Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Assessment and Collection of Regulatory Fees for Fiscal Year 2021	)	MD Docket No. 21-190
	)	
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Assessment and Collection of Regulatory Fees for Fiscal Year 2020	)	MD Docket No. 20-105
	)	
	)	

To: The Commission

JOINT REPLY COMMENTS OF THE STATE BROADCASTERS ASSOCIATIONS

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The

New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations") by their attorneys in this matter, hereby file these Joint Reply Comments in response to the Commission's Notice of Proposed Rulemaking released May 4, 2021 in the above-captioned proceeding and certain of the Comments filed in response thereto.[1] Additionally, these Joint Reply Comments seek to update the record in this year's proceeding by addressing the impact of the recently decided *Telesat Canada v. FCC*[2] case.

INTRODUCTION AND SUMMARY

With the issuance of the U.S. Court of Appeals for the D.C. Circuit's decision in *Telesat Canada,* the Commission can no longer turn a blind eye to the fact that, in continuing to robotically apply its outdated methodology for calculating the regulatory fee obligations of

[1] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 21-190, FCC 21-49 ("*FY2021 NPRM*") (rel. May 4, 2021). These Reply Comments are timely filed on the first business day following the observance of the Juneteenth National Independence Day federal holiday. *See Extension of Filing Deadlines Following Federal Holiday Observed June 18, 2021*, Public Notice, DA 21-717 (released June 17, 2021).

[2] *Telesat Canada v. Federal Communications Commission*, No. 20-1234, 2021 WL 2274296 (D.C. Cir. June 4, 2021) ("*Telesat Canada*").

broadcasters, it is in clear violation of the RAY BAUM's Act of 2018 ("RBA").[3] The D.C. Circuit made clear that under the RBA, *benefits,* rather than licenses (or, the State Associations would add, FTEs), are the "*touchstone*" for assessing regulatory fees.[4]

As the National Association of Broadcasters ("NAB") and the State Associations have noted in this and prior regulatory fee proceedings since adoption of the RBA,[5] the RBA fundamentally and dramatically changed the way the FCC must undertake its annual task of assessing regulatory fees among payors.[6] However, each year, the FCC has continued to reject that notion, asserting that "the fee assessment structure dictated by the statute fundamentally remains unchanged."[7] It can no longer do so in light of the *Telesat Canada* decision.

This means that (i) the FCC must justify requiring broadcasters to shoulder costs unrelated to broadcasting on something more than the mere fact that broadcasters hold a license, and (ii) the FCC must reach beyond the low-hanging fruit of regulatees to whom it has issued a license to those who receive the *benefits* of the Commission's regulatory activities without

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[3] Pub. Law No. 115-141 § 102, 132 Stat. 348, 1082-86 (2018) (codified at 47 U.S.C. §§ 159, 159A).

[4] *Telesat Canada* at 5.

[5] *See e.g.,* Joint Comments of the Named State Broadcasters Associations, MD Docket No. 19-105 (filed June 7, 2019 and incorporated herein by reference) (*hereinafter 2019 State Association Comments*); Joint Comments of the State Broadcasters Associations, MD Docket No. 20-105 (filed June 12, 2020 and incorporated herein by reference) (*hereinafter 2020 State Association Comments*); Comments of the National Association of Broadcasters, MD Docket No. 21-190 (filed June 3, 2021) (*hereinafter 2021 NAB Comments*); Comments of the National Association of Broadcasters, MB Docket No. 20-105 (filed June 11, 2020) (*hereinafter 2020 NAB Comments*); Comments of the National Association of Broadcasters, MB Docket No. 19-105 (filed June 7, 2019) (*hereinafter 2019 NAB Comments*).

[6] *See 2020 State Association Comments* at 6-9; *2019 State Association Comments* at 16-18; *2020 NAB Comments* at 10-11; *2019 NAB Comments* at 3 and 8.

[7] *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 8189, 8193 ¶ 7 (2019) ("*FY2019 Report and Order*").

paying a share relative to the benefit they receive. Given that the FCC has not changed its regulatory fee process in response to the requirements of the RBA, the *FY2021 NPRM* is fundamentally defective, as is its specific proposal to impose increased regulatory fees on broadcasters.

The Commission has previously faulted the State Associations and NAB for failing to present the Commission with a ready-made solution for the admittedly challenging task that the RBA imposes upon the FCC.[8] While the State Associations herein offer various suggestions the FCC may wish to consider in meeting its RBA-imposed obligation to "fee" those who clearly benefit from the FCC's regulatory activities but which are not currently assessed a regulatory fee, and address more specific concerns that broadcasters have raised with respect to the costs of regulating noncommercial educational broadcast stations and the Commission's proposal to adopt a tiered fee system for television broadcasters, ultimately, the task of complying with the RBA falls solely upon the FCC. Compliance with the RBA cannot be ignored because it is difficult, nor delegated to those impacted by this broken system, particularly where they lack access to the internal FCC information needed to repair it.

