

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Review of the Commission’s Assessment and) MD Docket No. 22-301
Collection of Regulatory Fees)
)

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these brief reply comments regarding the Commission’s Notice of Inquiry concerning its regulatory fee methodology.²

Although it may be impossible to perfectly align regulatory fees with the costs of regulating any given industry, NAB agrees with commenters calling for the Commission to “seek to assess and collect the statutorily required fees in a more accurate and equitable manner.”³ It is long past time for the Commission to modernize its regulatory fee methodology to more accurately account for the work performed by 75% of the Commission’s full-time equivalent employees (FTEs). Despite being required to amend the schedule of regulatory fees to “reflect the full-time equivalent number of employees in the bureaus and offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits

¹ The National Association of Broadcasters (NAB) is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Review of the Commission’s Assessment and Collection of Regulatory Fees*, Notice of Inquiry, MD Docket No. 22-301 (rel. Sept. 14, 2022) (Notice).

³ Comments of the Satellite Industry Association, MD Docket No. 22-301, at 3 (Oct. 26, 2022) (SIA Comments).

provided to the payor of the fee by the Commission’s activities,”⁴ the Commission makes no effort to determine to what extent regulatory fee payors benefit from the work performed by the more than 900 non-auction FTEs in fourteen of the eighteen bureaus and offices of the Commission.

Though the inaccuracy and unfairness of this approach seems readily apparent, one commenter urges the Commission to exercise extreme caution in reevaluating its allocations of indirect FTEs, contending that the existing system meets the requirements of the statute and that making changes could result in significant unplanned shifts in regulatory fees and unduly burden Commission resources.⁵ These comments ignore the fact that, as SIA points out, significant, unplanned changes to regulatory fees already occur as a result of changes in the numbers of FTEs in the core bureaus or organizational changes, and that the benefits of having consistent regulatory fees “do not outweigh the statutory requirement that fees be ‘reasonably related to the benefits provided’ to regulatory fee payors.”⁶

Contrary to ACA Connects’ contentions, it is also administratively possible to more precisely allocate indirect FTEs in the noncore bureaus and offices of the Commission. The Commission has plenty of experience with disaggregating FTEs in the Commission’s bureaus and offices based on the work such FTEs perform. Every year the Commission determines which FTEs in all bureaus and offices are working on auctions in order to exclude such FTEs from the regulatory fee calculation. The Commission also has done analysis of the work

⁴ 47 U.S.C. § 159(d).

⁵ See Comments of ACA Connects – America’s Communications Association, MD Docket No. 22-301 (Oct. 26, 2022) (ACA Connects Comments).

⁶ SIA Comments at 5.

performed by FTEs in the International and Wireline Competition Bureaus to reclassify certain FTEs as indirect or otherwise distribute them for regulatory fee purposes.

Although the Commission's re-examination of its allocation of indirect FTEs may require some additional resources, it will be worth it if it results in a fee methodology that is more equitable and sustainable moving forward. At the end of the day, the Commission's administrability goals cannot supersede its statutory mandate or the need for a fair and sustainable fee structure. Commenters advocating to preserve the status quo benefit from the existing methodology that treats many FTEs working on broadband internet access services, Universal Service Fund (USF), and unlicensed spectrum activities as indirect, forcing broadcasters that do not provide such services to subsidize a substantial portion of the tab. ACA Connects' warning that the Commission should "do no harm" to the existing fee methodology,⁷ conveniently ignores the harm the current system exacts on broadcasters that do not provide such services, have no way of passing on regulatory fee costs to a subscriber base, and simply do not benefit from some of the Commission's most significant priorities.

It is difficult to believe that with all the changes that have occurred in the telecommunications marketplace over the last decade, the existing methodology for allocating regulatory fees continues to meaningfully reflect the benefits provided to fee payors by the Commission's activities. Indeed, the Commission is considering another reorganization to create a "Space Bureau" in recognition of the fact that the scope of the agency's work and priorities with respect to satellite communications has changed.⁸ Though the Commission has provided little detail or insight into how this reorganization will take place, it will undoubtedly

⁷ See ACA Connects Comments at 9.

