

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Report on the Future of the Universal Service Fund) WC Docket No. 21-476
)
)

COMMENTS OF
THE FREE STATE FOUNDATION

Randolph J. May
President

Seth L. Cooper
Senior Fellow and Director of Policy Studies

Andrew K. Magloughlin
Legal Fellow

Free State Foundation
P.O. Box 60680
Potomac, MD 20859
301-984-8253

February 17, 2022

Table of Contents

I.	Introduction and Summary	1
II.	The Commission Should Take Actions to Improve Its Effectiveness in Furthering Universal Service Goals for Broadband	5
A.	The Commission Should Transition Universal Service to a System of Direct Subsidies to Consumers Who Need Them to Access Broadband	5
B.	The Commission Should Reduce and Eventually Sunset Nearly All High-Cost Fund Subsidies	8
C.	The Commission Should Consider Requiring Online Companies that Provide Video and Voice Calls to Make Some Form of Contribution to Universal Service	9
D.	The Commission Should Guard Against Waste, Fraud, Abuse	12
E.	The Commission Should Not Inject Extraneous Issues Like Net Neutrality Regulation into Universal Service Policy.....	13
III.	The Commission's Report Should Focus on the Goal of Broadband Deployment	13
IV.	Congress Should Take Actions to Solidify the Commission's Legal Authority to Modernize Universal Service for the Broadband Era.....	15
A.	Congress Should Put Universal Service on More Solid Constitutional Footing.....	15
B.	Congress Should Amend Section 254 to Require Online Companies to Make Some Form of Contribution to the Universal Service Fund	18
V.	Conclusion.....	20

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of)
)
Report on the Future of the Universal Service Fund) WC Docket No. 21-476
)
)

COMMENTS OF
THE FREE STATE FOUNDATION¹

I. Introduction and Summary

These comments are submitted in response to the Federal Communications Commission's Notice of Inquiry on the future of the Universal Service Fund (USF) and the FCC's report to Congress on improving the agency's effectiveness in achieving universal service goals for broadband. These comments recommend that Congress and the Commission reform the universal service regime in some fundamental ways into a broadband-centric¹ system so that, at some point in the future, the universal service system, for the most part, will provide direct subsidies in the form of a consumer-empowering "Lifeline Voucher" to low-income Americans. Consistent with this end, and considering the massive amount of federal support recently appropriated by

¹ These comments express the views of Randolph J. May, President of the Free State Foundation, Seth L. Cooper, Senior Fellow and Director of Policy Studies, and Andrew K. Magloughlin, Legal Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

Congress for closing present deployment and adoption gaps – roughly at least \$140 billion – it is most likely that further subsidies to providers should be substantially reduced. However, given the expected expenditure of such massive congressionally appropriated funds over the next several years for broadband, it is difficult to forecast with any certainty what more, if any, funding may be needed at that time, and what the precise contours of a federal universal service system should be.

Whatever the actual needs are determined to be at that point, however, it is preferable that they be funded through the regular congressional appropriations process rather than through a surcharge (read: tax) on consumers' telecommunications bills. And in one way or the other, companies that benefit immensely from the ubiquitous availability of broadband and their use of broadband networks, such as, for example, so-called "Big Tech" Internet companies, should be required to make some form of universal service contributions.

As it now stands, the existing universal service system is fiscally unsustainable, and it most likely will collapse unless it is fixed. The USF contribution base is shrinking while program expenditures exceed \$8 billion per year. Voice consumers are subject to a 25%-to-30% surcharge rate that has climbed exponentially over the last two decades. When Congress enacted Section 254 in 1996, it primarily had in mind voice services, not broadband services. Going forward, the universal service system needs a substantial make-over to comport with today's broadband-centric Internet ecosystem.

While Congress's recent appropriation of such vast sums of money to be spent further expanding broadband deployment and adoption make it difficult, indeed, foolhardy, to try to project future needs several years from now – and therefore to propose with a high degree of

certainty the precise contours of a future universal service regime – it is none too soon to suggest that there should be fundamental reforms. After the expenditure of so much already appropriated new money is completed, the need for ongoing subsidies to providers almost certainly should be reduced. After all, private sector providers already have expended approximately \$2 trillion of their own capital in the last two decades building out broadband networks. And for many years they have expended in the range of \$70-80 billion on an annual basis in further deployments. But if the various new federal subsidy expenditures – whether through the IJJA, ARPA, RUS, or other spending vehicles – are not carefully targeted to build out unserved areas rather than overbuilding, then not only is it likely there will be considerable waste and abuse, but it's likely the level of such private sector expenditures will not be maintained.

