Nos. 24-354, 24-422 (consolidated)

In the

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
CONSUMERS' RESEARCH, ET AL.,
Respondents.

SHLB COALITION, ET AL.,
Petitioners,
v.
CONSUMERS' RESEARCH, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS SHLB COALITION, BENTON INSTITUTE, NDIA, AND MEDIAJUSTICE

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QUESTIONS PRESENTED

In the Telecommunications Act of 1996, Congress required the Federal Communications Commission ("FCC" or "Commission") to update existing subsidy mechanisms in order to promote "universal service," supported by statutorily required contributions from carriers offering interstate telecommunications service. Congress defined universal service and adopted specific, detailed principles to guide and cabin the FCC's exercise of delegated authority. *See* 47 U.S.C. § 254(b), (c), (d), (h).

Following Congress's directive in Section 254, the FCC has administered the Universal Service Fund ("USF" or the "Fund") for decades, with ministerial support from the Universal Service Administrative Company ("USAC" or the "Administrator"). The FCC's rules limit USAC's role to administrative matters, prohibit USAC from making policy decisions, and provide for de novo FCC review of any USAC decision upon request.

The questions presented are:

1. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund.

2. Whether the Commission violated the nondelegation doctrine by using the Administrator's financial projections in computing universal service contribution rates.

3. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative

responsibilities to the Administrator violates the nondelegation doctrine.

4. Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in Case No. 24-354 are the Federal Communications Commission and the United States of America.

Petitioners in Case No. 24-422 are the Schools, Health & Libraries Broadband Coalition ("SHLB Coalition"), Benton Institute for Broadband & Society, National Digital Inclusion Alliance, and Center for Media Justice dba MediaJustice, Competitive Carriers Association, National Telecommunications Cooperative Association dba NTCA, and USTelecom – The Broadband Association.

Respondents in both cases are Consumers' Research; Cause Based Commerce, Inc.; Kersten Conway; Suzanne Bettac; Robert Kull; Kwang Ja Kirby; Tom Kirby; Joseph Bayly; Jeremy Roth; Deanna Roth; Lynn Gibbs; Paul Gibbs; and Rhonda Thomas.

The disclosure statement included in the Petition for Writ of Certiorari in Case No. 24-422 remains accurate as to SHLB Coalition, Benton Institute for Broadband & Society, National Digital Inclusion Alliance, and Center for Media Justice dba MediaJustice.

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The opinion of the en banc Fifth Circuit is available at 109 F.4th 743 and reproduced at Pet. App. 1a. (All "Pet. App." citations are to the petition appendix in Case No. 24-354.). The opinion of the Fifth Circuit panel is available at 63 F.4th 441 and reproduced at Pet. App. 125a.

JURISDICTIONAL STATEMENT

The en banc Fifth Circuit entered its judgment on July 24, 2024. Petitioners timely filed their petition for certiorari on October 11, 2024, and the Court granted certiorari on November 22, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, Section 1 of the U.S. Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Pertinent statutory and regulatory provisions are reproduced at App. 1a-127a to this brief.

STATEMENT OF THE CASE

A. The FCC's History of Promoting Universal Service

The FCC's history of promoting universal service long predates the Telecommunications Act of 1996 ("1996 Act"). Congress created the FCC in the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) ("the Act" or "Communications Act"), with a charge to promote universal service—*i.e.*, "to make available … to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide … communication service … at reasonable charges." 47 U.S.C. § 151.

In 1934, "AT&T … held a virtual monopoly over the Nation's telephone service." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994). AT&T's vertical business model enabled it to provide long-distance telephone service at higher rates to help subsidize its subsidiaries' local service.

In the early 1980s, following antitrust litigation resulting from the development of competition in the long-distance market, AT&T was forced to divest its local telephone subsidiaries. Because AT&T could no longer internally subsidize local service, the FCC began assessing charges on all interstate long-distance carriers to finance a "Universal Service Fund" to support high-cost areas.[1] That Fund used revenues from "easy-to-reach customers, such as city dwellers, to implicitly subsidize service to those in

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[1] *See* Access Charges; MTS and WATS Market Structure, 48 Fed. Reg. 10319, ¶ 123 (Mar. 11, 1983) ("*1983 Access Charge Order*").

areas that were hard to reach." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1242 (D.C. Cir. 2018) (citation omitted).

At that time, the FCC derived the authority to promote universal service from several general provisions of the Communications Act. *See 1983 Access Charge Order* ¶¶ 36-55, 83; *infra* p.20 & n.27. *See generally Nat'l Ass'n Regul. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1108 n.6 (D.C. Cir. 1984) ("*NARUC*") (affirming the FCC's implicit universal service goal and related authority).

The FCC also allowed providers to assess end-user charges.[2] Out of concern that these new charges could impact telephone subscribership levels, and thus undermine universal service, the FCC implemented the Lifeline program to waive the end-user charges for qualifying households.[3]

B. Congress's Direction to the FCC to Promote Universal Service in the 1996 Act

In 1996, Congress adopted fundamental changes that moved away from a monopoly-based system for local telephone service to a competitive market-driven approach. Because competition was inconsistent with the use of implicit subsidies, Congress required the FCC to replace its implicit subsidy system with explicit universal service mechanisms, as codified in 47 U.S.C. § 254.

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[2] *1983 Access Charge Order* ¶ 3.

[3] *See* MTS and WATS Market Structure; and Establishment of a Joint Board; Amendment, 50 Fed. Reg. 939 (Jan. 8, 1985); MTS and WATS Market Structure, 51 Fed. Reg. 1371 (Jan. 13, 1986).

Section 254 directs the FCC's implementation of universal service in numerous ways.

Universal Service Definition. Congress defined universal service as "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." 47 U.S.C. § 254(c)(1); *see also* S. Rep. No. 104-23, at 27 (1995) (explaining the intention to "ensure that the definition of universal service evolves over time to keep pace with modern life"). Congress authorized the FCC to define the "services that are supported by Federal universal service support mechanisms," requiring that the FCC "shall consider" the extent to which the services are "essential to education, public health, or public safety," "subscribed to by a substantial majority of residential customers," "being deployed in public telecommunications networks," and "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1)(A)-(D).

Principles. Congress required the FCC to base its universal service policies on six limiting principles. 47 U.S.C. § 254(b). The first three principles provided direction for implementation, building on the FCC's prior universal service tenets of affordability and nationwide availability:

> (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 … that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable … .

Id. § 254(b)(1)-(3).

The fourth and fifth enumerated principles established guidelines for a funding mechanism:

> (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.

Id. § 254(b)(4)-(5).

In the last enumerated principle, Congress established schools, libraries, and rural health care providers as explicit beneficiaries:

> (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).

Id. § 254(b)(6).

Congress also authorized the FCC to adopt additional principles, subject to the requirements that they "are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter." *Id.* § 254(b)(7).

Funding Mechanism. Congress established the framework for contributions to finance universal service. It required every "carrier that provides interstate telecommunications service [to] 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(d). Congress specified that the support be "explicit and sufficient to achieve the purposes" of Section 254. *Id.* § 254(e).

Specific Programs. For the new support mechanisms for rural health care providers and schools and libraries, Congress required that telecommunications carriers provide services at discounted rates. For rural health care facilities, the rate must be "reasonably comparable to rates charged for similar services in urban areas in that State." *Id.* § 254(h)(1)(A). For "elementary schools, secondary schools, and libraries," Congress directed the Commission to provide a discount compared to the rates for "similar services to other parties" that "the Commission … determine[s] is appropriate and necessary to ensure affordable access to and use of such services by such entities." *Id.* § 254(h)(1)(B).

Oversight. Congress established periodic reporting requirements in the 1996 Act and subsequent legislation to oversee the FCC's implementation of Section 254. For example, the FCC must conduct an annual inquiry into "the availability of advanced telecommunications capability to all Americans" and, if necessary, "take immediate action to accelerate deployment of such capability." *Id.* § 1302(b). And in 1997, immediately after the FCC issued rules implementing Section 254, Congress required the FCC to submit a detailed report on who was required to contribute, and who was permitted to receive, universal service funds.[4]

Likewise in 2009, Congress mandated that the FCC assess the state of broadband deployment.[5] The FCC published the National Broadband Plan the following year.[6] And in 2021, Congress further required the FCC to provide recommendations for "improving its effectiveness in achieving the universal service goals for broadband," with a limitation that the recommendations "may not in any way reduce the congressional mandate to achieve the

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[4] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521-22 (1997).

[5] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(C), 123 Stat. 115, 516 (2009) ("2009 Recovery Act").

[6] FCC, *Connecting America: The National Broadband Plan* (2010).

universal service goal for broadband."[7] The FCC submitted its Report in 2022.[8]

C. FCC Implementation of Section 254

1. In 1997, the FCC adopted regulations to implement Congress's directives.[9]

High Cost. As Congress directed, the FCC adopted an explicit support mechanism. *Id.* ¶ 246; *see* 47 U.S.C. § 254(e). The FCC implemented the statutory requirement that rates in high-cost areas be "reasonably comparable" to urban rates, 47 U.S.C. § 254(b)(3), by presuming that a rural rate within two standard deviations of the national average urban rate was "reasonably comparable."[10]

Lifeline. The FCC modified the Lifeline program to make it consistent with Congress's direction that "low-income consumers" should have access to telecommunications "in all regions of the Nation." 47 U.S.C. § 254(b)(3).[11] The FCC similarly implemented Congress's direction that low-income consumers should have "reasonably comparable" services, 47 U.S.C. § 254(b)(3), by providing that the Lifeline

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[7] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60104(c)(1)-(3), 135 Stat. 429, 1206 (2021) ("IIJA").

[8] *See Report on the Future of the Universal Service Fund*, 37 FCC Rcd. 10041 (2022) ("*2022 Future of USF Report*").

[9] *See generally Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776 (1997) ("*1997 Universal Service Order*").

[10] *Federal-State Joint Board on Universal Service*, 18 FCC Rcd. 22559, ¶ 38 (2003).

[11] *See 1997 Universal Service Order* ¶ 27.

program should include the same eligible services as the other USF programs.[12]

E-Rate. The FCC developed the "E-Rate" program to satisfy Congress's explicit direction to include schools and libraries as universal service beneficiaries.[13] To satisfy Congress's mandate that the discount for schools and libraries be "appropriate and necessary to ensure affordable access," 47 U.S.C. § 254(h)(1)(B), the FCC adopted a discount level that varied from 20 to 90% depending on poverty indicators.[14] The FCC has also implemented a periodically adjusted annual cap to fulfill Congress's directive to establish a "specific, predictable and sufficient" universal service support mechanism. 47 U.S.C. §§ 254(b)(5), (d), (e); *see 1997 Universal Service Order* ¶ 529.

Rural Health Care. In establishing the Rural Health Care Program, the FCC implemented the statutory requirement that rates be "reasonably comparable," 47 U.S.C. § 254(h)(1)(A), by requiring that they be "no higher than the highest" rate charged in the nearest large city in the same state.[15] Finally, the FCC implemented a $400 million cap on the Rural Health Care program.[16]

2. The FCC also directed the creation of the Universal Service Administrative Company to provide ministerial support for the Fund programs. The FCC charged the Administrator with "billing

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[12] *See 1997 Universal Service Order* ¶ 28.
[13] *See id.* ¶ 425.
[14] *1997 Universal Service Order* ¶ 31.
[15] *1997 Universal Service Order* ¶ 669.
[16] *Id.* ¶ 35.

contributors, collecting contributions to the universal support mechanisms, and disbursing universal service support funds." 47 C.F.R. § 54.702(b). The FCC forbade the Administrator from "mak[ing] policy" or "interpret[ing] unclear provisions" of the Act or FCC rules. *Id.* § 54.702(c). The FCC also required that the Administrator "be neutral and impartial."[17] The FCC noted that the Administrator's parent entity had been administering the High Cost Fund for more than a decade when Congress passed the 1996 Act.[18]

The FCC established comprehensive oversight and control of the Administrator. The FCC required that the Administrator: (1) submit its cost allocation manual; (2) provide the FCC with full access to all the data it collected; (3) file an annual report, including an itemization of monthly administrative costs; and (4) submit quarterly reports on USF disbursements. *See* 47 C.F.R. § 54.702(g), (h), (j)-(k).

3. The FCC also implemented Congress's requirement that telecommunications carriers providing interstate telecommunications services contribute to the universal service mechanisms. *See* 47 U.S.C. § 254(d). Each quarter, pursuant to Section 254(d), the FCC adopts a "contribution factor" that specifies the percentage of telecommunications providers' "end-user interstate and international telecommunications revenues" that must be paid into the Fund. 47 C.F.R. § 54.709(a)(2).

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[17] *1997 Universal Service Order* ¶ 863.

[18] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd. 25058, ¶ 14 (1998).

The contribution factor is calculated based on that quarter's ratio of projected universal service program expenses to total eligible interstate and international revenues (the "contribution base"):

$$\textbf{USF Quarterly Contribution Factor} = \frac{\textbf{Projected USF Demand} \text{ (Projected program support + administrative expenses)}}{\textbf{Contribution Base} \text{ (Total eligible interstate \& international revenues – projected contributions)}}$$

Demand. To facilitate the FCC's determination, the Administrator calculates and submits the projected USF support amounts—including "the basis for those projections" based on the FCC's detailed rules for the programs—at least sixty calendar days before each quarter as well as its projected administrative expenses. *Id.* § 54.709(a)(3); *see also* Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company ¶ 13 (Oct. 17, 2024), https://www.fcc.gov/sites/default/files/usac-mou.pdf ("*FCC/USAC MOU*").

Contribution Base. Next, at least 30 days before the start of the quarter, the Administrator submits the total "contribution base" (*i.e.*, providers' projected interstate and international revenues) to the FCC. 47 C.F.R. § 54.709(a)(3). The Administrator determines projected revenue based on quarterly reports from service providers. Pursuant to the

Memorandum of Understanding between the FCC and the Administrator, the FCC's Office of Managing Director must "review the contribution base and provide any necessary feedback to USAC before USAC publicly files the contribution base with the FCC." *FCC/USAC MOU* ¶ 13.

Contribution Factor. After reviewing the demand and contribution base projections from the Administrator, the FCC—through its Office of Managing Director—issues a public notice with a proposed contribution factor. "The Commission reserves the right to set projections of demand and administrative expenses at amounts that the Commission determines will serve the public interest." 47 C.F.R. § 54.709(a)(3). If the FCC takes no further action within 14 days of the public notice, the contribution factor is "deemed approved." *Id.*

While the contribution factor percentage has increased over time, this increase is primarily due to a decline in the contribution base (particularly the number of landline phones) rather than from significant growth in the Fund programs. Thus, USF disbursements *decreased* from $8.71 billion in 2012 to $8.27 billion in 2020, while the contribution base decreased from $65.9 billion in 2011 to $41.4 billion in 2020.[19]

4. The FCC has adjusted the four USF programs over time to reflect evolving technologies. The growing need for broadband support spurred the most comprehensive reform of the USF programs. After Congress directed the FCC in 2009 to develop a

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[19] *See 2022 Future of USF Report* ¶¶ 91-92.

National Broadband Plan to ensure every American has "access to broadband capability,"[20] the FCC began to refocus Fund support from basic landline voice telephone service to broadband deployment.[21]

Today, the High Cost program funds rural services to consumers and businesses in every state and territory. Over 8.5 million households subscribe to the Lifeline program, including low-income households, Veterans, and people on tribal lands.[22] From 2022 to 2024, over 106,000 schools and 12,500 libraries received funding from the E-Rate program, benefiting over 54 million students.[23] From 2021 to 2023, over 16,000 health care providers received funding from the Rural Health Care program.[24]

D. This Litigation

In 2021, Respondents began challenging each successive FCC quarterly contribution factor in the federal courts of appeals. Respondents contended that (1) Congress violated the nondelegation doctrine in granting the FCC authority regarding the collection of contributions in support of universal service in Section 254; and (2) the FCC violated the private nondelegation doctrine by relying on the

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[20] 2009 Recovery Act § 6001(k)(2).

[21] *See, e.g.*, *Connect America Fund, et al.*, 26 FCC Rcd. 17663, ¶ 115 (2011) ("*2011 USF Transformation Order*").

[22] *Program Data: Lifeline Participation*, USAC, https://www.usac.org/lifeline/resources/program-data/ (last accessed Jan. 7, 2025) (figures from "Lifeline Participation Rate" Excel file).

[23] FCC, *The Universal Service Fund: How It Impacts the United States*, at 1 (2024).

[24] *Id.*

Administrator to calculate the projected demand and contribution base that inform the FCC's quarterly contribution factor. The Sixth and Eleventh Circuits rejected those challenges. *See* Pet. App. 14a, 127a; *Consumers' Rsch. v. FCC*, 67 F.4th 773, 778 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2628 (2024); *Consumers' Rsch. v. FCC*, 88 F.4th 917, 920-21 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 2629 (2024).

A panel of the Fifth Circuit agreed. The panel reasoned that Section 254(b) "expressly requires" the FCC to ensure compliance with the enumerated principles, and Congress therefore "provided ample direction." Pet. App. 133a. The Fifth Circuit panel also concluded that there was no private nondelegation violation because the Administrator cannot make policy, lacks rulemaking power, and completes all of its functions subject to FCC supervision and review. *See id.* at 139a-40a.

The en banc Fifth Circuit, in a 9-7 vote, granted Respondents' petition for review. The majority first considered whether the challenge "might be moot" given that "sovereign immunity may bar recovery of the monies [Respondents] paid into USF." Pet. App. 13a. It declined to reach that issue, however, concluding that the challenge was justiciable "because it is capable of repetition yet evading review." *Id.*

On the merits, the court held the First Quarter 2022 contribution factor unconstitutional.[25] First, the

[25] The Fifth Circuit stayed the issuance of its mandate pending this Court's disposition of a petition for a writ of certiorari. *See* Order, *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. Aug. 26, 2024).

court concluded that USF contributions were a tax, not a fee, and that Congress therefore delegated its power to tax—a "core legislative power"—to the FCC. Pet. App. 23a-24a. The court nevertheless recognized that delegations by Congress to agencies are permissible so long as Congress provides an intelligible principle to guide the exercise of delegated authority. *See id.* at 24a-25a. It further recognized that this Court "has not in the past several decades held that Congress failed to provide a requisite intelligible principle." *Id.* at 25a-26a (quoting *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022)). The Fifth Circuit did not conclude that Section 254 violated the nondelegation doctrine under this Court's precedents. Instead, it expressed "grave concerns about § 254's constitutionality." *Id.* at 42a.

