Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Report on the Future of the	)	WC Docket No. 21-476
Universal Service Fund	)	

JOINT COMMENTS OF USTELECOM – THE BROADBAND ASSOCIATION, NTCA – THE RURAL BROADBAND ASSOCIATION, AND COMPETITIVE CARRIERS ASSOCIATION

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TABLE OF CONTENTS

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	)	
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USTelecom – The Broadband Association ("USTelecom"),[1] NTCA – The Rural Broadband Association ("NTCA"),[2] and Competitive Carriers Association ("CCA")[3] submit these joint comments on the discrete constitutional, statutory, and procedural issues raised in comments submitted by Consumers' Research, Caused Based Commerce, and a variety of individuals (hereafter, "Consumers' Research") in this proceeding and with respect to the proposed universal service contribution factors for the fourth quarter of 2021 and the first and second quarters of 2022.[4]

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[1] USTelecom is the premier trade association representing service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses in every corner of the country.

[2] NTCA represents approximately 850 independent, community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services.

[3] CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. Members range from small, rural carriers serving fewer than 5,000 customers to regional and nationwide providers serving millions of customers, as well as vendors and suppliers that provide products and services throughout the wireless communications ecosystem.

[4] *See* Comments and Objections of Consumers' Research *et al*., CC Docket No. 96-45, at 31-51 (Sept. 23, 2021) ("Consumers' Research September Comments"); Comments and Objections of Consumers' Research *et al*., CC Docket No. 96-45, at 32-51 (Nov. 19, 2021) ("Consumers' Research November

INTRODUCTION AND SUMMARY

In addition to asking how best to help stabilize the universal service contribution mechanism—among the issues Joint Commenters are addressing separately in individual comments—the Federal Communications Commission ("Commission" or "FCC") seeks comment on recent claims raised by Consumers' Research regarding the constitutionality, statutory consistency, and procedural lawfulness of the universal service contribution regime created more than 25 years ago pursuant to Section 254 of the Communications Act.[5] Consumers' Research's claims lack merit and should be rejected.

First, Section 254 is not an unconstitutional delegation. Consumers' Research fails to cite to any binding precedent supporting its expansive view of the nondelegation doctrine, relying instead largely upon a dissenting opinion in the recent *Gundy* decision of the U.S. Supreme Court.[6] Yet the controlling decision in that case confirms that the test adopted nearly a century ago and still in place today is "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."[7] Viewing Section 254 by this standard, it is clear that the direction to the Commission to establish a new universal service mechanism is an "intelligible principle" and not an unconstitutional delegation.[8] And even if the *Gundy* dissent had

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Comments"); Comments and Objections of Consumers' Research *et al.*, WC Docket No. 21-476, at 32-54 (Jan. 14, 2022) ("Consumers' Research January 2022 Comments"); Comments and Objections of Consumers' Research *et al*., CC Docket No. 96-45, at 32-58 (Feb. 7, 2022) ("Consumers' Research February 2022 Comments"). The Commission seeks comment on these issues in footnote 124 of the Notice of Inquiry. *See* FCC 21-127, ¶ 45 n.124 (rel. Dec. 15, 2021) (NOI). USTelecom, NTCA, and CCA are separately filing individual comments on the other issues raised in the NOI.

[5] NOI at ¶¶ 44-45.

[6] *See Gundy v. U.S.*, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).

[7] *Id*. at 2123.

[8] *See* 47 U.S.C. § 254(b)-(d) (providing detailed principles and direction to the Commission regarding what constitutes universal service and how to assess contributions in support of this statutory mission).

established the controlling standard for evaluating Congress's instruction to the Commission to establish a universal service program and associated contribution mechanism, Section 254 would fit comfortably within that standard as a permissible delegation. In this instance, the Commission is doing nothing more than "fill[ing] up the details" of a directive from Congress.[9]

Relatedly, Consumers' Research misses the mark in arguing that universal service fund ("USF") contributions are taxes.[10] Precedent makes clear that whether contributions might be characterized as taxes or fees is irrelevant in determining whether Congress has properly delegated authority.[11] Regardless, federal courts reviewing this very question have previously concluded that USF contributions are *not* taxes,[12] and the same is true of state courts reviewing challenges to analogous state USF mechanisms.[13] Nor are USF contributions functionally equivalent to taxes. Courts have concluded that USF contributions benefit providers and that they qualify as a fee rather than a tax.[14]

Second, the Commission has not unlawfully delegated to USAC. The Commission has not delegated to the Universal Service Administrative Company ("USAC") any lawmaking authority, and Consumers' Research provides no specific example of the Commission having

[9] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825)).

[10] Consumers' Research November Comments at 1.

[11] *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989); *Rural Cellular Ass'n & Universal Serv. v. FCC*, 685 F.3d 1083, 1091 (D.C. Cir. 2012) (*Rural Cellular II*).

[12] *See, e.g.*, *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 n.52 (5th Cir. 1999) (*TOPUC I*); *Rural Cellular II*, 685 F.3d at 1091.

[13] *See, e.g.*, *Schumacher v. Johanns*, 722 N.W.2d 37, 51 (2006).

[14] *See, e.g.*, *TOPUC I*, 183 F.3d at 427 n.52; *Rural Cellular II*, 685 F.3d at 1091.

done so.[15] USAC does not establish, for example, the quarterly factor that sets the level of fees paid by contributors; instead, USAC merely performs the ministerial function of gathering data necessary for the calculation of the factor "by the Commission" as specified in Commission rule.[16] In performing this function, USAC neither makes any rule or law nor exercises any unreviewable authority to raise money. Indeed, the Commission's regulations draw a bright line, making clear that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[17] The Commission was and is not prohibited from engaging an entity like USAC for the performance of administrative tasks, as the limits on such authority are drawn at "decision-making authority."[18] Claims that Congress did not permit the Commission to assign USAC its administrative role are therefore unpersuasive.

