RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0093p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONSUMERS' RESEARCH; CAUSE BASED COMMERCE, INC.; JOSEPH BAYLY; JEREMY ROTH; DEANNA ROTH; LYNN GIBBS; PAUL GIBBS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

BENTON INSTITUTE FOR BROADBAND AND SOCIETY; CENTER FOR MEDIA JUSTICE dba MediaJustice; COMPETITIVE CARRIERS ASSOCIATION; NATIONAL DIGITAL INCLUSION ALLIANCE; NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION dba NTCA; SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION; USTELECOM,

Intervenors.

No. 21-3886

Petition for Review of an Order of the Federal Communications Commission;
No. DA21-1134.

Argued: March 17, 2023

Decided and Filed: May 4, 2023

Before: MOORE, CLAY, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: R. Trent McCotter, BOYDEN GRAY & ASSOCIATES, Washington, D.C., for Petitioners. James M. Carr, FEDERAL COMMUNICATIONS COMMISSION, Washington, D.C., for Respondents. **ON BRIEF:** R. Trent McCotter, BOYDEN GRAY & ASSOCIATES, Washington, D.C., for Petitioners. James M. Carr, Jacob M. Lewis, FEDERAL

COMMUNICATIONS COMMISSION, Washington, D.C., Gerard J. Sinzdak, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. Andrew Jay Schwartzman, Washington, D.C., Jennifer Tatel, WILKINSON BARKER KNAUER, LLP, Washington, D.C., for Intervenors. Albert H. Kramer, PUBLIC KNOWLEDGE, Washington, D.C., Matthew S. Hellman, JENNER & BLOCK LLP, Washington, D.C., Eric P. Gotting, KELLER AND HECKMAN LLP, Washington, D.C., Corbin K. Barthold, TECHFREEDOM, Washington, D.C., Jeffrey S. Beelaert, STEIN MITCHELL BEATO & MISSNER LLP, Washington, D.C., for Amici Curiae.

OPINION

KAREN NELSON MOORE, Circuit Judge. For nearly a century, Congress has aimed to provide all Americans with universal access to telecommunications services. Congress issued this universal-service mandate in the Communications Act of 1934 and elaborated upon it in the Telecommunications Act of 1996. The Federal Communications Commission ("FCC") implemented the universal-service mandate by establishing the Universal Service Fund ("USF" or "the Fund"), which now consists of four different program mechanisms to "help[] compensate telephone companies or other communications entities for providing access to telecommunications services at reasonable and affordable rates throughout the country, including rural, insular and high costs areas, and to public institutions." Fed. Commc'ns Comm'n, *Glossary of Telecommunications Terms: Universal Service*, https://www.fcc.gov/general/glossary-telecommunications-terms; *see also* 47 U.S.C. § 254. To pay for these universal-service pursuits, Congress requires that certain telecommunications carriers fund these efforts. 47 U.S.C. § 254(d). Thus, on a quarterly basis, the FCC publishes the percentage of "interstate and international end-user telecommunications revenue" that covered telecommunications carriers must contribute to the Universal Service Fund's programs, known as the quarterly contribution factor. 47 C.F.R. § 54.709(a)(3). Petitioners—a group of consumers, a nonprofit organization, and a carrier—challenge this statutory arrangement as violating the nondelegation doctrine. They further allege that the role of a private entity in administering the Universal Service Fund violates the private-nondelegation doctrine. We disagree and **DENY** the petition for review.

I. BACKGROUND

A. Congress's Goal of Universal Service

1. The Creation of the FCC, the Universal-Service Mandate, the Origins of the Universal Service Fund, and the Telecommunications Act of 1996

Congress created the FCC in 1934 and directed it to make available "communication by wire and radio . . . 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, [through] a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended). Congress charged the FCC with "securing a more effective execution of this policy." *Id.* The FCC's creation reflected Congress's desire to make these services universal and its universal-service mandate. Since 1934, "[u]niversal service has been a fundamental goal of federal telecommunications regulation." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000); *see also* FCC Br. at 4–5.

The FCC initially pursued the universal-service mandate by providing explicit and implicit subsidies. *Tex. Off. of Pub. Util. Couns. v. FCC* (*TOPUC I*), 183 F.3d 393, 406 (5th Cir. 1999). "Explicit subsidies provide carriers or individuals with specific grants that can be used to pay for or reduce the charges for telephone service." *Id.* The FCC provided implicit subsidies by adjusting some customers' rates to subsidize the rates of other customers. *Id.*; *see also* FCC Br. at 5; Pet'rs Br. at 10–11. These implicit subsidies worked in the monopoly environments that made up the industry at the time because carriers could offer above-cost and below-cost rates only if other carriers were not offering at-cost rates. *TOPUC I*, 183 F.3d at 406; FCC Br. at 5; Pet'rs Br. at 10–11. Opening the market to competition in the 1980s and 1990s necessitated a new approach for promoting universal service. *See TOPUC I*, 183 F.3d at 406; FCC Br. at 5; Pet'rs Br. at 10–11.

The FCC created the Universal Service Fund to ease the transition to a competitive market and address universal service in high-cost areas. *See In re Amend. of Part 67 of the Comm'n's Rules & Establishment of a Joint Bd.*, 96 F.C.C.2d 781, 795–800 (1983); Brief for

USTelecom et al. as Intervenors Supporting Respondents, No. 21-3886, at 3; *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1311 (D.C. Cir. 1988) ("The Commission . . . proposes to create a federal 'Universal Service Fund' ('Fund') to 'ensure that telephone rates are within the means of the average subscriber in all areas of the country, thus providing a foundation on which the states can build to develop programs tailored to their individual needs.'" (quoting 96 F.C.C.2d at 795)). *Rural Telephone Coalition* explained that "the [USF] was proposed in order to further the objective of making communication service available to all Americans at reasonable charges" and upheld the creation of the USF as "within the Commission's statutory authority." 838 F.2d at 1315. The FCC also established other programs to assist low-income communities, known as Link Up and Lifeline. Congressional Research Service, *Universal Service Fund: Background and Options for Reform*, at 2–3 (updated Oct. 25, 2011) [hereinafter *CRS USF Report*]. These programs operated in connection with the Fund. *See* Fed. Commc'ns Comm'n, *Universal Service Fund*, https://www.fcc.gov/general/universal-service-fund (last visited May 4, 2023) [hereinafter *FCC: Universal Service Fund*].

In 1996, in the wake of the Bell Telephone System's breakup when subsidies were no longer possible in a competitive market, Congress elaborated upon its universal-service mandate and enacted the Telecommunications Act of 1996, which amended the Communications Act of 1934. Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see also* FCC Br. at 6; *TOPUC I*, 183 F.3d at 406. Among other things, § 254 of the Telecommunications Act (codified in 47 U.S.C. § 254) recognized preexisting and additional priorities of universal service and called for "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." *Id.* § 254(b)(5); *see also id.* § 254(b)(3), (6). This gave rise to today's Universal Service Fund and its four specific mechanisms, which are also referred to as programs or funds. *See In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C. Rcd. 8776, 8780 (1997); *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 56–57 (D.C. Cir. 2011); *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 318–19 (*TOPUC II*) (5th Cir. 2001) (explaining "[t]he 1996 Act . . . required that the implicit subsidy system of rate manipulation be replaced with explicit subsidies for universal service" and the FCC responded by "replac[ing implicit subsidies] with an explicit universal service fund"); *CRS USF Report*, *supra*, at 2 ("A new federal Universal Service Fund (USF or Fund) was established

in 1997 to meet the specific objectives and principles contained in the 1996 act."); *FCC: Universal Service Fund*, *supra*.

