

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

**AMICUS CURIAE BRIEF OF FORMER
LEADERSHIP OF THE UNIVERSAL
SERVICE ADMINISTRATIVE COMPANY
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTERESTS OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT: THE DELEGATION OF MINISTERIAL DUTIES TO USAC BY THE FCC IS LAWFUL UNDER THIS COURT’S PRECEDENT.....	4
I. USAC Is Subordinate to the FCC	4
A. USAC’s Limited Role and Organiza- tional Structure Demonstrate It Is Subordinate to the FCC.....	6
B. USAC Has a Subordinate Role in the Calculation of the Quarterly Universal Service Contribution Factor	10
II. USAC Is Subject to the FCC’s Authority and Surveillance	17
III. USAC’s Role Satisfies This Court’s Standard for Lawful Agency Delegation to a Private Entity	24
CONCLUSION	26

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Carter v. Carter Coal</i> , 298 U.S. 238 (1936).....	24, 25
<i>Consumers' Rsch. v. FCC</i> , 109 F.4th 743 (5th Cir. 2024), <i>cert. granted</i> , 2024 WL 4864036 (U.S. Nov. 22, 2024) (No. 24-354).....	2, 8, 11, 13, 15, 16
<i>Consumers' Rsch. v. FCC</i> , 67 F.4th 773 (6th Cir. 2023), <i>cert. denied</i> , 144 S. Ct. 2628 (2024)	10, 16
<i>Oklahoma v. United States</i> , 62 F.4th 221 (6th Cir. 2023).....	16
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940).....	2, 4, 17, 25
STATUTES	
Communications Act of 1934, ch. 652, 48 Stat. 1064 (47 U.S.C. 151 <i>et seq.</i>).....	5
47 U.S.C. § 151	5
47 U.S.C. § 254.....	5
47 U.S.C. § 254(d).....	14

Cited Authorities

	<i>Page</i>
47 U.S.C. § 254(h)(1)(A).....	13
47 U.S.C. § 254(h)(1)(B).....	13
47 U.S.C. § 254(h)(4)	13
REGULATIONS	
47 C.F.R. § 54.420(b).....	19
47 C.F.R. § 54.502	13
47 C.F.R. § 54.505(c)	14
47 C.F.R. § 54.516	19
47 C.F.R. § 54.631	19
47 C.F.R. § 54.702(a)	7
47 C.F.R. § 54.702(b)	7
47 C.F.R. § 54.702(c)	7
47 C.F.R. § 54.702(c)(3)	8
47 C.F.R. § 54.702(g)	21
47 C.F.R. § 54.702(h)	22

Cited Authorities

	<i>Page</i>
47 C.F.R. § 54.702(j)	22
47 C.F.R. § 54.703(b)	7
47 C.F.R. § 54.704(b)	8
47 C.F.R. § 54.704(c)	8
47 C.F.R. § 54.706	14
47 C.F.R. § 54.706(e)	14
47 C.F.R. § 54.709(a)(2)	15
47 C.F.R. § 54.709(a)(3)	15
47 C.F.R. § 54.711(a)	14
47 C.F.R. § 54.711(b)	22
47 C.F.R. § 54.715(a)	14
47 C.F.R. § 54.715(b)	10
47 C.F.R. § 54.715(c)	9
47 C.F.R. § 54.717.....	19
47 C.F.R. § 54.719	17

Cited Authorities

	<i>Page</i>
47 C.F.R. § 54.719(c)	7
47 C.F.R. § 54.723(a)	17

OTHER AUTHORITIES

FED. COMMC'NS COMM'N:

<i>Connect America Fund</i> , Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011), <i>pets. for review denied</i> , In <i>Re</i> FCC 11-161, 753 F.3d 1015 (10th Cir. 2014)	12
<i>E-Rate FY 2024 Program Integrity Assurance FCC Form 471 Review Procedures</i> , Letter, 39 FCC Rcd. 2922 (2024).....	9
<i>FCC Agency Financial Report for Fiscal Year 2024</i> , Report, DA-24-1142 (OMD rel. Nov. 15, 2024), https://docs.fcc.gov/public/attachments/DA-24-1142A1.pdf	20, 21
<i>FCC Guidance to USAC on E-rate Competitive Bidding Rules</i> , Letter, DA 24-1287 (WCB rel. Dec. 20, 2024), https://docs.fcc.gov/public/attachments/DA-24-1287A1.pdf	23
<i>FCC Off. Inspector Gen., FCC's Top Performance and Management Challenges for FY 2025</i> (2014), https://www.fcc.gov/sites/default/files/fy25_fcc_tmpe_10012024.pdf	24

Cited Authorities

	<i>Page</i>
Letter from Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, to Sen. Ben Ray Luján (Jan. 12, 2024), https://docs.fcc.gov/public/attachments/DOC-400113A1.pdf	8
Letter from Mark Stephens, Managing Director, Fed. Commc'ns Comm'n, to Radha Sekar, Chief Exec. Officer, Universal Serv. Admin. Co. (Dec. 19, 2018), https://www.fcc.gov/sites/default/files/2018-procurement-review-ltr121918.pdf	9
Letter from Mark Stephens, Managing Dir., Fed. Commc'ns Comm'n, to Radha Sekar, Chief Exec. Officer, Universal Serv. Admin. Co. (Jan. 14, 2020), https://www.fcc.gov/sites/default/files/fcc-afr-findings-ltr-to-usac-01142020.pdf	21
<i>Lifeline and Link Up Reform and Modernization</i> , Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962 (2016).	12
<i>Lifeline Program for Low-Income Consumers</i> , FCC, https://www.fcc.gov/general/lifeline-program-low-income-consumers (last visited Jan. 6, 2025).	12
<i>Lifeline Support for Affordable Communications</i> , FCC, https://www.fcc.gov/lifeline-consumers (last visited Jan. 6, 2025).	12

