Brand X Marks the Spot: Ensuring Universal Service After Net Neutrality

by David Gonzalez[*]

The Telecommunications Act of 1996 outlines a program of universal service to provide modern communications infrastructure for all Americans, subsidizing the extension of telephone and internet networks to underserved regions. Due to changes in the telecommunications market, the traditional funding mechanism for universal service is rapidly failing, putting the program in jeopardy. At the same time, recent judicial decisions have eroded the power of the Federal Communications Commission, taking away its most powerful regulatory tools and bringing the law out of line with reality. While a recent Sixth Circuit decision spells doom for one FCC initiative, it inadvertently offers a road to salvation for universal service. By breathing new life into the 2005 Brand X *decision, the Sixth Circuit has unwittingly thrown a lifeline to the FCC. Applying this dated decision to modern technology offers the Universal Service Fund a way to escape its "death spiral," secure its future, and restore fairness to America's technological landscape.*

Imagine a strip mall whose incoming deliveries drive most of the traffic on a rural highway. The stores' gargantuan semi-trucks grind down the asphalt, keeping customers well-supplied but requiring the town to build out and upgrade old roadways. Neither the stores nor their customers pay taxes, despite the stores' massive profits. Although the trucks pay tolls, the collections do not go toward the highway's construction costs. Instead, the town charges local taxis a hefty surcharge to fund road upgrades, driving many to stop taking passengers altogether and retool for other industries.

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Perhaps you are unfamiliar with these strip mall shops, but you have probably heard of their real-world counterparts, "edge providers": normal content-producing websites that drive most internet traffic.[1] That local highway is the internet—the so-called "Information Superhighway"—and the toll collectors are the Internet Service Providers ("ISPs"), who do not pay to fund broadband expansion but may charge newly connected subscribers anyway.[2] Finally, those local taxi companies are the traditional telecommunications providers, who currently pay into the Universal Service Fund ("USF"), which funds access to communications services for rural, isolated, or otherwise underserved communities.[3] This is the story of the "death spiral," a cycle of declining funding that threatens universal access to the internet.[4]

Universal service has been a mere footnote to the long-running battle over net neutrality, an FCC policy that treats internet access as a utility and prevents ISPs from giving preferential treatment to certain websites.[5] The "common carrier" label that imposes net neutrality obligations mandates contributions to the USF.[6] Both net neutrality and universal service hinge on courts' interpretations of the Telecommunications Act of 1996. Unfortunately, these interpretations do not reflect the technological realities of the 2020s and threaten the future of the USF. With courts now reviewing statutes *de novo* rather than

[1] United States Telecom Ass'n v. FCC, 825 F.3d 674, 690 (D.C. Cir. 2016) (describing the major components of internet infrastructure).

[2] *Cf.* Connect Am. Fund, 26 FCC Rcd. 17663, 17669, ¶ 7 (2011) ("[USF] recipients lack any obligations or accountability for advancing broadband-capable infrastructure.").

[3] FCC v. Consumers' Rsch., 606 U.S. 656, 662–64 (2025) (outlining universal service).

[4] Report on the Future of the Universal Service Fund, 37 FCC Rcd. 10041 app. at 10104 (2022) [hereinafter Future of USF] (Commissioner Carr's labelling the USF's funding woes as such).

[5] *United States Telecom Ass'n*, 825 F.3d at 689 (defining net neutrality as "the principle that broadband providers must treat all internet traffic the same regardless of source").

[6] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005).

deferring to agency interpretation,[7] the time has come to establish exactly what differentiates telecommunications from information services, and what that means for universal service. Specifically, the FCC's authority to collect contributions for the USF should be interpreted broadly to reflect both the statute's plain text and the centrality of technology in modern life.

This Contribution will outline universal service as established in the Telecommunications Act of 1996 ("1996 Act") and its interactions with terminology used throughout the statute. Then, it will describe how judicial interpretations of those terms clash with the provisions governing the USF, contravening its mission and leading to the current "death spiral." Finally, it will explain how the death spiral issue may be addressed considering recent legal developments, as well as how advocates may counter attacks on the FCC's prerogatives.

