Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Universal Service Contribution Methodology  )  WC Docket No. 06-122
A National Broadband Plan For Our Future  )  GN Docket No. 09-51

COMMENTS OF MAGICJACK VOCALTEC LTD.

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In the Matter of

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COMMENTS OF MAGICJACK VOCALTEC LTD.

I. INTRODUCTION AND SUMMARY

magicJack VocalTec Ltd. (“magicJack”), a Voice over Internet Protocol (VoIP) cloud-based technology and services communications provider and the inventor of the magicJack device, respectfully responds to the Public Notice seeking comment on whether the Commission should subject one-way VoIP service revenues to federal universal service fund (USF) contribution requirements.1

The answer to that question is no. As the Commission recognized eight years ago when it sought comment on proposals to reform and modernize the USF contribution system,2 the current regime is like the Titanic steaming towards an iceberg. Except here, the iceberg is in plain sight, and every crew member and passenger see it. But rather than divert the ship, the


Commission seeks to put out another deck chair by requiring one-way VoIP services to contribute to the USF. This approach makes no sense.

As a threshold matter, the proposal that one-way VoIP providers be required to contribute to the USF is legally flawed. The record in this proceeding demonstrates – and numerous judicial decisions confirm – that one-way VoIP is not a “telecommunications service,” and thus one-way VoIP providers are not subject to the mandatory contribution requirements under section 254(d). Nor could the Commission lawfully exercise its permissive authority under section 254(d) to require that one-way VoIP providers contribute to the USF because one-way VoIP services do not provide “telecommunications.” This is so for two independent reasons: first, because these services do not provide “transmission,” and, second, because they necessarily involve a change in the “form or content” of the information sent or received.

Furthermore, Congress has foreclosed the Commission’s ability to subject one-way VoIP to USF contribution requirements by distinguishing non-interconnected VoIP services from interconnected VoIP service. Because Congress has codified the distinction between “non-interconnected” and “interconnected” VoIP, the Commission is prohibited from collapsing these categories and treating one-way and interconnected VoIP as synonymous for USF contribution purposes.

Even if the Commission were not foreclosed from treating one-way VoIP providers like interconnected VoIP providers for purposes of universal service contributions, it would be unreasonable for the Commission to exercise its permissive authority under section 254(d) to require one-way VoIP services to contribute to the USF. Doing so would sweep in more services

3 One-way VoIP is a type of non-interconnected VoIP service. See, e.g., 47 U.S.C. § 153(36) (defining non-interconnected VoIP); USF Contribution FNPRM ¶ 58 (defining one-way VoIP). The terms are used interchangeably in these comments.
– including text messaging and email, among others – than the statutory language can reasonably bear. And, any finding that one-way VoIP services provide “telecommunications” would represent a definitional change so broad as to encompass practically any Internet-based service. The Commission would be required to articulate a reasoned basis for excluding these other services from its USF contribution regime, which would not be an easy undertaking.

In addition to lacking the legal authority to require one-way VoIP providers to contribute to the USF, the Commission cannot satisfy the public interest requirement necessary to exercise its permissive authority under section 254(d) to include revenues derived from the provision of one-way VoIP services in the contribution base. Specifically, the public interest does not require subjecting one-way VoIP services to USF contribution obligations because doing so would: (1) stifle innovation in the development and deployment of one-way VoIP services (2) unduly complicate USF compliance and administration; and (3) not cure the ailing USF contribution system.

Rather than attempting to subject one-way VoIP providers to USF contribution obligations, the Commission should devote its time and energy to reforming the USF system. Those reforms must include not only the current contribution regime – which is irreparably broken – but the entire universal service framework that is built around the Universal Service Administrative Company (USAC), a private corporation tasked with calculating and collecting universal service contributions and disbursing universal service support. This framework is a house of cards because USAC violates the Government Corporation Control Act and the U.S. Constitution. Unless the Commission remedies these violations, it will expose the entire universal service system to collapse.
II. THE COMMISSION LACKS AUTHORITY UNDER SECTION 254(D) TO SUBJECT ONE-WAY VOIP SERVICE PROVIDERS TO USF CONTRIBUTION OBLIGATIONS.

The Commission’s proposal fails at the outset because the Commission lacks statutory authorization to subject one-way VoIP service providers to USF contribution obligations. “[L]ike other federal agencies,” the Commission “literally has no power to act . . . unless and until Congress confers power upon it.” Am. Library Ass’n v. FCC, 406 F.3d 689, 698 (D.C. Cir. 2005) (omission in original) (quoting La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986)). Here, the Commission points to section 254(d) as its source of authority to force one-way VoIP service providers to contribute to the USF. Public Notice at 1. But that section says nothing of the sort.

Section 254(d) contains two provisions: first, the mandatory provision, which requires “[e]very telecommunications carrier that provides interstate telecommunications services” to contribute to the USF; and second, the permissive provision, which authorizes the Commission to require, “if the public interest so requires,” any “other provider of interstate telecommunications” to contribute to the USF. 47 U.S.C. § 254(d). Neither provision applies to one-way VoIP services.

A. One-Way VoIP Services Are Not Subject To The Act’s Mandatory Contribution Provision Because They Do Not Provide “Telecommunications Services.”

Section 254(d)’s mandatory contribution provision offers no statutory support for the Commission’s proposal. That section applies only to “telecommunications services”: “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.” 47 U.S.C. § 254(d); see also USF Contribution FNPRM, ¶ 7 (“Under this mandatory contribution
provision, every provider of interstate telecommunications services must contribute …”

(footnotes omitted)). But a one-way VoIP service is an information service—not a telecommunication service—and, as such, it is “not required to contribute” to the USF.4

Several courts—along with at least one Commissioner—have concluded that the Communications Act requires treating interconnected VoIP services as “information services.” See, e.g., Charter Advanced Servs. (MN), LLC v. Lange, 903 F.3d 715, 719 (8th Cir. 2018) (“the VoIP technology used by Charter Spectrum is an ‘information service’ under the Act”), cert. denied sub nom. Lipschultz v. Charter Advanced Servs. (MN), LLC, 140 S. Ct. 6 (2019); PAETEC Commc’ns, Inc. v. CommPartners, LLC, No. 08-cv-0397, 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010) (“transmissions which include net format conversion from VoIP to TDM are information services”) (emphasis added); BellSouth’s Petition for Declaratory Ruling, WC Docket No. 19-44, 2019 WL 5617878, at *15 (Oct. 30, 2019) (statement of Commissioner O’Rielly) (“VoIP should be classified as an interstate, information service”). That should end the matter. While the Commission itself repeatedly has declined to place VoIP services on either side of the telecommunications/information services divide, see Rural Call Completion, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 16154, ¶ 35 n.101 (2013), the judiciary has spoken. And that “prior judicial construction . . . trumps an agency construction” where, as here, the court’s reading “follows from the unambiguous terms of the

4 Under the Communications Act, the “telecommunications services” and “information services” categories “have been treated as mutually exclusive by the Commission since the late 1990s.” Mozilla Corp. v. FCC, 940 F.3d 1, 19 (D.C. Cir. 2019) (per curiam). As the Commission has explained, one result of that exclusivity is that information service providers “are not required to contribute to support mechanisms” under the mandatory contribution provision. Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, ¶ 788 (1997) (“First Report and Order”), aff’d in part, rev’d in part, remanded in part sub nom, Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999), cert. denied, 530 U.S. 1210 (2000), cert. dismissed, 531 U.S. 975 (2000).
statute.” *Sierra Club v. EPA*, 479 F.3d 875, 880 (D.C. Cir. 2007) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). Accordingly, the Commission cannot lawfully classify one-way VoIP service as a “telecommunications service.”