Cited Authorities

	<i>Page</i>
Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company (Oct. 17, 2024), https://www.fcc.gov/sites/default/files/usac-mou.pdf	6
<i>Modernizing the E-rate Program for Schools and Libraries</i> , Report and Order, 29 FCC Rcd. 8870 (2014)	21
<i>Proposed Fourth Quarter 2024 Universal Service Contribution Factor</i> , Public Notice, DA 24-494 (rel. Sept. 11, 2024)	15
<i>Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Accomack County Public School</i> , Order, 38 FCC Rcd. 330 (WCB 2023)	22
<i>Rural Digital Opportunity Fund; Connect America Fund</i> , WC Docket Nos. 19-126 and 10-90, Report and Order, 35 FCC Rcd. 686 (2020)	12
<i>Rural Health Care Program Funding Year 2024 Funding Request Review Procedures</i> , Letter, 39 FCC Rcd. 4125 (2024)	10
<i>Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company</i> , Public Notice, DA 24-482 (rel. June 3, 2024), https://docs.fcc.gov/public/attachments/DA-24-482A1.pdf	18

Cited Authorities

	<i>Page</i>
<i>Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company</i> , Public Notice, DA 24-862 (rel. Sept. 3, 2024), https://docs.fcc.gov/public/attachments/DA-24-862A1.pdf	18
<i>Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative</i> , Public Notice, DA 24-973 (rel. Oct. 1, 2024), https://docs.fcc.gov/public/attachments/DA-24-973A1.pdf	18
<i>Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative</i> , Public Notice, DA 24-1169 (rel. Dec. 2, 2024), https://docs.fcc.gov/public/attachments/DA-24-1169A1.pdf	18
Testimony of Jessica Rosenworcel, Chairwoman, Fed. Commc’ns Comm’n, Before the Subcomm. on Commc’ns & Tech. of the H. Comm. on Energy & Com., 118th Cong. (Nov. 30, 2023), https://docs.fcc.gov/public/attachments/DOC-398881A1.pdf	18
<i>Universal Service Fund General Management & Oversight</i> , FCC, https://www.fcc.gov/universal-service-fund-general-management-and-oversight (last visited Jan 9, 2025).	23

Cited Authorities

	<i>Page</i>
<i>Wireline Competition Bureau Announces E-Rate and RHC Programs' Inflation-Based Caps for Funding Year 2024</i> , Pub. Notice, 39 FCC Rcd. 2206 (Mar. 8, 2024).....	13
MISCELLANEOUS:	
<i>2023 Annual Report</i> , Universal Serv. Admin. Co., https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2023/2023_USAC_Annual_Report.pdf	5
<i>Audit Committee Briefing Book</i> , Universal Serv. Admin. Co. (Oct. 28, 2024) (USAC Audit Comm. Briefing Book), https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/audit/2024/2024-10-28-AC-Briefing-Book-Public.pdf	10
<i>Beneficiary & Contributor Audit Program (BCAP)</i> , Universal Serv. Admin. Co., https://www.usac.org/about/appeals-audits/beneficiary-and-contributor-audit-program-bcap/ (last visited Jan. 8, 2025)	19
<i>PQA Program</i> , Universal Serv. Admin. Co., https://www.usac.org/about/appeals-audits/pqa-program/ (last visited Jan. 8, 2025)	20

Cited Authorities

	<i>Page</i>
<i>Rural Health Care Committee Briefing Book, Universal Serv. Admin. Co. (Oct. 28, 2024), https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/rhc/2024/2024-10-28-RHC-Briefing-Book-Public.pdf</i>	<i>10</i>
<i>U.S. Gov't Accountability Off., GAO-24-106967, Telecommunications: Administration of Universal Service Program Is Consistent with Selected FCC Requirements (2024)</i>	<i>24</i>

INTERESTS OF AMICUS CURIAE¹

We are former board members and former employees of the Universal Service Administrative Company (USAC), the not-for-profit company that administers the federal universal service program. We provide this amicus brief in support of the Petitioners. Our interest is to provide a description, based on our collective experience, of how USAC is subordinate to and operates under the authority and surveillance of the Federal Communications Commission (FCC). The Fifth Circuit Court of Appeals, to reach its decision, relied on factual inaccuracies about the relationship between USAC and the FCC that we wish to correct and clarify for the record.

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1. As required by Rule 37.6, we note that this amicus brief was not authored, either in whole or in part, by counsel to any party in this case. In addition, no monetary contribution to this amicus brief was made by either party to this case, by counsel to either party, or by any person other than the signatories to this brief and their counsel.

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SUMMARY OF ARGUMENT

This brief demonstrates that USAC is not the uncontrolled free agent depicted by the Fifth Circuit, *Consumers' Rsch. v. FCC*, 109 F.4th 743, 783 (5th Cir. 2024), *cert. granted*, 2024 WL 4864036 (U.S. Nov. 22, 2024) (No. 24-354). In reality, the numerous limitations set forth by Congress and the FCC are a model of how a federal agency can employ the benefits of outsourcing certain ministerial functions in compliance with the legal standard articulated by this Court. Such outsourcing allows the FCC to implement its policymaking while maintaining full control and authority over the universal service program that Congress established.

This Court has held that a private entity may carry out the ministerial tasks associated with a federal agency's functions as long as (1) the private entity "function[s] subordinately to" the federal agency, and (2) the federal agency "has authority and surveillance over the activities"

of the private entity. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). Based on our collective firsthand knowledge of USAC's operations, we can attest that the relationship between the FCC and USAC complies with that standard. The USAC depicted by the Fifth Circuit does not match our own experience of how USAC operates.