The 1996 Act provides for universal service, an "evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[8] The 1996 Act defines telecommunications services as the "offering of telecommunications for a fee directly to the public,"[9] and telecommunications as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[10]

Telecommunications services contrast with information services, which "offer[] . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[11] Information services also exclude "any such capability for the management, control, or operation of a telecommunications system or the

[7] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (overruling Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984)).
[8] 47 U.S.C. § 254(c)(1).
[9] *Id.* § 153(53).
[10] *Id.* § 153(50).
[11] *Id.* § 153(24).

management of a telecommunications service."[12] By virtue of offering services "via telecommunications," information services necessarily rely on telecommunications to operate.[13] In turn, telecommunications services such as telephone service allow a person to retrieve information (an information service) by calling and speaking with others (a telecommunications service), which highlights the difficulty of drawing lines between these two categories.

The exact difference between the two has been hotly contested.[14] This hazy distinction is particularly significant for service providers: providers of telecommunications services are treated as common carriers,[15] which requires them to charge reasonable rates and contribute to the USF.[16] Conversely, information services need not contribute and may charge what they please. Nevertheless, universal service urges expansion of both telecommunications services and information services.[17]

Consequently, the telecommunications-information distinction presents a massive issue for USF funding. The FCC funds universal service by collecting contributions from "telecommunications carrier[s]," defined as "any provider of telecommunications service."[18] The FCC calculates a firm's contribution by comparing the expected costs associated with universal service to the total end-user telecommunications revenues of relevant telecommunications carriers, using the percentage as a quarterly "contribution factor" from each

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[12] *Id*.
[13] *Id*.
[14] *See, e.g.,* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) (redefining broadband as a telecommunications service under President Obama); Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (restoring broadband's classification as an information service); Safeguarding and Securing the Open Internet; Restoring Internet Freedom, 89 Fed. Reg. 45404 (May 22, 2024) (treating broadband again as a telecommunications service under President Biden).
[15] 47 U.S.C. § 153(51).
[16] 47 C.F.R. § 54.706 (2025); 47 U.S.C. § 201(b).
[17] 47 U.S.C. § 254(b) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation.").
[18] *Id.* § 153(51).

provider.[19] The provider may pass that cost onto customers via a line item on their bill.[20]

While annual spending by the USF remains steady,[21] the contribution pool has declined sharply due to shrinking telecommunications revenues among providers.[22] Simultaneously, telecommunications providers have seen major increases in revenue from "non-telecommunications services."[23] While not stated explicitly, these non-telecommunications revenues likely derive from information services, because the top telecommunications providers are also prominent names in broadband and analogous services.[24] The decline in telecommunications revenues leads to a higher contribution per provider, increasing costs for end-users and encouraging them to unsubscribe—the "death spiral" that imposes mounting contributions on telecommunications carriers.[25]

Meanwhile, the USF funds expansion of broadband networks into underserved areas, allowing ISPs and edge providers to reach new customers and boost revenues—funded by contributions from telecommunications carriers, of course.[26] Thus, the current split between telecommunications and information services under the 1996 Act creates a free-rider problem, in which information

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[19] 47 C.F.R. § 54.709(a)(2) (2026).
[20] *Id.* § 54.712(a).
[21] *Consumers' Rsch.*, 606 U.S. at 686 & n.8 (noting the minor increase in USF spending since 1999, when the programs were fully operational). *But see Consumers' Rsch.*, 606 U.S. at 718 (Gorsuch, J., dissenting) (arguing that USF spending has nearly doubled since 1998, when the program began).
[22] *Future of USF*, 37 FCC Rcd. at 10085–86, ¶ 91.
[23] *Id*.
[24] *Cf.* FCC, UNIVERSAL SERVICE MONITORING REPORT 13 n.1 (2021), https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports [https://perma.cc/QR7T-F56D] (listing AT&T, Verizon, Cox, Comcast, and others among the 10 largest telecommunications providers by revenue).
[25] Future of USF, 37 FCC Rcd. at 10086, ¶ 92 ("[I]n order to collect the same amounts to fund the USF, a higher contribution factor must be applied to the smaller revenue base.").
[26] *See* Future of USF, 37 FCC Rcd. at 10089, ¶ 98 ("[O]nline companies that are profiting from the ubiquitous broadband services provided through the USF program should start contributing towards universal service.").

services benefit at the expense of telecommunications services, though consumers may view the two as interchangeable.[27]

