

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Assessment and Collection of)	MD Docket No. 21-190
Regulatory Fees for Fiscal Year 2021)	

COMMENTS OF TECHFREEDOM

TechFreedom hereby files these Comments in the above-referenced proceeding in response to the Commission’s Report and Order and Notice of Proposed Rulemaking (NRPM).¹ In these Comments, we address only the question of whether the FCC should adopt “new regulatory fee categories.”² For the reasons stated below, we do not believe that the FCC has the statutory authority to require entities unlicensed and unregulated by the FCC to pay regulatory fees.

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. We are active participants in FCC proceedings and

¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, MD Docket No. 21-190, Report and Order and Notice of Proposed Rulemaking, FCC 21-98 (Aug. 26, 2021) (“*Regulatory Fee NPRM*” or “*NPRM*”). The NPRM appeared in the Federal Register on September 21, 2021, 86 Fed. Reg. 52429 (September 21, 2021), and set the comment date for October 21, 2021. These Comments are timely filed.

² *NPRM* at ¶73.

court cases involving FCC policies, ranging from media,³ to spectrum policy,⁴ to satellites,⁵ to net neutrality.⁶

2. The FCC's Voyage of Discovery into New Regulatory (and Taxing) Authority

The *Regulatory Fee NPRM* is the latest example of the FCC seeking to enhance its regulatory powers and punish “Big Tech” for being . . . big, and technology focused.⁷ The *NPRM* suggests that the FCC should begin to assess regulatory fees on all manner of entities that “benefit” from the FCC.

We seek comment on whether we should adopt new regulatory fee categories and on ways to improve our regulatory fee process regarding any and all categories of service. Some commenters suggest that we impose fees on particular industry participants, essentially asking that we consider new fee categories. For example, NAB asks that unlicensed spectrum users, especially large technology companies, be required to pay regulatory fees, and we seek comment on this proposal. We seek comment on the legal basis for assessing regulatory fees on such users, consistent with the precedent interpreting our section 9 authority. What would be the proposed methodology for assessing regulatory fees on unlicensed spectrum users? We note that unlicensed spectrum users include a significant number of equipment manufacturers, such as appliance and other home goods equipment, many of which neither

³ See *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150 (2001), brief of amicus curiae TechFreedom, available at https://www.supremecourt.gov/DocketPDF/19/19-1231/161496/20201123101413222_tsac%20TechFreedom%2019-1231%2019-1241.pdf.

⁴ See Reply Comments of TechFreedom in WT Docket No. 20-443, filed July 7, 2021, available at <https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-Reply-Comments-7-7-21.pdf>.

⁵ See *Viasat, Inc. v. FCC*, No 21-1123, DC Cir., brief of amicus curiae TechFreedom, filed September 28, 2021, available at <https://techfreedom.org/wp-content/uploads/2021/09/File-Stamped-TechFreedom-Amicus-Brief-Viasat-v-FCC.pdf>.

⁶ See, e.g. Reply Comments of TechFreedom in Docket WC 17-108, filed May 20, 2020, available at <https://techfreedom.org/wp-content/uploads/2020/05/TechFreedom-Net-Neutrality-RIFO-Reply-Comments-5-20-20.pdf>

⁷ For the most recent foray into the FCC attempts to find regulatory “elephants in mouseholes,” (*Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)), recall the FCC’s ill-fated journey just last year in attempting to stick its regulatory nose in the national debate over content moderation and Section 230. See Reply Comments of TechFreedom in RM-11862, filed September 17, 2020, available at <https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Reply-Comments-9.17.2020.pdf>. Fortunately, time ran out on the prior FCC before it could get too far into a process what most certainly would have gone down in flames on appeal.

apply for nor require authorization by the Commission. Commenters should also explain, to the extent they advocate imposition of regulatory fees on either a subset of users or certain entities benefitting from such use, how to define any new fee category and how to calculate and assess such fees on an annual basis. Alternatively, should the Commission assess regulatory fees on large technology companies based on a different basis, such as any advantages they receive because of the Commission’s universal service or other activities? Are there other categories that should be added, deleted, or reclassified?⁸

Rarely has such a self-indulgent and self-important paragraph been written by the FCC. It reeks of the “you didn’t build that”⁹ mentality of some career politicians and bureaucrats who argue that advancement in the human condition is driven by regulators rather than innovators, and that somehow, we all need to pay for the privilege of being regulated. While Congress has dictated that the FCC must be self-sufficient (i.e., that its \$374,000,000 budget must be offset by application and regulatory fees),¹⁰ it hasn’t given the FCC the authority to tax all who “benefit” from its activities, far from it.

Commenters, seeking to lessen their own regulatory taxes, point to a minor change made by the RAY BAUM Act,¹¹ which removed the term “licensee” from Section 159 of the Communications Act, leaving only the undefined term “units” as the measurement of who should pay regulatory fees, and how much they should be charged. The FCC seized upon this

⁸ *NPRM* at ¶ 73 (footnotes omitted).

⁹ *See, e.g.*, J. Pethokoukis, “You didn’t build that: Obama and Elizabeth Warren argue against any limiting principle to Big Government,” American Enterprise Institute, July 12, 2012, available at <https://www.aei.org/pethokoukis/you-didnt-build-that-obama-and-elizabeth-warren-argue-against-any-limiting-principle-to-big-government/>.

¹⁰ *NPRM* at n. 1. *See also* 47 U.S.C. §§ 156, 159; Federal Communications Commission of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. E, Title V, 134 Stat. 1182 (2020) (Consolidated Appropriations Act, 2021) (appropriating \$374,000,000 to the Commission for salaries and expenses and directing the Commission to collect \$374,000,000 in offsetting collections for fiscal year (FY) 2021).

