

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

In the Matter of:	)	
	)	
Assessment and Collection of Regulatory Fees For Fiscal Year 2021	)	MD Docket No. 21-190
	)	
Assessment and Collection of Regulatory Fees For Fiscal Year 2022	)	MD Docket No. 22-223
	)	

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

July 5, 2022

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**I. INTRODUCTION AND SUMMARY**

The National Association of Broadcasters (NAB)<sup>1</sup> hereby submits the following comments in response to the Commission’s Notice of Proposed Rulemaking concerning regulatory fees for Fiscal Year 2022 (FY 2022).<sup>2</sup>

Congress authorizes the Commission to charge regulatory fees to entities that benefit from the Commission’s activities.<sup>3</sup> This authority is limited by the statutory requirements that the Commission’s fee schedule collect the total amounts appropriated in a given year and that the “fees reflect the full-time equivalent number of employees within the bureaus and

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<sup>1</sup> 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.

<sup>2</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2021; Assessment and Collection of Regulatory Fees for Fiscal Year 2022*, Report and Order and Notice of Proposed Rulemaking, MD Docket Nos. 21-190, 22-223 (rel. June 2, 2022) (NPRM).

<sup>3</sup> *Telesat Can. v. FCC*, 999 F.3d 707, 712 (D.C. Cir. 2021) (*Telesat*) (Section 9 “provides a general guide to the FCC that it should charge regulatory fees to those that benefit from its regulations.”); 47 U.S.C. § 159.

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."<sup>4</sup> The Commission contends that in addition to meeting the statutory requirements, it strives to ensure that its fee proposals serve the Commission's goals of making regulatory fees "fair, administrable, and sustainable."<sup>5</sup> This year's fee proposal exceeds the Commission's statutory authority and falls well short of achieving the Commission's stated regulatory fee goals, by unfairly, unlawfully, and disproportionately burdening broadcasters with subsidizing the costs of FCC activities that do not benefit them. There is no other explanation for why the NPRM proposes to raise broadcasters' fees by a staggering 13%, despite the Commission's budget increasing by 2.1%.

For years, broadcasters have urged the Commission to reform its methodology to ensure that the fees broadcasters pay bear a meaningful relationship to the work performed by Commission FTEs to benefit or regulate the broadcast industry.<sup>6</sup> Broadcasters have also

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<sup>4</sup> 47 U.S.C. § 159(d).

<sup>5</sup> NPRM at ¶ 11.

<sup>6</sup> See, e.g., Comments of NAB, MD Docket No. 19-105, at 7 (June 7, 2019) (questioning the Commission's allocation of direct FTEs on a one-to-one basis); Comments of NAB, MD Docket No. 20-105, at 5 (June 11, 2020) (noting that proportional allocation unfairly forces broadcasters to bear a higher portion of indirect costs) (NAB FY 2020 Comments); Comments of NAB, MD Docket No. 21-190, at 10 (June 3, 2021) (stating that proportional allocation of indirect FTEs does not "accurately capture the amount of work being done by the indirect offices and bureaus of the Commission on behalf of regulatees in the core bureaus.") (NAB FY 2021 Comments); Comments of NAB, MD Docket No. 21-190, at 4-8 (Oct. 21, 2021) (advocating that the Commission undertake an accounting of the actual functions of FTEs in the noncore offices and bureaus of the Commission to ensure that fees bear a reasonable relationship to the amount of work the Commission performs for the benefit of the payor.) (NAB FY 2021 NPRM Comments); Reply Comments of NAB, MD Docket No. 21-190, at 4-6 (Nov. 5, 2021) (explaining that "the Commission must change its methodology to conform to the Ray Baum's Act and accurately account for the work being performed by the Commission and the beneficiaries of that work" including "tak[ing] action

requested the Commission assess regulatory fees on the direct beneficiaries of a substantial portion of the Commission's resources, including broadband internet service providers and unlicensed spectrum users, rather than force broadcasters to subsidize these industries.<sup>7</sup> It makes no sense to tax broadcasters to foot the bill for large technology companies that benefit greatly from the Commission's work.

NAB was pleased when the Commission last year made important strides in conforming its fee methodology to the law by acknowledging that broadcasters do not benefit from the Commission's broadband activities and modifying its methodology to exempt broadcasters from certain broadband-related costs.<sup>8</sup> Though last year's regulatory fee process represented a step forward, this year's fee proposal takes significant steps backward by abandoning the modifications and taking no action on the growing need to expand the base of payors to include the beneficiaries of the bulk of the Commission's primary activities – broadband internet service providers. As a result, broadcasters face

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to reassess its proportional allocation of fees related to the Commission's indirect bureaus and offices") (NAB FY 2021 NPRM Reply Comments).

<sup>7</sup> See, e.g., NAB FY 2021 Comments at 12-14 (requesting the Commission require Big Tech and unlicensed spectrum users pay their fair share of regulatory fees); NAB FY 2021 NPRM Comments at 10-14 (urging the Commission to add a fee category for broadband service providers and to require Big Tech companies that utilize and benefit from Commission resources to pay their fair share of the Commission's costs); NAB FY 2021 NPRM Reply Comments at 6-14 (same); Joint Reply Comments of the State Broadcasters Associations, MD Docket 21-190, at 5-13 (Nov. 5, 2021) (urging the Commission to expand payor base to include equipment authorization holders and broadband service providers) (State Broadcasters' FY 2021 NPRM Reply Comments).

<sup>8</sup> See *Assessment and Collection of Regulatory Fees for FY 2021*, Report and Order and Further Notice of Proposed Rulemaking, 36 FCC Rcd 12990, 12998 ("[W]e will exclude 'Media Services' licensees from recovery of the \$33 million earmark for Broadband DATA Act appropriation.") (FY 2021 R&O and NPRM).

what seems like a punishment: a fee increase that is more than *six times* the magnitude of the Commission’s budget increase.

This result is nonsensical and unlawful, and has serious implications for broadcasters who, unlike other regulatees, must provide a free service to the public and cannot pass these costs on to consumers.<sup>9</sup> As NAB has highlighted in other proceedings, the broadcast “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”<sup>10</sup> The FCC must ensure that its regulatory framework, including its assessment of regulatory fees, does not hinder broadcasters’ abilities to operate as viable private enterprises in a competitive market and to effectively serve the public interest and their local communities.

The Commission must also disabuse itself of any notion that broadcasters can easily absorb unjustified regulatory fee increases. Fee proposals that require broadcasters to pay more than their fair share of the Commission’s costs directly harm broadcasters’ ability to compete in the communications marketplace,<sup>11</sup> and have detrimental impacts on the

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<sup>9</sup> See Government Accountability Office, *Federal Communications Commission: Regulatory Fee Process Needs to be Updated*, GAO 12-686 at 21 (Aug. 2012), available at <https://www.gao.gov/assets/gao-12-686.pdf>. (noting that while FCC regulatory fees have little to no direct financial impact on certain companies, “broadcasting entities cannot pass regulatory fees on to consumers but must incorporate the fee payment into operating costs to be paid with general operating revenue . . . This potential impact on companies underscores the importance that FCC assess regulatory fees on a fair and equitable basis.”) (GAO Report).

<sup>10</sup> *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992); see also Comments of NAB, MD Docket No. 18-349, at 2-3 (Sept. 2, 2021) (NAB Quadrennial Comments).

