

Nos. 24-354 and 24-422

In the
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

SCHOOLS, HEALTH & LIBRARIES
BROADBAND COALITION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF WTA – ADVOCATES FOR RURAL BROADBAND
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Michael F. Smith
Counsel of Record
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Avenue N.W.
Suite 1025
Washington, D.C. 20006
(202) 454-2860
smith@smithpllc.com

Counsel for Amicus Curiae

Gibson Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. There was no impermissible delegation.....	3
A. Universal Service History	3
B. The Fifth Circuit Mischaracterizes the Operation of FCC's USF Program	6
II. WTA Members and their Customers will be Significantly Harmed if the Fifth Circuit Decision Stands.....	13
CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Consumers' Rsch. v. FCC</i> , 63 F.4th 441 (5th Cir. 2023)	6
<i>Consumers' Rsch. v. FCC</i> , 67 F.4th 773 (6th Cir. 2023).....	6
<i>Consumers' Rsch. v. FCC</i> , 88 F.4th 917 (11th Cir. 2023).....	6
<i>Lucas v. Forty-Fourth Gen. Assembly</i> , 377 U.S. 713 (1964).....	34
<i>McGirt v. Oklahoma</i> , 591 U.S. 894 (2020).....	19
<i>MCI Telecomms. Corp. v. FCC</i> , 750 F.2d 135 (D.C. Cir. 1984).....	5
<i>National Ass'n of Reg. Util. Com'rs v. FCC</i> , 737 F.2d 1095 (D.C. Cir. 1984).....	5
<i>Rural Cellular Ass'n v. FCC</i> , 685 F.3d 1083 (D.C. Cir. 2012).....	9
<i>Texas Off. of Pub. Util. Couns. v. FCC</i> , 183 F.3d 393 (5th Cir. 1999)	6, 9
<i>Trump v. United States</i> , 603 U.S. 593 (2024).....	33
Statutes and regulations	
Broadband Deployment Accuracy and Technological Availability Act (“Broadband DATA Act”) (47 U.S.C. 641 <i>et seq</i>).....	7

Statutes and regulations (cont'd)

Communications Act of 1934, ch. 652, 48 Stat. 1064 (47 U.S.C. 151 <i>et seq.</i>)	3
47 U.S.C. 151.....	3
47 U.S.C. 254.....	2, 5, 6, 7, 8
47 U.S.C. 254(a)	6
47 U.S.C. 254(b)	6
47 U.S.C. 254(b)(3).....	5, 34
47 U.S.C. 254(b)(6).....	5
47 U.S.C. 254(d)	5
Congressional Review Act, (5 U.S.C. 801 <i>et seq.</i>)	8
5 U.S.C. § 801.....	8
5 U.S.C. § 802.....	8
Consolidated Appropriations Act, 2021, Pub. L. No. 116-260	7
Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47	7
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.....	3, 5
47 C.F.R. 54.502	9
47 C.F.R. 54.503	9
47 C.F.R. 54.709	10
47 C.F.R. 54.717	10
47 C.F.R. 69.601	5
47 C.F.R. 69.603	5

Other Authorities

Fed. Commc'ns Comm'n:

<i>Before the Federal Communications Commission Nov. 4, 2024, Alaska Connect Fund</i> , https://docs.fcc.gov/public/attachments/FCC-24-116A1.pdf (last visited January 13, 2025).....	9
<i>Before the Federal Communications Commission, Order of October 25, 2024</i> , https://docs.fcc.gov/public/attachments/DA-24-1104A1.pdf (last visited January 13, 2025).....	9
<i>Connect America Fund</i> , 26 FCC Rcd. 17663 (2011).....	10
<i>Connect America Fund: A National Broadband Plan for Our Future High-Cost Universal Service Support, et al.</i> , 38 FCC Rcd. 7040 (2023).....	9
<i>Federal-State Joint Board on Universal Service</i> , 12 FCC Rcd. 8776 (1997).....	10
<i>Lifeline and Link Up Reform and Modernization et al.</i> , 31 FCC Rcd. 3962 (2016).....	10
<i>MTS & WATS Market Structure: Third Report and Order</i> , 93 F.C.C. 2d 241 (1983).....	4
<i>Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserve Between the Interstate and Intrastate Operations of Telephone Companies</i> , 26 F.C.C. 2d 247 (1970).....	4

Other Authorities (cont'd)

Fed. Commc'ns Comm'n (cont'd):

Promoting Telehealth in Rural America,
 WC Docket No. 17-310,
 33 FCC Rcd. 6574 (2018)..... 10

*Schools and Libraries Universal Service
 Support, Mechanism A National Broadband
 Plan for Our Future*,
 25 FCC Rcd. 18762 (2010)..... 10

*Streamlined Process for Resolving Requests
 for Review of Decisions by the Universal
 Service Administrative Company*,
 29 FCC Rcd. 11094 (WCB 2014) 11

S.J.Res. 34, 115th Cong. 1st Sess. (2017)..... 8

Miscellaneous

About Hart County,
<https://hartcountygga.gov/aboutus.html>
 (last visited January 13, 2025)..... 21

About Kalama Telephone Company,
<https://kalamatelephone.com/about/>
 (last visited January 13, 2025)..... 32

About Tenino Telephone Company,
<https://teninotelephone.com/about/>
 (last visited January 13, 2025)..... 32

Central Arkansas Telephone, *Who We Are*,
<https://catc.net/about/who-we-are/>
 (last visited January 13, 2025)..... 18

Miscellaneous (cont'd)

- Connecting the Wild Country to the World: A Family-Owned Business Keeps Remote West Texas Communities in Communication*,
Landscapes (Summer 2016),
<https://www.findfarmcredit.com/landscapes-articles/connecting-the-wild-country-to-the-world>
(last visited January 13, 2025)..... 14
- Hart Telephone Company, *Our History*,
<https://www.htconline.net/history/>
(last visited January 13, 2025)..... 21
- The History of CTC Telecom*,
<https://ctcweb.net/our-history>
(last visited January 13, 2025)..... 16
- J. Burger, *Sulphur Residents Helping Neighbors Despite Their Own Uncertainties Following Tornado Outbreak*, KOCO-TV (April 29, 2024),
<https://www.koco.com/article/sulphur-oklahoma-tornado-damage-helping-others/60634657>
(last visited January 13, 2025)..... 19-20
- Matanuska Telecom Ass'n, *Alaska Plan*,
<https://www.mtasolutions.com/about/alaskaplan/>
(last visited January 13, 2025)..... 22
- Mescalero Apache Telecom, Inc.*,
<https://www.matinetworks.net/about.html>
(last visited January 13, 2025)..... 24
- The National Congress of American Indians
Resolution #RAP-10-009,
https://archive.ncai.org/attachments/Resolution_PRgyVhwGXgnpechTBriZtnmGKcpIgxqqtupPWDqGZZNqoDTLPFs_RAP-10-009.pdf
(last visited January 13, 2025)..... 20

