



DIGITAL
GOVERNANCE
WORKING
GROUP

AEI Digital Platforms and American Life Project

The Future of Universal Service

Thomas M. Johnson Jr.

SEPTEMBER 2022

A M E R I C A N E N T E R P R I S E I N S T I T U T E

Executive Summary

For decades, Congress has made it the United States's policy to make modern communications services available to all Americans. This policy recognizes that in certain rural areas and economically depressed communities, the fixed costs associated with broadband deployment would make providing service prohibitive absent government subsidies.

The principal means by which Congress has authorized the Federal Communications Commission (FCC) to achieve universal service, however, no longer makes sense in today's technological environment. Currently, through the Universal Service Fund, the FCC subsidizes broadband deployment with fees collected from providers (and ultimately users) of legacy communications services like voice telephony. That system is unfair, as it unduly and regressively taxes the disproportionately lower-income Americans who continue to use legacy voice services. It is also unsustainable, as the FCC will soon be unable to collect sufficient revenue from the

dwindling number of legacy-service users to fund modern broadband deployment.

Recent congressional actions suggest a potential path out of this dilemma. During the COVID-19 pandemic, Congress directly appropriated billions of dollars to subsidize broadband deployment and enable lower-income Americans to stay connected. Congress could choose to make such appropriations permanent and tailored to areas of genuine need, rather than continue to support the existing archaic universal-service funding mechanism.

Absent direct appropriations, there will be increasing calls to reform the Universal Service Fund to expand its contribution base to keep it solvent. For example, FCC commissioners from both parties and some internet service providers have proposed requiring internet platforms to contribute to the fund because they benefit from the user traffic that rides over modern broadband networks.

The Future of Universal Service

Thomas M. Johnson Jr.

Nearly 90 years after Congress first declared it the policy of the United States that all Americans should have access to “rapid, efficient, Nation-wide, and world-wide” communications services,¹ and decades since it determined that modern internet-access services “should be provided in all regions of the Nation,” including to “low-income consumers and those in rural, insular, and high cost areas,”² the federal government’s role in promoting universal service faces an existential crisis.

On one hand, the reality of widespread access to communications services has surpassed the wildest dreams of the New Deal-era reformers who enacted the Communications Act. The goal of universal service originated in a belief that all Americans should have access to essential emergency services like 911 on the old landline telephone network. Today, millions of Americans rely on high-speed, low-latency internet access for remote work, remote learning, telemedicine, and connectivity with friends and family.

During the height of the COVID-19 pandemic, the strength and resiliency of America’s broadband networks were on full display. Despite increased demand on retail broadband occasioned by the shift from office and school to home, our networks performed admirably, demonstrating the capacity for real-time virtual meetings that would have been unreliable even 10 years earlier.

In response to the crisis, Congress allocated billions of dollars in subsidies to keep Americans connected and spur new broadband adoption, and the Federal Communications Commission (FCC) did an admirable job administering those programs and providing additional regulatory relief. Even before the pandemic, the FCC used its existing statutory authority over the Universal Service Fund to conduct

reverse auctions that distributed billions of additional dollars for broadband deployment, connecting millions of additional households.

Real challenges remain, however, in ensuring that Americans in rural and other high-cost areas have access to modern communications services. According to one recent estimate, over 19 million Americans still lack access to high-speed broadband services.³ Meanwhile, the FCC’s Universal Service Fund—the principal policy tool that the federal government historically has used to promote universal service—faces unprecedented legal, economic, and practical challenges.

Congress has not materially updated the universal-service statute since 1996. As a result, the fund relies on an antiquated funding mechanism, and the FCC lacks clear congressional guidance to adapt to the times. Specifically, while the fund now primarily supports modern broadband service (and by extension the countless apps and websites that ride over the networks), the fund receives its revenue primarily from fees assessed on providers (and ultimately customers) of “plain old-fashioned” telephone service. As fewer and fewer Americans own landlines, this contribution base has dwindled, putting the fund on a collision course with insolvency.

In addition, frontal assaults on the constitutionality of the fund are currently pending in the federal courts of appeals for the Fifth and Sixth Circuits. Those lawsuits question whether Congress put in place intelligible standards to guide the FCC’s discretion in distributing universal-service support and whether the FCC impermissibly delegated that same work to the Universal Service Administrative Company, a private entity that administers the fund.

