

Before the
Federal Communications Commission
Washington, DC

In re

Assessment and Collection of Regulatory Fees
for Fiscal Year 2021

Docket No. 21-190

COMMENTS OF CCIA, DiMA, INCOMPAS AND INTERNET ASSOCIATION

The Computer & Communications Industry Association, Digital Media Association, INCOMPAS, and Internet Association (Associations) submit these comments in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding seeking comment on whether the Federal Communications Commission (FCC or Commission) should adopt new regulatory fee categories and on ways to improve the regulatory fee process regarding any and all categories of service.¹

I. INTRODUCTION AND SUMMARY

The Associations' member companies represent a broad cross-section of the most innovative technology and communications companies in the United States who have invested significant resources and delivered unprecedented value to consumers through products and services that rely upon unlicensed spectrum. The Associations greatly appreciate the Commission's significant efforts to make unlicensed spectrum available as a public good that has enabled innovative products and services, and recognize that the Commission's regulatory fees are important to fund its vital activities to regulate a broader industry of communications services providers and spectrum license holders.

In these comments, the Associations encourage the Commission to ensure that regulatory fees are consistent with its statutory requirements to be fair, administrable, and sustainable, and appropriately reflect the Commission's core work to regulate spectrum licensees and communications service providers who directly benefit from the work of the FCC. The questions raised in the NPRM to expand the base of contributors of regulatory fees, however, could amount to a tax on Wi-Fi users, service providers,

¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 21-190, FCC 21-98, (rel. August 26, 2021) ("NPRM").

equipment manufacturers, and other entities that are delivering innovative products and services that rely on unlicensed spectrum (Wi-Fi tax), and may have little engagement with the Commission. Moreover, the regulatory fee categories proposed by certain parties, such as “unlicensed spectrum users” or “especially large technology companies,” would be unworkable or arbitrarily narrow for the Commission to effectively administer, and beyond the scope of the Commission's legal authority to impose fees on entities “that are reasonably related *to the benefits provided to the payor of the fee by the Commission’s activities.*”² For these reasons, the Associations urge the Commission to maintain the current base of regulatory fees payors and reject any suggestions to expand the scope of such fees that commenters may raise in response to the NPRM.

II. THE COMMISSION’S APPROACH TO UNLICENSED SPECTRUM USERS HAS UNLEASHED SIGNIFICANT INVESTMENT, INNOVATION, AND CONSUMER CHOICE

As Acting Chairwoman Jessica Rosenworcel has said, “No matter who you are or where you live, the odds are good that you have benefited from unlicensed airwaves and Wi-Fi.”³ Similarly, Commissioner Brendan Carr has noted that increasing the availability of unlicensed spectrum will add nearly \$200 billion to the U.S. economy and unleash a new wave of virtual reality applications for education, commerce and other “next-gen connection” applications.⁴ Indeed, almost every American consumer and business has benefited from unlicensed spectrum.⁵ Fully realizing the value of this unlicensed spectrum requires technology companies to create products and services to use this spectrum.

In recent years there has been a dramatic increase in the number of innovative connected devices, providing immeasurable benefits for consumers through unlicensed spectrum. Consumers use devices

² 47 U.S.C. § 159(d) (emphasis added).

³ Statement of FCC Commissioner Jessica Rosenworcel, Notice of Proposed Rulemaking, Unlicensed Use of the 6 GHz Band, ET Docket No. 18-295; Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz, GN Docket No. 17-183, Oct. 24, 201, *available at* <https://docs.fcc.gov/public/attachments/FCC-18-147A5.pdf>.

⁴ Statement of FCC Commissioner Brendan Carr, Report and Order, Unlicensed Use of the 6 GHz Band, ET Docket No. 18-295; Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz, April 23, 2020 *available at* <https://www.fcc.gov/document/fcc-opens-6-ghz-band-wi-fi-and-other-unlicensed-uses/carr-statement-0>.

⁵ NCTA, Unlicensed Spectrum Gives U.S. Economy a \$525 Billion Boost, May 24, 2018, *available at* <https://www.ncta.com/whats-new/unlicensed-spectrum-gives-us-economy-a-525-billion-boost> (noting that unlicensed spectrum users contribute hundreds of billions of dollars to the U.S. economy every year).

like connected thermostats, alarm systems, baby monitors, fitness trackers, and home appliances to improve their daily lives. Industries across the U.S. economy use unlicensed spectrum to increase productivity and efficiency in the workplace. Moreover, Americans have relied on unlicensed spectrum more than ever to work and learn from their homes throughout the COVID-19 pandemic.

