IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 21-3886

CONSUMERS' RESEARCH, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ACTION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIAN M. BOYNTON
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL

SARAH E. HARRINGTON
DEPUTY ASSISTANT ATTORNEY GENERAL

MARK B. STERN
GERARD J. SINZDAK
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

P. MICHELE ELLISON
GENERAL COUNSEL

JACOB M. LEWIS
DEPUTY GENERAL COUNSEL

JAMES M. CARR
ADAM G. CREWS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

TABLE OF CONTENTS

Table Of Authorities iii

Statement In Support Of Oral Argument xii

Jurisdiction 1

Statement Of The Issues 2

Statutes And Regulations 2

Introduction 2

Counterstatement 4

A. The FCC's Universal Service Mandate 4

B. Section 254 Of The Communications Act 6

C. The Implementation Of Section 254 9

D. The FCC's Universal Service Contribution Rules 14

E. The Fourth Quarter 2021 Universal Service Contribution Factor 16

F. Subsequent Developments 18

Summary Of Argument 19

Standard Of Review 23

Argument 23

I. The Court Lacks Jurisdiction Because The Petition For Review Is Untimely. 23

A. The Hobbs Act's 60-Day Time Limit For Filing Pre-Enforcement Challenges Has Long Expired. 23

B. Petitioners Should Have Raised Their Claims By Objecting To USAC's Invoice Or By Filing A Petition For Rulemaking. 26

II. Section 254 Does Not Unconstitutionally Delegate Legislative Power To The FCC. 28

A. Congress Does Not Delegate Legislative Power When It Provides An "Intelligible Principle" To Guide Administrative Implementation Of Its Enactments. 28

B. Section 254 Satisfies The Intelligible Principle Standard By Providing Ample Legislative Guidance To The FCC To Implement The Universal Service Program. 30

1. Section 254(b)'s Universal Service Principles. 31

2. Section 254(c)'s Limits On Defining Eligible Services. 37

3. Section 254(d)'s Requirement That Contributions Be Equitable And Nondiscriminatory. 40

4. Section 254(e)'s Requirement That Support Be Sufficient. 42

5. Section 254(h)'s Guidance For Calculating Support To Schools, Libraries, And Health Care Providers. 44

C. Petitioners' Attempts To Avoid The Controlling Understanding Of The Nondelegation Doctrine Are Unavailing. 47

III. The FCC Has Not Impermissibly Delegated Government Power To USAC. 52

A. USAC Merely Provides Administrative Support To The FCC. 52

B. The FCC's Delegation To USAC Is Constitutional Because The Commission Supervises USAC And Retains Final Decisionmaking Authority. 56

Conclusion 62

TABLE OF AUTHORITIES

CASES:

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 30, 34

Alenco Commc'ns, Inc. v. FCC, 201 F.3d 608 (5th Cir. 2000)..... 4, 21, 36, 42, 43

Allnet Commc'n Serv., Inc. v. Nat'l Exchange Carrier Ass'n, 965 F.2d 1118 (D.C. Cir. 1992) 11

Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946)..... 29, 30, 39, 47

Am. Road & Transp. Builders Ass'n v. EPA, 588 F.3d 1109 (D.C. Cir. 2009) 27

Arctic Express, Inc. v. U.S. Dep't of Transp., 194 F.3d 767 (6th Cir. 1999).....24

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 5, 6

AT&T, Inc. v. FCC, 886 F.3d 1236 (D.C. Cir. 2018) 9, 39

Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701 (5th Cir. 2017) 57

Bosse v. Oklahoma, 137 S. Ct. 1 (2016) 52

Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n, 264 Kan. 363, 956 P.2d 685 (Kan. 1998).....51

Comsat Corp. v. FCC, 250 F.3d 931 (5th Cir. 2001)..... 15, 41

Fund for Animals v. Kempthorne, 538 F.3d 124 (2d Cir. 2008).....56

Gen. Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).....39

Graceba Total Commc'ns, Inc. v. FCC, 115 F.3d 1038 (D.C. Cir. 1997).....26

Gundy v. United States, 139 S. Ct. 2116 (2019) .. 20, 22, 28, 29, 30, 47, 48, 49

Gutierrez v. Sessions, 887 F.3d 770 (6th Cir. 2018).....23

Hachem v. Holder, 656 F.3d 430 (6th Cir. 2011) 29, 30, 49

Herr v. U.S. Forest Serv., 803 F.3d 809 (6th Cir. 2015).....26

In re A.P. Liquidating Co., 421 Fed. Appx. 583 (6th Cir. 2011).....39

In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014)..... 9, 36, 43

In re Incomnet, Inc., 463 F.3d 1064 (9th Cir. 2006).....61

inContact, Inc. v. FCC, 495 Fed. Appx. 95 (D.C. Cir. 2013)..... 26, 57

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 20, 48

La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor, 745 F.3d 653 (3d Cir. 2014)..... 55, 56

Loving v. United States, 517 U.S. 748 (1996).....28

Mistretta v. United States, 488 U.S. 361 (1989).....28

Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984)..... 31, 39

N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12 (1932) 30

NAACP v. Fed. Power Comm'n, 425 U.S. 662 (1976) 37, 39

Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) 29, 37, 39

Nat'l Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 50

Nat'l Lifeline Ass'n v. FCC, 983 F.3d 498 (D.C. Cir. 2020).....12

Nat'l Truck Equip. Ass'n v. NHTSA, 711 F.3d 662 (6th Cir. 2013) 54

Ohio Pub. Int. Rsch. Grp. v. Whitman, 386 F.3d 792 (6th Cir. 2004) 25

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 30, 34

PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019) 24

Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004) 56, 60

Qwest Commc'ns Int'l, Inc. v. FCC, 398 F.3d 1222 (10th Cir. 2005) 33, 35

Qwest Corp. v. FCC, 258 F.3d 1191 (10th Cir. 2001) 33, 35

RLR Investments, LLC v. City of Pigeon Forge, 4 F.4th 380 (6th Cir. 2021) 49

Rural Cellular Ass'n v. FCC, 588 F.3d 1095 (D.C. Cir. 2009) 4, 21, 35, 36, 43

Rural Cellular Ass'n v. FCC, 685 F.3d 1083 (D.C. Cir. 2012) 16, 22, 32, 50, 51, 54

Rural Tel. Coal. v. FCC, 838 F.2d 1307 (D.C. Cir. 1988) 31, 51

Schumacher v. Johanns, 272 Neb. 346, 358-63, 722 N.W.2d 37 (Neb. 2006) 51

Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) 22, 51

State of Tex. v. Rettig, 987 F.3d 518 (5th Cir. 2021) 55, 57, 58

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 57

Taylor v. Buchanan, 4 F.4th 406 (6th Cir. 2021) 49

Texas Off. of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) 5, 6, 9, 10, 22, 24, 31, 33, 40, 41, 42, 44, 50

Texas Off. of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001) 5, 33, 39

Thompson v. Marietta Educ. Ass'n, 972 F.3d 809 (6th Cir. 2020) 49

Thomson Multimedia Inc. v. United States, 340 F.3d 1355 (Fed. Cir. 2003) 50

Touby v. United States, 500 U.S. 160 (1991) 35

Trafigura Trading LLC v. United States, 29 F.4th 286 (5th Cir. 2022) 50

U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004)..... 54, 56

United States v. Alcorn, 93 Fed. Appx. 37 (6th Cir. 2004).....35

United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) 58

United States v. Felts, 674 F.3d 599 (6th Cir. 2012) 29

United States v. Frame, 885 F.2d 1119 (3d Cir. 1989).....60

United States v. Gibson, 881 F.2d 318 (6th Cir. 1989).....48

United States v. Grimaud, 220 U.S. 506 (1911) 28, 47, 51

United States v. Horn, 679 F.3d 397 (6th Cir. 2012).....29

United States v. Lawrence, 735 F.3d 385 (6th Cir. 2013).....29

United States v. Marshall, 954 F.3d 823 (6th Cir. 2020).....23

United States v. Satterwhite, 893 F.3d 352 (6th Cir. 2018).....23

United States v. Stevens, 691 F.3d 620 (5th Cir. 2012).....25

United States v. U.S. Shoe Corp., 523 U.S. 360 (1998) 50

United States v. Wright, 747 F.3d 399 (6th Cir. 2014).....58

Van Buren v. United States, 141 S. Ct. 1648 (2021).....32

Verizon Commc'ns Inc. v. FCC, 535 U.S. 467 (2002) 5

Voicestream GSM I Operating Co. v. La. Pub. Serv. Comm'n, 943 So. 2d 349 (La. 2006).....51

Vt. Pub. Serv. Bd. v. FCC, 661 F.3d 54 (D.C. Cir. 2011).....10

Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 28, 47

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 29, 30, 46

Yakus v. United States, 321 U.S. 414 (1944) 30, 46

ADMINISTRATIVE MATERIALS:

Alpaugh Unified Sch. Dist., 22 FCC Rcd 6035 (2007) 53

Changes to the Board of Directors of the National Exchange Carrier Association, Inc., 12 FCC Rcd 18400 (1997) 11, 14, 24

Changes to the Board of Directors of the National Exchange Carrier Association, Inc., 13 FCC Rcd 25058 (1998) 11, 12, 24

Connect America Fund, 26 FCC Rcd 17663 (2011), *pets. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014)..... 9, 36, 59

Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776 (1997), *aff'd in part and rev'd in part, TOPUC I*, 183 F.3d 393) 9, 10, 11

First Quarter 1998 Universal Service Contribution Factors Revised and Approved, 12 FCC Rcd 21881 (CCB 1997) 58, 59

Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 34 FCC Rcd 4143 (2019) 59

Report on the Future of the Universal Service Fund, FCC 22-67, 2022 WL 3500217 (released Aug. 15, 2022)..... 16, 19, 25, 43

Revised Second Quarter 2003 Universal Service Contribution Factor, 18 FCC Rcd 5097 (WCB 2003).....58

Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, DA 22-448, 2022 WL 1302467 (WCB rel. April 29, 2022).....53

Universal Service Contribution Methodology (Dorial Telecom, LLC), 26 FCC Rcd 3799 (WCB 2011) 26

Universal Service Contribution Methodology, 32 FCC Rcd 4094 (WCB 2017) 26

Wireline Competition Bureau Provides Guidance to the Universal Service Administrative Company Regarding the High-Cost Service Mechanism Budget, 32 FCC Rcd 9243 (WCB 2017) 59

STATUTES:

21 U.S.C. § 811(c) 35

21 U.S.C. § 811(h) 35

28 U.S.C. § 2342(1) 1, 23

28 U.S.C. § 2344 ..... 20, 23, 24

31 U.S.C. § 1341 62

47 U.S.C. § 151 ..... 4, 31

47 U.S.C. § 153(53) 38

47 U.S.C. § 254 ..... 2, 6

47 U.S.C. § 254(a)(1)-(2) 9

47 U.S.C. § 254(a)(1) 9

47 U.S.C. § 254(a)(2) 38

47 U.S.C. § 254(b) 7, 31, 32

47 U.S.C. § 254(b)(1)-(6) 8

47 U.S.C. § 254(b)(1) 21, 31, 35

47 U.S.C. § 254(b)(2) 32

47 U.S.C. § 254(b)(3) 32

47 U.S.C. § 254(b)(4) 32

47 U.S.C. § 254(b)(5) 6, 32

47 U.S.C. § 254(b)(6) 32

47 U.S.C. § 254(b)(7) 9, 32, 36

47 U.S.C. § 254(c)(1) 7, 37, 38, 39
47 U.S.C. § 254(c)(1)(A) 38
47 U.S.C. § 254(c)(1)(A)-(C) 38
47 U.S.C. § 254(c)(1)(A)-(D) 7
47 U.S.C. § 254(c)(1)(B) 38
47 U.S.C. § 254(c)(1)(C) 38
47 U.S.C. § 254(c)(1)(D) 38
47 U.S.C. § 254(c)(3) 7, 40
47 U.S.C. § 254(d) 6, 8, 21, 34, 40, 41, 55
47 U.S.C. § 254(e) 8, 21, 34, 42
47 U.S.C. § 254(h) 7
47 U.S.C. § 254(h)(1)(A) 44
47 U.S.C. § 254(h)(1)(A)-(B) 34, 44
47 U.S.C. § 254(h)(1)(B) 45
47 U.S.C. § 254(h)(2) 45
47 U.S.C. § 254(h)(2)(A) 45
47 U.S.C. § 254(i) 8, 21
47 U.S.C. § 254(j) 31
47 U.S.C. § 402(a) 1, 20, 24
47 U.S.C. § 410(c) 9
Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49 61
Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) 18
Tariff Act, 42 Stat. 858 (1922) 48
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 6
Universal Service Antideficiency Temporary Suspension Act, Pub. L. No. 108-494, 118 Stat. 3986 61

