

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

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

**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 Proposed Rulemaking concerning regulatory fees for Fiscal Year 2021.²

On June 4, 2021, the D.C. Circuit Court of Appeals issued its decision in *Telesat Canada v. FCC* that dismissed non-U.S. licensed space stations’ challenge to the FCC’s decision to expand the base of regulatory fees to include such entities (*Telesat*).³ The court found that it is reasonable for the FCC to charge regulatory fees to entities that benefit from its activities, regardless of whether the entity is a licensee. The *Telesat* decision therefore directly supports NAB and others’ repeated requests that the Commission consider steps to

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 *Assessment and Collection of Regulatory Fees for Fiscal Year 2021; Assessment and Collection of Regulatory Fees for Fiscal Year 2020*, Report and Order and Notice of Proposed Rulemaking, MD Docket Nos. 21-190, 20-105, FCC 21-49 (rel. May 4, 2021) (R&O and NPRM).

³ See *Telesat Can. v. FCC*, No. 20-1234, 2021 U.S. App. LEXIS 16677 (D.C. Cir. June 4, 2021) (*Telesat*).

expand the base of regulatory fee payors to include Big Tech and other unlicensed spectrum users that use the Commission’s resources to their benefit.⁴ For example, Big Tech is one of the primary drivers of the policy work being done by the currently non-core Office of Engineering and Technology (OET).

Though the Commission previously has failed to address this issue in its regulatory fee proceedings, the matter of Commission authority to assess regulatory fees on such entities absent further congressional action has been raised.⁵ In *Telesat*, a court for the first time interpreted the Commission’s Section 9 authority as modified by the Ray Baum’s Act, and found that the only condition upon which the Commission needs to rest a policy decision to charge regulatory fees is whether the payor receives benefits from the Commission’s activities. Given *Telesat*’s interpretation of the Commission’s regulatory fee authority, the Commission must, at a minimum, address NAB’s requests and issue a Further Notice of Proposed Rulemaking seeking comment on whether and how to include these entities in its

⁴ See, e.g., Comments of NAB, MD Docket No. 20-105, at 9-14 (June 11, 2020) (explaining that the Commission has the statutory authority to expand its base of payors to include unlicensed spectrum users who utilize Commission resources and benefit from the Commission’s activities) (FY2020 NAB Comments); Comments of State Broadcaster Associations, MD Docket No. 20-105, at 3-4 (June 12, 2020) (stating that the Commission must “find ways to bring those who truly are benefiting from the Commission’s work into the regulatory fee payment scheme and highlighting the fact that in many cases “the Commission’s efforts are specifically designed to permit unlicensed uses, increasing interference and competition to broadcasters”); Comments of NAB, MD Docket No. 19-105, at 2, 8-11 (June 7, 2019) (urging the Commission to require unlicensed spectrum users to contribute to regulatory fees).

⁵ See Statement of Commissioner O’Rielly, *Assessment and Collection of Regulatory Fees for Fiscal Year 2020*, MD Docket No. 20-105, FCC 20-64 (May 13, 2020) (“To those who have filed comments opposing increased fees, I remain sympathetic. The fee setting exercise is largely a zero-sum game, and absent congressional action, it is difficult to imagine broadening the base of payors.”).

annual assessment of regulatory fees so that all stakeholders can provide input on this critical issue.

In addition, Commission staff also recently posed questions regarding the FCC's authority to include core bureau full-time employees (FTEs) that are classified as auction FTEs in the core bureaus' direct FTE counts for purposes of proportionally allocating indirect and overhead costs as NAB proposed.⁶ For the reasons set forth below, there are no statutory limitations to adopting NAB's proposal.

II. THE D.C. CIRCUIT'S DECISION MAKES IT CLEAR THAT THE COMMISSION HAS THE STATUTORY AUTHORITY TO CHARGE BIG TECH REGULATORY FEES.