Setting aside the practical consequences, the telecommunications-information distinction has eluded satisfactory resolution by courts and agencies. Under *Chevron,* courts had to defer to agencies' permissible interpretations of statutes, even when an agency's interpretation was not the natural or "best" reading of the text.[28] The FCC has repeatedly switched its classification of broadband from a telecommunications service to an information service and back again, attracting the ire of the Supreme Court.[29]

In the aftermath of *Loper Bright*, however, the Sixth Circuit struck down the Biden Administration's bid to reclassify broadband as a telecommunications service, disavowing mechanical subservience to *Chevron*-era precedent.[30] Even so, the court relied heavily on the Supreme Court's 2005 decision in *Brand X*, which itself was grounded in *Chevron* deference.[31] Under the FCC's permissible reading of the 1996 Act in *Brand X*—reapplied by the Sixth Circuit in *Ohio Telecom Association v. FCC*—information services "offer a capability" to "do more," whereas telecommunications services merely transmit information.[32] Cable modem service, the predecessor to modern broadband, should be viewed in terms of its "comprehensive service offering," not its individual components.[33] Consequently, broadband, which offers users the ability to manipulate

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[27] *Id*. at 10090, ¶ 102 (noting comment from AT&T alleging competition between information and telecommunications services).
[28] *Loper Bright,* 603 U.S. at 369 (describing *Chevron* deference).
[29] *See id*. at 438 (Gorsuch, J., concurring) (criticizing the instability of broadband regulation under *Chevron*).
[30] Ohio Telecom Ass'n v. FCC (*In re* MCP No. 185), 124 F.4th 993, 1009 (6th Cir. 2025).
[31] *Brand X*, 545 U.S. at 986 (upholding the FCC's construction of the 1996 Act as reasonable under *Chevron*).
[32] *See Ohio Telecom*, 124 F.4th at 1007 (citing in re Amendment of Section 64.702 of the Comm'rs Rules and Regs. (Second Computer Inquiry), 77 F.C.C.2d 384, 420, ¶ 97 (1980)).
[33] *See id*. at 1006 (citing Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities, 17 FCC Rcd. 4798, 4823, ¶¶ 38–40 (2002)); *see also Brand X*, 545 U.S. at 978.

information online, falls firmly into the information services bucket.[34] The split is all-or-nothing: if a service uses telecommunications to do anything beyond mere transmission, then what it offers is an information service rather than a telecommunications service, so it may benefit from universal service without contributing to its progress.[35]

Bizarrely, however, the *Brand X* court did not disturb the FCC's treatment of DSL and dial-up as telecommunications services, despite their being functionally equivalent to cable-modem service.[36] Supposedly, these services only provided "last-mile" transmission and could reasonably be classified separately from the comprehensive service offering, unlike cable-modem service.[37]

Justice Scalia's dissent in *Brand X*, illuminates the flaws in this strained vision of the cable-modem internet, which the Sixth Circuit applied to broadband. Per Scalia, the telecommunications aspect of cable-modem service, while contributing to the overall web-surfing experience, retains an independent identity; telecommunications are "offered," not "provided," within the delivery of internet access.[38] Consumers may invariably use broadband to access websites, but realistically they recognize that their broadband subscription exists separately from websites like Google, Amazon, or YouTube.[39]

Instead of framing internet-enabling cables and subsequent interactions with websites as one cohesive experience, Scalia asserts that cable-modem should be understood as offering internet functionality atop a distinct offering of

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[34] *Ohio Telecom*, 124 F.4th at 1009.
[35] *See id.* (citing Second Computer Inquiry, 77 F.C.C.2d at 420, ¶ 97 ("An [information] service is any offering over the telecommunications network which is more than a basic transmission service.")).
[36] *Brand X*, 545 U.S at 1001.
[37] *See Ohio Telecom*, 124 F.4th at 1006 (distinguishing last-mile transmission of internet data from internet access).
[38] *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting) ("[T]he telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer.").
[39] *Id.* (contending that consumers, like the FCC, view high-speed internet and applications as separate things).

telecommunications.[40] The conduits running between the computer-processing facilities and residential computers constitute a discrete target for regulation, distinct from any separate processing.[41] After all, cable-modem's market rivals, DSL and dial-up internet, are both viewed in terms of their underlying telecommunications infrastructure rather than their information capabilities.[42]