<sup>11</sup> NAB has warned about the pernicious effects of regulatory asymmetry in other proceedings, citing numerous studies showing that “retaining legacy asymmetric regulations in an era of increased competition creates regulatory distortions, drives up the regulated industry’s costs, causes already scarce capital to flow to less regulated industries, deters

Commission’s effort to advance digital equity for all by threatening small broadcasters’ ability to continue to serve rural and underserved communities.<sup>12</sup> Broadcasters are already subject to far more regulatory costs and burdens than other regulatees, and radio industry margins are already very thin. Most radio stations operate with staff in the single digits, many doing more than one job to keep the station going. With stations dealing with continued fallout from the coronavirus pandemic and other inflationary pressures, many stations are simply trying to stay in business. A dollar more in regulatory fees is a dollar that can no longer go to the provision of local programming, including local news, or the purchase of equipment.

Given these realities, and the Commission’s duty to preserve the public interest in free, over the air broadcast radio and television service, it is essential that the Commission approach regulatory fees with the same care it would if its own money or that of its employees were at stake. Although the regulatory fee process may be difficult and complex, the Commission can and must do more to align fees with the benefits conferred on each industry group. Not only is it statutorily required, but other fee-funded federal agencies do it regularly. For example, the Nuclear Regulatory Commission (NRC) considers it “part of NRC’s mission as a regulatory agency to ensure that the link between costs and fees is apparent.”<sup>13</sup> To that end, NRC publishes extensive workpapers that it uses to determine the

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new firm entry and places the more heavily regulated companies at a competitive disadvantage relative to companies that provide similar services but are able to avoid regulatory classifications and constraints.” See NAB Quadrennial Comments, at 15-16, n. 35.

<sup>12</sup> See NPRM at ¶ 54 (seeking comment “on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein.”).

<sup>13</sup> See GAO Report at 31.

fees and rates in its NPRMs and Final Orders to further promote transparency.<sup>14</sup> Likewise, the Federal Energy Regulatory Commission “tracks its costs by industry sector and fee category annually and assesses fees in alignment with its costs.”<sup>15</sup>

Despite having recognized that “it is consistent with section 9 of the Act to better align, to the extent feasible these regulatory fees with the current costs of Commission oversight and regulation of each industry group” and that such alignment “promotes the requirement in section 9 to ensure the benefits provided to the payor of the fee are consistent with the Commission’s activities,”<sup>16</sup> the Commission does not provide a similar level of transparency or make a similar effort to align fees with either the costs of regulating a given industry or the actual benefits fee payors receive.

Broadcasters’ disproportionate 13% fee increase is not justified by increased costs to the Commission of regulating broadcasters or increased “benefits” they have received from the Commission’s activities. Broadcasters’ fees are skyrocketing to unsustainable levels because of a fee methodology that both fails to perform any analysis of the benefits provided to industries by 75% of the Commission and is inconsistently applied, and the Commission’s willingness to force broadcasters to subsidize other companies by paying for broadband-related activities that the Commission acknowledges do not provide any benefits to broadcasters. Broadcasters should not be penalized because the Commission’s fee methodology has not kept pace with market changes and technological convergence in other

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2013*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 28 FCC Rcd 7790, 7795 (2013) (FY 2013 NPRM).



industries. As set forth in detail below, the Commission has a duty to remedy these fundamental defects and to mitigate the adverse impacts of its unjustified fee increase on broadcasters.

**II. THE COMMISSION SHOULD REEXAMINE ITS DIRECT/INDIRECT FEE RATIONALE AND ENSURE THAT ITS METHODOLOGY PROPERLY ACCOUNTS FOR THE BENEFITS RECEIVED BY THE PAYOR BY THE COMMISSION'S ACTIVITIES**

When exercising its regulatory fee authority, Congress specifically directed the Commission to amend the schedule of regulatory fees “so that such fees 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.”<sup>17</sup> In other words, it is not sufficient for regulatory fees to merely reflect changes in the “full time equivalent [FTE] number of employees within the bureaus and offices of the Commission,” if the fees do not also bear a reasonable relationship to the benefits conferred on the payor.

As NAB and others have explained in previous filings, the Commission’s current methodology fails to make the statutorily required adjustments.<sup>18</sup> The Commission bases the entire fee schedule solely on an analysis of the number of FTEs in each of the Commission’s core bureaus – approximately 25% of Commission FTEs. The costs associated with the remaining 75% of Commission FTEs are mechanically allocated in proportion to the

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<sup>17</sup> 47 U.S.C. § 159(d).

<sup>18</sup> See, e.g., Notice of *Ex Parte* Communication from R. Kaplan, NAB, to M. Dortch, FCC, MD Docket No. 21-190 (May 12, 2022); Letter from R. Kaplan, NAB, to M. Dortch, FCC, MD Docket No. 21-190 (March 31, 2022). Comments of NAB, MD Docket No. 21-190 (June 3, 2021) (NAB FY 2021 Comments); Joint Reply Comments of the State Broadcasters Associations, MD Docket No. 21-190 at 5-16 (June 21, 2021) (State Broadcasters’ FY 2021 Reply Comments); Letter from R. Kaplan, NAB, to M. Dortch, FCC, MD Docket No. 21-190 (Aug. 20, 2021).

direct FTEs, with the Commission making no effort to even try to quantify or analyze the extent to which any industry benefits from the offices and bureaus not directly related to the function of an identified industry.<sup>19</sup> Consequently, the costs of over 343 FTEs have been assigned to the Media Bureau this year without any analysis performed as to what portion of them actually work on Media Bureau issues.<sup>20</sup>

To the Commission's credit, although the NPRM attempts to defend its methodology, it also seeks comment on whether the Commission's fee assessments ultimately "undermine the Commission's rationale for retaining its current direct/indirect methodology"<sup>21</sup> and whether it should use other calculation methods to reclassify direct FTEs when a category of licensees does not benefit from the FTEs' work.<sup>22</sup> As discussed below, the Commission's current methodology results in a fee system that is arbitrary and capricious, inequitable, and unlawful, thereby undermining any rationale for retaining the Commission's current methodology and underscoring the need for the Commission to look more closely at the functions performed by indirect FTEs. In addition, in a regulatory fee system that requires the Commission to adjust fees to account for benefits received by fee payors, the Commission *must* reallocate indirect FTE costs in situations where a category of licensees does not benefit from the work such FTEs perform.

The Commission asserts it does not examine the functions of indirect FTEs because the "FTE allocation does not apportion the time of specific employees along with their individual work assignments," and "much of the work [of indirect FTEs] that could be

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<sup>20</sup> See NPRM at ¶ 18.

<sup>21</sup> *Id.* at ¶ 52.

<sup>22</sup> *Id.*

assigned to a single category of regulatees is also interspersed with the work that [Commission] staff does on behalf of many entities that do not pay regulatory fees, e.g., governmental entities, non-profit organizations, and very small regulatees that have an exemption.”<sup>23</sup> The Commission contends that its “approach is most accurate when we look at the work of a larger group such as a division or office or bureau” to determine regulatory fee allocations.<sup>24</sup>

However, on many occasions the Commission does examine the workload of individual FTEs to determine FTE allocations recognizing that “the plain wording of [section 9] requires the Commission to calculate fees based on what FTEs are doing, not on where they are located.”<sup>25</sup> For example, the NPRM acknowledges that the “Commission has previously reclassified certain direct FTEs as indirect for regulatory fee purposes *due to the nature of their work assignments*” in the International and Wireline Competition Bureaus.<sup>26</sup> The Commission also analyzes in detail the functions and individual workloads of FTEs across all bureaus and offices to determine the portion of FTEs that work on auctions for purposes of excluding them from the regulatory fee allocation.<sup>27</sup>

There is no question that these practices “undermine the Commission’s rationale for retaining its current direct/indirect methodology” and fail to “on balance, produce a more accurate regulatory fee assessment.”<sup>28</sup> Ultimately, the Commission’s lopsided methodology

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<sup>23</sup> *Id.* at ¶ 17.

