

**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
)
)

**REPLY COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These reply comments are submitted in response to the Federal Communications Commission's Notice of Inquiry regarding 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. In the Free State Foundation's initial comments, we recommended "that Congress and the Commission reform the universal service regime in some fundamental ways into a broadband-centric 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." After review of other initial comments, that remains our position.

In this reply, we will address three points raised by commenters that warrant additional discussion or emphasis. First, pending the fundamental overhaul of the universal service regime by Congress which we have recommended, the Commission should

* These comments express the views of Randolph J. May, President of the Free State Foundation, Seth L. Cooper, Director of Policy Studies and Senior Fellow, 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 an independent, nonpartisan free market-oriented think tank.

prioritize fiscal discipline in carrying out its existing universal service-related operations and responsibilities to eliminate waste and fraud. Congress already has authorized an unprecedented \$82 billion *minimum* for the federal government to spend on broadband deployment and subscription subsidies over the next few years, with this supplemented by some further amount from the \$380 billion American Rescue Plan Act (ARPA) funds eligible for broadband use. And the recently adopted Consolidated Appropriations Act of 2022 includes about \$450 million of *additional* funding for broadband. Considering the massive amount of funds already appropriated, which Congress just increased again this month, it is difficult, if not impossible, to predict with any reasonable degree of certainty what the future needs of a federal universal service system will be.

Second, whatever the precise contours of any future universal service programs, "Lifeline-like" vouchers should be employed to address adoption concerns relating to low-income persons and to empower recipients to choose among service providers.

Third, once the massive subsidies already appropriated have been spent, whatever universal service system subsidies are determined to be necessary, if any, should be provided through direct congressional appropriations. In other words, universal service subsidies would no longer be funded through surcharges assessed on subscribers. Replacing the present funding system with congressional appropriations would restore political accountability to the universal service regime. But if Congress fails to act, it is possible that the Commission may possess permissive authority under Section 254(d) of the Communications Act to impose some form of contribution requirement on certain companies, so-called Big Tech firms and otherwise, that currently do not contribute to

support universal service but that derive substantial benefit from their use of broadband networks.

II. The Commission Should Prioritize Fiscal Discipline, Considering the Massive Disbursement of Broadband Funds

Our initial comments explained that it is difficult, if not impossible, to project future universal service needs prior to the exhaustion of the massive amount of funds recently authorized by Congress for broadband support or dedicated to support universal service through existing Commission programs.¹ The federal government already has dedicated at least \$82 billion² that *will* fund broadband buildout and at least another \$380 billion³ that *could* fund broadband buildout over the next few years. These figures exclude the funds disbursed from the FCC's existing universal service programs.

With this in mind, we oppose assertions by some parties that the present extent of funding under existing Commission Universal Service Fund programs remains necessary.⁴ Even now, before the disbursement of most of the broadband funding already authorized, the Consolidated Appropriations Act of 2022, adopted by Congress on March 10, 2022, adds nearly \$550 million in new broadband funds.⁵ Given the unprecedented level of disbursements that will occur in the next several years, and given the present lack of

¹ Comments of the Free State Foundation, February 17, 2022, at 2-3.

² This figure includes the \$42.5 billion for broadband grants, \$14.2 billion for subscription subsidies, \$2 billion for ReConnect, and \$1 billion for middle mile grants in the Infrastructure Act, as well the \$11.2 billion to be distributed in Phase II of the FCC's Rural Digital Opportunity Fund, \$9 billion to be distributed in the FCC's 5G Fund, \$1.15 billion presently being distributed in Phase III of USDA's ReConnect Program, and about \$450 million additional funds for ReConnect and other programs in the Consolidated Appropriations Act of 2022.

³ This figure includes the \$350 billion State and Local Coronavirus Recovery Fund, \$19.53 billion Local Coronavirus Recovery Fund, and \$10 billion Coronavirus Capital Projects Fund created by ARPA, all of which can fund broadband deployment.

