

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Report on the Future of the	)	
Universal Service Fund	)	WT Docket No. 21-476
	)	
To: The Commission	)	

**COMMENTS OF TECHFREEDOM**

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Dated: January 18, 2022

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## Summary

The federal government is set to spend “the largest ever federal investment in broadband, totaling approximately \$65 billion.” That is on top of the billions spent just last year. As part of the Infrastructure Act, Congress has required the FCC to report back by August 12, 2022 as to the “effectiveness in achieving the universal service goals for broadband in light of this Act.” The FCC, and the government as a whole, is ill-equipped to account for where the money will be spent. First, with multiple government programs all spending money to achieve the same goal, coordination is a must, yet appears to be sorely lacking. Second, there is no current map that accurately depicts where broadband exists, and where it is lacking. The FCC maps have historically overstated broadband deployment, while the recent NTIA map severely understates deployment based on bad data. The FCC must accelerate its mapping efforts and report back to Congress the results *before* states spend the \$42 billion allocated to them. Otherwise, the money will be wasted, and in many cases spent to overbuild and compete with existing commercial broadband networks.

The FCC should also undertake a study of how consumers use broadband and honestly report to Congress those results. Reliable studies show that, even when many Americans stayed at home to work and school their children, few, if any, required symmetrical speeds. Yet this debate continues to rage by those who want fiber to the home (FTTH) to be the only solution to closing the Digital Divide – a recipe ensuring that the divide can never be closed, because FTTH is just not feasible for the most rural areas.

The FCC cannot unilaterally widen the USF contribution base to include “Big Tech.” The statute does not allow it. And for Congress to mandate such payments, it would have to establish some sort of jurisdictional hook with the FCC, lest such rules be “ancillary to nothing.”

Finally, the FCC must take a hard look at the constitutionality of the USF, and especially its delegation of tremendous powers to USAC under the nondelegation rule. Given recent caselaw, there is a valid question as to whether the entire USF regime could withstand a court challenge.

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TechFreedom hereby files these Comments in response to the Notice of Inquiry (NOI),<sup>1</sup> released December 15, 2021, seeking comment on “issues related to the future of the Universal Service Fund (USF or Fund) in light of the broadband investments in the Infrastructure Investment and Jobs Act (Infrastructure Act or Act).”<sup>2</sup> Through this NOI, the FCC begins the process of reporting to Congress “on the options of the Commission for improving its effectiveness in achieving the universal service goals for broadband in light of this Act,” and “may make recommendations for Congress on further actions the Commission and Congress could take to improve the ability of the Commission to achieve the universal service goals for broadband.”<sup>3</sup> The report is due within nine months of the statute’s enactment, or August 12, 2022.

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<sup>1</sup> Report on the Future of the Universal Service Fund, Notice of Inquiry, FCC 21-127 (Dec. 15, 2021). The *NOI* set the comment date as January 18, 2022, and the reply comment date as January 31, 2022. These Comments are timely filed.

<sup>2</sup> *See, e.g.*, Comments of New America’s Open Technology Institute and Public Knowledge, (November 2, 2021). The Federal Register Notice set the comment date as December 2, 2021 and reply comment date of January 3, 2022.

<sup>3</sup> *Id.* ¶ 2.

<sup>3</sup> *NOI* ¶ 2 (citing Infrastructure Act, div. F, tit. I, § 60104(c)).

## **1. About TechFreedom**

TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

## **2. Coordinate, Coordinate, Coordinate**

More taxpayer dollars will be spent on broadband deployment in the next few years than has been spent in the history of this nation. The NOI catalogs the various programs that are spending money at a dizzying rate:

In addition to funding the Commission's Affordable Connectivity Program, the Act contains numerous programs to be implemented by NTIA, such as the BEAD Program, the State Digital Equity Capacity Grant Program and its federal counterpart, the Middle Mile Infrastructure Grant Program, and the Tribal Broadband Connectivity Program, as well as the State and Local Cybersecurity Grant Program to be implemented by the Department of Homeland Security and the RUS Distance Learning, Telemedicine, and Broadband Program. We invite commenters to identify any other provisions in the Act or any other recent legislation that constitute "legislation that addresses [the broadband universal service] goals" that we should consider in this proceeding. Please describe the relationships between these programs and our universal service programs.<sup>4</sup>

Some are already questioning whether the federal government even knows where taxpayer monies are going, and whether that money is actually being spent on broadband

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<sup>4</sup> NOI ¶ 22 (footnotes omitted).

