Insight

USF Constitutional Questions: Impact and Path Forward

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Executive Summary

- The Fifth Circuit Court of Appeals ruled in July that the current funding mechanism for the Universal Service Fund (USF), which is used to provide broadband affordability and deployment subsidies, violates the Legislative Vesting Clause of the Constitution as an unlawful tax.
- While the decision will be appealed by the Federal Communications Commission (FCC), it could throw the existing USF programs into question, possibly affecting as many as 20 million Americans enrolled in the program and jeopardizing over 3 million USF deployment projects.
- If Congress wants to continue the USF programs, it should more clearly delegate authority to the FCC to administer them, potentially with reforms to limit costs; alternatively, lawmakers may find that other programs and increased market competition could obviate the need for USF entirely.

Introduction

Earlier this summer, the Fifth Circuit Court of Appeals broke with both the Sixth and Eleventh Circuits to hold the current funding mechanism for the Universal Service Fund (USF) unconstitutional under the Legislative Vesting Clause. Though the decision is being appealed by the Federal Communications Commission (FCC), which could theoretically amend its processes to alleviate constitutional concerns, the court's ruling puts the FCC's USF programs in jeopardy.

The USF includes a variety of broadband-related support programs, most notably the Lifeline program, which provides a subsidy for low-income consumers to afford broadband

connectivity, and the High Cost Support Mechanism (High Cost program), which provides funding to broadband providers to deploy to hard-to-reach households, businesses, and anchor institutions. USF is administered by the Universal Service Administrative Company (USAC), a private entity that proposes the specific fees to be assessed on different telecommunications services and collects the fees from the companies providing those services.

While the Fifth Circuit decision primarily focuses on the FCC's sub-delegation of authority to USAC, the ruling could temporarily delay or outright stop USF distributions moving forward. The most recent numbers from USAC indicate that almost 20 million Americans would lose support for their telephone or broadband service, and 3.1 million households, businesses, and anchor institutions currently slated for deployment under the High Cost program would remain unserved. Further, the current 118,000 schools and libraries and 16,000 clinics supported by the E-Rate and Rural Healthcare programs, respectively, could likewise be in jeopardy.

The case leaves Congress with two paths forward. First, if Congress wants to continue broadband support for low-income and unserved Americans, it should clarify its delegation of authority to the FCC to ensure the program remains on solid constitutional footing. If it does clearly delegate more authority, lawmakers could consider reforms to limit the amount of money USF requires to more specifically target funds to the programs that provide the most value. Second, it could choose to either let the fund be eliminated by the courts or revoke the authority for the program should the FCC continue the program with changes to comply with the court order. While programs such as Lifeline and the High Cost program would expire, there are several other broadband programs available, and the price of broadband has never been lower. Eliminating USF could provide the most value for consumers who would no longer have to pay a USF fee on every bill.

Universal Service Fund

The USF is a telecommunications support mechanism consisting of four programs. First, the Lifeline program provides low-income consumers a $9.25 subsidy for telephone, broadband, or bundled services. Second, the High Cost program provides funding for building-out broadband to unserved locations across the country, largely through the Connect America Fund and the Rural Digital Opportunity Fund. Third, the E-Rate program provides subsidies to schools and libraries to ensure that both students and the general public can access broadband services, even if the individuals do not subscribe to a broadband program. Finally, the rural health care program provides funding to eligible health care providers for broadband services necessary for the provision of health care.

To fund these programs, Congress specified that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms establish by the Commission to preserve and advance universal service." In practice, telecommunications providers charge a universal service contribution fee on every consumer's bill. This charge does not apply to broadband services that are currently not classified as telecommunications services under the Communications Act, and recent attempts to reclassify broadband specifically did not include broadband in the USF contribution mechanism. Notably, to administer the program, the FCC contracts with a private entity, USAC, which in turn collects money to support the programs through users' phone bills.