This past term, the Supreme Court demonstrated its willingness to aggressively curb federal agencies' power when it declared unlawful the Environmental Protection Agency's assertions of authority to achieve decarbonization through policies like the Obama-era Clean Power Plan. And the Fifth Circuit recently invalidated the Securities and Exchange Commission's long-standing practice of bringing cases seeking civil penalties before the agency's in-house administrative law judges. In sum, it is now imaginable that courts could send Congress back to the drawing board on universal service, forcing a political confrontation on the best path forward.

Adding insult to injury, the Government Accountability Office (GAO) recently released a report sounding an alarm that "U.S. broadband efforts are not guided by a national strategy" and that "federal broadband efforts are fragmented and overlapping, with more than 100 programs administered by 15 agencies." The result, as FCC Commissioner Brendan Carr recently highlighted, is a lack of "adequate tracking, measurement, and accountability standards," which risks wasteful overbuilding and "adds to the inflationary pressures that are already hitting Americans in their pocketbooks."⁴

Federal policymakers must now grapple with how the fund and its various programs intersect with this bewildering array of other sources of federal funding and develop a coordination strategy to eliminate duplicative spending and minimize potential abuse. Now that Congress has demonstrated its ability and willingness to directly appropriate billions of federal dollars to broadband deployment and low-income connectivity, does the Universal Service Fund have a role in the future? If it does, how should it be funded, and where should its limited pool of money be spent? And with billions of federal dollars already flooding the market, how much more is needed to achieve optimal results?

In short, the challenges confronting the FCC's Universal Service Fund are daunting. But the competing dynamics now at play—a more connected America and an aging, unsustainable federal funding mechanism—could set the stage for a fundamental rethinking of our approach to universal service. The time is

ripe for policymakers to ask fundamental questions about what purpose (if any) the fund should serve in the future, where its limited resources should be directed, and whether there are other, better ways for Congress and the FCC to keep Americans connected.

The Need for Congressional Action

In the Infrastructure Investment and Jobs Act, which allocated hundreds of billions of dollars to broadband connectivity as a COVID-19 relief measure, Congress recognized that the FCC's incumbent approach to universal service required a root-and-branch reexamination. Accordingly, Congress asked the FCC to provide a report that would "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."⁵ On August 12, 2022, the FCC released a report that included various proposals to reform the fund's aging contribution mechanism and suggested more reliance on appropriations as a means to advance universal service.⁶

While universal service has its origins in the progressive policies of the Franklin D. Roosevelt era, it has rightly become a conservative commitment as well. Conservatives have long understood that public policy has a limited but vital role to play in promoting and protecting the bedrock institutions of a healthy society, from families to churches to civic organizations to workplaces. In recent years, this commitment has included renewed attention on those blue-collar and rural communities that have been disrupted by technological evolution and globalization.

For example, former FCC Chairman Ajit Pai (whom I served as the FCC's general counsel) made it his top priority on day one of his tenure to close the "digital divide" between communities that had access to broadband and those that did not. During his administration, the federal government committed tens of billions of dollars to rural deployment, reaching millions of previously unserved homes and businesses.

Sound universal-service policies can empower rural communities and lower-income Americans to achieve better outcomes in health, educational achievement, employment, and family cohesion. Improving connectivity through the American heartland also facilitates the essential work done by the farmers who prepare our food, the coal miners and other energy producers who power our grids, and the teachers who educate our children. Moving forward, however, doing this will require Congress to update the anachronistic way that the Universal Service Fund attempts to subsidize broadband deployment and affordability.

Sound universal-service policies can empower rural communities and lower-income Americans to achieve better outcomes in health, educational achievement, employment, and family cohesion.

Historically, Congress has required providers that participate in the fund to pay a percentage of their interstate consumer revenue (called the “contribution factor”) into the fund. While the fund’s assets increasingly subsidize modern broadband services, the fees collected for the fund are assessed only on “telecommunications services,” which currently are interpreted to include traditional landline telephone

service and interconnected Voice over Internet Protocol. As a practical matter, providers pass that tax on to consumers in the form of a regulatory fee on their telephone bills.