By reiterating the framework of *Brand X*, *Ohio Telecom* represents a devastating blow to the FCC's authority, restricting its ability to reclassify broadband internet for purposes of net neutrality and universal service. Moreover, it blurs the line between telecommunications and information services, analyzing services inconsistently as either constituent parts or integrated wholes. Granted, the Sixth Circuit can only do so much with a decades-old law that predates the "convergence" of telecommunications and information services in the internet age.[43] Nevertheless, the reassertion of *Brand* X as good law post-*Chevron* inadvertently opened a backdoor for expanded USF contributions by deploying the *Brand X* Court's distinction between "offering" and "providing."[44]

The 1996 Act allows the FCC to draw contributions from "every telecommunications carrier that provides interstate telecommunications services," but it also enables collections from "any other provider of interstate telecommunications . . . if the public interest so requires."[45] If *Ohio Telecom* validates *Brand X* and establishes that a service may "provide" a service within some greater "offering," then an information service reasonably "provides" telecommunications within its offering of internet access. After all, information services, be they ISPs or edge

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[40] *Id*. at 1009.
[41] *Id*. at 1010.
[42] *Id*. at 1009.
[43] *Cf. United States Telecom Ass'n,* 825 F.3d at 720 (noting the convergence of voice communications and internet functionality as embodied by smartphones).
[44] *Ohio Telecom*, 124 F.4th at 1007 (citing *Brand X*, 545 U.S. at 987) (adopting the *Brand X* treatment of broadband as an offering provided via telecommunications).
[45] 47 U.S.C. § 254(d).

providers, use physical means to store and transmit data to users.[46] Put simply, an information service is necessarily a provider of telecommunications.[47] Accordingly, the *Brand X* decision permits the FCC to draw USF contributions from information services on a discretionary basis.

The discretionary portion of 47 U.S.C. § 254(d)—the statute that governs USF contributions—has been used only sparingly to draw USF contributions from Voice over Internet Protocol ("VoIP") services.[48] Under this quasi-information service construction, VoIP providers contribute to universal service but need not comply with common carrier obligations.[49] In justifying this decision, the FCC noted that VoIP services transmit data to simulate telephone calls, thereby competing with traditional telephone service.[50] In the spirit of fair competition, VoIP providers could be required to contribute to universal service.[51] By framing technology in terms of its substitutes, as Justice Scalia did in *Brand X*, the FCC justified a creative use of its discretionary power.

While VoIP is merely one example of this quasi-information service construction, 47 U.S.C. § 254 frequently invokes information and telecommunications services in the same breath, collapsing the distinction.[52] Congress's vision for universal

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[46] *See* Future of USF, 37 FCC Rcd. at 10089–90, ¶ 99 (noting ISPs' investments in "routers, servers, fiber," and other physical implements); *see also United States Telecom Ass'n*, 825 F.3d at 767 (Williams, J., concurring in part and dissenting in part) (indicating that streaming services invest in physical infrastructure, directly or indirectly, to better serve users).

[47] *See Brand X,* 545 U.S. at 990 ("In the telecommunications context, it is at least reasonable to describe companies as not 'offering' to consumers each discrete input that is necessary to providing, and is always used in connection with, a finished service.").

[48] Universal Serv. Contribution Methodology, 21 FCC Rcd. 7518, 7538, ¶ 37 (2006).

[49] *Cf.* Future of USF, 37 FCC Rcd. at 10085, ¶ 89 n.329 (recognizing VoIP as a provider of telecommunications without reclassifying VoIP as a telecommunications service).

[50] Universal Serv. Contribution Methodology, 21 FCC Rcd at 7541, ¶ 44.

[51] *See id.* (describing consumers' replacement of traditional telephone service with VoIP and the need to ensure fair competition).

[52] *See supra* note 17; *see also* 47 U.S.C. § 254(c)(1) ("taking into account advances in telecommunications and information technologies and services.").

service emphasizes real-world practice, encouraging the FCC to look to the market when funding new infrastructure rather than relying on the text of the Act. The 1996 Act describes universal service as an evolving standard, pointing toward services that are "essential to education, public health, or public safety"; "subscribed to by a substantial majority of residential customers"; "deployed in public telecommunications by telecommunications carriers"; and "consistent with the public interest."[53] Beyond this definition, the 1996 Act provides principles for universal service, including "access to advanced telecommunications and information services" for "schools, health care, and libraries."[54]