Even if the Commission could lawfully classify VoIP as a telecommunications service, it still could not subject one-way VoIP services to the mandatory contribution requirement under section 254(d). The record in this proceeding demonstrates that one-way VoIP is not a “telecommunications service” because one-way VoIP providers do not “offer” “telecommunications for a fee directly to the public.” 47 U.S.C. § 153(53). In addition to not providing “telecommunications,” see infra, many one-way VoIP providers “do not charge” their end users, and none “offer” telecommunications, as defined by the Commission. “[I]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated final product.” *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, ¶¶ 45–57 (2018), aff’d in part, rev’d in part, remanded in part sub nom. *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (per curiam).

And just as one-way VoIP services do not provide telecommunications, as detailed below, no reasonable consumer would perceive that they do. *Cf. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1238–39 (D.C. Cir. 2007) (recognizing that interconnected VoIP providers do not “offer” telecommunications). For these reasons, the Commission lacks authority to expand the USF contribution base to include one-way VoIP services through exercise of its mandatory contribution authority.

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B. The Act’s Permissive Contribution Provision Does Not Authorize the Commission To Force One-Way VoIP Providers To Contribute To The USF.

1. One-Way VoIP Services Do Not Provide “Telecommunications.”

In addition to imposing a mandatory contribution requirement on telecommunications carriers providing interstate telecommunications services, section 254(d) grants the Commission a permissive authority. That permissive authority, however, applies only to services that offer “telecommunications”: “[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.” 47 U.S.C. § 254(d). And, a one-way VoIP service does not provide “telecommunications.”

There are two key statutory elements that determine whether a service offering provides “telecommunications.” The first is whether the service provides “transmission.” 47 U.S.C. § 153(50); see Universal Serv. Contribution Methodology Fed.-State Joint Bd. On Universal Serv. 1998 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 41 (2006) (“the heart of ‘telecommunications’ is transmission” (citation omitted)) (“USF Contribution Order”), aff’d in part, rev’d in part sub nom. Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007). The second is whether the service transmits the user’s information “without change in the form or content of the information,” 47 U.S.C. § 153(50), or instead “acts on the [user’s] information—in such a way as to ‘transform’ that information,” Lange, 903 F.3d at 719. Because one-way VoIP services do not satisfy either element, they do not provide “telecommunications.”

First, one-way VoIP services do not provide “transmission.” The Commission acknowledged as much in Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service, 19 FCC Rcd. 3307, ¶ 9
(2004) (FCC 04-27) (“IP Enabled Services Order”) (internal quotation marks omitted). As the Commission explained, because users of VoIP services are required to supply their own broadband connection, those services “neither offer[ed] nor provide[d] transmission to its members” but merely “use[d] some telecommunications” in the provision of the VoIP service. Id.

In 2006, the Commission distinguished “interconnected” VoIP services, which, according to the agency, “permit users to receive calls from and terminate calls to the PSTN.” USF Contribution Order ¶ 36 (emphasis added). The Commission found that interconnected VoIP provides “PSTN transmission itself to end users” because interconnected VoIP providers “generally purchase access to the PSTN from a telecommunications carrier who accepts outgoing traffic from and delivers incoming traffic to the interconnected VoIP provider’s media gateway.” Id. ¶ 41. In that regard, interconnected VoIP providers were like the “resellers” that supply “telecommunications to their customers even though they do not own or operate the transmission facilities.” Id.6

Critically, although the USF Contribution Order carved out interconnected VoIP services, it affirmed the IP Enabled Services Order’s determination that non-interconnected VoIP services do not provide transmission. As the Commission explained, in contrast to one-way VoIP services, “[i]nterconnected VoIP providers do more than just ‘use’ some telecommunications to connect servers to the Internet.” USF Contribution Order ¶ 41 n.147 (quoting IP Enabled Services Order ¶ 9). “Rather, they self-provide or contract with underlying

6 In addition, the Commission found that competitive neutrality and the public interest supported imposing USF contribution obligations on interconnected VoIP providers because “much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN.” Id. ¶ 43 (emphasis added).
carriers or providers for transmission services, including interconnection with the PSTN.” *Id.* According to the Commission, this difference meant that interconnected VoIP services could be viewed as providing transmission, even though it had previously determined that non-interconnected VoIP services could not.7

To be sure, the Commission left open the door to possibly expanding the definition of interconnected VoIP services to include non-interconnected VoIP services. *USF Contribution Order* ¶ 36. However, Congress has since shut that door, as discussed below. In the interim, the Commission obviously meant what it said when it determined that only “interconnected VoIP providers [are] ‘providing’ telecommunications” because only “interconnected VoIP supplies PSTN transmission[]” *USF Contribution Order* ¶ 41.8 Thus, for more than a decade, the FCC’s consistent regulatory practice has been to treat interconnected VoIP services as providing transmission subject to permissive USF contribution obligations under section 254(d), but to exempt one-way VoIP services because they do not.9

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7 The *USF Contribution Order* codified the dividing line between interconnected and non-interconnected VoIP in the Commission’s USF contribution rules. See 47 C.F.R. § 54.5 (incorporating by reference 47 C.F.R. § 9.3).

8 In light of this plain language, the Commission’s statement in 2012 that the *USF Contribution Order* determined that “a provider of one-way VoIP provides telecommunications” is plainly wrong. *USF Contribution FNPRM* ¶ 60 n.170. The other precedent cited by the Commission relied on the *USF Contribution Order* for the proposition that “[t]he Commission previously has recognized that interconnected VoIP providers are providers of telecommunications.” *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 954 (2011) (emphasis added).

9 The record in this proceeding confirms that the dichotomy remains valid. See, e.g., Microsoft Comments, at 6 (explaining that “VoIP, email, IM or other applications still on the horizon . . . allow users to take full advantage of the network transmission services they have purchased from a third-party operator”) (emphasis added); Comments of Sprint Nextel Corp., WC Docket No. 06-122, GN Docket No. 09-51, at 23 (filed July 9, 2012) (“Many information services providers, including providers of services that compete with those offered by network operators, require their customers to ‘bring your own’ broadband connection”); Reply Comments of Google Inc., WC Docket No. 06-122, GN Docket No. 09-51, at 7–8 (filed Aug. 6, 2012)
Second, non-interconnected VoIP services do not provide “telecommunications” for the independent reason that they do not send or receive the user’s information “without change in the form or content of the information.” 47 U.S.C. § 153(50). Specifically, one-way VoIP providers must transform the user’s information between IP data packets and analog TDM signals compatible with circuit-switched networks to exchange communications with the PSTN, and courts have recognized that this is a change in form or content within the meaning of the Act.

In Charter Advanced Services LLC, for example, the Eighth Circuit examined “an ‘interconnected’ VoIP service” offered by Charter Advanced that enabled “subscribers to exchange calls with traditional telephones.” 903 F.3d at 717–18. The court found that, because the calling “information enter[ed] Charter’s network ‘in one format (either IP or TDM, depending on who originated the call) and le[ft] in another, its system offer[ed] “net” protocol conversion.’” Id. at 719. That protocol conversion, the Eighth Circuit explained, was a “transformation” of the information sent or received.