REGULATIONS:

47 C.F.R. § 1.401(a) 27
47 C.F.R. § 54.101(a) 10
47 C.F.R. § 54.101(b) 10
47 C.F.R. §§ 54.302-54.321 10
47 C.F.R. § 54.303(a)(1) 13, 53, 55
47 C.F.R. §§ 54.400-54.423 10
47 C.F.R. §§ 54.500-54.523 10
47 C.F.R. § 54.502(a)(1)-(2) 10
47 C.F.R. § 54.507(a) 53, 55
47 C.F.R. §§ 54.600-54.633 10
47 C.F.R. § 54.619(a) 54, 55
47 C.F.R. § 54.702(b) 12, 23, 53
47 C.F.R. § 54.702(c) 12, 53
47 C.F.R. § 54.702(e) 12
47 C.F.R. § 54.703(a) 12
47 C.F.R. § 54.703(b) 12
47 C.F.R. § 54.703(c)(3) 58
47 C.F.R. § 54.706(a) 14
47 C.F.R. § 54.706(c) 15, 41
47 C.F.R. § 54.709 24
47 C.F.R. § 54.709(a) 53, 54
47 C.F.R. § 54.709(a)(2) 15, 55
47 C.F.R. § 54.709(a)(3) 1, 15, 16, 18, 23, 27, 54, 55, 56, 57
47 C.F.R. § 54.709(b) 54
47 C.F.R. § 54.711(a) 15, 55
47 C.F.R. § 54.712(a) 16
47 C.F.R. § 54.717 14
47 C.F.R. § 54.717(b)-(g) 14

47 C.F.R. § 54.717(k) 14
47 C.F.R. § 54.719 23
47 C.F.R. §§ 54.719-54.725 13
47 C.F.R. § 54.719(a)-(b) 26
47 C.F.R. § 54.719(b) 53, 57
47 C.F.R. § 54.722 26
47 C.F.R. §§ 54.801-54.1515 10
47 C.F.R. § 54.901(a) 13
47 C.F.R. § 54.1304(b) 13

LEGISLATIVE MATERIALS:

H.R. Rep. No. 103-560 (1994) 11

TREATISE:

PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 2.1.1 (2d ed. 1999) 5

OTHER MATERIALS:

Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company, Dec. 19, 2018 ..... 12, 13, 61

Pet. for Review, *Consumers' Research v. FCC*, 11th Cir. No. 22-13315-DD (filed Oct. 3, 2022) 18

Pet. for Review, *Consumers' Research v. FCC*, 5th Cir. No. 22-60008 (filed Jan. 5, 2022) 18

Pet. for Review, *Consumers' Research v. FCC*, 5th Cir. No. 22-60195 (filed April 6, 2022) 18

Pet. for Review, *Consumers' Research v. FCC*, 5th Cir. No. 22-60363 (filed June 27, 2022) 18

Statement of Patricia A. Dalton, GAO, Before the Senate Committee on Commerce, Science, and Transportation, April 11, 2005, GAO-05-546T 62

U.S. CONST., art. I, § 1 28

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Respondents believe that the Court could find oral argument helpful in examining the claims raised by petitioners.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 21-3886

CONSUMERS' RESEARCH, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ACTION OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTION

The universal service contribution factor for the fourth quarter of 2021 was deemed approved by the Federal Communications Commission on September 24, 2021. A.68-A.72; 47 C.F.R. § 54.709(a)(3). Petitioners filed a petition for review on September 30, 2021, invoking this Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As we explain in Part I of the Argument below, the Court lacks jurisdiction because the petition for review is untimely.

STATEMENT OF THE ISSUES

(1) Whether the Court lacks jurisdiction because the petition for review is untimely.

(2) Whether section 254 of the Communications Act, 47 U.S.C. § 254, which authorizes the FCC to preserve and advance universal service to all telecommunications subscribers, unconstitutionally delegates legislative power to the FCC.

(3) Whether the FCC can rely on a private company to provide billing, accounting, and related services for the universal service program, subject to the FCC's oversight and final decisionmaking authority.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum bound with this brief.

INTRODUCTION

For the past quarter century, the FCC's universal service subsidy program authorized by section 254 of the Communications Act, 47 U.S.C. § 254, has benefited millions of Americans. It has made telephone service affordable for low-income consumers and residents of "high-cost" rural areas. It has also supported the provision of essential telehealth services by rural health care providers, as well as the deployment of internet access services to classrooms and libraries throughout the nation.

Pursuant to section 254, the FCC finances the universal service support program by collecting fees from providers of interstate telecommunications. The Commission distributes the collected funds to targeted populations through four programs it has established in detailed regulations.

Petitioners—a telephone service provider and several telephone service subscribers—contend that the FCC may not collect fees to support the universal service program because the program is unlawful. Specifically, petitioners maintain that section 254 unconstitutionally delegates legislative power to the FCC. In addition, they claim that the Commission improperly subdelegated its regulatory authority under section 254 to a private entity, the Universal Service Administrative Company (USAC).

As a threshold matter, this Court lacks jurisdiction to hear petitioners' claims. Petitioners seek to mount a comprehensive challenge to the FCC's rules implementing the universal service program in a proceeding that was concerned solely with calculating the contribution factor for a single calendar quarter. The time period for seeking review of those rules—which were adopted decades ago and on which countless parties have relied—has long expired.

Even if this case were properly before the Court, petitioners' claims lack merit. The delegation of authority to the FCC under section 254 is

clearly constitutional under controlling Supreme Court precedent because Congress has provided an intelligible principle—indeed, several such principles—limiting the FCC's discretion in implementing the statute. Furthermore, it was entirely permissible for the FCC to rely on USAC (a private entity) for assistance in administering the universal service program. USAC is subordinate to the Commission and assists only in performing the accounting, billing, disbursement, and related functions necessary to operate the program. The Commission makes all universal service policy decisions.

COUNTERSTATEMENT

A. The FCC's Universal Service Mandate

"Universal service"—the availability of affordable, reliable telecommunications service nationwide—"has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000); *see also Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1098 (D.C. Cir. 2009) (*Rural Cellular I*). Indeed, Congress established the FCC to "make available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

For the first half-century of its existence, the FCC was able to fulfill its statutory mandate to promote universal service through "the manipulation of rates for some customers to subsidize more affordable rates for others." *Texas Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) (*TOPUC I*). For example, "[u]rban users subsidize[d] rural ones, business subscribers subsidize[d] residential, and long-distance service subsidize[d] local." PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 2.1.1, at 84 (2d ed. 1999); *see also Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 480 (2002); *TOPUC I*, 183 F.3d at 406.

Such implicit subsidies would have been unsustainable if a telephone company that sought "to subsidize below-cost rates to rural customers with above-cost rates to urban customers" was "vulnerable to a competitor that offer[ed] at-cost rates to urban customers." *TOPUC I*, 183 F.3d at 406. Historically, however, local exchange carriers (providers of local telephone service) "had natural monopolies … in their respective regions." *Texas Off. of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 317 (5th Cir. 2001) (*TOPUC II*). Until the 1990s, States typically "granted an exclusive franchise" to one local carrier "in each local service area," *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999), which enabled the FCC to support universal service with implicit subsidies embedded in the regulated rate structure.

B. Section 254 Of The Communications Act

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), enacted in the wake of the court-mandated breakup of the Bell Telephone System, "ended the longstanding regime of state-sanctioned monopolies" in "local telephone markets." *AT&T*, 525 U.S. at 371. With the introduction of competition in those markets, "Congress recognized that the universal service system of implicit subsidies would have to be re-examined." *TOPUC I*, 183 F.3d at 406. Consequently, Congress added a new provision to the Communications Act: 47 U.S.C. § 254.

In section 254, Congress "directed the FCC to replace" the existing "patchwork of explicit and implicit subsidies with 'specific, predictable and sufficient … mechanisms to preserve and advance universal service.'" *TOPUC I*, 183 F.3d at 406 (quoting 47 U.S.C. § 254(b)(5)). "Every telecommunications carrier that provides interstate telecommunications services" must "contribute" to these mechanisms "on an equitable and nondiscriminatory basis," and "[a]ny other provider of interstate telecommunications may be required to contribute … if the public interest so requires." 47 U.S.C. § 254(d).

The statute describes "[u]niversal service" as "an evolving level of telecommunications services that the Commission shall establish periodically

…, taking into account advances in telecommunications and information technologies and services." *Id.* § 254(c)(1). In defining "the services that are supported by Federal universal service support mechanisms," the Commission must "consider the extent to which such telecommunications services"—

> (A) are essential to education, public health, or public safety;
>
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
>
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
>
> (D) are consistent with the public interest, convenience, and necessity.

Id. § 254(c)(1)(A)-(D). "In addition to the services included in the definition of universal service" under section 254(c)(1), "the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of" section 254(h). *Id.* § 254(c)(3); *see id*. § 254(h).

Section 254(b) directs the Commission to establish "policies for the preservation and advancement of universal service." *Id*. § 254(b). In doing so, the Commission must take into account six universal service "principles" reflecting Congress's goals and priorities:

> (1) Quality services should be available at just, reasonable, and affordable rates.

> (2) Access to advanced telecommunications and information services should be provided in all regions of the Nation.
>
> (3) Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
>
> (4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
>
> (5) There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
>
> (6) Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in section 254(h).

Id. § 254(b)(1)-(6). A number of these principles are reiterated in subsequent subsections of section 254. *See id.* § 254(d) (providers of interstate telecommunications service "shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service"); *id.* § 254(e) (universal service support "should be explicit and sufficient to achieve the purposes of this section"); *id.* § 254(i) (the

Commission "should ensure that universal service is available at rates that are just, reasonable, and affordable").

Congress also empowered the Commission to base universal service policies on "other principles" that "the [Federal-State] Joint Board [on Universal Service] and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with" the Communications Act. *Id*. § 254(b)(7).[1]

C. The Implementation Of Section 254

To implement section 254, Congress directed the FCC to revise its rules based on recommendations by the Joint Board. *See* 47 U.S.C. § 254(a)(1)-(2). After reviewing the Joint Board's recommendations and

[1] The Joint Board is composed of three FCC Commissioners, four State Utility Commissioners, and a consumer advocate representative. *See id.* §§ 254(a)(1), 410(c); *see also* https://www.fcc.gov/general/universal-service-federal-state-joint-board. Pursuant to its section 254(b)(7) authority, the FCC has added two principles on the Joint Board's recommendation. In 1997, it adopted the "principle of 'competitive neutrality' among providers and technologies, requiring that specific universal [service] support mechanisms 'neither unfairly advantage nor disadvantage one provider [or technology] over another.'" *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1243 (D.C. Cir. 2018) (quoting *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801 ¶47 (1997) (*Universal Service Order*), *aff'd in part and rev'd in part, TOPUC I*, 183 F.3d 393). In 2011, it adopted the principle of "support for advanced services." *Connect America Fund*, 26 FCC Rcd 17663, 17679 ¶45 (2011), *pets. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

public comments, the Commission created four universal service programs to provide affordable service to (1) high-cost areas (remote areas where the cost of providing service is high), 47 C.F.R. §§ 54.302-54.321, 54.801-54.1515; (2) low-income consumers who qualify for the FCC's Lifeline program, *id*. §§ 54.400-54.423; (3) schools and libraries, *id*. §§ 54.500-54.523; and (4) rural health care providers, *id*. §§ 54.600-54.633. *See Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56-57 (D.C. Cir. 2011).

Pursuant to section 254(c)(1), the FCC adopted a rule designating the telecommunications services that qualify for universal service support. *Universal Service Order*, 12 FCC Rcd at 8809-22 ¶¶61-82. Under that rule, the only telecommunications services eligible for support are voice telephony services that include certain specified features. 47 C.F.R. § 54.101(a), (b).

