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Congress Should Require Major Web Platforms to Support Universal Service

by

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I. Introduction and Summary

The future of the Universal Service Fund (USF) that provides subsidies to communications providers and to individual subscribers of communications services was a prime topic of conversation at #FSFConf14 – the Free State Foundation's Fourteenth Annual Policy Conference. This is not surprising because the Federal Communications Commission is in the midst of conducting a congressionally-ordered review to advise Congress on ways to improve the agency's effectiveness in achieving universal service goals for broadband. And the FCC itself just announced on June 9 that the "contribution factor" for the third quarter of 2022 will be increased to 33%, an all-time high. In other words, consumers will pay a 33% tax on all interstate telephone calls. No wonder the future of universal service was a hot topic.

As the Free State Foundation urged in its comments in the FCC's universal service proceeding, it is clear that Congress and/or the FCC need to reform the universal service regime in very fundamental ways. And given the billions of dollars that Congress already has appropriated to support broadband deployment and adoption going forward, it is by no means clear that the existing USF system should continue to exist in anything like its present form.

But to the extent that subsidy support for broadband remains necessary on an ongoing basis after the expenditure of the billions of dollars already appropriated, Congress should consider an idea discussed by FCC Commissioners Brendan Carr and Nathan Simington at #FSFConf14: expand the base of USF contributors by including web platforms like Amazon, Apple, Facebook, Google, Microsoft, and Twitter, that benefit most from nationwide broadband network availability. As an important step, Congress should promptly pass the FAIR Contributions Act – or similar legislation – that would authorize the Commission to recommend ways to expand the USF contribution base and ensure its financial sustainability.

When the USF program was adopted in 1996, it was geared toward legacy voice services, not broadband. And the USF's $8+ billion annual subsidy distributions are a much larger amount than when the program began. Voice service consumers pay for USF in the form of surcharges on their monthly bills. But as Commissioner Carr observed at #FSFConf14, the "[t]elephony revenues, the revenue base that we use for universal service, is somewhere in the $30 billion to $40 billion range. It's a significant decline from where it was when we initiated this mechanism." And Commissioner Simington remarked that "[a]nyone looking at the world in 2022 would not design the universal service mechanism as it is now." Indeed, the combination of a shrinking contribution base and increasing distribution amounts has put the USF program in peril and overtaxed voice consumers. Indeed, a June 8 *ex parte* filing at the FCC by Mattey Consulting, LLC indicated that "the contribution factor could reach 40% in the foreseeable future if action is not taken."

Commissioner Simington posed the pertinent question: "Why are we charging last mile providers, who are not the greatest beneficiary of adding the last mile customer, and not charging the upstream companies that are the primary beneficiaries?" He noted that "the business models for many companies for equipment, software-as-a-service, social media, video companies, are predicated on the assumption of universal broadband or near-to-universal broadband, and without that they wouldn't have a customer base. They are structurally non-contributors to USF while the pressure on telephony is getting unbearable." Similarly, Commissioner Carr suggested that "[w]e need to start looking to Big Tech to start contributing a fair share." And he raised the idea of looking to digital advertising revenues, since "that's something like an $180 billion-a-year industry and growing compared to $30-$40 billion in telephony. And I do think that they are one of the largest beneficiaries of this spending."

In comments and reply comments filed earlier this year in the FCC's "Future of Universal Service Report" proceeding, Free State Foundation scholars made the case that the Commission's existing authority under Section 254(d) may allow the agency to collect contributions from certain providers of voice and video call services that have not heretofore been required to pay into the existing universal service fund. As a legal proposition, such an expansion of the USF contribution base appears to be backed by the agency's decision in 2006 to require interconnected VoIP providers to contribute to USF.

Notably, at #FSFConf14, Commissioners Carr and Simington both affirmed that, in their view, the FCC has authority to require USF contributions from online providers of video and voice calls. But they also recognized that the Commission's existing authority to expand the contribution base is limited and it could go only part way in tapping revenue sources needed to bring long-term financial stability to USF. According to Commissioner Carr, "the reality is we need additional authority from Congress to sweep in the full suite of large technology company revenues."