⁸ See FCC, *Chairwoman Rosenworcel Proposes Space Bureau* (Nov. 3, 2022), available at: <https://docs.fcc.gov/public/attachments/DOC-388826A1.pdf>.

involve analysis of the work performed by various FTEs and impact the Commission's assessment of regulatory fees. Now is therefore an ideal time for the Commission to examine more broadly the work performed by FTEs in the indirect bureaus and offices of the Commission to determine whether the Commission's proportional allocations of such FTEs correspond in any way to the benefits that industries receive from the work performed.

Even if the Commission makes no changes to how it allocates FTEs in the noncore bureaus and offices of the Commission, changing the classification of the FTEs working on non-high cost USF programs in the Wireline Competition Bureau (WCB) as NAB proposed would go be a significant and necessary step towards right-sizing the Commission's fee structure.⁹ Hundreds of FTEs in the noncore bureaus and offices perform an immense amount of work to support the Commission's broadband and Universal Service Fund priorities, which the existing methodology unlawfully and unfairly requires broadcasters to substantially subsidize. Given the Commission's continued refusal to add a separate fee category for broadband services on the grounds that broadband internet access service providers already pay regulatory fees, counting the USF FTEs as direct FTEs for those fee payors that provide broadband services would better reflect the amount of work performed by the Commission to promote broadband internet access services and the benefits provided to existing fee payors that provide broadband internet access services. Making this change has the added benefit of not carrying with it any of the administrability concerns raised by opponents of any regulatory fee reform.

⁹ See Comments of NAB, MD Docket No. 22-301, at 15-22 (Oct. 26, 2022) (NAB Comments).

II. THE RECORD DEMONSTRATES THAT THE COMMISSION CAN REVISE ITS FEE METHODOLOGY WITHOUT UNDUE BURDEN

No stakeholder should be satisfied with a regulatory fee system that bases regulatory fees on an examination of only 25% of the FTEs that the Commission is required, by statute, to consider. Although there are components of the Commission's costs that "are not specifically correlated with any particular category of regulatees, and/or that benefit the Commission and the industry as a whole,"¹⁰ it is not reasonable that 75% of the Commission's costs should be treated as such and that there is not an administratively feasible methodology for more precisely allocating FTEs that benefit multiple categories of regulatees.

Arguments to the contrary rest on shaky ground at best. For example, ACA Connects asserts that the existing methodology is sufficient to meet the statute's requirements because there is no way to perfectly align regulatory fees with the benefits a fee payor receives from the Commission's activities, and that "if the Commission finds the activities of certain indirect FTEs directly and consistently attributable to one particular industry segment, it will reclassify such FTEs as direct FTEs in the applicable core bureau."¹¹ However, the sole example ACA Connects cites in support of its contention that the Commission already makes the necessary adjustments involves FTEs in a core bureau.¹² ACA Connects ignores the fact

¹⁰ ACA Comments at 4.

¹¹ *Id.* at 5.

¹² *Id.* at 3, n. 9 ("[I]n 2015 the Commission reassigned four International Bureau FTEs working on market access requests for non-U.S. licensed space stations as indirect, but in 2020 reclassified them as direct to account for the Commission's decision to assess regulatory fees on non-U.S. licensed space stations."). Not only is ACA Connects' example irrelevant to the Commission's treatment of indirect FTEs in the noncore bureaus and offices, but it also illustrates problematic inconsistencies in the Commission's fee methodology. It is troubling that these International Bureau FTEs were ever classified as indirect, when, as ACA Connects

that the Commission does no analysis of work performed by FTEs in the noncore bureaus and offices of the Commission to determine whether the activities of such FTEs “directly and consistently [are] attributable” to any industry to determine if such reclassification is necessary, which is precisely the task that NAB and others are asking the Commission to undertake.