Invoking its authority under sections 254(c)(3) and 254(h)(1)(B), the FCC designated two additional services provided to schools and libraries—internet access and the installation and maintenance of internal connections—as services eligible for support. *Universal Service Order*, 12 FCC Rcd at 9008-23 ¶¶436-463; 47 C.F.R. § 54.502(a)(1)-(2). The Fifth Circuit upheld the FCC's authority to subsidize these services. *TOPUC I*, 183 F.3d at 440-43.

In 1997, the FCC appointed the National Exchange Carrier Association (NECA) as the temporary administrator of the new universal service support mechanisms. *Universal Service Order*, 12 FCC Rcd at 9216-17 ¶866.[2] Later that year, the FCC directed NECA "to create an independently functioning, not-for-profit subsidiary"—the Universal Service Administrative Company (USAC)—to "administer temporarily" the high cost and low income support mechanisms, "as well as perform billing and collection functions" for all four universal service support mechanisms. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 12 FCC Rcd 18400, 18415 ¶25 (1997) (*Contribution Order*). In November 1998, the Commission made USAC the permanent administrator of the universal service support mechanisms as of January 1, 1999. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd 25058, 25059-61, 25069-70 ¶¶2, 5, 20 (1998) (*USAC Order*).

USAC is an independent, not-for-profit private corporation. *See* https://www.usac.org/about/. Its board of directors includes representatives

[2] NECA, "a nonprofit, non-stock membership corporation," was "formed pursuant to FCC orders." *Allnet Commc'n Serv., Inc. v. Nat'l Exchange Carrier Ass'n*, 965 F.2d 1118, 1119 (D.C. Cir. 1992). Prior to the 1996 Act, NECA administered several FCC programs designed to "keep local [telephone] rates affordable," including a "Universal Service Fund" and "two Lifeline Assistance Programs." H.R. Rep. No. 103-560, at 33 (1994).

of private industry, recipients of universal service funding, and consumer groups, as well as USAC's Chief Executive Officer. USAC's board of directors is wholly "separate" from NECA's board, which is "prohibited from participating in" USAC's functions. 47 C.F.R. § 54.703(a). *See id.* § 54.703(b) (describing the composition of USAC's board); *id.* § 54.702(e) (USAC's books must be "separate" from NECA's books).

USAC's role is "exclusively administrative," *USAC Order*, 13 FCC Rcd at 25067 ¶16, and "relatively narrow," *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 503 (D.C. Cir. 2020). USAC acts "as the Commission's agent,"[3] with responsibility "for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." 47 C.F.R. § 54.702(b).

USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation," USAC must "seek guidance from the Commission." *Id.* § 54.702(c).[4] The

[3] *See* Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company, Dec. 19, 2018, at 2, § III.B (FCC-USAC MOU), available at https://www.fcc.gov/sites/default/files/usac-mou.pdf.

[4] *See* FCC-USAC MOU at 17, § IV.J (describing procedures for USAC to seek guidance from Commission staff).

FCC is ultimately "responsible for the overall management, oversight, and administration" of the universal service program, "including all … policy decisions." FCC-USAC MOU at 2, § III.A. And the FCC's policy decisions are often reflected in detailed regulations that govern USAC. For example, the FCC's rules for high-cost support provide precise formulas that USAC must use to calculate available support. *See, e.g.*, 47 C.F.R. § 54.303(a)(1) (total eligible annual operating expenses); *id*. § 54.1304(b) (safety net additive support); *id*. § 54.901(a) (Connect America Fund Broadband Loop Support).

Beyond these prescriptive rules, the FCC actively oversees USAC's administration of the universal service program. Any party aggrieved by a USAC decision may request de novo review by the Commission if USAC declines to reconsider the decision. *See id*. §§ 54.719-54.725. In addition, the Commission periodically directs USAC to take specific actions to ensure the proper operation of the universal service support mechanisms (such as, for example, improving cybersecurity, reducing fraud, and making adjustments in response to audits).[5]

[5] These directives are available at https://www.fcc.gov/universal-service-fund-general-management-and-oversight.

The FCC also requires USAC to "obtain and pay for an annual audit conducted by an independent auditor" to determine whether USAC "is properly administering the universal service support mechanisms to prevent fraud, waste, and abuse." *Id*. § 54.717. The FCC's Office of Managing Director (OMD) approves the audit's requirements, reviews its preliminary findings, and makes recommendations to the auditor. *See id*. § 54.717(b)-(g). "Based on the final audit report," the OMD "may take any action necessary to ensure that the universal service support mechanisms operate in a manner consistent with" the Commission's rules and "the public interest." *Id*. § 54.717(k).

D. The FCC's Universal Service Contribution Rules

Consistent with section 254(d), FCC rules require "telecommunications carriers providing interstate telecommunications services" and "[c]ertain other providers of interstate telecommunications" to "contribute to the universal service support mechanisms." *Id*. § 54.706(a). In 1997, the Commission adopted a rule prescribing the procedures for calculating the amount of each carrier's quarterly universal service contribution. *See Contribution Order*, 12 FCC Rcd at 18424-28 ¶¶42-50. Under that rule, at least 60 calendar days before each quarter, USAC must submit to the FCC and the OMD "its projections of demand" and "administrative expenses" for

the universal service support mechanisms for the upcoming quarter "and the basis for those projections." 47 C.F.R. § 54.709(a)(3). At least 30 days before the quarter, USAC must submit to the OMD "the total contribution base" (the projected collected interstate and international end-user telecommunications revenues for all carriers). *Ibid*.[6]

After receiving USAC's submissions, the FCC announces USAC's projections and proposes a "contribution factor" for the next quarter "in a public notice … available on the Commission's website." *Id*. § 54.709(a)(3). The "contribution factor" is "based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions." *Id*. § 54.709(a)(2).[7]

The FCC "reserves the right" to revise USAC's projections and set them "at amounts that the Commission determines will serve the public interest" at any time "within the fourteen-day period following release of the Commission's public notice." *Id.* § 54.709(a)(3). "If the Commission takes

[6] To calculate the contribution base, USAC uses data self-reported by carriers every quarter. *See* 47 C.F.R. § 54.709(a)(3); *id*. § 54.711(a).

[7] The rules exclude from the contribution base the international revenues of carriers with relatively small interstate revenues—an exception traceable to a prior Fifth Circuit ruling. *See* 47 C.F.R. § 54.706(c); *Comsat Corp. v. FCC*, 250 F.3d 931, 934 (5th Cir. 2001).

no action" within that 14-day period, USAC's projections and the proposed contribution factor are "deemed approved by the Commission." *Ibid*.

Once the contribution factor has been approved by the Commission, USAC then applies it to each carrier's contribution base "to calculate the amount of individual contributions." *Id.* § 54.709(a)(3); *see Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1086 (D.C. Cir. 2012) (*Rural Cellular II*).

The Commission's rules permit—but do not require—carriers to recover their federal universal service contribution costs "through interstate telecommunications-related charges to end users." 47 C.F.R. § 54.712(a); *see Report on the Future of the Universal Service Fund*, FCC 22-67, 2022 WL 3500217, ¶90 (released Aug. 15, 2022) (*Report to Congress*), available at https://www.fcc.gov/document/fcc-reports-congress-future-universal-service-fund. If a carrier "chooses to recover its federal universal service contribution costs through a line item" on customers' bills, "the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of [each] customer's bill times the relevant contribution factor." 47 C.F.R. § 54.712(a).

E. The Fourth Quarter 2021 Universal Service Contribution Factor

On August 2, 2021, USAC submitted to the FCC its projections of demand and administrative expenses for the universal service support

mechanisms for the fourth quarter of 2021. *See* A.1-A.59. One month later, USAC provided the FCC with the projected contribution base for that quarter. *See* A.60-A.67.

In a public notice issued on September 10, 2021, the FCC's OMD proposed a contribution factor of 29.1 percent for the fourth quarter of 2021. Public Notice, Proposed Fourth Quarter 2021 Universal Service Contribution Factor, DA 21-1134 (OMD Sept. 10, 2021) (A.68). The proposed contribution factor was based on USAC's cost and revenue projections, which were set forth in the public notice. *See id*. at 1-2 (A.68-A.69). In accordance with FCC rules, the public notice stated that if the FCC took "no action" within 14 days, USAC's projections and the proposed contribution factor "shall be deemed approved by the Commission." *Id*. at 4 (A.71).

On September 23, 2021, the day before the expiration of that 14-day period, petitioners filed extensive comments in response to the public notice. *See* A.73-A.169. In those comments, petitioners made no specific objections to USAC's projections; nor did they question the accuracy of the OMD's calculation of the contribution factor based on those projections. Instead, they argued that the Commission should set the contribution factor at zero and suspend the collection of universal service contributions because (according to petitioners) the FCC's universal service program is unlawful.

Among other things, petitioners maintained that section 254 violates the Constitution by delegating Congress's legislative and taxing power to the FCC, and that the Commission improperly re-delegated this power to USAC. A.99-A.119.

The FCC took no action within 14 days after the public notice was released. Accordingly, the proposed contribution factor of 29.1 percent for the fourth quarter of 2021 was "deemed approved by the Commission" and became effective on September 24, 2021. *See* 47 C.F.R. § 54.709(a)(3).

F. Subsequent Developments

Petitioners filed petitions for review of the contribution factors for the first three quarters of 2022 in the Fifth Circuit.[8] They petitioned for review of the fourth quarter 2022 contribution factor in the Eleventh Circuit.[9]

In August 2022, pursuant to section 60104(c) of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), the FCC submitted a report to Congress concerning the future of the universal service

[8] *See Consumers' Research v. FCC*, 5th Cir. No. 22-60008 (filed Jan. 5, 2022); *Consumers' Research v. FCC*, 5th Cir. No. 22-60195 (filed April 6, 2022); *Consumers' Research v. FCC*, 5th Cir. No. 22-60363 (filed June 27, 2022). The Fifth Circuit heard oral argument in No. 22-60008 on December 5, 2022. The other two cases are stayed pending a decision in No. 22-60008.

[9] *See Consumers' Research v. FCC*, 11th Cir. No. 22-13315-DD (filed Oct. 3, 2022).

program. *Report to Congress* ¶1. In that report, the Commission concluded that petitioners' arguments challenging the lawfulness of the universal service program lack merit. *Id*. ¶¶112-119. Specifically, the Commission found that the delegation of authority to the FCC under section 254 is constitutional, *id*. ¶¶114-115, and that the agency did not improperly subdelegate its authority to USAC, *id*. ¶116.

SUMMARY OF ARGUMENT

For more than two decades, the FCC's universal service program has carried out a central goal of telecommunications regulation in the United States: to give every American access to affordable telecommunications. Countless consumers, including low-income families and those in high-cost areas, as well as schools, libraries, and health care providers, have relied on the program to support communications services that are critical to modern life.

Petitioners challenge the legality of the program on the basis of arguments that could have been raised long ago. They chiefly complain that section 254 of the Communications Act, which lays out a comprehensive set of guidelines for the Commission, nevertheless unconstitutionally delegates legislative power to the agency. They also claim that USAC, the program's administrator, is unlawfully vested with government power, even though

USAC has no policymaking authority, performs accounting and billing functions, and is overseen by the FCC at every step. As we show below, the Court lacks jurisdiction to hear this case because the petition for review is untimely. In any event, petitioners' claims are baseless.

I. Under the Hobbs Administrative Orders Review Act, pre-enforcement challenges to FCC rules must be brought within 60 days after the rules' publication. 28 U.S.C. § 2344; see 47 U.S.C. § 402(a). The Commission adopted its universal service rules in the late 1990s, and the contribution factor rules were last amended in 2011. Petitioners' arguments that those rules are unlawful are thus at least a decade out of time.

In any event, petitioners' claims fail on the merits.

II.a. The delegation of authority to the FCC under section 254 is constitutional if Congress has provided "an intelligible principle to which" the Commission "is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Supreme Court has applied this "intelligible principle" test for nearly a century, and it has upheld the vast majority of congressional delegations under that test. *See Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion); *id*. at 2130-31 (Alito, J., concurring in the judgment).

b. Section 254 easily satisfies the intelligible principle test. Multiple provisions of the statute limit the FCC's discretion to implement the universal service program.