"Congress passed § 254 to ensure the facilitation of broad access to telecommunications services across the country." *Consumers' Rsch. v. FCC*, 63 F.4th 441, 445 (5th Cir. 2023); *see also* 47 U.S.C. § 254. "The USF accomplishes this goal by raising funds which are later distributed to people, entities, and projects to expand and advance telecommunications services in the nation." *Consumers' Rsch.*, 63 F.4th at 445. The USF consists of four mechanisms: (1) the Connect America Fund servicing rural areas (previously named "High-Cost Support"), 47 C.F.R. §§ 54.302–54:322, 54.801–54.1515; (2) the Lifeline Program servicing low-income consumers, *id.* §§ 54.400–54.423; (3) the Schools and Libraries Support program ("E-Rate"), *id.* §§ 54.500–54.523; and (4) the Rural Health Care Support program, *id.* §§ 54.600–54.633.[1] Fed. Commc'ns Comm'n, *Universal Service*, https://www.fcc.gov/general/universal-service (last visited May 4, 2023) [hereinafter *FCC: Universal Service*]; *Vt. Pub. Serv. Bd.*, 661 F.3d at 56–57 ("Pursuant to [§ 254's] statutory directives, the Commission established the Universal Service Program, which consists of four separate funds[.]"); FCC Br. at 10.

Additionally, § 254 established how to fund "the[se] specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). Congress also required a means for federal-state engagement through a Federal-State Joint Board, identified the principles that should guide the task of providing universal service, instructed how to determine which services fall therein, and provided the funding mechanism. We begin below with an overview of § 254.

[1]The Connect America Fund addresses rural service access by offering support to "certain qualifying telephone companies that serve high-cost areas, thereby ensuring that the residents of these regions have access to reasonably comparable service at rates reasonably comparable to urban areas." *FCC: Universal Service*, *supra*. The Lifeline Program "assists low-income customers by helping to pay for monthly telephone charges so that telephone service is more affordable." *Id.* The Schools and Libraries Support program provides various "telecommunications services[,] . . . [i]nternet access, and" equipment "to eligible schools and libraries." *Id.* Finally, the "Rural Health Care Support [program] allows rural health care providers to pay rates for telecommunications services similar to those of their urban counterparts, making telehealth services affordable, and also subsidizes Internet access." *Id.*

2. Section 254 of the Telecommunications Act of 1996

Directing the Use of a Federal-State Joint Board

Subsection 254(a)(1) requires the use of a Federal-State Joint Board ("the Joint Board")[2] "to coordinate federal and state regulatory interests." *TOPUC I*, 183 F.3d at 406. As part of the initial implementation of the 1996 Act, Congress required that, after a period of notice and comment, the Joint Board make recommendations initially to the FCC regarding how to achieve the Act's universal-service provisions by the provided statutory deadlines. *Id.*; 47 U.S.C. § 254(a)(1). Section 254 specifically required that the Joint Board issue recommendations on "the definition of the services that are supported by Federal universal service support mechanisms" by the statutory deadline. 47 U.S.C. § 254(a)(1).

After the initial implementation, Congress directed the Joint Board to remain involved in making recommendations pertaining to universal service. Section 254 states that the Joint Board may make "subsequent recommendations . . . on universal service" to the FCC. *Id.* § 254(a)(2). As detailed below, Congress identifies the principles that must guide both the Joint Board when making recommendations regarding and the FCC in making "policies for the preservation and advancement of universal service." *Id.* § 254(b). After identifying six principles for universal service, § 254(b) empowers the Joint Board and the FCC to determine other "necessary and appropriate" principles. *Id.* § 254(b)(7). Congress also permits the Joint Board to recommend to the FCC "modifications in the definition of the services that are supported by Federal universal service support mechanisms." *Id.* § 254(c)(2).

Identifying Seven Principles to Guide Universal-Service Policies

In § 254(b), Congress identified "[u]niversal service principles" and required that "[t]he Joint Board and the Commission *shall* base policies for the preservation and advancement of universal service on the following principles." *Id.* (emphasis added). Subsection 254(b) lists the following principles:

[2]The Joint Board is comprised of three FCC Commissioners, four State Utility Commissioners, and "a State-appointed utility consumer advocate" representative. 47 U.S.C. §§ 254(a)(1), 410(c).

> (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.

Id.

Defining Which Services Are Included in "Universal Service"

Congress instructed the FCC to anticipate and address evolving technologies when effectuating universal service. Section 254 of the Act states that "[u]niversal service is an *evolving* level of telecommunications services that the Commission shall establish periodically under this section." *Id.* § 254(c)(1) (emphasis added). It therefore instructs that when the Joint Board makes recommendations and the FCC establishes and modifies the definition of which "services . . . are supported by Federal universal service support mechanisms," they "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.

47 U.S.C. § 254(c)(1); *see also id.* § 254(c)(2) (discussing "[a]lterations and modifications" to the definition of services). Further, the FCC "may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h)," *id.* § 254(c)(3), which refers to the FCC's "Schools and Libraries Support" and "Rural Health Care Support" programs. *See FCC: Universal Service*, *supra*; *CRS USF Report*, *supra*, at 3–4.

Funding the USF's Mechanisms Through Telecommunications Carriers' Contributions

To fund the USF's mechanisms, Congress required in § 254(d) that "[e]very 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." Subsection 254(d) thus requires that certain telecommunication carriers contribute to the USF.

B. Funding and Administering the USF

The FCC addresses § 254(d)'s funding requirement on a quarterly basis by, in essence, establishing a percentage to be applied to each covered carrier's "interstate and international end-user telecommunications revenues" in order "to calculate the amount of individual contributions" that each carrier must pay to the USF. 47 C.F.R. § 54.709(a)(3); *see also id.* § 54.709(a)(2). That percentage is known as the quarterly contribution factor. It arises from a ratio of various projections and data that the USF's administrator, Universal Service Administrative Company ("USAC"), submits to the FCC for the FCC's approval. *See id.* § 54.709(a); *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1085–86 (D.C. Cir. 2012). USAC is a not-for-profit private organization that is structured pursuant to the FCC's regulations. *See, e.g.*, 47 C.F.R. §§ 54.701, 54.703.

USAC submits to the FCC (1) projections of the Fund's quarterly expenses (the projected demands for each mechanism and the administrative expenses) and (2) the "contribution base," which is "the total projected collected end-user interstate and international telecommunications revenues" of the covered carriers that is derived from their self-reported revenue. *See* 47 C.F.R. § 54.709(a)(2)–(3). The first projection—the Fund's demand and administrative expense projections—must be submitted by USAC to the FCC sixty days before the start of each quarter. 47 C.F.R. § 54.709(a)(3).[3] The second figure—the total contribution base—must be submitted to the FCC thirty days before the start of each quarter. *Id.*[4] The FCC then issues a Public Notice of the projections and data and includes therein its *proposed* contribution factor. *Id.* The FCC may revise USAC's projections of the Fund's quarterly expenses within this fourteen-day period. *Id.* "If the [FCC] take[s] no action within fourteen (14) days of the date of release of the public notice . . . the contribution factor shall be deemed approved by the" FCC. *Id.* Once the contribution factor is approved by the FCC, USAC applies the contribution factor to each carrier's applicable revenue, *id.*, and issues each carrier a monthly invoice, *see id.* § 54.713(b).