<sup>24</sup> *Id.*

<sup>25</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, 78 FR 52433, 52437 (Aug. 23, 2013).

<sup>26</sup> NPRM at ¶ 52 (emphasis added).

<sup>27</sup> *Id.* at ¶ 5.

<sup>28</sup> *Id.* at ¶ 52.

leads to fundamentally unfair results. The Media Bureau is saddled with a higher fee burden merely because, unlike other core bureaus, the Commission has not reclassified Media Bureau FTEs as indirect and because there are relatively fewer auction FTEs in the Media Bureau. Because the Commission looks at only one side of the direct/indirect equation to allocate regulatory fees, the Media Bureau ends up paying the largest portion of indirect costs due to the mathematical consequences of how the Commission has chosen to organize itself, not because its regulatees benefit from or burden the most Commission resources. Regulatees in other core bureaus and those that do not pay regulatory fees at all but are the beneficiaries of much of the work in indirect bureaus such as the Consumer and Governmental Affairs Bureau, the Office of Engineering and Technology, and the Enforcement Bureau receive a discount or entirely free ride. Thus, for the Commission's fee schedule to accurately account for the benefits received by regulatory fee payors, the Commission must perform a more fulsome analysis of the work of the FTEs in the indirect bureaus and offices of the Commission.<sup>29</sup>

The fact that indirect FTEs also perform work on behalf of "governmental entities, non-profit organizations, and very small regulatees that have an exemption"<sup>30</sup> does not justify the Commission's failure to analyze the workloads of indirect FTEs to reclassify where necessary. The Commission routinely requires regulatees to pay for direct FTEs in the core

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<sup>29</sup> NAB has explained in previous filing how the Commission should go about examining the work of FTEs in the noncore bureaus and offices. See NAB FY 2021 NPRM Comments at 4-8. Doing so will not automatically lead to significant changes in regulatory fees year to year as the NPRM suggests. The Commission could, for example, look at the work performed by FTEs in the noncore bureaus over a period of three years to determine whether FTEs in those bureaus are focused on a particular category of regulatees.

<sup>30</sup> *Id.* at ¶ 17.

bureaus that perform functions on behalf of exempt entities. For example, the Commission requires broadcasters to pay for FTEs attributable to non-commercial broadcast stations. In fact, the Commission expressly rejected broadcasters' argument that these costs should be treated as indirect on the grounds that "[t]here are exempt entities in most of the regulatory fee categories" and therefore it is "consistent with section 9 of the Act to include those costs that are attributable to all regulatees in each bureau's revenue requirement."<sup>31</sup> Given the logic used by the Commission to dismiss broadcasters' concerns, it is frankly irrational and arbitrary and capricious for the Commission to use that logic as a reason to refuse to reclassify indirect FTEs that could be assigned to a particular fee category.

To the extent that the Commission determines reclassification of direct FTEs is necessary in certain circumstances,<sup>32</sup> the Commission must "consider different calculation methods when reclassified FTEs work on issues that clearly do not benefit certain classes of

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<sup>31</sup> See State Broadcasters' FY 2021 Reply Comments at 19-20; FY 2021 R&O and NPRM at 13003.

<sup>32</sup> If the Commission refuses to consider the actual work performed by indirect FTEs and instead bases its fee allocations solely on "the FTE burden associated with oversight and regulation by the relevant core bureaus," it also should not scrutinize the workloads of direct FTEs to reclassify FTEs as indirect or exclude auction FTEs for purposes of determining regulatory fee allocations. Such FTEs are still presumably involved in the oversight and regulation of the industries within the relevant core bureau. Furthermore, NAB has detailed in prior filings how the Wireline Telecommunications Bureau has substantially lowered its regulatory fee burden by classifying over half of its FTEs as auction-related. This classification distorts the wireless industry's share of regulatory fees by artificially depressing the Commission's measurement of the amount of work that is being performed on behalf of the wireless industry in the direct and indirect bureaus and offices of the Commission and the benefits the industry receives. Nothing in Section 9, the Appropriations Act or the statute authorizing the Commission to retain auction revenues (47 U.S.C. § 309(j)(8)(B)) suggests that auction employees should be excluded for purposes of measuring the "benefits" the wireless industry receives from the Commission's activities. See, e.g., NAB FY 2021 Comments at 10-11.

licensees” in order to properly account for the benefits received by fee payors.<sup>33</sup>

Broadcasters have been forced to pay for a portion of the 38 FTEs in the Wireline Competition Bureau that the Commission determined were working on Universal Service Fund (USF) programs that benefited certain regulatees in other core bureaus. Importantly, in 2016 the Commission initially declined requests to reclassify these FTEs, noting that doing so “ignores licensees not involved in high-cost and Lifeline, such as radio and television broadcasters, that would be responsible for contributing to the cost of those Wireline Competition Bureau FTEs.”<sup>34</sup> The FCC reversed its position the following year, relying solely on one commenter’s thin argument that the Commission need not worry about broadcasters because “there is no completely pure way to precisely allocate every Commission FTE” to justify dismissing its earlier concerns.<sup>35</sup>

Rather than achieving a “more balanced and fair fee assessment,” broadcasters became responsible for approximately seven additional FTEs that the Commission expressly acknowledged do not benefit broadcasters because broadcasters do not provide USF services, contribute to USF, or receive any benefits from USF programs. Essentially, to relieve regulatees in the Wireline Competition Bureau from paying for the full costs of FTEs that do provide benefits to their industry, the Commission determined it was better to foist 20% of the costs upon licensees that receive no benefits whatsoever. This ham-fisted approach is unacceptable in a system where benefits are the “touchstone” of whether it is appropriate to

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<sup>33</sup> NPRM at ¶ 52.

<sup>34</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2016*, Report and Order, 31 FCC Rcd 10339, 10347 (2016).

<sup>35</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order, 32 FCC Rcd 7057, 7063 (2017).

charge regulatory fees.<sup>36</sup> Rather than assign broadcasters a proportional allocation of these indirect costs, the Commission should have then and should now distribute them solely amongst those regulatees that benefit from the USF work the FTEs perform. Forcing broadcasters to pay for these costs is a wholesale abandonment of the statutory requirement that fees be adjusted to reflect benefits received by the payor by the Commission's activities.

For similar reasons, the Commission should ensure that broadcasters bear no responsibility for the 84 direct FTEs in the Media Bureau that the Commission has stated to Congress are working to promote a 100% broadband policy.<sup>37</sup> Based on the Commission's representation to Congress, the Commission must reclassify these FTEs as indirect and distribute the costs among regulatees that benefit from the Commission's broadband activities. These FTEs account for approximately 63% of Media Bureau FTEs.<sup>38</sup> Given that the Media Bureau "recommends, develops, and administers the policy and licensing programs relating to electronic media, including broadcast, cable, and satellite television,"<sup>39</sup> it is unclear why 84 Media Bureau FTEs are working on broadband, but nevertheless, the Commission has already established that broadcasters do not benefit from broadband-related work. Like the FTEs the Commission reclassified in the International and Wireline Competition Bureaus, the benefits provided to fee payors by these Media Bureau FTEs inure

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<sup>36</sup> *Telesat*, 999 F.3d at 713.