Section 254(b) requires the FCC to base its universal service policies on certain specified principles, including that rates be "just, reasonable, and affordable." 47 U.S.C. § 254(b)(1). *Accord id*. § 254(i). Section 254(c) directs the Commission to consider particular factors when defining the services that will receive universal service support. Section 254(d) constrains the FCC's authority to assess universal service fees by requiring that carriers contribute to universal service "on an equitable and nondiscriminatory basis." 47 U.S.C. § 254(d). Section 254(e) mandates that universal service support be "sufficient to achieve the purposes of" section 254. *Id*. § 254(e). Both the Commission and the courts have construed this sufficiency requirement to prohibit "excessive funding" of universal service. *See Rural Cellular I*, 588 F.3d at 1102-03, 1108; *Alenco*, 201 F.3d at 620. Finally, section 254(h) provides detailed instructions to the FCC concerning the establishment and funding of the universal service support mechanisms for rural health care providers, schools, and libraries. All of these provisions intelligibly confine the FCC's discretion to increase the size and scope of its universal service program and the amount of fees it collects to finance the program. Therefore,

the delegation of authority to the FCC under section 254 amply satisfies the controlling constitutional standard.

c. Petitioners urge the Court to apply a different test based on the "original understanding" of nondelegation. Br. 32-38. But a majority of the Supreme Court recently adhered to the intelligible principle test, which remains controlling. *See Gundy*, 139 S. Ct. at 2123-30 (plurality opinion); *id*. at 2130-31 (Alito, J., concurring in the judgment).

Petitioners also assert that the Court should apply a stricter standard of review than the intelligible principle test because section 254 delegates "taxing power" to the FCC. Br. 48-62. But universal service contributions are fees, not taxes, because they benefit the telecommunications carriers that pay them by supporting an expanded network. *See TOPUC I*, 183 F.3d at 427 n.52; *Rural Cellular II*, 685 F.3d at 1091. In any event, petitioners' argument for more rigorous scrutiny of "taxing" delegations is foreclosed by Supreme Court precedent, which holds that delegations of taxing power are "subject to no constitutional scrutiny greater than that … applied to other" delegations. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989).

III. Petitioners' private delegation challenge likewise fails for two reasons. First, USAC does not exercise regulatory power. USAC has no policymaking role in administering the universal service program, *see* 47

C.F.R. § 54.702(c), and it is subject to extensive FCC oversight. *See, e.g.*, *id*. § 54.719 (providing for review of USAC decisions). Instead, USAC simply performs the billing, collection, disbursement, and related functions necessary to implement the program. *Id*. § 54.702(b). Even as to the calculation of the contribution factor, a largely fact-gathering and arithmetic task, the Commission retains final decisionmaking power. *Id*. § 54.709(a)(3).

STANDARD OF REVIEW

This Court reviews jurisdictional and constitutional issues de novo. *United States v. Satterwhite*, 893 F.3d 352, 355 (6th Cir. 2018); *Gutierrez v. Sessions*, 887 F.3d 770, 774 (6th Cir. 2018).

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE THE PETITION FOR REVIEW IS UNTIMELY.

A. The Hobbs Act's 60-Day Time Limit For Filing Pre-Enforcement Challenges Has Long Expired.

This case arises under the Hobbs Act, which provides pre-enforcement review of FCC rules by granting the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain FCC orders. 28 U.S.C. § 2342(1). A Hobbs Act challenge must be filed "within 60 days" of a rule's publication. *Id.* § 2344. That deadline is "jurisdictional," *United States v. Marshall*, 954 F.3d 823, 829 (6th Cir. 2020), and it "force[s] parties who want to challenge agency orders via facial, pre-

enforcement challenges to do so promptly," thereby ensuring the swift resolution of any "uncertainty" surrounding the lawfulness of agency rules. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2059 (2019) (Kavanaugh, J., concurring).

Although petitioners purport to challenge the Commission's approval of a single quarterly contribution factor, they identify no calculation error, lack of evidence, or procedural defect. Petitioners are not challenging the rules' application; instead, petitioners attack the rules themselves.

This across-the-board challenge comes "long after the expiration of the 60-day time limitation" for seeking review of the universal service rules. *See Arctic Express, Inc. v. U.S. Dep't of Transp.*, 194 F.3d 767, 771 (6th Cir. 1999). The Commission devised USAC's role and enacted the contribution factor rules in 1997 and 1998,[10] and those rules were last amended in 2011. After each of these proceedings, aggrieved parties had 60 days to file petitions challenging the universal service regime as facially unconstitutional. 28 U.S.C. § 2344; 47 U.S.C. § 402(a). None did, even when other challenges were timely filed. *See, e.g.*, *TOPUC I*, 183 F.3d at 405 (addressing a

[10] *See Contribution Order*, 12 FCC Rcd at 18415 ¶25 (directing USAC's creation); *id.* at 18424-28 ¶¶42-50 (adopting 47 C.F.R. § 54.709); *USAC Order*, 13 FCC Rcd at 25069-70 ¶20 (designating USAC the permanent administrator).

"consolidated challenge" to the FCC's implementation of section 254, including constitutional claims). By trying "to raise [facial] challenges much later than they would have been required to had they followed the proper channels," petitioners attempt an improper "end run" around the Hobbs Act's time limit. *United States v. Stevens*, 691 F.3d 620, 623 (5th Cir. 2012).

Allowing such an end run would prejudice millions of Americans who have reasonably relied on universal service support for decades. In 2020 alone, the FCC disbursed $8.27 billion in universal service subsidies, an amount that has "remained relatively stable over the past decade." *Report to Congress* ¶92. An untimely collateral attack on the program threatens to throw into disarray longstanding support for essential services to remote areas, low-income consumers, schools, libraries, and rural health care providers.

The FCC's approval of the fourth quarter 2021 contribution factor did not provide a new opportunity to relitigate the validity of the universal service program because the agency gave "no indication" that it "was reconsidering" the program. *Ohio Pub. Int. Rsch. Grp. v. Whitman*, 386 F.3d 792, 800 (6th Cir. 2004). To the contrary, the Commission's straightforward application of longstanding rules in this case merely continued, rather than reopened, the universal service regime challenged here.

B. Petitioners Should Have Raised Their Claims By Objecting To USAC's Invoice Or By Filing A Petition For Rulemaking.

The Hobbs Act's 60-day window for pre-enforcement review does not bar petitioners from *ever* litigating their claims. They have at least two avenues to raise their facial challenge.

First, petitioner Cause Based Commerce (the only petitioner that is required to pay into the fund) could have objected to the invoice from USAC and sought relief from the FCC. *See* 47 C.F.R. §§ 54.719(a)-(b), 54.722; *Universal Service Contribution Methodology (Dorial Telecom, LLC*), 26 FCC Rcd 3799 (WCB 2011). If the FCC denied relief, Cause Based Commerce could then have sought judicial review. *See inContact, Inc. v. FCC*, 495 Fed. Appx. 95 (D.C. Cir. 2013).[11]

Petitioners did not timely seek review of the FCC's application of the universal service rules to them. *See Herr v. U.S. Forest Serv.*, 803 F.3d 809, 821-22 (6th Cir. 2015); *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997). The action they challenge—FCC approval

[11] USAC has adopted—and the FCC has upheld—a "pay-and-dispute" policy that permits carriers to appeal a USAC invoice to the FCC after paying the invoiced amount. *See Universal Service Contribution Methodology*, 32 FCC Rcd 4094, 4098-99 ¶16 (WCB 2017). Carriers that successfully appeal are entitled to reimbursement.

of a contribution factor—is an instruction to *USAC* regarding how to compute invoices. The contribution factor was not applied to carriers until USAC issued those invoices. Petitioners filed this lawsuit *before* those invoices were issued. Thus, any "as-applied" challenge by petitioners is premature.[12]

Second, petitioners could have obtained judicial review by petitioning for the "amendment or repeal" of the universal service rules. *See* 47 C.F.R. § 1.401(a); *Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1112 (D.C. Cir. 2009). But petitioners did not ask the FCC to amend or repeal the rules, which would have given other interested parties ample time to comment and afforded the agency a fair opportunity to address petitioners' arguments. Petitioners cannot cure that failure by raising those claims in the contribution factor proceeding below, since the sole purpose of that proceeding is for the Commission "to set projections of demand and administrative expenses at amounts that [it] determines will serve the public interest." 47 C.F.R. § 54.709(a)(3).

The Court should not reward petitioners' disregard for Congress's comprehensive framework for judicial review of FCC orders by entertaining this petition on the merits.

---

[12] Petitioners never objected to USAC's invoices. Instead, Cause Based Commerce avers that it paid. Br. Exh. 1, ¶4 (Condit Decl.).

II. SECTION 254 DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWER TO THE FCC.

A. Congress Does Not Delegate Legislative Power When It Provides An "Intelligible Principle" To Guide Administrative Implementation Of Its Enactments.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST., art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy*, 139 S. Ct. at 2123 (plurality opinion).

Although "Congress may not delegate the power to make laws," it may lawfully delegate "the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). *See United States v. Grimaud*, 220 U.S. 506, 517 (1911) (Congress may enact legislation that gives administrative agencies the power "to fill up the details") (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). As a practical matter, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). "[N]o statute can be entirely precise," and "some judgments, even some judgments involving policy considerations, must be left to the officers executing the law." *Id*. at 415 (Scalia, J., dissenting).

Given these considerations, the Supreme Court has long recognized that Congress "may confer substantial discretion on executive agencies to implement and enforce the laws" so long as it "has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy*, 139 S. Ct. at 2123 (plurality opinion). *Accord United States v. Lawrence*, 735 F.3d 385, 419-20 (6th Cir. 2013); *United States v. Horn*, 679 F.3d 397, 404-05 (6th Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *Hachem v. Holder*, 656 F.3d 430, 438-39 (6th Cir. 2011).

The intelligible principle test is "not demanding." *Gundy*, 139 S. Ct. at 2129 (plurality opinion). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). When applying this test, courts "have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001) (cleaned up). As a result, over the years, the Supreme Court has upheld as constitutional congressional delegations to the FCC and the ICC to regulate broadcasting and railroad consolidations in the "public interest," *see Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943); *N.Y. Cent. Sec. Corp. v. United*

States, 287 U.S. 12, 24-25 (1932), to the EPA to regulate air quality to protect the "public health," *Whitman*, 531 U.S. at 472, and to the wartime Price Administrator to ensure that commodity prices are "fair and equitable," *Yakus v. United States*, 321 U.S. 414, 426-27 (1944).

"The cases where Congress violates the nondelegation principle are few and far between." *Hachem*, 656 F.3d at 439. The Supreme Court has found a legislative delegation unconstitutional "[o]nly twice in this country's history" (both times in 1935); and in those cases, Congress "failed to articulate *any* policy or standard to confine discretion." *Gundy*, 139 S. Ct. at 2129 (plurality opinion) (cleaned up) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

B. Section 254 Satisfies The Intelligible Principle Standard By Providing Ample Legislative Guidance To The FCC To Implement The Universal Service Program.

To resolve a delegation challenge, the Court must construe section 254 to "figure out what task it delegates and what instructions it provides." *Gundy*, 139 S. Ct. at 2123 (plurality opinion). In examining these questions, the Court must consider not only the text of the relevant statute, but also its "purpose," its "factual background," and its "context." *Am. Power & Light*, 329 U.S. at 104; *Muller Optical Co. v. EEOC*, 743 F.2d 380, 390 (6th Cir.

1984). Here, the text, purpose, and context of section 254—including its numerous provisions governing the FCC's discretion to administer the universal service program—provide more than enough guidance to the FCC to satisfy the intelligible principle standard.

1. Section 254(b)'s Universal Service Principles.

When Congress enacted section 254 in 1996, it was not writing on a blank slate. Long before 1996, the FCC had pursued universal service policies designed "to make available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide … wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; *see TOPUC I*, 183 F.3d at 405-06; *Rural Tel. Coal. v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988); 47 U.S.C. § 254(j) ("[n]othing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program" previously established for low-income consumers).

