

# Consumers' Research v. Federal Communications Commission

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109 F.4TH 743 (5TH CIR. 2024)

In *Consumers' Research v. Federal Communications Commission*, the Fifth Circuit decided en banc that the Federal Communication Commission's ("FCC") methods of funding Congress's goal of affordable and nationwide cell service were unconstitutional.

## I. BACKGROUND

Congress's goal in enacting § 254 of the Telecommunications Act of 1996 (codified at 47 U.S.C. § 254) was to promote policy that would lead to "providing 'universal' [telecommunications] service to all residents and businesses in the United States," a goal that persists to the present day.<sup>1</sup> As it stands, the FCC does not decide how much money is necessary to reach the goals set out for Universal Service as prescribed by 47 U.S.C. § 254 (2016).<sup>2</sup> The FCC "instead, . . . relies on a private company called the Universal Service Administrative Company, ("USAC") which "is managed by representatives from 'interest groups affected by and interested in universal service programs.'"<sup>3</sup> The issues presented in this case surround the constitutionality of the FCC's practices in their pursuit of fulfilling their statutory prescription from Congress in 47 U.S.C. § 254.<sup>4</sup> The Fifth Circuit Court of Appeals originally denied petition, but that decision was vacated and the case was reheard en banc.<sup>5</sup> Upon rehearing, the Fifth Circuit Court of Appeals decided en banc that this method of gathering funds for the Universal Service Fund (USF) "violates Article 1, § 1 of the Constitution."<sup>6</sup>

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<sup>1</sup> *Consumer's Rsch. v. FCC*, 109 F.4th 743, 748 (5th Cir. 2024) (quoting Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 89 IND. L.J. 239, 279 (2005)).

<sup>2</sup> *See id.* at 750.

<sup>3</sup> *See id.* (quoting *Leadership*, UNIVERSAL SERV. ADMIN. CO., <https://www.usac.org/about/leadership/> [<https://perma.cc/MG3Q-3K84>] (last visited Feb. 1, 2025)).

<sup>4</sup> *See id.* at 756.

<sup>5</sup> *See id.* at 743.

<sup>6</sup> *See id.* at 748.

## II. ANALYSIS

The agency action that prompted this challenge was the FCC's proposal of the goal contribution amount for "Q1 2022," which was "derived directly from USAC's proposed contribution amount."<sup>7</sup> The challenge invokes the nondelegation doctrine to assert that the delegation of power from both Congress to the FCC and the FCC to USAC is unconstitutional for three reasons: (1) the collection of fees from telecommunication companies is a tax, (2) there is no intelligible principle in 47 U.S.C. § 254, and (3) the FCC delegated a tax power to a private party.<sup>8</sup> Yet, the court grounds its decision in the proposition that even if the individual delegations of power themselves are constitutional, the combination of the two delegations is not.<sup>9</sup>

### *A. The Fees Charged to the Regulated Industry Are Taxes*

The court began its analysis by first establishing that what the FCC portrayed as "fees" charged to companies in the regulated field is actually a tax levied against those parties. The court defined a fee as "having three characteristics," and asserted that the FCC's fee lacks all three.<sup>10</sup> According to the court, a fee is a charge "incurred 'incident to a voluntary act,'" which can only be imposed on members of the agency's regulated industry,<sup>12</sup> and payment of the fee yields benefits for the paying party, "rather than to the public generally."<sup>13</sup>

The court found that the FCC's fee had none of the three characteristics set out above. First, the fees were not "incident to a voluntary act," but rather "a condition of doing business."<sup>14</sup> Second, the fees were a cost that was permissibly passed onto the consumer.<sup>15</sup> In other words, companies subject to the fee offset the cost of the fee by raising prices and otherwise passing that cost onto consumers so that the company's profits would not be significantly affected.<sup>16</sup> Third, those who benefit from the fee are not members of the

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<sup>7</sup> See *Consumers' Rsch.*, 109 F.4th at 752 (challenging the constitutionality of USAC being able to propose a goal contribution amount to reach through the taxes at issue, and the FCC's decision to use that amount in its own rulemaking).

<sup>8</sup> See *id.* at 756.

<sup>9</sup> See *id.* at 782 (referencing the "double-layered delegation" being unconstitutional).

<sup>10</sup> See *id.* at 757.

<sup>11</sup> *Id.* (quoting *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974)).

<sup>12</sup> See *id.* (quoting *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000)).

<sup>13</sup> See *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989) (quoting *Nat'l Cable Television Ass'n, Inc.*, 415 U.S. at 343).

<sup>14</sup> *Consumers' Rsch.*, 109 F.4th at 757 (quoting from *Nat'l Cable Television Ass'n, Inc.*, 415 U.S. at 340).

<sup>15</sup> See *id.* (referencing 47 C.F.R. § 54.712(a) (2006)) (allowing the payer of the fee to pass the cost of the fee onto its consumers).

