minimum required speeds for popular online video services like Netflix, Hulu, and Amazon Prime require download speeds of about 15 Mbps for 4K Ultra HD streaming video, and it is less for HD and standard definition.<sup>7</sup>

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<sup>5</sup> FCC, Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (released August 15, 2022), ¶ 1, at: <https://docs.fcc.gov/public/attachments/FCC-22-67A1.pdf>.

<sup>6</sup> See, e.g., US Telecom, "Broadband Capex Report" (July 18, 2022), at: <https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf>.

<sup>7</sup> See, e.g., Netflix, "Internet connection speed recommendations" (last checked August 21, 2023), (15 Mbps download recommended minimum for Ultra HD) at: <https://help.netflix.com/en/node/306>; Hulu,

Two-way video communications services such as Zoom require *less than* 5 Mbps/5 Mbps.<sup>8</sup> And minimum speeds required for web browsing and email are even lower. Use cases and market realities do not support broadband definitions based on download speeds of 1 Gbps, 500 Gbps, or 100 Mbps. Also, if "broadband" definitions are adopted that are divorced from actual consumer demand, and economic and technological realities, providers will be more inclined to put subsidies to work to boost speeds in areas that are easier to connect, thereby diverting attention and resources away from areas that have the most serious coverage gaps. Taxpayer funds will be expended wastefully. Congress should direct subsidy support first and foremost to any remaining areas with zero Mbps speeds and secondarily focus on areas that lack 25 Mbps speeds.

The FAIR Contributions Act is an example of legislation that would lay the groundwork for a future reduction in overall amounts of annual subsidies for universal service. The Act was introduced in the 116th and 117th Congresses. If passed by Congress, the Act would authorize the FCC to prepare a concrete evaluation of different contribution reform models and project necessary future annual funding needs. The evaluation report also would address the continued necessity of the USF once broadband service capability has been deployed to all Americans. Such a future report would be informed by the improvements in access that will be enabled by the massive subsidies appropriated by Congress.

For more from FSF scholars on this topic, please see the following:

- Randolph J. May and Andrew Long, "[The FCC Should Define 'Broadband' Based on Actual Consumer Usage](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 34 (August 24, 2023).
- Andrew Long, "[Billions at Risk of Wasteful Duplication](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 29 (July 13, 2023).
- Michelle P. Connolly, "[Mindfully Wasteful Spending: The Definition of Broadband](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 20 (May 18, 2023).
- Andrew Long, "[A True Assessment of the USF's Future Relevance Demands a Full Accounting of Broadband Subsidies](#)," *FSF Blog* (August 30, 2022).
- Randolph J. May, "[The FCC's USF Report: Unprecedented Broadband Funding Requires Fundamental Universal Service Reforms](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 42 (August 26, 2022).
- [Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (February 17, 2022).
- [Reply Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (March 17, 2022).

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"Internet speed recommendations" (July 10, 2021) 15 Mbps download recommended minimum for Ultra HD), at: <https://help.hulu.com/s/article/speed-recommendations>.

<sup>8</sup> Zoom, "Zoom system requirements: Windows, macOS, Linux" ["Bandwidth requirements"] (February 17, 2023), at: [https://support.zoom.us/hc/en-us/articles/201362023-Zoom-system-requirements-Windows-macOS-Linux#h\\_d278c327-e03d-4896-b19a-96a8f3c0c69c](https://support.zoom.us/hc/en-us/articles/201362023-Zoom-system-requirements-Windows-macOS-Linux#h_d278c327-e03d-4896-b19a-96a8f3c0c69c).

## **Universal Service Should Be Funded Exclusively (or at Least Primarily) by Regular Congressional Appropriations**

Congress should reform the present funding system by replacing it with some form of multi-year congressional appropriations. Periodic multi-year appropriations would provide a window for planning deployment projects, and appropriations would provide transparency and restore political accountability to the universal service regime regarding important decisions such as uses and amounts of spending. Congressional appropriations also would mean the elimination or significant reductions in surcharges and thereby provide needed relief to voice consumers.

The present system lacks sufficient accountability because it delegates major policy decisions regarding universal service to the FCC, USAC, and the Federal-State Joint Board on Universal Service. This present lack of congressional direction regarding the FCC's existing programs raises serious constitutional nondelegation doctrine issues, especially given the substantial size of the surcharges (i.e., taxes) assessed and disbursed each year by unelected government officials. Indeed, the breadth and vagueness of Congress's delegation of revenue-raising authority to the Commission under Section 254 of the Communications Act may exceed the boundaries of what is permissible under the Supreme Court's nondelegation doctrine. In particular, the statute nowhere identifies precisely what services are to be subsidized. And Section 254 contains no "intelligible principle" to guide the amount, frequency, or manner by which universal service contributions are to be collected and spent.

