

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

In the Matter of)	
)	
Review of the Commission’s Assessment and Collection of Regulatory Fees)	MD Docket No. 22-301
)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2023)	MD Docket No. 23-159
)	

COMMENTS OF TECHFREEDOM

TechFreedom¹ hereby files these Comments in the above-referenced proceeding in response to the Commission’s Report and Order and Notice of Proposed Rulemaking (NRPM).² In these Comments, we address only the question of whether the FCC should adopt “new regulatory fee categories.”³ As we’ve explained, the FCC lacks the statutory authority to require entities it neither licenses nor regulates to pay regulatory fees.⁴ Especially after

¹ TechFreedom is a nonprofit 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, including media, spectrum policy, satellites, and net neutrality.

² See Review of the Commission’s Assessment and Collection of Regulatory Fees, MD Docket No. 22-301, Report and Order and Notice of Proposed Rulemaking, FCC 23-23 (May 15, 2023) (“2023 Regulatory Fee NPRM” or “NPRM”). The NPRM set the comment date as June 14, 2023, and the reply comment date as June 29, 2023. These Comments are timely filed.

³ NPRM ¶ 95.

⁴ See Reply Comments of TechFreedom in the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2021 & Fiscal Year 2022, MD Docket No. 21-190 & 22-223 (July 18, 2022), <https://techfreedom.org/wp-content/uploads/2022/07/TechFreedom-Comments-2022-Regulatory-Fees.pdf>; Comments of TechFreedom in Assessment and Collection of Regulatory Fees for Fiscal Year 2021, MD Docket No. 21-190 (Oct. 21, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/TechFreedom-Comments-on-Regulatory-Fees.pdf>.

the Supreme Court’s decision in *West Virginia v. EPA*,⁵ an administrative agency can’t issue new regulations just because it’s a good idea—they must be grounded in clear statutory authority; federal agencies may not exercise regulatory power “over a significant portion of the American economy” or “make a radical or fundamental change to a statutory scheme” through rulemaking without clear authorization by Congress.⁶

I. The FCC Has Asked and Answered Twice the Question About Requiring Edge Providers to Pay Regulatory Fees

For at least the third year in a row, the Commission asks whether it should create “new regulatory fee categories.”⁷ Quoting from previous regulatory fee NPRMs, the Commission asks: “[S]hould 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?”⁸ In prior years, the FCC declined to add new categories, including for those who receive “advantages” (previously referred to as “benefits”) from the Internet.⁹ Ultimately, the Commission concluded:

With such a large group of users of spectrum on an unlicensed basis, adopting a new regulatory fee category for these users would be the equivalent of asking every industry and consumer to pay this fee, resulting in a regulatory fee scheme far more extensive than our current regulatory fee system and would

⁵ *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2022 U.S. LEXIS 3268 (2022).

⁶ *Id.* at 2608-09.

⁷ NPRM at ¶ 95.

⁸ *Id.* at n. 185, quoting FY 2021 Report and Order, 36 FCC Rcd at 13026, ¶ 73.

⁹ In its *2022 Regulatory Fee Report and Order*, for example, the Commission addressed calls for several new fee categories, including holders of experimental licenses, broadband internet access service (BIAS) providers, holders of equipment authorizations, spectrum database operators, and users of spectrum on an unlicensed basis. Assessment and Collection of Regulatory Fees for Fiscal Year 2022, Report and Order, FCC 22-68, released September 2, 2022, ¶¶ 75-103.

reach all households and businesses. Such a fee would be logistically infeasible to collect, at least on the basis of this record.¹⁰

Such fees would indeed be unworkable. But the FCC has never addressed the essential question: does the agency have the statutory authority to regulate “large technology companies” at all? Only by answering yes could the Commission require them to pay regulatory fees. As we demonstrate herein, the FCC has no such authority, and any attempts to assess regulatory fees against this “large group of users” would fail judicial review.