ACA Connects also claims that “potential revisions to the Commission’s methodology for allocating indirect FTEs very easily could breach any reasonable bounds of administrability.”¹³ Specifically, ACA Connects claims that significant, unplanned shifts in regulatory fees from year to year resulting from changing assignments would unfairly burden regulatees that do not expect such increases and are not contemplated by Section 9.¹⁴ These alleged concerns should not prevent the Commission from making changes to its methodology for two reasons. First, as NAB pointed out in its comments, there appear to be groups of FTEs in the noncore bureaus and offices that are consistently focused on particular industry segments and that do not appear to change significantly over time.¹⁵ The Commission could also reassess FTE allocations over the course of three or five years if necessary, to avoid significant annual shifts. Second, Section 9 expressly contemplates and

recognizes, the Commission forces commercial broadcasters to bear the costs of FTEs working on matters pertaining to noncommercial radio and television stations. Like the non-U.S. licensed space stations in 2015, noncommercial broadcasters are not required to pay regulatory fees. In light of its 2015 decision with respect to the International Bureau FTEs, there is no justification for the Commission’s continued refusal to ascertain the number of Media Bureau FTEs working on noncommercial broadcast issues and to reclassify them as indirect as broadcasters have advocated. See Joint Reply Comments of the State Broadcasters Associations, MD Docket Nos. 21-190, 20-105, at 19-20 (June 21, 2021).

¹³ ACA Comments at 5.

¹⁴ *Id.* at 6-7.

¹⁵ See NAB Comments at 9-10.

requires these amendments to the schedule of regulatory fees, so that fees “reflect the full-time equivalent number of employees in 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.”¹⁶ Every year regulatory fees change to account for changes in the number of direct FTEs in the core bureaus or changes the agency makes to its organizational structure. Broadcasters have seen their fees increase well in excess of the Commission’s overall budget increase some years due to such changes.¹⁷ As SIA highlights, the Commission has not shied away from making other changes to FTE allocations that have resulted in substantial unplanned shifts in regulatory fees without regard to the administrability of such a change.¹⁸ Indeed, the Commission’s decision to reclassify the USF FTEs resulted in a significant, unplanned increase of over \$5 million dollars in the amount of regulatory fees owed by broadcasters in FY 2017, yet this shift remarkably did not raise administrability concerns.

Concerns that allocating indirect FTEs in a more accurate manner would unduly burden Commission resources are also overblown. Though some of the Commission’s offices’ work may be so cross-cutting as to not allow for this type of accounting, the Commission has shown through its ability to account for auction-related activities that it is possible for FTEs to account for their time in a more granular manner in many of the indirect bureaus. Every year the Commission performs some analysis of what FTEs are working on its strategic goals and on USF programs presumably to provide good faith estimates in its budget estimate to

¹⁶ 47 U.S.C. § 159(d).

¹⁷ For example, the Commission’s budget did not increase at all in Fiscal Year 2020, yet broadcasters’ fees increased by 4-5%.

¹⁸ See SIA Comments at 5.

Congress. The Commission also has examined the work assignments of FTEs in the International Bureau and WCB to determine how they should be allocated for regulatory fee purposes without unduly burdening Commission resources. For instance, in addition to determining that 38 FTEs worked on non-high cost USF programs, in 2017 the Commission also was able to estimate that eight FTEs worked on numbering issues in WCB and should be split between WCB and the Wireless Telecommunications Bureau for regulatory fee purposes without undue burden.¹⁹ ACA Connects provides no reasonable explanation for why the Commission cannot do the same thing with FTEs in the noncore bureaus and offices of the Commission.