C. The Fourth Quarter 2021 Universal-Service Contribution Factor

On August 2, 2021, USAC submitted to the FCC its projections for the Fund's demand and administrative expenses. *USAC Q4 2021 Projected Fund Size*. On September 1, 2021, USAC provided the FCC with the contribution base (the industry revenue projections based on the carriers' self-report data). *USAC Q4 2021 Projected Contribution Base*. On September 10, 2021, the FCC published a Public Notice regarding the Fourth Quarter 2021 Contribution Factor, which presented USAC's projections and data and the FCC's proposed contribution factor of 29.1%. Fed. Commc'ns Comm'n, *Proposed Fourth Quarter 2021 Universal Service Contribution Factor,* (Sept. 10, 2021) https://www.fcc.gov/document/usf-proposed-4th-quarter-

[3]USAC provides the projections in a report to the FCC. *See, e.g.*, USAC, *Federal Universal Service Support Mechanisms Fund Size Projections for Fourth Quarter 2021* (Aug. 2, 2021), https://www.usac.org/wp-content/uploads/about/documents/fcc-filings/2021/fourth-quarter/financials/USAC-4Q2021-Federal-Universal-Service-Mechanism-Quarterly-Demand-Filing_Final.pdf [hereinafter *USAC Q4 2021 Projected Fund Size*].

[4]USAC provides the data in a report to the FCC. *See, e.g.*, USAC, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Fourth Quarter 2021* (Sept. 1, 2021), https://www.usac.org/wp-content/uploads/about/documents/fcc-filings/2021/fourth-quarter/financials/USAC-4Q2021-Universal-Service-Contribution-Base-Filing.pdf [hereinafter *USAC Q4 2021 Projected Contribution Base*].

contribution-factor-291-percent [hereinafter *Q4 2021 Contribution Factor*]. The public had until September 24, 2021 to submit comment and objections.

Petitioners filed a comment on September 23, 2021. *Comments and Objections of Consumers' Rsch. et al.*, CC Docket No. 96-45 (Sept. 23, 2021), https://www.fcc.gov/ecfs/document/109231271512688/1. Petitioners requested that the FCC set the contribution factor at 0%. *Id.* at 5. Petitioners' comment listed numerous reasons why they believed that the USF violates the law, including arguments that it violates the nondelegation doctrine, the private-nondelegation doctrine, the Appointments Clause, and the Administrative Procedure Act's ("APA") requirements for rule promulgations. *Id.* at 2–5.

The FCC approved the fourth quarter 2021 contribution factor on September 24, 2021. On September 30, 2021, Petitioners filed a Petition for Review in this court seeking review of whether the FCC's approval of the *Q4 2021 Contribution Factor* "exceeds the FCC's statutory authority and violates the Constitution and other federal laws." D. 1-2 (Pet. at 3). Petitioners raised many of the same challenges made in their comment. *Id.* at 3–5. In their brief filed with this court, Petitioners narrowed their challenge and addressed their nondelegation-doctrine and private-nondelegation-doctrine arguments.

II. STANDARD OF REVIEW

We review de novo constitutional claims raised in a petition for review. *Consumers' Rsch.*, 63 F.4th at 445; *see also United States v. Bowers*, 594 F.3d 522, 527 (6th Cir. 2010); *Gutierrez v. Sessions*, 887 F.3d 770, 774 (6th Cir. 2018). We also review de novo questions of statutory interpretation and questions of law. *Boler v. Earley*, 865 F.3d 391, 401 (6th Cir. 2017).

III. DISCUSSION

A. JURISDICTION

We conclude that Petitioners have Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Petitioner Cause Based Commerce, Inc. ("CBC") has Article III standing because, as a carrier, it "is a regulated entity required to contribute directly to the Universal Service Fund, with the amount likewise based on the Contribution Factor." Pet'rs Br.

at 30. According to CBC's President David Condit, CBC "contributes directly to the Universal Service Fund and has done so during all relevant times for this suit, including the fourth quarter of 2021," and "plans to continue" doing so and remains subject to the contribution requirement. D. 46-2, Ex. 1 (Decl. of David W. Condit) ¶ 4; *see also id.* ¶¶ 2, 5. When the party is "an object of the action . . . at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62. Here, CBC's President's testimony demonstrates an actual, concrete, and particularized injury of fact that is fairly traceable to the FCC's conduct and is redressable by a favorable judicial ruling. *See id.* at 560–61. CBC has established Article IIII standing. We can review a petition for review when one petitioner has standing. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006). Thus, Petitioners have satisfied *Lujan*'s standing requirements.

The parties contest, however, whether Petitioners have jurisdiction to file their Petition in this court pursuant to the Administrative Orders Review Act, also referred to as the Hobbs Act, 28 U.S.C. § 2342. Under § 2342, "federal courts of appeals have 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of' certain 'final orders of the Federal Communication[s] Commission.'" *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2053 (2019) (quoting 28 U.S.C. § 2342(1)). "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

The Hobbs Act imposes a jurisdictional limit. *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 447, 454 (6th Cir. 2013); *Consumers' Rsch.*, 63 F.4th at 446; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) (considering another jurisdictional question but stating that "[t]he Government also notes that lower court decisions have uniformly held that the Hobbs Act's 60–day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional"); *United States v. Marshall*, 954 F.3d 823, 829 (6th Cir. 2020) (same).

"Generally, administrative orders are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process."

Leyse, 545 F. App'x at 455 n.5 (quoting *Multistar Indus., Inc. v. Dep't of Transp.*, 707 F.3d 1045, 1052 (9th Cir. 2013)). But the Hobbs Act is complicated, and the answer to the jurisdiction inquiry varies depending on the agency, the type of agency decision at issue, and the facts of the case. A one-size-fits-all approach does not work.

The FCC argues that it did not issue a reviewable final order within sixty days of Petitioners' challenge. First, the FCC asserts that Petitioners' challenge is many years too late given that their Petition actually challenges the FCC's regulations and orders from the 1990s and 2011 regarding the contribution method and USAC rather than the *Q4 2021 Contribution Factor* itself. Second, the FCC contends that the challenge is simultaneously *unripe* because the final order is USAC's invoice applying the quarterly contribution factor to a carrier's covered revenue, rather than the FCC's approval of the quarterly contribution factor. FCC Br. at 24–27. We disagree and hold that Petitioners have carried their burden of establishing jurisdiction under the Hobbs Act. *See Lujan*, 504 U.S. at 561 (placing burden of establishing jurisdiction on party opposing dismissal); *Hautzenroeder v. DeWine*, 887 F.3d 737, 740 (6th Cir. 2018) (same).