By making direct appropriations out of the Treasury for universal service subsidies on some form of multi-year basis, Congress would alleviate those constitutional concerns regarding delegation of power as well as related policy concerns about lack of accountability. In reorienting universal service to a broadband-centric regime, Congress should make those important decisions explicit in the statute and not leave them up to judicial inference or the discretion of the FCC, USAC, or the Federal-State Joint Board.

Additionally, appropriations are superior to line-item surcharges because these surcharges increase prices and limit overall adoption rates. To the extent that price is a barrier to broadband adoption for some low-income consumers, then the current universal service funding mechanism reduces broadband adoption by pricing some customers out of the market. But under an appropriations-funded universal service program, low-income consumers would pay lower overall prices with the present surcharges removed.

For more from FSF scholars on this topic, please see the following:

- [Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (February 17, 2022)
- [Reply Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (March 17, 2022).

- Randolph J. May, "[A Nondelegation Doctrine Challenge to the FCC's Universal Service Regime](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 58 (November 4, 2021).
- Justin (Gus) Hurwitz, "[Congress May Invest Billions in Broadband: It Should Reform the Universal Service Fund Too](#)," *Perspectives from FSF Scholars*, Vol.16, No. 34 (July 9, 2021).
- Randolph J. May and Seth L. Cooper, "[Congress Should Put Universal Service on a Firmer Constitutional Foundation](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 20 (April 22, 2021).

### **If Assessments Are Still Needed to Fund USF, the Contribution Base Should Be Expanded to Include Major Online Platforms**

Congress should make direct appropriations out of the Treasury on some periodic multi-year basis the exclusive way of supporting universal service – or at least the primary way of supporting it. Failing adoption of appropriations as the exclusive funding mechanism, Congress should provide clear direction for subsidizing broadband through surcharges assessed against a broad base of providers of communications services, including major online Internet platforms.

The FCC's existing authority under Section 254(d) may allow the agency to collect contributions from certain providers of two-way video and voice calls – such as Facebook's Messenger, Instagram, Microsoft's Skype, Slack, Snapchat, WhatsApp, and Zoom that have not heretofore been required to pay into the universal service fund. Section 254(d) mandates contributions from telecommunications carriers, and it grants the Commission permissive authority to require "any other provider of interstate telecommunications" to contribute "if the public interest so requires."<sup>9</sup> It appears that service providers, such as those just identified, transmit voice and video calls between or among points specified by the user, and therefore could be considered to be encompassed within the definition of "telecommunications." Such an expansion of the contribution base also appears to be backed by the agency's 2006 decision requiring interconnected VoIP providers to contribute to USF. Certainly, a case can be made that the public interest requires some form of contribution from them.

However, the limited assessments on these providers addressed above under the FCC's existing authority likely would go only partway in meeting USF funding needs and doing so in an equitable manner. There is a wider scope of online web platforms that should be considered for USF contributions. Major online social media and e-commerce platforms such as Amazon, Apple, Facebook, Google, Microsoft, and Netflix benefit the most from nationwide broadband network availability and, by far, generate the most broadband traffic. According to Sandvine, those six providers accounted for nearly 48% of global

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<sup>9</sup> 47 U.S.C. § 254(d).



Internet traffic in the first half of 2022.<sup>10</sup> Along these lines, FCC Commissioner Brendan Carr has suggested that online digital advertisers are potential USF contributors.<sup>11</sup>

Under existing law, however, it is likely that the Commission lacks authority to require USF contributions from those major web platforms and digital advertisers. Clear direction from Congress regarding the inclusion of these major web platforms as contributors to the support subsidies would ensure political accountability and avoid future constitutional nondelegation challenges. To the extent that Congress fails to determine that appropriations should be used exclusively to fund USF subsidies, it should pass legislation to amend Section 254 and reform the USF contribution system by expanding the base of USF contributors so that the major providers of online services that gain so much financially from nationwide broadband network connections share in the financial responsibility for maintaining universal service and providing voice consumers relief from high surcharges.

The FAIR Contributions Act is an example of legislation that could play a constructive role in achieving USF reform. The Act would require the FCC to examine the feasibility of funding the USF program by requiring contributions from online content or services, such as search engines, social media platforms, streaming services, app stores, cloud computing services, and e-commerce platforms. If passed by Congress, the Act would require the Commission to submit a report to congressional committees that weighs the relative equities for consumers under the existing contribution system as well as under alternative systems. Notably, the report also would address the extent to which there is continued need for the USF program once broadband connectivity is made available to all Americans.