⁴ *See, e.g.*, Comments of Next Century Cities et al., February 17, 2022, at 4; Comments of GCI Communications Corp. February 17, 2022, at 5; Comments of Public Knowledge, February 17, 2022, at 4.

⁵ Consolidated Appropriations Act of 2022, H.R. 2471, 117th Cong. Division A, Title III (2022).

agency coordination among existing programs from the FCC and various agencies, what is most needed now is the prioritization of fiscal discipline to ensure, to the maximum extent possible, the elimination of waste and fraud in the disbursement of government subsidies.

Specifically, in the exercise of fiscal discipline, the Commission should plan now on transitioning to an "end-state" for universal service that, at least for the most part, sunsets the High-Cost Fund and other legacy programs.⁶ If there is future need for any additional universal service subsidies after spending the IIJA, ARPA, and other presently allocated funds, a determination can be made at that time.

The present lack of coordination among agencies managing existing broadband programs also makes projecting future universal service needs even more difficult. While some agencies managing broadband programs have made efforts towards coordination,⁷ which we commend, ARPA has since added a fourth agency, the Treasury Department, into the mix. The mere existence of programs with duplicative and often conflicting missions risks waste.⁸ Further, while the FCC and NTIA will rely on the eventual broadband maps Congress commissioned in the Broadband DATA Act, the Department of Agriculture has made no such commitment. And the Treasury Department will administer ARPA funds considering "any available data including but not limited to" these maps.⁹

⁶ We agree with Free Press to the extent that it suggests that the unprecedented funding Congress provided in the Infrastructure Act warrants "tossing aside" the outdated and duplicative High-Cost Fund. Comments of Free Press, February 17, 2022, at 14.

⁷ See "FCC, NTIA, and USDA Interagency Agreement on Broadband Funding Deployment" (June 25, 2021), available at: <https://www.fcc.gov/document/fcc-ntia-usda-interagency-agreement-broadband-funding-deployment>.

⁸ Randolph J. May and Andrew Long, "Self-Defeating Treasury Subsidy Rule Wrongly Champions Broadband Overbuilds," *Perspectives from FSF Scholars*, Vol. 17, No. 4 (January 19, 2022). Regarding the potential for waste and fraud resulting from such massive amounts of money being disbursed by several different agencies with somewhat different missions, see the Press Release, "Wicker Calls for Oversight Review on COVID-19 Broadband Spending," March 15, 2022.

⁹ Andrew Long, "The Department of Agriculture (Obviously) Is Not the FCC: Why, Then, Is It Dictating Communications Policy?" *Perspectives from FSF Scholars*, Vol. 16, No. 62 (November 29, 2021); Andrew

Sunsetting legacy universal service programs at the Commission would at least ameliorate the difficulties inherent in interagency coordination.

These two factors – the massive disbursement of subsidies over the next several years and the need for ongoing coordination among existing programs – support the Commission prioritizing fiscal discipline in carrying out its universal service responsibilities.

III. The Commission Should Transition Existing Universal Service Programs to "Lifeline-Like" Vouchers

As suggested above, the Commission should begin planning now to transition its existing universal service programs to an "end-state" that largely eliminates legacy deployment subsidies, including the existing High-Cost Fund, while continuing to provide support for low-income persons to obtain broadband services. This end-state should take the form of "Lifeline-like" vouchers for eligible low-income individuals to purchase broadband subscriptions. We fully agree with Brent Skorup in this regard, and we partly agree with Public Knowledge that the Commission should look to the structure of the American Connectivity Program (ACP) as a roadmap for reforming Lifeline.¹⁰ But as AT&T and the Internet Innovation Alliance suggest, and as we too suggested in our initial comments, the adoption component of universal service could be further improved by directly subsidizing low-income individuals rather than reimbursing carriers after the fact in a burdensome middleman arrangement.¹¹

Long, "Treasury Department Resurrects the Scary Biden Broadband Plan," *Perspectives from FSF Scholars*, Vol. 16, No. 56 (October 20, 2021).