Indeed, it is the continuing lack of transparency and what appear to be inaccuracies[9] in the FCC's data and resulting fees that make it nearly impossible for the State Associations, NAB,

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[8] *Id. at* 8194-95 ¶ 14.

[9] For example, NAB notes that Appendix A to the *FY2021 NPRM* appears to contain mathematical errors that call into question exactly how much the Commission expects to raise via regulatory fees this year in general and from radio stations in particular. *See 2021 NAB Comments* at 2 n.6. In 2019, the Commission's proposed radio regulatory fees had to be modified after the State Associations pointed out that they were significantly inflated, inexplicably failing to account for the revenue being received from nearly a fifth of all licensed radio stations. *See also Assessment and Collection of Regulatory Fees for Fiscal Year 2020*, Report and Order and Further Notice of Proposed Rulemaking, DA 20-120 at ¶ 25 (2020) ("*FY2020 Report and Order"*).

or any third party to help the Commission craft a rational regulatory fee policy. As noted by commenters in this and prior years, this process, already defective from an RBA standpoint, remains so intractably opaque as to raise serious denial of due process concerns that cannot be allowed to continue. At bottom, the Commission's continued adherence to its pre-RBA approach does great harm to the broadcasting industry, which has been unfairly subsidizing its competitors through regulatory fees for almost 30 years. In recognizing that the RBA requires the FCC to assess regulatory fees not simply on the basis of licenses held,[10] the D.C. Circuit joins Congress, the Government Accountability Office ("GAO"), the State Associations, and NAB in recognizing that the Commission must modernize its regulatory fee approach, not only in the interests of fairness and regulatory parity, but because the RBA requires it.

I. By Failing to Assess Regulatory Fees Consistent With the Benefit of Its Regulatory Activities to the Payor, the FCC Violates the RBA

As has been discussed at great length previously and more briefly summarized below,[11] in a process that came together after the FCC's prior regulatory fee methodology was roundly criticized by the GAO in 2012,[12] each year the FCC undertakes a multi-step process to divide its budget appropriation, and therefore the total regulatory fee burden, among the regulatees of the four "core" bureaus that have licensing authority – the Media Bureau, the International Bureau, the Wireless Telecommunications Bureau ("WTB"), and the Wireline Competition Bureau.[13] Initially, the Commission calculates the number of Full Time Equivalent employees ("FTEs")

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[10] *Telesat Canada* at 5.

[11] *See, e.g., 2019 State Association Comments* at 7-8.

[12] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-686, FEDERAL COMMUNICATIONS COMMISSION: REGULATORY FEE PROCESS NEEDS TO BE UPDATED (2012).

[13] *Assessment and Collection of Regulatory Fees for Fiscal Year 2020,* Report and Order and Notice of Proposed Rulemaking, 35 FCC Rcd 4976, 4998 n.147 (2020).

who work in each of those four bureaus. These FTEs are known as "direct" FTEs of the core bureau to which they are assigned.[14] From these direct FTE numbers, the Commission determines the percentage each core bureau comprises of the four-bureau total number of direct FTEs.[15] Each bureau's percentage then determines the proportion of all other Commission costs that must be funded by the regulatees of that bureau. Among these "other costs" are all of the FTEs from the Commission's remaining bureaus, known as "indirect" FTEs (which represent about *four times* the total number of direct FTEs at the Commission).[16]

Ultimately, the total regulatory fee burden (including the cost of that bureau's direct FTEs and its proportion of indirect FTE costs) is meted out to the various categories of regulatees regulated by that licensing bureau.[17] The historical result of this approach is that the licensees who are the most heavily regulated, through no fault of their own, shoulder an outsized burden for all the activities and facilities of the FCC, while others who benefit handsomely from the FCC's non-licensing activities, escape all or most of the costs associated with those activities.

To further put that in perspective, and as the State Associations have previously noted to the Commission, radio and TV broadcasters combined currently have approximately 210 MHz of

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[14] *See, e.g.*, *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 27 FCC Rcd 8458, 8461 ¶ 7 (2012) ("*Reform NPRM*"). This headcount ostensibly excludes FTEs attributable to the Commission's auctions program, whose costs are intended to be funded by a separate appropriation made specifically for the auctions program. *Id.* at 8467 n.19. While the Commission has repeatedly stated that auction FTEs are separately funded and not charged to "overhead," the largest portion of which is paid by Media Bureau regulatees, NAB in its Comments raises a concern that so many FTEs of the Wireless Telecommunications Bureau have been categorized as auction FTEs that WTB regulatees may not be paying their fair share of the Commission's non-auction appropriation. The State Associations agree with NAB that this issue needs to be carefully reviewed and addressed. *See 2021 NAB Comments* at 11-12.