Miscellaneous (cont'd)

Northeast Nebraska Telephone Company, <i>About NNTC</i> , https://nntc.net/about/ (last visited January 13, 2025).....	26
<i>NortheastTel – Our History: How we got here!</i> , https://pelicanbroadband.com/about/ (last visited January 13, 2025).....	25
Rally Networks, <i>Meet Rally</i> , https://rallynet.us/about-us/ (last visited January 13, 2025).....	31
Shawnee Communications, <i>Our Mission and History</i> , https://shawnee.com/mission-history/ (last visited January 13, 2025).....	27
Smithville Communications, <i>Keeping You Connected!</i> , https://www.smithville.com/about/ (last visited January 13, 2025).....	29
Telecommunications: Administration of Universal Service Programs Is Consistent with Selected FCC Requirements, GAO-24- 106967, Publicly Released: Aug 22, 2024 (https://www.gao.gov/assets/gao-24-106967) (last visited January 13, 2025).....	11

INTEREST OF *AMICUS CURIAE*

Amicus curiae WTA – Advocates for Rural Broadband (WTA) is a national trade association representing approximately 400 rural local telecommunications carriers (RLECs) that provide voice, broadband and other services to some of the most remote, rugged, sparsely populated, and expensive-to-serve areas of the United States.¹ Founded as the Western Telecommunications Alliance from the 2004 merger of two regional associations that collectively represented the rural industry west of the Mississippi for 105 years, WTA now represents rural telecommunications providers and industry vendors coast-to-coast.

WTA members have long constructed and operated their rural networks – very often as providers of last resort – in high-cost farming, ranching, mining, mountain, forest, and desert areas, as well as on Native American reservations and other Tribal lands. The typical WTA member company serves fewer than 5,000 customers per service area and has fewer than 50 employees. All of WTA’s RLEC members are Eligible Telecommunications Carriers (ETCs) that receive high-cost Universal Service Fund (USF) support from Petitioner FCC – approximately 53 percent receive model-based support from the Enhanced Alternative Connect America Cost Model (E-ACAM) and earlier ACAM support programs, and approximately 47 percent receive cost-based support from the Connect America Fund – Broadband Loop

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than WTA, its members or its counsel made such a monetary contribution.

Service (CAF-BLS) and High-Cost Loop Support (HCLS) programs, plus Alaska RLECs that receive support from the Federal Alaska Connect Fund. Most WTA members also receive Connect America Fund – Intercarrier Compensation (CAF-ICC) support, and many also receive funds from one or more other USF programs, including the Lifeline program, the Schools and Libraries (E-Rate) program and the Rural Health Care program. As detailed below, WTA members and customers throughout their vast service areas have extensively relied on USF support for current and long-term operations, and will suffer significant harm if the Fifth Circuit’s decision is not reversed.

SUMMARY OF ARGUMENT

Congress in enacting Section 254 delegated neither legislative nor governmental power, nor otherwise acted unlawfully under the Fifth Circuit’s novel “combination” theory. It merely codified the long-standing system of telecommunications services providers contributing to the funding of universal service support, and expanded that support to ensure that affordable service was available to all schools, libraries and health-care providers throughout our vast Nation. In doing so, it acted well within its constitutional authority.

Further, the Fifth Circuit decision misstated key component factors of FCC’s USF program, as well as its history. If not reversed, its ruling will have calamitous effects on millions of customers for whom the program is a lifeline connecting them to the modern world – individuals, schools, hospitals and others in rural and Tribal areas throughout the country.

ARGUMENT

I. There was no impermissible delegation.

A. Universal Service History

When Congress adopted the universal service provisions of the Telecommunications Act of 1996 at issue here, it was not writing on a clean slate. Universal service has been a Federal (and State) policy for over 90 years. Congress, in the original Section 1 of the 1934 Communications Act (1934 Act), incorporated the universal-service principle as an FCC goal:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio *so as to make available, so far as possible to all the people of the United States* a rapid, efficient, Nation-wide, and world-wide wire and radio communication service *with adequate facilities at reasonable charges.*²

Congress, however, did not elaborate on that principle until some six decades later.

Rather, since early last century FCC, State regulators and the telephone companies implemented universal service policies by using long-distance revenues to subsidize local service rates and to encourage small local entities to serve outlying high-cost and sparsely populated rural areas that the larger carriers found unprofitable. The costs for the local carriers were allocated between the State and Federal jurisdictions based on a separations manual developed by FCC and the States' National

² 47 U.S.C. 151 (emphasis added).

Association of Regulatory Utility Commissioners (NARUC), with the former Bell System making payments to large and small independent telephone companies or transfers to the local Bell companies under the Settlements and Separations processes to reimburse these “Federal” local service costs. In 1970, the regulators and the phone companies agreed to modify the separations manual to more than triple the “over-allocation” of costs to the Federal jurisdiction in order to subsidize local service under the “Ozark Plan.”³

However, with the introduction of competition for long-distance service in the mid-1970s and the break-up of the Bell System in the early 1980s, the previous approach of using AT&T’s interstate long-distance revenues to provide the subsidies to keep local service rates affordable was unsustainable. Thus, Petitioner FCC, in concert with State regulators as well as industry stakeholders, made significant changes to the separations/subsidy plan. FCC froze the percentage of non-traffic costs assigned to the Federal jurisdiction (the Subscriber Plant Factor) at 25%, established a program for HCLS for companies whose costs significantly exceeded the national average, and required all interstate long-distance carriers to contribute to covering these costs.⁴ This new and more transparent industry subsidy program was equitable and justified by the “network effect” – that is, the value of the services provided by long-distance

³ *Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserve Between the Interstate and Intrastate Operations of Telephone Companies*, 26 F.C.C. 2d 247 (1970).

⁴ *MTS & WATS Market Structure: Third Report and Order*, 93 F.C.C. 2d 241 (1983).

and other carriers increases as more people are connected to the network and can be reached via it. This program was implemented through access charge tariffs, with the HCLS and pooled tariffs administered for RLECs by the National Exchange Carrier Association (NECA), which was created by the telecommunications industry under FCC supervision.⁵ These FCC, Joint Board and industry arrangements were upheld on appeal.⁶

With the subsequent emergence of local-service competition in the 1990s, Congress specifically addressed universal service in the context of comprehensive telecommunications law reform through the Telecommunications Act of 1996. In doing so, Congress in Section 254 codified the long-standing system of telecommunications services providers contributing to the funding of universal service support,⁷ as well as expanding that support to ensure that affordable access to telephone service and advanced services was also available to all schools, libraries and healthcare providers.⁸ In addition, Congress in Section 254 provided guidance on how FCC, working with the States through the Joint Board, was to design and run the newly

⁵ 47 C.F.R. 69.601 and 69.603.