As part of the initial onboarding of new board members and new employees, it is explained that USAC functions subordinately to the FCC. We understood that USAC served a purely administrative function and that its role was defined and limited by the FCC's rules, orders, and directives. The FCC's rules make clear that USAC is prohibited from creating or even interpreting rules. The FCC retains and exercises final decision-making authority over every aspect of the federal universal service program and its contribution mechanism. Finally, in its normal course of operations, the FCC is in near-constant contact with USAC and provides direct oversight of USAC's operations.²

Below, we explain first that USAC is subordinate to the FCC: in the specific and limited responsibilities assigned to USAC by the FCC, which give USAC no authority to enact or interpret rules or to create policy; in its organizational structure and governance; and specifically in the FCC's calculation of the quarterly contribution factor for the universal service program.

2. As former USAC board members and employees, we worked with FCC staff on a near-daily basis. To be clear, USAC's employees have more frequent contact with FCC staff than USAC's board members do, but the members of the board nonetheless have routine contact with FCC staff.

We then explain that the FCC has authority over and oversees every aspect of USAC's performance of its ministerial duties. The FCC exercises its oversight by reviewing and resolving appeals of USAC decisions by universal service program participants, reviewing audits of USAC's performance, reviewing various reports that USAC is required to file with the FCC, and issuing formal and informal guidance to USAC through various other means. In particular, the FCC has adopted rules establishing the parameters for, and continues to exercise stringent oversight of, the demand and revenue projections that enable the FCC to set the quarterly contribution factor for the universal service program. Finally, we explain why the delegation of responsibilities from the FCC to USAC is lawful under the standard established by this Court.

ARGUMENT: THE DELEGATION OF MINISTERIAL DUTIES TO USAC BY THE FCC IS LAWFUL UNDER THIS COURT'S PRECEDENT

Under this Court's longstanding precedent, a federal agency may delegate ministerial tasks to a private entity as long as (1) the private entity "function[s] subordinately to" the federal agency, and (2) the federal agency "has authority and surveillance over the activities" of the private entity. *Sunshine Anthracite Coal*, 310 U.S. at 399. The FCC's delegation of ministerial duties to USAC complies with this standard and is therefore lawful.

I. USAC Is Subordinate to the FCC

The goal of universal telecommunications service has long been an objective of U.S. policymakers, going back as far as the Communications Act of 1934, which established

the FCC.³ 47 U.S.C. § 151 *et seq.* Policymakers have correctly recognized that ensuring all Americans’ access to telecommunications services—and in the twenty-first century, broadband service as well—benefits society as a whole. Universal service promotes economic development, as well as the dignity and freedom of individual Americans, by improving their access to employment opportunities, education, and health care.

Congress established the modern federal universal service program in Section 254 of the Telecommunications Act of 1996. 47 U.S.C. § 254. At its core, the universal service program involves the collection of fees from telecommunications providers that are then used to fund the four support mechanisms that constitute the universal service program. The largest of these four support mechanisms, by far, is the high-cost program. This program subsidizes telecommunications and broadband service in rural America, where the cost of providing service would otherwise be both prohibitively expensive for consumers and unprofitable for telecommunications providers. In 2023, 53 percent of all universal service disbursements nationwide (approximately \$4.3 billion) were for the high-cost program.⁴

3. The preamble of the Communications Act of 1934 stated that its purpose was to make available to “all the people of the United States . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151.

4. *2023 Annual Report 3*, Universal Serv. Admin. Co., https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2023/2023_USAC_Annual_Report.pdf. This report covers universal service funding year 2023, which began on July 1, 2023, and ended on June 30, 2024.

The other three support mechanisms receive the remaining funding (in 2023, \$3.8 billion of the approximately \$8.1 billion in total universal service support disbursed). They are the schools and libraries program, commonly known as the E-Rate program, which subsidizes eligible telecommunications and broadband services for schools and libraries throughout the country (\$2.46 billion disbursed in 2023); the Lifeline program, which provides a small monthly telecommunications or broadband subsidy for low-income Americans (\$870 million disbursed in 2023); and the rural health care program, which subsidizes telecommunications and Internet access services for health care providers (\$468 million disbursed in 2023).

A. USAC’s Limited Role and Organizational Structure Demonstrate It Is Subordinate to the FCC

To implement the universal service program that Congress mandated, the FCC directed the creation of a not-for-profit entity, USAC, to carry out the ministerial tasks associated with collecting and distributing universal service program funds. The relationship between the FCC and USAC is defined by the FCC’s rules and orders and by a memorandum of understanding (MOU) between the FCC and USAC.⁵ These sources make clear that USAC is subordinate to the FCC and that the FCC retains final decision-making authority with respect to the universal service program.

5. Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company (Oct. 17, 2024) (MOU), <https://www.fcc.gov/sites/default/files/usac-mou.pdf>.

USAC's Limited Role. When it designated USAC the administrator of the universal service program, the FCC adopted rules laying out the core responsibilities assigned to USAC: (1) administering the four support mechanisms of the universal service program (47 C.F.R. § 54.702(a)); and (2) billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds (47 C.F.R. § 54.702(b)). The MOU between the FCC and USAC makes clear that USAC's "sole purpose is to assist the FCC in the administration of the [universal service] programs . . . as an agent and instrumentality of the FCC," and that USAC's "operations are narrowly prescribed by FCC regulations and day to day oversight." MOU at 2.