[15] *Reform NPRM* at 8467 ¶ 24.

[16] *Id.* at 8466 ¶ 20.

[17] *Id.* at 8461 ¶ 8.

spectrum cumulatively allocated for their services out of *300 GHz* of allocated spectrum.[18] In other words, **broadcasters are using just 0.07% of allocated spectrum, while covering, by NAB's estimate in its comments, at least 16% of the FCC's entire budget *and* offering a free service to the public**.[19]

This disparate treatment of those who benefit and those who pay, or pay more, is based almost entirely on the vagaries of whether the FCC decides to regulate a particular category of beneficiary via licenses, as opposed to through rule and policy changes, unlicensed spectrum allocations, equipment authorizations, etc., and whether the FCC's reorganizations of its bureaus, offices and personnel result in a particular benefit being dispensed by one of the four core *licensing* bureaus.[20] For FY 2021, the results of this process are that Media Bureau regulatees will again be paying the lion's share, 36.39%, of the FCC's non-auction related salaries and expenses.[21]

As noted, this process was devised back in 2012 when the authorizing language in Section 9 of the Communications Act directed the Commission to recover the costs of its enforcement, policy and rulemaking, user information services, and international activities by:

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[18] *See 2020 State Association Comments* at 14 (*citing* United States Frequency Allocations, NTIA (Jan. 2016) (https://www.ntia.doc.gov/files/ntia/publications/january_2016_spectrum_wall_chart.pdf) (last visited June 17, 2021)).

[19] *See 2021 NAB Comments* at 8 n.21.

[20] Examples of such reorganizations include reorganizing the Private Radio, Mass Media, and Common Carrier Bureaus originally named in Section 9 into the current Media, Wireline Competition, Wireless Telecommunications and International Bureaus, *see Reform NPRM* at 8460 n.5; the creation of new offices such as the Office of Economics and Analytics, *see FCC Opens Office of Economics And Analytics,* News Release (December 11, 2018); and the reassignment of employees independent of the creation of any new office or bureau, *see Transfer of EEO Audit and Enforcement Responsibilities to Enforcement Bureau*, Public Notice, 34 FCC Rcd 1370 (EB 2019).

[21] *FY2021 NPRM* at 11-12 ¶ 23.

> determining the full-time equivalent number of employees performing [those activities] within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other 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, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest.[22]

However, in 2018, Congress dramatically revised this process when it passed the RBA. In the RBA, Congress directed the FCC to "assess and collect regulatory fees at such rates as the Commission shall establish in a schedule of regulatory fees that will result in the collection, in each fiscal year, of an amount that can reasonably be expected to equal the amounts"[23] of the Commission's annual appropriation. Importantly, this language contains no limitations tying the Commission's assessment and collection to regulatees of any particular bureau or office or basing it on the number of FTEs of such bureaus and offices (or for that matter, limiting such fees to regulatees).

Meanwhile, the FCC's regulatory fee process remains mired almost exclusively in the concept of licenses, despite the fact that Congress recognized the dramatic changes in the Commission's work that have occurred in the almost 30 years since it first authorized the Commission to collect regulatory fees. More to the point, the RBA equipped the FCC with the flexible authority to assess and collect fees based on the *benefit of the Commission's work*, not on the increasingly arbitrary factors of whether the payor holds a license or how the Commission has organized itself.

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[22] 47 U.S.C. § 159(a)(1) (2017) (The bureaus named in the original version of Section 9 are the predecessors to those that the FCC currently considers its four "core" licensing bureaus. *See supra* Note 20).

[23] 47 U.S.C. § 159(b).

It was Congress that in 2009 put the FCC in charge of crafting the audacious National Broadband Plan,[24] entrusting it to develop a "detailed strategy for achieving affordability and maximizing use of broadband to advance 'consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.'"[25] In taking up that mantle, the *National Broadband Plan*'s authors recommended that the FCC create policies to "expand opportunities for innovative spectrum access models by creating new avenues for **opportunistic and unlicensed use of spectrum** and increasing research into new spectrum technologies."[26]

Not surprisingly, today, the Commission's own assessment of "What We Do" prominently displayed on its website sets out its top three competencies as:

- Promoting competition, innovation and investment in broadband services and facilities
- Supporting the nation's economy by ensuring an appropriate competitive framework for the unfolding of the communications revolution
- Encouraging the highest and best use of spectrum domestically and internationally[27]

When describing the work of its offices and bureaus, the FCC lists licensing as only one of the top six of its competencies:

- Developing and implementing regulatory programs
- Processing applications for licenses and other filings
- Encouraging the development of innovative services
- Conducting investigations and analyzing complaints

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[24] Pub. Law No. 111-5 § 6001(k), 122 Stat. 115, 513 (2009) (codified at 47 U.S.C. § 1305(k)) (*hereinafter National Broadband Plan*).

