



General Counsel

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503**

April 18, 2018

Mr. Thomas M. Johnson, Jr.
General Counsel
Federal Communications Commission
Washington, D.C.

Dear Mr. Johnson:

This letter sets forth the new legal opinion of the Office of Management and Budget, Office of General Counsel (“OMB OGC”) on issues concerning the Universal Service Fund (“USF”), and responds to a request from the Department of Treasury, Bureau of the Fiscal Service, Office of Chief Counsel, to revisit conclusions made by our Office in 2000 regarding whether USF receipts are public moneys and may be held outside of the U.S. Treasury.¹ On April 28, 2000, OMB OGC provided a legal opinion (“the 2000 OMB OGC opinion”) concluding that funds collected for the Universal Service Fund pursuant to section 254 of the Telecommunications Act of 1996 (“the 1996 Act”) are not “public moneys” received “for use of the United States,” and thereby any funds collected pursuant to such section are not subject to the requirements of section 3302(b) of title 31, U.S. Code (“the miscellaneous receipts statute”). We have revisited the conclusions made in the 2000 OMB OGC opinion, and for the reasons described below, believe that funds collected for the Universal Service Fund pursuant to section 254 of the Telecommunications Act of 1996 are subject to the miscellaneous receipts statute. Furthermore, we believe that section 254 of the 1996 Act constitutes a permanent indefinite appropriation, and so any funds collected pursuant to such section are available for obligation for expenses outlined in such section. Such funds are not subject to the Treasury general fund deposit requirements of the miscellaneous receipts statute, but should be deposited into a Federal Communications Commission (“FCC”)-administered account in the Treasury.

I. The miscellaneous receipts statute

The miscellaneous receipts statute directs that “... an official or agent receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”² This statute, in large part, preserves Congressional power over the appropriations process by restating the principle that a government official or agent may not spend money unless Congress provides an appropriation.³ In keeping with such

¹ Consistent with a GAO recommendation, the FCC is exploring transferring USF funds from a private bank to the U.S. Treasury. See, GAO, *Telecommunications: Additional Action Needed to Address Significant Risks in FCC’s Lifeline Program*, GAO-17-538 (May 2017) at 65.

² 31 U.S.C. § 3302(b)

³ GAO, *Principles of Federal Appropriations Law 3rd Ed.*, at 6-169.

principle, both courts and the Comptroller General have explained that the statute should be applied broadly to financial transactions involving the government, and so, agencies may not circumvent the statute by altering the form of their transactions through a third party.⁴

The Comptroller General decisions advise that a government official or agent “receive(s) money for the Government” and thereby triggers the requirements of the miscellaneous receipts statute when such individual receives “money ... to be used to bear the expenses of the government or to pay the government’s obligations.” For example, the Comptroller General found that fees charged by the Small Business Administration (“SBA”) to certain lenders that were collected and retained by contractors were subject to the miscellaneous receipts statute because the “fees paid by ... lenders represent expenses SBA would have to pay from its appropriations regardless of whether the expenses were performed by actions of SBA employees or by a contractor’s employees.”⁵ In general, funds are received for the Government when an official or agent receives money to pay for an expense “directly related to the agency’s work.”⁶

II. Universal Service Fund

Congress created the FCC in the Communications Act of 1934 to regulate the telecommunications industry.⁷ In such Act, Congress directed FCC to use its regulatory authority to promote universal service,⁸ which is “the principle that all Americans should have access to communications services.”⁹ FCC currently implements universal service through the authority provided to the Commission in the 1996 Act, which directed the FCC and Federal-State Joint Board on Universal Service to “base policies for the ... advancement of universal service on [a number of] principles,” including, but not limited to: making quality services available at just, reasonable, and affordable rates; providing access to advanced telecommunications and information services in all regions of the Nation; providing comparable services to consumers in urban and rural areas; and providing advanced telecommunications services for schools, health care, and libraries.¹⁰ The 1996 Act also required every telecommunications carrier that provides

⁴ *E.g., Scheduled Airlines Traffic Offices, Inc. Reeve Aleutian Airways, Inc. v. Rice*, 789 F.Supp. 417, 421 (D.D.C. 1992) (explaining that a private airline’s proposed concession fee to be available for the Air Force’s morale, recreation, and welfare fund in a bid award for a contract to exclusively serve an Air Force Base on a remote island would be subject to the miscellaneous receipts statute because the amounts would be paid “to purchase the use of property of the United States”); B-303413, Nov. 8, 2004.

⁵ *Id.* at 7.

