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Legal Sidebar

Fifth Circuit Considers Constitutionality of the Universal Service Fund

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In the case *Consumers' Research v. FCC*, the U.S. Court of Appeals for the Fifth Circuit is considering whether the funding mechanisms for the Federal Communications Commission's (FCC's) Universal Service Fund (USF) are unconstitutional. The court, in particular, is assessing challengers' arguments that (1) the statutory framework governing the USF unconstitutionally delegates legislative or taxing authority to the FCC, and (2) the FCC's use of the Universal Service Administrative Company (USAC) is an impermissible delegation of regulatory authority to a private entity. The case is fully briefed and the court heard oral argument on December 5, 2022.

The USF subsidizes voice and broadband service to high-cost areas and low-income households throughout the country, as well as to schools, libraries, and rural healthcare providers. This case thus could have a significant impact on both U.S. telecommunications policy and the current beneficiaries of USF subsidies. This Sidebar describes the USF and its statutory framework, explains the nondelegation doctrine, discusses the various legal arguments raised in the case, and identifies some considerations for Congress.

The Universal Service Fund

The USF is a fund administered by USAC, a non-profit entity, under the direction of the FCC. As detailed in a CRS Report, the USF subsidizes telecommunications service in rural and high-cost areas, as well as for schools, libraries, and rural health care providers. Telecommunications carriers—including wireline and wireless companies, and interconnected Voice over Internet Protocol (VoIP) providers—must contribute to the USF based on an assessment of their interstate and international end-user revenues. Eligible telecommunications carriers that serve high-cost areas are entitled to receive money from the fund.

The FCC's USF authority is largely governed by Section 254 of the Communications Act of 1934, which was added by the Telecommunications Act of 1996. Section 254(d) requires interstate carriers to contribute to the advancement of universal service on an "equitable and nondiscriminatory basis" based on the mechanisms established by the Commission. The FCC has implemented this directive by adopting regulations requiring interstate carriers to pay a percentage of their revenue at a rate set on a quarterly

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basis, called the "contribution factor." To calculate the contribution factor, FCC regulations direct USAC to project the demand and administrative expenses for universal support services in each quarter, along with the "total contribution base" (i.e., carriers' total revenue from interstate and international services). USAC must submit the demand and expense projections to the FCC's Office of Managing Director (OMD) at least 60 days before the start of each quarter, and it must submit the total contribution base at least 30 days before the start of each quarter. OMD then uses USAC's projections to determine the contribution factor, which it publishes on the FCC's website. The proposed contribution factor is "deemed approved" by the FCC if the agency takes no action to change it within 14 days of its publication. Once the contribution factor is set, USAC is responsible for overseeing the collection of contributions from telecommunications carriers. FCC regulations permit the carriers to pass on their USF contribution costs to their customers as a line-item charge on their customers' bills.

Section 254(b) directs the FCC, in consultation with a Federal-State Joint Board on Universal Service, to take into account several principles and factors when formulating its USF policies, including (1) ensuring service is available at just, reasonable, and affordable rates; (2) ensuring service is available in all regions of the country, including rural, insular, and high-cost areas; and (3) other principles that the FCC and the Joint Board deem necessary and appropriate for protection of the public interest, convenience, and necessity. Section 254(c) further states that the FCC must determine which services are supported by the USF by considering the extent to which the services are (1) essential to education, public health, or safety; (2) subscribed to by a substantial majority of residential customers; (3) being deployed in public telecommunications networks by telecommunications carriers; and (4) are consistent with "public interest, convenience, and necessity."

As explained further in a CRS In Focus, the FCC has, in consultation with the Joint Board, established various USF programs. These programs include the Connect America Fund and the associated Rural Digital Opportunity Fund, which provide support for voice and broadband services in rural and high-cost areas, and the Lifeline Program, which subsidizes voice and broadband service for low-income customers.

The Nondelegation Doctrine

Under Article I of the Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." The nondelegation doctrine limits Congress's ability to cede this legislative power to other entities. The nondelegation doctrine is not rigid, and the U.S. Supreme Court has recognized that Congress may delegate "at least some authority that it could exercise itself." Nevertheless, for any delegation to be lawful, it must comply with the standards established by the Supreme Court. These standards differ depending on whether the delegation is to a governmental entity or a private entity.

