Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 11 of the	)	
Commission's Rules Regarding the	)	PS Docket No. 15-94
Emergency Alert System	)	
	)	
Wireless Emergency Alerts	)	PS Docket No. 15-91

To: The Commission

COMMENTS OF TECHFREEDOM

TechFreedom hereby files these Comments in response to the Notice of Inquiry issued as part of the Notice of Proposed Rulemaking and Notice of Inquiry, adopted March 17, 2021 and released March 19, 2021 in the above-referenced proceeding.[1] The NOI seeks input to allow the Commission to meet its statutory mandate to "[n]ot later than 180 days after the date of enactment of [the] Act, and after providing public notice and opportunity for comment…complete an inquiry to examine the feasibility of updating the Emergency Alert System to enable or improve alerts to consumers provided through the internet, including through streaming services."[2] As demonstrated in these Comments, the Commission should inform Congress that while utilizing the Internet to distribute

[1] Notice of Proposed Rulemaking and Notice of Inquiry, FCC 21-36. The NPRM was published in the Federal Register on March 30, 2021. 86 Fed. Reg. 16565 (March 30, 2021) [hereinafter NOI]. The Federal Register Notice set the comment date for the Notice of Inquiry as May 14, 2021, and reply comment date of June 14, 2021. These comments are timely filed.

[2] NOI, *supra* 1, ¶ 57 (quoting William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, National Defense Authorization Act of 20221, Pub. L. 116-283, 134 Stat. 3388, § 9201(e) (NDAA21)).

emergency alerts theoretically is a laudable idea, the Internet is not designed with an "always on/always available" architecture, and the FCC lacks jurisdiction over "streaming services" to require them to participate in the Emergency Alert System (EAS).

1. About TechFreedom

TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

2. The Statutory Requirements of the NDAA21 is Limited to "Examining the Feasibility" of Using the Internet to Distribute WEA Alerts and Reporting the Results Back to Congress

The Commission's role under NDAA21 Section 9201(e) is limited. Congress requested only that the FCC "examine the feasibility of updating the Emergency Alert System to enable or improve alerts to consumers provided through the internet" and report its finding back to Congress.[3] To this end, the NOI asks a number of important questions in paragraphs 57-68. Nonetheless, the NOI fails to ask two key gating questions:

> 1) is the Internet constructed in such a way that it can be relied upon to transport emergency alert messages?
>
> 2) Does the FCC have jurisdiction over "streaming services" such that it can promulgate rules that bring them into the EAS system?

We submit that the answer to both of those critical questions is a resounding "NO," and the FCC should end its inquiry there, and report back to Congress these findings. Section 9201(e)

[3] NDAA21, Pub. L. 116-283, 134 Stat. 3388, § 9201(e)(1) & (2).

is neither a directive, nor an invitation, for the FCC to begin a rulemaking proceeding. At most, the FCC could inform Congress of the necessary statutory changes necessary to grant it authority. If it does so, however, it needs to fully analyze the First Amendment impacts of, for the first time, its proposed regulation of Edge Providers, as discussed below.

3. The "End-to-End Emergency Communications Infrastructure" Does Not Encompass the Internet

Section 615 of the Communications Act establishes the portions of this country's telecommunications networks that constitute the "end-to-end emergency communications infrastructure."[4] An analysis of this term makes clear that Congress never intended to include the Internet as part of this infrastructure. The term derives from the Wireless Communications and Public Safety Act of 1999.[5] The 1999 Act describes two types of services, "emergency services," defined as the 911 system[6] and "emergency notification services," defined as "services that notify the public of an emergency."[7] The Internet never was mentioned in the 1999 Act.[8] Compare this to the 1996 Telecommunications Act, Public Law 104-104, which refers to the Internet eleven times.[9] In subsequent implementation of the 1999 Act, the FCC and other agencies have limited the term "emergency notification services"

[4] 47 U.S.C. § 615.

[5] Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, available at https://www.govinfo.gov/content/pkg/PLAW-106publ81/html/PLAW-106publ81.htm.

[6] *Id.* § 222(5).