The resulting system is doubly regressive. First, it imposes taxes primarily on consumers of legacy telecommunications services (like landline telephone), who are disproportionately likely to be lower-income Americans. Second, because the contributions are revenue based, they do not account for the relative burden placed on consumers based on income. Worse, because legacy services constitute a dwindling fraction of the nation’s consumption of communications services, the FCC has had to increase the contribution factor dramatically to keep up with the changing technological landscape.

Over the past 10 years, the Universal Service Fund contribution base declined from \$65.9 billion to \$41.4 billion—more than a 35 percent reduction.⁷ To account for the shrinking base, the FCC has increased the contribution factor nearly fivefold from 6 percent in 2001 to 29.1 percent in 2021.⁸ This trend is poised to continue, as more American companies and individuals opt out of legacy landline communications services and use internet-based platforms to host meetings and connect with others.

Fund administration also plays a role in taxing consumers. By placing the burden on providers to contribute to the fund and offer low-income Americans access to communications devices (under the long-standing Lifeline program), Congress has created an inefficient scheme whereby providers act as middlemen to collect taxes and distribute benefits. This results in increased costs for providers, which inevitably means higher prices for consumers.

There is a simple and practical solution to these problems. As noted, in response to the COVID-19 pandemic, Congress appropriated tens of billions of dollars for broadband deployment and adoption, telehealth, educational connectivity, and other purposes, through the Infrastructure Investment and Jobs Act and other programs. These subsidy programs, in one form or another, address all the four major areas presently targeted by Universal Service

Fund dollars—high-cost support for rural areas, low-income consumers (the Lifeline program), schools and libraries, and rural health care.

Pandemic-era subsidies point the way to a potential long-term solution to the fund's insolvency: Congress could make direct appropriations permanent and sufficient to meet the fund's needs. Appropriations represent a fairer approach that would distribute costs more equitably, recognizing that all or nearly all American consumers and businesses benefit from broadband connectivity. Indeed, the reduction in provider costs and elimination of regulatory fees would likely result in a net gain for many consumers. Direct appropriations also ensure that individual beneficiaries of services receive those benefits directly, without any need to coordinate with intermediaries and with reduced potential for waste, fraud, and abuse.

Congress could further alleviate the burden on taxpayers by adopting a proposal advanced by Chairman Pai and others to use a portion of net proceeds from the FCC's spectrum auctions to fund universal service. Under current law, the FCC has the authority to auction off public airwaves used for wireless broadband and cellular voice service, among other things. For example, the late 2020–early 2021 auction of spectrum for the “C-Band”—a swath of spectrum with significant potential for next-generation 5G wireless services—yielded a record-breaking \$80 billion in proceeds.⁹ By statute, the proceeds for those auctions must be deposited in the US Treasury, where they are used for general appropriations. Dedicating even a small amount of such proceeds to universal service would help alleviate the burden on the fund and consumers.

If Congress elects to keep the existing Universal Service Fund in some form, it should confront and resolve challenging questions about its future and trajectory. There is currently a mismatch between the fund's contribution base, which is focused on legacy communications services, and the fund's principal use today to facilitate widespread internet access. In response to this, FCC commissioners from both political parties and some commenters in the FCC's open universal-service proceeding have

proposed expanding the existing contribution base to include large internet platforms that benefit from the user traffic facilitated by robust networks.

Another potential reform would involve limiting fund eligibility to those providers that would have challenges relying on annual appropriations because they require a dedicated funding mechanism to secure financing for network builds. Congress could also consider reforming the Lifeline program to focus primarily on voice services, given the success of COVID-era subsidies (under the Affordable Connectivity Program and the Emergency Broadband Benefit program) in providing broadband to low-income households. Should Congress decide not to switch to a pure appropriations model, it should weigh alternative proposals that could steer the fund to a more sustainable course.

Further Work at the FCC

Meanwhile, the FCC should continue to identify ways to reduce or eliminate regulatory barriers to broadband deployment, which could slow down or even stop the provision of services to high-cost or low-income areas.