Third, USAC board member selection presents no Appointments Clause or statutory authority problem. Consumers' Research alternatively contends that selection of the USAC board would violate the Appointments Clause if USAC is a public entity, but this argument is unavailing because there is no dispute that USAC is a *private* entity. And Consumers' Research supplies no authority to support the proposition that the Commission has acted in excess of statutory authority to the extent Congress did not authorize the Commission Chair to appoint USAC's board directors.[19]

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[15] *See* Consumers' Research September Comments at 44-47; Consumers' Research November Comments at 44-47.

[16] *See* 47 C.F.R. § 54.709(a) ("Contributions to the mechanisms . . . shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly *by the Commission.*") (emphasis added).

[17] *Id*. at § 54.702(c).

[18] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[19] *See* Consumers' Research September Comments at 48; Consumers' Research November Comments at 48.

Finally, the adoption of quarterly contribution factors is not procedurally deficient. As noted, the Commission long ago established by rule how the quarterly factor would be calculated, and there is no Administrative Procedure Act ("APA") or Federal Register Act ("FRA") requirement for notice-and-comment rulemaking and publication in the Federal Register each time an updated factor is announced. Despite Consumers' Research's recent claims, this rule was adopted following notice-and-comment rulemaking in 1997 and published in the Federal Register, with the only step now being the establishment of the assessments each quarter pursuant to that rule. Thus, what Consumers' Research is really challenging is not the factor itself, but the long-standing rule by which the factor is calculated, making the argument untimely.

Moreover, the USF contributions mechanism has been considered and/or amended in multiple rulemaking proceedings over the past 25 years, meaning parties (including Consumers' Research itself) have had numerous "bites at the apple" to raise constitutional or procedural concerns; whether through participation in these proceedings or through the filing of its own petition(s) at certain points years ago, Consumers' Research had ample opportunity to pursue advocacy on this issue rather than launching misplaced and belated attacks now on the mere notices that announce the calculations conducted pursuant to this long-standing rule.

DISCUSSION

I. SECTION 254 IS NOT AN UNCONSTITUTIONAL DELEGATION TO THE COMMISSION.

Consumers' Research contends that the delegation in Section 254 to the Commission over two decades ago to collect contributions from certain kinds of providers in furtherance of universal service objectives violates "both the original understanding of nondelegation and the more modern caselaw requiring a so-called intelligible principle."[20] But it fails to cite any binding precedent supporting such an expansive view of the nondelegation doctrine, relying instead largely on a dissenting opinion in *Gundy v. United States*, a recent Supreme Court decision addressing claims of an unconstitutional delegation of Congress's lawmaking power.[21] And its contention that contributions to the USF are unconstitutional taxes fares no better,[22] because precedent makes clear that USF contributions are not taxes and, even if they were, the nondelegation analysis would not change.

A. Congress's Section 254 Delegation to the FCC Fits Comfortably Within the Scope of Discretion Permitted by Supreme Court Precedent.

Consumers' Research's heavy reliance on the *dissent* in *Gundy* to support its nondelegation claims is misplaced. The *controlling* plurality opinion from *Gundy* confirms that the test adopted nearly a century ago and still in place today is "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."[23] Put differently, a delegation

[20] Consumers' Research September Comments at 31; Consumers' Research November Comments at 32.

[21] Consumers' Research September Comments at 31-36; Consumers' Research November Comments at 32-36.

[22] Consumers' Research September Comments at 36-44; Consumers' Research November Comments at 36-44.

[23] *Gundy*, 139 S. Ct., at 2129 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475-76 (2001) (concluding that delegation to the agency "to set air quality standards at the level that is 'requisite'—that is, not lower or

is permissible when "Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'"[24] As further noted by the plurality in *Gundy*, "[o]nly twice in this country's history has the Court found a delegation excessive, in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion."[25] Notably, those two cases finding an excessive delegation were both decided in 1935,[26] and as described herein, unlike those cases, Section 254 providers a clear standard that guides the Commission's discretion in implementing its universal service obligations.

Viewing Section 254 by the intelligible-principle standard—and especially when read against the backdrop of the prior system where universal service was enabled through implicit subsidies under a monopoly regime[27]—it is clear that the direction to the Commission to establish a universal service contribution mechanism provides much more than an "intelligible principle" and is therefore not an unconstitutional delegation. That is, Congress set forth explicit principles for the Commission to follow,[28] defined "universal service" in a prescriptive manner

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higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent").

[24] *Id.* at 2129 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (alteration in original).

[25] *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7) (emphasis in original).

[26] *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[27] *See Am. Power & Light Co.*, 329 U.S. at 104-05 (noting that statutory standards should not be read in isolation when assessing delegation question because such standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context"); *Gundy*, 139 S. Ct. at 2127-29 (reviewing legislative history and congressional intent to buttress interpretation of the statute's text in evaluation of a challenge on nondelegation grounds).

[28] *See* 47 U.S.C. § 254(b) (providing six "universal service principles," including that "[q]uality services should be available at just, reasonable, and affordable rates," and that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service"). Although Section 254(b) permits the creation of additional principles, such principles must be "necessary and appropriate for the protection of the public interest, convenience, and necessity and [be] consistent with this Act."

that nevertheless acknowledges the likelihood of change in the telecommunications industry,[29] and provided clear directions for how contribution mechanisms should be designed.[30] These instructions establish the bounds of the Commission's authority and make clear to the Commission the policy it is to pursue.