[7] *Id.* § 222(6).

[8] Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, available at https://www.govinfo.gov/content/pkg/PLAW-106publ81/html/PLAW-106publ81.htm.

[9] Telecommunications Act of 1996, Pub. L. No. 104-104, available at https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg56.pdf.

to systems such as the Emergency Alert System (EAS), regulated by 47 C.F.R. Part 11,[10] and the Wireless Emergency Alert (WEA) system, regulated under 47 C.F.R. Part 10,[11] both of which are accessed and administrated at the federal level by FEMA, the FCC, and the National Oceanic and Atmospheric Administration's National Weather Service.[12] The Department of Homeland Security defines "emergency notification system" as a type of "reverse 911."[13] Thus, reliance on the Internet as a necessary component of the "end-to-end emergency communications infrastructure" was never contemplated by Congress, and never implemented by any federal agency. To jump immediately to a "feasibility" analysis of whether the Internet should be integrated into the EAS system fails to deal with the fact that prior to NDAA21, Congress has never considered the Internet as part of the EAS system, and for good reason, as discussed below.

4. The Internet Was Never Designed to Be More than a "Best-Efforts" System

The Internet has always been, at its core, a "best efforts" network. The United States government has repeatedly stated such, for example:

> In the past most internet traffic was delivered on what is known as a "best efforts" basis, a quality standard that does not guarantee that the traffic will be delivered by a certain time or speed. Under best efforts some data packets arriving at congestion points will be dropped and held until a future date while others will be forwarded in real time. Earlier common applications (e.g., email) are not time sensitive and the use of best efforts will not degrade the user

[10] For a fuller explanation of EAS, *see The Emergency Alert System (EAS)*, FCC (May 13, 2020), https://www.fcc.gov/emergency-alert-system.

[11] For a fuller explanation of WEA, *see Wireless Emergency Alerts*, FCC (April 7, 2020), https://www.fcc.gov/public-safety-and-homeland-security/policy-and-licensing-division/alerting/general/wireless.

[12] *Id*.

[13] *See Best Practices in Wireless Emergency Alerts*, Department of Homeland Security First Responders Group (Sept. 2013), https://www.dhs.gov/sites/default/files/publications/Wireless%20Emergency%20Alerts%20Best%20Practices_0.pdf.

> experience. Newer applications (e.g., telemedicine) are sensitive to interruption and latency making network management practices that affect how packets travel over the network of greater concern.[14]

Any inquiry into whether the Internet can be integrated into the overall EAS system has to take this into account. While the Internet has demonstrated its overall resilience over the years, and especially during the COVID-19 pandemic, it was never designed to have the level of point-to-point reliability necessary to be considered as part of the "end-to-end emergency communications infrastructure." Imposing requirements on BIAS providers, for example, to make sure that emergency messages make it out to people who should be receiving them via the Internet, would interject a level of "prioritization" into the Internet that does not exist, and may never be possible, given the Internet's current architecture.

This line of thinking echoes the flawed arguments some commenters made in the net neutrality proceeding after the *Mozilla* remand.[15] Even if the FCC were to adopt rules requiring that all communications to and from public safety entities receive prioritization, those rules could never assure the types of access and service guarantees these commenters

---

[14] ANGELE A. GILROY, CONGRESSIONAL RESEARCH SERVICE, ACCESS TO BROADBAND NETWORKS: NET NEUTRALITY 2 (April 10, 2019), available at https://crsreports.congress.gov/product/pdf/IF/IF10955. *See also Special Access Data Collection -- Glossary of Terms*, FCC (June 3, 2014), https://www.fcc.gov/general/special-access-data-collection-glossary-terms ("Best Efforts Business Broadband Internet Access Service means a best efforts Internet access data service with a minimum advertised bandwidth connection of at least 1.5 megabits per second (Mbps) in both directions (upstream/downstream) that is marketed to enterprise customers (including small, medium, and large businesses)."); *Explanation of Broadband Deployment Data*, FCC (Mar. 12, 2020), https://www.fcc.gov/general/explanation-broadband-deployment-data (explanation of FCC Form 477 data: "MaxCIRDown: Maximum contractual downstream bandwidth offered by the provider in the block for Business service (filer directed to report 0 if the contracted service is sold on a 'best efforts' basis without a guaranteed data-throughput rate)").