Throughout the provision, Congress hints that internet access and, by extension, broadband, are part and parcel of universal service. For example, § 254(h), labeled "Telecommunications services for certain providers," mandates certain internet safety rules for schools and libraries receiving USF funding.[55] Naturally, the internet safety mandate implies that covered schools have or will have internet access. Congress's vision for broadband expansion under the USF is further supported by its 2021 Infrastructure Act, which ordered the FCC to submit a report recommending actions to help "achieve the universal service goals for broadband."[56]

The mention of internet service policies in relation to schools and libraries comports with the 1996 Act's emphasis on real-world usage and consumer preferences rather than formalism.[57] A substantial majority of Americans subscribe to broadband service,[58] often in a "bundle" from their telecommunications providers.[59] Broadband also plays an essential role in healthcare and education, as evidenced by the growth of remote learning and telehealth during the COVID-19 pandemic as well as continued use of tools such as Google Classroom and Zoom in these

[53] 47 U.S.C. § 254(c).
[54] *Id.* § 254(b)(2), (6).
[55] *Id.* § 254(h), (l).
[56] Future of USF, 37 FCC Rcd. at 10046, ¶ 10.
[57] *See* 47 U.S.C. § 254(c).
[58] DANIELA MEJIA, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2021 2 (2024).
[59] Future of USF, 37 FCC Rcd. at 10085, ¶ 90.

industries. Both of these developments support including broadband in USF contributions.[60]

The USF already helps bring internet access to students who would otherwise be unable to complete their schoolwork, so the threat to USF funding also threatens basic access to education for vulnerable Americans,[61] to say nothing of healthcare and emergency services. Thus, expanding USF contributions to reach ISPs would embody the spirit of universal service by providing for the public good.

Finally, even *Brand X* calls into question the Sixth Circuit's inflexible approach to modern technologies. The Court found it "improbable that the Communications Act unambiguously freezes in time the [FCC's 1980] treatment of facilities-based information-service providers."[62] The 1980 model reflected not a mandatory structure imposed by Congress, but rather the FCC's distrust of monopolistic telephone companies.[63] The FCC drew a distinction between "basic" communications services—which merely transmit raw data, similar to telecommunications services—and "enhanced" communications services—which provide additional processing, thereby paralleling information services.[64] That distinction allowed the FCC to designate monopolistic telephone companies as common carriers, preventing them from suppressing new technologies through onerous service fees.[65] The *Brand X* Court acknowledged that this framework was a product of those specific circumstances—circumstances that changed drastically with the breakup of the Bell telephone monopoly in 1982.[66] Considering that universal service underwent radical redefinition in the new competitive

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[60] *See* 47 U.S.C. § 254(c).
[61] Addressing the Homework Gap Through the E-Rate Program, No. FCC 24-76, 39 FCC Rcd. 8989, 8990, ¶ 3 (2024).
[62] *Brand X*, 545 U.S. at 996.
[63] *Id*.
[64] *Ohio Telecom*, 124 F.4th at 976 (citing Second Computer Inquiry, 77 F.C.C.2d at 417–23, ¶¶ 86–101).
[65] *Brand X*, 545 U.S. at 996 (citing Second Computer Inquiry, 77 F.C.C.2d at 474–75, ¶¶ 229–31).
[66] *See Consumers' Rsch.*, 606 U.S. at 712–13 (Gorsuch, J., dissenting) (describing universal service's evolution following the breakup of the AT&T monopoly).

telephone landscape, the Sixth Circuit's strict division of information and telecommunications under *Brand X* cannot reasonably be extended to the USF framework.

The FCC has already considered extending USF contributions to broadband companies as a solution to its funding woes,[67] but ultimately did not take this step.[68] Nevertheless, such a decision would stand on strong doctrinal footing, despite—or perhaps because of—*Ohio Telecom*. Additionally, broadband contributions enjoy industry buy-in: broadband providers such as Verizon have endorsed the solution, albeit noting that broadband contributions alone may not resolve the USF's funding issues.[69]

When broadband inclusion was suggested, opponents argued that USF contributions would increase broadband subscription costs for users, contravening the USF's emphasis on quality services at reasonable prices.[70] However, the FCC's studies on expansion of USF contributions estimate only minor increases in costs, likely accompanied by concomitant decreases in the cost of telephone subscriptions.[71]

Considering the industry's reaction and the potential issues, requiring broadband ISPs to contribute to the USF is neither a radical change nor a reliable solution, particularly if one wants to significantly reduce the total burden per consumer rather than merely slow the death spiral. Instead, the more dramatic—and ultimately superior—solution to the USF's funding woes is the imposition of USF contributions on so-called edge providers.