First, the FCC's regulations indicate that the *Q4 2021 Contribution Factor* is a final order consistent with the Hobbs Act. The FCC's regulations state that an FCC "action shall be deemed *final*, for purposes of . . . judicial review, on the date of public notice as defined in [47 C.F.R.] § 1.4(b)." 47 C.F.R. § 1.103(b) (emphasis added); *see also Cal. Ass'n of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1988). The *Q4 2021 Contribution Factor* is a "Public Notice" that the FCC released and issued on September 10, 2021, and approved on September 24, 2021. *Q4 2021 Contribution Factor* at 1; Fed. Commc'ns Comm'n, *USF Proposed 4th Quarter Contribution Factor is 29.1 Percent*, https://www.fcc.gov/document/usf-proposed-4th-quarter-contribution-factor-291-percent. Though "[t]he particular label placed upon" the type of agency decision "is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive," *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), the fact that the FCC prescribes that an order becomes final for the purposes of judicial review based "on the date of public notice," 47 C.F.R. § 1.103(b), constitutes support for

jurisdiction in this instance. Thus, Petitioners filed their Petition for Review well within sixty days of both dates.[5]

Nonetheless, even if the *Q4 2021 Contribution Factor* is not a final order, we agree with Petitioners that the *Q4 2021 Contribution Factor* reapplies prior final FCC actions that restart the sixty-day clock. Reply Br. at 8–9. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) (noting in the context of agency's reopening of a proceeding and reissuing of an order that reaffirmed legal obligations in a prior agency order that an agency's subsequent order "is reviewable on its merits" under the Hobbs Act "even if it merely reaffirms the rights and obligations set forth in the original order"). When considering how the reapplication of regulations implicates Hobbs Act jurisdiction, the D.C. Circuit stated that the "statutory time limit restricting judicial review of [an FCC] action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). *Functional Music* explained that "administrative rules and regulations," unlike some other types of final agency action, "are capable of continuing application," and "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id.* Thus, *Functional Music* found that Hobbs Act jurisdiction exists when a petitioner files a challenge within sixty days of a reapplication of the underlying rule. *See id.* Our circuit has addressed when the clock restarts in a slightly different context. *See Ohio Pub. Int. Rsch. Grp., Inc. v. Whitman*, 386 F.3d 792, 799–800 (6th Cir. 2004) (considering analogous jurisdictional requirements). We explained that when an agency is "merely s[eeking] public comment on whether . . . programs were acting in accordance with [underlying] regulations" without demonstrating an "indication that the [agency] was reconsidering any underlying regulations," the agency is not republishing the rule and it "d[oes] not reopen the sixty-day notice and comment period." *See id.* at 800. *Ohio Public Interest Research Group* did not consider instances in which the new agency action reapplied the underlying rule. *See id.* at 799–800.

[5]Because the Petition is timely regardless of whether the FCC's September 10, 2021 release and issuance or the FCC's September 24, 2021 approval triggers the final order date, we need not decide which date controls.

In this specific circumstance, to the extent the *Q4 2021 Contribution Factor* itself is not a final order, Petitioners' challenge to the FCC's constitutional authority to implement § 254, reapply its prior regulations, and issue the *Q4 2021 Contribution Factor* restarts the sixty-day clock. *See Functional Music*, 274 F.2d at 546. Every quarter, the FCC reapplies 47 C.F.R. § 54.709 to determine a *new* contribution factor for the next quarter and impose a new legal obligation. The *Q4 2021 Contribution Factor* itself states that upon its approval, "[c]ontribution payments are due on the dates shown on the invoice" issued by USAC, and also details the sanctions that carriers will face if they fail to pay the contribution or pay the contribution late. *Q4 2021 Contribution Factor* at 4 ("Contributors will pay interest for each day for which the payments are late. Contributors failing to pay contributions in a timely fashion may be subject to the enforcement provisions of the Communications Act of 1934, as amended, and any other applicable law."). It is only because the FCC approves the contribution factor each quarter that USAC can then issue the invoice,[6] indicating that the legal obligation to pay the contribution arises when the FCC approves the contribution factor.[7] We see this particular instance as distinct from an agency's "mere[] [solicitation of] public comment[s] on whether . . . [a] program[] . . . act[s] in accordance with [underlying] regulations," *see Ohio Public Interest Research Group*, 386 F.3d at 800. And we do not "normally . . . require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) (second alteration in original) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010)) (considering different statutory time limitation); *see also Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (noting that challenges after sixty days of the original agency action may be permitted "when an

[6]The FCC's argument that a legal obligation arises only when USAC issues an invoice is unavailing as *only one* petitioner is a carrier who may receive an invoice. The other consumer petitioners ultimately pay a specific fee on their regular service bill because of the contribution factor that the FCC approves for that quarter without ever receiving an invoice. Reply Br. at 15; Oral Arg. at 29:28–30:05.

[7]Though certainly not dispositive, we find further support that the *Q4 2021 Contribution Factor* is an application of prior authority given that the FCC's Public Notices publishing the contribution factors are listed as one proceeding on the FCC's docket, Proceeding CC 96-45, created on March 20, 1996. *See* Fed. Commc'ns Comm'n, Proceeding Docket No. 96-45, https://www.fcc.gov/ecfs/search/search-filings/results?q=(proceedings.name:(%2296-45%22)) (last visited May 4, 2023); Fed. Commc'ns Comm'n, *Filing Detail DA-21-1134A1*, https://www fcc.gov/ecfs/search/search-filings/filing/0910088680112 (last visited May 4, 2023).

agency seeks to apply the rule" and "those affected may challenge that application" without awaiting "formal 'enforcement actions'"). Finally, we find significant that Petitioner CBC became a covered carrier only in 2006, *see* D. 46-2, Ex. 1 (Decl. of David W. Condit) ¶ 3, and Petitioner Jeremy Roth first paid a universal-service fee on his phone bill around 2016, *see* D. 46-2, Ex. 3 (Decl. of Jeremy Roth) ¶ 3,—years after the FCC adopted the rules it now reapplies in the *Q4 2021 Contribution Factor*. *See PDR*, 139 S. Ct. at 2062 (Kavanaugh, J., concurring). We therefore hold that this Petition for Review is timely.

B. NONDELEGATION DOCTRINE

Petitioners argue that § 254 of the Telecommunications Act of 1996 violates the nondelegation doctrine. We, like our colleagues in the Fifth and D.C. Circuits, disagree. *Consumers' Rsch.*, 63 F.4th at 450 ("[Section] 254 does not violate the nondelegation doctrine."); *Rural Cellular*, 685 F.3d at 1091 ("[S]ection 254 of the Act clearly provides an intelligible principle.").

The Constitution vests all legislative power in Congress and, under the nondelegation doctrine, bars Congress from "transfer[ring] to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). The Constitution, however, allows "Congress [to] obtain[] the assistance of its coordinate Branches," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), and to "confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy*, 139 S. Ct. at 2123. "The nondelegation doctrine is rooted in the principle of separation of powers." *Mistretta*, 488 U.S. at 371.