<sup>37</sup> See *2022 Budget Estimates to Congress*, Federal Communications Commission, at 15 (May 2021), available at: <https://www.fcc.gov/document/fcc-fy-2022-budget-estimates-congress> (depicting FTE distribution by strategic goals among the bureaus and offices of the Commission) (FY 2022 Budget Estimate).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 70.

to licensees in other bureaus. The Commission therefore has a sufficient basis to reclassify these FTEs as indirect and allocate their costs among those fee payors that benefit from the Commission's broadband activities.<sup>40</sup> There simply is no reason that broadcasters specifically, and Media Bureau regulatees generally should be solely responsible for these FTEs under the Commission's current methodology.<sup>41</sup>

### **III. BROADCASTERS SHOULD NOT BE RESPONSIBLE FOR THE COMMISSION'S BROADBAND COSTS**

Over the course of the last two years, the FCC's budget has swelled by \$42.95 million to primarily support the Commission's broadband priorities. Last year, the Commission's budget increased by \$35 million, \$33 million of which was appropriated to pay for the Commission to implement the Broadband DATA Act (Broadband Data Costs).<sup>42</sup> In response to comments from NAB and others, the Commission determined that broadcasters do not benefit from the Commission's broadband-related activities and exempted broadcasters from paying for Broadband Data Costs, as required by statute.<sup>43</sup>

The NPRM inexplicably reverses course and fails to examine whether it should continue to exempt broadcasters from paying for the Commission's broadband-related

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<sup>40</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, 28 FCC Rcd 12351, 12357 (2013) (justifying reclassification of International Bureau FTEs)

<sup>41</sup> Alternatively, broadcasters' share of the Media Bureau's regulatory fees should be reduced. Though the NPRM does not state what percentage of Media Bureau fees is collected from broadcasters, broadcasters appear to be responsible for approximately 45% of the Media Bureau's regulatory fees. Media Bureau FTEs working on broadband-related issues (63% of Media Bureau FTEs) cannot be working on behalf of broadcasters, who do not provide broadband services. Thus, broadcasters should be responsible for, at most, 37% of the Media Bureau's regulatory fee allocation.

<sup>42</sup> See FY 2022 Budget Estimate at 64.

<sup>43</sup> See, e.g., NAB FY 2021 Comments at 5-10; State Broadcasters' FY 2021 Reply Comments at 16.



activities from which broadcasters receive no benefits. The NPRM also contains no discussion of whether the Commission should add a fee category for broadband internet service providers to recover these costs as NAB and others have urged. Instead, the NPRM requires broadcasters to pay an exorbitant fee increase to cover the costs of activities the Commission last year acknowledged do not benefit them.

The Commission can no longer delay requiring broadband internet service providers to pay regulatory fees to ensure that the primary beneficiaries of a substantial and growing portion of the Commission's activities help pay for them. Because this process will take time and not provide broadcasters with any relief this year, the Commission must revise its fee proposal to reallocate broadband costs among only those fee payors that benefit from the Commission's broadband activities. Continuing to require broadcasters to pay for these "indirect" costs is unlawful and unfair, when the Commission has conceded that broadcasters have nothing to do with the Commission's broadband activities. While other regulatory fee payors may benefit from the Commission's broadband activities, as the Commission has acknowledged, broadcasters simply do not share in those benefits. No public interest goal is served by requiring broadcasters who provide a free service to the public to subsidize broadband costs that benefit other regulatory fee payors,

**A. The Commission Should Reallocate Broadband-Related Costs Among Fee Payors that Benefit from the Commission's Broadband Activities**

Just last year the Commission appropriately exempted broadcasters from paying for the Commission's broadband data mapping activities by reallocating those cost among other regulatory fee payors that do benefit, as the statute requires. In exempting broadcasters from paying for these costs, the Commission recognized that broadcasters "claim[ed] no regulatory impact or benefit" from the Commission's broadband data mapping activities and

“the unusual position of broadcasters vis-à-vis other Commission regulatees in this instance.”<sup>44</sup> Nothing has changed. Although the Commission described the Broadband Data Costs appropriation as a “one-time” event, the Commission removed the need for Congress to separately appropriate additional amounts for broadband data mapping by seeking additional resources in its FY 2022 budget request to support its mapping and other broadband-related activities. As a result, the Commission’s budget did not fall back to pre-FY 2021 levels but increased over the total FY 2021 appropriation.<sup>45</sup> The Commission has continued its broadband data mapping activities in FY 2022, and broadcasters remain in the same unusual position vis-à-vis other Commission regulatees with respect to those costs.<sup>46</sup> The Commission should therefore exempt broadcasters from the Commission’s broadband mapping-related costs as it did last year.

The Commission must also exempt broadcasters from paying for the Commission’s USF costs. The Commission’s proposal again forces broadcasters to subsidize the beneficiaries of the Commission’s USF activities by paying for 20% of the costs, despite having acknowledged for years that broadcasters “have no universal relationship” and are not involved in universal service issues.<sup>47</sup> An adjustment to broadcasters’ regulatory fees to

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<sup>44</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 21-190, at ¶ 16 (rel. Aug. 26, 2021) (FY 2021 R&O).

<sup>45</sup> See FY 2022 Budget Estimate at 7 (“The Commission requests \$387,950,000 in budget authority from regulatory fee offsetting collections. This request represents a net increase of \$13,950,000 or 3.7 percent from the FY 2021 appropriated level of \$374,000,000.”).

<sup>46</sup> See *Broadband Data Collection Resources*, Federal Communications Commission, available at: <https://www.fcc.gov/BroadbandData/resources> (listing “Orders, Public Notices, and Other Items” pertaining the Commission’s Broadband Data Collection activities).

<sup>47</sup> See *Statement of Chairman Tom Wheeler, Federal Communications Commission*, Hearing on the FCC’s Fiscal Year 2016 Budget Request Before the Subcommittee on Financial

account for the lack of benefits they receive from the Commission’s USF activities is long overdue.

The factors that weighed in favor of the Commission exempting broadcasters from paying for Broadband Data Costs apply with equal force here. Like the Broadband Data Costs, USF costs are “large” and quantified in the Commission’s annual budgets.<sup>48</sup> In addition, the USF program pertains to services which broadcasters do not offer. Broadcasters as a group therefore “claim no regulatory impact or benefit from” the Commission’s USF activities and occupy an “unusual position... vis-à-vis other Commission regulatees,” with respect to USF.<sup>49</sup>

Adjusting broadcasters’ fees to account for the lack of benefits they receive from the Commission’s USF activities as statutorily required will help ensure the Commission’s regulatory fee system remains fair and sustainable. According to the Commission’s FY 2022 budget estimate, the Commission incurs over \$22 million in costs each fiscal year in overseeing USF activities.<sup>50</sup> The effect of removing these costs from broadcasters’ fees is

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Services and General Government Committee on Appropriations U.S. House of Representatives, at 4-5 (March 24, 2015), available at: <https://www.fcc.gov/document/chairman-wheeler-statement-house-committee-appropriations>.