⁶ *Id.* at 4 citing B-221536, June 12, 1986.

⁷ Pub. L. 73-416

⁸ 47 U.S.C. § 151 (“For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”)

⁹ *History of Universal Service and the Universal Service Fund*, available at <https://www.fcc.gov/general/universal-service>.

¹⁰ 47 U.S.C. § 254(b)

interstate service to contribute to a mechanism established by the FCC to preserve and advance universal service.¹¹ Through regulation, FCC established the Universal Service Fund, prescribed carrier's contribution rates for such Fund, and appointed the Universal Service Administrative Company ("USAC"), a nonprofit entity, as the permanent Administrator of the federal universal service mechanism.¹² Consistent with the direction in the 2000 OMB OGC opinion that the Universal Service Fund does not constitute "public moneys," the Universal Service Fund is held in a bank account outside of the Treasury.

The 2000 OMB OGC opinion explained that the Universal Service Fund, as authorized by the 1996 Act, was, in part, not "public moneys" for the purposes of the miscellaneous receipts statute because the Universal Service Fund had "been maintained outside of the Treasury," and there was no indication that through passing the 1996 Act, Congress intended to change the administration of the Fund.¹³ However, we disagree with the assertion that Congress did not intend to change the administration of universal service support in the 1996 Act in material ways. Instead, the Act specifically directed FCC to administer universal service through "specific, predictable, and sufficient" universal service support mechanisms to respond to increased competition within the telecommunications marketplace,¹⁴ and authorized the Commission to collect and distribute financial contributions from telecommunications carriers to promote universal service.

From 1983 to 1996, FCC implemented universal service through explicit and implicit, but primarily implicit, subsidies to telecommunications providers.¹⁵ Prior to 1996, universal service was largely achieved through implicit subsidies, which consisted of geographic rate averaging, subsidizing residential lines via business lines, and interstate access charges.¹⁶ Only the smallest of the three implicit subsidy mechanisms – interstate access charges – was regulated by the FCC.¹⁷ The FCC also provided a limited amount of explicit subsidies to reduce the cost of telephone service through payments to carriers for certain cost recovery or through certain reductions in individuals' bills.¹⁸ To fund these explicit subsidies, in 1983, FCC established an

¹¹ 47 U.S.C. § 254(d)

¹² 47 CFR Part 54

¹³ *Damus Letter* (April 2000) at 1,4.

¹⁴ 47 U.S.C. § 254(d); *see also* 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.")

¹⁵ *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (1999) (*TOPUC*).

¹⁶ *Id.* ("For example, the regulators may require the carrier to charge 'above-cost' rates to low-cost, profitable urban customers to offer the 'below-cost' rates to expensive, unprofitable rural customers."); *see generally* *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8784 (1997).

¹⁷ *Id.*

¹⁸ *TOPUC* at 406 ("This form of subsidy includes using revenues from line charges on end-users to subsidize high-cost service directly and to support the Lifeline Assistance program for low-income subscribers.")

association of incumbent local telephone companies, known as the National Exchange Carrier Association (“NECA”), to, amongst other activities, administer the first iteration of the Universal Service Fund.¹⁹ The Universal Service Fund consisted of amounts collected by NECA from carrier charges.²⁰ NECA used amounts in the fund to “preserve universal service” by reimbursing local exchange companies for certain fixed costs.²¹ FCC did not consider amounts in this iteration of the Universal Service Fund to be “public moneys” because under section 203 of the Communications Act of 1934, the “preparation of tariffs and the administration of revenue pools is not a governmental function;” therefore, it could be carried out by NECA, an association of private carriers, taking over functions previously performed by AT&T.²²

The 1996 Act took a number of new steps to promote competition that had been growing in the telecommunications marketplace.²³ Among other things, the Act took measures to break up then-existing local monopolies by requiring carriers to permit other carriers to connect with their networks and by preempting state and local barriers to entry.²⁴ Due to this newly-competitive landscape, the Act needed to adopt a new paradigm for universal service that relied less on “implicit” subsidies contained in rates charged to dominant carriers. Accordingly, the 1996 Act directed FCC “to restructure [its] universal service support mechanisms to ensure the delivery of affordable telecommunications services to all Americans in an increasingly competitive marketplace,”²⁵ and to make those mechanisms “explicit.”²⁶

The Act recognized that some policies traditionally justified on universal service considerations would place either incumbents or new competitors at a disadvantage in a competitive market.²⁷ Congress thus directed FCC to establish a mechanism to be funded by contributions from telecommunications carriers to preserve and advance universal service, and provided FCC with permissive authority to require contributions from other providers of

¹⁹ In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Third Report and Order, 93 F.C.C.2d 241 (1983).

