

'Fingers Crossed' At FCC As Court's Subsidy Ruling Closes In

By **Christopher Cole**

Law360 (May 1, 2025, 9:00 PM EDT) -- There's plenty of hand-wringing at the Federal Communications Commission as a U.S. Supreme Court decision draws near over the legality of the revenue-raising scheme used to pay for more than \$9 billion in broadband and phone service subsidies.

The justices' decision will come by early summer, and perhaps within weeks, on whether the Universal Service Fund created in the 1990s clears a constitutional test regarding separation of powers.

But it's still not clear what kind of preparations the FCC has made in case the nation's highest court, spurred on by a cluster of conservative legal challenges, rejects the longstanding system of collecting fees from telecom companies, which they pass on to consumers, to fund the program and manage it through a quasi-private corporation.

One Democratic member of the FCC told Law360 she's "deeply hopeful" the justices overturn a Fifth Circuit decision last year that found the system unlawful. "The Universal Service Fund is so very important to ensuring affordable connectivity throughout the country," Commissioner Anna Gomez said after a recent FCC meeting in Washington, D.C. "So we'll see — fingers crossed."

Conservative litigation group Consumers' Research challenged the Universal Service Fund in various appeals courts, but won only in the Fifth Circuit. In appealing that decision, the FCC maintains that it conflicts with holdings of the Sixth and Eleventh circuits. A school and library advocacy coalition has also petitioned the court, in a case paired with the FCC's.

Despite the conservative bent of the program's critics, Republicans are worried about the Universal Service Fund's fate as well. Lawyers from both the FCC and Justice Department are trying to persuade justices to reject the circuit's split en banc decision that the fund delegates taxing authority away from Congress and hands it off to a private company, maneuvers that it said are unconstitutional when taken together.

The high court's March oral arguments showed some reluctance to upend the funding mechanism, including from conservative justices. But some of the jurists did raise concern about the program's spiraling costs and how much power has been transferred to the private Universal Service Administrative Co. The government argues USAC operates fully under the FCC's thumb.

For the subsidy fund's backers, the fact that justices peppered the arguing attorneys with questions on not only the legal, but practical effects of dismantling the decades-old system seemed like a good sign

for the program.

A majority of the justices "at least noted" the consequences for the universal service program if they found its structure to be unconstitutional, said Kimberly Morning, of counsel at Morgan Lewis & Bockius LLP, who worked on amicus briefs for the American Library Association and CoBank, which helps finance rural telecom providers, in support of the FCC's side.

There was a balance between questioning on the constitutional issues and the real-world impact of their upcoming decision, Morning said, but she was "pleasantly surprised" at the focus on what would happen if the program's funding were declared unconstitutional.

"Sometimes the court chooses not to have an extensive conversation about the consequences of their decisions," but here, the court appeared to take note of the roughly two dozen amicus briefs filed in the case, Morning said. One of those filings arrived from just across the street as lawmakers made a plea for preserving the congressional mandate to the FCC.

"In fact, the bipartisan brief from members of Congress was specifically noted during oral arguments. And so I think that really speaks to the importance of putting the consequences in the record so that the court can consider them," she added.

Not all the amici focused on the impact of scrapping the fund. The U.S. Chamber of Commerce filed in support of neither side, but said the court does need to revive the legal doctrine that prevents the executive branch from assuming powers granted only to Congress.

Opponents of the Universal Service Fund's structure argued that the fees amount to an unlawful tax. The Fifth Circuit had also been clear that turning over the fee-raising power to the FCC and then to an industry-run board did not fit with the constitutional separation of powers. Other courts have said Congress gave the FCC an "intelligible principle" to guide the fund's management, making it lawful under high court precedent.

The justices' ruling is expected to turn on their interpretation of how the nondelegation doctrine, the principle that Congress cannot hand off its authority to agencies, applies to the FCC fund. Supreme Court experts have said a decision upholding the Fifth Circuit ruling would mark a crucial change in administrative law rivaling the court's scrapping of Chevron deference last year.

Hogan Lovells lawyers who focus on nondelegation law told Law360 the court looked divided when it comes to that underlying legal question about the fund. Senior associate Danielle Desaulniers Stempel observed a "three-three-three split" during arguments, with the three liberal justices in favor of the program, but Justices Neil Gorsuch, Clarence Thomas and Samuel Alito "more skeptical of the program" and "looking for ways to potentially strike it down."

The other three, Justices John Roberts, Brett Kavanaugh and Amy Coney Barrett, seemed "very skeptical of limitations the challengers were offering," she said, referring to the idea of setting a dollar limit on the amount that the fund could raise or spend.

"They did not take kindly to the idea that setting a specific but fanciful upper limit would be a better constraint than what Congress actually did here. But I don't know if that actually tells us how they'll resolve the case," Stempel said. "Because, of course, that's simply the argument the challengers offered in terms of what Congress could have done instead."

Stempel added that in terms of the legal doctrine itself, she saw potentially enough votes for some sort of revived version of the nondelegation doctrine. "I think there are five justices willing to say the 'intelligible principle' test is not so intelligible after all. But I don't know if there are five votes yet for a single, consistent test, at least coming out of argument," she said.

Hogan Lovells appellate partner Katie Wellington said it was particularly hard to read where Justices Roberts and Kavanaugh are going to land. But she said Justice Barrett "was very much interested in trying to figure out a test that worked. She wasn't willing to accept the proposed test, which is just set a cap on the tax or on the fund, which she thought wasn't practical."

"No matter how the court decides this case, the Supreme Court has made clear that it cares about the nondelegation doctrine, that it's trying to formulate a new test or legal standard," Wellington said. "It's something that's going to start cropping up again and again in cases challenging agency authority."

She doesn't see the big-picture legal issue going away anytime soon, just like the "major questions" doctrine preventing agencies from tackling significant economic and political issues without clear direction from Congress remains central to legal disputes. "The Supreme Court is going to have to keep addressing these questions until it has formulated a clear rule," she said.

The FCC is represented by D. John Sauer of the U.S. Department of Justice and in-house by P. Michele Ellison, Jacob M. Lewis, James M. Carr and Matthew J. Dunne.

The Schools, Health and Libraries Broadband Coalition is represented by Christopher J. Wright, Sean A. Lev, Jason Neal, Mohammad M. Ali and Amy C. Robinson of HWG LLP.

The Benton Institute for Broadband & Society, the National Digital Inclusion Alliance and MediaJustice are represented by Andrew Jay Schwartzman.

The Competitive Carriers Association, the National Telephone Cooperative Association and USTelecom are represented by Paul D. Clement, C. Harker Rhodes IV and Kevin Wynosky of Clement & Murphy PLLC and Jennifer Tatel, Daniel H. Kahn and Tyler D. Dillon of Wilkinson Barker Knauer LLP.

Consumers' Research and the other challengers are represented by R. Trent McCotter, Jonathan Berry, Michael Buschbacher, Jared M. Kelson, James R. Conde and Jonathan Feld of Boyden Gray PLLC and Robert Henneke and Chance Weldon of the Texas Public Policy Foundation.

The cases are Federal Communications Commission et al. v. Consumers' Research et al., case number 24-354, and SHLB Coalition et al. v. Consumers' Research et al., case number 24-422, in the U.S. Supreme Court.

--Editing by Emily Kokoll.