Return to the highway analogy. Streaming and video services represent fully loaded semi-trucks, clogging up the highway lanes and slowing down traffic for other users. Streaming places heavy demands on broadband infrastructure, constituting up to seventy-five percent of traffic in rural areas and forcing

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[67] Future of USF, 37 FCC Rcd. at 10087, ¶ 94.
[68] *See Consumers' Rsch.*, 606 U.S. at 717–18 (Gorsuch, J., dissenting) ("[T]he FCC does not tax carriers' broadband revenues (think internet).").
[69] *Cf.* Future of USF, 37 FCC Rcd. at 10089, ¶ 97 (describing Verizon's argument that USF contributions should expand even beyond broadband).
[70] *Id.* at 10088, ¶ 96.
[71] *Id.* at 10087, ¶ 94.

broadband providers to expand their capacity to meet customers' demand.[72] However, streaming services are not required to contribute to the initial construction or expansion of broadband service, reaping the rewards of universal service for free.[73] This clash between ISPs and streaming services represented one of the major issues at stake in the fight for net neutrality, with net neutrality advocates fearing that ISPs would prioritize quality for partnered edge providers while slowing down service for rivals.[74]

Requiring edge providers like Netflix, YouTube, and Google to contribute funds would be a radical new step for the USF, but the basis for this new direction builds on the framework of *Brand X*. As Justice Scalia argued, the *Brand X* decision treats internet usage not in terms of discrete components but rather in terms of a functional, integrated experience.[75] The transmission services provided by broadband are subsumed into the larger experience of accessing the internet, uniting edge providers and ISPs.[76] Therefore, if information services provide telecommunications within their offering, the broadband-website complex falls within the FCC's discretionary power to draw USF contributions from "providers of telecommunications."[77]

Drawing contributions from edge providers would assuage a major fear concerning USF expansion: pass-on costs. Whereas telephone and broadband providers draw revenue from subscriptions, edge providers, particularly free services like YouTube, depend on advertisements for revenue.[78] Websites typically sell ad space via bidding rather than outright purchase,

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[72] *Id*. at 10089, ¶ 99 ("Some studies estimate that the five largest streaming companies account for 75 percent of total network traffic in rural areas.").
[73] *See id*. ("Commenters also argue that these companies benefit significantly from Internet infrastructure without contributing.").
[74] Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014) (describing advocates' fear that, without net neutrality, ISPs could bully edge providers into submission).
[75] *See Brand X*, 545 U.S. at 991 ("The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes).").
[76] *See id.* ("Such functionally integrated components need not be described as distinct 'offerings.'").
[77] *See* 47 U.S.C. 153(53).
[78] *See* Future of USF, 37 FCC Rcd. at 10091, ¶100.

hindering their ability to price in costs for bidders or pass them along to consumers.[79] Owing to these websites' massive advertising revenues, advocates estimate that requiring only the largest edge providers to contribute to the USF could drop the contribution factor to seven percent by 2029, which the edge providers could not reliably factor into user fees.[80] Accordingly, the inclusion of edge providers in the USF contribution pool may reduce everyday Americans' costs for telecommunications and information services.[81]

Another avenue of attack for opponents of USF contribution expansions would be the Major Questions Doctrine ("MQD"), which loomed large over *In re MCP No. 185*, with petitioners contending that net neutrality was too significant a decision to entrust to unelected officials.[82] Under the MQD, courts should not permit agencies to make decisions of substantial political or economic significance unless Congress clearly delegated such momentous power to that agency.[83] The Sixth Circuit did not reach the MQD claim brought by the plaintiffs in *Ohio Telecom*,[84] but challengers may raise similar claims against the FCC were the agency to seek USF contributions from edge providers.