As to Respondents' private nondelegation challenge, the Fifth Circuit found that the FCC's reliance on the Administrator was problematic for two reasons. It first stated that FCC regulations permit the Administrator's projections to take effect "without formal FCC approval." Pet. App. 49a. It then stated that the FCC has "*de facto* abdicat[ed]" its duty to supervise the Administrator. *Id.* at 50a. However, the Fifth Circuit stopped short of concluding that the FCC's reliance on the Administrator was itself unconstitutional. *See id.* at 55a.

Instead, the court determined that it "need not resolve either question in this case … because *the combination* of Congress's sweeping delegation to FCC and FCC's unauthorized subdelegation to USAC violates the Legislative Vesting Clause in Article I, § 1." *Id.* at 64a. The Fifth Circuit read this Court's

opinions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), and *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), to stand for "a general principle that … two constitutional parts do not necessarily add up to a constitutional whole." Pet. App. 66a-67a. Reviewing Congress's delegation to the FCC and the Administrator's role through this lens, the court concluded that the "combination of delegations, subdelegations, and obfuscations of the USF Tax mechanism offends Article I, § 1 of the Constitution." *Id.* at 81a.

Judge Stewart, writing for seven judges, dissented and argued that Section 254 provides an intelligible principle, imposing on the FCC "a duty to weigh the enumerated universal service principles." *Id.* at 92a. The dissent also noted that Sections 254(c) and (e) limit the FCC's discretion as to the eligible recipients and services. *See id.* at 93a-96a. These factors "satisfie[d] the intelligible principle test as articulated by the Supreme Court." *Id.* at 96a.

As to the private nondelegation doctrine, the dissent explained that the Administrator's authority is limited to billing, collection, and distribution of contributions, as well as collecting information from contributors to calculate inputs for the FCC's contribution-factor determination, applying formulas that the FCC provides. *See id.* at 99a. Finally, the dissent highlighted that the FCC's control over the Administrator is evident in regulations barring the latter from making policy, interpreting rules, or issuing anything that has the force of law. *Id.* at 100a.

In a second dissent, Judge Higginson, writing for five judges, disagreed with the majority's "novel

theory" of nondelegation. *Id.* at 115a. He explained that this Court had previously considered cases that raised both public and private nondelegation challenges, but "never instructed … that a different standard applies" in cases involving both issues. *Id.* at 116a (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)).

SUMMARY OF ARGUMENT

1. This case is not moot because it falls within the "capable of repetition yet evading review" principle.

2. In Section 254, Congress provided ample direction to the Commission. This Court has never applied the nondelegation rule to strike down a statute that provides intelligible principles as clear as those Congress provided here. Indeed, it has approved delegations that are far less detailed. Moreover, because Congress made the key policy decisions, while instructing the FCC to engage in the kind of context-specific fact-finding that is not controversial under the nondelegation doctrine, the statute satisfies any reasonable alternative nondelegation test. *See Gundy v. United States*, 588 U.S. 128, 158 (2019) (Gorsuch, J., dissenting).

3. The Fifth Circuit significantly exaggerated the scope of the Administrator's responsibilities. In fact, the FCC relies upon the Administrator only for ministerial duties and retains control over all of the Administrator's actions. In particular, the Administrator's role in connection with the FCC's adoption of the quarterly contribution factor is to collect data and make projections pursuant to detailed FCC rules. It would be surprising if the

Commission needed to revise the Administrator's projections frequently.

4. The Fifth Circuit's "combination" approach fails here, where both Congress's delegation and the FCC's reliance on the Administrator raise no serious constitutional issue. In addition, no precedent supports the use of a combination approach outside the removal context.

Moreover, the reasoning of *Free Enterprise Fund* is inapplicable to nondelegation cases. In that case, the Court identified a structural problem: the combination of tenure protection at two levels meant that "[n]either the President … nor even an officer whose conduct he may review only for good cause, ha[d] full control over" the entity at issue in that case. 561 U.S. at 496. In contrast, the FCC has full authority to control the Administrator, even assuming (contrary to fact) that it is not adequately supervising that entity under current rules. There is thus no structural problem analogous to the problem the Court identified in *Free Enterprise Fund*.

ARGUMENT

I. This Case Is Not Moot.

The Fifth Circuit correctly found the injury alleged by the petitioners in that court capable of repetition yet evading review. Pet. App. 13a. The FCC adopts the contribution factor each quarter, and the three months during which the contribution must be paid is too little time for "considered plenary review in this Court." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976).

This Court has never held that a challenger must exhaust every potential avenue for preliminary relief

for this exception to mootness to apply. And while some courts have denied application of the exception where a challenger's "procedural missteps … prevent judicial review," *Protestant Mem'l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 731 (7th Cir. 2006), this is not such a case. The challengers filed their petition for review promptly after the FCC adopted the First Quarter 2022 contribution factor. The FCC collects contributions on a monthly basis,[26] and those collections are used for ongoing Fund operations, including disbursements to recipients of Fund support. In this context, mandating that a challenger seek a stay of the contribution factor to bring any challenge would be extremely disruptive given the grave harm that could ensue for other stakeholders. Particularly here, where there is no dispute that the obligation to contribute recurs on a clear, periodic basis (as it has for many years), there is no benefit to denying application of this mootness exception.

If the Court does find the case moot, it should vacate the judgment below under its "well settled" *Munsingwear* practice. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023); *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). If the case is moot, it occurred before the Fifth Circuit decision, and that decision should not be binding in that circuit.

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[26] *See, e.g.*, *How to Pay*, USAC, https://www.usac.org/service-providers/making-payments/how-to-pay/ (last updated Oct. 2024) ("USF payments are due on the 15th of each month.").

II. Congress Provided Ample Direction to the FCC Regarding the Universal Service Fund.

Section 254 passes muster under any plausible understanding of the limits the Constitution places on delegation to agencies.

A. Section 254 Provides Extensive Guidance to the FCC.

When Congress adopted Section 254 in 1996, it was well aware that the FCC had previously created high-cost and lifeline programs, relying in part on Congress's direction that the Commission "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 communications service with adequate facilities at reasonable charges," 47 U.S.C. § 151.[27] Congress also recognized that the pre-1996 Act universal service regime relied on implicit subsidies under which some customers paid higher fees to keep rates affordable for other, lower-income and higher-cost consumers.

Because implicit subsidies cannot survive in a competitive environment, Congress in the 1996 Act directed the FCC to move to an explicit subsidy regime. *See* 47 U.S.C. § 254(e). And, to create the necessary parameters for such a new regime,

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[27] *See also 1997 Universal Service Order* ¶ 329 (citing 47 U.S.C. §§ 151, 154(i), 201, and 205 in summarizing pre-1996 Act authority); *see NARUC*, 737 F.2d at 1108 n.6 (rejecting argument that FCC had no authority over universal service because, in 47 U.S.C. § 151, "Congress directed that, 'so far as possible, ... *all* people of the United States' are to have adequate telephone facilities at reasonable prices").

Section 254 provided significantly more statutory direction as to the key inputs that determine the size of the universal service fund and thus the amount of the quarterly contribution factor.

Congress specified the entities that must pay into the regime: "Every telecommunications carrier that provides interstate telecommunications services" must contribute toward the universal service mechanisms created under the statute. *Id.* § 254(d).[28] Congress further provided that those payments must be "equitable and nondiscriminatory." 47 U.S.C. § 254(d).

Congress likewise constrained the FCC's authority as to the services that could be part of the "universal service" program. While giving the FCC the authority to determine the "evolving level" of services that should be covered, Congress generally limited the agency to supporting "telecommunications services"—a statutorily defined term that involves common carriage[29]—as well as other

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[28] Congress allowed the FCC to expand this class to include "providers of interstate telecommunications" if it made an appropriate public interest finding. *See id.*; s*ee also* 47 U.S.C. § 153(50), (53) (defining "telecommunications" and "telecommunications service"). The FCC has exercised that authority only to a limited degree to add, for instance, payphone providers and interconnected Voice over Internet Protocol services to the class of contributors. *See* 47 C.F.R. § 54.706(a).

[29] *See* 47 U.S.C. § 153(53) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").

services, including broadband, if they are provided over the same "facilities." 47 U.S.C. § 254(c)(1), (e).[30] Congress also mandated that, in deciding on the covered services, the agency evaluate the extent to which such services "are essential to education, public health, or public safety," have "been subscribed to by a substantial majority of residential customers," and "are being deployed in public telecommunications networks by telecommunications carriers, as well as being "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1).[31]

Congress also specified who may receive subsidies: "[O]nly an eligible telecommunications carrier designated under [47 U.S.C. § 214(e)] shall be eligible to receive specific Federal universal service support." 47 U.S.C. § 254(e); *see id.* § 214(e) (enumerating criteria for eligible telecommunications carriers). For particular programs, Congress also defined the customers whose services must be

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[30] *See 2011 USF Transformation Order* ¶¶ 64-65 ("Section 254(e) thus contemplates that carriers may receive federal support to enable the deployment of broadband facilities used to provide supported telecommunications services as well as other services."), *aff'd*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); *see* IIJA § 60104(c)(1)-(3) (directing that the FCC "may not in any way reduce the congressional mandate to achieve the universal service goal for broadband").

[31] Congress also authorized the FCC to designate additional services for support for schools, libraries, and health care providers that serve the purposes of Section 254(h). *See id.* § 254(c)(3); *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 441 (5th Cir. 1999) ("*TOPUC I*").

discounted based on that support. *See id.* § 254(h)(1)(A)-(B) (for Rural Health Care program, "any public or nonprofit health care provider that serves persons who reside in rural areas in that State," and for E-Rate, "elementary schools, secondary schools, and libraries").

Beyond this, in Section 254(b), Congress specifically identified the principles (quoted in full *supra* pp.4-6) the FCC should advance in making its judgments implementing the statute. A number of these principles are especially relevant to limiting the size of the universal service fund, and thus the amount of the quarterly contribution factor. The requirement in Section 254(b)(1) that quality service remain "affordable"[32] is significant because, as the FCC has explained, "if the universal service burden is too high, the affordability of service will be placed in jeopardy, undermining the very purpose of the universal service program."[33]

Likewise, the principle enunciated in Section 254(b)(5) (and Section 254(d)) that USF mechanisms be not only "specific" and "predictable," but also "sufficient" imposes an obligation to ensure that the Fund is large enough, but not too large, to achieve the statutory goals. Addressing judicial decisions discussing the text of Section 254, the FCC thus defined the term to mean "an affordable and sustainable amount of support that is adequate, *but*

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[32] *See also* 47 U.S.C. § 254(i) ("The Commission … should ensure that universal service is available at rates that are just, reasonable, and affordable.").

[33] *Lifeline and Link Up Reform and Modernization, et al.*, 27 FCC Rcd. 6656, ¶ 37 (2012) ("*2012 Lifeline Modernization Order*").

no greater than necessary, to achieve the goals of the universal service program."[34] The Fifth Circuit itself has read this language to confirm that "excessive funding may itself violate the sufficiency requirements." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

Section 254, moreover, provides additional specific guidance as to the amount that universal service subsidies should reduce end-user rates, again limiting the potential size of the universal service fund. Supported services for consumers in high-cost areas and low-income consumers should be "at rates that are reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3). Rural health care providers should be served at rates "reasonably comparable" to those for similar services in urban areas in the same state. *Id.* § 254(h)(1)(A). Schools and libraries "shall" receive service at "rates less than the amounts charged for similar services to other parties," through a discount "appropriate and necessary to ensure affordable access to and use of such services." *Id.* § 254(h)(1)(B). And for access to "advanced services"—which includes broadband Internet access for schools, libraries, and hospitals[35]—the statute directs the FCC to establish rules that account for what is "economically reasonable." 47 U.S.C. § 254(h)(2)(A). Four years ago, Congress passed legislation confirming the FCC's

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[34] *High Cost Universal Service Support, et al.*, 25 FCC Rcd. 4072, ¶¶ 3, 30 (2010) (emphasis added).

[35] *See Modernizing the E-rate Program for Schools and Libraries*, 29 FCC Rcd. 8870, ¶¶ 68-70 (2014); *Rural Health Care Support Mechanism*, 27 FCC Rcd. 16778, ¶ 39 (2012).

"congressional mandate to achieve the universal service goal for broadband" and tasking the FCC with preparing a report on how to improve the Fund.[36]

Consistent with this substantial legislative guidance, the FCC has repeatedly concluded that Section 254 constrains the Commission's decision-making. For instance, the FCC has established annual monetary caps for the USF programs to fulfill its "statutory obligation to create a specific, predictable, and sufficient universal service support mechanism."[37] Likewise, the FCC declined to extend support to rural home care providers, explaining that Section 254(h) limited support to statutorily defined health care providers.[38] Similarly, just last year, the FCC rejected calls for it to support certain broadband wireless technologies because, as it explained, it "remain[s] focused on the statutory obligation to establish rules that enhance access to the extent it is 'economically reasonable.'"[39]

Moreover, contrary to the Fifth Circuit's suggestion that Section 254 is so lacking in guidance that "no reviewing court could ever possibly invalidate any FCC action," Pet. App. 40a-41a, the Fifth Circuit and other federal courts have enforced Section 254's limits on multiple occasions. *See, e.g.*,

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[36] IIJA § 60104(c)(1)-(3).

[37] *1997 Universal Service Order* ¶ 529 (establishing initial cap for the E-Rate program); *id.* ¶ 705 (establishing initial cap for the Rural Health Care program).

[38] *Id.* ¶ 656.

[39] *Addressing the Homework Gap Through the E-Rate Program*, FCC 24-76, WC Docket No. 21-31, ¶ 25 (rel. July 29, 2024) (citing 47 U.S.C. § 254(h)(2)(A)).

TOPUC I, 183 F.3d at 425 (reversing FCC requirement for incumbent local exchange carriers to recover USF contributions through "access charges" as opposed to an "explicit surcharge" because "the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support"); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1202 (10th Cir. 2001) (remanding to define "reasonably comparable" and "sufficient" in a manner consistent with Section 254); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234, 1236-37 (10th Cir. 2005) (remanding again for FCC to "articulate a definition of 'sufficient' that appropriately considers the range of principles identified in the text of the statute" and because the definition of "reasonably comparable" rested on an "impermissible statutory construction").

Importantly as well, these cases predate *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). That decision reinforces the importance of the statutory guardrails that courts can and do impose by enforcing the extensive prescriptive language of Section 254. Reviewing courts will now exercise "independent judgment in deciding whether [the FCC] has acted within its statutory authority." *Id.* at 2273. And if an issue rises to the level of a "major question," courts will be especially careful to ensure that delegations are implemented within permissible bounds. *See Gundy*, 588 U.S. at 167 (Gorsuch, J., dissenting) ("we apply the major questions doctrine in service of" nondelegation principles).

B. The Fifth Circuit's Contrary Assessment of Section 254 Disregards the Significant Constraints on FCC Discretion.

The Fifth Circuit majority's contrary analysis of Section 254 is inconsistent with the statute's text and surrounding context.

To begin, the Fifth Circuit suggests that Section 254's definition of "universal service" is not "meaningful" because the concept of "universal service" is not "sufficiently intelligible." Pet. App. 26a. But the statutory text belies that conclusion. As noted above, Congress defined universal service to be an evolving level of "telecommunications services," which is a defined term, *see* 47 U.S.C. § 153(53), and the statute generally authorizes support only for those services and other services such as broadband that use the supported facilities. *See id.* § 254(e); *supra* pp.21-22.[40]

In addition, Section 254(c) specifies nearly mathematical criteria for FCC use in determining whether a particular service qualifies for universal service support. As noted, those criteria include whether the service is subscribed to "by a substantial majority of residential customers" and is "being deployed in public telecommunications networks by telecommunications carriers." 47 U.S.C. § 254(c)(1)(B)-(C).

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[40] As noted above, Section 254(c) authorizes the FCC to provide additional support for schools, libraries, and health care providers, but only where that is consistent with the policies in Section 254(h). *See supra* n.31.

Section 254(c) further mandates that the FCC consider whether a particular service is "essential to education, public health, or public safety." *Id.* § 254(c)(1)(A). Although the Fifth Circuit suggested without explanation that "essential" is not a meaningful direction, Pet. App. 29a, that is a common word that can be readily understood in accordance with its plain meaning. *See* American Heritage Dictionary (5th ed. 2022) ("1. Constituting or being part of the nature or essence of something; inherent … 2. Fundamentally important or necessary … ."). The FCC thus readily applied that term in 1997 in establishing nine core services supported by the federal universal service mechanisms.[41] For instance, the FCC concluded that single-party service was "essential to public health and safety in that it allows residential consumers access to emergency services without delay."[42]

Beyond that, as discussed above and as the Fifth Circuit previously explained, the fact that support should be "sufficient" to preserve and advance universal service itself limits the Fund to enough support, but not too much, to achieve Congress's objectives. *See supra* pp.23-24. Although, as the Fifth Circuit noted, that requirement may not mandate support that precisely "'equal[s] the actual costs incurred'" by each carrier, Pet. App. 27a (quoting *TOPUC I*, 183 F.3d at 412), that is far from failing to provide any meaningful limitation on FCC action. Indeed, in the portion of *TOPUC I* the circuit court majority cited, the Fifth Circuit noted that, as used in Section 254, "sufficiency" was a "*direct statutory*

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[41] *See 1997 Universal Service Order* ¶¶ 61-83.
[42] *Id.* ¶ 62.

command." *Id.* at 95a. And in that case, the Fifth Circuit approved the FCC's use of "forward-looking costs" rather than historical costs, which *reduces* the amount of support carriers receive and the size of the Fund. *See* 183 F.3d at 411; *see also Verizon Commc'ns v. FCC*, 535 U.S. 467, 475 (2002) (affirming the FCC's reliance on forward-looking costs to set just and reasonable rates under 47 U.S.C. § 252(d)(1), which was also part of the 1996 Act).