The FCC's previous universal service initiatives informed Congress's adoption of the "principles" articulated in 47 U.S.C. § 254(b). That provision requires the FCC to "base policies for the preservation and advancement of universal service on" six specified "principles":

> (1) the availability of "[q]uality services" at "affordable rates," *id*. § 254(b)(1);

> (2) nationwide "[a]ccess to advanced telecommunications and information services," *id*. § 254(b)(2);
>
> (3) providing low-income and rural consumers with access to telecommunications and information services "at rates that are reasonably comparable to rates charged for similar services in urban areas," *id*. § 254(b)(3);
>
> (4) ensuring that all telecommunications carriers "make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service," *id*. § 254(b)(4);
>
> (5) the creation of "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service," *id*. § 254(b)(5); and
>
> (6) "access to advanced telecommunications services" for "schools and classrooms, health care providers, and libraries" in accordance with section 254(h), *id*. § 254(b)(6).

In addition, the FCC, in conjunction with the Joint Board, may adopt "other principles" that "are necessary and appropriate for the protection of the public interest, convenience, and necessity" and "are consistent with" the Act. *Id*. § 254(b)(7).

Congress's directive that the Commission establish "policies for the preservation and advancement of universal service," *id*. § 254(b), "clearly provides an intelligible principle to guide the Commission's efforts, viz., 'to preserve and advance universal service.'" *Rural Cellular II*, 685 F.3d at 1091. Section 254(b)'s additional principles are thus "extra icing on a cake already frosted." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021).

Section 254(b)'s multiple principles constrain the Commission's discretion to advance the statute's universal service goals. Even if they were simply "aspirational," as petitioners would have it, Br. 45 (quoting *TOPUC II*, 265 F.3d at 321), these principles intelligibly guide the Commission's actions in service of Congress's goals, which is all that the Constitution requires. But the principles are not just "aspirational." On the contrary, section 254(b) imposes "a mandatory duty on the FCC" to take the principles into account in preserving and advancing universal service. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (*Qwest I*).

While the statute "allows the FCC a considerable amount of discretion" to "balance" these "competing" principles, "that discretion is not absolute." *TOPUC I*, 183 F.3d at 434. The FCC may "balance the principles against one another when they conflict," but it "may not depart from them altogether to achieve some other goal." *Qwest I*, 258 F.3d at 1200; *see also Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (*Qwest II*). And it is "impermissible" for the Commission to "ignore[] all but one" of the "principle[s] enumerated in [section] 254(b)" when assessing whether universal service support is "sufficient." *Qwest II*, 398 F.3d at 1234.

Moreover, as we explain in Parts II.B.3-5 below, several of the principles are codified as directives in other subsections of section 254. *See*

47 U.S.C. § 254(d) (providers of interstate telecommunications services must "contribute, on an equitable and nondiscriminatory basis," to the FCC's universal service mechanisms); *id*. § 254(e) (mandating that universal service support be "sufficient to achieve the purposes" of section 254); *id*. § 254(h)(1)(A)-(B) (prescribing specific standards for subsidizing services provided to rural health care providers, schools, and libraries). Those provisions further restrict the FCC's discretion to depart from the section 254(b) principles.

Thus, section 254(b) bears no resemblance to the statutes invalidated in *Panama Refining* and *Schechter Poultry*, as petitioners claim. Br. 45-47. The statutes in those cases gave the President "unlimited authority," *Panama Refining*, 293 U.S. at 415, and "virtually unfettered" discretion, *Schechter Poultry*, 295 U.S. at 542. In contrast, section 254(b) gives the FCC broad but constrained authority to advance universal service.

This Court rejected a nondelegation challenge to a similar regulatory statute. Applying the "intelligible principle" test, the Court held that the Comprehensive Drug Abuse Prevention and Control Act of 1970, which "requires the Attorney General to consider eight factors before redesignating any drug," provides "sufficient direction from Congress to render the [statute's] delegation of rule-making authority … constitutional." *United*

States v. Alcorn, 93 Fed. Appx. 37, 40 (6th Cir. 2004) (citing 21 U.S.C. § 811(c)); *see also Touby v. United States*, 500 U.S. 160 (1991) (rejecting a nondelegation challenge to 21 U.S.C. § 811(h)). By setting forth universal service principles that the FCC is required to consider, section 254(b) likewise limits the agency's discretion in implementing the universal service program. Indeed, the Tenth Circuit has found the section 254(b) principles sufficiently specific to enable judicial review to ensure that the FCC's actions are not inconsistent with those principles, and has twice remanded Commission decisions on that basis. *See Qwest I*, 258 F.3d at 1201-03; *Qwest II*, 398 F.3d at 1233-37.

Section 254(b) cabins the FCC's discretion to assess universal service fees. In deciding the appropriate level of universal service funding, the agency must take account of the first principle listed in section 254(b): the affordability of telephone service. 47 U.S.C. § 254(b)(1). "[I]t is hard to imagine how the Commission could achieve the overall goal" of section 254—to preserve and advance universal service—if the agency allowed universal service fees to grow "so large" that telecommunications services became "less 'affordable,' in contravention of [section] 254(b)(1)." *Rural Cellular I*, 588 F.3d at 1103. "Because universal service is funded … by all telecommunications providers—and thus indirectly by [their] customers—

excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market." *Alenco*, 201 F.3d at 620. To address this concern, the FCC has sometimes imposed caps or restrictions on universal service funding—cost controls that several courts have upheld.[13]

Petitioners argue that section 254(b) does not constrain the FCC because section 254(b)(7) allows the agency to adopt other principles as "necessary and appropriate for the protection of the public interest, convenience, and necessity." Br. 47 (quoting 47 U.S.C. § 254(b)(7)). But the Commission cannot unilaterally add principles; it must do so in conjunction with the federal-state Joint Board. Moreover, any universal service principles adopted by the FCC "for the protection of the public interest" must be "consistent with" the Communications Act, including the overarching goal of promoting universal service. 47 U.S.C. § 254(b)(7). And as the Supreme

[13] *See Alenco*, 201 F.3d at 620-21 (affirming a Commission "decision to impose cost controls to avoid excessive expenditures that will detract from universal service"); *Rural Cellular I*, 588 F.3d at 1103 (in capping high-cost support, the FCC reasonably balanced "the principle of providing sufficient funding mechanisms to advance universal service" and "the principle of affordability for consumers"); *In re FCC 11-161*, 753 F.3d at 1082 (in declining to subsidize broadband deployment by competitive carriers, the FCC considered the interests of "consumers and telecommunications providers who make payments to support" universal service) (quoting *Connect America Fund*, 26 FCC Rcd at 17732 ¶178).

Court has held, even an unadorned "public interest" standard provides a sufficiently intelligible limiting principle to uphold a delegation of authority to the FCC when the purposes of the legislation are taken into account. *Nat'l Broad. Co.*, 319 U.S. at 216 (upholding FCC's Chain Broadcasting regulations under the agency's power to grant broadcast licenses in accordance with the "public interest, convenience, or necessity"); *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) ("the words 'public interest' in a regulatory statute … take meaning from the purposes of the regulatory legislation").[14]

2. Section 254(c)'s Limits On Defining Eligible Services.

In addition to the principles listed in section 254(b), other subsections of section 254 constrain the Commission's discretion. One such provision is section 254(c). The FCC's rules implementing section 254 must "include a definition of the services that are supported by Federal universal service

[14] Petitioners suggest that the "public interest" cannot supply a limiting principle here because the challenged delegation does not involve "complex, technical determinations." Br. 43. But Congress felt otherwise. It recognized that the services receiving universal service support would necessarily "evolv[e] to "tak[e] into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1). Given the technological (and economic) complexities inherent in setting universal service policy, the public interest criterion "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Nat'l Broad. Co.*, 319 U.S. at 216.

support mechanisms." 47 U.S.C. § 254(a)(2). Section 254(c)(1) limits the FCC's discretion in defining such services. Under that provision, services that receive universal service funding must be "telecommunications services" as defined by the Act. *See id*. § 254(c)(1); *id*. § 153(53). Moreover, for purposes of defining which telecommunications services will receive support, section 254(c)(1) requires the Commission to "consider the extent to which" (1) the services "are essential to education, public health, or public safety," *id*. § 254(c)(1)(A); (2) "a substantial majority of residential customers" subscribe to the services, *id*. § 254(c)(1)(B); (3) carriers have "deployed" the services, *id*. § 254(c)(1)(C); and (4) the services "are consistent with the public interest, convenience, and necessity," *id*. § 254(c)(1)(D).

The four factors that the FCC must consider when defining supported services under section 254(c)(1) are not "vague" (Br. 47). The first three factors require the Commission to examine specific factual issues—whether the services are "essential" to education, health, or public safety, how many persons have subscribed to the services, and how extensively the services have been deployed. *See* 47 U.S.C. § 254(c)(1)(A)-(C). The fourth factor, which permits the FCC to assess whether a service is "consistent with the public interest," *id*. § 254(c)(1)(D), operates in concert with the other three; it does not empower the agency to dispense with those considerations. In any

event, when considering the public interest under section 254(c)(1), the FCC must take into account "the purpose" of section 254, "its factual background, and the statutory context." *See Am. Power & Light*, 329 U.S. at 104; *Muller Optical*, 743 F.2d at 390: *see also NAACP*, 425 U.S. at 669.

The statute thus does not permit the FCC to redefine universal service "as often as it chooses," as petitioners claim. Br. 47. Instead, the Commission is authorized to revise its definition of supported services to account for "advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1). "[T]he telecommunications market" is "dynamic" and subject to "dramatic changes." *TOPUC II*, 265 F.3d at 322; *see also In re A.P. Liquidating Co.*, 421 Fed. Appx. 583, 590 (6th Cir. 2011) ("in the telecommunications industry," technologies "are rapidly evolving"). Mindful of the need "to keep pace with technological advancements" in telecommunications, Congress made clear that "the universal service guarantee must be dynamic." *AT&T*, 886 F.3d at 1241. Congress properly granted the FCC "sufficiently elastic powers" to adapt its policies and rules to "accommodate dynamic new developments in the field of communications." *Gen. Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971); *see also Nat'l Broad. Co.*, 319 U.S. at 219.

Section 254(c)(3) authorizes the Commission to "designate additional services for [the] support mechanisms for schools, libraries, and health care providers for the purposes of" section 254(h). 47 U.S.C. § 254(c)(3). This provision "restricts the FCC's authority" by specifying that services may be designated for support under section 254(c)(3) only if they serve "'the purposes of [section 254(h)].'" *TOPUC I*, 183 F.3d at 441 (quoting 47 U.S.C. § 254(c)(3)). Courts can enforce this restriction when reviewing challenges to the FCC's designation of particular services. For example, the Fifth Circuit carefully considered—and ultimately rejected—a claim that the FCC exceeded its authority under section 254(c)(3) by designating internet access and internal connections provided to schools and libraries as "additional services" eligible for universal service support. *See id*. at 440-43.

3. Section 254(d)'s Requirement That Contributions Be Equitable And Nondiscriminatory.

Section 254(d) requires "[e]very telecommunications carrier that provides interstate telecommunications services" to "contribute, on an equitable and nondiscriminatory basis," to the FCC's universal service support mechanisms. 47 U.S.C. § 254(d). By requiring "that all universal service contributions be 'equitable and nondiscriminatory,'" *TOPUC I*, 183 F.3d at 433, section 254(d) restricts the Commission's discretion in assessing universal service fees.

In *TOPUC I*, 183 F.3d at 433-35, the Fifth Circuit held that the FCC violated section 254(d) by requiring all providers of interstate telecommunications services to contribute a percentage of their combined interstate and international revenues to universal service. The court found that this contribution requirement "forced" carriers with minimal interstate revenues and large international revenues "to pay more in universal service contributions than [they] can generate in interstate revenues," effectively requiring them "to incur a loss to participate in" the "interstate service" market. *Id*. at 434-35. Given the disparate impact on these carriers, the Fifth Circuit concluded that such contribution obligations were inequitable and discriminatory, in violation of section 254(d). *Ibid*.[15]

As *TOPUC I* makes clear, the FCC does not have unbounded discretion to assess universal service fees on carriers. To comply with section 254(d), the Commission must ensure that carriers make universal service payments "on an equitable and nondiscriminatory basis." 47 U.S.C. § 254(d).

[15] In response to this ruling, the FCC "adopted a bright-line percentage rule" to determine "when a carrier's international revenues would be included in the base from which the agency calculates the carrier's universal service contribution." *Comsat*, 250 F.3d at 934. Under the amended rule, if a carrier's interstate revenues fall below 12 percent of its combined interstate and international revenues, its international revenues are excluded from its contribution base. *See* 47 C.F.R. § 54.706(c).