Under the nondelegation doctrine, we look for an intelligible principle. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 372 (alterations in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) (explaining no constitutional violation exists "so long as Congress provides an administrative agency with standards guiding its actions such that a court could

'ascertain whether the will of Congress has been obeyed'" (quoting *Mistretta*, 488 U.S. at 379)); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). The intelligible-principle test tells us that "Congress . . . may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). 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). Even when these delegations are "broad," the Court has upheld Congress's power to delegate. *Mistretta*, 488 U.S. at 373–74.

The intelligible-principle test has long recognized "that 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." *Id.* at 372; *Gundy*, 139 S. Ct. at 2123 (explaining that the Court's holdings recognize these considerations "time and again"). The Supreme Court has struck down a statute for lacking an intelligible principle on only two occasions: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), struck down a statute that "provided literally no guidance for the exercise of discretion," *Whitman*, 531 U.S. at 474, and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), struck down a statute that "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition,'" *Whitman*, 531 U.S. at 474.

Gundy describes the methodology for analyzing a Congressional delegation. We employ statutory interpretation to answer "[t]he constitutional question [of] whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." 139 S. Ct. at 2123. We construe the "challenged statute's meaning" by analyzing "what task it delegates and what instructions it provides." *Id.* (noting that prior precedents have evaluated a statute's purpose, factual background, and context); *see also Consumers' Rsch.*, 63 F.4th at 447. If necessary, we next consider whether the statute "sufficiently guides" the agency's discretion. *Gundy*, 139 S. Ct. at 2123.

"[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475 (explaining that the specifics of

each statute affect the inquiry but noting the broad leeway Congress has, *id.* at 474–75). Our inquiry therefore homes in on the statute's specific features, *see id.*, but we apply one universal intelligible-principle test regardless of the type of statute at issue. *See Skinner*, 490 U.S. at 220, 222–23 (rejecting an alternative nondelegation standard for purported delegations of Congress's taxing power) ("[Neither] the text of the Constitution [n]or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." *Id.* at 222–23); *J.W. Hampton*, 276 U.S. at 409 (rejecting the argument that precedent treats differently delegations regarding "levy[ing] taxes and fix[ing] customs duties" and explaining that "[t]he authorities make no such distinction").[8]

Petitioners argue that § 254 violates the nondelegation doctrine because Congress neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund. They argue that the delegations scrutinized in *Skinner* and *J.W. Hampton* survived constitutional muster because, there, Congress capped the fee amounts to be collected and provided a formula for calculating the fee or the customs duty. Petitioners misconstrue *Skinner* and *J.W. Hampton*.

In *Skinner*, a unanimous Supreme Court analyzed a statutory scheme similar to 47 U.S.C. § 254 in what the Court referred to as a non-serious nondelegation-doctrine challenge. 490 U.S. at 219 (recognizing the appellant's only serious challenge concerned whether a heightened nondelegation doctrine applied when Congress delegates its taxing power before rejecting that challenge, *id.* at 220). *Skinner* considered Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, which "directs the Secretary of Transportation . . . to 'establish a

[8]Because no alternative intelligible-principle standard applies, it is unnecessary to classify the contributions as a "tax" or a "fee." *Skinner*, 490 U.S. at 222–23. We note, however, that in other contexts, courts have determined that contributions to the Universal Service Fund are fees, not taxes. *E.g.*, *Rural Cellular*, 685 F.3d at 1091 ("Nor is the Act as interpreted by the Commission an unconstitutional delegation of the Congress's authority under the Taxing Clause to 'lay and collect Taxes' because the assessment of contributions from carriers is not a tax."); *see also TOPUC I*, 183 F.3d at 427 & n.52 (dismissing tax argument and stating "the universal service contribution qualifies as a fee because it is a payment in support of a service (managing and regulating the public telecommunications network) that confers special benefits on the payees.").

Like with all nondelegation challenges, we consider the at-issue statute's specific features, including the very features Petitioners believe render § 254 a "revenue-raising" statute.

schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines.'" *Id.* at 214 (quoting Pub. L. 99–272, 100 Stat. 82, § 7005(a)(1)). The Court explained that § 7005 was "one of a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing." *Id.* at 215.

The Court in *Skinner* "ha[d] no doubt that" § 7005 contained sufficient Congressional "restrictions . . . on the Secretary's discretion" and supplied an intelligible principle given that "Congress delimited the scope of [the agency's] discretion with much greater specificity than in [other constitutional] delegations." *Id.* at 219–20. It provided examples that highlighted this "delimited" discretion. *Id.* at 219. For instance, Congress limited the Department of Transportation's discretion by restricting from whom the agency could collect fees and the activities on which the agency could spend the fees. *Id.* Congress further limited the agency's discretion by requiring that the agency apply a uniform approach to setting fees rather than permitting the "set[ting of] fees on a case-by-case basis." *Id.* As in 47 U.S.C. § 254, Congress provided a principle by which to guide the Department of Transportation in setting fees, requiring that the fees "bear a 'reasonable relationship' to" an enumerated list of criteria the agency used to set the fee. *Id.* Unlike 47 U.S.C. § 254, § 7005 stated that "at no time shall the aggregate of fees received for any fiscal year . . . exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees." *Id.* at 215 (quoting Pub. L. 99–272, 100 Stat. 82, § 7005(d)). Petitioners argue that the omission of § 7005's last feature dooms 47 U.S.C. § 254. Pet'rs Br. at 40–41. But *Skinner* determined—without "[any] doubt"—that the statute *easily* "satisfied" the intelligible-principle test; the Court did not hold, or even imply, that an intelligible principle required a price cap. *See Skinner*, 490 U.S. at 220; *see also id.* at 218–19. Justice Scalia repeated this very point in *Whitman* when he explained that the Supreme Court "ha[s] never demanded . . . that statutes provide a 'determinate criterion'" identifying "how much . . . is too much." 531 U.S. at 475 (quoting *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir.), *aff'd in part, rev'd in part sub nom. Whitman*, 531 U.S. 457 (2001)).

J.W. Hampton, 276 U.S. 394, similarly did not imply that absent "a precise formula," Pet'rs Br. at 39, a statute lacks an intelligible principle. The statute at issue in *J.W. Hampton* addressed customs duties and allowed the President, upon an investigation, to adjust Congressionally set duty rates to equalize the difference between the production costs in the United States and foreign production costs through a proclamation. 276 U.S. at 401. The statute's purpose in seeking rate equalization was to "secure revenue" and "enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States." *Id.* at 404. Because Congress "doubted" its ability "to fix with exactness this difference" and faced "difficulty in practically determining what that difference is," it turned to the Executive. *Id.* at 404–05. Of course, because the statute sought a mathematical goal of rate equalization (adjustments stemming from the difference between two numbers), it included general mathematics. *Id.* at 401–02, 411. In addition to the broader mathematical principle of rate equalization, Congress provided the President with four items to "take into consideration," *id.* at 401, when "ascertaining the differences in costs of production," *id.* at 403. In upholding the statute, the Court considered Congress's purpose and the mechanisms the statute used to accomplish that purpose, scrutinized the degree of guidance provided in the statute, and then found guidance in part from the broad mathematics of rate equalization. *See id.* at 404–09.

J.W. Hampton does not stand for the proposition that delegations lacking some sort of Congressional formula lack sufficient guidance. *See id.* Neither do other precedents. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 785 (1948) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.") (upholding statute and explaining "the purpose of the [statute] and its factual background establish a sufficient meaning for 'excessive profits' as those words are used in practice").