Similarly, the specific principles that Congress required the FCC to "base" its "policies" on in Section 254(b) cannot be disregarded on the basis that they are "aspirational." Pet. App. 28a. While it is undoubtedly the case that those principles cannot "overrid[e] other portions of the Act," *TOPUC I*, 183 F.3d at 421, the FCC in fact "must work to achieve each one unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC's authority." *Qwest*, 258 F.3d at 1199.

To be sure, as the Fifth Circuit noted (Pet. App. 28a), the FCC has authority to adopt additional principles. Those principles themselves, however, must be "necessary and appropriate for the protection of the public interest" and "consistent with this chapter," which includes all the limitations discussed above. 47 U.S.C. § 254(b)(7). Accordingly, in nearly three decades, the FCC has adopted only two such principles—advancing competitive neutrality and using universal service funds to support advanced services—both of which the FCC adopted because they are deeply grounded in the text

of the statute.[43] No party has challenged the FCC's judgments on those points in this case.

Section 254 plainly does not permit the FCC to use the Fund "to create an endowment … to fund whatever projects it might like." Pet App. 27a. Carriers may use universal service funding "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). And as discussed, Section 254 limits which services qualify as part of "universal service." *See* 47 U.S.C. § 254(c).

Nor is there significant ambiguity regarding "which schools and libraries should receive subsidized services." Pet. App. 29a. The statute makes clear that *all* schools and libraries that are eligible and that meet the statutory definition should receive subsidized service. Section 254(h)(1)(B) states that "*[a]ll* telecommunications carriers" receiving a "bona fide" request from "elementary schools, secondary schools, and libraries," "*shall*" provide the relevant supported services at the relevant discounted rate. (emphases added). *See also* 47 U.S.C. § 254(h)(4), (h)(7)(A) (defining elementary and secondary school and providing criteria for school and library eligibility).

Nor was the Fifth Circuit correct in suggesting either that (1) "the only real constraint" is Section 254(b)(1)'s reference to rates remaining "affordable" or (2) that that term is "*no guidance* whatsoever." Pet. App. 30a (internal quotation marks omitted). As explained, there are multiple additional

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[43] *See 1997 Universal Service Order* ¶ 43; *2011 USF Transformation Order* ¶¶ 10, 44, 64-65.

constraints on the size of the universal service contribution factor. *See supra* pp.20-24. Moreover, and contrary to the Fifth Circuit majority's understanding, the word "affordable" is not rendered meaningless when a product is so necessary that demand is "uncommonly inelastic." Pet. App. 30a. The FCC resolved this precise issue nearly 30 years ago, concluding that it must "consider both the absolute and relative components when making the affordability determinations required under section 254."[44] In determining affordability, it thus must assess not only rates, but also "non-rate factors, such as consumer income levels, that can be used to assess the financial burden" created by subscribing to a particular service.[45]

C. Section 254 Is Consistent with Precedent and Constitutional History and Would Satisfy Any Reasonable Nondelegation Test.

Precedent strongly supports the conclusion that Section 254 does not improperly delegate legislative power in violation of Article I, Section 1's Vesting Clause. That is equally true even under the more restrictive delegation standards advocated by some Justices.

1. Although the Vesting Clause prohibits delegating Congress's unique legislative power to an agency, it has long been established that Congress may lawfully delegate "the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). Thus, the

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[44] *1997 Universal Service Order* ¶ 110.
[45] *Id.*

Court has repeatedly held that there is no constitutional issue where Congress identifies an "'intelligible principle' to guide the delegee's exercise of authority." *Gundy*, 588 U.S. at 145 (plurality) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). And as the Court has explained in language that is particularly apt for the fast-changing world of telecommunications, "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).

The Court's application of that principle demonstrates that Section 254 is a permissible delegation. The Court, for instance, has upheld the FCC's issuance of regulations governing radio licensing based on the "public interest, convenience, or necessity." *NBC v. United States*, 319 U.S. 190, 215 (1943) (citing 47 U.S.C. §§ 307(a), (d), 309(a), 310, 312). In so doing, the Court rejected the claim that the "public interest" standard is "so vague and indefinite" that the "delegation is unconstitutional," explaining that "'[t]he purpose of the Act, the requirements it imposes, and the context of the provision'" make the statutory language more than a "'mere general reference to public welfare.'" *Id.* at 225-26 (quoting *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933)).

As discussed above, the specific directions imposed by the text of Section 254 are far more reticulated and prescriptive than the "public interest" standard upheld in *NBC*. *See NARUC*, 737 F.2d at 1129. Indeed, as it codified what services should be supported, Congress mandated that the

FCC consider a number of factual considerations *in addition to* the public interest. *See* 47 U.S.C. § 254(c)(1) (FCC "shall consider" what services are "essential" to education, health, or safety; are being "subscribed to by a substantial majority of residential consumers"; and are being "deployed in public telecommunications networks"). Beyond that, Congress provided guidance as to what kinds of services could be supported; which entities should be assessed to support those services; how those entities should be assessed; and how much support could be required, among many other things. *See, e.g.*, *id.* § 254(d), (e), (h). Unlike the statutory text at issue in *NBC*, Section 254 explicitly enumerates six principles Congress sought to advance. *See id.* § 254(b). And, as in *NBC*, these provisions must be understood in the context of the goals of the 1996 Act and the FCC's history of universal service regulation.

NBC is only one of a number of cases to approve delegations through language that is far more general than that at issue here. Many of those cases involve public utility regulations setting rates. *See, e.g.*, *Sunshine Anthracite*, 310 U.S. at 398 (approving delegation to set coal prices because "appropriateness of the criterion of the 'public interest' in various contexts … make it clear that there is a valid delegation of authority in this case"); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding authority of Administrator to promulgate regulations fixing prices of commodities that "'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' when, in his judgment, their prices 'have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act'") (quoting statute); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (approving

delegation to the EPA to set "ambient air quality standards" that "are requisite to protect the public health").

Contrary to the Fifth Circuit majority's suggestion, *NBC* cannot be disregarded on the basis that the "public owns the airwaves," so that "private people may use that resource only on terms the government sets." Pet. App. 35a-36a (cleaned up). The Executive has *not* exercised unique authority to act there without a congressional delegation: "Before 1927, the allocation of frequencies was left entirely to the private sector," and Congress established the Federal Radio Commission "to allocate frequencies among competing applicants." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77 (1969). Perhaps for that reason, the Fifth Circuit cites no language from *NBC* or any other case invoking such reasoning.

The Fifth Circuit also erred in suggesting that, unlike in the many other cases where this Court has approved delegations far less constrained than the one at issue here, the FCC lacks any "special agency expertise" relevant to universal service. Pet. App. 40a. In fact, this Court has for nearly a century acknowledged the FCC's (and its predecessor's) expertise in the fast-changing world of telecommunications and technology. *See Nelson Bros. Bond & Mortg. Co.*, 289 U.S. at 276 ("Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances."); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, (1978) (deference warranted for FCC's predictive factual determinations, as "forecast[s] of the direction in which future public interest lies

necessarily involves deductions based on the expert knowledge of the agency") (internal quotation omitted). Congress explicitly invoked that expertise in asking the FCC to "establish" the "evolving level of telecommunications services" that constitute universal service, "taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c).

The Fifth Circuit's suggestion that the constitutional analysis is different here because the USF contributions are allegedly a "tax" likewise runs counter to this Court's precedents. Pet. App. 19a-23a. The Court has held that there is no "different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 222-23 (1989).

2. Section 254 does not raise the same issues that concerned the Justices who dissented in *Gundy*. The statute in *Gundy* allowed the Attorney General to "specify the applicability" of registration requirements to sex offenders convicted before the statute's passage and "prescribe rules." 588 U.S. at 151, 177 (Gorsuch, J., dissenting). Justice Gorsuch concluded that the statutory language "gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country." *Id.* at 151. Section 254, as discussed above, bears no resemblance to that kind of language.

Likewise, Section 254 would satisfy the alternative test proposed by Justice Gorsuch in *Gundy*. In particular, Congress has "announced the controlling general polic[ies]" underlying Section 254. *Id.* at 157. Among other things, Congress has:

- Made the decision to support universal service and told the FCC what factors to consider in determining which particular "telecommunications services" and associated facilities to support. *See* 47 U.S.C. § 254(c)(1), (e).
- Defined which entities must pay fees to support universal service. *See id.* § 254(d).
- Established which entities are eligible to receive universal service support, criteria those entities must meet, and for what services they can use that funding. *See id.* §§ 214(e), 254(e).
- Adopted a series of principles that the FCC must follow in making decisions under Section 254. *See id.* § 254(b)(1)-(6).
- Created, through those principles and other explicit statutory text, meaningful limits on the extent to which specific services can be funded, thus limiting the size of the fund. *See supra* pp.21-24.

In all these instances, Congress has "set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting) (quoting *Yakus*, 321 U.S. at 426).

The decisions left to the FCC are thus reasonably understood to be authorizations to apply the statutory text and policies to evolving factual circumstances—or, in other words, to "'fill up the details.'" *Id.* at 157 (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825)); *see id.* at 158 (agencies permitted to engage in "fact-finding"). The FCC determines, for instance, what services have "been subscribed to by a

substantial majority of residential customers" and are "being deployed in public telecommunications networks by telecommunications carriers." 47 U.S.C. § 254(c)(1)(B)-(C); *see, e.g.*, *1997 Universal Service Order* ¶ 63 (concluding voice service should be covered "consistent with section 254(c)(1)"); *2012 Lifeline Modernization Order* ¶¶ 397-98 (declining to make payphones eligible for Lifeline support upon finding that they were not used by a substantial majority of residential consumers).

The agency likewise determines what is necessary for health care providers and those living in high-cost areas to have access at rates that are "reasonably comparable" to access in urban areas, 47 U.S.C. § 254(b)(3), (h)(1)(A), and for schools and libraries to have access at rates "less than the amounts charged for similar services to other parties," *id.* § 254(h)(1)(B). For instance, in the Rural Health Care program, the FCC determines what constitutes sufficient funding by subtracting the urban rate in the state from the rural rate for similar (*i.e.*, "reasonably comparable") services. *See* 47 C.F.R. §§ 54.603-605. Similarly, the FCC fulfills its statutory directive in the E-Rate program through its "lowest corresponding price" rules. *See id.* §§ 54.500, 54.511(b) (prohibiting providers from submitting bids higher than the price charged to non-residential customers that are similarly situated to the particular school or library "for similar services"). The fact that the FCC's granular implementation of the program flows directly from the statutory directives cannot be squared with the Fifth Circuit's conclusion that Congress left the agency at sea, without significant guidance.

3. The delegation of authority in Section 254 is also consistent with the practice of the early Congresses, which this Court has repeatedly emphasized are a good guide to the original understanding of the Constitution. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

The practice of those Congresses demonstrates that the Founders understood that delegations far broader than the one at issue here were consistent with the constitutional structure. For instance, the First Congress passed a bill to authorize the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General (or any three of them), to purchase an unspecified amount of certain debt

> with the approbation of the President of the United States … in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act: *Provided,* That the same be made openly, and with due regard to the equal benefit of the several states … .

Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

Similarly, in 1798, the Fifth Congress—which still included in its ranks many Framers[46]—adopted a direct tax to be apportioned among the states.

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[46] *See Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) ("[e]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning," and finding it "dispositive" that "[w]ithin 15 years of the founding, both the House of Representatives and the Senate adopted … rules" akin to those at issue in the case) (cleaned up).

See Act of July 9, 1798, ch. 70, § 8, 1 Stat. 580, 585. Congress levied the tax, but then allowed tax commissioners to "revise, adjust and vary, the valuations of lands and dwelling-houses in any assessment district … [at] such a rate … as shall appear to be just and equitable: *Provided,* that the relative valuations of the different lots or tracts of land, or dwelling-houses, in the same assessment district, shall not be changed or affected." *Id.* § 22, 1 Stat. at 589. In other words, Congress again enacted a delegation far broader than the one at issue here: "[F]ederal administrators had the power to raise or lower the tax assessments of thousands of property owners all at once, by any percentage amount, so long as the change 'shall appear to be just and equitable.'" Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1335 (2021) (quoting § 22);[47] *see also* Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 332-49 (2021) (collecting examples of broad delegations in the First Congress); Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 Colum. L. Rev. 2323 (2022).

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[47] Professor Parillo responded to the arguments of other scholars regarding his earlier paper in Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue With My Critics*, 71 Drake L. Rev. 367 (2024).

III. The FCC Exercises Direction and Control Over the Administrator.

The Administrator's role providing ministerial support to the FCC in managing the Fund is likewise well within the bounds of this Court's private nondelegation precedents. The Fifth Circuit majority's suggestion to the contrary is based on an "exaggerated conception" of the Administrator's "role and discretion." Pet. App. 103a (Stewart, J., dissenting).

A. In determining whether a delegation to a private actor is permissible, this Court has focused on whether "law-making is … entrusted to" a private actor and whether a private actor "function[s] subordinately to" a government actor with the ability to exercise "authority and surveillance" over it. *Sunshine Anthracite*, 310 U.S. at 399. In this case, those factors point decisively toward the lawfulness of the Commission's reliance on the Administrator. Additionally, although the Fifth Circuit analyzed factors that go beyond this Court's precedents, *see* Pet. App. 46a-47a, those factors likewise support the lawfulness of the Administrator's ministerial role.

Most significantly, responsibility for carrying out Congress's direction in Section 254 is "not entrusted to" the Administrator; rather, the Administrator remains subordinate to the FCC in all respects. *Sunshine Anthracite*, 310 U.S. at 399; *see* Pet. App. 46a (agency "must have final decision-making authority"). The FCC adopts the rules defining the scope of the various Fund programs, the eligible recipients consistent with the statute, and the amounts of the subsidies (including through rules governing competitive bidding to determine subsidy amounts for particular recipients). Those rules

include "eligibility requirements," "caps on particular types of support," and "precise formulas for calculating the amount of the subsidy" in particular programs." FCC Pet. 20 (citing 47 C.F.R. §§ 54.410, 54.507, 54.604-606).

Moreover, FCC rules explicitly prohibit the Administrator from "mak[ing] policy, interpret[ing] unclear provisions of the statute or rules or interpret[ing] the intent of Congress." 47 C.F.R. § 54.702(c). Where the Administrator is in doubt, it "shall seek guidance from the Commission." *Id.*

Regarding the quarterly contribution factor in particular, the factor "shall be determined by *the Commission*," not the Administrator. *Id.* § 54.709(a)(2) (emphasis added). The FCC rules and decisions regarding the Fund programs provide the foundation each quarter for determining both inputs into the factor: the Fund programs' needs and the assessable contribution base.

The Administrator, by contrast, plays only a ministerial role. For example, on the demand side, the Administrator prepares the "quarterly projected costs of the universal service support mechanisms" and the "projected expenses for the federal universal service support mechanisms for each quarter." *Id.* § 54.709(a)(2), (3). But those projections are no more than calculations based on decisions already made by the FCC, together with information provided by private parties under the FCC's rules. In this case, for example, the Administrator determined the support amounts for the various Fund programs by walking through the FCC rules and associated decisions for each program. *See, e.g.*, J.A. 21-33, 46-49. The FCC's caps and other funding limits further factor into each program's demand calculation. *See,*

e.g., *id.* at 46 (noting FCC "cap for Funding Year 2021" in Rural Health Care program).

On top of that, the "[t]otal projected expenses … for each quarter must be approved by the Commission before they are used to calculate the quarterly contribution factor," and the Commission "reserves the right 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).

Likewise, on the contribution-base side the Administrator "compile[s]" the "total subject revenues" to which the contribution factor will apply each quarter, "based on information contained in the Telecommunications Reporting Worksheets," the content of which is in turn mandated by the Commission's own rules. *Id.* § 54.709(a)(2); *see id.* § 54.711(a) (FCC rule requiring that contributors "calculate[] and file[]" their contributions based on this Worksheet as "published in the Federal Register" by the FCC). In this case, again, the Administrator's filing shows that the contribution base "was derived" from information on "Form 499-Q submissions" the FCC requires). Pet. App. 158a. *See generally* U.S. Gov't Accountability Off., GAO-24-106967, *Administration of Universal Service Programs Is Consistent with Selected FCC Requirements*, app. II at 21-22 (2024).

Additionally, the FCC supervises all the Administrator's functions. Pet. App. 47a. In addition to the FCC's direct role in determining the contribution factor and reviewing the Administrator's projections, the FCC regularly exercises its authority to review the Administrator's ministerial handling of claims for support. *See* 47

C.F.R. §§ 54.719 (parties may seek review), 54.723 (review of Administrator decisions is de novo). The Commission has not hesitated in exercising that authority and issues a monthly document disposing of appeals of the Administrator's actions. In April 2024, the FCC granted 27 of 53 E-Rate and Rural Health Care appeals. *See Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, 39 FCC Rcd. 2989, 2992 n.12 (2024) ("[c]onsistent with our obligation to conduct a de novo review of appeals of decisions made by USAC, we grant this request for review" based on "disagree[ment] with USAC's conclusion"); *see also Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, 34 FCC Rcd. 9870, 9872 n.9 (2019) ("direct[ing] USAC" to review remanded applications within 90 days); *Request for Review of a Decision of the Universal Service Support Mechanism*, 23 FCC Rcd. 15413, 15416 ¶ 7 (2008) (reviewing Administrator decision and granting waiver in order to "promote[] the statutory requirements of section 254(h)"). As Judge Stewart noted in dissent, these FCC orders modifying the support levels for Fund recipients are "quite routine[]." Pet. App. 101a.