<sup>48</sup> See FY 2022 Budget Estimate at 26.

<sup>49</sup> See FY 2021 R&O and NPRM at 12998. The Commission’s budget request indicates that 1 FTE in the Media Bureau is working on USF activities. Up until this year, the Commission did not identify a single FTE in the Media Bureau as working on USF activities. The FY 2022 Budget Estimate’s narrative explanation of “Universal Service Fund Activities and Costs” fails to include an explanation of what the single FTE it identifies in the Media Bureau does to help the agency carry out its USF management and oversight responsibilities. Even if there is 1 FTE in the Media Bureau tasked with working on USF, as discussed above, the Commission has long recognized that USF does not in any way benefit broadcasters. See FY 2022 Budget Estimate at 26.

<sup>50</sup> See FY 2022 Budget Estimate at 26.

substantial; removing just these costs would alone nearly halve broadcasters' FY 2022 fee increase. On the other hand, absent an adjustment, broadcasters will be forced to pay for more than \$3 million of the Commission's costs of administering the USF program. That is \$3 million that will come out of broadcasters' operating budgets for activities that the Commission acknowledges do not benefit broadcasters.

There is no excuse for this result when the Commission can use the same methodology it used last year to redistribute these costs among the regulatees that benefit from the Commission's USF activities. This type of distribution has proven to be administratively feasible and still result in the Commission collecting the full amount of regulatory fees that it is required to collect.<sup>51</sup> There is simply no plausible argument or administrative concern that should result in broadcasters footing these bills, directly or indirectly, and the Commission must take immediate action to address this inequity.<sup>52</sup>

#### **B. The Commission Should Add a Fee Category for Broadband Service Providers**

The Commission should act on NAB and others' requests that the Commission add a fee category for broadband internet service providers that benefit from the Commission's activities.<sup>53</sup> The NPRM explains that it "considers the adoption of a new regulatory fee category or a change in an existing regulatory fee category only when it develops sufficient

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<sup>51</sup> Indeed, as discussed below, last year the Commission collected \$4 million in excess fees.

<sup>52</sup> At a bare minimum, the Commission should ensure that broadcasters are not responsible for the costs of the 38 FTEs in the Wireline Competition Bureau supporting USF. As discussed in detail above, these FTEs are not working on matters that benefit the Commission and the industry as a whole because they do not benefit broadcasters. They should therefore be allocated only amongst the regulatory fee payors that benefit from such activities.

<sup>53</sup> See, e.g., NAB FY 2021 NPRM Comments at 9-12; Notice of *Ex Parte* Communication from K. Hastings, SES, to M. Dortch, FCC, MD Docket No. 21-190 (Apr. 6, 2022).

basis for making the change, and works to ensure that all changes serve the goal of ensuring that the Commission's assessment of regulatory fees is fair, administrable, and sustainable."<sup>54</sup> New fee categories are adopted when the Commission "finds that there is a sufficient basis for doing so under the relevant statutory provisions and precedent, and based on the record in a given proceeding."<sup>55</sup>

There is a substantial factual, statutory, and precedential basis for adding a fee category for broadband internet service providers and doing so will serve the Commission's goals. The Commission first sought comment on adding a broadband internet service provider category in its regulatory fee rulemakings in 2012 and 2013.<sup>56</sup> In the FY 2021 regulatory fee proceeding, the Commission indicated additional data and information that it would find useful in its consideration of whether to add a broadband fee category.<sup>57</sup> Broadcasters and other regulatees urged the Commission to require broadband internet

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<sup>54</sup> NPRM at ¶ 11.

<sup>55</sup> See NPRM at ¶ 12.

<sup>56</sup> See *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 27 FCC Rcd 8458 (2012) ("Should additional fee categories such as broadband be added to the regulatory fee schedule set forth in section 9? We seek comment on whether the Commission has authority, under section 9 to include broadband as a fee category."); FY 2013 NPRM at 7792 (seeking comment "on the treatment of non-U.S.-Licensed Space Stations; Direct Broadcast Satellites; and other services, such as broadband, in our regulatory fee process.").

<sup>57</sup> See FY 2021 R&O and NPRM at 12999.

access service providers to pay regulatory fees and made proposals for how the Commission might go about doing so.<sup>58</sup>

The Commission's budget is likely to significantly increase again in FY 2023 due to the Commission's request for an additional 113 FTEs that will work to "purs[ue] policies to bring affordable, reliable high-speed broadband to 100% of the country."<sup>59</sup> Absent Commission action, this budget increase will result in another fee increase for broadcasters. Because the Commission is required by statute to inform Congress of the addition of new fee categories 90 days before it goes into effect,<sup>60</sup> the Commission cannot afford to delay adding a broadband internet access service fee category and relieving broadcasters from subsidizing the beneficiaries of the Commission's largest priorities.

The Commission has a more than sufficient statutory basis for adding the fee category. The Commission has a duty to charge regulatory fees to entities that benefit from its activities and Congress has not exempted broadband internet service providers from paying regulatory fees.<sup>61</sup> The Commission also exercises authority over broadband internet service providers. For instance, the Commission has the authority to enforce the data collection requirements it has imposed on broadband internet service providers pursuant to the "Commission's general enforcement authority in the Communications Act and other

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<sup>58</sup> See, e.g., NAB FY 2021 NPRM Comments at 9-12; Comments of the Satellite Coalition, MD Docket No. 21-190, at 6 (Oct. 21, 2021 (Satellite Coalition Comments)).

<sup>59</sup> *2023 Budget Estimates to Congress*, Federal Communications Commission, at 15 (March 2022).

<sup>60</sup> See 47 U.S.C. § 159a(b)(2).

<sup>61</sup> See 47 U.S.C. § 159(e)(1) (listing parties to which regulatory fees are not applicable).

applicable laws” and “section 803 of the Broadband DATA Act” which makes it unlawful for any entity to submit materially inaccurate information or data.<sup>62</sup>

As a factual matter, broadband internet service providers are some of the largest beneficiaries of the Commission’s activities regardless of whether benefits are measured in terms of burdens on Commission resources or financial benefits to broadband internet service providers. There is no question that the Commission devotes significant and ever-increasing resources in both core and noncore bureaus to broadband rulemaking, policy, and enforcement activities. A quarter of the Commission’s budget is dedicated to promoting a 100% broadband policy.<sup>63</sup> According to the FCC’s FY 2022 Budget Estimate, there are over 560 FTEs throughout the Commission working on broadband activities.<sup>64</sup> The Enforcement Bureau has an entire fraud division dedicated to USF issues.<sup>65</sup> Even the work of the Office of the Inspector General’s Office of Investigations appears focused on broadband issues as it “often address[es] allegations of criminal misconduct or civil fraud in the Commission’s Universal service programs” and conducts investigations “to fulfill our mandate to deter and

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<sup>62</sup> See FCC Enforcement Advisory No. 2022-03, WC Docket Nos. 19-195, 11-10, DA 22-639 (June 15, 2022) (Broadband Enforcement Advisory).

<sup>63</sup> FY 2022 Budget Estimate at 143 (depicting distribution of resources by strategic goal and indicating that \$93,858,000 of estimated FY 2022 regulatory would be used to “Pursue a ‘100 Percent’ Broadband Policy.”).

<sup>64</sup> *Id.* at 15 (depicting distribution of Commission FTEs by strategic goals).