By comparison, a review of statutes found by the Supreme Court to have passed the intelligible-principle test demonstrates that Section 254's detailed instructions to the Commission come nowhere near to making this a close case—and that Section 254 most assuredly satisfied the intelligible-principle test. Notably, the Court in *National Broadcasting Co. v. United States* upheld the delegation to the FCC to regulate broadcast licensing "as public interest, convenience, or necessity" require.[31] More recently, in an opinion written by Justice Scalia, the Court upheld Congress's delegation to the U.S. Environmental Protection Agency to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health."[32]

Further belying Consumers' Research's assertion that "Congress failed to provide a meaningful intelligible principle to guide the Commission's policy choices,"[33] federal appeals

[29] *Id.* § 254(c) (defining universal service to be "an evolving level of telecommunications services that the Commission shall establish periodically . . . , taking into account advances in telecommunications and information technologies and services" and requiring that the definition shall consider whether the services are essential, have been subscribed to by a substantial majority of residential customers, are being deployed in public networks, and are consistent with the public interest, convenience, and necessity).

[30] *Id.* § 254(d) (requiring that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service").

[31] 319 U.S. 190, 214, 225-26 (1943).

[32] *Whitman*, 531 U.S. at 472-476.

[33] Consumers' Research September Comments at 33; Consumers' Research November Comments at 33.

courts cases applying Section 254 have shown that the statute provides ample guidance. Indeed, federal appeals courts have reversed FCC action based on interpretations of Section 254,[34] demonstrating that the agency's discretion under Section 254 is limited and "fits comfortably within the scope of discretion permitted by [Supreme Court] precedent"[35] where "'the criteria which congress has supplied are wholly adequate for carrying out the general policy and purpose' of the act."[36]

Not only does Section 254 pass muster under the long-established intelligible-principle standard, but it would also be constitutional even if the *Gundy* dissent were the controlling law. The *Gundy* dissent was careful to state that although Congress must make the policy decisions, Congress may still direct agencies to "fill in even a large number of details" and to "find facts that trigger the generally applicable rule of conduct specified in a statute."[37] Here, Congress has made "the policy decisions" and the Commission is filling in the details.[38]

First, Section 254 has not given the Commission discretion, in the first instance, to determine whether there should be a universal service program or the fundamental outlines and contours of the program. Rather, Section 254(d) provides, "*Every telecommunications carrier* that provides interstate telecommunications services *shall* contribute, on an equitable and

[34] *See, e.g.*, *TOPUC I*, 183 F.3d at 395 (reversing FCC decision after concluding that "[t]he agency has offered no reasonable explanation of how this outcome, which will require companies such as COMSAT to incur a loss to participate in interstate service, satisfies [Section 254(d)'s] 'equitable and nondiscriminatory' language."); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201, 1205 (10th Cir. 2001) (*Qwest I*) (concluding that the FCC had inadequately explained how its decision was related to the statutory requirements provided in Section 254).

[35] *Whitman*, 531 U.S. at 475.

[36] *Mistretta*, 488 U.S. at 379 (quoting *Sunshine Coal v. Adkins*, 310 U.S. 381, 398 (1940)).

[37] *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

[38] *Id.* at 2136 (Gorsuch, J., dissenting).

nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[39]

Second, Section 254(c)(1)'s delegation to the Commission to determine what constitutes universal service represents an instance of agency fact-finding, where Congress has provided the Commission with the relevant factors to consider. This is therefore not a case where Congress "found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge."[40] Rather, Congress recognized that "the telecommunications market [would] undergo[] dramatic changes,"[41] and the definition of universal service would need to keep pace by allowing for an "evolving" standard subject to congressional prescriptions.

In sum, Section 254 "set[s] forth the facts that the executive must consider and the criteria against which to measure them," and thereby "set[s] forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[42] Indeed, the courts' ability to ascertain whether Congress's guidance has been followed has been borne out by federal courts' review of Commission action taken pursuant to Section 254.[43]

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[39] 47 U.S.C. § 254(d) (emphasis added). Although Section 254(d) goes on to permit the Commission to exempt a carrier or class of carriers, this is simply conditional legislation subject to agency fact-finding. Similarly, Section 254(d)'s provision allowing for contribution from "any other provider of interstate telecommunications" likewise falls into the gap-filling category, where Congress has provided the policy, but agency gap-filling is required. *See Vonage Holdings v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007) (explaining the FCC required voice over internet protocol services (which did not have widespread commercial use in 1996) to make contributions and upholding that decision).

[40] *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting).

[41] *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 322 (5th Cir. 2001) (*TOPUC II*).

[42] *Gundy*, 139 S. Ct. at 2136, 2141 (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

[43] *See, e.g.*, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 436 (5th Cir. 2021) (noting that caselaw does not support the argument that the Commission "may deploy the universal-service mechanism to accomplish any non-prohibited purpose in the Act"); *TOPUC I*, 183 F.3d at 395 (reversing FCC decision

B. USF Contributions Are Not Taxes.

Consumers' Research also erroneously argues that charges imposed for universal service are taxes, and that Section 254 unconstitutionally delegated Congress' taxing power to the Commission.[44] As a threshold matter, whether USF contributions are taxes or fees is irrelevant for the purposes of nondelegation analysis. In *Skinner v. Mid-America Pipeline Co.*, the Supreme Court expressly held: "Even if the user fees are a form of taxation . . . the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges."[45] The D.C. Circuit has already reached this conclusion regarding the USF program, concluding that "[b]ecause section 254 of the Act clearly provides an intelligible principle to guide the Commission's efforts, viz., 'to preserve and advance universal service,' whether the assessment is deemed a tax is of no real moment."[46] These authorities put to rest Consumers' Research's taxation claims.

Even if the tax-versus-fee question were relevant, Consumers' Research is incorrect that USF contributions are legally equivalent to taxes. The U.S. Courts of Appeals for both the D.C. Circuit and the Fifth Circuit have already concluded that universal service contributions are not

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after concluding that "[t]he agency has offered no reasonable explanation of how this outcome, which will require companies such as COMSAT to incur a loss to participate in interstate service, satisfies [Section 254(d)'s] 'equitable and nondiscriminatory' language."); *Qwest I*, 258 F.3d at 1201, 1205 (concluding that the FCC had inadequately explained how its decision was related to the statutory requirements provided in Section 254); *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (*Qwest II*) (concluding the Commission had erred in its constructions of "sufficient" and "reasonably comparable").