Next, Petitioners argue that 47 U.S.C. § 254 lacks any real limits and affords the FCC too much discretion. They assert that § 254 offers no "meaningful definitions" and has "standardless" principles. Pet'rs Br. at 35, 44. *American Power* informs us that a statute's "standards need not be tested in isolation," and that standards "derive much meaningful content

from the purpose of the Act, its factual background and the statutory context in which they appear." 329 U.S. at 104. The FCC points to numerous statutory provisions that provide an intelligible principle and restrict the FCC's discretion in implementing the USF. Looking to § 254 to analyze "what task it delegates and what instructions it provides" and determining whether Congress "sufficiently guide[d]" the FCC's discretion, *Gundy*, 139 S. Ct. at 2123, we hold that Congress provided an intelligible principle and its delegation does not violate the separation of powers.

1. Subsection 254(b)'s Principles

Congress provided its principles for universal service in § 254(b). Contrary to Petitioners' assertion that these principles are "standardless" and nothing more than "tautologies," Pet'rs Br. at 44, Congress's principles are fairly detailed and instructive—especially relative to other statutes that have been upheld as constitutional. *See Whitman*, 531 U.S. at 474 (listing principles the Supreme Court has found intelligible and collecting cases); *Lichter*, 334 U.S. at 786 (same). These principles are essentially the goals of universal service and, alongside other provisions of § 254, limit the FCC in how it funds the USF. Therefore, we agree with the Fifth Circuit that Petitioners' "position is untenable." *Consumers' Rsch.*, 63 F.4th at 448.

In § 254(b), Congress first provided a high-level goal for universal service when it instructed that the FCC and the Joint Board work towards "the preservation and advancement of universal service." Congress did not end with this high-level goal but enumerated specific principles of universal service. *Id.* It mandated that, in working to effectuate this goal, the FCC and the Joint Board "*shall*" abide by numerous enumerated principles when effectuating the congressional "policies for the preservation and advancement of universal service." 47 U.S.C. § 254(b) (emphasis added).[9] When Congress then listed each principle individually, it stopped using "shall" and started using "should." *E.g.*, *id.* § 254(b)(1) ("Quality services *should* be available at just, reasonable, and affordable rates." (emphasis added)). Reading these two

[9]The entire provision reads: "The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles." 47 U.S.C. § 254(b).

provisions together, as other courts have, indicates that Congress *required* that the FCC base its efforts to preserve and advance universal service on the enumerated principles while allowing the FCC to then "*balance* [each] principle[] against one another when they conflict." *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (emphasis added).

The enumerated principles identify specific goals and provide a detailed framework for universal service. "Section 254 expressly requires the FCC to ensure that telecommunications services are: (1) of decent quality and reasonably priced; (2) equally available in rural and urban areas; (3) supported by state and federal mechanisms; (4) funded in an equitable and nondiscriminatory manner; (5) established in important public spaces (schools, healthcare providers, and libraries); and (6) available broadly across all regions in the nation." *Consumers' Rsch.*, 63 F.4th at 448. Thus, some principles focus on the **availability, accessibility, and affordability of service** by requiring that the FCC pursue services that are of sound quality and affordable; accessible regardless of region; and of comparable access and rates for low-income consumers, rural consumers, and consumers in areas where service is costly. *See* 47 U.S.C. § 254(b)(1)–(3). Other principles, such as those in § 254(b)(4)–(5), instruct on the **funding of universal service and creation of specific approaches** to "preserv[ing] and advanc[ing] universal service" by directing that "providers of telecommunications services" financially contribute to the USF by "mak[ing] an equitable and nondiscriminatory contribution," and requiring that there "be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." *Id.* § 254(b)(4)–(5). And the principle articulated in § 254(b)(6) names **additional beneficiaries of the USF** (health care providers, schools, and libraries) that "should have access to advanced telecommunications services." *See id.* § 254(b)(6). And, of course, Congress indicated its support to continue addressing high-cost service and low-income communities' access to telecommunication services. *See id.* § 254(b)(3).

Together, these principles provide comprehensive and substantial guidance and limitations on how to implement Congress's universal-service policy, and in turn, how the FCC funds the USF. The principles direct the FCC on (1) **what** it must pursue: accessible, quality, and affordable service. (2) **How** the FCC must fund these efforts: by imposing carrier

contributions. (3) **The method by which** the FCC must effectuate the goals of accessible, sound-quality, and affordable service: by creating specific mechanisms for the Fund. And (4) **to whom** to direct the programs: by identifying the USF's mechanisms' beneficiaries.

Petitioners' argument that these principles are too abstract, "lofty," and "aspirational only" is unpersuasive. Pet'rs Br. at 45 (quoting *TOPUC II*, 265 F.3d at 321). Their citation to *TOPUC II*'s statements about the § 254(b) principles is inapplicable. *TOPUC II* considered whether the FCC's CALLS Order, which in part raised a price cap on the amount that "end-users of basic local service pay" on their monthly telephone bills, *TOPUC II*, 265 F.3d at 318, violated the *statute's* "requirement of affordable universal access," *id.* at 320. The court applied *Chevron*'s two steps, asking "whether Congress has spoken directly on the precise question at issue," and if not and § 254 was ambiguous, then asking whether the FCC's "answer is based upon a permissible construction." *Id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). *TOPUC II* did *not* evaluate the constitutionality of Congress's delegation, *see generally id.*, but rather considered whether the FCC's price cap violated the Act's (specifically, § 254(b)(1)'s and § 254(i)'s) principles regarding the "just, reasonable, and *affordable* rates" of universal service. *Id.* at 320–21; *see also* 47 U.S.C. § 254(b)(1) (emphasis added), 254(i) (emphasis added).

When explaining why the court determined that the statute was ambiguous under *Chevron*'s step one and required moving on to *Chevron*'s step two, *TOPUC II* explained that it had "previously analyzed § 254(b) under *Chevron* step-two because the listed principles use 'vague, general language,' rendering the section ambiguous" under *Chevron*. 265 F.3d at 321 (quoting *TOPUC I*, 183 F.3d at 421). The Fifth Circuit found that, because the principle of affordability was an "*aspirational guideline* that must be carefully balanced with other statutory objectives," when the FCC acted in a manner that served other principles more than it served *affordability*, it did not violate § 254. *Id.* (emphasis added). Again, *TOPUC II* did not address the constitutional question about Congress's delegation and did not hold that § 254's principles were too lofty or aspirational to provide an intelligent principle or limitation on the FCC's discretion. *Id.* at 320–22. And, even in the statutory context, Congress's decision to require that the FCC consider these principles and balance them against one another affords the FCC

"considerable"—but "not absolute"—discretion. *See TOPUC I*, 183 F.3d at 434 (reviewing FCC's interpretation of § 254 and commenting on § 254's limits on the FCC's discretion).