Several district courts have reached similar conclusions. In a case involving a VoIP service offered by Vonage, a district court held that the service necessarily involved “a net change in form and content” of the user’s information. See Vonage Holdings Corp. v. Minn. Pub. Utilities Comm’n, 290 F. Supp. 2d 993, 1000 (D. Minn. 2003). The court explained that was so because, “[f]or calls originating with one of Vonage’s customers, calls in the VoIP format

(footnote cont’d.)
(“Offerings such as one-way VoIP, email, IM, SMS and applications still on the horizon reflect the trend toward enabling communications across various platforms and networks through so-called ‘over-the-top’ or ‘network-independent’ applications.” (internal quotation marks and footnotes omitted)); see also Reply Comments of Microsoft Corporation, WC Docket No. 06-122, GN Docket No. 09-51, at 5–6 (filed Aug. 6, 2012) (explaining that edge providers must “purchase some form of connection to the Internet in order to arrange for end-users to have access to their servers and to send data to these end-users” meaning that “they are users of telecommunications, not providers” (emphasis in original)) (“Microsoft Reply Comments”).
must be transformed into the format of the PSTN before a [traditional] user can receive the call.” *Id.* at 999. Conversely, “[f]or calls originating from a [traditional] user, the process of acting on the format and protocol is reversed.” *Id.* In either instance, completion of the call required a net change in “form or content” of the user’s information. *Id.* at 998 n.4, 1000. *Accord FTC v. Educare Ctr. Servs., Inc.*, 433 F. Supp. 3d 1008, 1018 (W.D. Tex. 2020); *PAETEC Commc’ns, Inc. v. CommPartners, LLC*, No. 08-cv-0397, 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010); *Sw. Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1081 (E.D. Mo. 2006), aff’d, 530 F.3d 676 (8th Cir. 2008); *Vonage Holdings Corp. v. New York State Pub. Serv. Comm’n*, No. 04-cv-4306, 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004).

These judicial decisions are in accord with the Commission’s decisions regarding net protocol conversion. As the Commission explained in 1996, a service “that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information.” *Implementation of the Non-Accounting*

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10 These judicial decisions ultimately held that the interconnected VoIP services at issue were “information services” not “telecommunications services.” The reasoning supporting those decisions—that the interconnected VoIP services transformed the information and thus did not provide “telecommunications”—is fully applicable to one-way VoIP services. They also resolve a question not answered by the D.C. Circuit in upholding the Commission’s decision to impose USF contribution obligations on interconnected VoIP services. As the D.C. Circuit explained, it lacked authority to decide whether interconnected VoIP services provide “telecommunications” because no party had “made this argument before the Commission.” *Vonage*, 489 F.3d at 1241; see 47 U.S.C. § 405 (conditioning jurisdiction on presentation of an issue to the Commission). In other words, a fundamental premise supporting the FCC’s exercise of permissive authority with regard to interconnected VoIP services escaped judicial review in 2006. Even though parties are statutorily prohibited from renewing a challenge to the USF Contribution Order at this juncture, see 47 U.S.C. § 402(a), 28 U.S.C. § 2344, if the Commission were to find in this proceeding that the net protocol conversion inherent in one-way VoIP services constitutes telecommunications, the fundamental premise underlying the USF Contribution Order would become “reviewable on its merits.” *See ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 278 (1987). Thus, any decision by the Commission to require one-way VoIP providers to contribute to the USF could potentially result in a court ruling that neither one-way nor interconnected VoIP services can lawfully be subject to USF contribution requirements.
Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶ 104 (1996) (“Non-Accounting Safeguards Order”). Although the Non-Accounting Safeguards Order did not address VoIP specifically, the Commission relied on the same rationale nearly a decade later when it determined that certain “IP in the middle” services are “telecommunications” because any protocol conversions “take place within [the] network” and thus are not “net protocol conversion.” Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Servs. are Exempt from Access Charges, 19 FCC Rcd. 7457, ¶ 12 (2004); see also id. ¶¶ 6–7 (relying on the Non-Accounting Safeguards Order to support this distinction).

Thus, both the courts and the Commission have recognized that services which enable an end-user to send information into a network in one protocol and have it exit the network in a different protocol do not provide telecommunications. One-way VoIP is such a service because, by definition, it requires a net protocol conversion between IP data packets and analog signals compatible with TDM.11 Thus, one-way VoIP services do not provide “telecommunications” because they do not send or receive a user’s information “without change in the form or content of the information.” 47 U.S.C. § 153(50). Rather, they transform the information.

2. Congress Has Foreclosed The Commission From Treating One-Way VoIP Services Like Interconnected VoIP Services For USF Contribution Purposes.

Eight years ago, the Commission suggested that it could evade these fundamental statutory limitations on its authority through a regulatory sleight of hand. Specifically, the Commission proposed to “expand” “the definition of interconnected VoIP service for purposes of universal service contributions” in order to subsume one-way VoIP services within the USF

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11 See, e.g., Reply Comments of Vonage Holdings Corp., WC Docket No. 06-122, GN Docket No. 09-51, at 5 (filed Aug. 6, 2012); Microsoft Comments, at 8.
Contribution Order’s finding that interconnected VoIP provides “telecommunications.” USF Contribution FNPRM ¶ 57; see Public Notice at 1 n.1. But that avenue has been foreclosed by Congress, which has codified the distinction between “interconnected” and “non-interconnected” VoIP, and the Commission may not exceed “the scope of its congressionally delegated authority” by treating the two service categories as equivalent. See Mozilla, 940 F.3d at 75.

In the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111–260, 124 Stat. 2752 (2010) (“CVAA”), Congress created a new class of “advanced communications services” that includes both “interconnected VoIP service” and “non-interconnected VoIP service.” Id. § 101(1)(53) (codified at 47 U.S.C. § 153(1)). It is a fundamental canon of statutory construction that, “where different terms are used in a single piece of legislation,” it is presumed “that Congress intended the terms to have different meanings.” Cares Cmty. Health v. United States Dep’t of Health & Human Servs., 944 F.3d 950, 958 (D.C. Cir. 2019) (quoting Vonage, 489 F.3d at 1240). Moreover, Congress made that implication express by specifying that a “non-interconnected VoIP service” “does not include any service that is an interconnected VoIP service.” 47 U.S.C. § 153(36)(B). Thus, the Commission is prohibited from collapsing these categories into one by treating one-way VoIP and interconnected VoIP as synonymous for USF contribution purposes.

Congress also specified the fundamental difference between these terms. The CVAA provides that the term “interconnected VoIP service” shall have “the meaning given” by FCC regulations, 47 U.S.C. § 153(25) (citing 47 C.F.R. § 9.3), and that a “non-interconnected VoIP service” means a service that “enables real-time voice communications that originate from or terminate to the user’s location using Internet protocol or any successor protocol,” 47 U.S.C. § 153(36) (emphasis added). Congress’s use of the disjunctive “or” to define a non-interconnected VoIP service contrasts with the FCC’s definition of an interconnected VoIP
service as that which permits users “to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.” 47 C.F.R. § 9.3 (emphasis added); see Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1141 (2018) (“‘or’ is ‘almost always disjunctive’” (citation omitted)). Thus, whatever discretion the Commission may have to adjust the boundary between interconnected and non-interconnected VoIP through reasonable interpretation, it is expressly prohibited from including within the definition of interconnected VoIP any services that enables only one-way communications between an IP network and the PSTN (i.e., one-way VoIP). Accordingly, because “Congress has directly spoken to the precise question” presented by the Public Notice, “that is the end of the matter,” and the FCC “must give effect to the unambiguously expressed intent of Congress” by acknowledging that it cannot include one-way VoIP within the definition of interconnected VoIP services. See Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2124–25 (2016) (citation omitted).

The Commission’s “longstanding regulatory practice” provides further support for the conclusion that the agency is precluded from extending USF contribution obligations to one-way VoIP services. See Cty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1472 (2020). As explained above, the Commission has for fourteen years recognized that only interconnected VoIP services provide “telecommunications” subject to its permissive contribution authority under section 254(d). And the Commission historically has maintained a similar distinction for contribution obligations “relating to emergency services, law enforcement, disabilities access, [and] consumer protection[.]” IP-Enabled Servs. Implementation of Sections 255 & 251(a)(2) of the Communications Act of 1934, Report and Order, 22 FCC Rcd. 11275, ¶ 9 (2007). The Commission has construed the statutory provisions authorizing these other funding mechanisms—as it has with section 254(d)—to encompass only interconnected VoIP services,
not one-way VoIP services. *Id.* “[T]his history, by showing that a comparatively narrow view of the statute is administratively workable, offers some additional support for the view that Congress did not intend as broad a delegation of regulatory authority as the [FCC’s proposal] would allow.” *Cty. of Maui*, 140 S. Ct. at 1473.