⁶ *National Ass'n of Reg. Util. Com'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135 (D.C. Cir. 1984).

⁷ 47 U.S.C. 254(d) (“Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”).

⁸ 47 U.S.C. 254(b)(3) and (b)(6).

expanded universal service programs.⁹ Not long after FCC adopted its new universal service program rules, the USF program’s constitutionality was challenged and upheld.¹⁰ More recently, Consumers’ Research *et al.* filed several challenges to the USF contribution mechanism, which were rejected by the Fifth, Sixth and Eleventh Circuits,¹¹ before being upheld by the *en banc* Fifth Circuit judgment under review here. Pet. App. 1a. That decision is an outlier, which as explained below ignored the history behind Section 254 and FCC’s oversight of the Universal Service Administrative Company (USAC).

B. The Fifth Circuit Mischaracterizes the Operation of FCC’s USF Program

The Fifth Circuit’s judgment misstates several important factors concerning FCC’s USF program. As an initial matter, it mischaracterizes the USF history when it asserts that “Congress allowed [AT&T] to charge supra-competitive rates to urban customers in exchange for requiring it to provide services it might not otherwise provide to high-cost rural customers.”¹² As explained above, while Congress did incorporate the universal-service principle as a purpose of the 1934 Act, universal service was a long-standing industry and regulator-driven program funded by the

⁹ 47 U.S.C. 254(a) and (b).

¹⁰ *Texas Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 426-429 (5th Cir. 1999).

¹¹ *Consumers’ Rsch. v. FCC*, 63 F.4th 441 (5th Cir. 2023); *Consumers’ Rsch. v. FCC*, 67 F.4th 773 (6th Cir. 2023); *Consumers’ Rsch. v. FCC*, 88 F.4th 917 (11th Cir. 2023).

¹² Pet. App. 2a.

industry, which Congress codified and expanded in Section 254 of the 1996 Act.

The decision below also mischaracterizes Congressional oversight of FCC, in asserting that Section 254 “insulates FCC from the principal tool Congress has to control FCC’s universal service decisions—the appropriations power.”¹³ In fact, Congress retains (and exercises) authority over FCC through the appropriations process when it annually sets FCC’s budget. Indeed, recent appropriations legislation has directed FCC with regard to the universal-service program,¹⁴ as well as requiring FCC to report to Congress on designated matters within a specified time frame.¹⁵ Moreover, Congress regularly

¹³ Pet. App. 31a; *see also* Pet. App. 40a (“§ 254 delegates to FCC the power to make important policy judgments, and to make them while wholly immunized from the oversight Congress exercises through the regular appropriations process”).

¹⁴ *E.g.*, Further Consolidated Appropriations Act, 2024: SEC. 511. None of the funds appropriated by this Act may be used by the Federal Communications Commission to modify, amend, or change its rules or regulations for universal service support payments to implement the February 27, 2004, recommendations of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal service support payments.

¹⁵ *E.g.*, Consolidated Appropriations Act, 2021: Broadband Maps.-- In addition to adopting the House report language on Broadband Maps, the agreement provides substantial dedicated resources for the FCC to implement the Broadband DATA Act. The FCC is directed to submit a report to the Committees on Appropriations within 90 days of enactment of this Act providing a detailed spending plan for these resources. ... The FCC is directed to report in writing to the Committees every 30 days on the date, amount, and purpose of any new obligation made for broadband mapping and any updates to the broadband

conducts oversight hearings of FCC and also has authority under the Congressional Review Act to disapprove FCC regulations with which it disagrees.¹⁶ Congress is not some helpless bystander as the Fifth Circuit suggests.

Similarly, the judgment below mischaracterizes USAC's independence in claiming that FCC unlawfully delegated authority to a private entity. According to that decision:

FCC has delegated government power—the power to dictate the size of the universal service contribution amount, which controls the size of a tax levied on American consumers—to USAC and private telecommunications carriers.¹⁷

But USAC and the private carriers do not have authority to dictate the contribution amount's size.¹⁸

mapping spending plan. [166 Cong. Rec. at H8440 (daily ed. Dec. 21, 2020)].

¹⁶ 5 U.S.C. 801 and 802. Indeed, Congress exercised such disapproval authority with respect to FCC's Open Internet privacy rules. S.J.Res.34, 115th Cong. 1st Sess. (2017).

¹⁷ Pet. App. 48a-49a; *see also*, Pet. App. 53a-54a (“The decision of how much money should be set aside to execute FCC's universal service policies—the very decision FCC has delegated to USAC and private carriers—is an independent decision that requires independent judgment. ... So even if we thought FCC correctly described the role of private entities, we would still conclude that dictating the contribution amount is an exercise of government power”) (citation omitted).

¹⁸ Despite the Fifth Circuit's characterization of the contribution factor as a tax, Section 254 codified prior practice, and as explained above, the USF and its predecessor support mechanisms have been financed by the industry for more than 70 years. Indeed, other courts that have addressed this issue,

Rather, USAC performs the ministerial acts of collecting information from carriers regarding their expected telecommunications-services revenues for the upcoming period, determining the expected payment amounts based on the authorized expenditures, and then advising the FCC on the calculation of the contribution factor.

FCC also uses myriad tools to control the amount of funds to be distributed to service providers under the various universal service programs. For the Schools and Libraries program, FCC annually issues a list of eligible services¹⁹ and it requires healthcare providers, schools and libraries to obtain service through a fair and open bid process, with notice of the request for bids posted on the USAC website.²⁰ With regard to the high-cost fund, many of the telephone companies receive model-based support, with a cap on the per-line support.²¹ In addition, FCC has set budget caps for each of the four universal service

including the Fifth Circuit, concluded it was not a tax. *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1091 (D.C. Cir. 2012); *Texas Off. of Pub. Util. Couns. v. FCC*, 183 F.3d at 440.

¹⁹ 47 C.F.R. 54.502. FCC recently released the eligible-service list for 2025 -- *Modernizing the E-Rate Program for Schools and Libraries*, DA 24-1104, released October 25, 2024, <https://docs.fcc.gov/public/attachments/DA-24-1104A1.pdf>.

²⁰ 47 C.F.R. 54.503.