deployment or adoption.<sup>5</sup> It is therefore paramount, in order to combat fraud, waste, and abuse, that the FCC coordinate with other federal and state governments to track where previous dollars have been spent, and where current dollars are being committed. Failure to do so will make the waste in the 2009 ARRA program look pale in comparison.<sup>6</sup> As part of its report to Congress, the FCC should detail its coordination efforts beyond what the NOI says about “meeting regularly” with other agencies.<sup>7</sup>

### 3. It’s All in the Maps

The Infrastructure Act allocates \$42.45 billion to states to be awarded by NTIA “in a way that gives priority to projects that will provide service to unserved locations, then to underserved locations, and next to community anchor institutions.”<sup>8</sup> Without proper maps, that will be impossible, and this misprioritization will result in costly overbuilds and a

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<sup>5</sup> See, e.g., Mark Buell & Katie Jordan, *Risks and Rewards of the U.S. Broadband Funding Boom*, INTERNET SOCIETY (May 6, 2021), <https://www.internetsociety.org/blog/2021/05/risks-and-rewards-of-the-u-s-broadband-funding-boom/> (“there is an equally great risk that these funds do more harm than good. This kind of investment is once in a generation for a reason and whatever happens next, it is unlikely we will see investment of this kind into broadband infrastructure and access again. With funding of this size, companies and individuals with malintent are going to come out of the woodwork. Large corporations could receive huge amounts of funding, but as we’ve seen for years, this doesn’t always trickle down to connecting communities. We also risk wasting funds by putting steep requirements on communities for spending. Small communities may receive an influx of cash and have to spend it too quickly to make sustainable investments.”). See also R. Barret & K. Arseneau, *With poor data, deficient requirements and little oversight, massive public spending still hasn’t solved the rural internet access problem*, MILWAUKEE JOURNAL SENTINEL (July 4, 2021), <https://www.jsonline.com/in-depth/news/2021/07/14/weve-spent-billions-provide-broadband-rural-areas-what-failed-wisconsin/7145014002/>.

<sup>6</sup> See, e.g., *Lessons Learned from the Recovery Act: An OIG Perspective*, U.S.D.A, Off. of Inspector Gen., August 2014, <https://www.usda.gov/sites/default/files/50703-0002-10.pdf> (“Our investigations into Recovery Act-related fraud resulted in 84 convictions, 8 years of total supervised release/probation, 8 months of total home confinement ordered, total recoveries of \$11 million, and total forfeiture/seizures of \$1.5 million.”). But See, G. Korte, *Five years since stimulus: Many fraud cases, few losses*, USA TODAY (Feb. 16, 2014), <https://www.usatoday.com/story/news/politics/2014/02/16/recovery-act-stimulus-fraud-convictions/5400705/> (1,268 cases of fraud in the \$840 billion stimulus program, resulting in \$57 million in recovered funds).

<sup>7</sup> NOI ¶ 16.

<sup>8</sup> NOI ¶ 5.

colossal waste of money. We already know that the broadband maps produced by NTIA are not even remotely accurate.<sup>9</sup> It is imperative, therefore, that the FCC accelerate its efforts to complete its broadband map,<sup>10</sup> and include in its report to Congress efforts it has made, and will continue to make, to harmonize its maps with that produced by NTIA. Unfortunately, it looks like much, if not all, of the Infrastructure Act's \$42.5 billion will be committed prior to the FCC completing an updated broadband map. This means money will be spent before we know where it is actually needed. This "Ready. Fire. Aim." approach to government spending undoubtedly will result in a massive waste of taxpayer dollars, and the FCC should so warn Congress.

#### **4. The FCC Must Remain Technology Neutral and Resist the Urge to Mandate Fiber to Everywhere**

To date, the Commission has done an excellent job of remaining technology neutral when it comes to broadband deployment. It has noted that different situations require

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<sup>9</sup> See Letter from Sen. Roger Wicker to NTIA (Jul. 19, 2021), <https://www.commerce.senate.gov/2021/7/wicker-asks-ntia-to-reassess-data-collection-processes> ("NTIA's map suffers from several major flaws. First, the data used in the map is outdated. The map includes data from the Census Bureau's American Community Survey, which the Census last compiled in 2019—two years ago. The state of broadband has changed significantly since then. Second, the map relies on the FCC's census-block level availability data. This data vastly overstates broadband coverage, and the FCC is actively replacing it with more granular, accurate data. Finally, the map uses speed-test and usage data that can be affected by a number of variables, including the end-user's equipment."). See also J. Eggerton, *NCTA: New NTIA Broadband Needs Map Is 'Often Inaccurate' Mashup*, BROADCASTING & CABLE (June 21, 2021), <https://www.nexttv.com/news/ncta-new-ntia-broadband-needs-map-is-often-inaccurate-mashup> ("Unfortunately NTIA has obscured, rather than clarified, the true state of broadband with this mashup of disparate, and often inaccurate, data sources. In particular, any suggestion that data from M-Lab or Microsoft accurately represents the speeds delivered by cable operators is demonstrably false.").