For delegations to governmental entities, the Supreme Court has established a fairly lenient test: these delegations are permitted as long as Congress provides an "intelligible principle" to govern its delegation. The Court has only twice struck down laws on nondelegation grounds under the intelligible principle standard. The Court decided both of these cases, which dealt with provisions of the National Industrial Recovery Act (NIRA), in 1935. In the first case, *A.L.A. Schechter Poultry Co. v. United States*, the Court struck down Section 3 of NIRA because it gave the President "virtually unfettered" discretion in approving or prescribing industry codes of fair competition. In the second case, *Panama Refining Co. v. Ryan*, the Court invalidated Section 9(c) of NIRA because it allowed the President to prohibit the transportation of petroleum without establishing any policy, standard, or rule governing the President's decisionmaking. Since deciding these two cases, however, the Supreme Court has consistently rejected nondelegation challenges. It has upheld broad standards as sufficiently intelligible principles, including directives that agencies regulate in the "public interest" or in a "fair and equitable manner." Some Justices, however, have recently signaled a willingness to reconsider the intelligible principle standard in favor of a more robust application of the nondelegation doctrine.

By contrast, Congress has less leeway when delegating regulatory authority to private entities. The seminal case *Carter v. Carter Coal Co*. established the foundations of the private nondelegation doctrine. In *Carter Coal*, the Supreme Court held that the Bituminous Coal Conservation Act of 1935 was an unconstitutional delegation of legislative authority because it gave the majority of coal producers in a given region the ability to impose minimum wage and hour regulations on all coal producers. The Court wrote that it was "legislative delegation in its most obnoxious form," as it was a delegation to "private persons whose interests may be and often are adverse to the interests of others in the same business." The Court, however, has not completely prohibited private involvement in regulation. Several years after *Carter Coal*, in *Sunshine Anthracite Coal Co. v. Adkins*, the Court upheld a statutory scheme authorizing boards of private coal producers to propose standards for regulating coal prices. In contrast to *Carter Coal*, the Court held that the statute was not an unlawful delegation because a federal agency had to review the proposals and determine the final coal prices. Thus, the Court explained, the boards acted "subordinately" to the Commission and were not engaged in "lawmaking."

Following *Adkins*, lower courts have similarly held that there is no unlawful delegation when a federal agency relies on the input of outside private parties, but ultimately retains meaningful decisionmaking authority. For instance, courts have held that it is not an unlawful delegation where an agency "condition[s] its grant of permission on the decision of another entity" or uses outside entities for fact gathering or for advice and policy recommendations. An agency may not, however, simply "rubber-stamp" a decision made by a private party. Rather, to avoid a delegation of decisionmaking authority, there must be meaningful mechanisms for the agency to review the determinations or advice of the private party and to "exercise its own judgment."

Consumers' Research v. FCC

In *Consumers' Research*, a telephone provider and several telephone subscribers have petitioned the Fifth Circuit to vacate the USF contribution factor for the first quarter of 2022. Petitioners argue that the USF's revenue-raising mechanisms are unconstitutional because they involve both an unlawful delegation to the FCC and an unlawful delegation to USAC, a private entity.

First, petitioners contend that Section 254 is an unlawful delegation of congressional authority—particularly its taxing authority—to the FCC. Petitioners argue that, while Section 254 directs the FCC to raise money from interstate carriers for the USF, it "place[s] no formula or meaningful limitations on the amount the FCC can raise." Petitioners reason that Section 254(b) and (c)'s principles and factors governing the FCC's USF determinations are so vague and expansive that they do not place "any meaningful limits" on the FCC's revenue-raising authority and do not constitute an intelligible principle. Petitioners cite, in particular, a Fifth Circuit decision deferring to the FCC's interpretation that the principles in Section 254(b) are "aspirational only." Petitioners acknowledge that broad standards, including a public interest standard, have been upheld as a sufficiently intelligible principle in other contexts. They argue, however, that more precision is required for delegations of revenue-raising authority. Petitioners argue that in two cases in which the Supreme Court upheld delegations of revenue-raising authority—*J.W. Hampton, Jr., & Co. v. United States* and *Skinner v. Mid-America Pipeline Co.*—the statutes restricted the Executive Branch's discretion by imposing conditions like a "discrete formula" for calculating revenue or a ceiling on the total revenue the Executive could raise.

