

**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	)	
	)	
Assessment and Collection of	)	MD Docket No. 22-223
Regulatory Fees for Fiscal Year 2022	)	

**REPLY COMMENTS OF TECHFREEDOM**

TechFreedom<sup>1</sup> hereby files these Reply Comments in the above-referenced proceeding in response to the Commission’s Report and Order and Notice of Proposed Rulemaking (NRPM).<sup>2</sup> In these Comments, we address only the question of whether the FCC should adopt “new regulatory fee categories.”<sup>3</sup> As we’ve stated before, we do not believe that the FCC has the statutory authority to require entities unlicensed and unregulated by the FCC to pay

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<sup>1</sup> 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 court cases involving FCC policies, ranging from media, to spectrum policy, satellites, to net neutrality.

<sup>2</sup> 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 22-39 (June 2, 2022) (“*Regulatory Fee NPRM*” or “*NPRM*”). The NPRM set the comment date as July 5, 2022, and the reply comment date as July 18, 2022. These Reply Comments are timely filed.

<sup>3</sup> *NPRM* at ¶53.

regulatory fees.<sup>4</sup> Especially after the Supreme Court’s recent decision in *West Virginia v. EPA*,<sup>5</sup> an administrative agency can’t undertake new regulations just because it’s a good idea—they must be grounded in clear statutory authority.

## **I. The FCC Must Have Ancillary Authority over Those upon Which It Seeks to Impose Regulatory Fees**

For the second year in a row, the Commission asks whether it should create “new regulatory fee categories.”<sup>6</sup> This year’s discussion consists of two sentences. We wish our response could be but two sentences long: “You don’t have the statutory authority to impose regulatory fees on unregulated entities. *See West Virginia v. EPA.*”<sup>7</sup>

Commenters have once again seized on this short paragraph to seek to reduce their own regulatory fees by sluffing off part of the FCC’s budget on unregulated entities and “Big Tech” because such entities “benefit” from FCC regulations.<sup>8</sup> Yet nothing has changed in the intervening year; the Commission still lacks statutory authority to tax entities over which it has no direct regulatory authority.<sup>9</sup> The fundamental legal principles also remain the same as the DC Circuit declared in 2005.

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<sup>4</sup> See Comments of TechFreedom in MD Docket 21-190, filed October 21, 2021, <https://techfreedom.org/wp-content/uploads/2021/10/TechFreedom-Comments-on-Regulatory-Fees.pdf>.

<sup>5</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2022 U.S. LEXIS 3268 (2022).

<sup>6</sup> *NPRM* at ¶53.

<sup>7</sup> See generally *West Virginia v. EPA*, 142 S. Ct. 2587.

<sup>8</sup> See Comments of the National Association of Broadcasters, p. 26; Joint Comments of the State Broadcasters Association, p. 13.

<sup>9</sup> We are confused by NAB’s argument that the FCC should add a fee category for “broadband service Providers.” NAB Comments at 18. Last-mile broadband is predominantly (almost

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, 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.<sup>10</sup>

That, of course, *is* the limiting principle on FCC authority. Before the FCC can regulate an entity, or levy regulatory fees, the Commission must have actual authority over the entity. Courts have followed this principle for over 50 years and have several times made clear where the FCC’s “ancillary authority” ends.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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exclusively) delivered by Cable, Interstate Telecommunications Service Providers, CMRS Mobile Services, and satellite, which together are slated to pay over \$292 million in regulatory fees, or 75% of the Commission’s budget. *See* NPRM at 34. NAB fails to indicate what new entities would be subject to regulatory fees under its proposal.

<sup>10</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

<sup>11</sup> *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*).

<sup>12</sup> *Comcast Corp. v. Federal Communications Commission*, 600 F.3d 642, 655 (D.C. Cir. 2010).