<sup>16</sup> See *id.*

regulated industry. Therefore, the court finds these fees to be taxes, and that Congress delegated its taxing power to the FCC.<sup>17</sup>

*B. Congress's Delegation of Power to the FCC Has No  
Intelligible Principle*

With the underpinning of this fee being a tax, the court then more directly addresses the petitioners' challenge.<sup>18</sup> The petitioners' challenge to "the USF's funding mechanism"<sup>19</sup> could be successful if there is no intelligible principle in 47 U.S.C. § 254 to guide the FCC in setting a tax collection goal for supplying the USF.<sup>20</sup> If there is no intelligible principle, then extending this tax power to the FCC could be unconstitutional on nondelegation grounds.

The court finds that the language of 47 U.S.C. § 254 does not establish an intelligible principle that permits the FCC to tax the telecommunication companies.<sup>21</sup> The language of the statute relevant to this inquiry "provides that USF funding should be 'sufficient . . . to preserve and advance universal service,'<sup>22</sup> and § 254(b)(1) suggests that telecommunications services 'should be available at . . . affordable rates.'"<sup>23</sup> The crux of the court's argument is that the clauses in 47 U.S.C. § 254, which are meant to limit the FCC's discretion, are so vague and without clear limitations that they provide no intelligible principle.<sup>24</sup> Additionally, the FCC has no "superior technical knowledge"<sup>25</sup> that would make a more general organic statute permissible,<sup>26</sup> especially where the power delegated is legislative, not executive.<sup>27</sup> All that being said, the court does not rely on this argument alone to deem this agency action unconstitutional.

*C. The FCC Impermissibly Delegated Power to a Private Entity*

On the issue of delegating this power to a private entity, the court pulled from Supreme Court precedent and from district court cases to establish the conditions that make for a constitutional delegation of power to a private party.<sup>28</sup> According to the Fifth Circuit, for a private delegation to be constitutional, a "government official must have final decision-making

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<sup>17</sup> See *id.* at 758.

<sup>18</sup> See *id.* at 760.

<sup>19</sup> *Id.*

<sup>20</sup> See *Consumers' Rsch.*, 109 F.4th at 760.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.* (quoting 47 U.S.C. § 254(d) (citations omitted)).

<sup>23</sup> *Id.* (quoting 47 U.S.C. § 254(b)(1) (citations omitted)).

<sup>24</sup> See *id.*

<sup>25</sup> *Id.* at 764.

<sup>26</sup> See *Consumers' Rsch.*, 109 F.4th at 764 (citing to *Whitman v. Am. Trucking Ass'n*, Inc., 531 U.S. 457, 472 (2001) (showing that a more general principle that relies on an agency's (the Environmental Protection Agency's) technical expertise may not violate the nondelegation doctrine even though it grants much discretion to the agency)).

<sup>27</sup> See *id.* at 765.

<sup>28</sup> See *id.* at 768-70.

authority,” that authority must “actual[ly] [be] exercise[d],” and “the private actors must always remain subject to the ‘pervasive surveillance and authority’ of some person or entity lawfully vested with government power.”<sup>29</sup>

The court found that because the approval of the tax doesn’t require affirmative approval from the FCC, and because the FCC “never made a single substantive change to the contribution amounts proposed by USAC,” the tax is an unconstitutional delegation to a private entity.<sup>30</sup> Additionally, because 47 U.S.C. § 254 does not explicitly prescribe delegation of this duty to a private entity, the court sees this delegation as likely unconstitutional.<sup>31</sup>

### *D. The Combination of the Delegation and Subdelegation is Unconstitutional*

The court then finally decides that the combination of the two delegations violates the Vesting Clause in Article 1 § 1, making the Q1 2022 USF Tax unconstitutional.<sup>32</sup> The court presents the opinion that even if the delegation from Congress to the FCC is constitutional, and the sub-delegation of power from the FCC to USAC is also constitutional, the combination of the two is not.<sup>33</sup>

First, the court emphasizes the unprecedented nature of double-layered delegation.<sup>34</sup> While there are some similar cases, the court finds that none are similar enough to provide a relevant means of comparison to the structure of the FCC’s delegation.<sup>35</sup> The court also distinguishes historical precedent by comparing the present regulatory scheme to a similar one used by the Framers of the Constitution.<sup>36</sup> The court found that the 1798 Congress’s use of private tax assessors to ascertain the “value [of] real estate for the purpose of administering a” tax was distinguishable from the present facts, and thus provides no justification for the kind of delegation at issue here.<sup>37</sup> The final nail in the coffin for the FCC’s practice is a structural argument about accountability.<sup>38</sup> Through the double-layered delegation, it is difficult for the public to know who is accountable for the taxes and extra costs passed onto

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<sup>29</sup> See *id.* at 769-70 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)).

<sup>30</sup> *Id.* at 771.

<sup>31</sup> See *id.*

<sup>32</sup> See *Consumers’ Rsch.*, 109 F.4th at 778.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* at 779.

<sup>35</sup> See *id.* at 780 (finding that *Sunshine Anthracite Coal Co.* is distinguishable from the present case because the recommendations for coal prices in that case did not de facto decide minimum coal prices, whereas here the court found the USAC recommended contribution goal de facto decided the contribution goal).

<sup>36</sup> See *id.* at 779-780.