III. RECLASSIFYING USF FTES AS NAB PROPOSED WOULD BE ADMINISTRABLE, FAIR, AND SUSTAINABLE

Even if the Commission does not make any changes to its allocation of FTEs in the noncore bureaus and offices, the Commission can begin to achieve a more fair and sustainable regulatory fee methodology by adopting NAB's proposal to restore the USF FTEs' direct classification and distribute them among the regulatory fee payors that benefit from the Commission's USF and broadband activities.²⁰ As NAB explained in its comments, the Commission's decision to continue classifying the USF FTEs as indirect forces broadcasters to not only pay for some of the USF FTEs, but also a higher portion of total Commission costs than they would otherwise.²¹ These other costs include significant numbers of FTEs in the

¹⁹ The Commission was able to determine that there were 38 USF FTEs working on non-high cost USF programs by collaborating with WCB staff to analyze the number of FTEs that worked on each USF program. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order, 32 FCC Rcd 7057, 7062 (2017). NAB has not been able to find an explanation of how the Commission arrived at its estimate of FTEs working on numbering issues.

²⁰ See NAB Comments at 15-22.

²¹ *Id.* at 17.

noncore bureaus and offices of the Commission that are focused on USF programs specifically, and the Commission's broadband objectives generally. The work these FTEs perform promote the public's adoption of and consumer confidence in the services provided by broadband service providers. There is no reasonable explanation as to why the regulatees that benefit from the Commission's USF activities should not be responsible for a higher portion of these FTEs, rather than broadcasters, when the Commission has acknowledged that broadcasters do not benefit from the Commission's USF programs nor provide broadband internet access services.²² Reclassifying the USF FTEs as NAB proposed will ensure that those regulatory fee payors that provide broadband services and benefit from the Commission's USF activities bear their fair share of the Commission's costs and that broadcasters are not unfairly saddled with these burdens.

In addition to better complying with the statute, NAB's proposal also does not carry with it any of the administrability concerns commenters opposing changes to the allocation of indirect FTEs have identified. The change will not unduly burden additional resources because the Commission already has performed all the work necessary to effectuate the change, including identifying the FTEs involved and the regulatory fee payors that benefit from their activities. NAB has also provided an administrable methodology for allocating the FTEs among the regulatory fee payors that benefit.²³ And, given that the number of FTEs working on non-

²² See *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2022, Report and Order*, FCC 22-68, at ¶ 70 (rel. Sept 2, 2022) (Report and Order) (acknowledging that broadcasters do not benefit from activities performed by USF FTEs); *Id.* at n. 29 (noting that the Commission recognized that broadcasters do not provide broadband internet access services.).

²³ See Notice of Ex Parte from R. Kaplan (NAB) to M. Dortch (FCC), MD Docket No. 22-223, Attachment at 7 (July 27, 2022).

high-cost USF programs in WCB has remained consistent for the last five years, it is unlikely that reclassifying the USF FTEs as direct and distributing them among the regulatory fee payors that benefit from their activities will result in significant, unplanned shifts in regulatory fees.

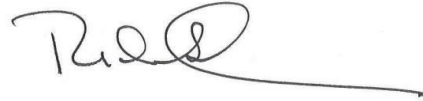
Adopting NAB's proposal will ultimately result in a methodology that is *more* consistent, transparent, and administrable. Currently, the Commission has provided no explanation of how its decision to exempt broadcasters from certain costs associated with the USF FTEs functions mathematically. The Commission has not explained how it will determine the amount that is to be subtracted from broadcasters' regulatory fee burden each year, nor explained its methodology for allocating such amount to the remaining fee payors. The percentage of direct FTEs in each core bureau does not correspond to the percentage of regulatory fees for which each core bureau is responsible, and there is no clear way to discern how the percentage of regulatory fees attributable to each core bureau was calculated. The Commission can avoid this confusing result and provide greater transparency to fee payors by simply dividing the USF FTEs as direct among the regulatory fee categories that directly benefit from the work the USF FTEs perform as NAB suggested.

IV. CONCLUSION

NAB strongly supports the Commission's review of its methodology for allocating indirect FTEs. The Commission should no longer delay doing the work necessary to ensure that its fee methodology more fairly and accurately accounts for the benefits provided to fee payors by the work performed by the overwhelming majority of the agency's FTEs, regardless of where those FTEs are located.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

Rick Kaplan
Larry Walke
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November 25, 2022