In addition to identifying exactly what USAC *is* authorized to do, the FCC's rules also clearly explain what USAC is *not* authorized to do. The rules explicitly prohibit USAC from making policy or from interpreting unclear statutory language, unclear provisions of the FCC's rules, or the intent of Congress. 47 C.F.R. § 54.702(c). Where the FCC's rules or the intent of Congress are unclear, USAC is required to seek guidance from the FCC. *Id.* USAC also has no authority to waive the FCC's rules; only the FCC itself may grant waivers. 47 C.F.R. § 54.719(c).

USAC's Organizational Structure and Governance. Furthermore, USAC's very organizational structure and governance reflect its subordinate status. USAC has a 20-member board of directors whose membership is defined in the FCC's rules. 47 C.F.R. § 54.703(b). The board membership represents universal service program participants (service providers, schools, libraries, rural health care providers, and low-income consumers) as well as state telecommunications regulators, state consumer

advocates, and Tribal communities. *Id.* Each represented group nominates board members to represent them, and the FCC must approve those nominees before they may serve on the board. 47 C.F.R. § 54.702(c)(3).

To select USAC's chief executive officer, who also serves as a permanent member of USAC's board of directors, the board submits a nominee to the chair of the FCC, who then reviews the nomination and appoints the CEO. 47 C.F.R. § 54.704(b). If the board of directors cannot reach consensus on a nominee or fails to submit a nomination, the chair of the FCC selects the CEO. 47 C.F.R. § 54.704(c). The Fifth Circuit's concern about private entities that are not accountable to government officials, *Consumers' Rsch. v. FCC*, 109 F.4th at 783, is not warranted here, as the FCC's selection of the CEO and board chair demonstrates that USAC is accountable to government officials at the FCC, who in turn are accountable to Congress.⁶

The FCC does not just make the final decision on USAC's leadership, though; the FCC is the final decision-maker on all significant aspects of USAC's governance and operations. USAC must submit its proposed budget to the FCC for review and

6. FCC commissioners are routinely called before Congress to provide reports and respond to questions. *See, e.g.*, Testimony of Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Com., 118th Cong. (Nov. 30, 2023), <https://docs.fcc.gov/public/attachments/DOC-398881A1.pdf>; Letter from Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, to Sen. Ben Ray Luján (Jan. 12, 2024), <https://docs.fcc.gov/public/attachments/DOC-400113A1.pdf>.

approval.⁷ 47 C.F.R. § 54.715(c). USAC must seek FCC approval before conducting procurements.⁸ USAC must submit its application review procedures for the E-Rate and rural health care programs for the FCC’s review and approval.⁹ USAC must submit its audit procedures

7. In 2018, the FCC set forth a specific schedule for its review and approval of USAC’s budget. Letter from Mark Stephens, Managing Director, Fed. Comm’n Comm’n, to Radha Sekar, Chief Exec. Officer, Universal Serv. Admin. Co. (Dec. 19, 2018), <https://www.fcc.gov/sites/default/files/2018-procurement-review-ltr121918.pdf>. USAC must submit, by budget category defined by the Office of Management and Budget, a detailed proposed budget that the FCC will then review and approve. The directive established a two-tiered review and approval process with specific deadlines for all of USAC’s administrative expenses. The FCC’s direct oversight of USAC is apparent in the statement that the FCC “looks forward to continuing to work closely with USAC to ensure that the FCC’s review and approval of USAC’s budget and administrative expenses runs smoothly.” *Id.*

8. The MOU requires USAC to provide the FCC’s managing director with an annual procurement plan, provide quarterly reports to the managing director on the status of its procurement activity and advance notice of upcoming procurement activity, meet regularly with the Office of the Managing Director over the course of the year to review its procurement activity, and provide a year-end procurement report to the managing director. MOU at 8–9. USAC must seek approval of procurements from the managing director in advance, unless they fall below a dollar threshold established by the managing director. *Id.* at 9. As a practical matter, the FCC routinely reviews, revises, and approves the need for those vendors, the procurement documents, and USAC’s selection of vendors. FCC staff have regularly consulted with USAC’s subcontractors and have participated in contract negotiations to reduce contract pricing.

9. *E-Rate FY 2024 Program Integrity Assurance FCC Form 471 Review Procedures*, Letter, 39 FCC Rcd. 2922 (2024); *Rural*

to the FCC for review and approval.¹⁰ USAC must submit all draft universal service forms and form changes to the FCC for review and approval. MOU at 5. The FCC’s rules limit what USAC can pay its employees. 47 C.F.R. § 54.715(b). USAC is not even permitted to make substantive changes to its website without prior approval from the FCC. MOU at 6.

In short, USAC is subordinate to the FCC in its operations and governance. As the Sixth Circuit Court of Appeals has concluded, “[t]he FCC has not afforded USAC any authority to make actual decisions or establish or define standards.” *Consumers’ Rsch. v. FCC*, 67 F.4th 773, 796 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2628 (2024).

B. USAC Has a Subordinate Role in the Calculation of the Quarterly Universal Service Contribution Factor

Of particular relevance to this case is the FCC’s process of calculating the contribution factor, which informs contributing telecommunications providers how much they must contribute to the universal service fund each quarter. The Fifth Circuit’s description of USAC

Health Care Program Funding Year 2024 Funding Request Review Procedures, Letter, 39 FCC Rcd. 4125 (2024).