²¹ *E.g.*, *Connect America Fund: A National Broadband Plan for Our Future High-Cost Universal Service Support, et al.*, 38 FCC Rcd. 7040 (2023)(Enhanced ACAM Order); *Connect America Fund; Alaska Connect Fund, et al.*, FCC 24-116, released Nov. 4, 2024, <https://docs.fcc.gov/public/attachments/FCC-24-116A1.pdf> (Alaska Connect Fund).

programs.²² The expenditures, which determine the contribution factor, are closely controlled by FCC. Clearly FCC has not delegated authority to USAC and/or the private telecommunications carriers to dictate the USF contribution factor.

Moreover, even assuming *arguendo* USAC's authority is not purely ministerial, the decision below did acknowledge that

[Such] delegation is lawful only if FCC (1) has final decision-making authority, (2) actually exercises that authority, and (3) exercises “pervasive surveillance and authority” over the private entities exercising power in its name.²³

As explained above, FCC prescribes the various elements that go into calculating the contribution factor. Thus, it is unsurprising that FCC has rarely found it necessary to revise the contribution factor or the associated elements USAC calculates – though it retains authority to do so.²⁴ Moreover, as explained below, FCC exercises “pervasive surveillance authority.”

FCC oversees and audits USAC's work.²⁵ Additionally, on a monthly basis it issues a public

²² *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, 25 FCC Rcd. 18762 (2010); *Connect America Fund*, 26 FCC Rcd. 17663 (2011); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776 (1997) and *Promoting Telehealth in Rural America*, WC Docket No. 17-310, 33 FCC Rcd. 6574 (2018); *Lifeline and Link Up Reform and Modernization et al.*, 31 FCC Rcd. 3962 (2016).

²³ Pet. App. 49a (citations omitted).

²⁴ 47 C.F.R. 54.709.

²⁵ 47 C.F.R. 54.717.

notice addressing appeals of USAC decisions filed by service providers, schools, libraries and healthcare providers.²⁶

WTA's members can confirm FCC's close supervision of USAC. Members uniformly reported to WTA that their contacts with USAC have been characterized by complete and rigid USAC adherence to the letter of all relevant FCC regulations. Many WTA members have been the subject of various performance and/or financial audits by USAC, while virtually all have had substantial contact with USAC regarding the content and filing deadlines for various USF forms and reports. Without exception, USAC has required complete and rigid adherence to all applicable FCC rules and deadlines; has refused to grant even minor exceptions (*e.g.*, for brief delays in meeting filing deadlines); has refused to negotiate differences in the calculation of disputed costs or support amounts; and has required USF recipients to seek FCC waivers for all disputes, rather than resolving them by negotiation and compromise.

The extent of FCC's oversight of USAC recently was confirmed by the Government Accountability Office (GAO), which reviewed USAC at Sen. Cruz's request.²⁷ Among other things, GAO concluded:

²⁶ *Streamlined Process for Resolving Requests for Review of Decisions by the Universal Service Administrative Company*, 29 FCC Rcd. 11094 (WCB 2014).

²⁷ "Telecommunications: Administration of Universal Service Programs Is Consistent with Selected FCC Requirements," GAO-24-106967, Publicly Released: Aug 22, 2024 (<https://www.gao.gov/products/gao-24-106967>) (GAO Report).

As required by the MOUs, USAC prepares monthly reports on USF and the other programs it administers. Our review of monthly reports found that they provide FCC with detailed information on actions pertaining to the USF programs, including updates on the 18-month plans....USAC also uses these monthly reports to update FCC on USAC's operations and other programs it administers, such as the Affordable Connectivity Program. This can include information on program audits, finance, and information technology projects. According to USAC executives, the monthly reports provide FCC important insight to USAC activities and progress toward meeting its goals, while also giving FCC an opportunity to provide feedback.

USAC and FCC's Office of the Managing Director also meet monthly to discuss metrics related to USF programs. During these meetings, USAC provides updates on items such as improper payments, ongoing audits, and corrective actions when issues are identified. Further, USAC executives and FCC staff reported that they meet more frequently when needed.²⁸

As GAO corroborates, FCC maintains close oversight of USAC, hence there has been no unlawful delegation by FCC to private parties under the *Black/Sunshine Anthracite* standards enunciated by the Fifth Circuit's judgment.

²⁸ GAO Report at 11.

II. WTA Members and their Customers will be Significantly Harmed if the Fifth Circuit Decision Stands.

As noted, all of WTA's RLEC members are ETCs that receive Federal high-cost USF support. These programs have enabled the small RLEC WTA-member companies to upgrade their former voice networks in recent years to bring robust broadband services to high-cost rural areas that the former Bell System and other large carriers long found unattractive to serve. The low population densities, long trunk and loop distances and often-rugged terrains of these areas make it very expensive not only to construct broadband networks, but also to operate, maintain and sustain such networks on a long-term basis.

Given their relatively small customer bases, most RLECs lack the ability to develop and market content and other services capable of substantially increasing their revenues, as the large broadband providers do. Rather, most WTA members depend upon high-cost USF support for at least half of their revenue streams. Termination or other significant disruption of the USF revenue stream will have significant adverse impacts on these community-based companies, including cessation or suspension of ongoing broadband upgrade and expansion projects; default or inability to comply with existing loan-repayment terms and schedules of the United States Department of Agriculture's Rural Utilities Service (RUS) and private banks; inability to recover broadband investments made by shareholders and other owners; significant increases in monthly residential broadband service rates (often to unaffordable levels);

and reductions in staffing and other operating expenses that would adversely impact service quality.

The experiences of a representative sample of WTA members under the current USF programs illustrate the critical importance of high-cost USF support to members' efforts to deploy, upgrade, and sustain their broadband services, and thus improve the quality of life and enhance public safety in their rural and/or Tribal service areas:

Big Bend Telephone Company (BBT) serves approximately 3,200 broadband customers in an 18,000-square-mile portion of southwestern Texas' Big Bend region. Headquartered in Alpine (population: 6,035), BBT serves a sparsely populated rural area (0.24 subscribers per square mile) that includes 485 miles of the United States-Mexico border.²⁹

Currently a recipient of E-ACAM support, BBT has employed high-cost USF support to qualify for and repay bank loans and grant-loan combinations it has used to upgrade its original voice service network to high-speed broadband. USF support has been integral to BBT's broadband deployment by allowing it to demonstrate the viability of broadband projects to its lender, helping it to repay its loans, and enabling it to pay operating expenses to sustain its network and services post-construction and deployment. BBT currently has approximately eight years of payments left to retire its existing debt. It has

²⁹ See generally *Connecting the Wild Country to the World: A Family-Owned Business Keeps Remote West Texas Communities in Communication, Landscapes* (Summer 2016), <https://www.findfarmcredit.com/landscapes-articles/connecting-the-wild-country-to-the-world>.

completed approximately 80 percent of its ultimate fiber-to-the-home (FTTH) network, and has deployed licensed fixed wireless to serve more remote and difficult to reach locations (plus hybrid low earth orbit (LEO) service to a handful of the most remote locations).