<sup>65</sup> See *Enforcement Overview*, Federal Communications Commission, at 6 (April 2020), available at: [https://www.fcc.gov/sites/default/files/public\\_enforcement\\_overview.pdf](https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf) (“The Fraud Division (FD) has primary responsibility for investigating and enforcing the most complex and egregious violations of the Communications Act and the FCC’s rules as they pertain to USF support, with a particular emphasis on addressing fraudulent activity.”).

detect fraud, waste and abuse in the COVID 19 Telehealth program, the Emergency Broadband Benefit Program and the Emergency Connectivity Fund program.”<sup>66</sup>

In addition to extensively burdening Commission resources, broadband internet service providers’ businesses financially benefit from the Commission’s broadband activities. The Commission’s number one priority is to have every person in the country subscribe to broadband internet service providers’ services.<sup>67</sup> Broadband service providers do not provide these services for free – their bottom lines benefit from the Commission’s efforts to ensure that every American has a broadband internet connection. Indeed, as part of this mission, the Commission’s USF and other broadband-related programs help fund the operations of broadband service providers including by providing subsidies to build out their networks,<sup>68</sup> reimbursements to service providers that furnish discounted broadband services and devices,<sup>69</sup> and monetary support to offset schools and libraries’ purchases of broadband services.<sup>70</sup> The broadband industry recognizes the enormous benefits that it receives from USF programs and has urged the Commission in other proceedings to require

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<sup>66</sup> See FY 2022 Budget Estimate at 23-24.

<sup>67</sup> See *id.* at 9 (describing “Strategic Goal 1: Pursue a ‘100 Percent’ Broadband Policy” and stating that “the FCC will pursue policies to help bring affordable, reliable, high-speed broadband to 100 percent of the country.”).

<sup>68</sup> See Sharon Gillett, *FCC Launches Connect America Fund*, Federal Communications Commission (April 25, 2012), available at: <https://www.fcc.gov/news-events/blog/2012/04/25/fcc-launches-connect-america-fund> (describing the Commission’s high-cost support).

<sup>69</sup> See FY 2022 Budget Estimate at 54 (describing the Emergency Broadband Benefit Program and explaining that “participating providers can receive a reimbursement” for discounts “of the cost of broadband service and certain connected devices” they offer to eligible low-income households.”).

<sup>70</sup> See *E-Rate – Schools & Libraries USF Programs*, Federal Communications Commission, available at: <https://www.fcc.gov/general/e-rate-schools-libraries-usf-program>.



broadband service providers to contribute to USF.<sup>71</sup> If broadband providers benefit from USF programs they also directly benefit from the Commission’s oversight of USF activities. There is no rational policy argument that supports requiring broadcasters to pay for these and other broadband-related costs rather than broadband internet service providers themselves.

Commission precedent also supports adding a fee category for broadband internet service providers. For instance, in 2014, the Commission added a fee category for toll-free numbers after recognizing that Commission FTEs “devote work to toll-free numbering issues and activities including enforcement activities, rulemakings, and other policy making proceedings” and thus it was “appropriate under section 9 of the Act to recover the associated costs.”<sup>72</sup> As discussed above, Commission FTEs clearly devote work to broadband internet service issues and activities, including enforcement activities, rulemakings, and other policy making proceedings. It is therefore appropriate, and consistent with Commission precedent, to “recover the associated costs” from broadband internet service providers.

Requiring broadband internet service providers to contribute regulatory fees is also administratively feasible. The Commission has the relevant information necessary to define

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<sup>71</sup> See, e.g. Comments of Public Knowledge, WC Docket No. 21-476, at 18 (Feb. 17, 2022) (urging the FCC to undertake contribution reform and noting that “332 organizations representing the public interest community, trade associations, residential and business consumer organizations, anchor institutions, broadband providers, and other organizations” have called for “the inclusion of broadband service revenues in the contribution base.”); Comments of Incompas, WC Docket Nos. 21-476, 06-122, at 14-18 (urging Commission to include broadband service providers in contribution base because “all four USF programs have been modernized to support broadband connectivity. It is therefore smart policy and common sense to use BIAS revenues to fund programs that support such broadband access.”).

<sup>72</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2014*, 29 FCC Rcd 10767, 10778 (2014)

the fee category and establish a basis for assessing fees. The Commission adopted a definition for “broadband internet access service” to implement the requirements of the Broadband DATA Act and can use this definition to define the category of fee payors.<sup>73</sup> The Commission can also modify existing information collection systems to obtain the data necessary to assess fees on either a subscription or revenue basis. Broadband internet service providers began submitting data, including counts of subscriptions to their broadband service offerings in the annual Broadband Data Collection on June 30, 2022, and will complete their submissions no later than September 1, 2022.<sup>74</sup> The Commission could use this information to assess fees on a per subscriber basis. Alternatively, if the Commission decides to assess fees on a revenue basis, it could modify FCC Form 499 and/or the Broadband Data Collection to require providers to report broadband internet access service revenues. The Commission could place this category within the Wireline Competition Bureau and reallocate FTEs that work primarily on broadband-related issues in the other core and noncore bureaus and offices of the Commission to this fee category to the extent necessary.<sup>75</sup>

Moreover, the addition of this fee category supports the Commission’s goals of ensuring that regulatory fees are “fair, administrable, and sustainable.” Broadening the base of regulatory fee payors to include broadband internet service providers would undoubtedly ensure a more fair and sustainable regulatory fee system. Requiring broadcasters that

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<sup>73</sup> See Broadband Enforcement Advisory at 2 (describing entities required to file in the Broadband Data Collection)

<sup>74</sup> *Id.*

<sup>75</sup> Although there appears to be no administrative impediment to adding a fee category for broadband internet access service providers, should the Commission require additional information it should move expeditiously to seek comment on those issues.

provide a free service to the public to sustain year-after-year fee increases to fund the Commission's growing broadband priorities is fundamentally unfair and unsustainable when there are identifiable entities that directly benefit from these activities. Given the tremendous amount of emphasis on broadband and Commission work that benefits broadband service providers, there simply is no explanation as to why the Commission should not add a fee category for broadband providers rather than continue to force broadcasters and other regulatees to subsidize these costs.<sup>76</sup>

#### **IV. THE COMMISSION SHOULD CONTINUE TO EXPLORE ADDING ADDITIONAL FEE CATEGORIES AND PURSUE OTHER AVENUES FOR FEE RELIEF**

Each year the regulatory fee rulemaking process is rushed, leaving little opportunity for the Commission to pursue reforms that will meaningfully impact a given year's proposed fee increases on the Commission's regulatees. As the Commission's budget increases to record levels to support initiatives that do not benefit broadcasters and other existing regulatory fee payors, it is critical that the Commission take action to ensure that the base of fee payors include all entities that benefit from the Commission's activities. In addition, the Commission should take an active role in seeking modifications to its fee authority from Congress to make the regulatory fee system fairer and reduce the burden on all regulatory fee payors. Moreover, even if the Commission determines it cannot or refuses to make

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<sup>76</sup> The fact that some broadband service providers already pay regulatory fees because they provide other services that fall into existing fee categories does not negate the need for a broadband fee category. Because the Commission treats costs relating to broadband as indirect, these entities avoid paying their full share of these costs, as broadcasters pick up 20% of the tab. It is not a new concept that some regulatory fee payors fall into multiple fee categories and must pay multiple regulatory fees. For example, many cable providers also pay wireless fees and DBS providers pay both satellite fees and the cable/DBS fee.

changes to this year's proposed fee schedule, the Commission should exercise its discretion as it has in the past to limit the impact this year's fee increase will have on broadcasters.