[15] *See* Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019); Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (*RIFO*).

demand in the net neutrality proceeding.[16] While the Internet and BIAS can serve as a platform for aiding public safety communications, it was never engineered to be always on, always available, always accessible, and always on-time, as would be necessary for it to be a reliable part of the EAS system. It is up to Congress, not the FCC, to craft a completely new statutory framework that specifically addresses the use of the Internet by public safety users or critical infrastructure providers or for communications with a clear nexus to public safety, outside of the previously established emergency services and emergency notification services. The NDAA21 certainly does not provide that independent authority.

5. The FCC Does Not Have Jurisdiction Over "Streaming Services" to Compel Them to Participate in the EAS System

The *NOI* properly notes that the NDAA21 statute nowhere defines "streaming service."[17] The question the *NOI* fails to ask, however, is the basis for the FCC to promulgate any rules that apply to such "streaming services," no matter how the FCC defines that term. Streaming services are a subset of what the FCC (and others) have described as "Edge Providers," Internet content providers who are basically beyond the reach of the FCC's jurisdiction. Such providers have never been regulated by the FCC, for very good reason. Since the dawn of the "net neutrality" debate, the FCC has been extremely careful to distinguish among the (at least) three sectors of the Internet: providing broadband Internet access

[16] *See, e.g.,* Restoring Internet Freedom Comments, WC Docket No. 17-108. Comments of Free Press at 18 ("The entire public must have access to open communications during a crisis, both to ensure those impacted can find and receive potentially life-saving information during an emergency, and to allow public health officials to build on-the-ground situational awareness with information they gather from residential broadband internet access service users."). *But see* Comments of AARP at 8, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) ("While the Record Refresh asks whether broadband providers have policies in place to facilitate public safety communications, just how broadband providers would track all communications that have public safety implications is not at all clear.").

[17] NOI, *supra* 1, ¶ 58.

service; providing content, applications, services, and devices accessed over or connected to broadband Internet access service ("edge" products and services); and subscribing to a broadband Internet access service that allows access to edge products and services.[18] The 2010 Net Neutrality Order made clear that its rules, including its "transparency" rules, did not apply to Edge Providers — the very entities that would have to be swept into the EAS system in order for the Internet to function as part of that system:

> these rules apply only to the provision of broadband Internet access service and not to edge provider activities, such as the provision of content or applications over the Internet. First, the Communications Act particularly directs us to prevent harms related to the ***utilization of networks and spectrum to provide communication by wire and radio***. Second, these rules are an outgrowth of the Commission's *Internet Policy Statement*. The Statement was issued in 2005 when the Commission removed key regulatory protections from DSL service, and was intended to protect against the harms to the open Internet that might result from ***broadband providers'*** subsequent conduct. ***The Commission has always understood those principles to apply to broadband Internet access service only***, as have most private-sector stakeholders. Thus, insofar as these rules translate existing Commission principles into codified rules, ***it is appropriate to limit the application of the rules to broadband Internet access service***.[19]

Only by focusing its rules exclusively on broadband providers, and not Edge Providers, was the 2010 Order able to dispense with the First Amendment arguments raised by some ISPs.[20]

---

[18] Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905, 17972-80, ¶ 20 (2010).

[19] *Id.* ¶ 50 (footnotes omitted, emphasis added).