BBT has developed a good working relationship with the U.S. Department of Homeland Security (DHS) and is employing its USF-supported fiber network to connect DHS' Marfa-sector headquarters, as well as its forward operations, numerous checkpoints and tethered aerostat radar systems, allowing DHS to utilize AI technology, facial recognition and other data in real time to save lives and apprehend criminals in one of the most active regions along the Southern border.

BBT has also used its USF-funded broadband network to enable local school districts and regional hospitals to extend and enhance their services. Broadband allows local schools to share teachers, lecturers and materials among themselves, and with more distant schools and universities via virtual education. It also allows teachers, students and parents to participate in classes and conferences from home when distance or weather conditions warrant. Likewise, broadband enables rural clinics to work closely with regional hospitals, including the Veterans Administration, to examine, monitor and treat rural patients without requiring them – who in many cases are elderly and/or seriously ill – to spend hours travelling to and from the hospital.

BBT's broadband network is also helping to rejuvenate agriculture in the region by enabling farmers to select and implement precision-agriculture

methods and increase the efficiency of water usage where it is in scarce supply. Other BBT projects will employ its fiber backbone to establish and serve AI-enabled data centers, deep-space research and even drone prescription-delivery services.

BBT's nascent broadband projects create additional revenues as a result of its fiber investment, but given the high-cost, low-population-density served, these added revenues alone would not cover the necessary operational expenses. BBT relies upon its E-ACAM support to continue these network upgrades, qualify for and repay its construction loans, and sustain its ongoing operating expenses. If its current E-ACAM support were to be terminated or suspended for a significant period, BBT would need to recover approximately \$290 per loop per month of additional revenue from its residential and other customers. Such a large rate increase would be unacceptable to customers. It means not only that BBT's network upgrades could not continue and its broadband service quality would be impaired, but also that its service to various border security, education, health, agricultural, data-center and science-research initiatives would also be disrupted.

Cambridge Telephone Company (CTC) provides broadband service to approximately 1,400 broadband customers in five exchanges within a 2,500-square-mile area of west-central Idaho.³⁰ Headquartered in Cambridge (population: 335), CTC serves a rocky, sparsely populated area – much of its territory has fewer than one person per square mile –

³⁰ See generally, *The History of CTC Telecom*, <https://ctcweb.net/our-history>.

that includes Hells Canyon, scattered small towns, and cattle ranches and other farms.

Since 1980, CTC has been engaged in a gradual and methodical upgrade of its former copper-voice network to a state-of-the-art FTTH broadband network. It first deployed fiber-optic trunks to connect its central offices, then installed fiber trunks between its central offices and the nodes serving various areas and customer clusters, and is currently deploying FTTH from nodes to individual customer locations. This is a difficult and expensive process, since conduit must be buried three feet below the very rocky surface and individual customer drops often extend for a mile. Given Idaho's abbreviated outdoor-construction season, CTC does not expect to finish upgrading customer locations to FTTH until 2029.

CTC has been financing its network upgrades with private-sector loans and credit lines since 2016 and has outstanding construction loans needing repayment during the next five years. It will need to draw upon a revolving line of credit to complete its FTTH upgrades during that time, and the loans' repayment periods will extend as long as to 2039. CTC will require uninterrupted E-ACAM support to continue its network upgrade and to repay its existing and future construction loans. It also requires its existing E-ACAM support to cover the above-average per customer operating costs needed to serve its remote and sparsely populated service area. In addition to the lack of economies of scale, CTC is faced with rapidly increasing equipment and cybersecurity costs. CTC estimates that removal of its current E-ACAM support would force it to lay off some of its 30 employees and could ultimately force it to double its monthly residential-service rates.

As a third-generation, family-owned company, CTC is very active in serving its rural customers and promoting the economic and social welfare of its service area. Its FTTH network supports education, job training, social and healthcare opportunities. CTC's broadband network also provides the backhaul services that enable wireless carriers to serve its area, reflecting additional positive externalities of fiber deployment.

Central Arkansas Telephone Cooperative (CATC) provides broadband service to approximately 3,500 member-customers across a 700-square-mile portion of central Arkansas.³¹ Headquartered in Bismarck (population: 2,332), CATC's rural service area includes rocky hills used for cattle ranching, and lakes/recreational areas that have attracted many retirees.

From 2017-2022, CATC undertook and completed a major project to convert its network to 100 percent FTTH, enabling it to meet the growing broadband service demands of its rural member-customers and to attract new ones. It also has improved the quality of the voice and 911 emergency services available to members. Due to the frequency of thunderstorm, tornado and ice-storm damage and outages in central Arkansas, CATC buried its FTTH cable. This entailed substantial expense resulting from the rocky and hilly terrain (\$80,000 to \$100,000 per mile), although buried plant ultimately will reduce maintenance and storm-recovery costs and minimize service outages. CATC financed its FTTH project with \$20 million in bank loans it must repay over the next 10 years.

³¹ See generally, *Who We Are*, <https://catc.net/about/who-we-are/>.

CATC's high-cost USF support has enabled it to obtain and begin repayment of its FTTH conversion loans and to cover the above-average operating costs of serving its rural area. If CATC were to lose its current E-ACAM support, it estimates it would need to increase its present residential broadband service rates by about \$90 per month per customer – a daunting expense for the retirees, family farmers and small-business owners comprising the bulk of its customers.

Chickasaw Telephone Company (Chickasaw) serves approximately 3,900 broadband customers in nine exchanges across a nearly 700-square-mile portion of rural south-central Oklahoma. Its headquarters are in Sulphur (population: 5,065) and, like many Oklahoma companies, its service area is exclusively Tribal land.³²

Since 1996, Chickasaw has invested over \$106.6 million to upgrade its former voice network to high-speed broadband services. Much of this took place during a FTTH upgrade that began in 2017, and Chickasaw has converted about 90 percent of its network to FTTH. Because its service area also is frequently subjected to tornados and ice storms, about 99 percent of its outside plant consists of expensive buried fiber, which costs \$60,000 to \$70,000 per mile to deploy. But such investment pays off – Chickasaw was able to remain in operation after tornados on April 27, 2024 ravaged the Sulphur area, including Chickasaw's own building.³³

³² See *McGirt v. Oklahoma*, 591 U.S. 894, 897-898 (2020).

³³ J. Burger, *Sulphur Residents Helping Neighbors Despite Their Own Uncertainties Following Tornado Outbreak*, KOCO-TV

Chickasaw’s FTTH facilities are scalable and capable of upgrading to meet future customer broadband speed needs at minimal incremental cost. Its state-of-the-art network enables its rural customers to enjoy entertainment, education, job training, and telehealth offerings comparable to urban residents.