Ideally, the desired future end-state of universal service for broadband should be a system of subsidies targeted to individual low-income consumers who meet the 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. During the transition to an end-state regime, direct subsidies to individuals via Lifeline Vouchers increasingly should become the main vehicle for ensuring universal service.

Additionally, efforts should be made to expand the contribution base to boost revenues and to bring relief to consumers who presently are saddled with high surcharges on their monthly bills. The Commission should consider requiring some form of universal service contributions from companies, whether somehow limited in a principled way to so-called Big Tech web firms

or not, that provide two-way video and voice calls – such as Facebook's Messenger, Instagram, Microsoft's Skype, Slack, Snapchat, WhatsApp, and Zoom.

The FCC possibly may have the authority to collect contributions from certain providers of voice and video call services that have not heretofore been required to contribute to universal service. 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." It appears that service providers, such as those identified above, transmit voice and video calls between or among points specified by the user, and possibly could be considered to be encompassed, for purposes, of Section 254(d)'s permissive provision and consistent with Commission precedent, to be within the definition of "telecommunications." And, certainly, a case can be made that the public interest requires some form of contribution from them.

Ultimately, of course, Congress possesses the authority to amend Section 254, and it should. While the Commission may have the authority to impose contribution obligations of some kind on those currently not contributing, it is much preferred that Congress consider requiring such contributions, especially from those companies, among the most highly capitalized in America, who benefit immensely from their use of high-speed broadband Internet networks. These companies include Alphabet, Amazon, Apple, Meta, Microsoft, Netflix, and Twitter, and other online web providers, social media companies, Internet messaging and video services, and so forth.

Furthermore, the Commission should protect against waste, fraud, and abuse. It should identify overlaps among its universal service programs to eliminate duplicate subsidies. And the

Commission should avoid inserting extraneous issues like net neutrality regulation into universal service policy considerations. Issues unrelated to core universal service goals would bog down the Commission's efforts in disputes that can be addressed in other proceedings. Also, as the Infrastructure Act instructs, the Commission should focus its report to Congress on the universal service goal of promoting broadband, and not on other, novel agency-created goals.

Constitutional concerns also should impel universal service reform. The breadth and vagueness of Section 254's delegation of revenue-raising authority to the Commission may exceed the boundaries of what is permissible under the Supreme Court's nondelegation doctrine. In any event, it certainly runs up against those boundaries. In the statute, Congress 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. Reorientation of universal service as broadband-centric should reinforce the need for more precise congressional direction. In a new law, Congress preferably should make direct appropriations out of the Treasury for universal service subsidies on some periodic basis. Failing that, it should expressly authorize subsidies for broadband through surcharges assessed in accordance with clear congressional direction. Absent clear congressional direction regarding the expenditure of the subsidies, the universal service regime will be susceptible to a constitutional nondelegation challenge.

II. The Commission Should Take Actions to Improve Its Effectiveness in Furthering Universal Service Goals for Broadband

A. The Commission Should Transition Universal Service to a System of Direct Subsidies to Consumers Who Need Them to Access Broadband

The universal service system is now at an inflection point. As it stands, the system is not fiscally sustainable and it most likely will collapse unless it is overhauled. As shown in the

Federal-State Joint Board's *2021 Universal Service Monitoring Report*, the USF contribution base declined significantly over the past decade. The annual contribution base from which universal service is funded declined from \$65.9 billion in 2011 to \$41.4 billion in 2020.² This decline almost certainly will continue in the years ahead. To prop up the old system, voice consumers are shouldering heavy financial burdens, as the surcharge rate has risen to the 25%-to-30% range – far higher than it was two decades ago.³ Legacy phone services are now severely overtaxed and the universal service system risks financial implosion.

When Congress enacted Section 254 in 1996, it primarily had in mind voice services, not broadband services. The universal service system needs a substantial makeover to better match the realities of today's broadband-centric communications market and Internet ecosystem. This includes consideration of expansion of the contribution base in order to draw in revenues from large online edge service providers who benefit most from widespread availability of broadband networks.