<sup>13</sup> *American Library Ass’n v. FCC*, 406 F.3d at 700 (“The insurmountable hurdle facing the FCC in this case is that the agency’s general jurisdictional grant does not encompass the regulation of

## II. *West Virginia v. EPA* Should Drydock the FCC's Voyage of Discovery of New Regulatory Powers

One thing *has* changed since last year. The Supreme Court made clear in *West Virginia v. EPA* that agencies are no longer free to find a vague provision in their governing statute and use it as a launching point to regulate. After discussing previous decisions in which the Supreme Court had limited agency actions, Chief Justice Roberts continued:

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, “common sense as to the manner in which Congress [would have been] likely to delegate” such power to the agency at issue, *Brown & Williamson*, 529 U.S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through “modest words,” “vague terms,” or “subtle device[s].” *Whitman*, 531 U. S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a “radical or fundamental change” to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.” E. Gellhorn & P. Verkuil, *Controlling Chevron-Based Delegations*, 20 *Cardozo L. Rev.* 989, 1011 (1999). We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.” *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CA DC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. *Utility Air*, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims. *Ibid.*

The same analysis applies here. While the dollar figures involved may not be “major,” the sheer number of companies that would, for the first time, come under the regulatory

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consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”).

authority of the FCC is vast. Given that every individual “benefits” from broadband, under that theory, the FCC would be free to collect regulatory fees from every consumer, every business, and even every machine connected to the Internet. *West Virginia v. EPA* says otherwise.

### III. Imposing Regulatory Fees on “Big Tech” Flies in the Face of Decades of FCC Policy

That the FCC can somehow levy regulatory fees on large technology companies runs contrary to any notion of jurisdictional limits on the FCC. The Commission has made clear, for example, that social media platforms and other edge providers are not subject to its jurisdiction.<sup>14</sup> We have made a similar demonstration of a lack of authority over edge providers in the FCC’s Wireless Emergency Alert System proceeding.<sup>15</sup> 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. 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

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<sup>14</sup> See, e.g., In re Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, FCC 04-27, 19 FCC Rcd 3307, Memorandum and Order.

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

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.*<sup>16</sup>

Only by focusing its rules exclusively on broadband providers, and not edge providers, could the 2010 Order dispense with the First Amendment arguments raised by some ISPs.<sup>17</sup>

Clearly, had the FCC attempted to extend any of its Open Internet rules to edge providers, those rules would have been subject to First Amendment scrutiny, which 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

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<sup>16</sup> 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, ¶ 50 (2010).

<sup>17</sup> 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.

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.”<sup>18</sup> The Congressional Research Service has also acknowledged this regulatory “hands off” approach to edge providers. “Edge provider activities, conducted on the ‘edge’ of the internet—hence the name—are not regulated by the Federal Communications Commission (FCC).”<sup>19</sup> 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.”<sup>20</sup> For the Commission to now conclude that it can require Big Tech edge providers to

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<sup>18</sup> *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 by exercising 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)).

<sup>19</sup> *See, e.g.*, CLARE Y. CHO, CONGRESSIONAL RESEARCH SERVICE, COMPETITION ON THE EDGE OF THE INTERNET (Jan. 30, 2020), [https://www.everycrsreport.com/files/20200130\\_R46207\\_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf](https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf).

<sup>20</sup> *See* Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor ‘Do Not Track’ Requests, DA 15-1266, Order (2015), <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).

pay regulatory fees fails for the same reasons: The FCC's plenary powers do not reach edge providers.<sup>21</sup>

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."<sup>22</sup> Rep. Cox also pointed out that "there is just 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

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<sup>21</sup> 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 is outside the purview of the FCC's Section 201 regulations).

<sup>22</sup> 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's 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 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.* (emphasis added.)



get there in time.”<sup>23</sup> In this proceeding, the FCC should refrain from attempting to cobble together authority that simply does not exist in an effort to levy new regulatory fees.

#### **IV. 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, a concept without any limiting principles.

Respectfully submitted,  
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<sup>23</sup> *Id.* at H8469.