**A. The Commission Should Consider Broadcasters' and Others' Proposals to Add Additional Fee Categories**

In addition to adding a fee category for broadband internet service providers, the Commission should continue to explore adding additional fee categories. As NAB and others have highlighted, given that indirect costs comprise 75% of the Commission's budget and are largely fueled by entities that do not pay regulatory fees, the Commission must ensure that its payor base includes all entities that benefit directly from the Commission's regulations, rather than force existing regulatory fee payors to bear these substantial costs.<sup>77</sup> Broadcasters and other regulatees have provided the Commission with proposals for how the Commission might go about including Big Tech and other unlicensed spectrum users in the base of regulatory fee payors.<sup>78</sup> Although NAB does not have access to the same level of information and data that the Commission possesses, broadcasters stand ready to work with the Commission as the expert agency, and other relevant stakeholders to further refine these proposals.

**B. The Commission Should Ask Congress to Modify Its Fee Authority to Ensure Fees are Fair, Administrable, and Sustainable**

The Commission should also join with broadcasters and other stakeholders to seek relief from Congress to minimize regulatory fee burdens on all regulatory fee payors. The Commission should request that Congress amend its authority to allow the Commission to deduct application fees from the amount of regulatory fees payors owe. Pursuant to Section

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<sup>77</sup> See, e.g., NAB FY 2021 NPRM Comments at 12-15; Satellite Coalition Comments at 5-6.

<sup>78</sup> *Id.*

8 of the Communications Act, the Commission charges application fees that are intended to cover the costs of processing applications.<sup>79</sup> These fees are based on the labor and overhead costs of the FTEs performing these activities and are deposited in the general fund of the U.S. Treasury.<sup>80</sup> Because the Commission has taken the position that it cannot credit these fees against a payor's regulatory fee obligations, broadcasters pay these very same FTE costs again through regulatory fees. There is no justification for requiring broadcasters to pay twice for the labor involved in processing applications and it is difficult to fathom that Congress intended for the FCC's fee collections to yield such unfair results. The Commission should either heed broadcasters' request that the Commission account for broadcasters' payment of application fees when calculating the regulatory fees they owe or implore Congress to act on this issue.<sup>81</sup>

The Commission should also request that Congress allow it to apply excess fee collections to offset its budgetary request the following fiscal year. The Commission collected \$4 million in excess fee collections in Fiscal Year 2021, which it was statutorily required to send to the treasury "for the sole purpose of deficit reduction."<sup>82</sup> Fee payors (all of which

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<sup>79</sup> See 47 U.S.C. § 158(a) ("The Commission shall assess and collect application fees at such rates as the Commission shall establish in a schedule of application fees to recover the costs of the Commission to process applications.").

<sup>80</sup> *Id.* § 158(e).

<sup>81</sup> See, e.g., State Broadcasters' FY 2021 NPRM Reply Comments at 14-15 (explaining that the "Commission should ask Congress at every opportunity for authority to apply application fees to reduce the amount that must be recouped through annual regulatory fees" and that the Commission "should remove FTEs whose work is paid for by application fees from the total headcount attributable to the Media Bureau when it calculates the portion of Commission non-Media Bureau overhead that is charged to the Media Bureau.")

<sup>82</sup> See Federal Communications Commission, *Agency Financial Report for Fiscal Year 2021* at 31.

already pay general corporate taxes to the government), and arguably the public, received no additional benefits from the Commission in exchange for these excess fees. Allowing the Commission to apply excess amounts to the next year's budget would help mitigate the impact of budget increases to fee payors and would also be consistent with the practices of "five other fee-funded regulatory agencies...[that] either apply excess fees as an adjustment to the subsequent year's fees or refund them."<sup>83</sup> There is no logical explanation for why regulatees of such agencies receive benefits from excess collections while FCC regulatees do not. Similarly, given that the Commission continually requires regulatees to fund work that clearly benefits none of the payors (e.g., paying for exempt categories), the FCC should request that Congress authorize the agency to use funds collected in enforcement proceedings to subsidize the Commission's enforcement activities.

To the extent the Commission believes it does not have the authority to assess regulatory fees on unlicensed spectrum users, the Commission should request that Congress permit auction funds to also fund the Commission's unlicensed work and/or directly appropriate funds to cover the costs of the Commission's unlicensed spectrum activities. These issues should be topics of discussion at congressional oversight hearings, budget hearings, and every other opportunity the Commission may have to raise issues with Congress. The Commission has a duty to take action to ensure that its regulatees are not unduly taxed as a result of its unsustainable regulatory fee regime.

**C. The Commission Should Exercise its Discretion to Mitigate the Adverse Impacts of a Substantial Fee Increase on Broadcasters**

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<sup>83</sup> See GAO Report at 34.

Even if the Commission makes no changes to its regulatory fee proposal, the Commission should nevertheless provide fee relief to broadcasters by either freezing the regulatory fee for broadcasters at the FY 2020 level or capping the fee increase. The magnitude of broadcasters' fee increase is unusually large and not justified by benefits received by broadcasters as a result of the Commission's activities.

Though the Commission maintains that "benefits" are to be determined by looking at the costs to the Commission of regulating a given entity, the Commission uses revenues and subscriber numbers as an objective measure of benefits received by entities within other fee categories. There is no reason the Commission should not also look to these market-based measures to determine whether it should adjust regulatory fees to account for the varying levels of benefits received between industries in different fee categories.

Fundamentally, the Commission must recognize that broadcasters do not have a subscriber base to whom they can pass on costs. Broadcasters are required to provide a free service to the public and are dependent on advertising revenues to cover their costs. Unlike other Commission regulatees that thrived during the pandemic all while being able to pass on to consumers their regulatory fee costs,<sup>84</sup> local broadcasters' challenges were

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<sup>84</sup> See, e.g., Marguerite Reardon, *AT&T's wireless business thrives amid pandemic*, CNET (Oct. 22, 2020), available at: <https://www.cnet.com/tech/mobile/at-ts-wireless-business-thrives-amid-pandemic/>; *T-Mobile Caps Best Year Ever in 2020 with Strong Q4 Results, is the Only National Wireless provider to Beat Expectations on BOTH Customer Growth and Profitability*, T-Mobile (Feb. 4, 2021), available at: <https://investor.t-mobile.com/news-and-events/t-mobile-us-press-releases/press-release-details/2021/T-Mobile-Caps-Best-Year-Ever-in-2020-with-Strong-Q4-Results-Is-the-Only-National-Wireless-Provider-to-Beat-Expectations-on-BOTH-Customer-Growth-and-Profitability/default.aspx> (reporting T-Mobile had total revenues of \$20.3 billion in Q4 2020 compared to \$11.8 billion in Q4 2019); *Verizon ends 2020 with strong earnings and cash flow, and increased wireless service revenue growth*, Verizon (Jan. 26, 2021), available at: <https://www.verizon.com/about/news/verizon-ends-2020-strong-earnings-and-cash-flow->

exacerbated and further magnified by the pandemic's shocks to the advertising market.<sup>85</sup> The radio industry has not yet fully recovered from the impacts of the pandemic, as illustrated by the fact that radio units declined significantly from FY 2021 to FY 2022.<sup>86</sup> The broadcast industry has simply not realized the same level of benefits over the course of the last several years relative to other industries in the telecommunications marketplace. The Commission's fee methodology has failed to keep pace with these marketplace realities, as illustrated by the fact that broadcasters pay nearly the same share of regulatory fees as the entire wireless industry.<sup>87</sup>

The Commission can take action to adjust fees to account for this reality. The Commission has exercised its discretion in the past to freeze regulatory fees and cap or phase in fee increases to avoid imposing undue economic hardship on regulatees and should do so now to provide relief for broadcasters. For instance, the Commission froze the regulatory fee for CMRS Messaging Services for over a decade because CMRS Messaging units had declined and the decline appeared not to be temporary.<sup>88</sup> In addition, in 2013, the Commission capped fee increases at 7.5% to prevent "unexpected, substantial increases

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[and-increased-wireless-service-revenue-growth](#) (reporting total consolidated revenue of \$16.7 billion for 2020, a 2.2.% increase year over year).