10. *Rural Health Care Committee Briefing Book*, Universal Serv. Admin. Co. (Oct. 28, 2024), <https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/rhc/2024/2024-10-28-RHC-Briefing-Book-Public.pdf>; *Audit Committee Briefing Book*, Universal Serv. Admin. Co. (Oct. 28, 2024) (*USAC Audit Comm. Briefing Book*), <https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/audit/2024/2024-10-28-AC-Briefing-Book-Public.pdf>.

receiving a “blank check” from the FCC to “fill it out however it saw fit,” *Consumers’ Rsch.*, 109 F.4th at 773, and of “rel[ying] on for-profit telecommunications companies to determine how much American citizens would be forced to pay,” *Id.* at 748, bears no resemblance whatsoever to how the contribution factor is actually developed. In reality, USAC does nothing more than collect data and provide projections of estimated revenues and program demand. The FCC’s rules define and constrain the inputs on each side of this equation, and USAC operates within this framework. USAC’s projected demand and revenues are not binding on the FCC; the FCC may revise any aspect of USAC’s estimates. The quarterly contribution factor is then calculated by the FCC by dividing the projected costs of the universal service support mechanisms by the projected revenues reported by universal service program contributors. Thus, USAC has no decision-making role in the quarterly universal service contribution factor.

Universal Service Program Costs. The numerator for calculating the contribution factor is the projected quarterly costs for the universal service program. USAC estimates these costs based on the projected demand for support from each of the four universal service support mechanisms (high cost, Lifeline, E-Rate, and rural health care), plus USAC’s projected administrative costs. USAC must base its cost projections on the limitations that the FCC has established in its rules and orders (including eligibility requirements and spending limits) for each of the four universal service support mechanisms.

The high-cost program operates to reduce the cost of providing telephone and Internet service to rural

consumers, so that people in rural areas of the country pay rates that are comparable to rates paid by people in urban areas. The FCC has constrained funding for this program by adopting a budget target of \$4.5 billion per year and establishing caps on certain types of funding within the high-cost program.¹¹ The Lifeline program is also subject to a budget. In 2016 the FCC adopted an annual budget of \$2.25 billion for the program with an annual inflation adjustment.¹² The size of the Lifeline program also is limited by parameters the FCC has set: (1) the Lifeline discount is only available to households with an income at or below 135 percent of the federal poverty guidelines or that qualify for other types of federal low-income assistance; (2) the discount is capped at \$9.25 per month for most areas of the country, with Tribal households eligible for an additional \$25 per month; (3) only one discount is available per household; and (4) the discount is only provided by a limited number of service providers that have been designated eligible to participate in the program by the FCC or a state public utility commission.¹³

11. *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 17710–12 (2011), *pets. for review denied*, *In Re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); *Rural Digital Opportunity Fund*; *Connect America Fund*, WC Docket Nos. 19-126 and 10-90, Report and Order, 35 FCC Rcd. 686, 688 ¶ 5 (2020).

12. *Lifeline and Link Up Reform and Modernization*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962, 4110 ¶¶ 400, 403 (2016).

13. *Lifeline Support for Affordable Communications*, FCC, <https://www.fcc.gov/lifeline-consumers> (last visited Jan. 6, 2025); *Lifeline Program for Low-Income Consumers*, FCC, <https://www.fcc.gov/general/lifeline-program-low-income-consumers> (last visited Jan. 6, 2025).

The FCC has capped support for the other two support mechanisms—the E-Rate program and the rural health care program—with annual adjustments to reflect inflation. E-Rate has a cap of \$4.94 billion for the current funding year, and the rural health care program is capped at \$707 million.¹⁴ Congress and the FCC have defined exactly which entities and services are eligible for support under these two programs; USAC has no discretion. *See, e.g.*, 47 U.S.C. § 254(h)(1)(A)–(B) (authorizing universal service support for health care providers, schools, and libraries); 47 C.F.R. § 54.502 (identifying services eligible for E-Rate support).¹⁵

14. *Wireline Competition Bureau Announces E-Rate and RHC Programs' Inflation-Based Caps for Funding Year 2024*, Pub. Notice, 39 FCC Rcd. 2206 (Mar. 8, 2024). Current demand for these two programs is below the caps. Actual disbursements for these two programs depend on approved funding applications by eligible program participants, and the FCC rules require that these applications must be supported by contracts with service providers. However, disbursements typically are below demand estimates due to several factors, including that applicants sometimes do not move forward with planned projects in any given funding year. In addition, the FCC's rules provide that any monies collected that are not used in these two programs in a given funding year is carried over to subsequent years to reduce program demand—and thus the contribution factor—in those years. 47 C.F.R. § 54.709(a)(3).

15. The Fifth Circuit incorrectly stated that Section 254 does not limit the FCC's discretion to supply universal service funding for educational programs. *Consumers' Rsch. v. FCC*, 109 F.4th at 761 n.7. In fact, Congress specified that only elementary and secondary schools were eligible, that schools had to be non-profit, and that a school could not have an endowment of more than \$50 million. 47 U.S.C. § 254(h)(1)(B), (h)(4). Libraries have to be eligible for assistance under the Library Services and Technology Act. 47 U.S.C. § 254(h)(4). The FCC has not limited E-Rate support to low-income schools, as stated by the Fifth Circuit,

USAC's administrative expenses are similarly restrained by the FCC's rules. 47 C.F.R. § 54.715(a). The rules cap the pay of all USAC officers and employees such that their compensation cannot exceed the rate of basic pay for Level 1 of the Executive Schedule for federal government employees. 47 C.F.R. § 54.715(b). (USAC board members are reimbursed for expenses but otherwise receive no compensation.) In addition, USAC employees' benefits must be reasonably comparable to benefits provided to employees of the federal government. *Id.* The FCC reviews USAC's budget to ensure that USAC is operating efficiently and closely manages USAC's spending by working with USAC on its selection of subcontractors, including for information technology, audits, and legal assistance, among other work.