<sup>37</sup> See *id.* at 780-81 (distinguishing the present facts from the historical precedent regarding tax assessors because in 1798, “Congress itself decided the amount of revenue the Government would levy from the American citizens”, “Congress made all relevant tax policy decisions,” and the tax assessor’s role was “to discern between falsity and truth”).

<sup>38</sup> See *Consumers’ Rsch.*, 109 F.4th at 782-83.

consumers, and difficult to voice their frustrations through the democratic process.<sup>39</sup>

In all, the court roots its decision in the double-layered delegation being unprecedented and unsupported by law, and contrary to the structure of the executive branch as prescribed by the Framers.<sup>40</sup>

### III. CONCURRENCE (J. ELROD JOINED BY J. HO, J. ENGELHARDT)

This concurrence is in full accord with the majority's opinion, only concurring to add that the court should rule each level of this delegation to be unconstitutional for the same reasons the majority presented.<sup>41</sup>

### IV. CONCURRENCE (J. HO)

Similarly, this concurrence agrees wholeheartedly with the majority, but writes separately to drive home the structural argument the majority makes.

### V. DISSENT (J. STEWART JOINED BY J. SOUTHWICK, J. HAYNES, J. GRAVES, J. HIGGINSON, J. DOUGLAS)

Judge Stewart's dissent concludes that both levels of delegation are permissible. First, the dissent disagrees with the majority in asserting the existence of an intelligible principle in 47 U.S.C. § 254, arguing that the "duty to weigh the enumerated universal service principles is reminiscent of constitutional statutory delegations that provided an intelligible principle."<sup>42</sup> The dissent finds that the statute provides adequate guidance for the FCC when taking into account the entirety of the statute and the "context, purpose, and history" of 47 U.S.C. § 254.<sup>43</sup>

Next, the dissent addresses the constitutionality of the FCC's delegation to the USAC.<sup>44</sup> For the FCC's delegation to the USAC to be constitutional, the USAC must be subordinate to the FCC.<sup>45</sup> Here, the USAC is subordinate because there is a long process before the "public notice announcing USAC projections,"<sup>46</sup> where there are opportunities for the FCC to review the USAC's processes and conclusions.<sup>47</sup> The dissent concludes that the private-nondelegation doctrine is not violated because the USAC is subordinate to the FCC.<sup>48</sup>

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<sup>39</sup> See *id.* at 783.

<sup>40</sup> See *id.* at 783-84.

<sup>41</sup> See *id.* at 786 (Elrod, J., concurring).

<sup>42</sup> *Id.* at 790 (Stewart, J., dissenting)..

<sup>43</sup> See *id.* at 792-93.

<sup>44</sup> See *Consumers' Rsch.*, 109 F.4th at 793-97.

<sup>45</sup> See *id.* at 793 (Stewart, J., dissenting).

<sup>46</sup> See *id.* at 750 (majority opinion).

<sup>47</sup> See *id.* at 793-94 (Stewart, J., dissenting).

<sup>48</sup> See *id.* at 796.

Finally, the dissent refutes the majority's claim that the fees the USAC administers are taxes. The fee is compared to another Fifth Circuit case,<sup>49</sup> where the court held that "a charge by a legislative body is a fee, and not a tax."<sup>50</sup> Specifically, the Fifth Circuit held that if a charge is "levied against a specific industry sector, serves a regulatory purpose, and raises funds for a specific regulatory program," then it is a fee and not a tax.<sup>51</sup> The dissent finds that this fee on the telecommunication companies satisfies all aspects of the above fee characteristics, along with a characteristic forwarded by the majority: that the charged party must also benefit from the fee.<sup>52</sup> For those reasons, the dissent asserts that both layers of delegation are constitutional and that the fee is not a tax.<sup>53</sup>

## VI. DISSENT (J. HIGGINSON JOINED BY J. STEWART, J. SOUTHWICK, J. GRAVES)

Judge Higginson's dissent further disagrees with the majority by disputing that the combination of the two delegations of power is what creates the unconstitutional regulatory scheme.<sup>54</sup> This opinion also asserts that more general guidance from Congress to the FCC is necessary for it to effectively regulate such a dynamic and ever-changing industry.<sup>55</sup>

## VII. CONCLUSION

Despite the Dissenters' arguments, the Fifth Circuit Court of Appeals held the Q1 2022 USF Tax unconstitutional.<sup>56</sup> Petitioners appealed the decision to the Supreme Court, which granted certiorari on November 22, 2024. The Supreme Court heard oral arguments on March 26, 2025.

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<sup>49</sup> See *id.* at 798; *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 502 (5th Cir. 2021).

<sup>50</sup> See *Consumer's Rsch.*, 109 F.4th at 798 (referencing *Hegar*, 10 F.4th at 506-507) (Stewart, J., dissenting).

<sup>51</sup> See *id.* at 798 (referencing *Hegar*, 10 F.4th at 506-507).

<sup>52</sup> See *id.* at 799.

<sup>53</sup> See *id.* at at 801.

<sup>54</sup> See *id.* (Higginson, J., dissenting).

<sup>55</sup> See *id.* at 803-04.

<sup>56</sup> See *Consumer's Rsch.*, 109 F.4th at 786 (majority opinion).