Other forms of FCC supervision and control abound. *See, e.g.*, 47 C.F.R. §§ 54.702(g) (annual report from Administrator to FCC and Congress), 54.702(h) (quarterly report to FCC "on the disbursement of … program funds"), 54.702(j) (FCC has "full access to the data collected" in Administrator's duties), 54.709(b) (FCC "may instruct the Administrator" on how to handle "excess contributions" beyond steps already provided by rule).

B. Contrary to the Fifth Circuit's understanding, the FCC "actually exercise[s]" its authority each quarter to adopt the contribution factor. Pet. App. 47a (emphasis omitted). The Fifth Circuit stated that "USAC's projections take legal effect without formal FCC approval," *id.* at 49a, but that is inconsistent with FCC rules and the actual process for adopting the contribution factor. The FCC's Office of Managing Director—not the Administrator—issues the Public Notice announcing the proposed contribution factor, and the absence of any further action within fourteen days of the release of that Public Notice means the projections and resulting contribution factor are "deemed approved by the Commission." 47 C.F.R. § 54.709(a)(3). It is thus the FCC's rules that govern approval and modifications.

The Fifth Circuit also stated that the "'approval' process for [the Administrator's] proposals plays out just days before the new quarter begins," leaving the FCC "no real choice but to accept [the] proposed figures." Pet. App. 50a n.17. That, too, is inaccurate. The Administrator must submit its quarterly projections of demand (including program administrative expenses) and the "basis for those projections" to the FCC and its Office of Managing Director "at least sixty (60) calendar days" before the start of each quarter, and must submit the "total contribution base ... at least thirty (30) days before." 47 C.F.R. § 54.709(a)(3). In addition, the Commission's Office of Managing Director "shall review" both submissions and provide "any necessary feedback" *before* either is "publicly filed with the FCC." *FCC/USAC MOU* ¶ 13. And after the Commission's own Office of Managing Director releases the proposed contribution factor, the Commission reserves time within which it can revise

the projected demand and administrative expenses amounts where necessary to "serve the public interest." 47 C.F.R. § 54.709(a)(3). That the window for this final step is 14 days does not support a conclusion that the Commission cannot or does not exercise its authority over the Administrator.

The Fifth Circuit also stated that the relative infrequency with which the Commission "substantive[ly] change[s]" the Administrator's projections means that it is a mere rubber stamp. Pet. App. 50a (emphasis omitted). The legally relevant question is whether the FCC has such authority, not the frequency with which it exercises it. *See Sunshine Anthracite*, 310 U.S. at 399. Regardless, as discussed above, the Administrator's projections are based on extensive FCC rules governing the various Universal Service Fund programs. *See supra* pp.11-12. It is unsurprising that the FCC, having established the policies and determined the amount of necessary revenues and then tasked the Administrator with calculation and other ministerial tasks to implement those determinations, does not frequently alter the output of that process. The Fifth Circuit's characterization of this system as an unsupervised "blank check" is thus incorrect. Pet. App. 53a.

In any event, the government *has* identified multiple occasions—including before this litigation began—on which it has departed from the Administrator's projections for the quarterly contribution factor. *See* FCC Pet. 23; *Proposed Fourth Quarter 2023 Universal Service Contribution Factor*, 38 FCC Rcd. 8362, 8362-63 (2023); *Proposed Third Quarter 2023 Universal Service Contribution Factor*, 38 FCC Rcd. 5670, 5670-71 (2023); *Revised*

Second Quarter 2003 Universal Service Contribution Factor, 18 FCC Rcd. 5097, 5097-98 (2003). The FCC has also discussed its own revisions to the methodology for calculating the contribution factor in public notices for the proposed contribution factor. *See, e.g.*, *Proposed First Quarter 2002 Universal Service Contribution Factor*, 16 FCC Rcd. 21334, 21334 (2001) (FCC "reduce[d] the interval between the accrual of revenues and the assessment of universal service contributions based on those revenues" from 12 months to 6 months). And at various times, the Commission has "adjust[ed] the contribution factor … if USAC collect[ed] insufficient funds, or if USAC collect[ed] funds in excess of actual expenses in the prior quarter." *Universal Service Contribution Methodology; A National Broadband Plan for Our Future*, 27 FCC Rcd. 5357, ¶ 351 (2012). In multiple ways, the FCC revises the Administrator's projections or the contribution factor itself.

The Fifth Circuit also suggested that the possibility that "disbursements often do not comply with FCC policy" means that the FCC's role in defining the rules and scope of Fund programs "does nothing to limit the revenue FCC allows private entities to exact from consumers." Pet. App. 51a. There is no basis in this Court's precedent for such a standard—an improper payment does not give rise to a private nondelegation doctrine issue. *See id.* at 122a (Higginson, J., dissenting) (waste and fraud have "never been enough to declare a coequal branch's act unconstitutional"). In any event, as discussed above, the FCC's rules for Fund programs provide significant oversight into the relevant aspects of how recipients spend Fund support. *See, e.g.*, 47 C.F.R. § 54.622 (extensive rules regarding the

competitive bidding process Rural Health Care program participants must undertake to request services and select a provider); *id.* §§ 54.801-806 (rules regarding competitive bidding, coverage obligations, reporting requirements, and more for Rural Digital Opportunity Fund in High Cost program). The Administrator's work also is subject to independent audit (with the participation of the FCC's Office of Managing Director). *See id.* § 54.717.

C. The Fifth Circuit also stated that Section 254 "does not authorize" the role the FCC has assigned to the Administrator. Pet. App. 55a. It acknowledged, however, that the challengers did not bring a statutory claim. *Id.* at 63a & n.21. It also recognized that its concerns regarding statutory authorization do not apply to delegations of "ministerial tasks." *Id.* at 56a-58a. As discussed above, the Administrator's role is ministerial—the FCC adopts the contribution factor, and the Administrator's role is limited to providing inputs into that determination, subject to FCC approval and numerous forms of supervision. Whether Section 254 or other provisions of the Communications Act authorize the FCC to assign tasks to the Administrator is therefore immaterial to deciding the private nondelegation issue in this case.[48]

IV. The Court Should Reject the Fifth Circuit's "Combination" Approach.

Despite its concerns regarding the public and private nondelegation issues, the Fifth Circuit

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[48] In any event, in responding to such a statutory challenge, the FCC may point to 47 U.S.C. §§ 154(i), 201(b), and other provisions.

concluded that it "need not resolve either question in this case" because, in its view, "*the combination* of Congress's sweeping delegation to FCC and FCC's unauthorized subdelegation to USAC violates the Legislative Vesting Clause in Article I, § 1." Pet. App. 64a.

A. As discussed above, the majority's reasons for being "highly skeptical," Pet. App. 64a, of Congress's delegation to the FCC are without merit. Rather, as the principal dissent concluded, the text and context of Section 254 establish "a clear intelligible principle delimiting agency discretion." *Id.* at 97a. Likewise, the court of appeals' reasons for being "skeptical" of the FCC's use of the Administrator in a subordinate capacity do not survive scrutiny. Rather, as Judge Stewart put it in dissent, the majority adopted an "exaggerated conception of USAC's role and discretion to create a private nondelegation doctrine problem where none exists." *Id.* at 103a. The combination of these two non-violations is not problematic.

B. In addition, the Fifth Circuit's approach is inconsistent with how this Court addressed challenges in *Sunshine Anthracite*, *Currin*, and other cases.

Sunshine Anthracite—like this case—involved both public and private nondelegation claims. Yet, this Court addressed those issues individually, rather than assessing the "combination" of the two issues as the Fifth Circuit would. The Court first concluded that Congress's authorization for the National Bituminous Coal Commission to "fix minimum prices" and "establish maximum prices" for members of the "Bituminous Coal Code" was permissible, holding that "in the hands of experts the

criteria which Congress has supplied are wholly adequate." 310 U.S. at 388-89, 397-98. Separately, the Court concluded that "law-making is not entrusted to the industry." *Id.* at 399. Were the Fifth Circuit's approach correct, the Court would have gone on to consider whether, while "not independently unconstitutional," the alleged public and private nondelegation problems nonetheless "*combine[d]* to violate the Constitution's separation of powers." Pet. App. 64a.

Currin likewise considered both public and private nondelegation issues. Congress authorized the Secretary of Agriculture to designate markets where standards for tobacco would apply, subject to the condition that growers in that market vote in favor. *See* 306 U.S. at 6. The Court separately considered whether that scheme "involve[d] any delegation of legislative authority" to the "growers of tobacco," and concluded it did not. *Id.* at 15. The Court then concluded there was also no "unconstitutional delegation to the Secretary of Agriculture." *Id.* at 16. The Court did not consider whether the combination of those features separately violated the separation of powers.

The Fifth Circuit's attempt to distinguish *Sunshine Anthracite* and *Currin* because "the Court found the Government had not delegated any legislative power to any private entity" fails. Pet. App. 78a-79a. The Fifth Circuit's "combination" approach was necessary in this case *because* that court did not hold that Section 254 or the FCC's administration of the Fund violates either the public or private nondelegation doctrine. *Sunshine Anthracite* and *Currin* similarly rejected both public and private nondelegation challenges. The Fifth

Circuit's approach thus would have called for an analysis whether the "not independently unconstitutional" parts, *id.* at 64a, were an unconstitutional whole.

Beyond the specific context of public and private nondelegation challenges, this Court has often considered multiple separation-of-powers challenges (and other constitutional challenges) in the same case. As in *Sunshine Anthracite*, the Court did not analyze whether a "combination" of non-violations together amounted to a constitutional violation.

In *Mistretta*, for example, prisoners challenging the constitutionality of the U.S. Sentencing Commission raised several "separation of powers" concerns, in addition to arguing that "Congress [had] delegated excessive authority to the Commission to structure the [Sentencing] Guidelines." 488 U.S. at 370. This Court first addressed and rejected the nondelegation doctrine challenge, even while agreeing that the Sentencing Commission "enjoys significant discretion in formulating guidelines." *Id.* at 377. "Having determined" that the nondelegation challenge failed, the Court "turn[ed] to" the multiple distinct separation-of-powers challenges regarding the "[l]ocation" and "[c]omposition" of the Commission and the President's ability to "remove" its members. *Id.* at 380, 384, 397, 409. Contrary to the Fifth Circuit's approach here, the Court addressed the nondelegation doctrine issues and each of the purported separation-of-powers violations separately, without considering whether the combination of these independently constitutional

facets might together violate the Constitution. *See*, *e.g.*, *id.* at 381-411.[49]

C. Neither *Seila Law* nor *Free Enterprise Fund* requires that courts assess the "combination" of multiple, individually constitutional, aspects of any challenged statutory or regulatory scheme. Both cases addressed a particular separation-of-powers question not at issue here: what restrictions on the President's authority to remove officers are permissible, consistent with the Constitution's vesting of the "executive Power" in the President. *See Seila Law*, 591 U.S. at 227 (quoting *Free Enter. Fund*, 561 U.S. at 483).

The removal question at issue in *Seila Law* was whether the single head of an "agency that wields significant executive power" could constitutionally enjoy protection from at-will removal by the President. 591 U.S. at 204. While *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), had approved removal protections for "multimember

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[49] *See also, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 660 (1988) (considering whether provisions governing the function of an independent counsel violated the Appointments Clause of Article II or the "limitations of Article III" or otherwise "impermissibly interfere[d] with the President's authority under Article II in violation of the constitutional separation of powers); *Yakus*, 321 U.S. at 418 (considering multiple constitutional issues alongside a public nondelegation challenge); *J.W. Hampton, Jr.*, 276 U.S. at 404-07, 411-13 (considering challenges to both (1) Congress's grant of authority to the President to impose customs duties on certain goods and (2) whether such customs duties could be imposed for a purpose other than raising revenue).

expert agencies that do not wield substantial executive power" and *Morrison* had approved removal protection for "inferior officers with limited duties," the head of the Consumer Financial Protection Bureau fit neither description, and the Court was unwilling to "extend those precedents to th[is] 'new situation.'" 591 U.S. at 216-20. Thus, as Judge Higginson explained in dissent, the Court simply "applied precedent" and "declined to create a new" exception to the President's "otherwise 'unrestricted removal power.'" Pet. App. 117a (quoting *Seila Law*, 591 U.S. at 204).

Nor did *Free Enterprise Fund* establish an approach that supports the Fifth Circuit's combination theory. In that removal case, the statutory scheme provided that members of the Public Company Accounting Oversight Board were "substantially insulated from the [Securities and Exchange] Commission's control," and SEC commissioners were also understood to be protected from at-will removal. 561 U.S. at 486-87. For that reason, the Court was required to "consider a new situation not yet encountered" in its line of precedents on removal authority—"whether these separate layers of protection may be combined." *Id.* at 483. Because the "added layer of tenure protection" meant that the "President is stripped of the power [the Court's] precedents have preserved," the Court struck it down. *Id.* at 495-96; *see also id.* at 514 ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction … .").

Contrary to the Fifth Circuit's reading, however, *Free Enterprise Fund* did not purport to announce a "general principle" extending beyond a challenge to

multiple layers of removal protection. Pet. App. 66a. Indeed, *Free Enterprise Fund* itself also involved several additional challenges to the Board "under the Appointments Clause," 561 U.S. at 510, each of which the Court considered and rejected independently, without considering whether their combination might nonetheless violate the Constitution.

Moreover, removal issues are significantly different from nondelegation issues. As this Court explained, on account of the "second level of tenure protection" at issue in *Free Enterprise Fund*, "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, ha[d] full control over the Board." 561 U.S. at 496. Thus, even if both levels of tenure protection were acceptable by themselves, as was the case in *Free Enterprise Fund*, they combined to create a structure that necessarily limited the President's authority beyond permissible bounds.

In contrast, there is nothing inherently problematic about Congress delegating to an agency and the agency separately relying on another entity for some functions, subject to the agency's supervision. Even assuming *arguendo* that the FCC is not adequately supervising the Administrator, the FCC retains full authority to do so. Accordingly, this is not a case where "even" officials "whose conduct [the President] may review only for good cause" lack control over the Administrator. *Id.* And if a court were to determine that some agency lacked full control over the entity to which it delegated authority, the appropriate remedy would be to correct the impermissible delegation.

Finally, the harm in removal cases is cumulative, while the harm in public and private nondelegation cases is not. That is, each layer of tenure protection limits the President's ability to control his subordinates—each layer's harm is the same, with cumulative effect. In contrast, the harms in public nondelegation cases (Congress's improper delegation of its legislative powers) and the harm in private nondelegation cases (an agency's improper delegation of government power to private actors) are distinct and non-cumulative. Therefore, for example, a grant of authority by Congress that satisfies the public nondelegation doctrine is not affected by an agency's impermissible delegation of non-ministerial duties to a private party.

D. The Fifth Circuit's approach also would create serious workability problems, which in turn would lead to confusion in the lower courts. Most notably, the Fifth Circuit "offers no test" for adjudicating situations involving authorization for both government agencies and private parties providing ministerial support, Pet. App. 123a (Higginson, J., dissenting), let alone other separation-of-powers contexts. Neither *Free Enterprise Fund* nor *Seila Law* offered one, as neither case spoke so broadly as the Fifth Circuit concluded they did.

Indeed, this Court has raised workability concerns regarding such an interpretation of *Seila Law*, rejecting the argument that "the constitutionality of removal restrictions hinges on" the "relative importance of the regulatory and enforcement authority of disparate agencies." *Collins v. Yellen*, 594 U.S. 220, 253 (2021). "Courts are not well-suited to weigh" such matters. *Id.* Yet, the Fifth Circuit's approach would require courts to go far

beyond such issues, weighing the "relative importance" of various *constitutional* aspects of various statutory or regulatory schemes for determining whether their combination exceeds a thus-far undefined limit.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX

47 U.S.C. § 151 provides:

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. § 153 provides, in relevant part:

Definitions

For the purposes of this chapter, unless the context otherwise requires—

[…]

(50) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

[…]

(53) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 154 provides, in relevant part:

Federal Communications Commission

[…]

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. § 201 provides:

Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision

of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 205 provides:

Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C. § 214 provides, in relevant part:

Extension of lines or discontinuance of service; certificate of public convenience and necessity

[…]

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the

case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area

served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's

"study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

47 U.S.C. § 252 provides, in relevant part:

Procedures for negotiation, arbitration, and approval of agreements

[…]

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

47 U.S.C. § 254 provides:

Universal service

(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 ser vice 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.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost

areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(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.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C. 9121 et seq.].

(5) Requirements for certain schools with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented

for the school under subsection (*l*); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary school or a secondary school as defined in section 7801 of title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access

through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with Internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under

this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without Internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (*l*); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program

funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without Internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the

effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in section 7801 of title 20.

(B) Health care provider

The term "health care provider" means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics;

(vii) skilled nursing facilities (as defined in section 395i-3(a) of title 42); and

(viii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vii).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term "minor" means any individual who has not attained the age of 17 years.

(E) Obscene

The term "obscene" has the meaning given such term in section 1460 of title 18.

(F) Child pornography

The term "child pornography" has the meaning given such term in section 2256 of title 18.

(G) Harmful to minors

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of title 18.

(I) Technology protection measure

The term "technology protection measure" means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(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.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(l) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h), each school or library to which subsection (h) applies shall—

(A) adopt and implement an Internet safety policy that addresses—

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including

socalled "hacking", and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may—

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B).

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other

authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

47 U.S.C. § 307 provides, in relevant part:

Licenses

(a) Grant

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

[…]

(d) Renewals

No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

47 U.S.C. § 309 provides, in relevant part:

Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 310 provides:

License ownership restrictions

(a) Grant to or holding by foreign government or representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for aliens licensed by foreign governments; multilateral or bilateral agreement to which United States and foreign country are parties as prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the

Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of regional concentration rules for broadcast stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term "regional concentration rules" means the provisions of sections 73.35, 73.240, and 73.636 of title 47, Code of Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

47 U.S.C. § 312 provides:

Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Order to show cause

Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) Burden of proof

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) Procedure for issuance of cease and desist order

The provisions of section 558(c) of title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

(f) "Willful" and "repeated" defined

For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

(g) Limitation on silent station authorizations

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period,

notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness. Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

47 U.S.C. § 1302 provides:

Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of title 20.