The Funding Affordable Internet with Reliable Contributions Act – or FAIR Contributions Act, S.2427, 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. The FAIR Contributions Act was favorably reported out of the Senate Commerce, Science, and Transportation Committee on May 11. 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. 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.

Congress should pass the FAIR Contributions Act – or similar legislation – as a step toward USF contribution reform. Central to the Commission's analysis and to any reform recommendations should be the principle that at least the major providers of online services that gain so much financially from nationwide broadband network connections should finally share in the financial responsibility for maintaining universal service.

II. The USF Program's Financial Support Mechanism Is Unsustainable

The Universal Service Fund is a federal subsidy program intended to serve the goal of ensuring that all Americans are connected to communications services. This includes subsidy support for high-cost areas, low-income consumers, schools and libraries, as well as telemedicine services. The program's funding is ultimately taken from consumers of interstate and international voice services in the form of USF surcharges included on monthly bills.

When Congress enacted Section 254 of the Communications Act in 1996, it was focused primarily upon voice services and not broadband services. Also, the USF operated with a smaller budget that drew from a larger contribution base compared to today. The USF program's total distributions for 2020 totaled $8.3 billion dollars, significantly higher than the $2.3 billion and $3.6 billion distributed in 1998 and 1999. According to the Federal-State Joint Board's *2021 Universal Service Monitoring Report*, the annual contribution base of legacy voice service providers declined from $65.9 billion in 2011 to $41.4 billion in 2020.

At #FSFConf14, FCC Commissioner Brendan Carr identified the unpleasant financial realities facing USF: "Telephony revenues, the revenue base that we use for universal service, is somewhere in the $30 billion to $40 billion range. It's a significant decline from where it was when we initiated this mechanism."

In order to keep the USF program afloat, consumers of voice services have become severely overtaxed. The USF surcharge rate has risen to the 25% to 30% range – far higher than it was two decades ago. Commissioner Carr acknowledged that the USF contribution factor recently had declined to the low 20% range, but he also insisted "that number is going to come flying back towards 30 percent very quickly here." In fact, a June 8 *ex parte* filing at the FCC by Mattey Consulting, LLC indicated that "the contribution factor could reach 40% in the foreseeable future if action is not taken."

Commissioner Nathan Simington also recognized that the USF program's contribution mechanism is outdated: "Anyone looking at the world in 2022 would not design the universal service mechanism as it is now. Using telephony to fund broadband spend probably made sense at the time, but things have evolved." He posed pertinent questions about funding sources for universal service in today's communications marketplace:

> Every time a broadband provider adds a customer, you have to ask, "Who else adds a customer?" Search engines add customers, streaming video adds customers, online web apps add customers. It may be the case that, in fact, if a company has sufficient market penetration there might be much more upside for that company than for the actual last mile provider to add a customer at the last mile. Very often its cost structure is almost pure profit per incremental user.
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> If this theory holds water, then the question would be: "Why are we charging last mile providers, who are not the greatest beneficiary of adding the last mile customer, and not charging the upstream companies that are the primary beneficiaries?" This would require us to think through this question of: "Who is the beneficiary of network effects?" But on the other hand, the business models for many companies for equip, software-as-a-service, social media, video companies, are predicated on the assumption of universal broadband or near-to-universal broadband, and without that they wouldn't have a customer base. They are structurally non-contributors to USF while the pressure on telephony is getting unbearable. What I'm hearing from business telephony users is that they can't even budget effectively because they have no idea what the contribution factor is going to be quarter to quarter.

III. Major Web Platforms Should Be Responsible for Helping Support Universal Service

Commissioner Carr also identified potential new contribution sources for the USF program. As he explained: "We need to start looking to Big Tech to start contributing a fair share." An idea that Commissioner Carr posed is looking to digital advertising revenues. He stated that "[r]ight now that's something like an $180 billion-a-year industry and growing compared to $30-$40 billion in telephony. And I do think that they are one of the largest beneficiaries of this spending."