As an alternative argument, petitioners contend that the intelligible principle standard is not even appropriate for delegations of Congress's taxing power. They argue that the USF contributions are taxes, because they are designed to further broad societal goals, rather than fees paid in exchange for a government benefit. According to petitioners, given the unique importance of Congress's taxing power and the "dangers of a self-funding Executive," any delegations of that power should be subject to strict guidelines. Petitioners argue that *Skinner*, in which the Supreme Court rejected a stricter standard for delegations of Congress's taxing power, should be "overruled or narrowed."

Lastly, petitioners argue that the FCC's "re-delegation" of its authority over the USF to USAC violates the private nondelegation doctrine. According to petitioners, the FCC is "not even a rubber stamp" to USAC's projections, as the quarterly contribution factor based on those projections is "deemed approved" by the FCC's inaction. Petitioners claim that, even if the FCC wanted to reject USAC's projections, it would not be feasible for it to review USAC's calculations and respond to them in the "narrow window" before the new quarter.

In reply, the FCC argues that, as a threshold matter, the court lacks jurisdiction because petitioners failed to challenge the FCC's USF regulations at the time they were adopted. On the merits, the FCC maintains that Section 254 "easily satisfies the intelligible principle test," pointing to, among other things, the principles and factors articulated in Section 254(b)–(c) and Section 254(d)'s requirement that carrier contributions have an "equitable and nondiscriminatory basis." The FCC rejects the characterization of USF contributions as taxes, but, in any case, points out that the Supreme Court's decision in *Skinner*, which the Fifth Circuit must follow, forecloses the argument that a stricter standard should apply to delegations of Congress' taxing power. On the private delegation issue, the FCC contends that petitioners overstate USAC's role in establishing the quarterly contribution factor. USAC, the FCC explains, only performs a "fact gathering" function by making various expense, demand, and revenue projections that are then used by the FCC to calculate the contribution factor. The FCC describes this as purely "ministerial," without involving any policymaking decisions. The FCC argues, therefore, that no delegation of regulatory power to USAC has occurred. Even if governmental power had been delegated, the FCC reasons that it is a proper delegation because the FCC retains control over USAC and has revised USAC's projections to account for changes in FCC policy.

Considerations for Congress

Promoting universal service is a significant part of U.S. telecom policy. The USF is used to support voice and broadband service to millions of rural and low-income Americans across the country, as well as schools, libraries, and rural healthcare providers. It remains to be seen whether the Fifth Circuit will hold that the USF's funding mechanisms are unconstitutional. At oral argument, the Fifth Circuit panel hearing the case did not clearly signal one way or the other how it might rule. Petitioners' federal nondelegation arguments face an uphill battle. The Supreme Court has consistently upheld congressional delegations to federal agencies under the intelligible principle standard, and in *Skinner* rejected a stricter standard for delegations of tax authority. Petitioners' private nondelegation arguments, however, may have more traction, given courts' record of holding such delegations unconstitutional. The Fifth Circuit, indeed, recently held that another statute, the Horseracing Integrity and Safety Act, unconstitutionally delegated government authority to a private entity. Still, the FCC's arguments that USAC performs purely ministerial calculations may lead the Fifth Circuit to conclude that no policymaking authority has been delegated to USAC.

To the extent Congress wants to avoid disruptions to the USF that may come from a ruling adverse to the FCC, it could amend Section 254 to insulate the USF further from nondelegation challenges by imposing clearer guidelines for the FCC's and USAC's USF funding activities. For instance, Congress could limit the FCC's discretion over the program by placing a cap the total revenue the FCC may collect from interstate carriers, or Congress could articulate a formula for how the contribution factor should be calculated. To alleviate concerns around USAC's role, Congress could require the FCC to play a more active part in the contribution factor calculations, such as by requiring it affirmatively to approve the contribution factor rather than allowing the factor to be "deemed approved" by the agency's inaction. On the other hand, to the extent Congress favors the USF's current funding arrangement because, for instance, it provides the FCC with more flexibility, it could await conclusion of the litigation before considering any decision to revise the current statutory scheme.

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