<sup>85</sup> See, e.g., Comments of NAB, MB Docket No. 18-349, at 75-79 (Sept. 2, 2021) (explaining radio broadcasters' struggles to obtain adequate advertising revenue pre- and post-pandemic).

<sup>86</sup> Based on the Commission's data, AM and FM Class radio stations declined by approximately 100 units. See FY 2021 R&O and NPRM at App'x B (showing 9,918 AM and FM class FY 2021 payment units); NPRM at App'x B (showing 9,819 AM and FM class FY 2022 payment units).

<sup>87</sup> See NPRM at ¶ 19 (indicating that Wireless Telecommunications Bureau regulatees are responsible for 21.28% of total regulatory fees).

<sup>88</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2014*, 29 FCC Rcd 6417, 6422 (June 13, 2014).



which could severely impact the economic wellbeing of these licensees.”<sup>89</sup> In 2015, the Commission decided to phase in the DBS fee due to concerns that the regulatory fee would have an adverse impact on DBS customers and to avoid sudden and large changes in the amount of fees.<sup>90</sup>

The Commission should be equally, if not more, concerned about the impact of a 13% increase on small broadcasters that have no ability to pass the increase on to consumers and that cannot easily find additional advertising revenue to cover these increased costs and still provide quality local news and information to their communities. It would therefore be well within reason and consistent with the Commission’s historic approach and the public interest to mitigate the harmful impacts of the Commission’s fee increase by freezing broadcasters’ regulatory fees at the FY 2021 level or capping the fee increase at a lower level.

**V. THE COMMISSION SHOULD CONSIDER INCREASING THE DE MINIMIS FEE AMOUNT**

The NPRM explains that the Commission “has taken steps to minimize the economic impact on small entities by adopting a de minimis threshold under the section 9(e)(2) exemption in the Communications Act.”<sup>91</sup> Last year, NAB pointed out that the Commission’s initial FY 2021 proposed fee increases eliminated the de minimis exemption for many small broadcasters, and with the Commission’s budget forecasted to rise, anticipated further reductions in the number of small entities that are able to take advantage of the

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<sup>89</sup> See FY 2013 NPRM at 7803-7804.

<sup>90</sup> *Assessment & Collection of Regulatory Fees for FY 2015*, 30 FCC Rcd 5354, 5372 (May 21, 2015)

<sup>91</sup> NPRM at App’x. I, ¶ 38.

exemption.<sup>92</sup> NAB therefore suggested that raising the de minimis threshold could help minimize the administrative burden the Commission incurs in collecting regulatory fees from entities that require a minimum amount of Commission resources to regulate in the first instance and that will simply not be in a position to pay the fee on time and without additional intervention from the Commission.<sup>93</sup> As expected, this year’s proposed fee increase further reduces the number of small broadcasters that will be able to take advantage of the existing de minimis exemption.<sup>94</sup> The NPRM seeks comment on whether the Commission should increase the de minimis threshold and “how to calculate the costs of collection of regulatory fees in establishing the annual de minimis threshold.”<sup>95</sup>

The Commission’s costs of collection have likely increased since the Commission last examined this issue in 2019 and retained the \$1,000 de minimis threshold. In the intervening years, broadcasters and other entities have suffered economically because of business disruptions caused by the coronavirus pandemic. It is likely that, even if the Commission considers only the costs of collection it examined in 2019, the Commission’s “administrative debt collection process” has become more burdensome given inflation and the increased need for fee relief among small regulatory fee payors due to the pandemic.

To determine the costs of collection, the NPRM asks for specific feedback on “which steps in the debt collection process should be included” and whether the Commission should “also consider the costs associated with reviewing and resolving waiver requests and

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<sup>92</sup> See NAB FY 2021 NPRM Comments at 14-15.

<sup>93</sup> *Id.*

<sup>94</sup> See NPRM at App’x. C (showing that only three classes of AM stations serving no more than 25,000 people will be eligible for the de minimis exemption).

<sup>95</sup> *Id.* at ¶¶ 49-51.

installment payment requests” in the cost of collecting a regulatory fee.<sup>96</sup> Section 9 contains no express or implied limit on what “costs of collection” should be included in the Commission’s calculation.<sup>97</sup> The Commission could therefore include all relevant costs including the costs it incurs “when the Commission collects data on a payor’s regulatory fee status” and the “costs associated with reviewing and resolving waiver requests and installment payment requests.” This would be consistent with at least one other provision of the U.S. Code pertaining to federal fee collections which defines the “costs of collecting a fee or charge” to include “the reasonable administrative, accounting, personnel, contract, equipment, supply, training, and travel expenses of calculating, assessing, collecting, enforcing, reviewing, adjusting, and reporting on a fee or charge.”<sup>98</sup>

The Commission has not published any data concerning what its actual costs are, and this lack of information makes it difficult for outside parties to suggest what threshold would exceed these costs. However, raising the de minimis threshold by at least \$200 to \$1,200 seems to be reasonable and would provide some relief to small broadcasters by ensuring that radio broadcasters that could take advantage of the de minimis exemption last year would be able to do so again this year.

## VI. CONCLUSION

The Commission’s proposed 13% fee increase for broadcasters is unjustified, illogical, and unlawful. Broadcasters’ disproportionate fee increase is due to a fee

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<sup>96</sup> *Id.* at ¶ 51.

<sup>97</sup> See 47 U.S.C. § 159(e)(2) (“If, in the judgment of the Commission, the cost of collecting a regulatory fee established under this section from a party would exceed the amount collected from such party, the Commission may exempt such party from paying such fee.”).

<sup>98</sup> See 14 U.S.C. § 946(h) (addressing Coast Guard user fees).

methodology that performs no analysis of the benefits provided by 75% of the Commission's FTEs and that is much too willing to require broadcasters to subsidize activities that the Commission acknowledges do not benefit them. As discussed herein, the Commission should take immediate action to mitigate the adverse impacts of such a substantial fee increase on broadcasters and ensure that broadcasters are not required to pay for the Commission's broadband-related activities. To effect lasting and sustainable change, the Commission must no longer delay taking the steps necessary to modernize its fee structure, broaden the base of payors, and seek necessary changes from Congress to make the regulatory fee system fair, equitable, and sustainable for all regulatory fee payors.

Respectfully submitted,

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



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Rick Kaplan  
Larry Walke  
Emily Gomes

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