Whereas Chickasaw has paid off the private-lender loans that it needed to finance the bulk of its broadband upgrades, it needs continuing CAF-BLS support to recover its \$106.6-million investment and to subsidize its above-average per-customer operating expenses. Without its current CAF-BLS support, Chickasaw would need to increase its residential broadband service rates by more than \$100 per month, which would render its service unaffordable for most customers. The USF Lifeline program is especially important in enabling many of Chickasaw’s Native-American customers to afford voice and broadband services.³⁴

Hart Telephone Company (Hart) serves over 8,000 broadband customers in a 174-square mile

(April 29, 2024), <https://www.koco.com/article/sulphur-oklahoma-tornado-damage-helping-others/60634657>.

³⁴ See, e.g., National Congress of American Indians Resolution #RAP-10-009, *Ensuring Future Universal Service Support in Indian Country and Existing Telephony During the Broadband Transition* (June 23, 2010),

https://archive.ncai.org/attachments/Resolution_PRgyVhwGXgnpechTBriZtnmGKcplgxqqtupPWDqGZZNqoDTLPFs_RAP-10-009.pdf (“...as USF reform takes place, Congress and the FCC must not inadvertently ‘cut the only wire’ going into Indian Country. The current analog telephone High Cost and Lifeline and Link-Up programs are vital to Indian Country and must not be negatively affected”).

service area in the Piedmont region of northeastern Georgia. Headquartered in Hartwell (population: 4,470), Hart serves a rural area known for boating, hiking, golfing and other outdoor recreational activities on and near Lake Hartwell.³⁵

In 2019, Hart began a \$40-to-\$50 million project to upgrade its former copper digital subscriber line (DSL) network to FTTH. Hart has completed approximately 60 percent of this project, and expects to finish its FTTH deployment in 2026 if its CAF-BLS support continues unabated. To date, Hart's upgraded broadband facilities and services have enhanced the abilities of formerly commuting customers to work from home. Hart has also improved the 911 emergency services available to reach local police, fire, ambulance and EMT facilities and personnel. Finally, Hart's upgraded broadband network has improved the ability of local customers and businesses that offer lodging, meals and recreational activities to market their services to potential visitors.

Hart is self-financing its FTTH upgrade. However, given the \$40-to-\$50 million cost, Hart cannot operate its FTTH network and recover its capital investment within a reasonable time period by relying on monthly customer revenues alone. Rather, it needs its current CAF-BLS support to supplement its customer revenues. In fact, Hart's current USF support constitutes approximately 55 percent of its monthly revenue stream. If that USF support is terminated, Hart will have to cease work on its FTTH upgrade and

³⁵ See generally, *Our History*, <https://www.htconline.net/history/>; *About Hart County*, <https://hartcountygga.gov/aboutus.html>.

is unlikely to resume its construction and investment within the foreseeable future. Moreover, Hart would need to raise the residential service rates of its existing broadband customers by approximately \$60/month per customer to replace its USF support – an increase unlikely to be paid by many customers, who would instead terminate their service. It would also have to cut its operating expenses in an amount necessary to offset the USF revenue loss, thus reducing service quality.

Matanuska Telecom Association (MTA) is a cooperative that provides broadband, voice and other services to approximately 33,000 members in a 10,000- square-mile, fast-growing portion of south-central Alaska.³⁶ Headquartered in Palmer (population: 6,378), about 10 percent of the population MTA serves are Indigenous peoples of Alaska.

MTA deployed DSL service during the late 1990s and is currently engaged in a major network upgrade that entails replacing 5,500 miles of copper outside plant with high-capacity and scalable FTTH. However, the Alaska construction season is limited to the period between mid-May and mid-October, and broadband deployment and maintenance is further rendered difficult and expensive by the need to use snowmobiles, boats and planes to reach many areas due to the lack of roads. MTA anticipates it will take a number of years to complete the conversion of its network to FTTH even without any major weather, financial or other disruptions (*e.g.*, termination or interruption of USF support).

³⁶ See *Alaska Plan*, <https://www.mtasolutions.com/about/alaskaplan/>.

MTA currently has a substantial broadband construction loan from a private lender that must be repaid over the next seven years. Without continuing support from the new Alaska Connect Fund, MTA will not be able to repay its existing loan, continue its FTTH upgrade project, or obtain additional future loans. And given that approximately 80 percent of MTA's current Alaska Fund support is needed to pay its very high Alaskan operating expenses, any loss or interruption of MTA's USF support will immediately and adversely impact the quality of its existing broadband and voice services. MTA estimates that loss of its existing high-cost USF support would require it to increase its present service rates by at least 42 percent (or about \$50/month on average).

The continuation and reliability of MTA's broadband services and upgrades are essential to enable isolated Alaskan residents and villages to participate in the 21st-Century society and economy. Particularly in light of Alaska's harsh weather and lack of roads, high-speed broadband service is crucial for distance learning, job training, and growing telemedicine applications. MTA's broadband is also essential for national defense and cybersecurity, as the cooperative serves critical military bases, radar installations, and off-base homes of military personnel and their families.

Mescalero Apache Telecom, Inc. (MATI) is a Tribally owned carrier that provides broadband service to approximately 1,130 Tribal members in a 750-square-mile area of the Mescalero Apache Tribe

Reservation in New Mexico.³⁷ It is headquartered in Mescalero (population: 891).

Since 2021, MATI has constructed and deployed buried or aerial FTTH facilities and services throughout its entire service area. It has financed this broadband project with three RUS loans totaling \$25 million – one of which has been repaid, but the others remain due over 10-year and 20-year periods.

MATI's broadband project has brought first-time service to virtually all of its 1,130 Tribal customers.³⁸ It has improved health and safety on the Reservation by providing 911 connectivity and enhanced education by permitting students to attend school online from home during the COVID quarantines and on snow days. MATI's network also provides the backhaul functions necessary to enable wireless service throughout the Reservation. MATI is working hard to encourage and expand use of its broadband network for cultural preservation, job training, telehealth and other functions that improve Tribal life.

High-cost USF support has been essential to enable MATI to obtain and repay its RUS loans and to sustain the high costs of operating and maintaining its aerial and buried fiber trunks and lines in rural New Mexico. Tribal Lifeline support is also necessary to enable almost a third of MATI's customers (approximately 400 households) to afford service. Termination of high-cost and Lifeline support would be a massive setback for MATI's progress and plans.

³⁷ See generally, *Mescalero Apache Telecom, Inc.*, <https://www.matinetworks.net/about.html>.