Contrary to petitioners' contention (Br. 44-47), this is yet another "meaningful limitation[]" on the Commission's power to raise revenues to support universal service.

4. Section 254(e)'s Requirement That Support Be Sufficient.

Section 254(e) states that universal service "support should be explicit and sufficient to achieve the purposes of this section." 47 U.S.C. § 254(e). The Fifth Circuit has construed section 254(e) as a "statutory command" requiring the FCC to ensure the "sufficiency of universal service support." *TOPUC I*, 183 F.3d at 412; *see also Alenco*, 201 F.3d at 614. This sufficiency requirement imposes an additional constraint on the FCC's discretion to increase the size of the universal service program and the level of funding necessary to sustain it.[16]

In upholding the FCC's adoption of cost controls to slow the growth of universal service subsidies, the Fifth Circuit noted that "excessive funding" of universal service can "violate the sufficiency requirements" of section 254(e)

[16] Section 254(e) also limits the Commission's power to implement the universal service program by requiring that universal service support be "explicit." Applying that limitation, the Fifth Circuit held that section 254(e) barred the FCC from allowing local carriers to recover universal service contributions through increased interstate access charges, "a form of implicit subsidy." *TOPUC I*, 183 F.3d at 425.

"by causing rates unnecessarily to rise, thereby pricing some consumers out of the market" and reducing the number of telephone service subscribers. *Alenco*, 201 F.3d at 620. Thus, the FCC's authority under section 254 to assess fees to support universal service is not "limitless." Br. 32. To prevent the sort of "excessive funding" that would "violate the sufficiency requirements" of section 254(e), the Commission has adopted—and the courts have upheld—measures to restrain the growth of the universal service program. *See Alenco*, 201 F.3d at 620-21; *Rural Cellular I*, 588 F.3d at 1101-08; *In re FCC 11-161*, 753 F.3d at 1079-83.[17]

[17] There is no basis for petitioners' suggestion that the "skyrocketing costs" of the universal service program demonstrate that the Commission is "unaccountable." Br. 7. To begin with, the program's costs are not "skyrocketing." Universal service disbursements "have remained relatively stable over the past decade." *Report to Congress* ¶92. "The contribution burden on households" also "has been relatively stable in recent years." *Id.* ¶91. While the contribution factor has grown recently, that increase is "due in large part to a decline in the contributions revenue base," as providers report "a declining share of telecommunications revenues and an increasing share of non-telecommunications revenues." *Ibid.* In any event, as explained above, section 254 places numerous constraints on the FCC's implementation of the universal service program. In view of these constraints, petitioners cannot plausibly claim that the Commission is "unaccountable."

5. Section 254(h)'s Guidance For Calculating Support To Schools, Libraries, And Health Care Providers.

Finally, section 254(h) imposes further limits on the Commission's discretion to provide universal service support to schools, libraries, and health care providers.

Before Congress passed the 1996 Act, the FCC historically promoted universal service by subsidizing the provision of telephone service to "high-cost" areas and "low-income subscribers." *TOPUC I*, 183 F.3d at 406. "Section 254(h) adds a new wrinkle to the concept of universal service by directing the FCC to provide support to elementary and secondary schools, libraries, and health care providers …, irrespective of whether they are high-cost [or low-income] consumers." *Id*. at 440.

Section 254(h)(1) contains specific directives regarding the amount of funding for the universal service mechanisms for rural health care providers, schools, and libraries. *See* 47 U.S.C. § 254(h)(1)(A)-(B).

Carriers that are required to provide telecommunications services to rural health care providers under section 254(h)(1)(A) "shall be entitled" to a subsidy in "an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State." *Id*. § 254(h)(1)(A).

Carriers that are required to provide services to schools and libraries at discounted rates under section 254(h)(1)(B) shall "have an amount equal to the amount of the discount treated as an offset to [their] obligation to contribute" to universal service funding. *Id.* § 254(h)(1)(B)(i). "The discount" for such services "shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by" elementary schools, secondary schools, and libraries. *Id*. § 254(h)(1)(B).

Section 254(h)(1) thus articulates standards that the FCC must apply when deciding how much money to raise to subsidize services to rural health care providers, schools, and libraries.

In addition, section 254(h)(2)(A) directs the FCC to establish rules to enhance "access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries." *Id*. § 254(h)(2)(A). The statute requires that such rules be "competitively neutral," *id*. § 254(h)(2), as well as "technically feasible and economically reasonable," *id*. § 254(h)(2)(A). These considerations further constrain the Commission's discretion in supporting services provided to schools, libraries, and health care providers.

*****

Whether considered separately or in combination, multiple provisions of section 254—including sections 254(b), (c), (d), (e), and (h)—intelligibly limit the FCC's authority to increase the size and scope of the universal service program and the fees that carriers must pay to support universal service.

Petitioners assert that "delegations of revenue-raising powers" can pass constitutional muster "only" if Congress prescribes "restrictions like a ceiling on the amount raised, or formulas with objective variables." Br. 5; *see also* Br. 12, 17, 31, 35, 39-41. But the Supreme Court has never held that the Constitution *requires* Congress to adopt hard caps or precise formulas limiting a delegee's discretion. "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus*, 321 U.S. at 425-26; *see also Whitman*, 531 U.S. at 475 ("even in sweeping regulatory schemes," the Supreme Court has "never demanded … that statutes provide a determinate criterion for saying how much … is too much"). Indeed, in 1911, the Supreme Court held that the Secretary of Agriculture did not exercise "legislative power" when he used delegated authority to assess fees on users of forest reserves, even

though Congress set no specific limits on such fees. *Grimaud*, 220 U.S. at 521-23.

In section 254 of the Communications Act, Congress "clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light*, 329 U.S. at 105. Therefore, the FCC's administration of the universal service program under the authority granted by section 254 does not violate the constitutional separation of powers.

C. Petitioners' Attempts To Avoid The Controlling Understanding Of The Nondelegation Doctrine Are Unavailing.

1. Petitioners urge the Court to hold that section 254 "violates the original understanding of nondelegation." Br. 32. But from the earliest days of the Republic, the Supreme Court has recognized that Congress may delegate to an administrative agency the power to "fill up the details" of a legislative program. *Wayman*, 23 U.S. at 43. *Accord Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). In determining how far "the maker of the law may commit something to the discretion of other departments," *Wayman*, 23 U.S. at 46, it has long been settled that a delegation is constitutional if Congress provides an "intelligible principle" to guide administrative discretion, a standard that fixes the "extent and character of that assistance . . .

according to common sense and the inherent necessities of the governmental coordination." *J.W. Hampton*, 276 U.S. at 404, 406. *See Gundy*, 139 S. Ct. at 2129 (plurality opinion); *id*. at 2130-31 (Alito, J., concurring in the judgment).[18]

Although several Justices have recently expressed interest in reexamining the nondelegation doctrine, "it is not the prerogative" of this Court "to anticipate the demise of directly applicable Supreme Court precedent." *United States v. Gibson*, 881 F.2d 318, 323 n.2 (6th Cir. 1989). Even "when it seems that the Supreme Court might soon change a doctrine," the courts of appeals "leave that prerogative to the [Supreme] Court and do not try to anticipate the Court's direction." *RLR Investments, LLC v. City of*

[18] In any event, section 254's delegation of authority to the FCC would likely satisfy the test proposed by petitioners, which is based on Justice Gorsuch's dissent in *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). Justice Gorsuch recognized that there was "a good argument . . . that the statute in *J.W. Hampton* passed muster under the traditional tests" he favored. *Ibid*. And the statute in *J.W. Hampton* is much like section 254, in that it sets forth a number of factors that, "so far as … practicable," are to be taken into administrative consideration. *See J.W. Hampton*, 276 U.S. at 401-02 (quoting Tariff Act, § 315(c), 42 Stat. 858, 942-43 (1922)) (in ascertaining the differences in costs of production of domestic and foreign articles, the President shall "take into consideration" differences in "conditions in production," differences in "wholesale selling prices," "advantages granted to a foreign producer by a foreign government," and "any other advantages or disadvantages in competition").

Pigeon Forge, 4 F.4th 380, 390 (6th Cir. 2021); *see also Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813-14 (6th Cir. 2020). This Court "may not disregard Supreme Court precedent unless and until it has been overruled by the [Supreme] Court itself." *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021). Under current law, this Court must uphold section 254's delegation of authority to the FCC because Congress has provided an intelligible principle constraining the Commission's discretion to implement the statute. *See Gundy*, 139 S. Ct. at 2129 (plurality opinion); *id*. at 2130-31 (Alito, J., concurring in the judgment); *Hachem*, 656 F.3d at 438-39.

2. Petitioners also urge the Court to "bar," or at a minimum "subject to strict guidelines," legislative delegations of "taxing power." Br. 62. But universal service contributions are not taxes, and even if they were, the Supreme Court has made clear that no stricter nondelegation standard applies.

As the Supreme Court has explained, a federal agency does not exercise taxing power if it requires regulated entities to pay a "fee" that "bestows a benefit on the [payor], not shared by other members of society."

Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340-41 (1974).[19] The D.C. and Fifth Circuits have concluded that universal service contributions are fees, *not* taxes, because universal service "confers special benefits" on contributing carriers by expanding the network they can serve. *See Rural Cellular II*, 685 F.3d at 1090-91 (because contributing carriers "provide Internet access over subscribers' telephone lines," they "will particularly benefit" from universal service, which increases the "utility of the Internet" by providing more users with "access to broadband"); *TOPUC I*, 183 F.3d at 427 n.52; *id*. at 428 (each contributing carrier "directly benefits

[19] In support of their assertion that universal service contributions are not fees, petitioners cite two cases interpreting the Constitution's Export Clause. *See* Br. 54 (citing *United States v. U.S. Shoe Corp*., 523 U.S. 360, 363 (1998); *Trafigura Trading LLC v. United States*, 29 F.4th 286, 292-93 (5th Cir. 2022) (opinion of Ho, J.)). Petitioners' reliance on those cases is misplaced. The standard for deciding whether an assessment is a "permissible user fee" under the Export Clause "is far stricter than" the standard applicable under other clauses of the Constitution. *See Thomson Multimedia Inc. v. United States*, 340 F.3d 1355, 1360-61 (Fed. Cir. 2003). For example, "the Takings Clause imposes fewer constraints on user fees" and "is less restrictive than the Export Clause." *U.S. Shoe*, 523 U.S. at 368-69.

from" the "larger network" produced by "the provision of universal service").[20]

In any event, for purposes of the nondelegation doctrine, it makes no difference whether universal service contributions are fees or taxes. Even assuming that those payments "are a form of taxation," the Supreme Court has held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that … applied to other nondelegation challenges." *Skinner*, 490 U.S. at 223; *see Rural Cellular II*, 685 F.3d at 1091.[21] In light of *Skinner*'s controlling ruling, this Court must reject petitioners' assertion (Br. 62) that taxing delegations should receive stricter scrutiny than other delegations.

---

[20] The D.C. Circuit also held that the FCC did not exercise "taxing power" when it adopted cost allocation requirements to subsidize universal service in the 1980s. *Rural Tel. Coal.*, 838 F.2d at 1314. And state courts in Louisiana, Nebraska, and Kansas have ruled that charges levied on carriers to fund state universal service programs are not taxes. *See Voicestream GSM I Operating Co. v. La. Pub. Serv. Comm'n*, 943 So. 2d 349, 359-62 (La. 2006); *Schumacher v. Johanns*, 272 Neb. 346, 358-63, 722 N.W.2d 37, 47-51 (Neb. 2006); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 264 Kan. 363, 396-400, 956 P.2d 685, 708-10 (Kan. 1998).

[21] Nor is a stricter standard applicable to "revenue-raising" delegations generally. Br. 39. The Supreme Court made that clear in *Grimaud*, 220 U.S. at 521-23, when it upheld the Secretary of Agriculture's assessment of fees on users of forest reserves under a broad grant of rulemaking authority to preserve forest resources.