47 C.F.R. § 54.410 provides:

Subscriber eligibility determination and certification.

(a) All eligible telecommunications carriers must implement policies and procedures for ensuring that their Lifeline subscribers are eligible to receive Lifeline services. An eligible telecommunications carrier may not provide a consumer with an activated device that it represents enables use of Lifeline-supported service, nor may it activate service that it represents to be Lifeline service, unless and until it has:

(1) Confirmed that the consumer is a qualifying low-income consumer pursuant to § 54.409, and;

(2) Completed the eligibility determination and certification required by this section and §§ 54.404 through 54.405, and completed any other necessary enrollment steps.

(b) ***Initial income-based eligibility determination.***

(1) Except where the National Verifier, state Lifeline administrator or other state agency is responsible for the initial determination of a subscriber's eligibility, when a prospective subscriber seeks to qualify for Lifeline using the income-based eligibility criteria provided for in § 54.409(a)(1) an eligible telecommunications carrier:

(i) Must not seek reimbursement for providing Lifeline to a subscriber, unless the carrier has received a certification of eligibility from the prospective subscriber that complies with the requirements set forth in paragraph (d) of this section and has confirmed the subscriber's income-based eligibility using the following procedures:

(A) If an eligible telecommunications carrier can determine a prospective subscriber's income-based eligibility by accessing one or more databases containing information regarding the subscriber's income ("income databases"), the eligible telecommunications carrier must access such income databases and determine whether the prospective subscriber qualifies for Lifeline.

(B) If an eligible telecommunications carrier cannot determine a prospective subscriber's income-based eligibility by accessing income databases, the eligible telecommunications carrier must review documentation that establishes that the prospective subscriber meets the income-eligibility criteria set forth in § 54.409(a)(1). Acceptable documentation of income eligibility includes the prior year's state, federal, or Tribal tax return; current income statement from an employer or paycheck stub; a Social Security statement of benefits; a Veterans Administration statement of benefits; a retirement/pension statement of benefits; an Unemployment/Workers' Compensation statement of benefit; federal or Tribal notice letter of participation in General Assistance; or a divorce decree, child support award, or other official document containing income information. If the prospective subscriber presents documentation of income that does not cover a full year, such as current pay stubs, the prospective subscriber must present the same type of documentation covering three consecutive months within the previous twelve months.

(ii) Must securely retain copies of

documentation demonstrating a prospective subscriber's income-based eligibility for Lifeline consistent with § 54.417, except to the extent such documentation is retained by the National Verifier.

(2) Where the National Verifier, state Lifeline administrator, or other state agency is responsible for the initial determination of a subscriber's eligibility, an eligible telecommunications carrier must not seek reimbursement for providing Lifeline service to a subscriber, based on that subscriber's income eligibility, unless the carrier has received from the National Verifier, state Lifeline administrator, or other state agency:

(i) Notice that the prospective subscriber meets the income-eligibility criteria set forth in § 54.409(a)(1); and

(ii) If a state Lifeline administrator or other state agency is responsible for the initial determination of a subscriber's eligibility, a copy of the subscriber's certification that complies with the requirements set forth in paragraph (d) of this section.

(iii) An eligible telecommunications carrier must securely retain all information and documentation provided by the state Lifeline administrator or other state agency consistent with § 54.417.

(c) ***Initial program-based eligibility determination.***

(1) Except in states where the National Verifier, state Lifeline administrator, or other state agency is responsible for the initial determination of a subscriber's program-based eligibility, when a prospective subscriber seeks to qualify for Lifeline service

using the program-based criteria set forth in § 54.409(a)(2) or (b), an eligible telecommunications carrier:

(i) Must not seek reimbursement for providing Lifeline to a subscriber unless the carrier has received a certification of eligibility from the subscriber that complies with the requirements set forth in paragraph (d) of this section and has confirmed the subscriber's program-based eligibility using the following procedures:

(A) If the eligible telecommunications carrier can determine a prospective subscriber's program-based eligibility for Lifeline by accessing one or more databases containing information regarding enrollment in qualifying assistance programs ("eligibility databases"), the eligible telecommunications carrier must access such eligibility databases to determine whether the prospective subscriber qualifies for Lifeline based on participation in a qualifying assistance program; or

(B) If an eligible telecommunications carrier cannot determine a prospective subscriber's program-based eligibility for Lifeline by accessing eligibility databases, the eligible telecommunications carrier must review documentation demonstrating that a prospective subscriber qualifies for Lifeline under the program-based eligibility requirements. Acceptable documentation of program eligibility includes the current or prior year's statement of benefits from a qualifying assistance program, a notice or letter of participation in a qualifying assistance program, program participation documents, or another official document

demonstrating that the prospective subscriber, one or more of the prospective subscriber's dependents or the prospective subscriber's household receives benefits from a qualifying assistance program.

(ii) Must securely retain copies of the documentation demonstrating a subscriber's program-based eligibility for Lifeline, consistent with § 54.417, except to the extent such documentation is retained by the National Verifier.

(2) Where the National Verifier, state Lifeline administrator, or other state agency is responsible for the initial determination of a subscriber's eligibility, when a prospective subscriber seeks to qualify for Lifeline service using the program-based eligibility criteria provided in § 54.409(a)(2) or (b), an eligible telecommunications carrier must not seek reimbursement for providing Lifeline to a subscriber unless the carrier has received from the National Verifier, state Lifeline administrator or other state agency:

(i) Notice that the subscriber meets the program-based eligibility criteria set forth in § 54.409(a)(2) or (b); and

(ii) If a state Lifeline administrator or other state agency is responsible for the initial determination of a subscriber's eligibility, a copy of the subscriber's certification that complies with the requirements set forth in paragraph (d) of this section.

(iii) An eligible telecommunications carrier must securely retain all information and documentation provided by the state Lifeline administrator or other state agency consistent with § 54.417.

(d) ***Eligibility certification form.*** Eligible telecommunications carriers and state Lifeline administrators or other state agencies that are responsible for the initial determination of a subscriber's eligibility for Lifeline must provide prospective subscribers Lifeline certification forms that provide the information in paragraphs (d)(1) through (3) of this section in clear, easily understood language. If a Federal eligibility certification form is available, entities enrolling subscribers must use such form to enroll a qualifying low-income consumer into the Lifeline program.

(1) The form provided by the entity enrolling subscribers must provide the information in paragraphs (d)(1)(i) through (vi) of this section:

(i) Lifeline is a federal benefit and that willfully making false statements to obtain the benefit can result in fines, imprisonment, de-enrollment or being barred from the program;

(ii) Only one Lifeline service is available per household;

(iii) A household is defined, for purposes of the Lifeline program, as any individual or group of individuals who live together at the same address and share income and expenses;

(iv) A household is not permitted to receive Lifeline benefits from multiple providers;

(v) Violation of the one-per-household limitation constitutes a violation of the Commission's rules and will result in the subscriber's de-enrollment from the program; and

(vi) Lifeline is a non-transferable benefit and the subscriber may not transfer his or her benefit to any other person.

(2) The form provided by the entity enrolling subscribers must require each prospective subscriber to provide the information in paragraphs (d)(2)(i) through (viii) of this section:

(i) The subscriber's full name;

(ii) The subscriber's full residential address, or, for a subscriber seeking to receive emergency communications support from the Lifeline program, a prior billing or residential address from within the past six months;

(iii) Whether the subscriber's residential address is permanent or temporary;

(iv) The subscriber's billing address, if different from the subscriber's residential address;

(v) The subscriber's date of birth;

(vi) The last four digits of the subscriber's social security number, or the subscriber's Tribal identification number, if the subscriber is a member of a Tribal nation and does not have a social security number;

(vii) If the subscriber is seeking to qualify for Lifeline under the program-based criteria, as set forth in § 54.409, the name of the qualifying assistance program from which the subscriber, his or her dependents, or his or her household receives benefits; and

(viii) If the subscriber is seeking to qualify for Lifeline under the income-based criterion, as set forth in § 54.409, the number of individuals in his or her household.

(3) The form provided by the entity enrolling subscribers shall require each prospective subscriber to

initial his or her acknowledgement of each of the certifications in paragraphs (d)(3)(i) through (viii) of this section individually and under penalty of perjury:

(i) The subscriber meets the income-based or program-based eligibility criteria for receiving Lifeline, provided in § 54.409;

(ii) The subscriber will notify the carrier within 30 days if for any reason he or she no longer satisfies the criteria for receiving Lifeline including, as relevant, if the subscriber no longer meets the income-based or program-based criteria for receiving Lifeline support, the subscriber is receiving more than one Lifeline benefit, or another member of the subscriber's household is receiving a Lifeline benefit.

(iii) If the subscriber is seeking to qualify for Lifeline as an eligible resident of Tribal lands, he or she lives on Tribal lands, as defined in 54.400(e);

(iv) If the subscriber moves to a new address, he or she will provide that new address to the eligible telecommunications carrier within 30 days;

(v) The subscriber's household will receive only one Lifeline service and, to the best of his or her knowledge, the subscriber's household is not already receiving a Lifeline service;

(vi) The information contained in the subscriber's certification form is true and correct to the best of his or her knowledge,

(vii) The subscriber acknowledges that providing false or fraudulent information to receive Lifeline benefits is punishable by law; and

(viii) The subscriber acknowledges that the subscriber may be required to re-certify his or her

continued eligibility for Lifeline at any time, and the subscriber's failure to re-certify as to his or her continued eligibility will result in de-enrollment and the termination of the subscriber's Lifeline benefits pursuant to § 54.405(e)(4).

(e) State Lifeline administrators or other state agencies that are responsible for the initial determination of a subscriber's eligibility for Lifeline must provide each eligible telecommunications carrier with a copy of each of the certification forms collected by the state Lifeline administrator or other state agency for that carrier's subscribers.

(f) ***Annual eligibility re-certification process*** —

(1) All eligible telecommunications carriers must annually re-certify all subscribers, except for subscribers in states where the National Verifier, state Lifeline administrator, or other state agency is responsible for the annual re-certification of subscribers' Lifeline eligibility.

(2) In order to re-certify a subscriber's eligibility, an eligible telecommunications carrier must confirm a subscriber's current eligibility to receive Lifeline by:

(i) Querying the appropriate eligibility databases, confirming that the subscriber still meets the program-based eligibility requirements for Lifeline, and documenting the results of that review; or

(ii) Querying the appropriate income databases, confirming that the subscriber continues to meet the income-based eligibility requirements for Lifeline, and documenting the results of that review.

(iii) If the subscriber's program-based or

income-based eligibility for Lifeline cannot be determined by accessing one or more eligibility databases, then the eligible telecommunications carrier must obtain a signed certification from the subscriber confirming the subscriber's continued eligibility. If the subscriber's eligibility was previously confirmed through an eligibility database during enrollment or a prior recertification and the subscriber is no longer included in any eligibility database, the eligible telecommunications carrier must obtain both an Annual Recertification Form and documentation meeting the requirements of paragraph (b)(1)(i)(B) or (c)(1)(i)(B) from that subscriber to complete the process. Eligible telecommunications carriers must use the Wireline Competition Bureau-approved universal Annual Recertification Form, except where state law, state regulation, a state Lifeline administrator, or a state agency requires eligible telecommunications carriers to use state-specific Lifeline recertification forms.

(iv) In states in which the National Verifier has been implemented, the eligible telecommunications carrier cannot re-certify subscribers not found in the National Verifier by obtaining a certification form from the subscriber.

(3) Where the National Verifier, state Lifeline administrator, or other state agency is responsible for recertification of a subscriber's Lifeline eligibility, the National Verifier, state Lifeline administrator, or state agency must confirm a subscriber's current eligibility to receive a Lifeline service by:

(i) Querying the appropriate eligibility databases, confirming that the subscriber still meets the program-based eligibility requirements for

Lifeline, and documenting the results of that review; or

(ii) Querying the appropriate income databases, confirming that the subscriber continues to meet the income-based eligibility requirements for Lifeline, and documenting the results of that review.

(iii) If the subscriber's program-based or income-based eligibility for Lifeline cannot be determined by accessing one or more eligibility databases, then the National Verifier, state Lifeline administrator, or state agency must obtain a signed certification from the subscriber confirming the subscriber's continued eligibility. If the subscriber's eligibility was previously confirmed through an eligibility database during enrollment or a prior recertification and the subscriber is no longer included in any eligibility database, the National Verifier, state Lifeline administrator, or state agency must obtain both an approved Annual Recertification Form and documentation meeting the requirements of paragraph (b)(1)(i)(B) or (c)(1)(i)(B) from that subscriber to complete the certification process. Entities responsible for recertification under this section must use the Wireline Competition Bureau-approved universal Annual Recertification Form, except where state law, state regulation, a state Lifeline administrator, or a state agency requires eligible telecommunications carriers to use state-specific Lifeline recertification forms, or where the National Verifier Recertification Form is required.

(4) Where the National Verifier, state Lifeline administrator, or other state agency is responsible for recertification of subscribers' Lifeline eligibility, the

National Verifier, state Lifeline administrator, or other state agency must provide to each eligible telecommunications carrier the results of its annual re-certification efforts with respect to that eligible telecommunications carrier's subscribers.

(5) If an eligible telecommunications carrier is unable to re-certify a subscriber or has been notified by the National Verifier, a state Lifeline administrator, or other state agency that it is unable to re-certify a subscriber, the eligible telecommunications carrier must comply with the de-enrollment requirements provided for in § 54.405(e)(4).

(g) ***One-Per-Household Worksheet.*** If the prospective subscriber shares an address with one or more existing Lifeline subscribers according to the National Lifeline Accountability Database or National Verifier, the prospective subscriber must complete a form certifying compliance with the one-per-household rule upon initial enrollment. Eligible telecommunications carriers must fulfill the requirement in this paragraph (g) by using the Household Worksheet, as provided by the Wireline Competition Bureau. Where state law, state regulation, a state Lifeline administrator, or a state agency requires eligible telecommunications carriers to use state-specific Lifeline enrollment forms, eligible telecommunications carriers may use those forms in place of the Commission's Household Worksheet. At re-certification, if there are changes to the subscriber's household that would prevent the subscriber from accurately certifying to paragraph (d)(3)(vi) of this section, then the subscriber must complete a new Household Worksheet. Eligible telecommunications carriers must mark subscribers as having completed a Household Worksheet in the National Lifeline Accountability Database if and only

if the subscriber shares an address with an existing Lifeline subscriber, as reported by the National Lifeline Accountability Database.

(h) ***National Verifier transition.*** As the National Verifier is implemented in a state, the obligations in paragraphs (b) through (g) of this section with respect to the National Verifier and eligible telecommunications carriers will also take effect.

(i) ***Survivors of domestic violence.*** All survivors seeking to receive emergency communications support from the Lifeline program must have their eligibility to participate in the program confirmed through the National Verifier. The National Verifier will also transition survivors approaching the end of their six-month emergency support period in a manner consistent with the requirements applied to eligible telecommunications carriers at paragraph (f) of this section, and the National Verifier will de-enroll survivors whose continued eligibility to participate in the Lifeline program cannot be confirmed, consistent with § 54.405(e)(6).

47 C.F.R. § 54.500 provides, in relevant part:

Terms and definitions.

[…]

Lowest corresponding price. "Lowest corresponding price" is the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.

47 C.F.R. § 54.507 provides:

Cap.

(a) ***Amount of the annual cap.*** The aggregate annual cap on federal universal service support for schools and libraries shall be $3.9 billion per funding year, of which $1 billion per funding year will be available for category two services, as described in § 54.502(a)(2), unless demand for category one services is higher than available funding.

(1) ***Inflation increase.*** In funding year 2016 and subsequent funding years, the $3.9 billion funding cap on federal universal service support for schools and libraries shall be automatically increased annually to take into account increases in the rate of inflation as calculated in paragraph (a)(2) of this section.

(2) ***Increase calculation.*** To measure increases in the rate of inflation for the purposes of this paragraph (a), the Commission shall use the Gross Domestic Product Chain-type Price Index (GDP-CPI). To compute the annual increase as required by this paragraph (a), the percentage increase in the GDP-CPI from the previous year will be used. For instance, the annual increase in the GDP-CPI from 2008 to 2009 would be used for the 2010 funding year. The increase shall be rounded to the nearest 0.1 percent by rounding 0.05 percent and above to the next higher 0.1 percent and otherwise rounding to the next lower 0.1 percent. This percentage increase shall be added to the amount of the annual funding cap from the previous funding year. If the yearly average GDP-CPI decreases or stays the same, the annual funding cap shall remain the same as the previous year.

(3) ***Public notice.*** When the calculation of the yearly average GDP-CPI is determined, the Wireline Competition Bureau shall publish a public notice in the FEDERAL REGISTER within 60 days announcing any increase of the annual funding cap including any increase to the $1 billion funding level available for category two services based on the rate of inflation.

(4) ***Filing window requests.*** At the close of the filing window, if requests for category one services are greater than the available funding, the Administrator shall shift category two funds to provide support for category one services. If available funds are sufficient to meet demand for category one services, the Administrator, at the direction of the Wireline Competition Bureau, shall direct the remaining additional funds to provide support for category two requests.

(5) ***Amount of unused funds.*** All funds collected that are unused shall be carried forward into subsequent funding years for use in the schools and libraries support mechanism in accordance with the public interest and notwithstanding the annual cap. The Chief, Wireline Competition Bureau, is delegated authority to determine the proportion of unused funds, if any, needed to meet category one demand, and to direct the Administrator to use any remaining funds to provide support for category two requests. The Administrator shall report to the Commission, on a quarterly basis, funding that is unused from prior years of the schools and libraries support mechanism.

(6) ***Application of unused funds.*** On an annual basis, in the second quarter of each calendar year, all funds that are collected and that are unused from prior years shall be available for use in the next full funding year of the schools and libraries mechanism in accordance with the public interest and

notwithstanding the annual cap as described in this paragraph (a).

(b) ***Funding year.*** A funding year for purposes of the schools and libraries cap shall be the period July 1 through June 30.