[44] Consumers' Research September Comments at 36-44; Consumers' Research November Comments at 36-44.

[45] 490 U.S. 212, 223 (1989).

[46] *Rural Cellular II*, 685 F.3d at 1091.

taxes.[47] In addition, state courts have concluded that universal service contributions are not taxes under analogous state laws.[48]

Nor are universal service contributions a functional equivalent to taxes. Consumers' Research claims that use of the term "universal" in the name of the program is textual proof that it is intended to confer broad benefits to the general public,[49] but this takes the reach of USF too far. The benefits conferred through the universal service program are directed to specific subsets of providers and customers—*i.e.*, those that require assistance to provide or obtain services that would otherwise be unavailable or unaffordable.

Consumers' Research argues that USF contributions are a tax and not a fee because they do not confer a sufficient benefit to contributors, and that there should be a "monotonically positive" relationship between fees and benefits that is lacking in the USF mechanisms.[50] Courts have concluded, however, that USF contributions *do* benefit providers and that they qualify as a fee rather than a tax,[51] and Consumers' Research has cited no legal authority for the proposition that the relationship between a fee's benefits and costs must be monotonically positive. Moreover, the made-up "monotonicity" test is an unworkable standard—it appears to require that

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[47] *See id.* (concluding USF contributions are fees, not taxes); *TOPUC I*, 183 F.3d at 427 n.52 (concluding in the alternative that "[a]s applied to paging carriers, the universal service contribution qualifies as a fee because it is a payment in support of a service.").

[48] *See, e.g.*, *Schumacher*, 722 N.W.2d at 51 ("Based upon our independent review, we conclude that the surcharge assessed by the [Public Service Commission] pursuant to the [Nebraska Telecommunications Universal Service Fund Act] is not a tax."); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 956 P.2d 685, 709 (Kan. 1998) (concluding that the universal service funds are not for the benefit of the general public where the funds are distributed only to certain qualifying members of the telecommunications industry).

[49] Consumers' Research September Comments at 9; Consumers' Research November Comments at 8-9.

[50] Consumers' Research September Comments at 38-42; Consumers' Research November Comments at 38-43.

[51] *See, e.g.*, *TOPUC I*, 183 F.3d at 427 n.52; *Rural Cellular II*, 685 F.3d at 1091.

each individual payor receive an increasing benefit,[52] but requiring an analysis of every payor's contributions and receipts would be extremely difficult and fact-intensive.[53] Rather, in determining whether contributions are fees, what matters is whether payors benefit in general, which they do as beneficiaries of USF funds.[54]

Indeed, many of the Joint Commenters' members—as contributors to the USF mechanisms—can confirm firsthand that USF support helps to make the business case for deployment of networks and in the delivery of services that satisfy universal service principles articulated by Section 254. For example, serving some of the most high-cost rural areas in the country, where population densities tend to average roughly four serviceable locations per square mile,[55] these companies could not make the business case to deploy their networks or deliver high-quality services at affordable rates without USF. Put more plainly, many of the Joint Commenters' members could not sustain their businesses in the absence of the USF support that they and others contribute. The universal service program plainly benefits such providers. It is also important to note that mobile networks that are deployed and sustained in high-cost rural areas provide expanded service to all payors through expanded connectivity as a result of the

[52] Consumers' Research September Comments at 38-40 (citing attached Report of Dr. George Ford, at 8 tbl.2 (showing ratio of support to revenues for several providers in the high-cost program); Consumers' Research November Comments at 38-41 (same).

[53] *Cf. Skinner*, 490 U.S. at 223 (noting the district court's efforts to determine whether the pipeline safety users fees were more properly thought of as taxes).

[54] *See Rural Cellular II*, 685 F.3d at 1090-91 (not examining in detail benefits to each contributor but rather examining the benefits to the group of contributors as a whole).

[55] *See, e.g.*, NTCA, NTCA Membership Broadband Survey at 1 (Dec. 2021), https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf (showing average serviceable area locations for respondents is 7,581, and average service area is 1,906 square miles).

potential to roam on those networks. Network effects like these illustrate the benefits to payors resulting from universal service contributions.

II. THE COMMISSION MAY PERMISSIBLY DIRECT USAC TO PROVIDE ASSISTANCE IN ADMINISTERING THE UNIVERSAL SERVICE PROGRAM.

Consumers' Research wrongly claims that this case involves "a delegation of lawmaking power . . . to private bodies" because the Commission has engaged USAC in administering the universal service program,[56] and therefore USAC's administrative role represents either an unconstitutional delegation or a delegation in excess of the Commission's statutory authority.[57] In fact, USAC is expressly forbidden from making any policy decisions, and Consumers' Research relies on inapt authority for its claims and grossly exaggerates USAC's role.

A. Because USAC Exercises No Legislative Authority, There Is No Unconstitutional Sub-Delegation of Legislative Power to USAC.

Consumers' Research contends that USAC possesses "lawmaking" authority through its role in calculating the quarterly contribution factor, arguing that USAC "devises" the figures that the FCC uses to calculate the factor.[58] The Commission's own regulations clearly rebut the proposition by providing: "Contributions to the mechanisms . . . shall be based on contributors' projected collected end-user telecommunications revenues, and on a contribution factor determined quarterly *by the Commission*."[59] Thus, it is the Commission, not USAC, that

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[56] Consumers' Research September Comments at 44 (quoting *Texas v. Rettig*, 993 F.3d at 410 (Ho, J., dissenting from denial of rehearing en banc)); Consumers' Research November Comments at 44 (same).

[57] Consumers' Research September Comments at 46-47; Consumers' Research November Comments at 47.

[58] Consumers' Research September Comments at 45; Consumers' Research November Comments at 45.