The vast sums of money recently allocated by Congress to expand broadband availability also should impel an overhaul of the universal service fund. As the Notice observes, Congress has recently allocated over *\$62 billion dollars* to improve access to broadband.⁴ These sums are in addition to the combined sum of \$18 billion already dedicated for distribution over the coming decade through the Rural Digital Opportunity Fund (RDOF) and the 5G Fund.⁵ And those sums are in addition to the billions spent annually through the High-Cost Fund (\$5.06 billion in 2020),

² Federal-State Joint Board, *2021 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 Jan. 14, 2022), at 17 (Table 1.5).

³ See Public Notice, Proposed First Quarter 2022 Universal Service Contribution Factor, CC Docket No. 96-45 (released Dec. 13, 2021) (setting the quarterly rate at 25.2%). See also Randolph J. May, Media Advisory: USF Contribution Factor Tops 31% and May Be Nearing a Tipping Point," *FSF Blog* (Dec. 16, 2020), at: <https://freestatefoundation.blogspot.com/2020/12/media-advisory-usf-contribution-factor.html>.

⁴ See Notice of Inquiry, at ¶¶ 5-15.

⁵ See Universal Service Administrative Co. (USAC), *2020 Annual Report* (2021), at 12.

Lifeline (\$853 million in 2020), E-Rate (\$2.09 billion in 2020), and other programs.⁶ It ought to be expected that the spending of these unprecedented amounts of money by the Commission, the NTIA, the Treasury Department, the Rural Utilities Service, and the states will boost dramatically broadband network availability and thus reduce significantly the numbers of truly unserved Americans. In light of this burst of enormous spending, and at least for the foreseeable future, annual subsidies to broadband providers ought to be reduced over time in order to ensure program effectiveness and sustainability. However, given the expected expenditure of such massive congressionally appropriated funds over the next several years for broadband, it is difficult to forecast now with any certainty what more, if any, funding may be needed at that time, and what the precise contours of a federal universal service system should be.

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 qualifications of need. After one-time subsidies directed to providers have run their course and the High-Cost Fund has been sunset, or at least mostly sunset, the Lifeline program ought to become the exclusive subsidy mechanism for ensuring that American consumers have access to broadband.

The most effective subsidies are those that go directly to individual Americans who actually need them. Primary reliance on individually-targeted subsidies through a "Lifeline Voucher" that empowers consumers to use the subsidy to acquire the communications service that best serves their needs would disentangle government from the practice of subsidizing private market providers with money from the public treasury or with surcharge money taken from American consumers. Additionally, subsidies targeted to individual consumers can be more reliably monitored for accountability than subsidies given to broadband providers. The inherent

⁶ See USAC, *2020 Annual Report*, at 5.

difficulties of identifying different costs of business incurred by broadband Internet providers and ascertaining the efficiency of those operations can be avoided by directing subsidies, via Lifeline Vouchers, to those individuals who meet low-income criteria.

B. The Commission Should Reduce and Eventually Sunset Nearly All High-Cost Fund Subsidies

In order to bring the universal service system more in line with the principle of fiscal responsibility, the Commission should reduce the size of the High-Cost Fund over time, and, at least for the most part, end all such subsidies. The universal service contribution mechanism is now unsustainable, and the financial burden on consumers of telecommunications services will most likely continue to grow heavier. A significant reduction in the overall size of the High-Cost Fund is therefore necessary to avoid undermining the purpose of making telecommunications services universally affordable to consumers. Such a reduction also is needed to avoid a likely future collapse of the universal service system. Also, Congress's recent appropriation of vast sums of money to be spent further expanding broadband availability, combined with new programs that the Commission has established since 2019, will pour tens of billions of dollars toward improving access to broadband services.

Importantly, incremental reductions in the overall size of the High-Cost Fund, which now is subject to an annual budget capped at \$4.5 billion for legacy funds, should be a critical part of an overall effort to bring high-cost subsidies, for the most part, to an eventual end so that direct subsidies for individual subscribers to broadband Internet services can become the primary means for achieving universal service goals. After the expenditure of so much already appropriated money is complete, the need for ongoing subsidies to providers should almost certainly be reduced. After all, private sector providers already have expended approximately \$2

trillion of their own capital in the last two decades building out broadband networks.⁷ And for many years their annual expenditures have been in the range of \$70-80 billion.⁸

To ensure that such reductions in subsidies to telecommunications providers serving high-cost areas happen, the Commission should adopt a specific date by which most High-Cost Fund subsidies will eventually sunset. For instance, we recommend that the Commission, at some point in the near future, set a sunset date in the range of 10 years for eliminating most subsidies to providers. Setting a sunset target date will make the goal of significant reductions in such subsidies concrete and allow providers time to transition to a more market-oriented approach.