Although petitioners concede as much, they baldly contend that "*Skinner* should be overruled or narrowed." Br. 62. But "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (cleaned up). Unless the Supreme Court overrules *Skinner*, this Court must review the delegation in this case under the same standard applicable to all delegations: the intelligible principle test. And as we explained, the delegation made by section 254 plainly passes that test.

III. THE FCC HAS NOT IMPERMISSIBLY DELEGATED GOVERNMENT POWER TO USAC.

Petitioners also contend that the FCC impermissibly delegated its regulatory power to USAC, its private contractor. Br. 63-69. That argument fails for two reasons: (1) It rests on the false premise that USAC exercises government power, rather than providing administrative assistance; and (2) any delegation would be lawful even if USAC's role were more substantial because the FCC retains final decisionmaking authority over universal service collections and disbursements.

A. USAC Merely Provides Administrative Support To The FCC.

1. At the outset, petitioners overstate USAC's functions and role. USAC is primarily responsible for "billing" contributors, "collecting"

universal service contributions, and "disbursing" universal service funds. 47 C.F.R. § 54.702(b). In performing these administrative tasks, USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." *Id*. § 54.702(c). Instead, when facing a gap or ambiguity, USAC must "seek guidance from the Commission." *Ibid*. And a party dissatisfied with a USAC decision may seek review at the FCC, *id*. § 54.719(b), which often grants relief.[22]

Most importantly for present purposes, only the Commission has power to adopt a quarterly contribution factor. USAC's role is simply to provide the agency with projections of "demand" and "administrative expenses" for the various universal service mechanisms, as well as the "total contribution base." *Id*. § 54.709(a). USAC's projections take account of FCC rules that limit or cap available support; thus, USAC is constrained by the FCC's universal service policy decisions. *See, e.g.*, *id*. § 54.303(a)(1) (high-cost support monthly per-line limit); *id.* § 54.507(a) (schools and

[22] *See, e.g.*, *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, DA 22-448, 2022 WL 1302467 (WCB rel. April 29, 2022) (granting, dismissing, or denying numerous requests for review); *Alpaugh Unified Sch. Dist.*, 22 FCC Rcd 6035 (2007) (granting 78 appeals of USAC decisions).

libraries annual cap); *id.* § 54.619(a) (health care providers annual cap).[23] The contribution factor is announced in a Public Notice issued by the agency's Office of Managing Director. *Id*. § 54.709(a). If, within 14 days of the announcement, the Commission does not exercise its reserved power "to set projections of demand and administrative expenses at amounts that [it] determines will serve the public interest," the contribution factor is "deemed approved by the Commission." *Id*. § 54.709(a)(3).

2. "[A]gency 'subdelegations [of statutory powers] to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.'" *Nat'l Truck Equip. Ass'n v. NHTSA*, 711 F.3d 662, 675 (6th Cir. 2013) (quoting *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004)). But this presumption against "subdelegation of decision-making authority" does not prohibit agencies from relying on certain "types of legitimate outside party input" to inform their decisionmaking. *U.S. Telecom*, 359 F.3d at 566. For instance, "a federal agency entrusted with broad discretion to permit … certain activities may condition its grant of permission

[23] If USAC's projections turn out to be wrong, there is no lasting injury to contributors. FCC rules provide that if "contributions for a particular quarter exceed" universal service "disbursements" plus "USAC's administrative costs for that quarter, the 'excess payments will be carried forward,' thereby reducing the contribution factor for the subsequent quarter." *Rural Cellular II*, 685 F.3d at 1086 (quoting 47 C.F.R. § 54.709(b)).

on the decision of another entity" outside the agency, "so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination." *Id*. at 567; *see also State of Tex. v. Rettig*, 987 F.3d 518, 531 (5th Cir. 2021); *La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 673 (3d Cir. 2014). To determine whether there is such a connection, courts examine the relationship between Congress's charge to the agency and the outside entity's input. *See Rettig*, 987 F.3d at 531-32; *La. Forestry*, 745 F.3d at 673-75.

USAC's input is reasonably related to the Commission's statutory charge to oversee carrier contributions. *See* 47 U.S.C. § 254(d). Each contribution factor is based on the "ratio" of (1) "projected quarterly expenses" of universal service support to (2) "projected collected end-user interstate and international telecommunications revenues." 47 C.F.R. § 54.709(a)(2). Commission policy constrains the expenses by limiting total available support, *e.g.*, *id.* §§ 54.303(a)(1), 54.507(a), 54.619(a), and the Commission reviews and approves USAC's projected expenses "before they are used to calculate the quarterly contribution factor and individual contributions," *id.* § 54.709(a)(3). Carriers self-report their projected revenues to USAC. *Id.* § 54.711(a).

The "fact gathering" that USAC performs for the FCC is a "legitimate outside party input." *See La. Forestry*, 745 F.3d at 672; *U.S. Telecom*, 359 F.3d at 566. USAC's contribution factor inputs are not a policymaking decision. Rather, they are the revenue and demand projections used to calculate the contribution factor that the agency's Office of Managing Director adopts and the Commission approves. 47 C.F.R. § 54.709(a)(3). *Cf. Pittston Co. v. United States*, 368 F.3d 385, 397 (4th Cir. 2004) (upholding a private entity's "ministerial task of doing calculations"). There is no delegation of government power when USAC performs these data-gathering functions.

B. The FCC's Delegation To USAC Is Constitutional Because The Commission Supervises USAC And Retains Final Decisionmaking Authority.

1. Even if USAC's role in determining the contribution factor were more substantial, there would be no impermissible delegation. An agency's "subdelegation to an outside entity in the absence of express congressional authorization" is improper "only if [the] agency actually delegate[s] its power" by "'abdicat[ing] its final reviewing authority'" and "'shift[ing] to another party'" a decision that Congress entrusted to the agency. *La. Forestry*, 745 F.3d at 671-72 (quoting *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008)). There is no such delegation where (as here)

the private party (1) has a government-imposed "standard" to guide it and (2) lacks "final say." *See Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 708 (5th Cir. 2017).

"Agencies may subdelegate to private entities so long as the entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over their activities.'" *Rettig*, 987 F.3d at 532 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). Here, USAC simply applies the FCC's detailed regulations and calculates the projected demand, expenses, and contribution base for each quarter. 47 C.F.R. § 54.709(a)(3). Based on USAC's projections, the Commission calculates and approves the contribution factor, which USAC then applies. *Ibid*. Any "party aggrieved" by USAC action may "seek review" from the FCC. *Id*. § 54.719(b). In particular, carriers can appeal USAC invoices to the FCC. *See inContact*, 495 Fed. Appx. 95. That governing standard and opportunity for review defeat petitioners' claim that the FCC's subdelegation to USAC is unlawful.

Moreover, longstanding precedent allows private entities to "propose" policy if the proposal is "approved, disapproved, or modified" by a government authority. *Sunshine Anthracite Coal*, 310 U.S. at 388, 399. So long as the agency retains "final reviewing authority" and "review[s] and

accept[s]" the outside entity's input, there is no unlawful delegation of government power. *Rettig,* 987 F.3d at 533. Because USAC's work is "closely superintended" by the Commission, there is no unlawful private delegation if USAC proposes a policy that the Commission ultimately adopts. *Ibid.* (cleaned up).[24]

2. Petitioners contend (Br. 65) that the Commission is a mere "rubber stamp" that "[n]ever actually" oversees USAC and "has [n]ever rejected or meaningfully modified USAC's proposals." Not so. The FCC has revised USAC's calculations to account for changes in Commission policy. *See Revised Second Quarter 2003 Universal Service Contribution Factor*, 18 FCC Rcd 5097 (WCB 2003) (adjusting rate from 9.0044% to 9.1%); *First Quarter 1998 Universal Service Contribution Factors Revised and Approved*, 12 FCC Rcd 21881 (CCB 1997) (setting "the approved contribution factors"). Thus, petitioners are wrong when they claim (Br. 66-67) that the "narrow

[24] In a single sentence near the end of their brief, petitioners contend that the appointment of USAC's board members by the FCC Chair "fails to comply with" the Constitution's requirements for the appointment of "Officers" of the United States. Br. 68-69 (citing 47 C.F.R. § 54.703(c)(3)). The "cursory discussion" of this issue in petitioners' brief "is insufficient to present a claim." *United States v. Wright*, 747 F.3d 399, 416 (6th Cir. 2014). In any event, given the FCC's review and approval power, USAC's board members are not officers of the United States under the Constitution because they do not "exercis[e] significant authority pursuant to the laws of the United States." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021).

window" for completing review leaves the Commission with "no option but to accept USAC's quarterly numbers." Indeed, the FCC has "extended the review period" when necessary. *See* 12 FCC Rcd at 21882-83 (recounting three extensions).

In any event, it is unsurprising that the Commission's revisions are relatively infrequent, given USAC's limited role and the Commission's additional oversight in advance of contribution factor announcements. For example, the Commission has acted "to avoid dramatic shifts in the contribution factor" by directing USAC to make certain collections "regardless of the projected quarterly demand."[25] And the FCC has "direct[ed]" USAC to retain certain funds "and not to take that amount into consideration when determining the contribution factor for the first quarter of 2018."[26] These examples further reflect the Commission's active oversight of the contribution factor process. Furthermore, because USAC's calculations

[25] *See* Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 34 FCC Rcd 4143, 4144–45 ¶5 (2019) (citing *Connect America Fund*, 26 FCC Rcd at 17847 ¶561).

[26] *See Wireline Competition Bureau Provides Guidance to the Universal Service Administrative Company Regarding the High-Cost Service Mechanism Budget*, 32 FCC Rcd 9243 (WCB 2017).

are guided by the FCC's detailed regulations, the FCC ordinarily would have no occasion to override those calculations.

3. USAC's role in collection and disbursement is similarly limited. The collection of assessments is a "ministerial" function that courts have consistently upheld. *Pittston*, 368 F.3d at 397 (a private entity may perform "the ministerial task" of "collecting funds" to support a federal program); *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989) (upholding the private Cattleman's Board's collection of assessments). Petitioners try to distinguish these cases by noting that the FCC's approval is passive and USAC's collections are large. Br. 68. But *Pittston* upheld private assessments based only on statutory "guidance" with *no* pre-collection government review, 368 F.3d at 397, and *Frame* upheld private collection of "$1.00 per head of cattle," 885 F.2d at 1128, which in 2020 totaled over $41.5 million.[27] The Commission's quarterly review and approval of the universal service budget entails far more agency involvement than either of those cases.

Petitioners' claim (Br. 64) that "the Ninth Circuit has held" that the FCC "has essentially no power" over the collection and disbursement process

[27] https://www.beefboard.org/2020-annual-report/financials.

misstates the Ninth Circuit's holding in *Incomnet* and ignores its rationale. That case addressed a narrow bankruptcy law issue: whether USAC was a "transferee" from which a bankruptcy estate could recover a preferential transfer. *In re Incomnet, Inc.*, 463 F.3d 1064, 1068 (9th Cir. 2006). Under the Ninth Circuit's "dominion" test, USAC was a transferee because it "holds legal title to the funds in the [universal service] account." *Id.* at 1073, 1076.

Incomnet's bankruptcy holding is irrelevant here. Far from suggesting "no meaningful oversight" (Br. 63), the Ninth Circuit recounted how USAC exists "to collect, pool, and disburse" funds with its "operations [all] carried out pursuant to regulations promulgated by the FCC." 463 F.3d at 1067. Although USAC held legal title to the funds, the FCC had "substantial authority to determine USAC's budget and approve its disbursements" as part of its responsibility for "overseeing USAC." *Id.* at 1074.

In any event, USAC no longer holds legal title to universal service funds. Those funds are now maintained at the U.S. Treasury, *see* FCC-USAC MOU, at 2, § III.B, and Congress treats them as permanent indefinite appropriations (*i.e.*, unlimited in duration or amount). *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, tit. V, § 510; Universal Service Antideficiency Temporary Suspension Act, Pub. L. No. 108-494, 118 Stat. 3986, 3998, tit. III, § 302 (exempting universal service

contributions and distributions from the Antideficiency Act, 31 U.S.C. § 1341); *see also* Statement of Patricia A. Dalton, GAO, Before the Senate Committee on Commerce, Science, and Transportation, April 11, 2005, GAO-05-546T, at 26-28, available at https://www.gao.gov/assets/gao-05-546t.pdf (like numerous other "permanent appropriation" statutes, section 254 "authorized collection of fees" by a federal agency to fund "expenditures for a specified purpose").