(c) ***Requests.*** The Administrator shall implement an initial filing period that treats all schools and libraries filing an application within that period as if their applications were simultaneously received. The initial filing period shall begin and conclude on dates to be determined by the Administrator with the approval of the Chief of the Wireline Competition Bureau. The Administrator shall maintain on the Administrator's Web site a running tally of the funds already committed for the existing funding year. The Administrator may implement such additional filing periods as it deems necessary.

(d) ***Annual filing requirement.***

(1) Schools and libraries, and consortia of such eligible entities shall file new funding requests for each funding year no sooner than the July 1 prior to the start of that funding year. Schools, libraries, and eligible consortia must use recurring services for which discounts have been committed by the Administrator within the funding year for which the discounts were sought.

(2) Installation of category one non-recurring services may begin on January 1 prior to the July 1 start of the funding year, provided the following conditions are met:

(i) Construction begins after selection of the service provider pursuant to a posted FCC Form 470,

(ii) A category one recurring service must depend on the installation of the infrastructure, and

(iii) The actual service start date for that recurring service is on or after the start of the funding year (July 1).

(3) Installation of category two non-recurring services may begin on April 1 prior to the July 1 start of the funding year.

(4) The deadline for implementation of all non-recurring services will be September 30 following the close of the funding year. An applicant may request and receive from the Administrator an extension of the implementation deadline for non-recurring services if it satisfies one of the following criteria:

(i) The applicant's funding commitment decision letter is issued by the Administrator on or after March 1 of the funding year for which discounts are authorized;

(ii) The applicant receives a service provider change authorization or service substitution authorization from the Administrator on or after March 1 of the funding year for which discounts are authorized;

(iii) The applicant's service provider is unable to complete implementation for reasons beyond the service provider's control; or

(iv) The applicant's service provider is unwilling to complete installation because funding disbursements are delayed while the Administrator investigates the application for program compliance.

(e) ***Long term contracts.*** If schools and libraries enter into long term contracts for eligible services, the

Administrator shall only commit funds to cover the pro rata portion of such a long term contract scheduled to be delivered during the funding year for which universal service support is sought.

(f) ***Rules of distribution.*** When the filing period described in paragraph (c) of this section closes, the Administrator shall calculate the total demand for both category one and category two support submitted by applicants during the filing period. If total demand for the funding year exceeds the total support available for category one or both categories, the Administrator shall take the following steps:

(1) ***Category one.*** The Administrator shall first calculate the demand for category one services for all discount levels. The Administrator shall allocate the category one funds to these requests for support, beginning with the most economically disadvantaged schools and libraries, as determined by the schools and libraries discount matrix in § 54.505(c). Schools and libraries eligible for a 90 percent discount shall receive first priority for the category one funds. The Administrator shall next allocate funds toward the requests submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for category one services in the same manner to the applicants at each descending discount level until there are no funds remaining.

(2) ***Category two.*** The Administrator shall next calculate the demand for category two services for all discount categories as determined by the schools and libraries discount matrix in § 54.505(c). If that demand exceeds the category two budget for that funding year, the Administrator shall allocate the category two funds beginning with the most economically

disadvantaged schools and libraries, as determined by the schools and libraries discount matrix in § 54.505(c). The Administrator shall allocate funds toward the category two requests submitted by schools and libraries eligible for an 85 percent discount first, then for a 80 percent discount, and shall continue committing funds in the same manner to the applicants at each descending discount level until there are no category two funds remaining.

(3) To the extent that there are single discount percentage levels associated with "shared services" under § 54.505(b)(4), the Administrator shall allocate funds to the applicants at each descending discount level (e.g., 90 percent, 89 percent, then 88 percent) until there are no funds remaining.

(4) In the event that demand exceeds available funding, requests for category one services used off-premises shall be funded after on-premises category one and category two services.

(5) For paragraphs (f)(1) through (4) of this section, if the remaining funds are not sufficient to support all of the funding requests within a particular discount level, the Administrator shall allocate funds at that discount level using the percentage of students eligible for the National School Lunch Program. Thus, if there is not enough support to fund all requests at the 40 percent discount level, the Administrator shall allocate funds beginning with those applicants with the highest percentage of NSLP eligibility for that discount level by funding those applicants with 19 percent NSLP eligibility, then 18 percent NSLP eligibility, and shall continue committing funds in the same manner to applicants at each descending percentage of NSLP until there are no funds remaining.

47 C.F.R. § 54.511 provides:

Ordering services.

(a) ***Selecting a provider of eligible services.*** Except as exempted in § 54.503(e), in selecting a provider of eligible services, schools, libraries, library consortia, and consortia including any of those entities shall carefully consider all bids submitted and must select the most cost-effective service offering. In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers, but price should be the primary factor considered.

(b) ***Lowest corresponding price.*** Providers of eligible services shall not submit bids for or charge schools, school districts, libraries, library consortia, or consortia including any of these entities a price above the lowest corresponding price for supported services, unless the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory. Promotional rates offered by a service provider for a period of more than 90 days must be included among the comparable rates upon which the lowest corresponding price is determined.

47 C.F.R. § 54.603 provides:

Consortia, telecommunications services, and existing contracts.

(a) ***Consortia.***

(1) Under the Telecommunications Program, an eligible health care provider may join a consortium with other eligible health care providers; with schools, libraries, and library consortia eligible under subpart F of this part; and with public sector (governmental) entities to order telecommunications services. With one exception, eligible health care providers participating in consortia with ineligible private sector members shall not be eligible for supported services under this subpart. A consortium may include ineligible private sector entities if such consortium is only receiving services at tariffed rates or at market rates from those providers who do not file tariffs.

(2) For consortia, universal service support under the Telecommunications Program shall apply only to the portion of eligible services used by an eligible health care provider.

(b) ***Telecommunications services.*** Any telecommunications service that is the subject of a properly completed bona fide request by a rural health care provider shall be eligible for universal service support. Upon submitting a bona fide request to a telecommunications carrier, each eligible rural health care provider is entitled to receive the most cost-effective, commercially-available telecommunications service, and a telecommunications service carrier that is eligible for support under the Telecommunications Program shall provide such service at the urban rate, as defined in § 54.604.

(c) ***Existing contracts.*** A signed contract for services eligible for Telecommunications Program support pursuant to this subpart between an eligible health care provider, as defined under § 54.600, and a service provider shall be exempt from the competitive bid requirements as set forth in § 54.622(i).

47 C.F.R. § 54.604 provides:

Determining the urban rate.

(a) Effective funding year 2024:

(1) If a rural health care provider requests support for an eligible service to be funded from the Telecommunications Program that is to be provided over a distance that is less than or equal to the "standard urban distance," as defined in paragraph (a)(3) of this section, for the state in which it is located, the "urban rate" for that service shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service in any city with a population of 50,000 or more in that state, calculated as if it were provided between two points within the city.

(2) If a rural health care provider requests an eligible service to be provided over a distance that is greater than the "standard urban distance," as defined in paragraph (a)(3) of this section, for the state in which it is located, the urban rate for that service shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service provided over the standard urban distance in any city with a population of 50,000 or more in that state, calculated as if the service were provided between two points within the city.

(3) The "standard urban distance" for a state is the average of the longest diameters of all cities with a population of 50,000 or more within the state.

(4) The Administrator shall calculate the "standard urban distance" and shall post the "standard urban distance" and the maximum supported distance

for each state on its website.

(b) As of funding year 2025, if a rural health care provider requests support for an eligible service to be funded from the Telecommunications Program the "urban rate" for that service shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service in any city with a population of 50,000 or more in that state, calculated as if it were provided between two points within the city.

47 C.F.R. § 54.605 provides:

Determining the rural rate.

(a) Effective funding year 2024, the rural rate shall be the average of the rates actually being charged to commercial customers, other than health care providers, for identical or similar services provided by the telecommunications carrier providing the service in the rural area in which the health care provider is located. The rates included in this average shall be for services provided over the same distance as the eligible service. The rates averaged to calculate the rural rate must not include any rates reduced by universal service support mechanisms. The "rural rate" shall be used as described in this subpart to determine the credit or reimbursement due to a telecommunications carrier that provides eligible telecommunications services to eligible health care providers.

(b) If the telecommunications carrier serving the health care provider is not providing any identical or similar services in the rural area, then the rural rate shall be the average of the tariffed and other publicly available rates, not including any rates reduced by universal service programs, charged for the same or similar services in that rural area over the same distance as the eligible service by other carriers. If there are no tariffed or publicly available rates for such services in that rural area, or if the carrier reasonably determines that this method for calculating the rural rate is unfair, then the carrier shall submit for the state commission's approval, for intrastate rates, or for the Commission's approval, for interstate rates, a cost-based rate for the provision of the service in the most economically efficient, reasonably available manner.

(1) The carrier must provide, to the state commission, for intrastate rates, or to the Commission, for interstate rates, a justification of the proposed rural rate, including an itemization of the costs of providing the requested service.

(2) The carrier must provide such information periodically thereafter as required, by the state commission for intrastate rates or the Commission for interstate rates. In doing so, the carrier much take into account anticipated and actual demand for telecommunications services by all customers who will use the facilities over which services are being provided to eligible health care providers.

47 C.F.R. § 54.606 provides:

Calculating support.

(a) The amount of universal service support provided for an eligible service to be funded from the Telecommunications program shall be the difference, if any, between the urban rate and the rural rate charged for the services, as defined in this section. In addition, all reasonable charges that are incurred by taking such services, such as state and federal taxes, shall be eligible for universal service support. Charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such service shall not be covered by the universal service support mechanisms.

(b) The universal service support mechanisms shall provide support for intrastate telecommunications services, as set forth in § 54.101(a), provided to rural health care providers as well as interstate telecommunications services.

(c) ***Mobile rural health care providers*** —

(1) ***Calculation of support.*** The support amount allowed under the Telecommunications Program for satellite services provided to mobile rural health care providers is calculated by comparing the rate for the satellite service to the rate for an urban wireline service with a similar bandwidth. Support for satellite services shall not be capped at an amount of a functionally similar wireline alternative. Where the mobile rural health care provider provides service in more than one state, the calculation shall be based on the urban areas in each state, proportional to the number of locations served in each state.

(2) **Documentation of support.**

(i) Mobile rural health care providers shall provide to the Administrator documentation of the price of bandwidth equivalent wireline services in the urban area in the state or states where the service is provided. Mobile rural health care providers shall provide to the Administrator the number of sites the mobile health care provider will serve during the funding year.

(ii) Where a mobile rural health care provider serves less than eight different sites per year, the mobile rural health care provider shall provide to the Administrator documentation of the price of bandwidth equivalent wireline services. In such case, the Administrator shall determine on a case-by-case basis whether the telecommunications service selected by the mobile rural health care provider is the most cost-effective option. Where a mobile rural health care provider seeks a more expensive satellite-based service when a less expensive wireline alternative is most cost-effective, the mobile rural health care provider shall be responsible for the additional cost.

47 C.F.R. § 54.622 provides:

Competitive bidding requirements and exemptions.

(a) ***Competitive bidding requirement.*** All applicants are required to engage in a competitive bidding process for supported services, facilities, or equipment, as applicable, consistent with the requirements set forth in this section and any additional applicable state, Tribal, local, or other procurement requirements, unless they qualify for an exemption listed in paragraph (i) in this section. In addition, applicants may engage in competitive bidding even if they qualify for an exemption. Applicants who utilize a competitive bidding exemption may proceed directly to filing a funding request as described in § 54.623.

(b) ***Fair and open process.***

(1) Applicants participating in the Telecommunications Program or Healthcare Connect Fund Program must conduct a fair and open competitive bidding process. The following actions are necessary to satisfy the "fair and open" competitive standard in the Telecommunications Program and the Healthcare Connect Fund Program:

> (i) All potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process.
>
> (ii) Service providers who intend to bid on supported services many not simultaneously help the applicant complete its request for proposal (RFP) or Request for Services form.
>
> (iii) Service providers who have submitted a bid to provide supported services, equipment, or

facilities to a health care provider may not simultaneously help the health care provider evaluate submitted bids or choose a winning bid.

(iv) Applicants must respond to all service providers that have submitted questions or proposals during the competitive bidding process.

(v) All applicants and service providers must comply with any applicable state, Tribal, or local procurement laws, in addition to the Commission's competitive bidding requirements. The competitive bidding requirements in this section are not intended to preempt such state, Tribal, or local requirements.

(c) ***Selecting a cost-effective service.*** In selecting a provider of eligible services, the applicant shall carefully consider all bids submitted and must select the most cost-effective means of meeting its specific health care needs. "Cost-effective" is defined as the method that costs the least after consideration of the features, quality of transmission, reliability, and other factors that the health care provider deems relevant to choosing a method of providing the required health care services. In the Healthcare Connect Fund Program, when choosing the most "cost-effective" bid, price must be a primary factor, but need not be the only primary factor. A non-price factor may receive an equal weight to price, but may not receive a greater weight than price.

(d) ***Bid evaluation criteria.*** Applicants must develop weighted evaluation criteria (*e.g.,* a scoring matrix) that demonstrates how the applicant will choose the most cost-effective bid before submitting its request for services. The applicant must specify on its bid evaluation worksheet and/or scoring matrix the

requested services for which it seeks bids, the information provided to bidders to allow bidders to reasonably determine the needs of the applicant, its minimum requirements for the developed weighted evaluation criteria, and each service provider's proposed service levels for the criteria. The applicant must also specify the disqualification factors, if any, that it will use to remove bids or bidders from further consideration. After reviewing the bid submissions and identifying the bids that satisfy the applicant's specific needs, the applicant must then select the service provider that offers the most cost-effective service.

(e) ***Request for Services.*** Applicants must submit the following documents to the Administrator in order to initiate competitive bidding:

(1) ***Request for Services, including certifications.*** The applicant must submit a Request for Services and make the following certifications as part of its Request for Services:

(i) The entity seeking supported services is a public or nonprofit health care provider that falls within one of the categories set forth in the definition of health care provider listed in § 54.600, or expects to be such a public or nonprofit health care provider before the end of the funding year for which the supported services are requested provided that the entity has received a conditional approval of eligibility pursuant to § 54.601(c);

(ii) The health care provider seeking supported services is physically located in a rural area as defined in § 54.600 or is a member of a Healthcare Connect Fund Program consortium which satisfies the rural health care provider composition requirements set forth in § 54.607(b). If an entity seeks

supported services under a conditional approval of eligibility set forth in § 54.601(c), the entity expects to be located in a rural area defined in § 54.600 before the end of the funding year for which the supported services are requested, or plans to be a member of a Healthcare Connect Fund Program consortium which satisfies the rural health care provider composition requirements set forth in § 54.607(b) before the end of the funding year for which the supported services are requested;

(iii) The person signing the application is authorized to submit the application on behalf of the health care provider or consortium applicant;

(iv) The person signing the application has examined the Request for Services and all attachments, and to the best of his or her knowledge, information, and belief, all statements contained in the request are true;

(v) The applicant has complied with any applicable state, Tribal, or local procurement rules;

(vi) All requested Rural Health Care Program support will be used solely for purposes reasonably related to the provision of health care service or instruction that the health care provider is legally authorized to provide under the law of the state in which the services are provided;

(vii) The supported services will not be sold, resold, or transferred in consideration for money or any other thing of value;

(viii) The applicant satisfies all of the requirements under section 254 of the Act and applicable Commission rules; and

(ix) The applicant has reviewed all applicable requirements for the Telecommunications Program or the Healthcare Connect Fund Program, as applicable, and will comply with those requirements.

(2) ***Aggregated purchase details.*** If the service or services are being purchased as part of an aggregated purchase with other entities or individuals, the full details of any such arrangement, including the identities of all co-purchasers and the portion of the service or services being purchased by the health care provider, must be submitted.

(3) ***Bid evaluation criteria.*** Requirements for bid evaluation criteria are described in paragraph (d) in this section and must be included with the applicant's Request for Services.

(4) ***Declaration of Assistance.*** All applicants must submit a "Declaration of Assistance" with their Request for Services. In the Declaration of Assistance, the applicant must identify each and every consultant, service provider, and other outside expert, whether paid or unpaid, who aided in the preparation of its applications. The applicant must also describe the nature of the relationship it has with each consultant, service provider, or other outside expert providing such assistance.

(5) ***Request for proposal (if applicable).***

(i) Any applicant may use an RFP. Applicants who use an RFP must submit the RFP and any additional relevant bidding information to the Administrator with its Request for Services.

(ii) An applicant must submit an RFP:

(A) If it is required to issue an RFP under

applicable State, Tribal, or local procurement rules or regulations;

(B) If the applicant is a consortium seeking more than $100,000 in program support during the funding year, including applications that seek more than $100,000 in program support for a multi-year commitment; or

(C) If the applicant is a consortium seeking support for participant-constructed and owned network facilities.

(iii) RFP requirements.

(A) An RFP must provide sufficient information to enable an effective competitive bidding process, including describing the health care provider's service needs and defining the scope of the project and network costs (if applicable).

(B) An RFP must specify the time period during which bids will be accepted.

(C) An RFP must include the bid evaluation criteria described in paragraph (d) in this section, and solicit sufficient information so that the criteria can be applied effectively.

(D) Consortium applicants seeking support for long-term capital investments whose useful life extends beyond the time period of the funding commitment (*e.g.,* facilities constructed and owned by the applicant, fiber indefeasible rights of use) must seek bids in the same RFP from service providers who propose to meet those needs via services provided over service provider-owned facilities, for a time period comparable to the life of the proposed capital

investment.

(E) Applicants may prepare RFPs in any manner that complies with the rules in this subpart and any applicable state, Tribal, or local procurement rules or regulations.

(6) ***Additional requirements for Healthcare Connect Fund Program consortium applicants.***

(i) ***Network plan.*** Consortium applicants must submit a narrative describing specific elements of their network plan with their Request for Services. Consortia applicants are required to use program support for the purposes described in their narrative. The required elements of the narrative include:

(A) Goals and objectives of the network;

(B) Strategy for aggregating the specific needs of health care providers (including providers that serve rural areas) within a state or region;

(C) Strategy for leveraging existing technology to adopt the most efficient and cost-effective means of connecting those providers;

(D) How the supported network will be used to improve or provide health care delivery;

(E) Any previous experience in developing and managing health information technology (including telemedicine) programs; and

(F) A project management plan outlining the project's leadership and management structure, and a work plan, schedule, and budget.