For more from FSF scholars on this topic, please see the following:

- [Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (February 17, 2022).
- [Reply Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (March 17, 2022).
- Seth L. Cooper, "[Congress Should Consider Expanding Universal Service Contributions: FCC Poses a Potential Answer to USF's Financial Problems](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 41 (August 23, 2022).
- Justin (Gus) Hurwitz, "[Congress May Invest Billions in Broadband: It Should Reform the Universal Service Fund Too](#)," *Perspectives from FSF Scholars*, Vol.16, No. 34 (July 9, 2021).

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<sup>10</sup> See Sandvine, "The Global Phenomena Internet Report 2023" (released January 20, 2023), at 10, at: <https://www.sandvine.com/global-internet-phenomena-report-2023>.

<sup>11</sup> See Brendan Carr, "Ending Big Tech's Free Ride," *Newsweek* (May 24, 2021), at: <https://www.newsweek.com/ending-big-techs-free-ride-opinion-1593696>.

## **Congress Should Transition USF Into a System of Direct Subsidies for Low-Income Consumers and Sunset (or Mostly Sunset) the High Cost Fund**

The desired future "end state" of universal service for broadband should be a system of direct subsidies targeted to individual low-income consumers who meet the eligibility qualifications of need. Primary reliance on individually targeted subsidies, through a "Lifeline Voucher" that empowers consumers to use the subsidy to acquire the communications services that best meet their own needs, would disentangle government from subsidization of private market providers. In this "end state," legacy deployment subsidies, including the existing High Cost program, would be eliminated or at least substantially eliminated, while the USF increasingly focuses on providing direct support for low-income persons to obtain broadband services.

Congress should direct the FCC to begin planning now to transition its existing universal service programs to this "end state" focused on "Lifeline-like" vouchers for eligible low-income individuals to purchase broadband subscriptions. After the recent one-time subsidies appropriated by Congress and directed to providers have run their course, Congress should set a specific date in the range of 10 years for eliminating all or almost all High Cost program subsidies to providers. Setting a sunset target date in that range, or in a similar range, will constructively further the goal of significant reductions in such subsidies and allow providers time to transition to a more market-oriented approach.

And once the High Cost program has been sunset, or at least mostly sunset, Congress should look to the structure of the current American Connectivity Program (ACP) as a model for providing subsidies to those low income persons in need of support. The ACP model is more soundly structured than the Commission's existing Lifeline program because the ACP encourages consumer choice through broad provider participation and lack of minimum service requirements. But this model likely can be further improved by replacing the provider reimbursement system with direct vouchers.

For more from FSF scholars on this topic, please see the following:

- [Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (February 17, 2022)
- [Reply Comments of the Free State Foundation](#), Report on the Future of the Universal Service Fund, WC Docket No. 21-476 (March 17, 2022).
- Andrew Long, "[Commenters Address Transition from Emergency Broadband Benefit to Affordable Connectivity Program](#)," *FSF Blog* (December 16, 2021).
- Andrew Long, "[The Emergency Broadband Benefit: A Possible Model for Future Lifeline Funding](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 6 (February 5, 2021).

## **Congress Should Eliminate the "Eligible Telecommunications Carrier" Requirement to Receive USF Subsidies**

Congress should eliminate the requirement that a provider must be an "Eligible Telecommunications Carrier" (ETC) to receive subsidies through the USF program or any successor to the USF. ETC requirements established by Congress in the Telecommunications Act of 1996 are vestiges of the legacy voice-specific paradigm in communications policy. Those requirements do not serve any constructive purpose in 2023, but instead discourage broadband providers from participating in USF programs. Eliminating ETC requirements would expand the pool of provider participants in the USF program and expand consumer choice and ability to access broadband services.

Sections 254(e) and 214(e) of the Communications Act require that broadband service providers be designated as ETCs by state public utility commissions (PUCs) or by the FCC in order to receive broadband-specific universal service funding. Unfortunately, the legacy ETC requirement forecloses many successful providers from participating in programs that seek to expand access to unserved areas. As then-FCC Commissioner Michael O'Rielly explained in a June 18, 2020, blog post:

While requiring ETC status doesn't bar participation by certain providers on its face, it serves as a major obstacle for many companies in practice. Getting the designation itself can be a time-consuming and resource-intensive process, especially depending on the state jurisdiction in question. However, that pales in comparison to the added regulatory burdens and litigation risks that come with being subject to state telecom regulation.... [A] nationwide provider with streamlined practices would potentially become subject to a patchwork of regulations – in certain cases, upwards of 40 different regulatory regimes – even though many of the rules entirely pre-date the modern broadband networks that our auctions are trying to subsidize, often, by several decades.<sup>12</sup>

The ETC requirement reduces consumer welfare by constraining artificially the number of choices available to consumers, which can lead to higher prices and lower levels of service quality. The requirement also reduces consumer welfare by undermining buildout efficiency. When projects subject to fixed funding amounts incur high project costs, the geographic size or coverage area of the project inevitably is reduced.