C. The Commission Should Consider Requiring Online Companies That Provide Video and Voice Calls to Make Some Form of Contribution to Universal Service

To better ensure that universal service programs remain financially viable, the Commission should consider requiring online companies that provide video and voice calls to make some form of contribution for universal service.

Under Section 254(d) of the Communications Act, the Commission is required to establish "specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service."⁹ Contributions from popular online video and voice call capabilities provided by online edge companies like Meta, Instagram, Microsoft, Slack, Snapchat, WhatsApp, and Zoom would help shore up universal service.

⁷ USTelecom, 2020 Broadband Capex Report (2021), at: <https://ustelecom.org/wp-content/uploads/2021/09/USTelecom-2020-Broadband-Capex-Report.pdf>

⁸ See, e.g., USTelecom, 2020 Broadband Capex Report. See also, e.g., CTIA, 2021 Annual Survey Highlights (July 2021), at: <https://api.ctia.org/wp-content/uploads/2021/07/2021-Annual-Survey-Highlights.pdf>.

⁹ 47 U.S.C. § 254(d).

When the universal service fund was established in the 1990s, nearly all of today's online providers of video and voice calls did not exist, and the then-leading online services were considered "infant industries" needing protection from being treated like traditional telephone companies for purposes of contributing to universal service. But total exclusion of established highly capitalized providers of online video and voice calls from the contribution base for universal service no longer makes sense.

Online companies or edge providers – including those that provide video and voice calls – depend on widespread broadband network availability for their businesses and they directly benefit from the deployment of broadband networks to all Americans. This is particularly so for large online companies that generate so much Internet traffic and consume so much bandwidth.

Regardless of how the services are classified under the techno-functional constructs in the existing Communications Act, video and voice calls provided by online companies or edge providers increasingly are used to replace traditional voice calls that are burdened with contributing to the USF system. The principle of competitive neutrality supports requiring them to contribute. As the Commission has stated, "competitive neutrality" means that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."¹⁰ So long as Big Tech companies do not have to make contributions like traditional voice carriers, universal service lacks competitive neutrality.

Indeed, the FCC possibly may have the authority to require providers of two-way voice and video call services that have not heretofore been required to contribute to universal service to

¹⁰ Universal Service Contribution Methodology, WC Docket 06-122, *et al.*, Report and Order and Notice of Proposed Rulemaking (released Jun. 27, 2006) at ¶ 44 (internal citations omitted).

now contribute. Section 254(d) mandates telecommunications carriers to contribute, and it grants the Commission permissive authority to require "any other provider of interstate telecommunications" to contribute "if the public interest so requires."¹¹ The Commission might be able to exercise this permissive authority under Section 254(d) to require two-way voice and video calling services provided by Facebook's Messenger, Instagram, Microsoft's Skype, Slack, Snapchat, WhatsApp, Zoom, and others. Certainly, a case can be made that the public interest requires some form of contribution from them.

The Communications Act defines "telecommunications" as "the 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."¹² Since it appears that those online edge providers transmit voice and video calls between or among points specified by the user, they potentially may be made subject to universal service contributions. Given the years-long annual declines in contributions, it also is possible that the Commission's ancillary authority would enable it to require some sort of contribution from online providers of video and voice calls as a necessary means of fulfilling the agency's obligations under Section 254(d).

Moreover, the fact that online edge companies might not own physical facilities for transmitting video and voice calls does not appear to pose an obstacle to the Commission requiring them to make universal service contributions. In its *2006 Universal Service Contribution Methodology Order*, the Commission exercised its permissive authority to require interconnected VoIP providers to make universal service contributions. The Commission found

¹¹ 47 U.S.C. § 254(d).