¹⁰ Comments of Brent Skorup, February 17, 2022, at 2; Comments of Public Knowledge, February 17, 2022, at 7.

¹¹ Comments of AT&T, February 17, 2022, at 27-28; Comments of Internet Innovation Alliance, February 17, 2022, at 7.

As Free State Foundation Senior Fellow Andrew Long explained, the ACP 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.¹² Both improvements foster consumer choice because they empower recipients to shop among a wider variety of providers to select a plan that meets their needs.

While the ACP includes some welcome features, further reforms should replace the provider reimbursement system with vouchers. The current Lifeline and ACP programs reimburse carriers that serve households enrolled in either program. Providers must submit detailed and time-consuming reimbursement requests to the Universal Service Administrative Company (USAC), making providers "middlemen" to both programs.¹³ Placing this administrative burden on providers may discourage their participation in Lifeline, effectively limiting consumer choice. Instead, if Lifeline consisted of vouchers for broadband service provided directly to individuals, not only would this empower low-income consumers, but the program may support more service choices for recipients.¹⁴

IV. Congress Should Support Universal Service Through Direct Appropriations, But the Commission May Have Permissive Authority to Assess Contributions on Certain Non-Contributing Companies

We agree with the Asian American and Pacific Islander advocates, the Digital Progress Institute, Jeffrey Westling, and others that congressional appropriations are the

¹² Andrew Long discussed the Emergency Broadband Benefit, the predecessor to the ACP that had the same structure. Andrew Long, "The Emergency Broadband Benefit: A Possible Model for Future Lifeline Funding," *Perspectives from FSF Scholars*, Vol. 16, No. 6 (February 5, 2021).

¹³ Comments of AT&T, February 17, 2022, at 27.

¹⁴ Lifeline could come in the form of electronic benefits cards that other federal programs already use. *See* Comments of Verizon, February 17, 2022, at 12.

preferable source of funding for universal service and, in any event, that Congress should decide whether the contribution base should be extended to companies other than those presently required to contribute under the Commission's existing regime.¹⁵ The appropriations process would provide political accountability regarding uses and amount of universal service spending. This would be a welcome improvement over the present system, which delegates major policy decisions regarding universal service to the Commission, USAC, and the Federal-State Joint Board on Universal Service. The present lack of congressional direction, absent from the Commission'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.¹⁶

Further, the present funding mechanism, which consists of line-item surcharges on customer phone bills, disproportionately burdens low-income consumers. These line-item surcharges are highly regressive, and the burden of regressive taxes falls most heavily on low-income consumers, limiting the universal service program's effectiveness.¹⁷

Appropriations are also superior to line-item surcharges because these surcharges limit overall broadband adoption by increasing prices. To the extent price is a barrier to broadband adoption, as it can be for some low-income consumers, then the current universal service funding mechanism reduces broadband adoption by pricing some

¹⁵ See, e.g., Comments of Michael Nguyen et al., February 16, 2022, at 2; Comments of the Digital Progress Institute, February 17, 2022, at 8; Comments of Jeffrey Westling, February 17, 2022, at 4.

¹⁶ See Randolph May, "A Nondelegation Doctrine Challenge to the FCC's Universal Service Regime," *Yale Journal on Regulation Notice & Comment Blog* (November 3, 2021), available at: <https://www.yalejreg.com/nc/a-nondelegation-doctrine-challenge-to-the-fccs-universal-service-regime/>.

¹⁷ Andrew K. Magloughlin, "Wireless Tax Hikes Mute Price Cuts - Tax Foundation Report," *FSF Blog* (November 16, 2021), available at: <http://freestatefoundation.blogspot.com/2021/11/wireless-tax-hikes-mute-price-cuts-tax.html>.

customers out of the market.¹⁸ The same would be true if the Commission began imposing surcharges on broadband services. Instead, under an appropriations-funded universal service program, low-income consumers would pay lower overall prices with the present surcharges removed.