In recent years, while some states adopted pro-growth policies that facilitated and encouraged 5G deployment, other states and localities used their powers as local zoning authorities to create bottlenecks to slow down deployment and exact rents from carriers that needed access to local rights-of-way. In 2018, the FCC released a series of orders designed to ensure that states and localities make speedy decisions on deployments and charge only fees that bear a reasonable relationship to the costs they incur maintaining the rights of way. These reforms helped lower the cost and accelerate the timing of 5G deployment. Consistent with these reforms, the FCC should continue to consider ways in which streamlining state and local regulations can play a part in promoting universal service.

The FCC also plays an important role in ensuring that universal-service dollars accomplish their intended purpose and are neither distributed

inefficiently nor diverted to unscrupulous actors. The FCC, for example, has made profitable use of the “reverse auction” procedure to encourage applicants to request only the amount they need to complete a project, ensuring that the most efficient provider is selected. Federal dollars and spectrum licenses should also continue to be tied closely to specific build-out requirements, reducing the risk that arbitrageurs squat on valuable public resources. The FCC and other federal and state enforcement agencies should also continue to use their authority to identify and prosecute genuine cases of fraud.

Beyond these measures, the FCC will have to develop a coordination strategy with other government agencies to ensure that the multiplying number of federal and state broadband subsidy programs does not result in waste or fraud. The federal government has already dedicated tens of billions of dollars to broadband deployment and should not simply assume that this amount of money must be allocated annually in perpetuity. The GAO and Commissioner Carr have already sounded the alarm that a coordinated federal strategy is needed to determine where genuine pockets of need still exist and direct targeted federal dollars to those areas.

Conclusion

Resolving the legal, economic, and practical problems with our current universal-service policies will not be easy. But while inflection points like the current moment can be disorienting, they often provide the seedbed for bold, creative, and decisive action.

Congress and the FCC should not let this moment pass. They should identify clear goals for the future of universal service and update the Communications Act to account for today’s increasingly dynamic and evolving internet environment.

About the Author

Thomas M. Johnson Jr. is the former general counsel of the Federal Communications Commission under Chairman Ajit Pai. He is currently an attorney in private practice in Washington, DC. The views expressed herein are his own and do not reflect the views of his former or current employers or clients.

Notes

1. 47 U.S.C. §151.
2. 47 U.S.C. § 254(b)(2), (3).
3. See Federal Communications Commission, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, January 19, 2021, Figure 3b, <https://www.fcc.gov/document/fcc-annual-broadband-report-shows-digital-divide-rapidly-closing>.
4. See Federal Communications Commission, “New GAO Watchdog Report Underscores Carr’s Concerns About the Absence of a National Strategy Coordinating Billions in Broadband Infrastructure Spending,” press release, June 10, 2022, <https://docs.fcc.gov/public/attachments/DOC-384164A1.pdf>.
5. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60104(c)(2).
6. See Federal Communications Commission, *Report on the Future of the Universal Service Fund*, August 15, 2022, <https://www.fcc.gov/document/fcc-reports-congress-future-universal-service-fund>.
7. See Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, 2021, Table 1.5, <https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports>.
8. Federal Communications Commission, *Report on the Future of the Universal Service Fund*, December 15, 2021, <https://www.fcc.gov/document/fcc-initiates-proceeding-future-universal-service>.
9. Marguerite Reardon, “Verizon, AT&T and T-Mobile Dominate \$81 Billion 5G Spectrum Auction,” CNET, February 24, 2021, <https://www.cnet.com/tech/mobile/verizon-at-t-t-mobile-dominate-81-billion-5g-spectrum-auction>; and Bret Swanson, “Record \$80.9 Billion Spectrum Auction Points to Promise of 5G,” AEIdeas, February 8, 2021, <https://www.aei.org/technology-and-innovation/record-80-9-billion-spectrum-auction-points-to-promise-of-5g>.

The project is generously supported by the John S. and James L. Knight Foundation.

© 2022 by the American Enterprise Institute for Public Policy Research. All rights reserved.

The American Enterprise Institute (AEI) is a nonpartisan, nonprofit, 501(c)(3) educational organization and does not take institutional positions on any issues. The views expressed here are those of the author(s).