(ii) ***Letters of agency (LOA).*** Consortium applicants must submit LOAs pursuant to § 54.610.

(f) ***Public posting by the Administrator.*** The Administrator shall post on its website the following competitive bidding documents, as applicable:

(1) Request for Services;

(2) Bid evaluation criteria;

(3) RFP; and

(4) Network plans for Healthcare Connect Fund Program applicants.

(g) ***28-day waiting period.*** After posting the documents described in paragraph (f) in this section, as applicable, on its website, the Administrator shall send confirmation of the posting to the applicant. The applicant shall wait at least 28 days from the date on which its competitive bidding documents are posted on the Administrator's website before selecting and committing to a service provider. The confirmation from the Administrator shall include the date after which the applicant may sign a contract with its chosen service provider(s).

(1) ***Selection of the most "cost-effective" bid and contract negotiation.*** Each applicant is required to certify to the Administrator that the selected bid is, to the best of the applicant's knowledge, the most cost-effective option available. Applicants are required to submit the documentation, identified in § 54.623, to support their certifications.

(2) Applicants who plan to request evergreen status under this section must enter into a contract that identifies both parties, is signed and dated by the health care provider or Consortium Leader after the 28-day waiting period expires, and specifies the type, term, and cost of service(s).

(h) **Gift restrictions.**

(1) Subject to paragraphs (h)(3) and (4) in this section, an eligible health care provider or consortium that includes eligible health care providers, may not directly or indirectly solicit or accept any gift, gratuity, favor, entertainment, loan, or any other thing of value from a service provider participating in or seeking to participate in the Rural Health Care Program. No such service provider shall offer or provide any such gift, gratuity, favor, entertainment, loan, or other thing of value except as otherwise provided in this section. Modest refreshments not offered as part of a meal, items with little intrinsic value intended solely for presentation, and items worth $20 or less, including meals, may be offered or provided, and accepted by any individual or entity subject to this rule, if the value of these items received by any individual does not exceed $50 from any one service provider per funding year. The $50 amount for any service provider shall be calculated as the aggregate value of all gifts provided during a funding year by the individuals specified in paragraph (h)(2)(ii) in this section.

(2) For purposes of this paragraph:

(i) The terms "health care provider" or "consortium" shall include all individuals who are on the governing boards of such entities and all employees, officers, representatives, agents, consultants, or independent contractors of such entities involved on behalf of such health care provider or consortium with the Rural Health Care Program, including individuals who prepare, approve, sign, or submit Rural Health Care Program applications, or other forms related to the Rural Health Care Program, or who prepare bids, communicate, or work with Rural Health Care Program service

providers, consultants, or with the Administrator, as well as any staff of such entities responsible for monitoring compliance with the Rural Health Care Program; and

(ii) The term "service provider" includes all individuals who are on the governing boards of such an entity (such as members of the board of directors), and all employees, officers, representatives, agents, consultants, or independent contractors of such entities.

(3) The restrictions set forth in this paragraph shall not be applicable to the provision of any gift, gratuity, favor, entertainment, loan, or any other thing of value, to the extent given to a family member or a friend working for an eligible health care provider or consortium that includes eligible health care providers, provided that such transactions:

(i) Are motivated solely by a personal relationship;

(ii) Are not rooted in any service provider business activities or any other business relationship with any such eligible health care provider; and

(iii) Are provided using only the donor's personal funds that will not be reimbursed through any employment or business relationship.

(4) Any service provider may make charitable donations to an eligible health care provider or consortium that includes eligible health care providers in the support of its programs as long as such contributions are not directly or indirectly related to the Rural Health Care Program procurement activities or decisions and are not given by service providers to circumvent competitive bidding and other Rural Health Care Program rules, including those in § 54.611(a),

requiring health care providers under the Healthcare Connect Fund Program to contribute 35 percent of the total cost of all eligible expenses.

(i) ***Exemptions to the competitive bidding requirements*** —

(1) ***Government Master Service Agreement (MSA).*** Eligible health care providers that seek support for services and equipment purchased from MSAs negotiated by federal, state, Tribal, or local government entities on behalf of such health care providers and others, if such MSAs were awarded pursuant to applicable federal, state, Tribal, or local competitive bidding requirements, are exempt from the competitive bidding requirements under this section.

(2) ***Master Service Agreements approved under the Rural Health Care Pilot Program or Healthcare Connect Fund Program.*** An eligible health care provider site may opt into an existing MSA approved under the Rural Health Care Pilot Program or Healthcare Connect Fund Program and seek support for services and equipment purchased from the MSA without triggering the competitive bidding requirements under this section, if the MSA was developed and negotiated in response to an RFP that specifically solicited proposals that included a mechanism for adding additional sites to the MSA.

(3) ***Evergreen contracts.***

(i) The Administrator may designate a multi-year contract as "evergreen," which means that the service(s) covered by the contract need not be re-bid during the contract term.

(ii) A contract entered into by a health care provider or consortium as a result of competitive bidding may be designated as evergreen if it meets all

of the following requirements:

(A) Is signed by the individual health care provider or consortium lead entity;

(B) Specifies the service type, bandwidth, and quantity;

(C) Specifies the term of the contract;

(D) Specifies the cost of services to be provided; and

(E) Includes the physical location or other identifying information of the health care provider sites purchasing from the contract.

(iii) Participants may exercise voluntary options to extend an evergreen contract without undergoing additional competitive bidding if:

(A) The voluntary extension(s) is memorialized in the evergreen contract;

(B) The decision to extend the contract occurs before the participant files its funding request for the funding year when the contract would otherwise expire; and

(C) The voluntary extension(s) do not exceed five years in the aggregate.

(iv) As of funding year 2024, if the date that services start under an evergreen contract differs from the date services were estimated to start, participants may request a change of the start date and end date of their evergreen contract within 60 days of the actual service start date provided the terms of the evergreen contract support such a change. Upon approving a requested change, the Administrator will issue a revised funding commitment letter to the health care provider reflecting

the changed dates. If the Administrator denies a requested change, it will issue a letter to the health care provider explaining the basis for the denial.

(4) ***Schools and libraries program master contracts.*** Subject to the provisions in § 54.500, § 54.501(c)(1), and § 54.503, an eligible health care provider in a consortium with participants in the schools and libraries universal service support program and a party to the consortium's existing contract is exempt from the competitive bidding requirements if the contract was approved in the schools and libraries universal service support program as a master contract. The health care provider must comply with all Rural Health Care Program rules and procedures except for those applicable to competitive bidding.

(5) ***Annual undiscounted cost of $10,000 or less.*** An applicant under the Healthcare Connect Fund Program that seeks support for $10,000 or less of total undiscounted eligible expenses for a single year is exempt from the competitive bidding requirements under this section, if the term of the contract is one year or less. This exemption does not apply to applicants under the Telecommunications Program.

47 C.F.R. § 54.702 provides:

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. § 54.706 provides, in relevant part:

Contributions.

(a) Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to:

(1) Cellular telephone and paging services;

(2) Mobile radio services;

(3) Operator services;

(4) Personal communications services (PCS);

(5) Access to interexchange service;

(6) Special access service;

(7) WATS;

(8) Toll-free service;

(9) 900 service;

(10) Message telephone service (MTS);

(11) Private line service;

(12) Telex;

(13) [Reserved]

(14) Video services;

(15) Satellite service;

(16) Resale of interstate services;

(17) Payphone services; and

(18) Interconnected VoIP services.

(19) Prepaid calling card providers.

47 C.F.R. § 54.709 provides:

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.

47 C.F.R. § 54.711 provides:

Contributor reporting requirements.

(a) Contributions shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet which shall be published in the FEDERAL REGISTER. The Telecommunications Reporting Worksheet sets forth information that the contributor must submit to the Administrator on a quarterly and annual basis. The Commission shall announce by Public Notice published in the FEDERAL REGISTER and on its website the manner of payment and dates by which payments must be made. An executive officer of the contributor must certify to the truth and accuracy of historical data included in the Telecommunications Reporting Worksheet, and that any projections in the Telecommunications Reporting Worksheet represent a good-faith estimate based on the contributor's policies and procedures. The Commission or the Administrator may verify any information contained in the Telecommunications Reporting Worksheet. Contributors shall maintain records and documentation to justify information reported in the Telecommunications Reporting Worksheet, including the methodology used to determine projections, for three years and shall provide such records and documentation to the Commission or the Administrator upon request. Inaccurate or untruthful information contained in the Telecommunications Reporting Worksheet may lead to prosecution under the criminal provisions of Title 18 of the United States Code. The Administrator shall advise the Commission of any enforcement issues that arise and provide any suggested response.

(b) The Commission shall have access to all data reported to the Administrator. Contributors may make

requests for Commission nondisclosure of company-specific revenue information under § 0.459 of this chapter by so indicating on the Telecommunications Reporting Worksheet at the time that the subject data are submitted. The Commission shall make all decisions regarding nondisclosure of company-specific information. The Administrator shall keep confidential all data obtained from contributors, shall not use such data except for purposes of administering the universal service support programs, and shall not disclose such data in company-specific form unless directed to do so by the Commission. Subject to any restrictions imposed by the Chief of the Wireline Competition Bureau, the Universal Service Administrator may share data obtained from contributors with the administrators of the North American Numbering Plan administration cost recovery (See 47 CFR 52.16 of this chapter), the local number portability cost recovery (See 47 CFR 52.32 of this chapter), and the TRS Fund (See 47 CFR 64.604(c)(4)(iii)(H) of this chapter). The Administrator shall keep confidential all data obtained from other administrators and shall not use such data except for purposes of administering the universal service support mechanisms.

(c) The Bureau may waive, reduce, modify, or eliminate contributor reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms.

47 C.F.R. § 54.717 provides:

Audits of the Administrator.

The Administrator shall obtain and pay for an annual audit conducted by an independent auditor to examine its operations and books of account to determine, among other things, whether the Administrator is properly administering the universal service support mechanisms to prevent fraud, waste, and abuse:

(a) Before selecting an independent auditor, the Administrator shall submit preliminary audit requirements, including the proposed scope of the audit and the extent of compliance and substantive testing, to the Office of Managing Director.

(b) The Office of Managing Director shall review the preliminary audit requirements to determine whether they are adequate to meet the audit objectives. The Office of Managing Director shall prescribe modifications that shall be incorporated into the final audit requirements.

(c) After the audit requirements have been approved by the Office of Managing Director, the Administrator shall engage within thirty (30) calendar days an independent auditor to conduct the annual audit required by this paragraph. In making its selection, the Administrator shall not engage any independent auditor who has been involved in designing any of the accounting or reporting systems under review in the audit.

(d) The independent auditor selected by the Administrator to conduct the annual audit shall be instructed by the Administrator to develop a detailed audit program based on the final audit requirements and shall be instructed by the Administrator to submit the audit program to the Office of Managing Director. The

Office of Managing Director shall review the audit program and make modifications, as needed, that shall be incorporated into the final audit program. During the course of the audit, the Office of Managing Director may direct the Administrator to direct the independent auditor to take any actions necessary to ensure compliance with the audit requirements.

(e) During the course of the audit, the Administrator shall instruct the independent auditor to:

(1) Inform the Office of Managing Director of any revisions to the final audit program or to the scope of the audit;

(2) Notify the Office of Managing Director of any meetings with the Administrator in which audit findings are discussed; and

(3) Submit to the Chief of the Wireline Competition Bureau any accounting or rule interpretations necessary to complete the audit.

(f) Within 105 calendar days after the end of the audit period, but prior to discussing the audit findings with the Administrator, the independent auditor shall be instructed by the Administrator to submit a draft of the audit report to the Office of Managing Director Audit Staff.

(g) The Office of Managing Director shall review the audit findings and audit workpapers and offer its recommendations concerning the conduct of the audit or the audit findings to the independent auditor. Exceptions of the Office of Managing Director to the findings and conclusions of the independent auditor that remain unresolved shall be included in the final audit report.

(h) Within fifteen (15) calendar days after receiving

the Office of Managing Director's recommendations and making any revisions to the audit report, the Administrator shall instruct the independent auditor to submit the audit report to the Administrator for its response to the audit findings. At this time the auditor also must send copies of its audit findings to the Office of Managing Director. The Administrator shall provide the independent auditor time to perform additional audit work recommended by the Office of Managing Director.

(i) Within thirty (30) calendar days after receiving the audit report, the Administrator shall respond to the audit findings and send copies of its response to the Office of Managing Director. The Administrator shall instruct the independent auditor that any reply that the independent auditor wishes to make to the Administrator's responses shall be sent to the Office of Managing Director as well as the Administrator. The Administrator's response and the independent auditor's replies shall be included in the final audit report[.]

(j) Within ten (10) calendar days after receiving the response of the Administrator, the independent auditor shall file with the Commission the final audit report.

(k) Based on the final audit report, the Managing Director may take any action necessary to ensure that the universal service support mechanisms operate in a manner consistent with the requirements of this part, as well as such other action as is deemed necessary and in the public interest.

47 C.F.R. § 54.719 provides:

Parties permitted to seek review of Administrator decision.

(a) Any party aggrieved by an action taken by the Administrator, as defined in § 54.701, § 54.703, or § 54.705, must first seek review from the Administrator.

(b) Any party aggrieved by an action taken by the Administrator, after seeking review from the Administrator, may then seek review from the Federal Communications Commission, as set forth in § 54.722.

(c) Parties seeking waivers of the Commission's rules shall seek relief directly from the Commission.

47 C.F.R. § 54.723 provides:

Standard of review.

(a) The Wireline Competition Bureau shall conduct *de novo* review of request for review of decisions issue by the Administrator.

(b) The Federal Communications Commission shall conduct *de novo* review of requests for review of decisions by the Administrator that involve novel questions of fact, law, or policy; provided, however, that the Commission shall not conduct *de novo* review of decisions issued by the Wireline Competition Bureau under delegated authority.

47 C.F.R. § 54.801 provides:

Use of competitive bidding for Rural Digital Opportunity Fund.

The Commission will use competitive bidding, as provided in part 1, subpart AA of this chapter, to determine the recipients of Rural Digital Opportunity Fund support and the amount of support that they may receive for specific geographic areas, subject to applicable post-auction procedures.

47 C.F.R. § 54.802 provides:

Rural Digital Opportunity Fund geographic areas, deployment obligations, and support disbursements.

(a) ***Geographic areas eligible for support.*** Rural Digital Opportunity Fund support may be made available for census blocks or other areas identified as eligible by public notice.

(b) ***Term of support.*** Rural Digital Opportunity Fund support shall be provided for ten years.

(c) ***Deployment obligation.***

(1) All recipients of Rural Digital Opportunity Fund support must complete deployment to 40 percent of the required number of locations as determined by the Connect America Cost Model by the end of the third year, to 60 percent by the end of the fourth year, and to 80 percent by the end of the fifth year. The Wireline Competition Bureau will publish updated location counts no later than the end of the sixth year. A support recipient's final service milestones will depend on whether the Wireline Competition Bureau determines there are more or fewer locations than determined by the Connect America Cost Model in the relevant areas as follows:

(i) ***More Locations.*** After the Wireline Competition Bureau adopts updated location counts, in areas where there are more locations than the number of locations determined by the Connect America Cost Model, recipients of Rural Digital Opportunity Fund support must complete deployment to 100 percent of the number of locations determined by the Connect America Cost Model by the end of the sixth year. Recipients of Rural

Digital Opportunity Fund support must then complete deployment to 100 percent of the additional number of locations determined by the Wireline Competition Bureau's updated location count by end of the eighth year. If the new location count exceeds 35% of the number of locations determined by the Connect America Cost Model within their area in each state, recipients of Rural Digital Opportunity Fund support will have the opportunity to seek additional support or relief.

(ii) ***Fewer Locations.*** In areas where there are fewer locations than the number of locations determined by the Connect America Cost Model, a Rural Digital Opportunity Fund support recipient must notify the Wireline Competition Bureau no later than March 1 following the fifth year of deployment. Upon confirmation by the Wireline Competition Bureau, Rural Digital Opportunity Fund support recipients must complete deployment to the number of locations required by the new location count by the end of the sixth year. Support recipients for which the new location count is less than 65 percent of the Connect America Cost Model locations within their area in each state shall have the support amount reduced on a pro rata basis by the number of reduced locations.

(iii) ***Newly Built Locations.*** In addition to offering the required service to the updated number of locations identified by the Wireline Competition Bureau, Rural Digital Opportunity Fund support recipients must offer service to locations built since the revised count, upon reasonable request. Support recipients are not required to deploy to any location built after milestone year eight.

(d) ***Disbursement of Rural Digital Opportunity Fund funding.*** An eligible telecommunications carrier will be advised by public notice when it is authorized to receive support. The public notice will detail how disbursements will be made.

47 C.F.R. § 54.803 provides:

Rural Digital Opportunity Fund provider eligibility.

(a) Any eligible telecommunications carrier is eligible to receive Rural Digital Opportunity Fund support in eligible areas.

(b) An entity may obtain eligible telecommunications carrier designation after public notice of winning bidders in the Rural Digital Opportunity Fund auction.

(c) To the extent any entity seeks eligible telecommunications carrier designation prior to public notice of winning bidders for Rural Digital Opportunity Fund support, its designation as an eligible telecommunications carrier may be conditioned subject to receipt of Rural Digital Opportunity Fund support.

(d) Any Connect America Phase II auction participant that defaulted on all of its Connect America Phase II auction winning bids is barred from participating in the Rural Digital Opportunity Fund.

47 C.F.R. § 54.804 provides:

Rural Digital Opportunity Fund application process.