¹² 47 U.S.C. § 153(50).

interconnected VoIP providers to be "providing" telecommunications "regardless of whether they own or operate their own transmission facilities or they obtain transmission from third parties."¹³

Importantly, the Commission may be able to impose universal service contribution obligations on certain online companies providing video and voice calls consistent with its longstanding commitment to light-touch regulation or non-regulation of information services. The Communications Act makes a distinction between providers of "telecommunications" that may be subject to universal service contributions under the Commission's permissive authority under Section 254(d) and "telecommunications carriers" that are common carriers subject to the strictures of Title II of the Act.¹⁴ The Commission requires interconnected VoIP providers to make universal service contributions – yet it has declined to classifying those providers as telecommunications carriers under Title II. Similarly, a decision by the Commission to require online providers of video and voices calls to make universal service contributions would not result in online edge provider information services being subject to Title II regulation.

D. The Commission Should Guard Against Waste, Fraud, Abuse

By more closely adhering to the principle of fiscal responsibility, the Commission can better ensure that universal service money helps to ensure that Americans have access to broadband Internet services. To this end, the Commission should maintain strong protections against waste, fraud, and abuse in all universal service programs. The recently-announced Rural Broadband Accountability Plan appears to be a constrictive measure in this regard.¹⁵ Also, the Commission's report should clearly identify any new broadband spending program overlap with Lifeline and other existing universal service programs and so help stop wasteful duplication.

¹³ Universal Service Contribution Methodology, WC Docket 06-122, at ¶ 41.

¹⁴ See 47 U.S.C. § 254(d); 47 U.S.C. § 153(50).

¹⁵ See Fact Sheet: Rural Broadband Accountability Plan (released Jan. 28, 2022).

Moreover, if the various subsidy expenditures – whether through the IJA, ARPA, RUS, or otherwise – are not carefully targeted to build out unserved areas rather than overbuilding, then it is likely that there will be considerable waste and abuse. And such overbuilding likely would undermine private sector investment in networks.

E. The Commission Should Not Inject Extraneous Issues Like Net Neutrality Regulation Into Universal Service Policy

In seeking to improve the Commission's effectiveness in furthering universal service for broadband, it is important that the agency avoid inserting extraneous issues like net neutrality regulation and funding of municipal broadband projects into its universal service policy. Injecting issues unrelated to core universal service goals would bog down the Commission's efforts with disputes that are unrelated to expanding availability of broadband.

In fact, imposing network neutrality regulation as a public interest obligation for eligible telecommunications carriers (ETCs) or recipients of subsidies would not further universal service goals for broadband. Such regulation would not expand access to Americans who previously did not access it. And it would not improve competition or make broadband services more affordable. Furthermore, the *Restoring Internet Freedom Order* found that economic theory and empirical evidence support the conclusion that public utility regulation actually reduces incentives for private network investment.¹⁶ Such disincentives would undermine universal service goals for broadband.

III. The Commission's Report Should Focus on the Goal of Broadband Deployment

The Commission's report to Congress on the future of universal service should comply with the instructions provided by Congress. It should focus on universal service goals set forth in

¹⁶ See *Restoring Internet Freedom*, WC Docket 17-108, Declaratory Ruling, Report and Order, and Order (*Restoring Internet Freedom Order*) (released January 4, 2018), at ¶¶ 87-106.

the law regarding deployment of broadband Internet services to all Americans and to schools, rather than on goals, aspirations, or interests that are not contained in the law.

As the Commission's Notice observes, Section 60104(c)(1) of the Infrastructure Act states that "the Commission shall submit to Congress a report on the options of the Commission for improving its effectiveness in achieving the universal service goals for broadband in light of this Act and the amendments made by this Act, and other legislation that addresses those goals."¹⁷ And Section 60104(c)(2) provides that "the Commission may make recommendations for Congress on further actions the Commission and Congress could take to improve the ability of the Commission to achieve the universal service goals for broadband."¹⁸ Importantly, Section 60104(a)(2) defines "universal service goals for broadband" to mean "the statutorily mandated goals" contained in Section 706.¹⁹ And Section 706(a) requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)."²⁰

Thus, the statute sets forth *deployment* to all Americans and to schools as universal service goals for broadband. It recognizes the need to inquire about broadband availability in order to ascertain whether broadband is, in fact, being reasonably and timely *deployed*. And the Commission is instructed to consider the implications of the Act as it bears on how the Commission achieves those goals for broadband deployment.