³⁸ *Ibid.*

There is no possibility that MATI's customers could pay the additional \$300 per month in residential rates needed to replace its USF support, and also no way that MATI could continue operating, much less to repay its RUS loans, without the high-cost and Lifeline dollars that comprise over 85 percent of its revenue stream.

Northeast Louisiana Telephone Company (NortheastTel) serves approximately 1,100 voice and/or broadband customers in a 270-square-mile portion of Morehouse Parish in northeastern Louisiana.³⁹ Although its service area is a sparsely populated and high-cost agricultural area (its main town is Collinston, population 274), NortheastTel has deployed FTTH facilities capable of serving 100 percent of its customer locations. However, NortheastTel is obligated to repay over the next eight or nine years the Broadband Infrastructure Plan (BIP) and other Federal loans it needed to finance its FTTH construction, and is reliant on continued USF payments to meet those obligations.

The organization recently acquired Campti-Pleasant Hill Telephone Company, Inc. (C-PH), which serves approximately 2,900 voice and/or broadband customers in a 510-square-mile area encompassing parts of four northwestern Louisiana parishes. This is a sparsely populated, high-cost area primarily comprising pine forests and swamps, where logging and oil/gas production are primary activities. C-PH has brought FTTH to approximately 30 percent of its service area and is taking out a 15-year line of credit

³⁹ See generally *NortheastTel – Our History: How we got here!*, <https://pelicanbroadband.com/about/> (click on “Company History”).

to help finance its deployment to the remaining 70 percent.

Broadband service is critical in rural Louisiana for public safety (especially during hurricanes and other natural disasters), economic development, schooling, job training and rural healthcare. Without high-cost USF support, NortheastTel (which is transitioning from CAF-BLS to E-ACAM) and C-PH (which recently moved from ACAM to E-ACAM) would not be able to obtain or repay the loans necessary to deploy high-speed broadband in most parts of their service areas or to sustain their existing broadband services and operating expenses. Moreover, NortheastTel estimates that termination of the existing E-ACAM support received by the two companies would require an increase in residential broadband-service rates by about \$160/customer per month – a rate increase that would put broadband service out of reach for most.

Northeast Nebraska Telephone Company (NNTC) is a co-operative serving approximately 5,100 broadband and 3,500 voice member-customers in 30 communities scattered throughout a 2,364-square-mile portion of north and central eastern Nebraska.⁴⁰ Its service areas are non-contiguous and sparsely populated farming and ranching regions. Headquartered in Jackson (population: 202), its population densities range from 2.2 subscribers/square mile in its eastern service areas to fewer than 1 subscriber/square mile in its western areas.

NNTC obtained a substantial RUS loan in 2009, with which it extended buried FTTH broadband

⁴⁰ See generally *About NNTC*, <https://nntc.net/about/>.

facilities and services to its member customers during a project completed in 2015. Because NNTC is a cooperative, all customers must be offered service regardless of the distance or cost to reach them. Although FTTH network construction was completed during 2015, the RUS loans will not be fully repaid until 2036.

In large-scale agricultural regions like NNTC's service area, broadband is important not only for economic development, employment, distance-learning and rural healthcare purposes, but is also becoming increasingly critical for precision-agricultural and video livestock auction purposes. NNTC needs continued high-cost USF support not only to repay its loans, but also to sustain its operations in a large area where lengthy trunks and lines entail expensive maintenance activities and repair calls, and low population density limits economies of scale for customer-service and cybersecurity functions. NNTC estimates that it would have to increase its members' residential broadband service rates by about \$90/month if its E-ACAM support became unavailable.

Shawnee Communications (Shawnee) serves approximately 7,000 broadband customers in a 650-square-mile area in southern and central Illinois.⁴¹ With offices in Lovington and Equality (population: 1,024 and 504, respectively), its service area includes corn, soybean and livestock farms, communities decimated by coal-mine closures, and the rocky terrain of the Shawnee National Forest and surrounding areas. Shawnee has relied on the FCC's

⁴¹ *See Our Mission and History*, <https://shawnee.com/mission-history/>.

high-cost program to ensure that its customers have access to advanced services at rates reasonably comparable to urban areas.

In 1994, Shawnee began deploying fiber-optic cable into its network interexchange facilities. Shawnee realized in 2002 that, with over 160 miles of fiber throughout its network, DSL services would be an inadequate long-term technology to keep pace with subscriber demands, and that FTTH technology would be needed to meet rapidly increasing consumer demands for higher broadband speeds and increased reliability. Shawnee relied upon consistent USF support when it secured RUS loans to upgrade its communities to FTTH beginning in 2007 and completed a major effort to convert all of its exchanges by 2014 – both the core towns and surrounding areas, servicing an average of 3.67 subscriber locations per mile. Finally, in 2017 Shawnee converted its recently acquired Lovington exchange to FTTH and fiber-to-the-premise (FTTP) using an RUS loan.

Shawnee was able to finance these FTTH and FTTP conversions primarily with Federal loans from RUS by relying on consistent, predictable and ongoing USF programs and will require E-ACAM support for repaying tens of millions in outstanding RUS loans between now and 2036. Additionally, ongoing USF support assists Shawnee with operating costs, including occasional government mandated highway-related network relocations, capital maintenance costs, and most important, keeping rural service rates comparable to urban rates. USF support has been and remains critical to the availability and affordability of services and sustainability of Shawnee operations.

Shawnee's FTTH network has provided opportunities for its customers to enhance their job skills and employment opportunities, established high-speed connections for local schools, connected critical hospitals and medical clinics, and supported remote education and telehealth. It has enhanced economic development in areas affected by coal-mine closures, and created growth opportunities in economically challenged communities. Shawnee estimates that if its high-cost USF support was suspended or terminated, it would result in monthly service-rate increases of over \$100/subscriber and/or necessitate employee layoffs. As one of the largest anchor employers in its economically depressed regions, these likely layoffs would produce significant negative impacts to customers' rates, customer service, and network services, as well as cause irreversible harm to fragile local economies.

Smithville Communications (Smithville) has been upgrading its residential broadband offerings that serve roughly 20,000 customers in 12 exchanges in an approximate 1,067-square-mile area of southern Indiana.⁴²

In 2008, Smithville took out a major RUS loan to finance the transformation of its residential exchanges to high-speed FTTH technology. It expended these funds during 2008-2014 to complete substantial network upgrades, but still has five years of loan repayments left. Smithville continues to convert remaining DSL facilities to FTTH, and during 2023 invested \$18 million of its own funds in these and other continuing broadband upgrades.

⁴² See generally *Keeping You Connected!*, <https://www.smithville.com/about/>.