<sup>10</sup> See Letter from Congresswoman Spartz to Acting Chairwoman Rosenworcel (Dec. 8, 2021), <https://ecfsapi.fcc.gov/file/1217077327468/21-633.pdf> (outlining efforts to date to create better broadband maps but declining to specify a timeline for the completion of the project).

different deployment strategies.<sup>11</sup> The FCC must continue to fight the urge to redefine broadband in such a way that it can only be achieved through the deployment of fiber to the home (FTTH).<sup>12</sup> Similarly, it must resist insistence upon symmetrical speeds in future builds, which, again, virtually ensures that any area without FTTH will be deemed “unserved” or “underserved,” making it ripe for overbuilding.<sup>13</sup> This may suit the ideological agenda of some against commercial networks, but it will waste scarce resources, and thus Congress’s goal of closing the Digital Divide.<sup>14</sup>

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<sup>11</sup> See, e.g., Rural Digital Opportunity Fund at ¶ 31, Report and Order, FCC 20-5 (Feb. 7, 2020) (“We adopt technology-neutral standards for voice and broadband services supported by the Rural Digital Opportunity Fund, based on our experience in the CAF Phase II auction and its success in awarding support to a variety of service providers to deploy broadband in unserved rural areas, and consistent with long-standing Commission policy. Specifically, we will permit bids in four performance tiers, and for each tier will differentiate between bids that would offer either low- or high-latency service.” (footnote omitted)).

<sup>12</sup> We note the requirement in the BEAD Program that networks must “must provide download speeds of at least 100 Mbps and upload speeds of at least 20 Mbps.” *NOI* ¶ 5. That requirement, in and of itself, may preclude some areas from receiving funding to close the Digital Divide, as it limits the technologies that may be employed, including some fixed wireless solutions.

<sup>13</sup> There is ample evidence that even at the height of the pandemic, the vast majority of users didn’t require anything close to the same upload speed as download speed. See, e.g., *You’ve Been Served: Defining Broadband as 100/100 is not 100*, TECHNOLOGY POLICY INSTITUTE (Mar. 29, 2021), <https://techpolicyinstitute.medium.com/youve-been-served-defining-broadband-as-100-100-is-not-5eefcb50905a> (“Even multiple people in a household sharing an internet connection are unlikely to use 100/100. In principle, you could have ten kids pretending to do Zoom school but actually doing TikToks while you’re in the other room pretending to work but actually watching Netflix, and still not run out of bandwidth.”). See also D. Collier, *The Asymmetrical Consequences of Symmetrical Speeds*, CITIZENS AGAINST GOVERNMENT WASTE (Mar. 25, 2021), <https://www.cagw.org/thewastewatcher/asymmetrical-consequences-symmetrical-speeds> (“If Congress or the Federal Communications Commission (FCC) were to arbitrarily and capriciously set a standard for data download and upload speeds to a symmetrical 100/100 Mbps, it would fly in the face of the way consumers now use the internet and create an even greater divide between those who have and those who do not have internet access. For example, service providers will be required to change their service to existing customers at the expense of those who remain without available service.”).

<sup>14</sup> See, e.g., Shane Tews, *Biden’s broadband boondoggle*, AMERICAN ENTERPRISE INSTITUTE (Apr. 2, 2021), <https://www.aei.org/technology-and-innovation/bidens-broadband-boondoggle/> (“Swapping human judgment and financial accountability for large government-funded programs has considerable downsides: consequences of faulty strategic planning and a lack of measurable outcomes for communities on how and where to concentrate their spending priorities. A 2019 study by the Technology Policy Institute’s Sarah Oh [did] not find evidence that municipal broadband yields benefits in broadband subscription rates or employment growth.”).