Last year, NAB advocated in its comments that the FCC's reasoning for charging non-U.S. licensed space stations regulatory fees applied with equal force to Big Tech and other unlicensed spectrum users, and that no further congressional action would be necessary to expand the base of payors to include these entities.⁷ Specifically, NAB noted that the Ray Baum's Act removed any prior statutory limitations by removing references to "licensees" as the entities from which regulatory fees should be collected, leaving only the direction that regulator fees should reflect the benefits the Commission's activities provide to the payor.⁸ Therefore, the Commission has the authority to charge Big Tech and unlicensed spectrum users regulatory fees because, like non-U.S. licensed space stations, Big Tech and other unlicensed spectrum users utilize Commission resources in the same manner as licensees that are charged regulatory fees and directly benefit from Commission activities, at times to

⁶ See Comments of NAB, MD Docket No. 21-190, at 10-12 (June 3, 2021) (NAB Comments).

⁷ See FY2020 NAB Comments at 9-14.

⁸ *Id.* at 10-11; 47 U.S.C. § 159(d).

the detriment of broadcasters and other licensees.⁹ While the Commission proceeded with its plan to assess fees on non-U.S. licensed space stations based on this reasoning, the Commission's order did not even address NAB's arguments.

Telesat is the first case to interpret the Commission's authority to assess regulatory fees on a new class of payors and resolves any doubts regarding the Commission's authority to do so in favor of NAB's position. In dismissing non-U.S. licensed space stations' challenge to the FCC's decision to charge them regulatory fees, the court rejected the notion that there are any statutory limits on the FCC's ability to charge regulatory fees to entities that benefit from the Commission's activities beyond the exemptions listed in Section 9.¹⁰ Far from dictating how and to whom regulatory fees can be assessed, the court found that Section 9 merely "provides a general guide to the FCC that it should charge regulatory fees to those that benefit from its regulations."¹¹ Moreover, the court expressly affirmed NAB's longstanding position that the primary consideration for whether the Commission may charge an entity regulatory fees are the benefits the entity receives from the Commission's activities:

[Through the Ray Baum's Act] Congress made clear that the Commission's regulatory fee schedule should take account of 'the benefits provided to the payor of the fee by the Commission's activities.' 47 U.S.C. § 159(d). *This*

⁹ *Id.* at 11-13 (explaining that several technology companies publicly acknowledged the massive benefits of the Commission's recent rulemaking proceedings to their businesses and that "[a]s a result of the benefits conferred by the Commission's activities, these entities will be allowed to introduce new technologies, many of which will ultimately compete with services provided by broadcasters and in some cases cause interference to broadcaster operations."); NAB Comments at 12-13 (explaining how Microsoft is using the resources of the Office of Engineering and Technology to further its Airband Initiative to the detriment of broadcasters) (NAB Comments).

¹⁰ See *Telesat* at *12-13.

¹¹ *Id.* at *7. The court also made clear that the Commission is not in any way limited to charging regulatory fees to only those entities that appeared on the original Section 9 fee schedule because "the [Ray Baum's] Act notes that the Commission retains flexibility to adjust or amend regulatory fees..." *Id.*

*suggests benefits—not licenses—should be the touchstone for whether it is reasonable for the FCC to collect regulatory fees.*¹²

Telesat's interpretation of the Commission's Section 9 authority thus affirmatively answers the question as to whether the FCC can or should begin the process of expanding its payor base to include unlicensed spectrum users that broadcasters and other licensees are currently forced to subsidize. There is no doubt that Big Tech and unlicensed spectrum users benefit from the Commission's activities. Indeed, unlicensed spectrum users uniquely benefit from the significant and increasing level of attention that the Commission has dedicated to providing new opportunities for unlicensed spectrum, as evidenced by the high level of participation of these entities in the Commission's rulemaking proceedings.¹³ *Telesat* has clarified that as the communications marketplace changes and the Commission's work evolves to place more focus and attention on unlicensed spectrum issues, the Commission undoubtedly has the statutory authority and flexibility under Section 9 to expand the base of payors to include Big Tech and unlicensed spectrum users that benefit from the Commission's activities.

III. THE FCC SHOULD ISSUE A FURTHER NOTICE OF PROPOSED RULEMAKING SEEKING COMMENT ON CHARGING BIG TECH AND OTHER UNLICENSED SPECTRUM USERS REGULATORY FEES

As NAB explained in its comments, policy considerations plainly counsel in favor of the Commission taking the necessary steps to include Big Tech and other unlicensed spectrum users in its base of regulatory fee payors.¹⁴ Aside from the now-debunked concern that the Commission lacks the authority to do otherwise, the Commission has given no reason for

¹² *Id.* at *12-13 (emphasis added).