So congressional appropriations – with their attendant political accountability – are the preferable way to fund any universal service subsidies determined to be needed. But if Congress does not act, it is possible the Commission may have authority to assess contributions from other firms, including so-called Big Tech web giants, that derive so much benefit from their use of broadband networks.¹⁹ Under Section 254(d) of the Communications Act, the Commission has permissive authority to assess universal service contributions from "[a]ny other provider of interstate telecommunications . . . if the public interest so requires."²⁰

TechFreedom asserts there is "nothing the FCC can do to expand" the bounds of its permissive authority.²¹ But the question is not whether the Commission may expand the bounds of its authority, which it may not do, but rather the proper interpretation of the Commission's authority. 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."²²

¹⁸ Hal Singer and Ted Tatos, "Subsidizing Universal Broadband Through a Digital Advertising Services Fee: An Alignment of Incentives," at 50, available at: <https://www.econone.com/wp-content/uploads/2021/09/Digital-Divide-HSinger-TTatos-2.pdf>; *see also* Comments of INCOMPAS, February 17, 2022, at 19.

¹⁹ Comments of AT&T, February 17, 2022, at 13.

²⁰ 47 U.S.C. § 254(d).

²¹ Comments of TechFreedom, February 17, 2022, at 7.

²² 47 U.S.C. § 153 (50).

While the Commission has described "transmission" as the core of telecommunications, "transmission" is not defined in the statute and neither has the Commission defined it.²³

The Commission has, in the past, exercised its permissive authority to assess contributions from entities that do not control physical transmission facilities.²⁴ This suggests it is at least possible that certain Internet "platforms" providing two-way voice and video calling services, such as Facebook's Messenger, Instagram, Microsoft's Teams, Slack, Snapchat, WhatsApp, Zoom, and others may engage in "transmission" such that the Commission could, if it wished, assess contributions.²⁵ The services such as those listed above are sending signals over wire and radio, and, for some time now, these services increasingly have replaced the legacy voice and video telecommunications services that presently are subject to the contribution requirement. The public interest possibly could justify assessing contributions on these services as a mean of addressing the ongoing shrinkage of the universal service fund's contribution base. That shrinkage may also make assessing contributions reasonably ancillary to the Commission's express authority in Section 254 to maintain the universal service fund. Importantly, deeming a service as "telecommunications" solely for purposes of Section 254(d)'s permissive authority does not convert that service into a "telecommunications service" because the latter term has its own additional statutory requirements in other sections of the Communications Act.²⁶ So if the Commission were to decide to exercise its permissive authority over services like those

²³ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Docket No. 03-45 (released Feb. 19, 2004), at ¶ 9.

²⁴ *Universal Service Contribution Methodology*, Docket No. 06-122 (released June 27, 2006) at ¶ 41, n. 147.

²⁵ A common definition of "transmit" is "to send a signal by wire, radio, or television waves." "Transmit," Dictionary.com, available at: <https://www.dictionary.com/browse/transmit>.

²⁶ A "telecommunications service" must also be offered "for a fee directly to the public." 47 U.S.C. § 153(53).

mentioned above, this would not – and should not – conflict with the light-touch regulatory policy in the *Restoring Internet Freedom Order*.²⁷

V. Conclusion

For the foregoing reasons, the Commission should reform universal service for broadband consistent with the views expressed herein and in our initial comments.

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March 17, 2022

²⁷ Assessing Internet platforms may be preferable to existing line-item surcharges on communications services, or expansion of these surcharges to broadband services, because of the potential for lower pass-through rates, increased adoption, and better-aligned incentives. A study from Hal Singer and Ted Tatos suggests that Internet platforms are far less able to pass through advertisement cost increases to downstream consumers than ISPs can pass through line-item surcharges on their services. Singer and Tatos, *supra* note 18, at 39-40, 53. Additionally, adding certain Internet platforms to the contributor pool would spread the burden among more providers, reducing the historically high communications service fees that reduce adoption. Further, because widespread broadband adoption benefits Internet platforms' advertising businesses, it may make sense from an incentives perspective to assess contributions to these platforms.