This history also provides the essential “regulatory . . . backdrop” that Congress is presumed to have incorporated with its amendments to the Communications Act. *See Si Min Cen v. Attorney Gen.*, 825 F.3d 177, 195 (3d Cir. 2016). Section 103(b) of the CVAA codified the obligation of interconnected VoIP providers to participate in and contribute to the Telecommunications Relay Services (TRS) Fund and extended that obligation to non-interconnected VoIP providers. 47 U.S.C. § 616; *see generally Contributions to the Telecommunications Relay Servs. Fund*, Report and Order, 26 FCC Rcd. 14532 (2011). Critically, Congress did not subject non-interconnected VoIP to USF or any other funding contribution obligations. “Since Congress legislated against the backdrop of the Commission’s preexisting [USF] regulation without criticizing that regulation, we infer that Congress endorsed it[.]” *City of N.Y. v. FCC*, 814 F.2d 720, 725 (D.C. Cir. 1987), aff’d, 486 U.S. 57 (1988). This Commission, therefore, may not end run that endorsement by reading “a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept.” William N. Eskridge Jr., Interpreting Law 415 (2016); *see also, e.g.*, *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 995 (D.C. Cir. 2013) (vacating FCC order interpreting “cable systems” to encompass “multichannel video programming distributors”).

The inference that Congress endorsed the FCC’s determination that non-interconnected VoIP providers should not be subject to USF contribution obligations is strengthened by Congress’s frequent attention to the Communications Act generally and to its universal service support mechanisms specifically. For example, prior to the CVAA, Congress enacted the

Meanwhile, Congress was actively modifying the Commission’s approach to other aspects of its universal support mechanisms. In addition to the CVAA’s imposition of a TRS funding obligation on VoIP services, Congress in 2017 expressly rejected a regulatory proposal that would have limited the USF support available to rural households. See RAY BAUM’S Act of 2018, Pub. L. No. 115-141, § 501, 132 Stat. 348, 1096 (2018). Thus, while Congress repeatedly amended the statutory support mechanisms, none if its actions suggested that one-way VoIP services should be subject to the Commission’s permissive contribution authority. “Under these circumstances, it is clear that Congress’ [USF]-specific legislation has effectively ratified the [FCC’s] previous position” that it lacked authority to impose a USF contribution obligation on one-way VoIP services. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000).12

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12 When Congress wants to change the Commission’s regulatory treatment of one-way VoIP services, it knows how to do so. For example, in RAY BAUM’S Act of 2018, Congress directed the Commission to “conclude a proceeding to consider adopting rules to ensure that the dispatchable location is conveyed with a 9-1-1 call, regardless of the technological platform used[.]” See RAY BAUM’S Act, § 506(a). In implementing this directive, the Commission amended its definition of “interconnected VoIP service” for 911 purposes to include “outbound-only interconnected VoIP services that generally permit users to initiate calls that terminate to the PSTN.” Implementing Kari’s Law and Section 506 of RAY BAUM’S Act, PS Docket No. 18-261, Report and Order, FCC 19-76, ¶ 183 (rel. Aug. 2, 2019). According to the Commission, this amendment was “[c]onsistent with Congress’s approach of establishing regulatory parity across technological platforms” for enabling the completion of 911 calls. Id.
3. **It Would Be Unreasonable To Treat One-Way VoIP Services Like Interconnected VoIP Services For USF Contribution Purposes.**

Even if the Commission were not foreclosed by the Communications Act from treating one-way VoIP providers like interconnected VoIP providers for purposes of universal service contributions, it would be unreasonable for the Commission to find that one-way VoIP services provide telecommunications.

To begin with, such a finding would sweep in more services than the statutory language could reasonably bear. For example, the Commission has recognized that text messaging services are information services but has declined to say whether they provide “telecommunications” subject to its permissive contribution authority. *See Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Serv.*, Declaratory Ruling, 33 FCC Rcd. 12075, ¶¶ 2, 48, n.162 (2018). But if the FCC were to find that one-way VoIP provides telecommunications, text messaging services presumably do as well because both services use the PSTN in a comparable fashion. *See id.* ¶ 34.

The same is true for e-mail, which the Commission has classified as information services. *See Fed.-State Joint Bd. on Universal Serv.*, Report to Congress, 13 FCC Rcd. 11501, ¶ 78 (1998). But email, like one-way VoIP, relies on “the provision of a transmission path for . . . delivery.” *See id.* (citation omitted). And connected healthcare services – of which there are so many variants that the Commission recently declined even to list them for “risk of being underinclusive” – also rely on some telecommunications. *See Promoting Telehealth for Low-Income Consumers Covid-19 Telehealth Program*, Report and Order, WC Docket Nos. 18-213, 20-89, ¶¶ 61–62 (Apr. 2, 2020) (“Telehealth R&O”).

These are just the beginning. Commenters in this proceeding already have explained that its “proposed definitional change is so broad as to encompass practically any Internet-based
service including those that are not close substitutes with PSTN services.” Comments of Level 3 Communications, Inc., WC Docket No, 06-122, GN Docket No. 09-51, at 6 (filed July 9, 2012).

And in the intervening years, even more services have developed that could be impacted by the Commission’s proposed treatment of one-way VoIP – a trend that the Covid-19 pandemic has only accelerated. See, e.g., Deloitte, Remote Collaboration: Facing the Challenges of COVID-19, at 8 (Mar. 2020), https://www2.deloitte.com/content/dam/Deloitte/de/Documents/human-capital/Remote-Collaboration-COVID-19.pdf.

These few examples illustrate that the “implications of the authority claimed” in the Public Notice are indeed “sweeping.” Merck & Co. v. United States Dep’t of Health & Human Servs., No. 19-5222, 2020 WL 3244013, at *7 (D.C. Cir. June 16, 2020). Under the Commission’s proposed construction of its permissive authority under section 254(d), it would seem to have “unbridled power” to subject any communications or information service to USF contribution obligations. Id. The “breadth” of the agency’s theory thus “underscores [its] unreasonableness.” Id.; see also Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy’ we typically greet its announcement with a measure of skepticism.” (citation omitted)); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994) (vacating interpretation of the Communications Act that would leave “to agency discretion” “the determination of whether an industry will be . . . regulated”).

And that is not the only reason the Commission’s proposed interpretation would be unreasonable. Even if the Commission were correct that Congress had delegated to it authority to determine that one-way VoIP services are subject to its permissive contribution authority (it has not), the Commission would be obligated to articulate a reasoned basis for excluding e-mail, text messages, connected healthcare, and other similar services from the scope of that authority.
See, e.g., *Gulf S. Pipeline Co., LP v. FERC*, 955 F.3d 1001, 1012 (D.C. Cir. 2020) (“It is textbook administrative law that an agency must provide a reasoned explanation for . . . treating similar situations differently.” (citations and internal quotations omitted)). That would require, at minimum, a significant expansion of the record to permit the FCC to categorize and distinguish numerous over-the-top applications and so avoid an arbitrary and “artificial narrowing of [the Commission’s] options.” *Pillai v. CAB*, 485 F.2d 1018, 1027 (D.C. Cir. 1973).