When the Commission works to increase the availability of unlicensed spectrum, it does not do so for the benefit of one industry or individual companies, but to be consistent with its overall mission to promote the public interest. When companies innovate using unlicensed spectrum, the benefits flow throughout the U.S. economy. The Commission should continue to encourage and promote the use of unlicensed spectrum and, as noted below, avoid policies that would inhibit innovative uses, such as expanding the base of regulatory fee payors to include “unlicensed spectrum users.”

III. THE COMMISSION SHOULD AVOID CREATING A NEW “WI-FI TAX” USING DEFINITIONS THAT WOULD BE OVERLY BROAD AND UNWORKABLE OR ARBITRARILY NARROW

In the NPRM, the Commission seeks comment on adopting new regulatory fee categories, such as “unlicensed spectrum users” and “especially large technology companies.”⁶ As noted below, “unlicensed spectrum users” could include an unworkably broad range of manufacturers of Internet of Things (IoT) and Bluetooth devices, such as thermostats, baby monitors, refrigerators, wireless earbuds, and smart speakers, as well as internet services that consumers and small businesses utilize via local Wi-Fi devices, including online banking, news websites, social media, and music streaming. Further, assessing “especially large technology companies” would require the Commission to identify an arbitrarily narrow and potentially discriminatory category of companies that would be subject to the regulatory fees, and would ignore the fees that such companies may already pay to support the Commission’s programs and requirements. For these reasons, the Commission should be cautious in considering any proposals to establish unworkably broad and arbitrarily narrow categories of entities required to pay regulatory fees.

⁶ NPRM at ¶ 73.

Within the scope permitted by the Communications Act, the Commission may collect regulatory fees that reflect the “full-time equivalent number of employees within the bureaus and offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”⁷ The Commission has used this authority to impose regulatory fees on service providers and companies that the agency devotes significant resources towards regulating, including providers of telecommunications services and equipment and licensed spectrum users. Limiting regulatory fees to entities that directly benefit from the Commission’s regulated activities creates a clear nexus between the agency and the entities paying regulatory fees.

The NPRM raises questions about whether the Commission should expand the scope of regulatory fee contributors, but the proposed category of “unlicensed spectrum users” is overly broad and unworkable. If the Commission expands the regulatory fee contributor base as some commenters have proposed, any consumer or entity that uses publicly available unlicensed spectrum may be charged regulatory fees regardless of whether that entity is causing or deriving significant benefit from the Commission’s regulatory work. This could effectively result in something like a Wi-Fi tax, which would be far beyond the purpose of the regulatory fee system. Further, the Commission may be compelled to collect regulatory fees from the manufacturers of any of billions of IoT devices that are becoming available in the United States⁸ - a complex and difficult task for Commission staff who would bear the enormous administrative burden of calculating the benefits each unlicensed spectrum user receives, and then collecting fees from the never-ending list of unlicensed spectrum users.

If the Commission instead chose to expand the regulatory fee contributor base only to “especially large technology companies,” it would be arbitrarily singling out a handful of businesses from a large group of competitive technology companies in violation of equal protection principles and –given the

⁷ 47 U.S.C. § 159(d) (emphasis added).

⁸ One projection suggests that there will be 43 billion Internet of Things devices on Earth by 2023. McKinsey & Company, *Growing opportunities in the Internet of Things*, July 22, 2019, available at <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/growing-opportunities-in-the-internet-of-things>.

recent history of criticisms aimed at “Big Tech” – potentially the First Amendment as well.⁹ This targeted assessment would also ignore the significant contributions that many of these companies already make to support the Commission’s programs.

In defining “especially large technology companies,” it is unclear how the Commission would determine appropriate fees in a way that does not pick winners and losers in the technology industry or harm consumers by imposing costs that would not otherwise be incurred. As many technology companies currently provide services to consumers at no cost, relying on advertising or other revenue, this business model, which provides significant value to consumers, may be threatened if companies that provide content over the internet are charged regulatory fees that have no correlation to regulatory costs at the Commission. Without a reasoned definition of an “especially large technology companies” category and an evidence-based explanation of why such a category of companies distinctly benefits from unlicensed spectrum differently than every other company that uses unlicensed spectrum, this narrowing seems arbitrary, capricious, and contrary to law.