Any universal service funds allocated to broadband network construction in unserved areas should flow to a broadband provider with a proven track record in delivering reliable high-speed Internet access. As a practical matter, this includes cable, fiber, and fixed wireless, and satellite providers. Many of those providers are or may be ideally situated to deliver broadband service to unserved areas with federal subsidy support. But

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<sup>12</sup> Commissioner Michael O'Rielly, "Removing Unnecessary Barriers and Maximizing Competition in USF Auctions" (June 18, 2020), available at <https://www.fcc.gov/news-events/blog/2020/06/18/removingunnecessary-barriers-and-maximizing-competition-usf-auctions>.

many of those same providers are *not* ETCs, and precluding or discouraging them from participating in subsidy programs makes no sense.

Safeguards are necessary to avoid waste, fraud, and abuse in USF programs. But the outdated ETC requirement is not a proper vehicle to serve that safeguard role. To combat waste, fraud, and abuse, the FCC should be required to conduct a direct inquiry into a broadband subsidy applicant's legal, technical, and financial fitness prior to entrusting it with USF funds. The Commission has experience in conducting such inquiries. One recent example is the vetting criteria that the Commission established in its *2020 RDOF Order*. In that order, the Commission required that a subsidy applicant provide the agency with ownership information, operational history, audited financials, and proof of spectrum access.<sup>13</sup> And the Commission required additional information from winning bidders, such as certifications regarding their financial and technical capability and funds availability, as well as letters of credit obligations tied to the achievement of deployment milestones.<sup>14</sup> Such information goes to the heart of a provider's ability to satisfy broadband buildout commitments and deliver promised benefits, whereas the ETC requirement at best does so indirectly and inefficiently.

The Rural Broadband Protection Act of 2023 (S. 275), is an example of legislation that would address waste, fraud, and abuse in the USF program through FCC vetting. If passed by Congress, the Act would require the Commission to adopt rules requiring those applicants of "new covered funding awards" to include, in their initial applications, a proposal containing sufficient detail and documentation for the agency to ascertain that the applicant possesses the technical capability, and has a reasonable plan, to deploy the proposed network and deliver services.

Additionally, the Expanding Opportunities for Broadband Deployment Act, which was introduced in the 116th and 117th Congresses, is a commendable example of legislation that would benefit consumers by eliminating ETC requirements and thereby expand the pool of providers that participate in the USF.

Waste, fraud, and abuse in broadband subsidy programs – particularly wasteful duplications of programs and subsidy support for expanding broadband access – also could be curbed by requiring federal agencies to formulate and follow a unified and coordinated national broadband strategy. A May 2022 report by the Government Accountability Office (GAO) identified about 133 programs managed by 15 different agencies, and the GAO found that this patchwork could lead to wasteful duplication of funding and effort.<sup>15</sup>

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<sup>13</sup> Rural Digital Opportunity Fund; Connect America Fund, WC Docket No. 19-126, WC Docket No. 10-90, Order, at ¶¶ 73-79, 80, 82-83 (2020) (*RDOF Order*).

<sup>14</sup> *RDOF Order*, at ¶¶ 88, 91, 96-113.

<sup>15</sup> GAO, "National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide," GAO-22-104611 (May 2022), at: <https://www.gao.gov/assets/gao-22-104611.pdf>. See also GAO, "Additional Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve Billions of Dollars in Financial Benefits," GAO-23-106089, at 40-41, at: <https://www.gao.gov/assets/gao-23-106089.pdf>.

For more from FSF scholars on this topic, please see the following:

- Andrew Long, "[Billions at Risk of Wasteful Duplication](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 29 (July 13, 2023).
- Andrew Long, "[Senate Bill Would Require FCC Vetting Process in Awarding High-Cost Broadband Subsidies](#)," *FSF Blog* (February 16, 2023).
- Andrew Long, "[The Emergency Broadband Benefit: A Possible Model for Future Lifeline Funding](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 6 (February 5, 2021).
- Andrew Long, "[Rep. Butterfield Reintroduces Legislation to Eliminate 'Eligible Telecommunications Carrier' Requirement for Universal Service Fund Recipients](#)," *FSF Blog* (June 8, 2021).

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Again, we thank you for soliciting views on the important questions regarding universal service reform. Please let us know whenever there is more that the Free State Foundation can do to assist your efforts.

Sincerely,

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