The Commission also would be required to reexamine the validity of many of its existing policies. The agency has long recognized that the classification of “Internet-based services” for USF purposes “raises many complicated and overlapping issues, with implications far beyond section 254.” *First Report and Order* ¶ 790. If the Commission were to determine in this proceeding that one-way VoIP services provide telecommunications, then it would also need to “grapple with” any other implications that might result from that determination, including for other kinds of services. *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 738–45 (D.C. Cir. 2019); see *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must consider “important aspect[s] of the problem”).

In short, imposing USF contribution obligations on one-way VoIP providers is not as simple or straightforward a decision as the *Public Notice* suggests. Rather, it would involve dragging the Commission and the communications industry through a legal and regulatory quagmire for no constructive purpose, as explained immediately below.

**III. EVEN ASSUMING THE COMMISSION HAD THE LEGAL AUTHORITY TO SUBJECT ONE-WAY VOIP SERVICES TO USF CONTRIBUTION OBLIGATIONS, WHICH IS NOT THE CASE, DOING SO WOULD NOT BE IN THE PUBLIC INTEREST.**

The Commission cannot meet the public interest standard for the exercise of its permissive authority under section 254(d) to extend USF contribution obligations to one-way
VoIP services, even assuming it had the legal authority to do so. 47 U.S.C. § 254(d).

Specifically, the public interest does not require subjecting one-way VoIP services to USF contribution obligations because doing so would: (1) stifle innovation; (2) unduly complicate USF compliance and administration; and (3) not cure the ailing USF contribution system. The Administrative Procedure Act, for its part, requires that this public interest analysis be reasonable and substantiated. The Commission’s proposal is neither.

A. **Imposing USF Contribution Obligations On One-Way VoIP Is Not In The Public Interest Because It Would Stifle Innovation.**

The VoIP market has witnessed an explosion of new and creative services in recent years. These offerings include web conferencing platforms such as Zoom, GoToMeeting, UberConference, and join.me; collaborative communication tools such as Slack, Microsoft Teams, and Google Hangouts; project management systems such as Basecamp 3; and call center platforms such as RingCentral and Five9. These offerings feature one-way VoIP components, which have proven critical to companies staying in business and individuals staying in touch during the COVID-19 pandemic. Saddling one-way VoIP services with legacy USF obligations would jeopardize this impressive track record of innovation, which would be contrary to the public interest. It also would be contrary to the President’s recent directive that “[a]gencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery,” Exec. Order No. 13924, 85 Fed. Reg. 31353 (May 19, 2020) (Regulatory Relief To Support Economic Recovery), not piling on new regulatory mandates.

The Commission has long recognized that “undue regulatory burdens can stand in the way of competition and innovation.” *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks,*
In seeking to eliminate outdated and unnecessary regulations, the Commission has explained that doing so “serves the public interest by generally reducing ‘carriers’ costs and, in turn, benefit[ting] consumers through lower rates and/or more vibrant ‘competitive offerings.’” Memorandum Opinion and Order, 34 FCC Rcd. 6503, ¶ 50 (2019). In the Commission’s view, a “minimal regulatory environment . . . promotes investment and innovation in a competitive market.” Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, ¶ 5 (2002); see also Vonage Holdings Corporation Petition for Declaratory Ruling an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶ 21 (2004) (innovative services flourish when they are “subject to the Commission's long-standing national policy of nonregulation of information services”), aff’d, Minn. PUC v. FCC, 483 F.3d 570 (8th Cir. 2007).

Obligating one-way VoIP providers to contribute to the USF would undermine the investment and innovation that the Commission seeks to promote. Indeed, imposing a legacy USF contribution obligation on innovative one-way VoIP services would be fundamentally inconsistent with this Commission’s regulatory approach. And such “an ‘unexplained inconsistency’ in agency policy” would be “‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’” Encino Motorcars, 136 S. Ct. at 2126 (quoting Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

In late 2016, after observing that “the regulatory underbrush at the FCC is thick,” then-Commissioner Pai promised “to fire up the weed whacker” to “remove those rules that are
holding back investment, innovation, and job creation.” Remarks of FCC Commissioner Ajit Pai Before the Free State Foundation’s Tenth Anniversary Gala Luncheon, 2016 FCC LEXIS 4032, *6 (Dec. 16, 2016). Consistent with that promise, the Commission under Chairman Pai’s leadership has made significant strides in clearing out the “regulatory underbrush that diverts resources away from product development, better service, and lower prices.” Remarks of FCC Commissioner Michael O’Rielly Before the Americans for Prosperity’s 2017 Defending the American Dream Summit, 2017 FCC LEXIS 2596, *6 (Aug. 19, 2017).

But extending legacy USF contribution obligations to one-way VoIP services would have the very effect the Commission seeks to avoid, namely diverting resources away from “product development, better service, and lower prices.” Id., at *5. It would be the equivalent of planting new regulatory brambles to ensnare providers and consumers alike – an approach the Commission should soundly reject.13

B. Imposing USF Contribution Obligations On One-Way VoIP Is Not In The Public Interest Because It Would Unduly Complicate Compliance And Administration.

One of the Commission’s goals in reforming the USF contribution regime is “to simplify compliance and administration.” USF Contribution FNPRM, ¶ 22. Subjecting one-way VoIP services to USF contribution obligations would be contrary to this goal because it would raise a host of complex compliance and administration issues.

13 According to Chairman Pai, the Commission is committed to creating “a regulatory framework that promotes private investment and innovation.” Remarks of FCC Chairman Ajit Pai at the Institute for Policy Innovation’s Hatton W. Sumners Distinguished Lecture Series, 2017 FCC LEXIS 2813, *12 (Sept. 17, 2017). This commitment reflects Chairman Pai’s view “that the most effective strategy for seizing the opportunities of the digital age is promoting the power of free markets” and that “Government can best serve the public interest by getting rid of the red tape that stifles innovation and progress.” Keynote Address of FCC Chairman Ajit Pai at the Reason Media Awards, 2017 FCC LEXIS 3550, *8 (Nov. 9, 2017). Layering legacy USF contribution obligations on innovative VoIP services would be inconsistent with the Chairman’s deregulatory view.
For example, many offerings that feature one-way VoIP services—such as web conferencing and call center platforms—also include information processing capabilities. And it would be no easy task to determine whether the one-way VoIP service in these circumstances constitutes a separate offering that may be subject to USF contribution requirements or is only one component of a functionally integrated information service exempt from USF contribution requirements.

The Wireline Competition Bureau’s (WCB) WebEx Order provides a helpful illustration of this complexity. That case involved Cisco’s challenge to a USF contribution audit conducted by USAC of Cisco’s 2009 revenues. USAC found that WebEx comprised two separate and distinct services (a desktop and document sharing application and an audio teleconferencing service) and directed Cisco to contribute to the USF based on revenues from the audio service when provided by Cisco using toll or toll-free calling via the PSTN. The WCB granted Cisco’s petition for review, finding that, “based on the facts presented,” WebEx constitutes a functionally integrated information service, the revenues from which are not assessable for USF purposes. WebEx Order ¶ 13.

But whether a particular offering includes an assessable one-way VoIP service or constitutes a nonassessable functionally integrated information service would be a fact-specific inquiry, the resolution of which may or may not be dictated by the WebEx Order. And if the

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14 Universal Service Contribution Methodology; Request for Review of a Decision of the Universal Service Administrator by Cisco WebEx LLC, Order, WC Docket No. 06-122, DA 16-1401 (rel. Dec. 16, 2016) (“WebEx Order”).