²⁰ *Id.* at 243, 282-83.

²¹ *Id.* at 243.

²² *Id.* at 334.

²³ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 *et al.*, First Report and Order, 11 FCC Rcd 15499, 15505 (1996) (*Local Competition Order*).

²⁴ See 47 U.S.C. §§ 251, 253

²⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-98, Report to Congress, 13 FCC Rcd 11501, 11505 (1998).

²⁶ 47 U.S.C. § 254(e)

²⁷ See *Local Competition Order* at 15505-06.

telecommunications.²⁸ FCC implemented such directive by requiring that “carriers should receive support for serving rural, insular and high cost areas based on the forward-looking cost of providing the supported services” from contributions from other carriers through the new universal support mechanism.²⁹ The 1996 Act also created new support mechanisms, funded through the same pool of contributions, for telecommunications carriers serving schools, libraries, and rural health care providers.³⁰ The Congressional directive in the 1996 Act for FCC to create and administer the new universal support mechanism substantially altered FCC’s role in promoting and advancing universal service, and changed the legal character of the funds received by the FCC for universal service support.

III. Application of the requirements of the miscellaneous receipts statute to the Universal Service Fund

The directive in the 1996 Act for FCC to administer Federal support to carriers to promote universal service made carrier contributions collected pursuant to section 254 of such Act “money...received for the Government,” and thereby subject to the miscellaneous receipts statute. The Comptroller General’s decisions explain that the miscellaneous receipts statute applies to any funds received by an agency or third party from an outside source to pay for an expense “directly related to the agency’s work.”³¹ The 1996 Act required the FCC to establish certain telecommunications services as “universal service” based on its consideration of factors specified in section 254(c)(1) of the Act, and to establish mechanisms to preserve and advance universal service through explicit federal support.³² Because the 1996 Act provided FCC with specific legislative authority to administer and advance universal service through Federal support, the money received by the FCC from interstate telecommunications carriers to support universal service is for expenses that directly relate to the agency’s statutory authorities. As such, the funds collected under subsection (d) of section 254 of the 1996 Act constitute “money ... received for the Government” and are subject to the miscellaneous receipts statute.

Even if funds are public money that are subject to the miscellaneous receipts statute, it does not necessarily follow that the money should be deposited in the Treasury as miscellaneous receipts. As a general matter, the miscellaneous receipts statute requires that money received for the Government shall be deposited in the general fund of the Treasury unless Congress provides

²⁸ 47 U.S.C. § 254(d)

²⁹ See *Federal-State Joint Board On Universal Service*, Seventh Report & Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45 Fourth Report & Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, 14 FCC Rcd 8078, 8087 (1999).

³⁰ 47 U.S.C. § 254(h)

³¹ *Id.* at 4 citing B-221536, June 12, 1986.

³² 47 U.S.C. § 254(c)(1) (“Universal service is 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.”); 47 U.S.C. § 254(d) (“Every 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.”)

the agency with authority to retain the funds, or if the funds constitute a “repayment” to an appropriation. Here, we believe that Congress provided an appropriation of the funds collected by FCC for FCC-administered universal service support. Specifically, section 254 of the Act appropriates the contribution amounts to FCC for making payments to eligible providers for “specific Federal universal service support.” In addition, GAO has consistently viewed section 254 of the 1996 Act as a permanent indefinite appropriation to the FCC of universal service receipts.³³ Based on these Congressional commands, USF receipts should be deposited into an FCC-administered account in the Treasury and made available for “specific Federal universal service support.”

Sincerely,



Mark R. Paoletta
General Counsel

CC: The Honorable Brent J. McIntosh
General Counsel
U.S. Department of the Treasury

³³ See e.g., Letter from Alice M. Rivlin, Director, Office of Management and Budget, to Senator Robert C. Byrd (March 19, 1996) at 5; GAO, *Telecommunications: Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program*, [GAO-05-151](#) (Feb. 9, 2005) at 14-15, 47-49 (“We recognize that prior to the passage of the Telecommunications Act of 1996, there existed an administratively sanctioned universal service fund. With the Telecommunications Act of 1996, Congress specifically expanded the contribution base of the fund, statutorily mandated contributions into the fund, and designated the purposes for which the monies could be expended. These congressional actions established USF in a manner that meets the elements for a permanent appropriation”)