## 5. CAPEX Support Without OPEX Support is a Recipe for Disaster

The NOI points out probably the largest problem of dumping billions of taxpayer dollars into the broadband ecosystem to build more infrastructure: there is no money for future operational costs (OPEX). In addressing the impact of the Infrastructure Act on the USF High-Cost Program, the NOI notes:

In general, the High-Cost program has supported both the initial construction and the ongoing operational expenses for supported networks. Support from the program goes to service providers over a certain term of years, and the support must be used to build and maintain voice and broadband capable networks meeting defined minimum speed and latency obligations. The Commission will disburse billions of dollars in support in the coming years for fixed network buildout and operations in unserved and underserved areas, through the various funds within the High-Cost program. The BEAD Program will focus on deploying new broadband infrastructure to unserved and underserved locations. Even after the networks supported by these programs are constructed, providers will incur ongoing operating expenses as well as some capital expenses.<sup>15</sup>

In Congress' rush to close the Digital Divide, it has ignored this key component of broadband networks.<sup>16</sup> The history of the near-complete failure of municipal broadband highlights the problem of rapidly building infrastructure without a plan, or the expertise, to maintain a broadband network.<sup>17</sup> Will the problem of no OPEX support become the responsibility of the High-Cost Program alone? If so, then the FCC will have to completely revamp it (and

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<sup>15</sup> NOI ¶ 30 (footnotes omitted).

<sup>16</sup> Consultants are rushing in to scoop up billions in consulting fees for assisting in these buildouts, but where will they be when there is no money for them to consult on operational issues?

<sup>17</sup> T. Randolph Beard, et al., *The Law and Economics of Municipal Broadband*, 73 FCBA J. 1, 18 (2020) ("Most of the gains attributed to municipal broadband systems are based on economic migration rather than economic development. Consider, for example, former FCC Chairman Tom Wheeler's description of the economic gains attributed to the municipal network in Chattanooga-Tennessee: 'Smaller businesses . . . relocated to the city, and Chattanooga is also emerging as an incubator for tech start-ups.' Note the operative word here is "relocated." For the most part, the economic development from municipal broadband systems appears to be based on stealing businesses from other cities." (footnotes omitted)).

eligibility to participate in High Cost) in a way far more complex than the 2011 Transformation Order.<sup>18</sup> The Commission should highlight this issue to Congress in its report.

## **6. The FCC Cannot Unilaterally Extend the Contribution Base for USF**

Of course, the FCC can only implement the laws passed by Congress. This is made most evident by the NOI's request for comment as to "whether changes in law are necessary or appropriate to update the system of universal service contributions."<sup>19</sup> Within that single sentence lies the core of what should be a national debate on how we fund the Universal Service Fund Program.

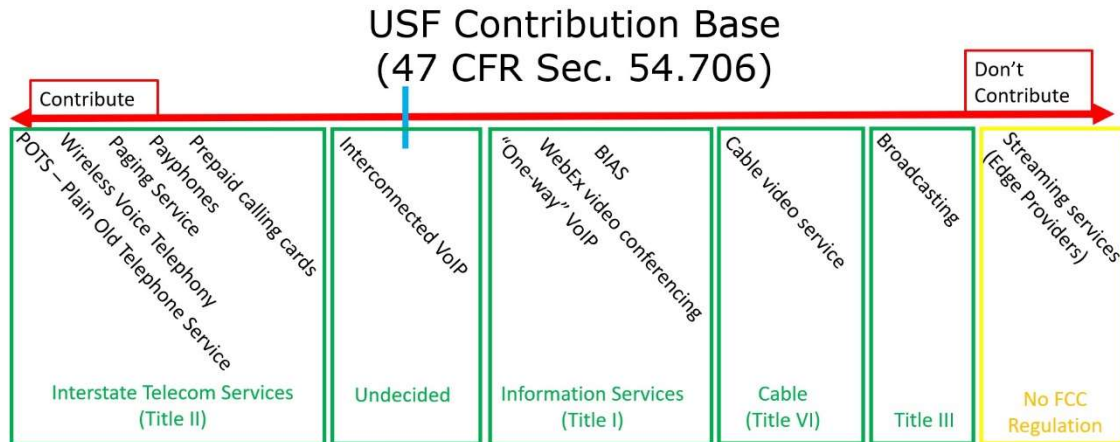
Section 254(d) limits the contribution base of USF to "interstate telecommunications services."<sup>20</sup> There is nothing the FCC can do to expand that definition by itself. Currently, the universe of services for which contributions to USF are required is depicted below (blue vertical line on the red line denoting the continuum from Title II services (to the left) all the way out to content providers (on the right), currently unregulated by the FCC).

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<sup>18</sup> Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 (2011) (USF/ICC Transformation Order and/or FNPRM).