Subsection 254(b)(7)'s final principle—requiring that the Joint Board and the FCC "shall base policies for the preservation and advancement of universal service on . . . [s]uch other principles" that they "determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter"—does *not* strip away the intelligible principle and the limits on the FCC's discretion that Congress imposed in the first six principles and throughout § 254. As the Fifth Circuit recently noted, "the statute enables, and likely obligates, [the FCC] to add principles 'consistent with' § 254's overall purpose." *Consumers' Rsch.*, 63 F.4th at 448 (quoting 47 U.S.C. § 254(b)(7)). Thus, any new principle could only be "necessary and appropriate for the protection of the public interest, convenience, and necessity" and must be "consistent with" § 254's detailed scheme for universal service. 47 U.S.C. § 254(b)(7).

Further, this final principle allows the FCC to comply with its mandate to account for the advances to the world of "evolving" telecommunications. *See* 47 U.S.C. § 254(c)(1). Enabling the FCC to account for "evolving" telecommunications reflects the exact rationale that underpins the nondelegation doctrine. *See Gundy*, 139 S. Ct. at 2123. Caselaw acknowledges that "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*, 488 U.S. at 372; *Am. Power*, 329 U.S. at 105 (explaining this precedent "is a reflection of the necessities of modern legislation dealing with complex economic and social problems"); *Gundy*, 139 S. Ct. at 2123 (explaining that the Court's holdings recognize these considerations "time and again"). Congress's decision to grant an agency the ability to address new concerns while still constricting the agency's discretion to do so within the statute's purpose and principles does not turn a statute with an intelligible principle into an unconstitutional delegation.

2. Section 254's Other Provisions and the Statute's Purpose

Section 254's other provisions also limit the FCC's discretion over the USF. For instance, § 254(c) limits the FCC in deciding **which kinds of telecommunications services** are

supported by the USF. By doing so, § 254(c) "limits distribution of USF funds" for specific services. *Consumers' Rsch.*, 63 F.4th at 450. Subsection 254(c) narrows the universe of telecommunications services eligible for inclusion by identifying the characteristics of the permissible types of services: Only "telecommunications services" that have been evaluated for the four factors specified by Congress may be included as services in the Fund. Specifically, § 254(c) mandates that the FCC, when identifying which telecommunications services are included, "*shall* consider the extent to which such telecommunications services . . . are [(A)] essential to education, public health, or public safety," (B) popular with "a substantial majority of residential customers," (C) "deployed in public telecommunications networks by telecommunications carriers[,] and" (D) "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1) (emphasis added).

The FCC also points to the relationship between the first three factors and the fourth factor as a further limitation. FCC Br. at 38–39. The first three factors (the telecommunications service's essentiality, popularity, and the degree of deployment) are factual questions to examine. *Id.* The fourth factor then tethers those factual factors to § 254's purpose and statutory context by mandating that the telecommunications services included be "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1)(D); *see also* FCC Br. at 38–39. The FCC argues that this relationship is evidence of § 254's purpose, "factual background, and the statutory context." FCC Br. at 39 (quoting *Am. Power*, 329 U.S. at 104). As *American Power* explained, a statute's standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." 329 U.S. at 104. Here, these limits on which telecommunications services are eligible for inclusion in the Fund lend further meaning to the statute's standard governing universal-service principles and impose additional constraints in determining which services the Fund can include and collect contributions for.

Congress's **method of funding USF's mechanisms** yet again limits the FCC's discretion. In § 254(d) Congress (1) mandated *who* pays for the universal-service mechanisms and (2) provided a general principle for *how* the FCC should calculate the amount each carrier must contribute. "[T]o preserve and advance universal service," § 254(d) requires that "[e]very

telecommunications carrier that provides interstate telecommunications services shall contribute[] on an equitable and nondiscriminatory basis" to the Fund. That the contributions must be "on an equitable and nondiscriminatory basis" prevents case-by-case contribution amounts and equalizes the obligation on carriers. *Id.*

More limits on the FCC's discretion exist in § 254(e), which "limits distribution of USF funds to eligible communication carriers under § 214(e)—and even those carriers may only receive support 'sufficient to achieve the purposes of' § 254." *Consumers' Rsch.*, 63 F.4th at 450 (quoting 47 U.S.C. § 254(e)). There are limits on **which** "**telecommunications carrier[s] . . . shall be eligible to receive specific Federal universal service support**." 47 U.S.C. § 254(e) (emphasis added). Section 254 also restricts **how eligible carriers spend the support funds** they receive by limiting support spending to "only . . . the provision, maintenance, and upgrading of facilities and services for which the support is intended," and instructs the FCC that it should make "[a]ny such support . . . explicit and *sufficient* to achieve the purposes of this section." *Id.* (emphasis added); *see also Alenco*, 201 F.3d at 620.

Not only does subsection 254(e) provide the FCC additional guidance for implementing universal service, but also its "sufficiency" command places a soft cap on the size and budget of the program, allowing growth no larger than what is "sufficient to achieve the purposes of" universal service. 47 U.S.C § 254(e); *see also TOPUC I*, 183 F.3d at 412 ("[T]he plain language of § 254(e) makes sufficiency of universal service support a direct statutory command rather than a statement of one of several principles."); *Alenco*, 201 F.3d at 620 ("[E]xcessive funding [of the USF] may itself violate the sufficiency requirements of the Act."). *Alenco* explained that "[b]ecause universal service is funded by a general pool subsidized by all telecommunications providers—and thus indirectly by the 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." *Id.*

Section 254 also limits the **type of beneficiaries of the USF**. Under § 254, universal-service efforts must address high-cost areas and low-income communities. 47 U.S.C. § 254(b)(3). Subsection 254(h) also includes "a new statutory mandate to subsidize support for certain beneficiaries"—rural health care providers, schools, and libraries. *TOPUC I*, 183 F.3d at

440; *see also* 47 U.S.C. § 254(h). Section 254 requires telecommunications carriers, upon request, to provide telecommunications services to rural health care providers and includes a specific formula that must be used to calculate the subsidies the FCC issues to these carriers for these services. 47 U.S.C. § 254(h)(1)(A). With regard to schools and libraries, Congress specifically required that telecommunications carriers serving certain geographical areas provide schools and libraries with services "for educational purposes at rates less than the amounts charged for similar services to other parties" upon request. *Id.* § 254(h)(1)(B). Section 254 instructs the FCC and States to set the discount by "determin[ing what] is appropriate and necessary to ensure affordable access to and use of such services by such entities." *Id.* Congress provided two alternative formulas for how carriers would receive subsidies for their discounted service. *Id.* § 254(h)(1)(B)(i)–(ii). These two provisions show that Congress kept for itself the decision of how much carriers could ultimately receive for the services they provide to rural health care providers and schools and libraries—market-value or discounted services, respectively. Finally, further limits exist with regards to "[a]dvanced services" in § 254(h)(2).