[59] 47 C.F.R. § 54.709(a) (emphasis added). *See also id.* § 54.709(a)(2) ("[T]he 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." (emphasis added)); *id.* § 54.709(a)(3) ("Total projected expenses for the federal universal service support mechanisms for each

determines the quarterly contribution factor. USAC simply gathers data to perform a calculation of what the appropriate contribution factor should be, as directed by the Commission.[60] On top of this, the regulations expressly exclude USAC from policy-making functions and responsibilities, providing that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress," and "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."[61] The Commission thus drew a bright line sharply circumscribing USAC's authority, allowing it only to perform administrative tasks. Indeed, Consumers' Research implicitly concedes the point by arguing that the *Commission* (not *USAC*) should set the quarterly contribution factors to zero.[62] If the Commission were to agree with Consumers' Research's arguments or chose for other reasons to freeze USF spending, USAC would be powerless to do anything about it, because it merely collects data as directed by the Commission and possesses no authority to set the quarterly factor.[63]

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quarter *must be approved by the Commission* before they are used to calculate the quarterly contribution factor and individual contributions." (emphasis added)).

[60] *See* 47 C.F.R. § 54.709(a)(2)-(3) (setting forth the process for USAC to compile total revenue used to determine the contribution factor and for submitting projections of demand, total contribution base, and administrative expenses used to calculate the contribution factor).

[61] *See* 47 C.F.R. § 54.702(c).

[62] *See* Consumers' Research September Comments at 2 (arguing that the Commission should not permit further universal service collections); Consumers' Research November Comments at 2 (arguing that the FCC, through the Office of Managing Director, should set the relevant universal service quarterly contribution factor to zero); Consumers' Research January 2022 Comments at 3 (arguing that the Commission should not permit further collections); Consumers' Research February 2022 Comments at 2 (arguing that the FCC, through the Office of Managing Director, should set the relevant universal service quarterly contribution factor to zero).

[63] Of course, freezing USF spending would likely run afoul of Section 254, which requires in part that support mechanisms be "sufficient."

These regulations demonstrate that USAC acts in a *ministerial* capacity when calculating the USF contribution factor and does not make any laws; nor does USAC exercise any unreviewable authority to raise money. One of the authorities that Consumers' Research relies on proves the point. It cites a dissent from the Fifth Circuit's denial of rehearing *en banc* in *Texas v. Rettig*, but the regulation at issue in that case required that the rates states paid to managed-care organizations *must* follow the practice standards established by the Actuarial Standards Board (a private entity).[64] The dissent from denial of rehearing *en banc* therefore described the Actuarial Standards Board as exercising "substantive *lawmaking power*, rather than some minor factual determination or *ministerial task*."[65] USAC lacks any such unreviewable power with regard to the universal service contribution factor; rather, it simply compiles data and performs projections to provide the Commission with factual information to determine the contribution factor. While Consumers' Research attempts to get around this by arguing that the Commission has not reversed the figures USAC proposes,[66] that does not change the fact that USAC's compiling task is nevertheless *reviewable* as opposed to the Actuarial Standards Board's role in *Rettig*.

Finding little support in the actual regulations that dictate USAC's functions and responsibilities with respect to the universal service contribution factor, Consumers' Research instead relies on *In re Incomnet*, a bankruptcy case where the court answered the narrow—and irrelevant—question of whether USAC was an "initial transferee" under the Bankruptcy Code.[67]

[64] 987 F.3d 518, 524–25 (5th Cir. 2021).

[65] *Rettig*, 993 F.3d at 410 (Ho, J., dissenting from denial of rehearing en banc) (emphasis added).

[66] Consumers' Research September Comments at 45-46; Consumers' Research November Comments at 45-46.

[67] 463 F.3d 1064, 1069 (9th Cir. 2006).

In answering that question, the court looked to the immediate control that USAC has over USF funds.[68] Significantly, however, *Incomnet* only answered this narrow bankruptcy law question. The court's holding says nothing regarding the relevant issue of USAC's lack of lawmaking authority. In fact, the court noted a litany of other ways in which the FCC controls USAC's actions.[69] *Incomnet* thus undercuts any argument that the FCC exercises little control over USAC.

B. Because USAC Exercises No Decision-Making Authority, the FCC's Sub-Delegation Is Permissible.

In addition to arguing that USAC unconstitutionally wields legislative power, Consumers' Research also argues—in one sentence—that Congress did not authorize the FCC to task USAC with ministerial functions necessary to administer the universal service program.[70] Consumers' Research does not identify any authority prohibiting the Commission from delegating administrative tasks to USAC. Tellingly, Consumers' Research does not even cite the leading case on agency sub-delegations, *U.S. Telecom Ass'n v. FCC*, which only prohibits sub-delegations of "*decision-making* authority."[71] However, as noted above, USAC lacks any "decision-making" authority; indeed, the FCC's regulations expressly preclude USAC from

[68] *Id.* at 1071–75.

[69] *Id.* at 1071–73. ("[T]he FCC does hold substantial power over the fund indirectly, essentially by overseeing USAC;" "The FCC has responsibility for implementing and regulating the collection and distribution of the USF;" "The FCC must approve USAC's total projected expenses and budget on a quarterly basis;" "USAC is prohibited from mak[ing] policy, interpret[ing] unclear provisions of the statute or rules, or interpret[ing] the intent of Congress;" "The FCC retains the authority to overrule USAC's actions in administering the universal service support funds; those who are aggrieved by USAC, its committees, or its Board may seek review from the FCC." (internal quotations and citations omitted)).

[70] Consumers' Research September Comments at 47; Consumers' Research November Comments at 47.