¹⁷ See Report on the Future of the Universal Service Fund, WC Docket No. 21-476, Notice of Inquiry (released Dec. 15, 2021), at ¶ 2 (quoting Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (Infrastructure Act), div. F, tit. I, § 60104(c).

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 3 (citing 47 U.S.C. § 1302).

²⁰ 47 U.S.C. § 1302(a). See also 47 U.S.C. § 1302(b)(requiring the Commission to annually undertake an inquiry regarding the "availability" of advanced telecommunications capability in which the Commission is to determine whether that capability "is being deployed to all Americans in a reasonable and timely fashion").

However, in its Notice, the Commission proposes its own set of expansive goals – "universal deployment, affordability, adoption, availability, and equitable access to broadband throughout the United States."²¹ Whatever one's views of those other concepts, they are not goals set by Congress. For this report, such concepts should only be considered to the extent that they bear on the effectiveness of the Commission in furthering broadband deployment.

IV. Congress Should Take Actions to Solidify the Commission's Legal Authority to Modernize Universal Service for the Broadband Era

A. Congress Should Put Universal Service on More Solid Constitutional Footing

Reforming universal service is more than just a matter of fiscal policy – it's also a matter of constitutional import. The universal service system is in significant tension with the basic underpinnings of our constitutional system, including separation of powers principles and democratic accountability. Indirect taxing and spending by the Commission likely do not conform to constitutional dictates. The Commission should recommend that Congress finally put the provision of universal service subsidies, to the extent they remain necessary, on firmer constitutional footing – preferably by making direct appropriations out of the Treasury for universal service on some periodic basis. Failing that, Congress should authorize subsidies for broadband through surcharges assessed in accordance with clear congressional direction.

Article I, Section 8, Clause 1 of the Constitution provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."²² The clause reflects the principle that the power of taxation is a legislative power. And the requirement that the taxing

²¹ See Notice of Inquiry, at ¶ 4.

²² U.S. CONST. ART. I, Sec. 8, Cl. 8.

power only be exercised by Congress provides a measure of accountability to citizens for the expenditure of public funds.

But the breadth and vagueness of Section 254's delegation of revenue-raising authority to the FCC appears, at the very least, to run up against the boundaries of what is permissible under the Supreme Court's nondelegation doctrine. According to the nondelegation doctrine, when Congress passes a law delegating legislative authority to a federal agency, the legislation at least must set forth an "intelligible principle" to guide the agency in carrying out that delegated authority.²³

In the statute, Congress nowhere identifies precisely what services are to be subsidized. Instead, that key question is left open-ended, even empowering the Commission to subsidize new services. As Section 254(c)(1) states that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically... taking into account advances in telecommunications and information technologies services."²⁴ That elastic proviso is made even more expansive by Section 254(a)(2)'s authorization for the Commission to establish rules to define what services are to receive universal service support and when they are to receive them.²⁵ Additional ambiguity is found in provisions such as Section 254(c)(3), which authorizes the Commission to subsidize "additional services" – that is, services other than what the Commission defines are eligible for universal service subsidies – for schools, libraries, and health care providers.²⁶ And there is further ambiguity in Section 254(d)'s requirement that telecommunications carriers make "equitable" universal service contributions according to

²³ See *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928). See also *A. L. A. Schechter Poultry Co. v. United States* 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan* 293 U.S. 388 (1935).

²⁴ 47 U.S.C. § 254(c)(1).

²⁵ See 47 U.S.C. § 254(a)(2).

²⁶ 47 U.S.C. § 254(c)(3).

support mechanisms that the Commission is empowered to establish as it sees fit.²⁷ Such provisions lack "intelligible" standards for the Commission's exercise of its authority.

There are a couple ways that the Commission can address Section 254's constitutional problem.²⁸ One option is for Congress to replace the existing system of FCC-administered surcharges and spending with congressionally-directed appropriations out of the Treasury for universal service subsidies on a periodic basis. Such appropriations also ought to state clearly the terms and conditions for making such subsidies available. Or, failing that, another option is for Congress to amend Section 254 to expressly authorize subsidies for broadband Internet services, assessed in accord with clear congressional direction. For example, Congress could authorize the Commission to provide subsidy support for broadband directly to individual low-income consumers, using money collected from surcharges imposed on broadband Internet service providers, social media companies, online advertising companies, and other expressly identified types of popular online edge providers that benefit from broadband network availability. And Congress could provide direction regarding how often recipients are to receive subsidies, when surcharges are to be collected and remitted to the Commission, and how the Commission is to determine or periodically adjust surcharge rates.