15 For example, while acknowledging that Cisco charged its customers separately for the telecommunications component and while conceding that pricing “may inform a classification decision,” the WCB concluded that the pricing arrangement for Cisco’s WebEx service was “not dispositive for purposes of this appeal.” WebEx Order ¶ 27. According to the WCB, “There are various business and administrative reasons that influence how a provider prices its service and bills its customers, and although we believe billing practices may be informative, we are not
one-way VoIP service is an assessable component of a bundled offering that also includes nonassessable information services, a contributor would be required to apportion its revenues, even though there are no clear rules governing the apportionment process. See USF Contribution FNPRM, ¶ 102 (noting that the FCC’s rules “give providers fairly wide latitude to determine assessable revenues within bundled services, which may result in contributors adopting different methodologies to determine their contribution base”). Thus, to what degree, if any, a contributor should include the revenues from an offering that includes a one-way VoIP service in its assessable revenue base would be subject to disagreement and dispute, putting contributors in a difficult, if not impossible, compliance position.

Added to this complexity is that, under the current USF contribution system, a provider’s contributions are based on its end-user revenues. But, as the Commission has recognized previously, many offerings, including certain one-way VoIP services, are “free” to end users because they are funded either by advertising or subscription fees. USF Contribution FNPRM, ¶ 86. How a provider offering one-way VoIP services for “free” would be expected to contribute to the USF in these circumstances would be anyone’s guess and would pose an administrative and compliance nightmare.\(^\text{16}\)

\(^\text{16}\) For example, magicJack, through its affiliates, sells devices, the purchase price for which includes an access license, which, when combined with the device, allows subscribers to utilize magicOut® communications service to reach phone numbers in the United States and Canada and other magicJack subscribers regardless of their location. Subscribers also have the option to get a phone number to utilize magicIn® service, which gives subscribers the option of receiving calls and enjoying related features of the service. In the Consent Decree, the Enforcement Bureau and magicJack agreed to a methodology that would govern the reporting of magicJack’s
In short, the public interest does not require subjecting one-way VoIP services to USF contribution obligations because of the complex compliance and administration issues that would inevitably result from the Commission adopting such a requirement.

C. **Imposing USF Contribution Obligations On One-Way VoIP Is Not In The Public Interest Because It Would Not Cure What Is Ailing The USF Contribution Regime.**

In its 2012 *USF Contribution FNPRM*, the Commission sought comment “on proposals to reform and modernize” its USF contribution regime. *Id.* ¶ 1. In response, commenters almost uniformly agreed that the current revenues-based regime is broken and urged the Commission to implement an alternative contribution scheme. However, in the absence of agreement on an acceptable alternative, the Commission has kept the current revenues-based regime in place for the past eight years.

The result has been predictable. The USF contribution base, comprised largely of assessable telecommunications service revenues reported by contributors, continues to shrink, while the demand for universal service funding continues to grow. To no one’s surprise, the quarterly contribution factor has thus skyrocketed. Since the Commission released its *USF Contribution FNPRM* in 2012, the quarterly contribution factor has grown exponentially. It

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*(footnote cont’d.)*

revenues for USF contribution purposes, if magicJack were to become an interconnected VoIP provider. *magicJack VocalTec, Ltd.*, File No. EB-IHD-14-00014887, Order, DA 20-589 (June 5, 2020) (“Consent Decree”). However, magicJack is not, never has been, and has no intention of becoming an interconnected VoIP provider. This methodology has no bearing on the appropriate approach for identifying assessable one-way VoIP revenues, and, in any event, is not binding upon other one-way VoIP providers.

17  *See, e.g.*, Microsoft Comments at 1-2 (“… fundamental reform of the contribution system is now urgently needed”); Comments of Google Inc., WC Docket No. 06-122, GN Docket No. 09-51, at 1-2 (filed Aug. 6, 2012).
currently stands at 26.5 percent, which is a record, as compared to 17.4 percent in the second quarter of 2012.\(^{18}\)

Extending USF contribution obligations on a new class of services such as one-way VoIP will not reverse this trend. First, there is no reason to believe that the revenues associated with one-way VoIP services are significant enough to make a dent in the quarterly contribution factor. Second, as explained immediately above, there are a host of implementation issues associated with subjecting one-way VoIP services to USF contribution obligations – issues that undoubtedly would complicate, if not frustrate, the Commission’s desire to tap additional revenue sources for USF contribution purposes. Thus, the public interest does not require including revenues derived from the provision of one-way VoIP services in the contribution base because doing so would not achieve the Commission’s goal of ensuring the “long term sustainability” of the USF. *USF Contribution FNPRM*, ¶ 22.

In short, the iceberg that threatens to sink the USF contribution system continues to loom. It cannot be avoided by extending USF contribution obligations to one-way VoIP services. Rather, the only way for the Commission to avert disaster is to reform and modernize the USF regime once and for all.

\(^{18}\) Nearly six years ago, Commissioner O’Rielly emphasized the need for USF contribution reform, observing that the current path was “clearly disturbing and unsustainable.” *USF Contribution Factor Over Time* (Sept. 11, 2014), https://www.fcc.gov/news-events/blog/2014/09/11/usf-contribution-factor-over-time. Commissioner O’Rielly made this observation when the contribution factor was 16.1 percent, which is significantly lower than the current contribution factor of 26.5 percent.
IV. THE FCC MUST OVERHAUL ITS UNIVERSAL SERVICE SYSTEM BECAUSE THE COMMISSION IS BARRED BY THE GOVERNMENT CORPORATION CONTROL ACT AND THE CONSTITUTION FROM COLLECTING AND DISBURSING USF FUNDS THROUGH USAC.

Rather than attempting to subject one-way VoIP providers to USF contribution obligations, the Commission should devote its time and energy to reforming the USF system. Those reforms should include not only the current contribution regime – which is irreparably broken as discussed above – but the entire universal service framework.

The Commission’s current USF framework has been built around USAC, which is a private corporation tasked with calculating and collecting universal service contributions and disbursing universal service support. But that framework represents the proverbial house of cards because USAC violates the Government Corporation Control Act and the U.S. Constitution. Unless the Commission remedies these violations, it will expose the entire system to collapse.

A. USAC Violates the Government Corporation Control Act.

its current form, the Act provides that an “agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action.” 31 U.S.C. § 9102 (emphasis added). No law authorizes USAC’s creation, much less “specifically.”

1. **The Commission “Established” USAC “To Act As An Agency.”**

There is no doubt that the Commission “establish[ed]” USAC, *id.*, as both USAC and the Commission admit. *See, e.g.*, *Glossary of Terms*, Universal Serv. Admin. Co., https://www.usac.org/e-rate/resources/glossary-of-terms/ (last visited Jan. 19, 2020) (explaining that USAC was “created by the FCC in 1997”); *Brief for Respondent at 14 n.19, AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006) (No. 05-1096), 2005 WL 3221136, at *14 (“USAC is an independent entity created and appointed by the FCC . . . .”); *United States ex rel. Heath v. Wisc. Bell, Inc.*, 760 F.3d 688, 689 (7th Cir. 2014) (“The Federal Communications Commission . . . established the Universal Service Administrative Company . . . .”). As the Commission put it in its implementing order, “we direct [the National Exchange Carrier Association] to establish USAC.” *Changes to the Board of Directors of the National Exchange Carrier Association (Changes to the Board I)*, 12 FCC Rcd. 18,400, 18,418 ¶ 30 (1997) (emphasis added); *see also, e.g.*, *id.* at 18,423 ¶ 39 (delegating power to the Commission’s Chairman to aid in “establishing USAC as quickly as possible”); *id.* at 18,438 ¶ 71 (“we direct NECA to establish USAC”).