[71] 359 F.3d 554, 566 (D.C. Cir. 2004) (emphasis added).

exercising such authority by providing that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[72]

Even the case that Consumers' Research cites, *Fund for Animals v. Kempthorne*, supports the proposition that USAC does *not* exercise decision-making authority that would run afoul of *U.S. Telecom*.[73] In that case, the court noted that the third parties had been delegated a "narrow[] band of discretion," but the discretion was narrow enough within the broader statute to be permissible.[74] Here, by contrast, the Commission has not provided USAC with *any* discretion.[75] USAC thus operates in purely a "ministerial or advisory role."[76]

III. BECAUSE USAC'S BOARD WAS PROPERLY CREATED AND CHOSEN, THERE IS NO APPOINTMENTS CLAUSE OR STATUTORY AUTHORITY PROBLEM.

USAC's board was neither unconstitutionally chosen nor selected in excess of statutory authority, as Consumers' Research contends.[77] Consumers' Research presents the constitutional argument as an alternative to its delegation argument, arguing that if USAC is determined to be a

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[72] 47 C.F.R. § 54.702(c).

[73] *See* Consumers' Research September Comments at 46 (citing *Kempthorn*e, 538 F.3d 124, 133 (2d Cir. 2008)); Consumers' Research November Comments at 46 (same).

[74] *Kempthorne*, 538 F.3d at 133.

[75] Not only has the Commission prevented from USAC from exercising any discretion related to the contribution factor, but the Commission has also forbid USAC from even advocating for any policy positions before the Commission. *See* 47 C.F.R. § 54.702(d) ("The Administrator may advocate positions before the Commission and its staff only on administrative matters relating to the universal service support mechanisms.").

[76] *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (citing *United States v. Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989)). Notably, the FCC created USAC more than twenty years ago. During that time, USAC has filed annual reports with Congress. If Congress did not think that the Commission had authority to assign USAC its administrative role more than twenty years ago, then Congress surely could have instructed the Commission to take a different approach. But Congress has not done so.

[77] Consumers' Research September Comments at 47-48; Consumers' Research November Comments at 47-48.

public entity, then the appointment of its board of directors violates the Appointments Clause because they were not appointed in accordance with the process for appointing inferior officers.[78] But because there is no dispute that USAC is a private entity (as Consumers' Research emphasizes throughout its comments),[79] there is no Appointments Clause problem. Multiple federal appeals courts have confirmed USAC's private nature.[80] For the same reason, there is no Miscellaneous Receipts Act issue, contrary to Consumers' Research's contention.[81] The Miscellaneous Receipts Act only applies to public entities, as Consumers' Research notes.[82] Further, it is not clear how this claim relates to the level of the contribution factor; any inconsistency with the Miscellaneous Receipts Act could be remedied without reducing the universal service contribution factor to zero.

While Consumers' Research also argues in passing that Congress did not permit the Commission Chair to select USAC's directors,[83] it provides no authority to support its argument and fails to acknowledge the Commission's authority under Section 4(i) of the Communications Act to make rules and regulations necessary in the execution of its functions.[84] Consumers'

[78] Consumers' Research September Comments at 47-48; Consumers' Research November Comments at 47-48.

[79] *See* Consumers' Research September Comments at 2-4, 11-14, 25, 44-46 (referring to USAC as a private company); Consumers' Research November Comments at 2-4, 11-14, 26, 44-47 (same).

[80] *See, e.g.*, *United States ex rel. Shupe v. Cisco Sys.*, 759 F.3d 379, 387 (5th Cir. 2014) ("USAC . . . is explicitly a private corporation."); *City of Springfield v. Ostrander (In re LAN Tamers, Inc.)*, 329 F.3d 204, 206 (1st Cir. 2003) (referring to USAC as "a private nonprofit corporation, subject to regulation").

[81] *See* Consumers' Research February 2022 Comments at 50.

[82] *See* 31 U.S.C. § 3302(b) (only applying requirement to "an official or agent of the United States Government" who receives "money for the Government"); Consumers' Research February 2022 Comments at 50 (only arguing that the Miscellaneous Receipts Act applies if USAC is determined to be a public entity).

[83] Consumers' Research September Comments at 48; Consumers' Research November Comments at 48.

[84] 47 U.S.C. § 154(i).

Research has therefore failed to set forth a persuasive argument that the Commission acted in excess of statutory authority in promulgating the regulation providing for the Commission Chair to appoint USAC's board.[85]

IV. THERE IS NO MERIT TO ARGUMENTS THAT THE FCC FAILED TO COMPLY WITH THE APA AND THE FEDERAL REGISTER ACT.

Consumers' Research's procedural claims are also unavailing.[86] The quarterly contribution factors are not "substantive" (or "legislative") rules that require compliance with APA requirements for rulemaking, nor do they require publication in the Federal Register pursuant to the FRA.

A. The FCC Did Not Violate the APA by Adopting a New Contribution Factor for Each Quarter Without Conducting a Notice-and-Comment Rulemaking.

As an initial matter, Consumers' Research's APA rulemaking challenge to the quarterly contribution notices is a misplaced challenge to Section 54.709 of the FCC's rules. Its constitutional arguments have nothing to do with the specific contribution factor adopted each quarter, but rather relate to the underlying assessment of *any* contribution to USF.[87] That is a challenge to the rule itself.[88] Section 54.709 was adopted in 1997 by notice and comment

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[85] *See* 47 C.F.R. § 54.703(c).

[86] *See* Consumers' Research September Comments at 4-5, 48-51, 55; Consumers' Research November Comments at 4-5, 48-51, 55.

[87] *See* Consumers' Research September Comments at 26 (arguing that the FCC should set the contribution factor at zero and suspend the collection of universal service contributions); Consumers' Research November Comments at 1, 26 (same).