Universal Service Contribution Base. On the revenue side of the calculation, the FCC has set the rules for the contributions that telecommunications providers must make to the universal service fund. The Communications Act and the FCC's rules define which entities must contribute and which revenues those contributions are to be based on. 47 U.S.C. § 254(d); 47 C.F.R. § 54.706. To determine projected quarterly revenues, the FCC requires telecommunications providers to file "Telecommunications Reporting Worksheets" on a quarterly and annual basis. 47 C.F.R. § 54.711(a). The rules require contributors to retain relevant records for at least five years, to ensure compliance with the contribution requirements. 47 C.F.R. § 54.706(e).

Consumers' Rsch., 109 F.4th at 761 n.7, but the E-Rate program does provide increased levels of support if the school has a higher percentage of students that qualify for the school lunch program or if the school is located in a rural area. 47 C.F.R. § 54.505(c).

Calculation of the Quarterly Contribution Factor.

The FCC's rules set forth the formula used to determine the quarterly contribution factor—the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected revenues—and provide that the FCC must approve USAC's quarterly projected costs for the universal service program. 47 C.F.R. § 54.709(a)(2). USAC is required to submit its projected demand for the four support mechanisms and its projected administrative expenses for each quarter (which are constrained by the FCC's rules, as explained above), along with an explanation of the basis for its projections, to the FCC at least 60 calendar days prior to the start of that quarter. 47 C.F.R. § 54.709(a)(3). USAC must submit the total projected contribution base for the quarter—calculated from the quarterly worksheets submitted by telecommunications providers—to the FCC 30 days before the start of each quarter. *Id.*

Based on this information, the FCC issues a public notice that contains USAC's projected program costs and projected revenues and the resulting contribution factor that the FCC has determined.¹⁶ 47 C.F.R. § 54.709(a)(3). The FCC's rules provide that if the FCC takes no action within 14 days after the release of the public notice, the projected costs and the contribution factor are deemed approved by the FCC. *Id.* The Fifth Circuit Court of Appeals has asserted that this provision of the rules means that “USAC's projections take legal effect without formal FCC approval.” *Consumers' Rsch.*, 109 F.4th at 771. But the rules explicitly state that it is the FCC that

16. *E.g., Proposed Fourth Quarter 2024 Universal Service Contribution Factor*, Public Notice, DA 24-494 (rel. Sept. 11, 2024).

determines the quarterly contribution factor, and the fact that the contribution factor is deemed approved 14 days after the FCC announces it in no way changes the fact that the FCC makes the final decision. “An agency exercises its policymaking discretion with equal force when it makes policy by either ‘decid[ing] to act’ or ‘decid[ing] not to act.’” *Consumers’ Rsch.*, 67 F.4th at 796 (quoting *Oklahoma v. United States*, 62 F.4th 221, 230 (6th Cir. 2023)).

In short, USAC’s projected program demand and administrative costs are constrained by the FCC’s rules and orders, as are the projected revenues. These projections are not binding on the FCC, which reviews USAC’s projections and determines the quarterly contribution factor. The FCC has ample time to review the projections and ask questions of USAC before it approves the projections and determines the contribution factor. This process is not a “rubber stamp,” as the Fifth Circuit characterized it. *Consumers’ Rsch.*, 109 F.4th at 771. In fact, the FCC conducts a thorough review of USAC’s projections every quarter and has adjusted those projections several times. *See* Fed. Pet’rs’ Br. 42–43. But it is no surprise that modification is generally not necessary because the FCC has defined the inputs to the contribution factor up front. As a result, USAC has no decision-making role in the determination of the quarterly contribution factor. By extension, the telecommunications industry has no decision-making role in setting the contribution factor, as the Fifth Circuit Court of Appeals has suggested. *Consumers’ Rsch.*, 109 F.4th at 772–73. Even if industry representatives made up a majority of USAC’s board of directors, which they do not, they would still have no decision-making authority regarding the contribution factor.

II. USAC Is Subject to the FCC's Authority and Surveillance

The second requirement of *Sunshine Anthracite Coal* is that the private entity must be subject to the federal agency's authority and surveillance. *Sunshine Anthracite Coal*, 310 U.S. at 399. This is clearly the case with USAC, as the FCC exercises pervasive authority over USAC, continuously reviewing USAC's performance of its administrative duties at a very granular level and frequently providing guidance and direction to USAC. This guidance and direction is provided through FCC review and resolution of appeals of USAC decisions by universal service program participants; audits of USAC's performance and of the effectiveness of USAC's review process; the review of reports that USAC submits to the FCC; and various other formal and informal means.

Appeals of USAC Decisions. One way the FCC monitors USAC's performance is through its review of hundreds of appeals of USAC decisions that are filed with the FCC each year. The FCC's rules allow any party aggrieved by an action taken by USAC to seek review from the FCC, after first seeking review from USAC itself. 47 C.F.R. § 54.719. The FCC conducts *de novo* review of all appeals of USAC decisions, so no decision of USAC is binding upon the FCC. 47 C.F.R. § 54.723(a). The FCC decides dozens of appeals of USAC decisions every month. The primary purpose of the FCC's review is to determine whether USAC reached the right decision with respect to the individual program participant submitting the appeal. However, through its review of appeals, the FCC can also identify areas where USAC may be misunderstanding the requirements of an FCC rule or order, or where program

efficiency calls for additional guidance to program participants. In many appeal decisions, the FCC directs USAC to take specific action to correct a mistake it made in its original decision. For example, the FCC has directed USAC to provide adequate explanation for the basis of its decision where USAC's original explanation was too vague and has ruled that USAC has incorrectly found issues with program applicant rule compliance.¹⁷