Fifth Circuit Declares the Current Sub-Delegation to USAC Unconstitutional

This past summer, the Fifth Circuit Court of Appeals issued a decision that the current mechanism, specifically having the FCC subdelegate administration to a private company, violates the Legislative Vesting Clause of the U.S. Constitution. Primarily, the court held that USF contributions are taxes and not fees, and USF contributions are not ultimately shouldered by the parties regulated by the FCC because the costs are passed on to consumers. Further, the delegation to USAC included the power to set the contribution amount, which in turn controls the contribution on each consumer's bill. This decision, however, conflicts with decisions in both the Sixth and Eleventh Circuits that rejected similar, if not identical, challenges to the USF contribution mechanism, potentially opening the door for the Supreme Court to resolve the circuit split.

Impact on Existing Subsidies

The Fifth Circuit stayed the decision while the FCC appeals the ruling, and while the FCC could potentially alter the program enough to address the key constitutional vulnerabilities, the decision has put the future of the USF program in question. If USF either faces disruptions or ceases to function, millions of Americans will be impacted, thought the effects may not be as dramatic as they appear.

Lifeline

An end to the USF program would most directly impact low-income consumers, particularly those who participate in the Lifeline program. According to USAC this past June, about 7.8 million households currently receive support from the Lifeline program for their telephone or broadband service. Assuming the average number of persons in a household receiving Lifeline support tracks with national average of around 2.51 persons-per-household, more

than 19 million Americans could lose access to broadband service.

That said, not all of these Americans would lose coverage. First, many low-income consumers would still choose to purchase broadband without the support – a notable point of contention for critics of low-income support programs such as Lifeline and the now-expired Affordable Connectivity Program. Indeed, as research has shown, the price of broadband generally doesn't affect adoption rates as much as other factors such as interest in purchasing the service. Second, prices for broadband have largely decreased over time, including when adjusted for inflation. Considering most providers have a low-income plan available to consumers, it is unclear what percent of current Lifeline subscribers would lose coverage without the support.

High Cost

While the High Cost program theoretically would be less impacted by the loss of funding, at least for those locations the program has already connected, there are still millions of outstanding obligations that have yet to be built out. Even though some of these projects have been funded, data from October 2024 indicate that the program has more than 3 million outstanding obligations to households, businesses, and anchor institutions. Thus, a lack of funding could result in these projects stalling or simply never getting finished.

Yet the actual effect on Americans may not be as significant as the numbers suggest. First, unlike Lifeline, there are several other broadband deployment subsidies that exist at both the federal and state levels, including the massive $42.5 billion Broadband Equity, Access, and Deployment program. Second, with increased competition from new technologies that can more easily reach the most rural households and businesses, most notably low-earth orbital satellites, direct subsidization for buildout may be unnecessary to provide universal access to broadband.

E-Rate and Rural Health Care Providers

According to the FCC, 106,000 schools and nearly 12,600 libraries were connected using E-Rate funds from 2022–2024. It is unclear, however, how many of these schools and libraries receive ongoing support, as well as the impact that losing E-Rate would have moving forward. Similarly, the Rural Health Care Program supported connectivity for more than 16,000 health care providers from 2021–2023. Again, however, other broadband deployment and support mechanisms exist, and many of these projects have already been completed, so the prospective outlook is unclear.

Role for Congress

If Congress wants to prevent the disruption of services, it could clarify its delegation of authority to the FCC. Reforms could include specifically allowing the FCC to delegate administrative functions to a private entity such as USAC to ensure the FCC maintains the necessary control over the fee collection process. Removing ambiguity and clarifying authority would alleviate some concerns about constitutionality.

At the same time, Congress may find that letting the USF program expire may provide more overall value to Americans, especially those who currently must pay monthly fees to subsidize costly and unnecessary builds. With the large number of other programs already in existence and lowering costs for broadband, even in rural areas, the direct impact on consumers may not be as significant as the numbers suggest. Even if the program isn't eliminated, the court's decision presents an opportunity for Congress to begin considering reforms to the program to limit distributions to specific projects and restrict them to consumers who truly need the support.