[88] Section 54.709 provides that contributions to the universal service support mechanisms are based on contributors' end-user telecommunications revenues and on a "contribution factor" that the FCC determines quarterly based on a ratio set forth in the rule and information provided by USAC. 47 C.F.R. § 54.709(a). The rule requires the FCC to announce the contribution factor via public notice, and affords the FCC fourteen days thereafter to adjust the contribution factor or it is deemed granted. *See id.* § 54.709(a)(3). The rule then instructs USAC to apply the FCC-approved contribution factor to calculate individual contributions. *Id.*

rulemaking and published in the Federal Register,[89] and has been amended numerous times since then—including in 2011 as part of a comprehensive USF rule reform—affording multiple opportunities for commenters to raise any constitutional concerns.[90] Having failed to timely do so before the Commission or in a timely appeal under the Hobbs Act,[91] they should file a properly pled petition for rulemaking to amend Section 54.709 rather than misplaced serial attacks on the resulting quarterly contribution factor notices.[92] Indeed, as of this filing, Consumers' Research has already filed three sets of comments objecting to the quarterly contribution factor calculations,[93] an additional set of comments in this proceeding raising nearly

[89] *See Changes to the Bd. of Dirs. of the Nat'l Exchange Carrier Ass'n, Inc. and Fed.l-State Bd. on Universal Serv.*, Report and Order, 62 Fed. Reg. 41294, 41305 (Aug. 1, 1997).

[90] *See, e.g.*, *Universal Serv.*, Fourth Order on Reconsideration and Report and Order, 63 Fed. Reg. 2094, 2132 (Jan. 13, 1998); *Fed.-State Joint Bd. on Universal Serv.*, Fifth Order on Reconsideration and Fourth Report and Order, 63 Fed. Reg. 43088, 43098 (Aug. 12, 1998); *Changes to the Bd. of Dirs. of the Nat'l Exchange Carrier Ass'n, Inc. and Fed.-State Bd. on Universal Serv.*, Third Report and Order, Fourth Order on Reconsideration and Eighth Order on Reconsideration, 63 Fed. Reg. 70564, 70576 (Dec. 21, 1998); *1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements*, Report and Order, 64 Fed. Reg. 41320, 41331-32 (July 30, 1999); *Fed.-State Joint Bd. on Universal Serv. Access Charge Reform*, Sixteenth Order on Reconsideration, Eighth Report and Order and Sixth Report and Order, 64 Fed. Reg. 60349, 60358 (Nov. 5, 1999); *Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 66 Fed. Reg. 16145, 16151 (Mar. 23, 2001); *Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 67 Fed. Reg. 11254, 11260 (Mar. 13, 2002); *Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 67 Fed. Reg. 79525, 79533 (Dec. 30, 2002); *Connect Am. Fund*, Report and Order, 76 Fed. Reg. 73830, 73876-77 (Nov. 29, 2011).

[91] *See* 28 U.S.C. § 2344 (providing 60 days to challenge an agency order); *Kelley v. Selin*, 42 F.3d 1501, 1515 n.3 (6th Cir. 1995) ("We cannot reach this issue, however, because we find that petitioners should have asserted such a claim within the 60-day period allowed by the Hobbs Act.").

[92] *See* 47 C.F.R. § 1.401; *cf. Request for Review of Decision by the Universal Serv. Admin'r*, Order, 16 FCC Rcd 8401, 8402 ¶ 1 (CCB/APD 2001) ("[R]ather than alleging error [regarding the calculation of USF discount rates] …, these applicants directly challenge *the fairness of the Commission's rules governing the calculation* of discount rates…. These applicants' challenge to the fairness of the rules is properly initiated by filing a petition for rulemaking ….") (emphasis added).

[93] *See generally* Consumers' Research September Comments; Consumers' Research November Comments; Consumers' Research February 2022 Comments.

identical claims,[94] and at least two appeals.[95] Rather than object on a serial basis, a petition for rulemaking would provide a more efficient approach for the Commission to review and address the arguments raised in a single order, which Consumers' Research could then appeal if desired. This approach would also conserve judicial resources in the federal courts of appeals.

Nor is the calculation and announcement of each quarterly contribution factor a substantive rule that requires notice and comment rulemaking and publication in the Federal Register under the APA, as Consumers' Research contends.[96] The D.C. Circuit has defined a substantive rule as "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties" and an interpretative rule as "[a]n agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties."[97] The contribution factor calculation is the latter: an action that interprets Section 54.709 by providing guidance *to USAC*, and not one that binds FCC regulatees.[98] As the FCC has explained:

> [Section 54.709(a)(3)] acts as a shot-clock provision, *telling USAC* that if the Commission has not acted to revise its projections within 14 days of the projections being published in a public notice, the calculated contribution factor set out in the public notice shall take

[94] *See generally* Consumers' Research January 2022 Comments.

[95] *See generally Consumers' Research et al. v. FCC*, No.21-3886 (6th Cir. filed Sept. 30, 2021); *Consumers' Research et al. v. FCC*, No. 22-60008 (5th Cir. filed Jan. 25, 2022).

[96] *See* Consumers' Research September Comments at 4, 48, 55; Consumers' Research November Comments at 4, 55.

[97] *Nat'l Mining Ass'n v. McCarthy*, 758 F. 3d 243, 251-52 (D.C. Cir. 2014), *quoted in Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 123 n.4 (2015) (Thomas, J., concurring in judgment).

[98] *See* 47 C.F.R. § 54.709(a)(3) ("[T]he *Administrator* shall apply the quarterly contribution factor, once approved by the Commission, to … calculate the amount of individual contributions.") (emphasis added); *Proposed Fourth Quarter 2021 Universal Serv. Contribution Factor*, Public Notice, DA 21-1134, at 4 (rel. Sept. 10, 2021) ("*USAC* shall use the contribution factor to calculate universal service contributions for the fourth quarter of 2021.") (emphasis added).