The most pressing MQD issue lies in whether a new USF framework would be treated as a decision of major economic and political significance. In 2025, the USF spent approximately $8.5 billion on its programs,[85] well below the magnitude of programs

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[79] *See id*. ("There is a very low likelihood that a fee on digital advertising platforms would be passed through to consumers via advertisers because prices for digital advertisements are set via auction.").
[80] *Id*. at 10090–91, ¶ 99–100.
[81] *Id*. ("The amount that consumers would pay would also be significantly lower than today—and potentially eliminated entirely.").
[82] *In re* MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815, at *11–12 (6th Cir. Aug. 1, 2024) ("'[A]ncillary' authority to fill gaps in Congress's regulatory scheme does not suffice to show that Congress clearly delegated authority to resolve a major question like [broadband classification].").
[83] *See* West Virginia v. EPA, 597 U.S. 697, 724 (2022) (outlining the major questions doctrine).
[84] *Ohio Telecom*, 124 F.4th at 1009.
[85] UNIVERSAL SERVICE ADMINISTRATIVE CO., 2025 ANNUAL REPORT 4 (2025).

challenged under the MQD.[86] In Q1 2025, telecommunications carriers contributed $2.1 billion to the USF based on their $8.17 billion in revenues.[87] Extrapolating to the entire year, the annual revenues of telecommunications carriers run approximately $33 billion, still short of the $50 billion deemed major elsewhere.[88] Adding the Q1 2025 revenue of a single major edge provider, Amazon, would increase the USF contribution base by $155.7 billion, to say nothing of other tech giants like Netflix and Google, who could be assessed similarly as "providers of telecommunications" under the *Brand X* framing.[89] Realistically, the significance of this change could open the FCC to an attack based on the MQD and even a finding that the FCC's interpretation is unlawful.[90]

Still, the total impact of "expanded" USF contributions would likely remain the same, given that USF spending has stayed steady or even decreased relative to inflation.[91] The Supreme Court has previously struck down politically contentious decisions made by executive agencies, even those that had only small economic consequences, but funding internet access may not carry the same political valence as, for instance, physician-assisted suicide.[92] Additionally, the Supreme Court has already validated Congress's delegation of universal service duties under the intelligible principle test, a cousin of the MQD, which requires Congress to provide sufficient standards for agency behavior when it delegates decisions to that agency.[93] Consequently, USF

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[86] *See, e.g.,* Biden v. Nebraska, 600 U.S. 477, 502–03 (2023) (denying $430 billion in student loan forgiveness by the Secretary of Education as beyond agency authority); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 764 (2021) (striking down the CDC's nationwide eviction moratorium, based in part on the $50 billion economic impact of the stay).

[87] Proposed First Quarter 2025 Universal Service Contribution Factor, 39 FCC Rcd. 13410, 13411 (2024).

[88] *See, e.g., Ala. Ass'n of Realtors*, 594 U.S. at 764.

[89] Press Release, Amazon.com, Inc., Amazon.com Announces First Quarter Results (May 1, 2025), https://s2.q4cdn.com/299287126/files/doc_financials/2025/q1/AMZN-Q1-2025-Earnings-Release.pdf [https://perma.cc/6EHG-RU8N].

[90] *See supra* note 86.

[91] *See supra* note 21.

[92] *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (affirming the invalidation of a federal rule that would prohibit physician-assisted suicide in Oregon).

[93] *See Consumers' Rsch.*, 606 U.S. at 691 ("[T]he main delegation at issue here, from Congress to the Commission, does not offend the Constitution.").

contribution expansion would likely withstand scrutiny under the MQD.

In sum, the reassertion of *Brand X* by the Sixth Circuit reiterates an outdated view of the internet, potentially dooming net neutrality while inadvertently rescuing universal service. This odd, if permissible, construction of information services as "offering" one thing while "providing" another opens the door to treating broadband services as "providers of telecommunications," allowing the FCC to draw USF contributions from their revenues. A more conservative application of this principle would allow the FCC to force broadband ISPs to fund expansion of the internet infrastructure that they use to reach rural subscribers, albeit through surcharges placed on their customers. A more radical application would allow the FCC to charge edge providers like Netflix, YouTube, and Amazon, who cannot pass those charges on, benefiting consumers.

While either solution (or both) represents an expansion of the FCC's authority in practice, the law behind universal service encourages a liberal reading of the statute, as does simple fairness: those who profit from a program should contribute to its operation. Those who get rich shuttling their wares down the Information Superhighway should be the first to chip in for its construction, and those who charge others to access it should do the same. The internet connects people and drives commerce in 2026 just as telephones did in 1980. It is time for the FCC and the courts to recognize reality and restore fairness to the USF by taxing ISPs and edge providers.