II. To Impose Regulatory Fees, the FCC Must Have Regulatory Authority

We will reiterate our simple response: The FCC has no statutory authority to impose regulatory fees on unregulated entities.¹¹ The fundamental legal principle remains the same as the DC Circuit explained in 2005:

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, 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.¹²

This is the fundamental limiting principle on FCC authority: Before the FCC may regulate an entity, or levy regulatory fees, the Commission must establish its authority over that entity. Courts have addressed this fundamental principle repeatedly in the last 50 years and have

¹⁰ *Id.* ¶ 99 (footnote omitted).

¹¹ Reply Comments of TechFreedom in the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2021 & Fiscal Year 2022, MD Docket No. 21-190 & 22-223 (July 18, 2022), <https://techfreedom.org/wp-content/uploads/2022/07/TechFreedom-Comments-2022-Regulatory-Fees.pdf>.

¹² *American Library Ass’n v. Fed. Comm’n Comm’n*, 406 F.3d 689, 692 (D.C. Cir. 2005) (quoting *United States v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (Midwest Video II)).

several times made clear where the FCC’s “ancillary authority” ends.¹³ 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.¹⁴

What does that tell us about who must pay regulatory fees? The FCC cannot impose such fees on any entity merely because of “advantages they receive” from FCC “activities.” Rather, the FCC must first establish its authority over that class of entities, and not just the equipment they use.¹⁵

III. *West Virginia v. EPA* Limits the Extent to which the FCC Can Regulate through Ancillary Authority

In *West Virginia v. EPA*, the Supreme Court made clear that agencies are no longer free to find a vague provision in their governing statute as authority to decide “major questions.”¹⁶ Summarizing previous decisions to that effect, Chief Justice Roberts explained:

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

¹³ 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*).

¹⁴ *Comcast Corp. v. Fed. Commc’n Comm’n*, 600 F.3d 642, 655 (D.C. Cir. 2010).

¹⁵ *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 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.”).

¹⁶ The D.C. Circuit made clear that this standard applies to FCC rules. See *Nat’l Ass’n of Broad. v. Fed. Commc’n Comm’n*, 39 F.4th 817, 819 (D.C. Cir. 2022) (“an agency must identify statutory authority for any action it takes”).

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.*¹⁷

Thus, held the Court, “an agency must point to clear congressional authorization when it seeks to regulate ‘a significant portion of the American economy.’”¹⁸ That is precisely what the FCC would be doing in claiming the authority to regulate edge providers. For the first time, a vast number of technology-related (and content producing) companies that have, until now, been shielded from FCC regulation by classification under Title I,¹⁹ could come under the regulatory thumb of the FCC. If the FCC may charge such companies regulatory fees, how else may it regulate them? Indeed, the FCC’s rationale suggests an even broader claim of authority: Is not every individual somehow “advantaged” by the FCC’s efforts to expand broadband and close the digital divide? Why could the FCC not use the same rationale to collect regulatory fees from every consumer, every business, and even every machine connected to the Internet? In effect, the



¹⁷ *West Virginia v. EPA*, No. 20-1530, at *24-25 (June 30, 2022).

¹⁸ *Id.* at *47 (Gorsuch, J., concurring) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

¹⁹ *Restoring Internet Freedom*, 33 *FCC Rcd* 311 (2018).