¹¹ Consolidated Appropriations Act, 2018, Division P–RAY BAUM’S Act of 2018, Title I, FCC Reauthorization, Public Law No. 115-141, § 102, 132 Stat. 348, 1082-86 (2018) (codified at 47 U.S.C. §§ 159, 159A) (RAY BAUM’S Act).

change to claim authority to collect regulatory fees from foreign-licensed satellite systems, since they must receive “market access” authority from the FCC before they can conduct business in the United States. The D.C. Circuit upheld the FCC’s ability to do this in *Telesat Canada v. FCC*.¹² As the *Telesat* court concluded:

Foreign-licensed satellite operators must petition the FCC to access the U.S. market. The FCC explained that it devotes significant resources to processing the growing number of such petitions. Foreign-licensed satellites benefit from the Commission’s oversight and regulation in the same manner as U.S. licensed satellites. And processing a petition for market access, according to the Commission, “requires evaluation of the same legal and technical information as required of U.S. licensed applicants.”¹³

The court was absolutely correct in its analysis, given that “market access” petitions are the functional equivalents of “applications,” and the authorizations such companies must receive from the FCC before they can conduct business in the United States are essentially “licenses.” What the FCC (and some commenters) are now seizing upon, however, is dicta in that opinion where the court stated: “This suggests benefits—not licenses—should be the touchstone for whether it is reasonable for the FCC to collect regulatory fees.”¹⁴ This has led some to argue that the FCC has the power to levy regulatory fees on all manner of entities impacted by the functions of the FCC, a notion that lacks any limiting principle.

3. The FCC Must Have Ancillary Authority Over Those Upon Which It Seeks to Impose Regulatory Fees

“Great caution is warranted here, because the disputed [] regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing. Just as the Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer “unbounded” jurisdiction on the Commission, Midwest Video II, 440 U.S. at 706, 99 S.Ct. 1435,

¹² *Telesat Canada v. Federal Communications Commission*, 999 F.3d 707 (D.C. Cir. 2021).

¹³ *Id.* at 710.

¹⁴ *Id.* at 713.

we will not construe the first prong in a manner that imposes no meaningful limits on the scope of the FCC's general jurisdictional grant.”¹⁵

That, of course, **is** the limiting principle. Before the FCC can regulate an entity or levy regulatory fees upon it to fund its operations, the Commission must have actual authority over the entity. That has **always been** the limiting principle on the FCC's jurisdiction. Courts have addressed this fundamental authority for over 50 years, and have several times made clear where the FCC's "ancillary authority" ends.¹⁶ Judge Tatel of the D.C. Circuit put it best in 2010:

[T]he Commission maintains that congressional policy by itself creates "statutorily mandated responsibilities" sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether.¹⁷

What does that tell us about who must pay regulatory fees? Rather than being allowed to impose such fees on any entity that "benefits" from FCC regulations, the FCC must first establish that it has authority over that class of entities, and not just the equipment they may use.

4. The FCC Traditionally Has Correctly Disavowed Authority Over Internet Content Providers and Users

The notion that the FCC can somehow levy regulatory fees against "large technology companies" runs contrary to any notion of jurisdictional limits on the FCC. The FCC has made clear, for example, that social media platforms and other edge providers are not subject to its jurisdiction. We have made a similar demonstration of a lack of authority over edge providers in the FCC's

¹⁵ *American Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

¹⁶ *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*).

¹⁷ *Comcast Corp. v. Federal Communications*, 600 F.3d 642, 655 (D.C. Cir. 2010).

Wireless Emergency Alert system proceeding.¹⁸ 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 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.¹⁹ The 2010 Net Neutrality Order made clear that its rules, including its “transparency” 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**.²⁰

¹⁸ See Comments of TechFreedom in PS Docket No. 15-94, filed May 14, 2021, available at <https://techfreedom.org/wp-content/uploads/2021/05/TF-Draft-Comments-WEA-NOI-5-14-21.pdf>.

¹⁹ 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).

²⁰ *Id.* ¶ 50 (footnotes omitted, emphasis added).

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.²¹

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.”²² This regulatory “hands off” approach to edge providers has been

²¹ 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 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.

²² *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)).

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).”²³ 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 Commission has been unequivocal in declaring that it has no intent to regulate edge providers.”²⁴ For the Commission to now conclude that it can require Big Tech edge providers to pay regulatory fees fails for the same reasons: The FCC’s plenary powers do not reach edge providers.²⁵

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 on edge providers. They did “not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.”²⁶ Rep. Cox also pointed out that “there is just too much going on on

²³ 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.

²⁴ 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).

²⁵ 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).

²⁶ 141 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 Internet, let us say, who

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.”²⁷ In this proceeding, the FCC should refrain from attempting to cobble together authority that simple does not exist in an effort to levy new regulatory fees.

CONCLUSION

Should the FCC consider broadening the “pool” of those who pay regulatory fees beyond traditional “licensees”? Possibly. But any foray in this area must be tempered by the knowledge that the FCC can only require payments from those it actually regulates, not all entities that somehow “benefit” from its regulations. Otherwise, the FCC’s taxing authority would be unlimited, and every connection to the Internet should come with a coin slot so the FCC can collect a quarter from everyone



benefiting from its regulations. As the picture makes clear, we should all “push to reject” such an approach to regulatory fees.

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.*

²⁷ *Id.* at H8469.

Respectfully submitted,

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Dated: October 21, 2021