Smithville launched a Bright Communities Initiative in 2024 to showcase how high-speed broadband elevates the quality of life for rural Indiana residents. It also launched a best-in-class Learning and Development and Talent program to foster a culture of continuous learning and development, and is offering next-generation services to its customers through its “Smithville at Home” and “Smithville at Work” services. Finally, Smithville is supporting telemedicine and telehealth initiatives in its rural service areas.

Continuing high-cost USF support is essential to complete the upgrade of Smithville’s residential network facilities to FTTH, repay the remaining balance of its RUS loans, earn a sufficient return on its own investments, and sustain its ongoing operational and cybersecurity expenses. Without substantial ongoing USF support, there is no business case to justify owner and shareholder investment in broadband facilities to serve many rural customers. Smithville has found that it costs as much as \$250,000 per location to extend FTTH service to many of its rural customer locations. Assuming that the company generates \$75 per month from the broadband customer at that location (and ignoring the time value of money and assuming that none of the \$75 is needed to cover operating expenses), it would take approximately 3,333 months (277 years) to recover the investment. Without substantial USF support to supplement customer revenues, these extremely high-cost locations would not be upgraded to robust FTTH broadband.

Rally Networks (Rally) owns and operates 17 different RLECs in rural portions of Oregon, Washington, Idaho, Missouri, Oklahoma and

Arkansas. Rally's general business plan is to acquire RLECs with substantial fiber backhaul facilities that provide DSL services and then upgrade them as much as feasible to provide FTTH service.⁴³

For example, Rally's five Oregon RLECs serve approximately 4,000 broadband customers in a roughly 4,000-square-mile area (or about one customer per square mile). To date, Rally has deployed FTTH service to approximately 90 percent of its Oregon customers. During 2002-2004, it used some \$70 million in RUS loans for a major FTTH upgrade and still has outstanding loan repayments for the next five years. It is currently working with a 50/50 RUS ReConnect grant/loan to deploy FTTH service in the most remote and expensive portions of its Oregon service areas.

In addition to the typical economic, social, educational and healthcare services, Rally has connected its Oregon FTTH networks via middle-mile trunks to urban data centers. It also uses its broadband networks to provide backhaul for cellular towers and to provide connections and transport for FirstNet emergency services.

Tenino Telephone Company (Tenino) and Kalama Telephone Company (Kalama) are commonly owned RLECs that serve rural areas in the western portion of Washington state. Tenino serves the city of Tenino (population: 1,870) and surrounding areas in the south Puget Sound region and has approximately 1,400 broadband customers within its 100-square-mile service area. Kalama serves the city of Kalama (population: 2,959) and surrounding areas

⁴³ See generally *Meet Rally*, <https://rallynet.us/about-us/>.

in southwestern Washington along the Columbia River and has approximately 1,500 broadband customers within its 120-square-mile service area.⁴⁴

Both companies have been upgrading their original copper-voice networks to broadband since 1996 and, by the early 2000s, had upgraded most of their dial-up Internet access services to higher-speed DSL. Starting in 2016, both companies began replacing their copper network facilities with scalable FTTH technology that will enable them to continue upgrading their networks at reduced incremental costs to meet evolving customer demands for ever-increasing broadband speeds. Today, both companies have converted about 40 percent of their customer locations to FTTH service. Kalama has received a RUS ReConnect grant (for which it has to furnish 25 percent of its own funds) and expects to have deployed FTTH to 90-95 percent of its customer locations by the end of 2028. However, providing FTTH to the last 5 percent or so of its customers will be extremely difficult and expensive due to the rough terrain that must be passed to reach their remote locations. For its part, Tenino is continuing to upgrade its network but needs a comparable RUS ReConnect or other Federal grant to increase its FTTH deployment pace to that of Kalama.

In addition to the economic, educational and healthcare benefits of high-speed broadband, both companies have used their fiber networks to connect and monitor the water reservoirs and distribution systems and fire/emergency-response facilities within

⁴⁴ See generally *About Tenino Telephone Company*, <https://teninotelephone.com/about/>; *About Kalama Telephone Company*, <https://kalamatelephone.com/about/>.

their service areas – extremely critical functions in western Washington state. Kalama also has provided broadband capabilities and services that have enabled the Port of Kalama to attract businesses and jobs and preserve its status as a leading West Coast port for exporting soybeans, corn and wheat.

Tenino and Kalama have thus far not incurred substantial debt to upgrade their networks to FTTH. However, their customer revenues alone are wholly insufficient to cover their above-average rural operating expenses, much less to recover their broadband investments. The companies estimate that Tenino would need to increase its residential broadband rates by \$93/month, and Kalama’s by \$86/month, to offset termination of their existing CAF-BLS support. Those amount to roughly a doubling of existing rates, and likely would be unaffordable for most customers.

* * * * *

Certainly, a practice’s lengthy pedigree may illuminate the issue of its constitutionality. *See Trump v. United States*, 603 U.S. 593, 643-646 (2024) (Thomas, J., concurring) (prosecution of the former President also may be unconstitutional because a private citizen appointed Special Counsel by Attorney General did not occupy office “established by law”, “[l]ongstanding practice from the founding to today comports with this original understanding that Congress must create offices by law”). As even the Fifth Circuit acknowledges, “Congress has long pursued a policy of providing universal telecommunications service to all residents and businesses in the United States.” Pet. App. 2a (cleaned up, citation omitted). As is shown by the

above experiences of the various WTA members nationwide, USF programs have been and remain critical to deploying and sustaining highly beneficial broadband services in rural America – progress that is threatened by the Fifth Circuit’s proposed termination of FCC’s USF program.

“Montana with its vast distances is not Rhode Island with its heavy concentrations of people.” *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 749 (1964) (Stewart, J. dissenting). This Court, situated on the densely populated and pervasively connected Eastern seaboard, should not lose sight of the fact that affirming the Fifth Circuit will greatly disrupt the extremely successful high-cost USF support programs. It will bring to a screeching halt the progress RLECs have made to reduce the “digital divide” and deploy the reasonably comparable and affordable broadband services required by 47 U.S.C. 254(b)(3) that have done so much to improve the economic, educational, health, public safety and social circumstances of our Nation’s long-neglected rural service areas. Terminating or significantly interrupting the existing high-cost USF support programs would cripple the availability and quality of broadband services and benefits in many or most RLEC service areas, and relegate their inhabitants to second-class (or worse) broadband service, impairing their full participation in the online world.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

/s/ Michael F. Smith

Michael F. Smith

Counsel of Record

The Smith Appellate Law Firm

1717 Pennsylvania Ave. N.W.

Suite 1025

Washington, D.C. 20006

(202) 454-2860

smith@smithpllc.com

Counsel for Amicus Curiae

WTA – Advocates for Rural

Broadband

January 15, 2025