Looking at the current state of the USF contribution system, Commissioner Carr observed:

> Right now it's a direct pass through to consumers' traditional telephone bills. And when we look at large tech companies, digital ad revenues in particular, there's a lot of room between those revenues that the company has and any end user bill such that net-net [having large tech companies contribute to universal service is]

> going to reduce the impact on consumers. So I think that we definitely should be doing that.

However, Commissioner Carr pushed back against the idea of shifting all of the contribution burden on the telephone portion of consumers' bills over to the Internet portion of their bills:

> We absolutely need to build a firewall around the idea that 100% of this should be coming out of the pockets of consumers on their broadband bill. Should some portion of it go in? Do broadband providers benefit from it? Yeah, I'm open to some idea along those lines as a compromise. But my starting position is: we cannot. It's a non-starter to say it should go 100% onto the Internet bill. Affordability is so important right now. Driving up artificially the Internet bills for consumers should be something that we all reject.

IV. Existing FCC Authority to Expand USF Contributions Goes Only Partway

In comments and reply comments filed earlier this year in the FCC's "Future of Universal Service Report" proceeding, Free State Foundation scholars made the case that the Commission's existing authority may allow the agency to collect contributions from certain providers of voice and video call services that have not heretofore been required to pay in to the existing universal service system. Section 254(d) of the Communications Act mandates contributions from telecommunications providers, and it grants the Commission permissive authority to require "any other provider of interstate telecommunications" to contribute "if the public interest so requires." The statute also requires the Commission to establish "specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service."

Online companies or edge providers that provide video and voice calls – such as Meta, Instagram, Microsoft, Slack, Snapchat, WhatsApp, and Zoom – directly benefit from the widespread deployment of broadband networks to American consumers. And the video and voice calls provided by popular online companies increasingly are used by consumers in place of legacy voice services that are under growing burdens in propping up the USF system. In the face of USF's lagging contribution base and high distribution amounts, requiring contributions from providers of popular online video and voice call capabilities could help to keep the program financially solvent and reduce the hardship for legacy voice services and voice subscribers.

As FSF's comments in the "Future of the Universal Service Fund Report" proceeding pointed out, agency precedent interpreting Section 254(d) appears to support such an expansion of the USF contribution base. In its *2006 Universal Service Contribution Methodology Order*, the Commission found 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," and the agency required those providers to make USF contributions.

Notably, at #FSFConf14, Commissioners Carr and Simington both affirmed that, in their view, the FCC has authority to require USF contributions from online providers of video and voice calls. Commissioner Simington expressly referenced the agency's 2006 decision to require USF contributions from VoIP by using its general power to draw on providers of interstate communications for contributions. However, he also acknowledged that the Commission's existing authority to expand the contribution base is still too limited to achieve comprehensive contribution reform:

> [I]f Congress decides to adopt a theory that companies with large network effects that are dependent on universal service should be contributors to USF, that would go beyond the theory that we draw on for VoIP. And I don't know that would be something that we could do under our own authority. That might be a little ambitious. And that might invite the sort of pushback that we might not consider prudent.

Similarly, Commissioner Carr cautioned that although an expansion of the USF contribution base could be accomplished under the Commission's existing authority, such an undertaking could go only partway toward a long-lasting solution:

> There are some revenue streams of large technology companies that I think would be assessable under the current structure, things that look like cloud-based transport, maybe the voice component of Microsoft Xbox. But it's a small portion of what I think we need to do. Yes, we could start. But the reality is we need additional authority from Congress to sweep in the full suite of large technology company revenues. That's why I'm pleased that Congress is starting to look at this, there is some bipartisan support, there is some study bills that are out there. And I think the FCC could go ahead and issue an NPRM that looks at a lot of these issues while we hopefully wait to get some additional authority from Congress.

Commissioners Carr and Simington are right in emphasizing the role of Congress in authorizing the agency to modernize and widen the USF contribution base. Only Congress can refit the USF program for the broadband era and place it on financially solid footing. Congress should begin laying the groundwork for a revamped contribution mechanism that allocates responsibility for financing the USF program to the companies that derive the greatest commercial benefits from universal broadband connectivity.