¹³ See FY2020 NAB Comments at n. 31 (listing unlicensed spectrum proceedings).

¹⁴ See NAB Comments at 12-14; FY2020 NAB Comments at 11-13.

allowing some of the largest and wealthiest companies in the world to free-ride on Commission activities that unquestionably benefit them, and to force their licensed competitors to subsidize the costs of their participation. To truly make the regulatory fee system fair and sustainable as the Commission's budget continues to grow, the base of payors should reflect the work the Commission performs and the industries which benefit from its activities.

At a minimum, this issue is worthy of consideration in a Further Notice of Proposed Rulemaking, which would allow all relevant stakeholders to help inform the Commission's policy determination on this issue. The Commission could pose the following questions, among others, if it pursues such a notice:

- Should or must the Commission assess regulatory fees on Big Tech and other unlicensed spectrum users, given that such entities benefit from the Commission's regulatory activities in the same manner as other licensees, and compete with regulated licensees that currently must subsidize the participation of such entities in Commission activities?;
- Does the Commission have the authority to assess regulatory fees on Big Tech and other unlicensed spectrum users?;
- How would regulatory fees be assessed and applied against Big Tech and other unlicensed spectrum users in a manner that is fair, administrable and sustainable?;
- Should the Commission pursue any changes to the current categorization of core and non-core bureaus and offices that could be necessary to facilitate the assessment of such regulatory fees (for example, should the Office of

Engineering and Technology be categorized as a core bureau whose FTEs are paid for by Big Tech and other unlicensed spectrum users)?.

IV. THE COMMISSION HAS THE AUTHORITY TO INCLUDE AUCTION FTEs FROM THE CORE BUREAUS WHEN CALCULATING EACH BUREAU'S SHARE OF INDIRECT COSTS

Commission staff recently raised the question of whether the Commission has the statutory authority to adopt NAB's proposal that the Commission include FTEs from the core bureaus that are charged to auctions in the core bureaus' direct FTE counts for purposes of allocating their proportional share of non-auction indirect costs (e.g. salaries and expenses of the non-core bureaus and offices and overhead). For instance, under the Commission's current methodology, 81 FTEs in the Wireless Telecommunications Bureau (WTB) are currently classified as auction employees and therefore are excluded from WTB's FTE count when calculating the percentage of indirect costs that should be allocated to the wireless industry.¹⁵ As NAB has explained, excluding these FTEs makes the WTB's footprint look much smaller than it is, and artificially depresses the indirect costs attributable to the wireless industry.¹⁶

There are no statutory impediments to adopting NAB's proposal. Section 9 of the Communications Act contains no reference to auction funding or the classification of auction FTEs.¹⁷ Congress's appropriations language likewise does not specify how the core bureaus' auction FTEs should be counted for purposes of allocating indirect costs.¹⁸ The Commission

¹⁵ See NAB Comments at 10-12.

¹⁶ *Id.*

¹⁷ See 47 U.S.C. §§ 159, 159a.

¹⁸ See Division E—Financial Services and General Government Appropriations Act, 2021, Title V—Independent Agencies, Federal Communications Commission of the Consolidated Appropriations Act, 2021, Public Law No: 116-260 (Dec. 27, 2020) ("Provided further, That, notwithstanding 47 U.S.C. 309(j)(8)(B), proceeds from the use of a competitive bidding system

therefore has the authority, and indeed the responsibility under the statute, to adjust its methodology to ensure that the industries in each of the core bureaus bear their fair share of the Commission's indirect costs.

V. CONCLUSION

Telesat has resolved any doubt as to whether the Commission has the authority to charge Big Tech and other unlicensed spectrum users regulatory fees should it decide it makes good policy sense to do so. The Commission also has the authority to reform its methodology to ensure that all industries pay for their fair share of the Commission's indirect costs. The Commission should no longer delay taking the steps necessary to modernize its fee schedule to more accurately reflect the work the Commission performs and broaden the base of contributors to include regulatory free riders that benefit from the work the Commission performs but contribute nothing to support the Commission's efforts.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1 M St, SE
Washington, DC 20003
(202) 429-5430



Rick Kaplan
Larry Walke
Emily Gomes

that may be retained and made available for obligation shall not exceed \$134,495,000 for fiscal year 2021.”).

June 18, 2021