[20] The Commission explained:

> In arguing that broadband service is protected by the First Amendment, AT&T compares its provision of broadband service to the operation of a cable television system, and points out that the Supreme Court has determined that cable programmers and cable operators engage in speech protected by the First Amendment. . . Unlike cable television operators, broadband providers typically are best described not as "speakers," but rather as conduits for speech. The broadband Internet access service at issue here does not involve an exercise of editorial discretion that is comparable to cable companies' choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefiting from an editorial presence. To the

Clearly, had the FCC attempted to extend any of its Open Internet rules to Edge Providers, they would have then been subject to First Amendment scrutiny they could never have survived. In 2017, a three-judge panel of the D.C. Circuit upheld the FCC's 2015 reclassification of broadband providers as common carriers. When broadband providers sought rehearing by the full D.C. Circuit, then-Judge Kavanaugh argued that imposing common carrier status on ISPs violated the First Amendment. Not so, explained the two judges who wrote the panel decision below, because the rules applied only insofar as broadband providers represented to their subscribers that their service would connect to "substantially all Internet endpoints" — and thus merely "require[d] ISPs to act in accordance with their customers' legitimate expectations."[21] This regulatory "hands off" approach to Edge Providers has been acknowledged elsewhere in government. "Edge provider activities, conducted on the 'edge' of the internet—hence the name—are not regulated by the Federal Communications Commission (FCC)."[22] The FCC has rejected attempts in the past to regulate social media and other Edge Providers, even at the height of Title II Internet regulation. "The

---

> contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.

Id. ¶¶ 140-41. Edge providers certainly are "speakers" and have full First Amendment rights.

[21] *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381 (D.C. Cir. 2017). Conversely, the judges wrote, ISPs could easily avoid the burdens of common carriage status, and exercise their First Amendment rights: "[T]he rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway—i.e., an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of 'editorial intervention.'" Id. at 389 (Srinivasan, J., concurring) (citing In the Matter of Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015)).

[22] *See, e.g.*, CLARE Y. CHO, CONGRESSIONAL RESEARCH SERVICE, COMPETITION ON THE EDGE OF THE INTERNET (Jan. 30, 2020), summary, available at: https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf.

Commission has been unequivocal in declaring that it has no intent to regulate edge providers."[23]

For the Commission to now conclude that it can apply rules related to emergency messages to "streaming services," the Commission must find authority where none exists. The FCC's plenary powers under Section 201 do not reach Edge Providers.[24] Nor does the definitional language in Section 153 of "information service" confer independent regulatory authority on the FCC, and the FCC has properly refrained from even attempting to regulate Edge Providers merely because *some* of the services they provide may fall within that definition.

Finally, the legislative history of the 1996 Telecommunications Act reveals unequivocally that the FCC lacks this regulatory authority. Sponsors Rep. Cox, Rep. Wyden, and others never contemplated that the FCC could promulgate rules impacting the content of Edge Provider "speech." We do "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."[25] Rep. Cox also pointed out that "there is just

---

[23] *See* Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests, DA 15-1266, Order (2015), available at https://docs.fcc.gov/public/attachments/DA-15-1266A1.pdf. That order goes on to state that even after finding that the provision of BIAS was a telecommunications service, At the same time, the Commission specified that in reclassifying BIAS, it was not "regulating the Internet, per se, or any Internet applications or content." Rather, as the Commission explained, its "reclassification of broadband Internet access service involves only the transmission component of Internet access service." Quoting Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, par. 5575 (2015).

[24] *See Howard v. Am. Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000) (class action suit against AOL dismissed after court rejects Section 201 claim, finding that AOL provided an "enhanced service," was not a "common carrier," and thus outside the purview of the FCC's Section 201 regulations).

[25] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The full quote from the floor colloquy sheds additional light on what one of Section 230 authors had in mind for how the law would operate: "Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the

too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time."[26] In this proceeding, the FCC should refrain from attempting to cobble together authority that simple does not exist, is antithetical to decades of FCC and court precedent, and would violate the First Amendment.

CONCLUSION

Congress has asked, and the FCC should answer: It is not currently "feasible" to promulgate rules to integrate the Internet into the EAS system. While a laudable goal, the Internet is not constructed in a manner to ensure proper dissemination of EAS messages, and the FCC lacks authority to promulgate rules over Edge Providers to bring them into that system.

Respectfully submitted,

_____/s/_____
James E. Dunstan
General Counsel

110 Maryland Ave., NE
Suite 205
Washington, DC 20002

Dated: May 14, 2021

Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, ***it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government***. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it." *Id*.

[26] *Id.* at H8469.