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Supreme Court Upholds Universal Service Contribution Requirements

June 27, 2025

The US Supreme Court, **in a 6 – 3 decision**, has upheld the Federal Communications Commission (FCC) system for determining and collecting universal service contributions. In overturning the US Court of Appeals for the Fifth Circuit's *en banc* decision, the Supreme Court holds that the congressional delegation of the power to set universal service contributions to the FCC and the FCC's use of the Universal Service Administrative Company (USAC), a private entity, to administer the contribution program do not violate the constitutional nondelegation doctrine, and that the combination of the congressional delegation and the FCC's use of USAC also is permissible. This decision allows the FCC to continue to require telecommunications carriers and voice over IP providers to contribute to the federal universal service fund under the rules it has had in place for many years. As a result, it also preserves the system of subsidies that support services to high-cost areas, low-income households, schools and libraries, and rural healthcare providers.

This case centered on the "non-delegation doctrine," which limits the power of Congress to give legislative authority to federal agencies. Under the doctrine, Congress may give agencies the power to implement legislation, but must provide sufficient guidance to ensure that an agency is following the law, rather than creating new legal requirements. Agencies are permitted to make policy judgments within the framework of a statute so long as Congress has set out an "intelligible principle" to guide them, including boundaries on what the agency can do.

The Supreme Court concluded that the universal service contribution requirements pass the intelligible principle test because Section 254 of the Communications Act, which gives the FCC the power to require contributions, provides sufficient guidance. In particular, the Supreme Court held that Congress limited contributions to amounts "sufficient" to support universal service programs and gave the FCC guidance on both the appropriate recipients of universal service support and the types of services that should be supported.

The Supreme Court also concluded that the FCC's further delegation of operational authority for collecting contributions to USAC did not violate a variation of the nondelegation doctrine called the private nondelegation doctrine. In doing so, it rejected an argument that USAC had the discretion to set contribution levels and found that "in the relationship between the two, the Commission dominates." The Supreme Court specifically noted that USAC sets contribution levels based on specific direction from the FCC and on the FCC's review of the underlying data before the levels are set.

In addition, the Supreme Court rejected a claim that the combination of congressional delegation to the FCC and the delegation by the FCC to USAC was impermissible. The Supreme Court held that there is no additional constitutional issue when there is a permissible delegation to a government agency like the FCC and a separate permissible delegation to a private entity like USAC.

This decision effectively ends all of the current challenges to the FCC's universal service contribution requirements. As a result, all companies subject to those requirements will continue to collect contributions from their customers and remit them to USAC, and the companies receiving support from the federal universal service fund will continue to have access to that funding.

There still are substantial questions about the sustainability of the federal universal service fund and how contribution requirements should be spread among users of the telecommunications network. However, the decision removes the cloud of uncertainty about the FCC's power to design and administer a contribution regime, which may facilitate future reform. Any change in the contribution regime could affect the obligations of both telecommunications companies and the users they serve.

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