In considering whether to expand the regulatory fee contributor base, the Commission should consider that many technology companies already pay FCC regulatory fees or incur costs to comply with the Commission’s regulations. For example, technology companies that engage in specific business activities that are regulated by the Commission, such as offering certain services, investing in certain network infrastructure, providing interconnected Voice over Internet Protocol (VoIP) services, or owning and operating satellites and/or undersea cables, are required to pay FCC regulatory fees or contribute to support specific FCC programs, such as federal Universal Service and Telecommunications Relay Service Funds. Further, under the current FCC process, many devices that use unlicensed spectrum must be

⁹ Judicial strict scrutiny applies under the First Amendment where a tax on information outlets lacks general applicability to a broader class of businesses, is based on content, or it is targeted at a small number of media outlets. *See* *Leathers v. Medlock*, 499 U.S. 439, 447-50 (1991). *See also* *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) (striking down gross receipts tax on advertising in newspapers with a weekly circulation above 20,000, affecting only 13 of 124 publishers in the State), *Minneapolis Star v. Minnesota Commissioner of Rev.*, 460 U.S. 575 (1983) (striking down paper and ink tax that targeted a “handful” of large newspapers), and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) (striking down sales tax on general interest magazines that exempted newspapers and religious, professional, trade, and sports journals).

certified using rigorous testing protocols to avoid causing harmful interference to radio services of licensed, fee-paying entities.¹⁰ Such certifications are costly and time-consuming, with expenses (including the FCC’s application filing fee) ultimately being passed down the chain to consumers. Many other devices that use unlicensed spectrum and have lesser chances of causing harmful interference can use the Supplier’s Declaration of Conformity (SDoC) process to demonstrate regulatory compliance. While manufacturers of these devices no longer bear the steeper economic burdens of required testing by FCC-accredited laboratories, they remain responsible for complying with meticulous testing and recordkeeping protocols to ensure compliance.

Given that technology companies of all sizes derive some benefit from the Commission’s activities, the Commission would have to choose between defining unworkable or arbitrary categories of new regulatory fee payors. Instead, the Commission should maintain the current approach to regulatory fees that provides a direct nexus between the Commission’s activities and payors who derive the most benefit and are overseen by the Commission.

IV. THE COMMISSION SHOULD AVOID MODIFYING THE REGULATORY FEE CONTRIBUTOR BASE IN WAYS THAT EXCEED THE COMMISSION’S LEGAL AUTHORITY

The Commission has the statutory authority to assess fees “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”¹¹ In making this calculation, the Commission considers the number of direct full-time employees and indirect full-time employees *devoted to the oversight and regulation of the industry*. Further, the Commission considers “the adoption of a new fee category or a change in fee categories only when it develops sufficient basis for making the change and works to ensure that all changes serve the goal of ensuring that the Commission’s actions in assessing regulatory fees are fair, administrable, and sustainable.”¹² In this proceeding, the NPRM asks commenters to explain how a new fee category would be consistent with this calculation, but any

¹⁰ FCC, Equipment Authorization – Fee Filing Guide, <https://www.fcc.gov/general/equipment-authorization-fee-filing-guide> (last visited Oct. 11, 2021).

¹¹ 47 U.S.C. 159(d).

¹² NPRM at ¶ 4.

proposals to expand the scope of regulatory fee payors to “unlicensed spectrum users” or “especially large technology companies” is wholly inconsistent with the Commission’s legal authority.