Congress has historically pursued universal service since before 1934. *See* 47 U.S.C. § 151 (creating the FCC in 1934 "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."); *TOPUC I*, 183 F.3d at 405–06. We find even more evidence of an intelligible principle in § 254 from Congress's consistent intention and the statute's purpose. *See Am. Power*, 329 U.S. at 104. Petitioners' dissatisfaction and disagreement with Congress's and the FCC's policy choices "does not translate to a constitutional or statutory violation." *Consumers' Rsch.*, 63 F.4th at 449 n.4. "Rather than leave the FCC with '*no guidance* whatsoever,' Congress provided ample direction for the FCC in § 254." *Id.* at 448–49 (quoting *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022)). Section "254 sets out the FCC's obligations with respect to administration of the USF and the FCC, in turn, calculates what funds are necessary to satisfy its obligations." *Id.* at 450. We therefore conclude that § 254(b)'s principles, Congress's numerous details and limitations on the FCC's implementation of the USF throughout the remainder of § 254, the statute's purpose, and Congress's history of pursuing universal service clearly articulate an intelligible principle and sufficiently limit the FCC's

discretion. *See id.* at 447–50; *Rural Cellular*, 685 F.3d at 1091 ("[S]ection 254 of the Act clearly provides an intelligible principle to guide the Commission's efforts, viz., 'to preserve and advance universal service.'"). We hold that § 254 does not violate the nondelegation doctrine.

C. PRIVATE-NONDELEGATION DOCTRINE

The private-nondelegation doctrine addresses the Constitution's bar on the government's delegation of "unchecked legislative . . . power" to private entities. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936); *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939). An unlawful delegation of authority to a private entity does not exist when the private entity "function[s] subordinate[] to the" agency while aiding the agency and the agency "has authority and surveillance over the activities of" the private entity. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940); *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021), *cert. denied sub nom. Texas v. Comm'r*, 142 S. Ct. 1308 (2022); *Consumers' Rsch.*, 63 F.4th at 450–51; *Oklahoma*, 62 F.4th at 229 ("[A] private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge."). Our cases teach that "a private entity may aid a public federal entity that retains authority over the implementation of federal law" in numerous ways. *Oklahoma*, 62 F.4th at 228–29. For example, "[p]rivate entities may serve as advisors that propose regulations. And they may undertake ministerial functions, such as fee collection," *id.* at 229 (citations omitted), gather facts for the agency, or advise on or make policy recommendations to the agency, *see U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

We again agree with the Fifth Circuit that there is no private-nondelegation doctrine violation because USAC is subordinate to the FCC and performs ministerial and fact-gathering functions. *See Consumers' Rsch.*, 63 F.4th at 451–52. USAC is "expressly subordinate[d] . . . to the FCC," as "USAC 'may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.'" *Id.* at 451 (quoting 47 C.F.R. § 54.702(b)). The FCC has not afforded USAC any authority to make actual decisions or establish or define standards. *Cf. U.S. Telecom*, 359 F.3d at 568.

It is Congress that mandates that certain telecommunications carriers contribute to the USF's mechanisms. 47 U.S.C. § 254(b). It is the FCC that implements congressional mandates regarding which services are included in the USF, which types of entities provide interstate telecommunications, and the means of calculating each carrier's contribution amount. *See, e.g.*, 47 C.F.R. § 54.709(a) ("Contributions to the mechanisms . . . shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly by the Commission."). The FCC also maintains detailed regulations regarding USAC's structure. *See, e.g.*, 47 C.F.R. §§ 54.701, 54.703. And it is the FCC that calculates the contribution factor. *Id.* § 54.709(a)–(b).

In its subordinate role, USAC provides the FCC with fact-gathering, ministerial, and administrative support. It submits for *approval* to the FCC the underlying data and projections that the FCC then uses to calculate the contribution factor. *See Adkins*, 310 U.S. at 388, 399 (explaining that the mere power to make a proposal does not run afoul of the private-nondelegation doctrine). As the FCC explained, USAC calculates the Fund's projected expenses and the contribution base subject to "detailed and specific rules and instructions with the Commission's regulations." Oral Arg. at 24:17–34. For instance, USAC does so in compliance with "FCC rules that limit or cap available support" and formulas for certain programs and presents those figures for the FCC to accept or reject.[10] *See* FCC Br. at 53–54, 56; *Adkins*, 310 U.S. at 388.

Critically, the FCC is not bound by USAC's projections. 47 C.F.R. § 54.709(a)(3). Once it has received USAC's projections, the FCC issues a Public Notice publishing the proposed contribution factor and solicits public comment. *Id.*; *see also Adkins*, 310 U.S. at 388. With the close of the public-comment period, the FCC decides whether to approve the contribution factor. 47 C.F.R. § 54.709(a)(3). "If the [FCC] take[s] no action within fourteen (14) days of the date of release of the public notice . . . the contribution factor shall be deemed approved by the" FCC. *Id.*

[10]The FCC explains, as an example, how formulas guide USAC's calculation for the High Cost Support Mechanism: "[T]he FCC's rules for high-cost support provide precise formulas that USAC must use to calculate available support." FCC Br. at 13 (citing 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)).

Petitioners argue that this process functions as a rubber stamp given their belief that "the FCC has [n]ever rejected or meaningfully modified" USAC's projections. Pet'rs Br. at 65. The FCC disagrees, arguing that it "has revised USAC's calculations to account for changes in Commission policy." FCC Br. at 58 (collecting sources). Regardless, an agency exercises its policymaking discretion with equal force when it makes policy by either "decid[ing] to act" or "decid[ing] *not* to act." *See Oklahoma*, 62 F.4th at 230. And the FCC's choice often to approve the projections does not change the fact that the FCC has the authority to reject or modify the projections or render USAC's projections as more than a mere proposal. As the FCC explained at oral argument, its decision often to approve USAC's projections reflects USAC's consistent adherence to the FCC's "detailed and specific rules and instructions within the Commission's regulation" when calculating the projections, the FCC's belief that USAC accurately calculates these projections, and satisfaction with USAC's performance. *See* Oral Arg. at 24:17–25:09. Additionally, "the FCC permits telecommunications carriers to challenge USAC proposals directly to the agency and often grants relief to those challenges." *Consumers' Rsch.*, 63 F.4th at 451. "Ultimately, the FCC only uses USAC's proposals after independent consideration of the collected data and other relevant information." *Id.* at 452.

USAC's role in handling the administrative functions of billing the contributing carriers and disbursing the universal-service funds, 47 C.F.R. § 54.702(b), is permissible ministerial support and further reflects its subordination to the FCC. *See Oklahoma*, 62 F.4th at 229 (explaining private entities "may undertake ministerial functions, such as fee collection"). USAC distributes invoices to each contributing carrier once the FCC approves the contribution factor; USAC applies the approved contribution factor to each "contributor's interstate and international end-user telecommunications revenues to calculate the amount of individual contributions." 47 C.F.R. § 54.709(a)(3); *see also id.* § 54.702(b). A private entity may assist an agency with this sort of ministerial support. Because USAC is appropriately subordinated to the FCC and serves a fact-gathering and ministerial function without exercising decision-making power, there is no private-nondelegation doctrine violation.

IV. CONCLUSION

The Constitution permits "Congress [to] obtain[] the assistance of its coordinate Branches," where it provides an intelligible principle. *Mistretta*, 488 U.S. at 371–72. Congress provided the FCC with a detailed statutory framework regarding universal service. That framework contains an intelligible principle because it offers nuanced guidance and delimited discretion to the FCC. Section 254 therefore does not violate the nondelegation doctrine. Because of USAC's subordination to the FCC and its assistance with fact gathering and ministerial support, there is no private-nondelegation doctrine violation. Accordingly, we **DENY** the Petition for Review.