Absent clear congressional direction, the universal service regime will be susceptible to a constitutional nondelegation challenge even under the current jurisprudence. And the issue of Section 254's broad and vague delegation could become even more serious if the Supreme Court decides to more vigorously enforce the nondelegation doctrine in the future. A majority of the

²⁷ 47 U.S.C. § 254(d).

²⁸ Although the constitutionality of Section 254 has been upheld by the U.S. Courts of Appeals of the Fifth and D.C. Circuits, both decisions directly addressed challenges based on the Article I Section 7 Origination Clause – and *not* the nondelegation doctrine. See *Rural Carrier Association v. FCC*, 685 F.3d 1083, 1090-1092 (D.C. Cir. 2012); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427-28 (1999).

current Justices have provided strong hints that they may do so.²⁹ But universal service reform ought not depend on judicial intervention. Section 254's nondelegation issue, and the institutional concerns behind the Constitution's lodging of the taxing power exclusively in Congress, should at least prompt Congress to consider exercising its powers of taxation in a more transparent, disciplined, and accountable manner.

B. Congress Should Amend Section 254 to Require Online Companies to Make Some Form of Contribution to the Universal Service Fund

It's possible that the FCC may have the authority to require certain providers of voice and video call services that have not heretofore been required to contribute to universal service to contribute. Section 254(d) requires 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."³⁰ Services, such as Facebook's Messenger, Instagram, Microsoft's Teams, Slack, Snapchat, WhatsApp, and Zoom and similar services, which transmit voice and video calls between or among points specified by the user on an interstate basis, possibly could be considered to be encompassed, for purposes of Section 254(d)'s permissive contribution provision and consistent with Commission precedent,³¹ within the definition of "telecommunications." And, certainly, a case can be made that the public interest requires some form of contribution from them.

²⁹ See, e.g., *Gundy v. U.S.*, 588 U.S. ___, 139 S.Ct. 2116, 2131 (Gorsuch, J., dissenting); *id.* (Alito, J., concurring).

³⁰ 47 U.S.C. § 254(d).

³¹ See Universal Service Contribution Methodology, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, paras. 38-49 (rel. June 27, 2006) (2006 Interim Contribution Methodology Order), *aff'd* in relevant part, *Vonage Holdings Corp., v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

While it is conceivable that the Commission currently possesses the authority to broaden the contribution base by expanding the services that it has not heretofore determined to be "telecommunications," the Commission nevertheless should recommend that Congress repurpose universal service for the broadband era and provide a solution to universal service's likely-approaching financial crisis. To the extent that an expansion of the contribution base is the preferred policy for supporting widespread broadband deployment in the future, the task should be undertaken by Congress. And Congress ought to consider requiring contributions from among the most highly capitalized web companies in America, who benefit so immensely from their use of high-speed broadband Internet networks.

Congress possesses the authority to amend Section 254 and remove all doubts regarding which entities are required to contribute to universal service. An update to Section 254 is justified on account of the dramatic reshaping of the communications market over the last 26 years.

When Congress enacted the Telecommunications Act of 1996, broadband received relatively little attention, there were far fewer Internet users and websites, and very few of today's major online web companies had yet come into existence. Today, however, the most highly capitalized and profitable major beneficiaries of the public Internet are so-called Big Tech providers like Alphabet (Google and YouTube), Amazon, Apple, Meta, Microsoft, Netflix, and Twitter. Providers of social media services, online advertising, and other large edge providers benefit tremendously from widespread deployment and availability of broadband networks. Given the substantial revenues those companies generate through their Internet-related businesses, it makes little sense that they do not contribute to universal service. There can be no

"equitable and nondiscriminatory" basis for saddling only legacy voice service providers – and ultimately, their subscribers – with the burden of supporting universal service.³²

V. Conclusion

For the foregoing reasons, the Commission should reform universal service for broadband consistent with the views expressed herein.

Respectfully submitted,

Randolph J. May

President

Seth L. Cooper

Senior Fellow and Director of Policy Studies

Andrew K. Magloughlin

Legal Fellow

Free State Foundation

P.O. Box 60680

Potomac, MD 20859

301-984-8253

February 17, 2022

³² See 47 U.S.C. § 254(d).