CONCLUSION

The petition for review should be dismissed or, in the alternative, denied.

Respectfully submitted,

BRIAN M. BOYNTON
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL

SARAH E. HARRINGTON
DEPUTY ASSISTANT ATTORNEY GENERAL

MARK B. STERN
GERARD J. SINZDAK
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

P. MICHELE ELLISON
GENERAL COUNSEL

JACOB M. LEWIS
DEPUTY GENERAL COUNSEL

/s/ James M. Carr

JAMES M. CARR
ADAM G. CREWS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

December 12, 2022

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

☒ this document contains 12,962 words, *or*

☐ this document uses a monospaced typeface and contains _ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word in Office 365 in 14-point Times New Roman, *or*

☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

/s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on December 12, 2022, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

Statutory Addendum

CONTENTS

47 U.S.C. § 151 ..... **1**
47 U.S.C. § 254 ..... **2**
47 C.F.R. § 54.702 ..... **7**
47 C.F.R. § 54.703 ..... **10**
47 C.F.R. § 54.709 ..... **13**

47 U.S.C. § 151

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 254
§ 254. Universal service
(Excerpts)

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service
Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action
The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles
The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates
Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services
Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas
Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions
All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms
There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries
Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles
Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general
Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in

establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications
The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services
In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) Telecommunications carrier contribution
Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support
After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section

214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

* * *

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services
The Commission shall establish competitively neutral rules--

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

* * *

(i) Consumer protection
The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance
Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

47 C.F.R. § 54.702

§ 54.702 Administrator's functions and responsibilities.

(a) The Administrator, and the divisions therein, shall be responsible for administering the schools and libraries support mechanism, the rural health care support mechanism, the high-cost support mechanism, and the low income support mechanism.

(b) The Administrator shall be responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.

(c) The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.

(d) The Administrator may advocate positions before the Commission and its staff only on administrative matters relating to the universal service support mechanisms.

(e) The Administrator shall maintain books of account separate from those of the National Exchange Carrier Association, of which the Administrator is an independent subsidiary. The Administrator's books of account shall be maintained in accordance with generally accepted accounting principles. The Administrator may borrow start up funds from the National Exchange Carrier Association. Such funds may not be drawn from the Telecommunications Relay Services (TRS) fund or TRS administrative expense accounts.

(f) The Administrator shall create and maintain a website, as defined in § 54.5, on which applications for services will be posted on behalf of schools, libraries and rural health care providers.

(g) The Administrator shall file with the Commission and Congress an annual report by March 31 of each year. The report shall detail the Administrator's operations, activities, and accomplishments for the prior year, including information about participation in each of the universal service support mechanisms and administrative action intended to prevent waste, fraud, and abuse. The report also shall include an assessment of subcontractors' performance, and an itemization of monthly administrative costs that shall include all expenses,

receipts, and payments associated with the administration of the universal service support programs. The Administrator shall consult each year with Commission staff to determine the scope and content of the annual report.

(h) The Administrator shall report quarterly to the Commission on the disbursement of universal service support program funds. The Administrator shall keep separate accounts for the amounts of money collected and disbursed for eligible schools and libraries, rural health care providers, low-income consumers, and high-cost and insular areas.

(i) Information based on the Administrator's reports will be made public by the Commission at least once a year as part of a Monitoring Report.

(j) The Administrator shall provide the Commission full access to the data collected pursuant to the administration of the universal service support programs.

(k) Pursuant to § 64.903 of this chapter, the Administrator shall file with the Commission a cost allocation manual (CAM) that describes the accounts and procedures the Administrator will use to allocate the shared costs of administering the universal service support mechanisms and its other operations.

(l) The Administrator shall make available to whomever the Commission directs, free of charge, any and all intellectual property, including, but not limited to, all records and information generated by or resulting from its role in administering the support mechanisms, if its participation in administering the universal service support mechanisms ends.

(m) If its participation in administering the universal service support mechanisms ends, the Administrator shall be subject to close-out audits at the end of its term.

(n) The Administrator shall account for the financial transactions of the Universal Service Fund in accordance with generally accepted accounting principles for federal agencies and maintain the accounts of the Universal Service Fund in accordance with the United States Government Standard General Ledger. When the Administrator, or any independent auditor hired by the Administrator, conducts audits of the beneficiaries of the Universal Service Fund, contributors to the Universal Service Fund, or any other providers of services under the universal service support mechanisms, such audits shall be conducted in accordance with generally accepted government auditing standards. In administering the Universal

Service Fund, the Administrator shall also comply with all relevant and applicable federal financial management and reporting statutes.

(o) The Administrator shall provide performance measurements pertaining to the universal service support mechanisms as requested by the Commission by order or otherwise.

47 C.F.R. § 54.703

§ 54.703 The Administrator's Board of Directors.

(a) The Administrator shall have a Board of Directors separate from the Board of Directors of the National Exchange Carrier Association. The National Exchange Carrier Association's Board of Directors shall be prohibited from participating in the functions of the Administrator.

(b) Board composition. The independent subsidiary's Board of Directors shall consist of nineteen (19) directors:

(1) Three directors shall represent incumbent local exchange carriers, with one director representing the Bell Operating Companies and GTE, one director representing ILECs (other than the Bell Operating Companies) with annual operating revenues in excess of $40 million, and one director representing ILECs (other than the Bell Operating Companies) with annual operating revenues of $40 million or less;

(2) Two directors shall represent interexchange carriers, with one director representing interexchange carriers with more than $3 billion in annual operating revenues and one director representing interexchange carriers with annual operating revenues of $3 billion or less;

(3) One director shall represent commercial mobile radio service (CMRS) providers;

(4) One director shall represent competitive local exchange carriers;

(5) One director shall represent cable operators;

(6) One director shall represent information service providers;

(7) Three directors shall represent schools that are eligible to receive discounts pursuant to § 54.501;

(8) One director shall represent libraries that are eligible to receive discounts pursuant to § 54.501;

(9) Two directors shall represent rural health care providers that are eligible to receive supported services pursuant to § 54.601;

(10) One director shall represent low-income consumers;

(11) One director shall represent state telecommunications regulators;

(12) One director shall represent state consumer advocates; and

(13) The Chief Executive Officer of the Administrator.

(c) Selection process for board of directors.

(1) Sixty (60) days prior to the expiration of a director's term, the industry or non-industry group that is represented by such director on the Administrator's Board of Directors, as specified in paragraph (b) of this section, shall nominate by consensus a new director. The industry or non-industry group shall submit the name of its nominee for a seat on the Administrator's Board of Directors, along with relevant professional and biographical information about the nominee, to the Chairman of the Federal Communications Commission. Only members of the industry or non-industry group that a Board member will represent may submit a nomination for that position.

(2) The name of an industry or non-industry group's nominee shall be filed with the Office of the Secretary of the Federal Communications Commission in accordance with part 1 of this chapter. The document nominating a candidate shall be captioned "In the matter of: Nomination for Universal Service Administrator's Board of Directors" and shall reference FCC Docket Nos. 97–21 and 96–45. Each nomination shall specify the position on the Board of Directors for which such nomination is submitted. Two copies of the document nominating a candidate shall be submitted to the Wireline Competition Bureau's Telecommunications Access Policy Division.

(3) The Chairman of the Federal Communications Commission shall review the nominations submitted by industry and non-industry groups and select each director of the Administrator's Board of Directors, as each director's term expires pursuant to paragraph (d) of this section. If an industry or non-industry group does not reach consensus on a nominee or fails to submit a nomination for a position on the Administrator's Board of Directors, the Chairman of the Federal Communications Commission shall select an individual to represent such group on the Administrator's Board of Directors.

(d) Board member terms. The directors of the Administrator's Board shall be appointed for three-year terms, except that the Chief Executive Officer shall be a permanent member of the Board. Board member terms shall run from January 1 of the first year of the term to December 31 of the third year of the term, except that, for purposes of the term beginning on January 1, 1999, the terms of the six directors shall expire on December 31, 2000, the terms of another six directors on December 31, 2001, and the terms of the remaining six directors on December 31, 2002. Directors may be reappointed for subsequent terms pursuant to the initial nomination and appointment process described in paragraph (c) of this section. If a Board member vacates his or her seat prior to the completion of his or her term, the Administrator will notify the Wireline Competition Bureau of such vacancy, and a successor will be chosen pursuant to the nomination and appointment process described in paragraph (c) of this section.

(e) All meetings of the Administrator's Board of Directors shall be open to the public and held in Washington, D.C.

(f) Each member of the Administrator's Board of Directors shall be entitled to receive reimbursement for expenses directly incurred as a result of his or her participation on the Administrator's Board of Directors.

47 C.F.R. § 54.709

§ 54.709 Computations of required contributions to universal service support mechanisms.

(a) Prior to April 1, 2003, contributions to the universal service support mechanisms shall be based on contributors' end-user telecommunications revenues and on a contribution factor determined quarterly by the Commission. Contributions to the mechanisms beginning April 1, 2003 shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission.

(1) For funding the federal universal service support mechanisms prior to April 1, 2003, the subject revenues will be contributors' interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of prior period actual contributions. Beginning April 1, 2003, the subject revenues will be contributors' projected collected interstate and international revenues derived from domestic end users for telecommunications or telecommunications services, net of projected contributions.

(2) Prior to April 1, 2003, the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total end-user interstate and international telecommunications revenues, net of prior period actual contributions. Beginning April 1, 2003, the quarterly universal service contribution factor shall be determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions. The Commission shall approve the Administrator's quarterly projected costs of the universal service support mechanisms, taking into account demand for support and administrative expenses. The total subject revenues shall be compiled by the Administrator based on information contained in the Telecommunications Reporting Worksheets described in § 54.711(a).

(3) Total projected expenses for the federal universal service support mechanisms for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factor and individual contributions. For each quarter, the Administrator must submit its

> projections of demand for the federal universal service support mechanisms for high-cost areas, low-income consumers, schools and libraries, and rural health care providers, respectively, and the basis for those projections, to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. For each quarter, the Administrator must submit its projections of administrative expenses for the high-cost mechanism, the low-income mechanism, the schools and libraries mechanism and the rural health care mechanism and the basis for those projections to the Commission and the Office of the Managing Director at least sixty (60) calendar days prior to the start of that quarter. Based on data submitted to the Administrator on the Telecommunications Reporting Worksheets, the Administrator must submit the total contribution base to the Office of the Managing Director at least thirty (30) days before the start of each quarter. The projections of demand and administrative expenses and the contribution factor shall be announced by the Commission in a public notice and shall be made available on the Commission's website. The Commission reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest at any time within the fourteen-day period following release of the Commission's public notice. If the Commission take no action within fourteen (14) days of the date of release of the public notice announcing the projections of demand and administrative expenses, the projections of demand and administrative expenses, and the contribution factor shall be deemed approved by the Commission. Except as provided in § 54.706(c), the Administrator shall apply the quarterly contribution factor, once approved by the Commission, to contributor's interstate and international end-user telecommunications revenues to calculate the amount of individual contributions.

(b) If the contributions received by the Administrator in a quarter exceed the amount of universal service support program contributions and administrative costs for that quarter, the excess payments will be carried forward to the following quarter. The contribution factors for the following quarter will take into consideration the projected costs of the support mechanisms for that quarter and the excess contributions carried over from the previous quarter. The Commission may instruct the Administrator to treat excess contributions in a manner other than as prescribed in this paragraph (b). Such instructions may be made in the form of a Commission Order or a public notice released by the Wireline Competition Bureau. Any such public notice will become effective fourteen days after release of the public notice, absent further Commission action.

(c) If the contributions received by the Administrator in a quarter are inadequate to meet the amount of universal service support program payments and administrative costs for that quarter, the Administrator shall request authority from the Commission to borrow funds commercially, with such debt secured by future contributions. Subsequent contribution factors will take into consideration the projected costs of the support mechanisms and the additional costs associated with borrowing funds.

(d) If a contributor fails to file a Telecommunications Reporting Worksheet by the date on which it is due, the Administrator shall bill that contributor based on whatever relevant data the Administrator has available, including, but not limited to, the number of lines presubscribed to the contributor and data from previous years, taking into consideration any estimated changes in such data.