<sup>19</sup> NOI ¶ 51 (citing Press Release, Office of Commissioner Brendan Carr, *Carr Calls for Ending Big Tech's Free Ride on the Internet*, (May 24, 2021), <https://docs.fcc.gov/public/attachments/DOC-372688A1.pdf>).

<sup>20</sup> 47 U.S.C. § 254(d).



Even reclassifying broadband internet access service (BIAS) as a Title II telecommunications service would not automatically increase USF funding; under the 2015 Open Internet Order, BIAS was not included in the USF contribution base.<sup>21</sup> Instead, this Commission would both have to reclassify BIAS as a Title II service, *and* “unforbear” from applying contribution requirements on BIAS providers — something the Wheeler FCC promised not to do.

And even if the FCC were to sweep BIAS into the USF fold, that still would not get the FCC to where Commissioner Carr would have it go: forcing “Big Tech” contribute to USF. Those companies fall completely outside the FCC’s jurisdiction in almost every respect.<sup>22</sup> Attempting to broaden the contribution base to include “Big Tech” platforms would suffer the same fate as the FCC’s attempt to do Hollywood’s bidding to protect copyrighted material.

<sup>21</sup> Protecting and Promoting the Open Internet, Report and Order, FCC 15-24, GN Docket No. 14-28 (2015) (forbearing from imposing USF contributions on BIAS providers ¶ 58 and affirmatively preempting any state attempt to require contributions to their respective state USF funds from BIAS providers ¶ 432).

<sup>22</sup> See Jim Dunstan, *The Arrival of the Federal Computer Commission*, THE FEDERALIST SOCIETY (Aug. 27, 2021), <https://fedsoc.org/commentary/fedsoc-blog/the-arrival-of-the-federal-computer-commission>.

“There is no statutory foundation for the broadcast flag rules,” ruled the D.C. Circuit in 2005, “and consequently the rules are ancillary to nothing.”<sup>23</sup>

More fundamentally, the entire USF contribution scheme is broken, and has been for at least a decade. USF contributions constitute the most regressive tax in the entire nation. When the contribution factor hit an all-time high of 31.8% in the first quarter of 2021,<sup>24</sup> the tax on every dollar of everyone’s phone bill (making more than 135% of the poverty level of \$26,500 for a family of four and thus not eligible for Lifeline), is equivalent to the federal income tax



E-rate is already funded through the high regressive tax in America

#TelecomActChat

TechFreedom @TechFreedom · Jan 19, 2021

A year ago, Americans paid a 21.2% tax on phone bills for Universal Service subsidies. Today, the FCC announced a new rate of 31.8%

USF is important, but this is the most regressive tax in America. It's reached the same effective rate on incomes of \$565k/year!

Time for reform!  
[Show this thread](#)

### 2020 Effective Tax Rates by Income for Single Individuals

Depending on where you fall, at the bottom or top of a tax bracket, you may have a very different effective tax rate than someone else in your same bracket.

Income	Effective Tax Rate
\$50K	10%
\$100K	22%
\$200K	32%
\$300K	35%
\$500K	37%
\$565K	31.8%

Source: Tax Foundation  
Chart: The Balance • [Get the data](#) • [Add this chart to your site](#)

3:16 PM · Feb 8, 2021 · Twitter Web App

rate one would pay on an annual income of \$565,000.<sup>25</sup> Not only is this not sustainable, it is fundamentally unfair to those just above the poverty line. There is no way to avoid such perversely regressive results so long as USF is funded out of a “contribution” — really, a flat tax — imposed on all telecommunications services. Instead, USF should be funded out of general revenues collected through progressive income taxation.

<sup>23</sup> American Library Ass’n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

<sup>24</sup> See *OMD announces proposed 3Q USF Contribution Factor is 31.8 percent*, FCC (June 10, 2021) <https://www.fcc.gov/document/omd-announces-proposed-3q-usf-contribution-factor-318-percent>.

<sup>25</sup> TechFreedom (@TechFreedom), Twitter (Feb. 8, 2021, 3:16 PM), <https://twitter.com/TechFreedom/status/1358872419117719552>.