Nor is there any doubt that the Commission established USAC “to act as an agency.” 31 U.S.C. § 9102. The term “agency,” for purposes of title 31 (of which the Government Corporation Control Act is a part) is defined broadly as “a department, agency, or instrumentality of the United States Government.” 31 U.S.C. § 101. In this context, an “instrumentality” is a “thing used to achieve an end or purpose” of the government. *Black’s Law Dictionary* (11th ed. 2019); *see also Webster’s Third New International Dictionary* 1172 (3d ed. 1993) (defining “instrumentality” as “something that serves as an intermediary or agent through which one or

That describes USAC to a T. The Commission both “created” USAC, Brief for Respondent at 14 n.19, *AT&T*, 454 F.3d 329, and concedes that USAC’s “establishment . . . [was] crucial to the Commission’s efforts to implement promptly and efficiently the new universal service program mandated by” federal law, *Changes to the Board I*, 12 FCC Rcd. at 18,447–48 ¶ 95 (emphasis added). As the Commission explained, “we [the Commission] are establishing a completely new universal service program,” *id.* at 18,429 ¶ 53, and “[t]o initiate [our] program, . . . the USAC . . . must complete quickly a number of administrative functions,” *id.* at 14,448 ¶ 95. Indeed, USAC’s certificate of incorporation—approved by the Commission—leaves no doubt that the company’s “purpose” was not to run its own business, but to “engage in any lawful act or activity, consistent with Federal Communications Commission (‘FCC’) Orders and Rules.” Universal Serv. Admin. Co., 1997 Board of Directors Meeting Minutes, attachment III ¶ 3 (Sept. 22, 1997) (emphasis added) (certificate of incorporation); *see also Changes to the Board I*, 12 FCC Rcd. at 18,418 ¶ 30 (“direct[ing] NECA to submit to the Commission for approval proposed articles of incorporation, bylaws, and any documents necessary to incorporate USAC . . . in order to ensure . . . that all requirements of [the Commission] have been satisfied”). Far from being an autonomous private company, USAC is—and always has been—an instrumentality of the Commission.
2. **But The Commission Lacked Specific Statutory Authorization.**

The only question is whether a “law of the United States specifically authoriz[ed]” the Commission to create USAC. 31 U.S.C. § 9102. No such law exists.

The Commission locates its “specific[] authoriz[ation]” to establish USAC, *id.*, in sections 4(i) and 254(d) of the Communications Act, 47 U.S.C. §§ 154(i), 254(d). *See Changes to the Board II*, 13 FCC Rcd. at 25,065 ¶ 14. But as the Government Accountability Office has already held, neither section “provide[s] the specific statutory authority needed by the Commission to meet the requirements of the Control Act.” B-278820, 1998 WL 465124, at *3.

It is not even close. Specific authorization is just that—*specific*. Congress must “express[ly]” state that the Commission is empowered to create a corporation. *Starr Int’l Co. v. United States*, 121 Fed. Cl. 428, 469 (2015) (emphasis added), *vacated in part on other grounds*, 856 F.3d 953 (Fed. Cir. 2017). But neither section 4(i) nor section 254(d) even *mentions* a corporation, much less specifically authorizes the Commission to create one. “[T]hat should be the end of it.” *In re Nica Holdings, Inc.*, 810 F.3d 781, 791 (11th Cir. 2015) (finding no “specific authorization” to file bankruptcy, where “[b]ankruptcy is never mentioned in the [ ] agreement”); *cf. Civil Aeronautics Bd. v. Delta Airlines, Inc.*, 367 U.S. 316, 334 (1961) (explaining that where an action must be “specifically authorized,” an agency “cannot rely” on its general “enabling act”); *S&S Packing, Inc. v. Spring Lake Rantite Ranch, Inc.*, 702 F. App’x 874, 885 (11th Cir. 2017) (holding that a contract’s authorization to use the “help of [one party’s] marketing partners” was “not express enough” to count as “specific[] authoriz[ation]” to use “commission merchants”).

In any event, Congress was not just silent on the matter—although, again, silence is fatal to the Commission’s position. Congress indicated—repeatedly—that it *intended to withhold* from the Commission the authority to create a corporation to administer the universal service

conference report, Congress indicated that its actions should “in no way be considered as expressing the approval of Congress of the action of the Federal Communications Commission (FCC) in establishing one or more corporations to administer Section 254(h) of the Communications Act of 1934.” H.R. Rep. No. 105-504, at 87 (1998) (Conf. Rep.).

If anything, Congress’s actions expressed its disapproval. The Commission “request[ed] from Congress specific statutory authority, similar to that provided in connection with numbering administration, to create or designate, . . . one or more entities, such as the Universal Service Administrative Company, to administer federal universal support mechanisms.” Report in Response to Senate Bill 1768 and Conference Report On H.R. 3579, 13 FCC Rcd. 11,810, 11,819 ¶ 15 (1998). But Congress has never granted that request, leaving serious questions about the Commission’s authority “under the Government Corporation Control Act[] to vest administrative responsibilities . . . in USAC.” Id.

With nowhere left to turn, the Commission claims that it has “implicit[] . . . authority to employ an independent entity to administer universal service.” Changes to the Board II, 13 FCC Rcd. at 25,066 ¶ 14 (emphasis added); see id. (discussing the way the Commission “had been,” with the help of a corporation, “administering the high cost support mechanism for more than a decade,” and inferring that Congress must not have intended “to prohibit the Commission from using . . . another entity to administer universal service” (emphasis added)). But implicit authority is the opposite of explicit—or specific—authority. And the very fact that the Commission relies on implicit authority all but confirms that there is no “specific[] authori[ty],” as the Government Corporation Control Act requires. 31 U.S.C. § 9102.

In Goodwin v. Jacksonville Gas Corp., for example, plaintiffs argued—like the Commission argues here—that another party’s “course of conduct” had “indicated” that plaintiffs had the necessary authorization to act. 302 F.2d 355, 361, 362 (5th Cir. 1962). But the
court held that regardless of what the course of conduct “might have indicated,” it “could hardly be regarded as showing a specific authorization” (which is what was required). Id. at 362 (emphasis added). So too here. “The requirement for specific authorization [can]not be met by inferences[.]” Id. And whatever Congress might “obviously [have] assume[d],” Brief for Petitioners 45, U.S. Dep’t of Justice v. Julian, 486 U.S. 1 (1988) (No. 86-1357), 1987 WL 881265, its actions cannot be “convert[ed] . . . into a statute that ‘specifically’” authorizes an action, Julian, 486 U.S. at 10 (emphasis added).

B. USAC Is Unconstitutional.

No matter the purported source of authority for USAC’s creation, the Commission’s decision to employ USAC to collect universal service payments runs afoul of core constitutional constraints on agency power. Although USAC wields enormous power over those who are subject to universal service obligations, it is structured as a private corporation, run by private, economically self-interested directors. This novel structure violates both (1) the Fifth Amendment’s Due Process Clause and (2) either the Appointments Clause or the private non-delegation doctrine.

1. Due Process Bars USAC’s Economically Self-Interested Directors From Exercising Any Regulatory Authority Over One-Way VoIP Providers.

Due process does not permit an “economically self-interested actor” to wield regulatory power over other private parties. Ass’n of Am. R.Rs. v. Dep’t of Transp., 821 F.3d 19, 23 (D.C. Cir. 2016). In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Supreme Court held that granting a corporation “the power to regulate the business of another, and especially of a competitor,” is “clearly a denial of rights safeguarded by the due process clause.” Id. at 311. Because a regulator must be “presumptively disinterested,” Congress could not empower selected, self-interested companies to regulate the rest of the industry. Id. Likewise, in Gibson
v. Berryhill, 411 U.S. 564 (1973), the Court held that a board consisting of unaffiliated optometrists could not exercise regulatory authority over optometrists employed by corporations. The Court explained that the board members had “substantial pecuniary interests” at stake, id. at 579, because they would benefit if the corporate optometrists were forced out of business, id. at 571. In either case, due process was violated because the entity wielding regulatory power could act in a way that disadvantaged its competitors.