(a) In addition to providing information specified in § 1.21001(b) of this chapter and any other information required by the Commission, any applicant to participate in competitive bidding for Rural Digital Opportunity Fund support shall:

(1) Provide ownership information as set forth in § 1.2112(a) of this chapter;

(2) Certify that the applicant is financially and technically qualified to meet the public interest obligations established for Rural Digital Opportunity Fund support;

(3) Disclose its status as an eligible telecommunications carrier to the extent applicable and certify that it acknowledges that it must be designated as an eligible telecommunications carrier for the area in which it will receive support prior to being authorized to receive support;

(4) Describe the technology or technologies that will be used to provide service for each bid;

(5) Submit any information required to establish eligibility for any bidding weights adopted by the Commission in an order or public notice;

(6) To the extent that an applicant plans to use spectrum to offer its voice and broadband services, demonstrate it has the proper authorizations, if applicable, and access to operate on the spectrum it intends to use, and that the spectrum resources will be sufficient to cover peak network usage and deliver the minimum performance requirements to serve all of

the fixed locations in eligible areas, and certify that it will retain its access to the spectrum for the term of support;

(7) Submit operational and financial information.

(i) If applicable, the applicant should submit a certification that it has provided a voice, broadband, and/or electric transmission or distribution service for at least two years or that it is a wholly-owned subsidiary of such an entity, and specifying the number of years the applicant or its parent company has been operating, and submit the financial statements from the prior fiscal year that are audited by an independent certified public accountant. If the applicant is not audited in the ordinary course of business, in lieu of submitting audited financial statements it must submit unaudited financial statements from the prior fiscal year and certify that it will provide financial statements from the prior fiscal year that are audited by an independent certified public accountant by a specified deadline during the long-form application review process.

(A) If the applicant has provided a voice and/or broadband service it must certify that it has filed FCC Form 477s as required during this time period.

(B) If the applicant has operated only an electric transmission or distribution service, it must submit qualified operating or financial reports that it has filed with the relevant financial institution for the relevant time period along with a certification that the submission is a true and accurate copy of the reports that were provided to the relevant financial

institution.

(ii) If an applicant cannot meet the requirements in paragraph (a)(7)(i) of this section, in the alternative it must submit the audited financial statements from the three most recent fiscal years and a letter of interest from a bank meeting the qualifications set forth in paragraph (c)(2) of this section, that the bank would provide a letter of credit as described in paragraph (c) of this section to the bidder if the bidder were selected for bids of a certain dollar magnitude.

(8) Certify that the applicant has performed due diligence concerning its potential participation in the Rural Digital Opportunity Fund.

(b) Application by winning bidders for Rural Digital Opportunity Fund support—

(1) ***Deadline.*** As provided by public notice, winning bidders for Rural Digital Opportunity Fund support or their assignees shall file an application for Rural Digital Opportunity Fund support no later than the number of business days specified after the public notice identifying them as winning bidders.

(2) ***Application contents.*** An application for Rural Digital Opportunity Fund support must contain:

(i) Identification of the party seeking the support, including ownership information as set forth in § 1.2112(a) of this chapter;

(ii) Certification that the applicant is financially and technically qualified to meet the public interest obligations for Rural Digital Opportunity Fund support in each area for which it seeks support;

(iii) Certification that the applicant will meet the relevant public interest obligations, including the requirement that it will offer service at rates that are equal or lower to the Commission's reasonable comparability benchmarks for fixed wireline services offered in urban areas;

(iv) A description of the technology and system design the applicant intends to use to deliver voice and broadband service, including a network diagram which must be certified by a professional engineer. The professional engineer must certify that the network is capable of delivering, to at least 95 percent of the required number of locations in each relevant state, voice and broadband service that meets the requisite performance requirements for Rural Digital Opportunity Fund support;

(v) Certification that the applicant will have available funds for all project costs that exceed the amount of support to be received from the Rural Digital Opportunity Fund for the first two years of its support term and that the applicant will comply with all program requirements, including service milestones;

(vi) A description of how the required construction will be funded, including financial projections that demonstrate the applicant can cover the necessary debt service payments over the life of the loan, if any;

(vii) Certification that the party submitting the application is authorized to do so on behalf of the applicant; and

(viii) Such additional information as the Commission may require.

(3) ***Letter of credit commitment letter.*** No later than the number of days provided by public notice, the long-form applicant shall submit a letter from a bank meeting the eligibility requirements outlined in paragraph (c) of this section committing to issue an irrevocable stand-by letter of credit, in the required form, to the long-form applicant. The letter shall at a minimum provide the dollar amount of the letter of credit and the issuing bank's agreement to follow the terms and conditions of the Commission's model letter of credit.

(4) ***Audited financial statements.*** No later than the number of days provided by public notice, if a long-form applicant or a related entity did not submit audited financial statements in the relevant short-form application as required, the long-form applicant must submit the financial statements from the prior fiscal year that are audited by an independent certified public accountant.

(5) ***Eligible telecommunications carrier designation.*** No later than 180 days after the public notice identifying it as a winning bidder, the long-form applicant shall certify that it is an eligible telecommunications carrier in any area for which it seeks support and submit the relevant documentation supporting that certification.

(6) ***Application processing.***

(i) No application will be considered unless it has been submitted in an acceptable form during the period specified by public notice. No applications submitted or demonstrations made at any other time shall be accepted or considered.

(ii) Any application that, as of the submission deadline, either does not identify the applicant

seeking support as specified in the public notice announcing application procedures or does not include required certifications shall be denied.

(iii) An applicant may be afforded an opportunity to make minor modifications to amend its application or correct defects noted by the applicant, the Commission, the Administrator, or other parties. Minor modifications include correcting typographical errors in the application and supplying non-material information that was inadvertently omitted or was not available at the time the application was submitted.

(iv) Applications to which major modifications are made after the deadline for submitting applications shall be denied. Major modifications include, but are not limited to, any changes in the ownership of the applicant that constitute an assignment or change of control, or the identity of the applicant, or the certifications required in the application.

(v) After receipt and review of the applications, a public notice shall identify each long-form applicant that may be authorized to receive Rural Digital Opportunity Fund support after the long-form applicant submits a letter of credit and an accompanying opinion letter as described in paragraph (c) of this section, in a form acceptable to the Commission. Each such long-form applicant shall submit a letter of credit and accompanying opinion letter as required by paragraph (c) of this section, in a form acceptable to the Commission no later than the number of business days provided by public notice.

(vi) After receipt of all necessary information, a

public notice will identify each long-form applicant that is authorized to receive Rural Digital Opportunity Fund support.

(c) ***Letter of credit.*** Before being authorized to receive Rural Digital Opportunity Fund support, a winning bidder shall obtain an irrevocable standby letter of credit which shall be acceptable in all respects to the Commission.

(1) ***Value.*** Each recipient authorized to receive Rural Digital Opportunity Fund support shall maintain the standby letter of credit in an amount equal to, at a minimum, one year of support, until the Universal Service Administrative Company has verified that the recipient has served 100 percent of the Connect America Cost Model-determined location total (or the adjusted Connect America Cost Model location count if there are fewer locations) by the end of year six.

(i) For year one of a recipient's support term, it must obtain a letter of credit valued at an amount equal to one year of support.

(ii) For year two of a recipient's support term, it must obtain a letter of credit valued at an amount equal to eighteen months of support.

(iii) For year three of a recipient's support term, it must obtain a letter of credit valued at an amount equal to two years of support.

(iv) For year four of a recipient's support term, it must obtain a letter of credit valued at an amount equal to three years of support.

(v) A recipient may obtain a new letter of credit or renew its existing letter of credit so that it is valued at an amount equal to one year of support once it meets its optional or required service

milestones. The recipient may obtain or renew this letter of credit upon verification of its buildout by the Universal Service Administrative Company. The recipient may maintain its letter of credit at this level for the remainder of its deployment term, so long as the Universal Service Administrative Company verifies that the recipient successfully and timely meets its remaining required service milestones.

(vi) A recipient that fails to meet its required service milestones must obtain a new letter of credit or renew its existing letter of credit at an amount equal to its existing letter of credit, plus an additional year of support, up to a maximum of three years of support.

(vii) A recipient that fails to meet two or more required service milestones must maintain a letter of credit in the amount of three year of support and may be subject to additional non-compliance penalties as described in § 54.320(d).

(2) ***Bank eligibility.*** The bank issuing the letter of credit shall be acceptable to the Commission. A bank that is acceptable to the Commission is:

(i) Any United States bank

(A) That is insured by the Federal Deposit Insurance Corporation, and

(B) That has a bank safety rating issued by Weiss of B− or better; or

(ii) CoBank, so long as it maintains assets that place it among the 100 largest United States Banks, determined on basis of total assets as of the calendar year immediately preceding the issuance of the letter of credit and it has a long-term

unsecured credit rating issued by Standard & Poor's of BBB− or better (or an equivalent rating from another nationally recognized credit rating agency); or

(iii) The National Rural Utilities Cooperative Finance Corporation, so long as it maintains assets that place it among the 100 largest United States Banks, determined on basis of total assets as of the calendar year immediately preceding the issuance of the letter of credit and it has a long-term unsecured credit rating issued by Standard & Poor's of BBB− or better (or an equivalent rating from another nationally recognized credit rating agency); or

(iv) Any non-United States bank:

(A) That is among the 100 largest non-U.S. banks in the world, determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the letter of credit (determined on a U.S. dollar equivalent basis as of such date);

(B) Has a branch office:

(*1*) Located in the District of Columbia; or

(*2*) Located in New York City, New York, or such other branch office agreed to by the Commission, that will accept a letter of credit presentation from the Administrator via overnight courier, in addition to in-person presentations;

(C) Has a long-term unsecured credit rating issued by a widely-recognized credit rating agency that is equivalent to a BBB− or better

rating by Standard & Poor's; and

(D) Issues the letter of credit payable in United States dollars

(3) ***Bankruptcy opinion letter.*** A long-form applicant for Rural Digital Opportunity Fund support shall provide with its letter of credit an opinion letter from its legal counsel clearly stating, subject only to customary assumptions, limitations, and qualifications, that in a proceeding under Title 11 of the United States Code, 11 U.S.C. 101 *et seq.* (the "Bankruptcy Code"), the bankruptcy court would not treat the letter of credit or proceeds of the letter of credit as property of the winning bidder's bankruptcy estate under section 541 of the Bankruptcy Code.

(4) ***Non-compliance.*** Authorization to receive Rural Digital Opportunity Fund support is conditioned upon full and timely performance of all of the requirements set forth in this section, and any additional terms and conditions upon which the support was granted.

(i) Failure by a Rural Digital Opportunity Fund support recipient to meet its service milestones for the location totals determined by the Connect America Cost Model, or the location total that is adjusted by the Wireline Competition Bureau for those areas where there are fewer locations than the number of locations determined by the Connect America Cost Model, as required by § 54.802 will trigger reporting obligations and the withholding of support as described in § 54.320(d). Failure to come into full compliance during the relevant cure period as described in §§ 54.320(d)(1)(iv)(B) or 54.320(d)(2) will trigger a recovery action by the Universal Service Administrative Company as

described in § 54.320(d)(1)(iv)(B) or § 54.806(c)(1)(i), as applicable. If the Rural Digital Opportunity Fund recipient does not repay the requisite amount of support within six months, the Universal Service Administrative Company will be entitled to draw the entire amount of the letter of credit and may disqualify the Rural Digital Opportunity Fund support recipient from the receipt of Rural Digital Opportunity Fund support or additional universal service support.

(ii) The default will be evidenced by a letter issued by the Chief of the Wireline Competition Bureau, or its respective designees, which letter, attached to a standby letter of credit draw certificate, shall be sufficient for a draw on the standby letter of credit for the entire amount of the standby letter of credit.

47 C.F.R. § 54.805 provides:

Rural Digital Opportunity Fund public interest obligations.

(a) Recipients of Rural Digital Opportunity Fund support are required to offer broadband service with latency suitable for real-time applications, including Voice over internet Protocol, and usage capacity that is reasonably comparable to comparable offerings in urban areas, at rates that are reasonably comparable to rates for comparable offerings in urban areas. For purposes of determining reasonable comparable usage capacity, recipients are presumed to meet this requirement if they meet or exceed the usage level announced by public notice issued by the Wireline Competition Bureau. For purposes of determining reasonable comparability of rates, recipients are presumed to meet this requirement if they offer rates at or below the applicable benchmark to be announced annually by public notice issued by the Wireline Competition Bureau, or no more than the non-promotional prices charged for a comparable fixed wireline service in urban areas in the state or U.S. Territory where the eligible telecommunications carrier receives support.

(b) Recipients of Rural Digital Opportunity Fund support are required to offer broadband service meeting the performance standards for the relevant performance tier.

(1) Rural Digital Opportunity Fund support recipients meeting the minimum performance tier standards are required to offer broadband service at actual speeds of at least 25 Mbps downstream and 3 Mbps upstream and offer a minimum usage allowance of 250 GB per month, or that reflects the average usage of a majority of fixed broadband customers as

announced annually by the Wireline Competition Bureau over the 10-year term.

(2) Rural Digital Opportunity Fund support recipients meeting the above-baseline performance tier standards are required to offer broadband service at actual speeds of at least 100 Mbps downstream and 20 Mbps upstream and offer at least 2 terabytes of monthly usage.

(3) Rural Digital Opportunity Fund support recipients meeting the Gigabit performance tier standards are required to offer broadband service at actual speeds of at least 1 Gigabit per second downstream and 500 Mbps upstream and offer at least 2 terabytes of monthly usage.

(4) For each of the tiers in paragraphs (b)(1) through (3) of this section, bidders are required to meet one of two latency performance levels:

(i) Low-latency bidders will be required to meet 95 percent or more of all peak period measurements of network round trip latency at or below 100 milliseconds; and

(ii) High-latency bidders will be required to meet 95 percent or more of all peak period measurements of network round trip latency at or below 750 ms and, with respect to voice performance, demonstrate a score of four or higher using the Mean Opinion Score (MOS).

(c) Recipients of Rural Digital Opportunity Fund support are required to bid on category one telecommunications and internet access services in response to a posted FCC Form 470 seeking broadband service that meets the connectivity targets for the schools and libraries universal service support program for eligible schools and libraries (as described in § 54.501) located

within any area in a census block where the carrier is receiving Rural Digital Opportunity Fund support. Such bids must be at rates reasonably comparable to rates charged to eligible schools and libraries in urban areas for comparable offerings.

47 C.F.R. § 54.806 provides:

Rural Digital Opportunity Fund reporting obligations, compliance, and recordkeeping.

(a) Recipients of Rural Digital Opportunity Fund support shall be subject to the reporting obligations set forth in §§ 54.313, 54.314, and 54.316.

(b) Recipients of Rural Digital Opportunity Fund support shall be subject to the compliance measures, recordkeeping requirements and audit requirements set forth in § 54.320(a)-(c).

(c) Recipients of Rural Digital Opportunity Fund support shall be subject to the non-compliance measures set forth in § 54.320(d) subject to the following modifications related to the recovery of support.

(1) If the support recipient does not report it has come into full compliance after the grace period for its sixth year or eighth year service milestone as applicable or if USAC determines in the course of a compliance review that the eligible telecommunications carrier does not have sufficient evidence to demonstrate that it is offering service to all of the locations required by the sixth or eighth year service milestone as set forth in § 54.320(d)(3):

> (i) Sixth year service milestone. Support will be recovered as follows after the sixth year service milestone grace period or if USAC later determines in the course of a compliance review that a support recipient does not have sufficient evidence to demonstrate that it was offering service to all of the locations required by the sixth year service milestone:
>
> > (A) If an ETC has deployed to 95 percent or more of the Connect America Cost Model

location count or the adjusted Connect America Cost Model location count if there are fewer locations, but less than 100 percent, USAC will recover an amount of support that is equal to 1.25 times the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations;

(B) If an ETC has deployed to 90 percent or more of the Connect America Cost Model location count or the adjusted Connect America Cost Model location count if there are fewer locations, but less than 95 percent, USAC will recover an amount of support that is equal to 1.5 times the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations, plus 5 percent of the support recipient's total Rural Digital Opportunity Fund support authorized over the 10-year support term for that state;

(C) If an ETC has deployed to fewer than 90 percent of the Connect America Cost Model location count or the adjusted Connect America Cost Model location count if there are fewer locations, USAC will recover an amount of support that is equal to 1.75 times the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations, plus 10 percent of the support recipient's total Rural Digital Opportunity Fund support authorized over the 10-year support term for that state.

(ii) Eighth year service milestone. If a Rural Digital Opportunity Fund support recipient is

required to serve more new locations than determined by the Connect America Cost Model, support will be recovered as follows after the eighth year service milestone grace period or if USAC later determines in the course of a compliance review that a support recipient does not have sufficient evidence to demonstrate that it was offering service to all of the locations required by the eighth year service milestone:

(A) If an ETC has deployed to 95 percent or more of its new location count, but less than 100 percent, USAC will recover an amount of support that is equal to the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations;

(B) If an ETC has deployed to 90 percent or more of its new location count, but less than 95 percent, USAC will recover an amount of support that is equal to 1.25 times the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations;

(C) If an ETC has deployed to 85 percent or more of its new location count, but less than 90 percent, USAC will recover an amount of support that is equal to 1.5 times the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations, plus 5 percent of the support recipient's total Rural Digital Opportunity Fund support authorized over the 10-year support term for that state;

(D) If an ETC has deployed to less than 85 percent of its new location count, USAC will recover an amount of support that is equal to 1.75 times the average amount of support per location received in the state for that ETC over the support term for the relevant number of locations, plus 10 percent of the support recipient's total Rural Digital Opportunity Fund support authorized over the 10-year support term for that state.

(2) Any support recipient that believes it cannot meet the third-year service milestone must notify the Wireline Competition Bureau within 10 business days of the third-year service milestone deadline and provide information explaining this expected deficiency. If a support recipient has not made such a notification by March 1 following the third-year service milestone, and has deployed to fewer than 20 percent of the required number of locations by the end of the third year, the recipient will immediately be in default and subject to support recovery. The Tier 4 status six-month grace period as set forth in § 54.320(d)(iv) will not be applicable.