Some commenters have claimed that “users of unlicensed spectrum” should pay regulatory fees because these users receive a benefit from the Office of Engineering and Technology (OET) when employees of OET work on proceedings to make unlicensed spectrum available.¹³ As an initial matter, the Commission has already rejected the suggestion that it should modify its current treatment of core bureaus and offices so that the OET be treated as a direct cost carried by regulatees, rather than an indirect cost.¹⁴ In doing so, the Commission states, “OET provides engineering and technical expertise to the agency and supports each of the agency’s four core bureaus,” and specifically notes a number of functions that benefit the Commission’s work as a whole, including the Media Bureau, stating “[m]uch of OET’s work benefits not only Media Bureau regulatees, but broadcast regulatees, in particular.”¹⁵ The FCC further observes the following about OET’s work:

OET’s work to make spectrum available on an unlicensed basis for new and emerging technologies and that such unlicensed use does not cause harmful interference benefits multiple industry sectors, including the broadcasting industry. Even OET’s work in overseeing the equipment authorization program benefits multiple industry sectors; there is no separate process for devices capable of operating wholly or partly under the Commission’s device rule, as many devices, including some broadcast receiving equipment (e.g., smart TVs) operate on several spectrum bands under rules for both licensed services and unlicensed operations.¹⁶

As the Commission has already found, OET’s work benefits all those regulated by the Commission as OET supports the work of the core Bureaus of the FCC, including the Media Bureau. The proposals by some commenters and questions raised in the NPRM fail to identify reasons why the Commission should reverse course.

¹³ See Comments of National Association of Broadcasters, [https://ecfsapi.fcc.gov/file/106032450330305/FY2021RegulatoryFeeComments\(6.3.2021\).pdf](https://ecfsapi.fcc.gov/file/106032450330305/FY2021RegulatoryFeeComments(6.3.2021).pdf).

¹⁴ NPRM at ¶¶ 22-25.

¹⁵ *Id.* n. 65.

¹⁶ *Id.*

Moreover, the broad category of companies and industries that would be included based on the NPRM's suggestions would stretch the Commission's requirement to ensure that fees are "reasonably related to the benefits provided to the payor of the fee by the Commission's activities."¹⁷ Congress determines what industries are included in the Commission's jurisdiction, and many of the companies that potentially would be included in such a new regulatory scheme currently fall outside of that jurisdiction. Unlike FCC licensees, there is no clearly definable category of users that benefits from unlicensed spectrum and as noted above, any Commission staff effort to define such category would be unworkable and arbitrary.¹⁸

Some commenters have also noted that certain users of unlicensed spectrum have been active in proceedings at the Commission to make more unlicensed spectrum available, and imply that participation in Commission proceedings proves that these companies are beneficiaries that should be charged regulatory fees.¹⁹ However, participation in Commission proceedings is not sufficient to create a new category of regulatory fees, and the Commission should be very cautious about arguments that deter participation in the Commission's public proceedings. The fact that a range of diverse organizations advocate in favor of unlicensed spectrum only confirms that the benefits of unlicensed spectrum extend universally to consumers, device makers, online services, Internet access providers, governments, and many other organizations.

In sum, the Commission may only expand the payors of regulatory fees "when it develops sufficient basis for making the change and works to ensure that all changes serve the goal of ensuring that the Commission's actions in assessing regulatory fees are fair, administrable, and sustainable." As the Commission has already found that OET's work generally supports the work of the Commission as a whole, the fact that "users of unlicensed spectrum" may derive indirect benefit from OET's work is not a sufficient basis to expand the regulatory fee payor base. Further, as the categories of "unlicensed

¹⁷ 47 U.S.C. 159(d).

¹⁸ For example, the NPRM explicitly notes that a significant number of appliance manufacturers that do not currently require authorization from the Commission would be covered. NPRM at ¶ 73.

¹⁹ *Id.*

spectrum users” or “especially large technology companies” would be unworkable or arbitrary, the Commission would be exceeding its authority to impose regulatory fees that are “fair, administrable, and sustainable.”

V. CONCLUSION

The Associations appreciate the Commission’s significant efforts to make unlicensed spectrum available as a public good that has enabled innovative products and services and recognize that the Commission’s regulatory fees are important to fund its vital activities. The NPRM’s questions about expanding the payors of regulatory fees to “unlicensed spectrum users” and “especially large technology companies” would be unworkable or arbitrary for the Commission to effectively administer, and beyond the scope of the Commission's legal authority to impose fees on entities that are fair, administrable, and sustainable. Moreover, the Commission should avoid creating a Wi-Fi Tax on any consumer or entity that uses publicly available unlicensed spectrum regardless of whether that entity is causing or deriving significant benefit from the Commission’s regulatory work. For these reasons, the Commission should proceed cautiously in evaluating any comments submitted in response to the NPRM and before modifying the base of regulatory fee payors.

Respectfully submitted,

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