## 7. The Constitutionality of the USF and USAC Is a Subject of Considerable Doubt

In paragraph 45 of the Notice, the Commission says, seemingly as an afterthought, that it “also” seeks comment on “issues raised in comments submitted with respect to the proposed universal service contribution factors for the fourth quarter of 2021 and the first quarter of 2022.” Anyone who consults the comments referred to in that dry sentence—the Notice buries a citation to them in footnote 124—will find that they raise multiple serious questions about the constitutionality of the USF and the USAC. The comments argue, among other things, (1) that the statute creating the USF unconstitutionally delegates legislative power to the Commission; (2) that the Commission in turn unlawfully delegates that power to the USAC; (3) that the USAC’s directors, if agents of the government, are not properly appointed; and (4) that the Commission violates the Administrative Procedure Act whenever it adopts a new contribution factor without undertaking notice and comment.

Congress handed the Commission unbounded discretion to define (and re-define at will) the term “universal service,” and to raise money in service of the USF almost entirely as it sees fit. The Commission then handed most of this sweeping authority to the USAC, a nonprofit corporation. Even under the current standard for nondelegation—under which Congress must provide an agency an “intelligible principle” by which to act—the constitutionality of the USF and the USAC is a subject of considerable doubt. The problem is only heightened by the fact that the Supreme Court clearly intends to revisit, and likely strengthen, the nondelegation rule.<sup>26</sup> The

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<sup>26</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (urging the Court to end its “intelligible principle misadventure”); *Id.* at 2130-31 (Alito, J., concurring in the judgment) (“If a majority of this Court were willing to reconsider the [intelligible principle] approach we have taken for the past 84 years, I would support that effort.”); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (“Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”); Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014) (describing the intelligible principle test as “notoriously lax”).

Commission should therefore study the nondelegation matter closely. It should then use the Report as an opportunity to recommend ways to make the statute authorizing the USF clearer, more detailed, and more rigorous—to make it into a law, in other words, that cabins the Commission’s discretion, and supplies the Commission substantial guidance, in running the USF. Otherwise, it is only a matter of time before the entire legal basis for USF fails in court under the nondelegation rule.

As it considers these issues, the Commission should pay particular attention to the importance of process. It is widely understood that “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”<sup>27</sup> Equally, though, does the acceptable degree of agency discretion vary according to how much process a statute requires the agency to undertake before acting. To avoid making “a pure delegation of legislative power,” Congress “must enjoin upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function.”<sup>28</sup> When, for example, a statute provides “for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review,” those restrictions can justify a broader conferral of substantive power to the agency.<sup>29</sup>

Given the importance of process to an analysis of nondelegation, it is of particular concern that the Commission currently (1) hands much of the running of the USF to a non-governmental

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<sup>27</sup> *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 475 (2000).

<sup>28</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935) (quoting *Wichita R.R. Light Co. v. Pub. Util. Comm’n*, 260 U.S. 48, 59 (1922)).

<sup>29</sup> The quote is from *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935), which cites these restrictions in explaining why Section 5 of the Federal Trade Commission Act, which enables the FTC to ban “unfair methods of competition,” is not an unconstitutional delegation. The broad grant of substantive power—that is, the authority to define what is “unfair”—was limited by (among other things) the requirement to proceed case-by-case, with a formal complaint, notice and hearing, etc.

entity and (2) then accepts that entity's proposed contribution factors without undertaking notice and comment. Under the nondelegation rule, it is Congress that must provide directions for policy-making. Whatever process the Commission might require of the USAC does not count, therefore, in an analysis of whether the USF is constitutional. For purposes of the nondelegation rule, in other words, any such process is equivalent to no process at all: the USAC's proposals might as well be pulled from a hat. This should be remedied. Likewise, under no circumstances should the Commission simply be rubber-stamping recommendations that come from elsewhere. Notice and comment is the minimum amount of process that could support "the scope of the power congressionally conferred"<sup>30</sup> in any statute that instructs the Commission to run the USF.

## CONCLUSION

Congressional action providing funding for broadband is a once in a lifetime opportunity to narrow, if not close entirely, the Digital Divide. But with so much money flowing so quickly, absent close coordination between the agencies distributing the money, and adequate maps defining "unserved" and "underserved" areas, there is a high likelihood that much of that largess will be misspent, squandering the last true chance we have as a nation to bring advanced services to as many people as possible. It is not enough merely to spend all that money. Such expenditures must translate directly to providing universal service. Achieving that is not going to be easy, especially given past evidence of waste, fraud, and abuse in government broadband programs. TechFreedom hopes the FCC will provide a report to Congress that soberly assesses the situation and proposes much needed legislation to clarify the roles of federal agencies in assisting the deployment of broadband networks throughout the country.

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<sup>30</sup> *Whitman*, 531 U.S. at 475.

Respectfully submitted,

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