USAC suffers the same fundamental flaws:

First, the directors wield significant regulatory authority. As the “Administrator of the federal universal service support mechanisms,” 47 C.F.R. § 54.701(a), USAC is “responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds,” id. § 54.702(b). Regulated entities must “provide [] records and documentation to . . . [USAC] upon request.” Id. § 54.711(a). And if, for example, an entity “fails to file” the appropriate worksheets—as the Bureau alleges in this case—then USAC “shall bill that [entity] based on whatever relevant data [USAC] has available,” id. § 54.709(d); the entity “shall” immediately “pay the amount” due, id. § 54.713(a). Although the Commission asserts that USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress,” id. § 54.702(c), the company in fact exercises substantial regulatory powers, including with its freewheeling contribution calculations based on “whatever relevant data” USAC happens to have, id. § 54.709(d).

Second, the directors do not even purport to be “disinterested.” Carter Coal, 298 U.S. at 311. To the contrary. They are nominated by private parties, see 47 C.F.R. § 54.703(c), for the explicit purpose of representing private interests—certain narrow “cross-section[s] of industry and beneficiary interests,” Changes to the Board I, 12 FCC Rcd. at 18,420 ¶ 33. One director, for example, “shall represent competitive local exchange carriers.” 47 C.F.R.
§ 54.703(b)(4). Private companies are of course entitled, and indeed duty-bound, to protect their interests. But they can’t be part of the government and regulate other private parties on that basis.

And third, USAC directors compete with, or otherwise have interests adverse to, non-interconnected VoIP providers. The less money that non-interconnected VoIP providers contribute to the universal service fund, the more money other contributors will need to pay, see Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, 22 FCC Rcd. 16,372, 16,378 ¶ 12 (2007) (“[L]ate or inadequate payments shift[] the resulting economic burden of the USF to the compliant contributors . . . , affording delinquent contributors an unfair competitive advantage over contributors that make payments on a timely basis.”), and the less money the beneficiaries (e.g., rural health care providers, see 47 C.F.R. § 54.703(b)(9)), will receive, see Comprehensive Review, 22 FCC Rcd. at 16,378 ¶ 12 (“Contributor delinquencies in payment deprive the universal support mechanisms of the funds necessary to carry out the program’s goals.”).

As in Carter Coal and Berryhill, this dynamic violates due process by creating a serious risk that the regulators will wield their power to benefit their own “substantial pecuniary interests,” Berryhill, 411 U.S. at 579, at others’ expense. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 805 (1987) (warning of the “potential for private interest to influence the discharge of public duty”).

The fact that the Commission could later correct one of USAC’s decisions does not solve the problem. See 47 C.F.R. § 54.719. The question is not whether a self-interested actor’s decisions could “affect,” much less definitively determine, “ultimate damages and relief.” Ass’n of Am. R.Rs., 821 F.3d at 33. It is whether the actor can sufficiently alter “the risk of liability” such that the regulated parties “face powerful incentives to obey. That is regulatory power.” Id.
(quoting Dep’t of Transp., 135 S. Ct. at 1236 (Alito, J., concurring)). In Association of American Railroads, for instance, the court assumed that violation of Amtrak’s standards was not itself subject to punishment. Id. Such a violation was simply grounds for a government agency to open an investigation. Id. Nevertheless, the court held that Amtrak wielded regulatory power, because complying with Amtrak’s standards reduced the risk of government investigation. Id.

Similar “powerful incentives to obey” USAC’s commands apply here. Id. When, for example, an entity that has failed to file a Telecommunications Reporting Worksheet “is billed by [USAC],” that entity “shall pay the amount for which it is billed,” 47 C.F.R. § 54.713(a)—or begin accruing significant late fees, see 47 C.F.R. § 54.713(c); Comprehensive Review, 22 FCC Rcd. at 16,380 ¶ 15 (setting a high interest rate, the better to “instill . . . the incentive to comply”). The pressure to immediately pay what USAC claims is owed is enormous. And “[t]hat is regulatory power.” Ass’n of Am. R.Rs., 821 F.3d at 33 (quoting Dep’t of Transp., 135 S. Ct. at 1236 (Alito, J., concurring)).

The analysis does not change simply because the Commission could later instruct USAC to return any overpayments. The due process violation is complete once USAC forces a regulated entity to “obey” its commands. Ass’n of Am. R.Rs., 821 F.3d at 33 (quoting Dep’t of Transp., 135 S. Ct. at 1236 (Alito, J., concurring)). Indeed, the Supreme Court has expressly rejected the notion that a due process violation “may be done if it can be undone.” Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972)). In Fuentes, a state law authorized “state agents to seize a person’s possessions, simply upon the ex parte application of any other person who claim[ed] a right to them.” Id. at 69. The Court held that this process violated due process because it permitted self-interested individuals to unilaterally “invoke state power.” Id. at 93. The fact that state officials could later participate,
order the return of wrongfully seized property, and even award damages, was irrelevant. *Id.* at 81–82. As here, the later remedies could not “undo” the initial violation. *Id.* at 82.

2. **USAC’s Structure Violates Either the Appointments Clause or the Private Non-Delegation Doctrine.**


If USAC is part of the government, then its CEO and directors are appointed in violation of the Appointments Clause. *Cf. Free Enter. Fund*, 561 U.S. at 484, 510 (addressing an Appointments Clause challenge to a “private ‘nonprofit corporation’”).

Yet the CEO and directors are not appointed in conformity with the Clause. They are not “nominate[d]” by the President and confirmed by the Senate. U.S. Const. art. II, § 2, cl. 2. Nor are they appointed by the “President alone,” a “Court[] of Law,” or a “Head[] of Department[].” *Id.* Each director is “nominate[d] by” the “industry or non-industry group that is represented by such director,” 47 C.F.R. § 54.703(c)(1), while the CEO is “nominate[d] by” the “members of the Board of Directors.” *Id.* § 54.704(b)(1). True, the Chairman of the FCC is to “approve” the CEO’s nomination, *id.*, and can “select” a CEO or director if the private parties responsible for the nomination fail to “reach consensus,” *id.* §§ 54.703(c)(3), 54.704(b). But such a limited, contingent role is a far cry from the unfettered appointment authority that the Appointments Clause requires. U.S. Const. art. II, § 2, cl. 2; see *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring).

Alternatively, if USAC is not part of the government, then its structure violates the private non-delegation doctrine. It is well-settled that “an agency may not delegate its public duties to private entities.” *Sierra Club v. Sigler*, 695 F.2d 957, 962 (5th Cir. 1983); accord, e.g., *Carter Coal*, 298 U.S. at 310–11; *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670–71 (D.C. Cir. 2013), vacated on other grounds, 575 U.S. 43 (2015); *Nat’l Ass ’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984). The Commission may not, for example, authorize one private company “to choose whether” another company will have certain “access rights.” *City of Dallas v. FCC*, 165 F.3d 341, 358 (5th Cir. 1999). Nor may the Commission authorize one company “to determine [another’s] payment owed” to a public fund. *Cf. Pittston Co v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (upholding a private company’s administration of a public fund because the company had “no power to determine the premium payments owed”). Yet that is exactly what USAC does. See, e.g., 47 C.F.R. § 54.709(d) (“If a contributor fails to file a Telecommunications Reporting Worksheet . . . the
Administrator shall bill that contributor based on whatever relevant data the Administrator has available . . . ”).

V. CONCLUSION

For the foregoing reasons, the Commission should decline invitations to subject one-way VoIP revenues to USF contribution requirements.

Respectfully submitted,

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