> effect. In other words, the rule simply provides *guidance to USAC . . . .*"[99]

Because the quarterly contribution factors are not new substantive rules, but rather guidance to USAC interpreting the requirements of a rule adopted decades ago pursuant to notice-and-comment rulemaking procedures, the routine issuance of public notices announcing those factors does not violate the notice and comment requirements of the APA.[100]

While Section 552(a)(1)(D) of the APA requires Federal Register publication of interpretive rules and guidance of "general applicability," other interpretations adopted by an agency need not be published in the Federal Register; rather, under Section 552(a)(2)(B), they need only be "ma[d]e available" to the public.[101] Because the quarterly contribution factor guides USAC specifically rather than the public generally, Federal Register publication is therefore not required.[102] Instead, APA Section 552(a)(2)(B) simply requires that each quarterly contribution factor be made public, and the Commission does just that: pursuant to Section 57.709(a) of the FCC's rules, each quarterly contribution factor is "announced by the Commission in a public notice" and is "made available on the Commission's website."[103]

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[99] *Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18263-64 App. F ¶ 23 (2011) (*Connect Am. Order*) (emphasis added), *aff'd sub nom. Direct Commc'ns. Cedar Valley, LLC v. FCC*, 753 F.3d 1015 (10th Cir. 2014).

[100] *See Perez*, 575 U.S. at 95 (finding that when an agency interprets one of its regulations, "it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act"); 5 U.S.C. §553(b)(A) (providing that the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

[101] *Compare* 5 U.S.C. § 552(a)(1)(D) *with id.* § 552(a)(2)(B).

[102] *See Connect Am. Order*, 26 FCC Rcd at 18264 App. F ¶ 23 (explaining that Section 54.709(a)(3) "simply provides guidance to USAC").

[103] *See* 47 C.F.R. 54.709(a)(3).

In any case, the calculation and announcement of each quarterly contribution factor without notice and comment and publication in the Federal Register is at most harmless error. Any failure to seek notice and comment on each quarterly contribution factor and publish it in the Federal Register is harmless to Consumers' Research, which has had no difficulty presenting comments and objections to the individual public notices announcing the quarterly contribution factors and has not alleged what additional arguments it would make with the opportunity for further comment. As noted, its constitutional and statutory-authority based challenges object to the underlying assessment of any contribution and USAC's role; it has not made any arguments specific to the calculation of individual contribution factors.[104] Moreover, the instant NOI provides Consumers' Research with the relief it seeks: the FCC has placed its objections on notice and is now seeking comment on those very objections. Any party that wishes to comment on the merits of those objections thus has an opportunity to do so.

B. The FCC Did Not Violate the Federal Register Act by Adopting a New Contribution Factor Each Quarter Without Publishing It in the Federal Register.

Because there is no APA violation, Consumers' Research's derivative claim that adoption of each quarterly contribution factor violates the FRA fails.[105] Under Section 1505(a) of the FRA, the following must be published in the Federal Register: (1) presidential proclamations and executive orders having general applicability and legal effect; (2) documents that the President may determine have general applicability and legal effect; and (3) documents that may be

[104] *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) (concluding that any failure to provide notice was harmless where petitioners could not identify any additional comment they would have made if notice had been given).

[105] *See* Consumers' Research September Comments at 4-5, 50-51, 55; Consumers' Research November Comments at 4-5, 51, 55.

required to so be published by Act of Congress.[106] The quarterly contribution factor notices are not presidential proclamations or executive orders and they are not documents that the President has determined to have general applicability and legal effect. That leaves subsection (3), but it is only applicable if Congress has prescribed publication elsewhere. The Tenth Circuit has recognized that with respect to subsection (3), "[t]he Administrative Procedure Act is the only apparent source of such a prescription."[107] As discussed above, the APA does not mandate publication of the quarterly contribution factor. Thus, because "the APA contains no requirement to publish" each quarterly contribution notice in the Federal Register, the FRA "d[oes] not require publication" of each notice.[108]

Regardless, any challenge to the absence of a Federal Register publication requirement is untimely and should have been lodged when the FCC eliminated the Federal Register requirement more than twenty years ago. The original 1997 version of Section 54.709(a)(3) required publication in the Federal Register, but the FCC eliminated the requirement in 1998 to avoid "confusion" over when the fourteen-day adjustment period began and because "adequate notice" is provided by posting on the FCC website.[109] Commenters objecting to the failure to

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[106] 44 U.S.C. § 1505(a)(1)-(3).

[107] *Lonsdale v. United States*, 919 F.2d 1440, 1446 (10th Cir. 1990); *see also Am. Inst. for Imported Steel, Inc. v. United States*, 600 F. Supp. 204, 210 (Ct. Int'l Trade 1984) (recognizing that "the FRA require[s] publication … only if the APA required such publication"); *White v. Bowen*, 636 F. Supp. 1235, 1241 (S.D.N.Y. 1986) (holding that "the Federal Register Act has not been violated" where "there is no statutory requirement that the [document in question] be published").

[108] *Lonsdale*, 919 F.2d at 1446.

[109] *See Fed.-State Bd. on Universal Serv.*, Fifth Order on Reconsideration and Fourth Report and Order, 13 FCC Rcd 14915, ¶¶ 5, 49-50 (1998) (eliminating the requirement that proposed contribution factors be published in the Federal Register because it "create[d] uncertainty about the date on which the contribution factors are deemed approved," and "the public is given adequate notice of release of the proposed contribution factors because they are posted on the Commission's website immediately upon release").

publish the contribution factor in the Federal Register are effectively seeking reconsideration of the 1998 order that eliminated the Federal Register requirement. Such a request should be rejected as untimely.[110] To the extent Consumers' Research would like the FCC to consider revising the rule to reinstitute a Federal Register requirement, it should file a properly pled petition for rulemaking to modify the rule.[111]

CONCLUSION

For the foregoing reasons, the Commission should reject claims by Consumers' Research challenging the legality of the universal service contribution regime created more than 25 years ago pursuant to Section 254.

[110] *See* 47 C.F.R. § 1.429(d) (petition for reconsideration must be filed within 30 days of public notice of final action).

[111] *See* 47 C.F.R. § 1.401.

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