V. Congress Should Direct the FCC to Study the Problem and Propose Contribution Reforms

The Funding Affordable Internet with Reliable Contributions Act (FAIR Contributions Act), S.2427, 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. The FAIR Contributions Act was favorably reported out of the Senate Commerce, Science, and Transportation Committee on May 11. If passed by Congress, the Act would require the Commission to submit a report to congressional committees that weighs the relative equities on consumers of the existing contribution system as well as potential alternative systems.

The FAIR Contributions Act also requires the FCC's report to address the extent to which there is continued need for the USF program once broadband connectivity is made available to all Americans. That is an important issue that Free State Foundation comments raised in the Commission's "Future of the Universal Fund Report" proceeding. It is clear that Congress and/or the FCC need to reform the universal service regime in fundamental ways. Yet given the billions of dollars that Congress already has appropriated to support broadband deployment and adoption going forward, it is by no means clear that the existing USF system should continue to exist in anything like its present form. To the extent that subsidy support for broadband remains necessary on an ongoing basis after the expenditure of the billions of dollars already appropriated, a modernized contribution mechanism will be needed. And a report by the Commission can help inform Congress about the best ways to establish it.

The Reforming Broadband Connectivity Act is another bill that would require the FCC to assess the need to expand the USF contribution base and to ensure that contribution requirements are imposed equitably and fairly. The Act has been introduced in the Senate (S.3236) and in the House of Representatives (H.R. 6314). If passed by Congress, the Act would require the Commission to submit a report to Congress with its findings. Under the Act, the Commission would have to consider the relative equities and burdens of any proposed changes in the contribution system with respect to consumers and businesses.

Congress should pass the FAIR Contributions Act – or similar legislation – as a step toward USF contribution reform. At Congress's direction, the FCC should compile a comprehensive factual record and examine ways to increase the sources of funding for the USF program, while bringing significant relief to consumers of voice services. Central to the Commission's analysis and to any reform recommendations should be the principle that at least the major providers of online services that gain so much financially from nationwide broadband network connections should finally share in the financial responsibility for maintaining universal service. Major web platforms such as Amazon, Apple, Facebook, Google, Microsoft, and Twitter collectively generate hundreds of billions in commercial revenues using broadband connections to the American public. With great profits from universal service should come great financial responsibility for sustaining it.

Commissioner Carr is correct that the FCC already has the authority to study ways to modernize the USF contribution mechanism and to propose specific reforms. Indeed, paragraph 51 of the Commission's Notice of Inquiry for its "Future of Universal Service Report" proceeding seeks comments on "potential recommendations to Congress for other amendments to section 254 of the Communications Act or any other legislative actions related to USF," including "whether changes in law are necessary or appropriate to update the system of universal service contributions." The Commission could offer some helpful facts, assessments, and recommendations regarding contribution reforms in its forthcoming "Future of the Universal Service Report" – due to Congress later this year. However, contribution reform is only one issue among myriad USF reform-related topics covered by the Commission's Notice. Given the wide scope of the Notice and the relatively short attention paid to the contribution mechanism, it appears unlikely that USF contribution reform will receive a detailed treatment in the Commission's upcoming report to Congress.

A mandate from Congress for a thorough examination of the USF contribution mechanism and ways to modernize it would help ensure that the Commission dedicates sufficient time and resources to such a study and that the agency completes the report in a timely matter.

VI. Conclusion

Reforms to the USF contribution mechanism are needed to save the program from fiscal collapse – and to provide relief to voice consumers who are burdened with paying for it. Congress should take up an idea discussed by FCC Commissioners Brendan Carr and Nathan Simington at #FSFConf14: expand the base of USF contributors by including major Web platforms like Amazon, Apple, Facebook, Google, Microsoft, and Twitter, that benefit most from nationwide broadband network availability. As a first step, Congress should promptly pass the FAIR Contribution Act or similar legislation. Congress should authorize the Commission to study the issue and to submit a report recommending ways to expand the USF contribution base and ensure its financial sustainability for the future.

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(Note: #FSFConf14 quotes contained in this *Perspectives* are based on an edited transcription made by the author for purposes of readability. None of the meaning was changed in doing so.)

Further Readings

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