The FCC monitors USAC's performance with respect to the contribution factor in particular by reviewing contributors' appeals of USAC decisions regarding their contribution obligations. Over the past three years, the FCC has decided more than 50 appeals of USAC decisions and requests for waiver submitted by universal service contributors.¹⁸ As explained above, the process of making these decisions not only ensures that these particular contributors are fairly assessed; it also helps the FCC identify areas where USAC's procedures or training materials may require adjustment or improvement to

17. See, e.g., *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, Public Notice, DA 24-482, 16 n.24 (rel. June 3, 2024), <https://docs.fcc.gov/public/attachments/DA-24-482A1.pdf>; *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative*, Public Notice, DA 24-1169, 2 n.6 (rel. Dec. 2, 2024), <https://docs.fcc.gov/public/attachments/DA-24-1169A1.pdf>; *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative*, Public Notice, DA 24-973, 6 nn.17–18 (rel. Oct. 1, 2024), <https://docs.fcc.gov/public/attachments/DA-24-973A1.pdf>.

18. See, e.g., *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, Public Notice, DA 24-862, 9–10, nn.26–27 (rel. Sept. 3, 2024), <https://docs.fcc.gov/public/attachments/DA-24-862A1.pdf>.

ensure that universal service program contributors understand what is required of them.

Audits of USAC's Performance. Another important way the FCC reviews USAC's performance is through audits. First, the FCC requires that USAC be audited annually by an independent auditor to ensure proper administration of the universal service fund and to prevent waste, fraud, and abuse. 47 C.F.R. § 54.717. The FCC's Office of Managing Director oversees every aspect of this audit, from reviewing and revising the preliminary audit requirements drafted by USAC, to approving and modifying the independent auditor's audit program, to reviewing the auditor's findings and USAC's responses to those findings. *Id.* These audits in turn may identify process changes that should be made to ensure program integrity.

The FCC also monitors USAC's performance through the audits that USAC itself conducts (or outsources to third-party auditing firms) of universal service program participants pursuant to the FCC's rules. *See, e.g.,* 47 C.F.R. § 54.420(b); 47 C.F.R. § 54.516; 47 C.F.R. § 54.631. There are two types of audits of program participants conducted by USAC: (1) audits conducted in accordance with generally accepted government auditing standards through the Beneficiary and Contributor Audit Program (BCAP);¹⁹ and (2) "desk audits" through

19. *Beneficiary & Contributor Audit Program (BCAP)*, Universal Serv. Admin. Co., <https://www.usac.org/about/appeals-audits/beneficiary-and-contributor-audit-program-bcap/> (last visited Jan. 8, 2025).

the Payment Quality Assurance Program to determine program improper payment rates.²⁰

USAC conducts these program participant audits under the oversight of, and in consultation with, the FCC.²¹ In addition to FCC approval of audit procedures before the audits are conducted, as explained in Part I.A., the FCC's Wireline Competition Bureau reviews programmatic draft audits before the auditors issue a final report. In addition to ensuring beneficiary compliance with program rules, the FCC uses the results of USAC's audits of program participants to identify areas where USAC's procedures may require improvements. If numerous program participants are making the same mistakes, the FCC works with USAC to modify USAC's procedures and training materials as needed to ensure

20. *PQA Program*, Universal Serv. Admin. Co., <https://www.usac.org/about/appeals-audits/pqa-program/> (last visited Jan. 8, 2025). As of fiscal year 2024, both the E-Rate program and the rural health care program were below OMB's benchmark for improper payments. *FCC Agency Financial Report for Fiscal Year 2024*, Report, DA-24-1142, 98, 100 (OMD rel. Nov. 15, 2024), <https://docs.fcc.gov/public/attachments/DA-24-1142A1.pdf>. (The rate for the rural health care program has been below the benchmark for multiple years, so the FCC does not have to include it in its annual financial report.) Improper payments are not necessarily indicators of waste, fraud, or abuse. Oftentimes, payments are improper simply because the program beneficiary provided insufficient documentation to support its funding request. In addition, the term "improper payments" refers not just to overpayments, but to underpayments as well.

21. MOU at 14; *USAC Audit Comm. Briefing Book* at 16 (noting submission of fiscal year 2025 audit plan and procedures to FCC for approval).

that program participants understand the applicable requirements.²²

The FCC works closely with USAC to implement plans to correct audit findings. For example, after the 2019 independent audit, the FCC's Office of Managing Director sent a corrective action letter to USAC requiring that USAC, among other things, take steps to improve information security controls at USAC.²³ USAC was required to provide the FCC with a corrective action plan describing the specific steps USAC would take to implement each recommendation. *Id.*

Review of Mandatory Reports By USAC. USAC is also required to prepare and submit a variety of reports to the FCC, to help the FCC monitor USAC's performance. USAC must submit to the FCC and to Congress an annual report detailing its operations, activities, and accomplishments for the previous year. 47 C.F.R. § 54.702(g). On a monthly basis, USAC is required to provide the FCC with a report setting forth performance metrics for USAC for each of the four support mechanisms, in categories including program operations, USAC's administrative performance, and USAC customer experience.²⁴ In addition, on a quarterly basis, USAC

22. *FCC Agency Financial Report for Fiscal Year 2024*, Report, DA 24-1142, 101-04 (OMD rel. Nov. 15, 2024), <https://docs.fcc.gov/public/attachments/DA-24-1142A1.pdf>.

23. Letter from Mark Stephens, Managing Dir., Fed. Comm'n's Comm'n, to Radha Sekar, Chief Exec. Officer, Universal Serv. Admin. Co. (Jan. 14, 2020), <https://www.fcc.gov/sites/default/files/fcc-afr-findings-ltr-to-usac-01142020.pdf>.