FCC could erect toll booths on the Internet. Without clear limiting principles specified by Congress, the amount of such tolls could quickly grow enough that their sheer scale could be considered a major question, in addition to the FCC’s claim of regulatory power.²⁰

In contrast, both the Supreme Court in *West Virginia v. EPA* and Congress have made clear the limits on FCC authority. In enacting the Telecommunications Act of 1996, Congress stated that it was U.S. policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”²¹

IV. Imposing Regulatory Fees on “Big Tech” Would Erase a Line Drawn by the FCC for Decades

An assertion of regulatory authority over edge providers would overturn decades of Commission decisions. The Commission has made clear, for example, that social media platforms and other edge providers are not subject to its jurisdiction.²² We have similarly demonstrated that the FCC lacks authority over edge providers in the FCC’s Wireless Emergency Alert System proceeding.²³ Streaming services are a subset of what the FCC and others have described as “edge providers”: Internet content providers who are basically

²⁰ See *West Virginia*, No. 20-1530, at *47 (Gorsuch, J., concurring) (“an agency must point to clear congressional authorization when it seeks to . . . require ‘billions of dollars in spending’ by private persons or entities.”).

²¹ 47 U.S.C. § 230(b)(2) (emphasis added).

²² See, e.g., In re Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum and Order, 19 FCC Rcd 3307 (Feb. 19, 2004).

²³ See Comments of TechFreedom in the Matter of Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System & Wireless Emergency Alerts, PS Docket No. 15-94 & 15-91 (May 14, 2021), <https://techfreedom.org/wp-content/uploads/2021/05/TF-Draft-Comments-WEA-NOI-5-14-21.pdf>.

beyond the reach of the FCC’s jurisdiction. Such providers have never been regulated by the FCC—for very good reason. The 2010 Open Internet Order made clear that its net neutrality rules, including its “transparency” rule, “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.”²⁴ The Commission drew this bright line for good reasons:

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.*²⁵

The Commission took pains to distinguish broadband providers from content providers that engage in editorial discretion. Only by doing so could the 2010 Order dispense with the First Amendment arguments raised by some ISPs.²⁶

²⁴ 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 Order).

²⁵ *Id.*

²⁶ 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

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.²⁷ When broadband providers sought rehearing by the full D.C. Circuit, then-Judge Brett 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.”²⁸ As the 2010 Order noted, “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.”²⁹

The Congressional Research Service aptly summarized the FCC’s “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

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.

²⁷ U.S. Telecom Ass’n v. Fed. Commc’ns Comm’n, 855 F.3d 381 (D.C. Cir. 2017).

²⁸ *Id.* 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 FCC Rcd 5601 (2015)).

²⁹ 2010 Order ¶ 141.

(FCC).³⁰ 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.”³¹ For the Commission to now conclude that it can require Big Tech edge providers to pay regulatory fees flies in the face its prior acknowledgement of its regulatory limits, further buttressed by court decisions defining where FCC authority ends within the various layers of Internet delivery.³²

Finally, the legislative history of the 1996 Telecommunications Act reveals unequivocally that the FCC lacks such authority. Sponsors Rep. Christopher Cox, Rep. Ron Wyden, and others never contemplated that the FCC could promulgate rules impacting the content of edge provider “speech.” We do, they said, “not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.”³³ Rep. Cox also noted that

³⁰ See, e.g., CLARE Y. CHO, CONG. RESEARCH SERV., R46207, COMPETITION ON THE EDGE OF THE INTERNET (Jan. 30, 2020), https://www.everycrsreport.com/files/20200130_R46207_aae4de15c44a3c957e7329b19ec513bd5d3a6629.pdf.

³¹ 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, ¶ 5575 (2015)).

³² 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 lay outside the purview of the FCC’s Section 201 regulations).

³³ 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). “Our amendment will do two basic things,” explained Rep. Cox, one of which was to

“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 get there in time.”³⁴ The FCC should accept the wisdom of its past decisions and legislative history of the 1996 Telecommunications Act.

V. CONCLUSION

TechFreedom does not oppose reshuffling the deck on who pays for the privilege of being regulated by the FCC. But the universe of potential sources of funding must remain limited to those over whom the FCC has regulatory authority. The Commission should end this multi-year attempt to gain support for the notion that any entity that can take “advantage” of the fruits of the FCC’s regulatory labors must pay.

Respectfully submitted,
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Dated: June 14, 2023

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.)

³⁴ *Id.* at H8469.