24. MOU at 12; see also, e.g., *Modernizing the E-rate Program for Schools and Libraries*, Report and Order, 29 FCC Rcd. 8870,

must report to the FCC on the disbursement of universal service funds. 47 C.F.R. § 54.702(h). The FCC has access to all of the underlying data and analytics used to generate the periodic reports. 47 C.F.R. §§ 54.711(b), 54.702(j); MOU at 12. These reporting requirements ensure that the FCC keeps a close watch on USAC's operations.

Other Forms of Oversight. The FCC often communicates its directives to USAC through formal orders. An example of this is a 2014 E-Rate order that, among other things, directed USAC to modernize its information technology systems, improve public access to E-Rate data, and use simpler language in its communications with program participants.²⁵ Another example comes from a 2023 order in which the FCC directed USAC to allow participants in the E-Rate program to correct typographical errors on the invoicing forms they submit to USAC for reimbursement.²⁶ This order in particular highlights how limited USAC's authority is. Prior to its release, USAC had to deny invoices that contained even the smallest typos, simply because the FCC had not given USAC explicit permission to let program participants correct those errors so they could receive their funding.

8893 ¶ 59 (2014) (*E-Rate Modernization Order*) (requiring monthly reports from USAC on its performance administering the E-Rate program).

25. *E-Rate Modernization Order*, 29 FCC Rcd. at 8972–74 ¶¶ 256, 258, 260.

26. *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Accomack County Public School*, Order, 38 FCC Rcd. 330, 336–37 ¶¶ 12–13 (WCB 2023).

In addition, the FCC's Office of the Managing Director, which has primary responsibility for the oversight of USAC's operational and financial processes, has sent USAC dozens of formal management and oversight letters over the years, providing USAC direction on various operational matters.²⁷ The FCC's Wireline Competition Bureau, which is responsible for substantive implementation of the universal service program and for reviewing appeals of USAC decisions, also routinely provides guidance to USAC on the implementation of the FCC's rules, particularly after the FCC adopts new rules.²⁸

The FCC oversees USAC through less formal means as well. FCC and USAC staff have regular meetings to identify administrative and substantive issues in the programs to determine the best course of action. For example, staff may discuss whether additional guidance to program beneficiaries would help clarify a rule. Additionally, program stakeholders often meet with FCC staff to discuss USAC performance issues. These meetings with program stakeholders help the FCC monitor USAC's administrative performance.

27. These letters can be found at *Universal Service Fund General Management & Oversight*, FCC, <https://www.fcc.gov/universal-service-fund-general-management-and-oversight> (last visited Jan 9, 2025).

28. For a recent example of a guidance letter from the Wireline Competition Bureau, see *FCC Guidance to USAC on E-rate Competitive Bidding Rules*, Letter, DA 24-1287 (WCB rel. Dec. 20, 2024), <https://docs.fcc.gov/public/attachments/DA-24-1287A1.pdf> (providing guidance to USAC regarding an FCC order revising service eligibility rules in the E-Rate program).

Finally, the FCC's oversight of USAC is itself subject to review. The FCC's Inspector General routinely reviews the FCC's policies and implementation of the universal service program as part of its mission to ensure the proper use of government resources.²⁹ The Government Accountability Office (GAO) also regularly reviews both USAC's performance and the FCC's oversight of the universal service program. Most recently, in July 2024, the GAO concluded that, for the requirements it reviewed, USAC is managing its operating budget in accordance with FCC requirements and that USAC processes align with FCC requirements.³⁰

III. USAC's Role Satisfies This Court's Standard for Lawful Agency Delegation to a Private Entity

The explanation we have provided of USAC's subordinate role and the FCC's pervasive authority and surveillance of USAC's operations makes clear that the FCC's delegation of ministerial duties to USAC is lawful under this Court's precedent. Where this Court has previously found fault with agency delegation to a private entity, it has been because the private entity was authorized to take actions that were not subject to agency authority or review. In *Carter v. Carter Coal*, private coal authorities were allowed to enact industry-wide minimum

29. *FCC Off. Inspector Gen., FCC's Top Performance and Management Challenges for FY 2025* 7–12 (2014), https://www.fcc.gov/sites/default/files/fy25_fcc_tmpe_10012024.pdf.

30. *U.S. Gov't Accountability Off., GAO-24-106967, Telecommunications: Administration of Universal Service Program Is Consistent with Selected FCC Requirements* 10, 15 (2024).

price codes and labor codes without approval by any federal official. 298 U.S. 238, 310–11 (1936). By contrast, where the private entity could merely make proposals that required approval by the federal agency before they could take effect, as in *Sunshine Anthracite Coal*, this Court found the delegation of duties to the private entity to be constitutional. 310 U.S. at 388, 399.

Above, we have explained that USAC takes no significant action with respect to the universal service program that is not subject to a directive from the FCC, up-front review and approval by the FCC, after-the-fact review by the FCC, or all three. No action of USAC is binding upon the FCC. In particular, the projected demand and revenues associated with the quarterly contribution factor undergo thorough review and approval by the FCC, as described above, and the FCC makes the final decision on the contribution factor. For all of these reasons, the FCC's delegation of ministerial duties to USAC is lawful under this Court's precedent.

CONCLUSION

In its performance of the ministerial duties the FCC has assigned it, USAC is subordinate to the FCC in every respect and is subject to the pervasive authority and surveillance of the FCC. Accordingly, the FCC's delegation of responsibilities to USAC is lawful under this Court's precedent. For that reason, the decision of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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