[25] *National Broadband Plan,* Executive Summary at XI (emphasis added).

[26] *Id.* at XII.

[27] https://www.fcc.gov/about-fcc/what-we-do (last visited June 15, 2021).

- Public safety and homeland security
- Consumer information and education[28]

The impact of these changed priorities and competencies are reflected in the Commission's funding as well. Specifically, the Commission receives a separate appropriation – $134,495,000 this year – to run its highly lucrative spectrum auctions.[29]

Having entrusted the Commission to lead the *National Broadband Plan* effort and effectively transforming the agency into one that auctions spectrum, often retaining little regulatory oversight once auction payments are received,[30] it should come as no surprise that, in 2018, Congress also modernized the Commission's regulatory fee authority and freed it from the strictures of the former license/licensing bureau FTE constructs. The RBA does instruct the Commission to **amend** its schedule of regulatory fees, when necessary, so that the fees that the Commission has already established "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**

[28] *Id.*

[29] Consolidated Appropriations Act, 2021, Division E – Financial Services and General Government Appropriations Act, 2021, Title V – Independent Agencies, Federal Communications Commission of the Consolidated Appropriations Act, 2021, Pub. Law No. 116-260 (H.R. 133).

[30] *See, e.g., In the Matter of Unlicensed Use of the 6 GHz Band; Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz,* Report and Order and Notice of Proposed Rulemaking, ET Docket No. 18-295, GN Docket No. 17-183, FCC 20-51 (rel. Apr. 20, 2020); *Unlicensed White Space Device Operations in the Television Bands,* Notice of Proposed Rulemaking, ET Docket No. 20-36, FCC 20-17 (rel. March 2, 2020); *Unlicensed Operation in the TV Broadcast Bands*, Second Memorandum Opinion and Order, 25 FCC Rcd 18661 (2010); *Revision of Part 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, First Report and Order, 29 FCC Rcd 4127 (2014).

activities."[31] But, the point of that provision is to merely align the work of those FTEs with the benefit they deliver to the payor.

If the impact of this change was not obvious before, the issuance of the D.C. Circuit's recent opinion in *Telesat Canada* leaves no doubt. In *Telesat Canada*, foreign satellite operators with US market access challenged the FCC's decision to begin charging them a regulatory fee in 2020, as the Commission had done for their American-licensed competitors beginning decades earlier. When the foreign satellite operators argued that the RBA ratified the Commission's long-standing practice of not assessing them regulatory fees, the court disagreed, noting that the RBA, far from ratifying the Commission's prior practices, had in fact made a seismic shift in them.

The court specifically approved the FCC's decision to assess the operators a regulatory fee despite the fact that they do not hold U.S. licenses, pointing out that the RBA changed the basis for the FCC's adjustment of fees away from "units or licensees" to "units."[32] Referencing the RBA, the court noted:

> But the statute, as will be recalled, provides a general guide to the FCC that it should charge regulatory fees to those who benefit from its regulations. It is undeniable that foreign satellites and their operators that serve the United States do benefit from the Commission's regulation in much the same way as their U.S.-licensed counterparts. The Commission creates a fair and safe environment for all U.S. market participants by, among other things, minimizing the risks of radio interference and mitigating the danger of orbital debris. The Commission reviews petitions for market access by foreign-licensed satellites to ensure legal and compliance with this carefully coordinated system.[33]

The court then summarized the impact of the RBA more broadly:

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[31] 47 U.S.C. § 159(c) (emphasis added).

[32] *Telesat Canada* at 2.

[33] *Id.* at 3.

> The Ray Baum's Act's other changes to Section 9 support this conclusion. As we noted, 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 suggests benefits—not licenses—should be the touchstone for whether it is reasonable for the FCC to collect regulatory fees*.[34]

With this stroke of the pen, the D.C. Circuit rejected the Commission's contrary assertion in the FCC's 2020 regulatory fee proceeding where, in response to challenges raised by broadcasters, the Commission stated:

> After review of the comments received, we determined in the *FY 2019 Report and Order* that because the new section 9 closely aligned to how the Commission assessed and collected fees under the prior section 9, we would hew closely to the existing methodology…. We affirm those conclusions here.[35]

But as *Telesat Canada* makes clear, the new Section 9 does not "closely align[] to how the Commission assessed and collected fees under the prior section 9," but changes it in a most fundamental way – empowering, and in fact, requiring, the FCC to collect regulatory fees based upon the "touchstone" of benefits received, not licenses held.

Indeed, the change wrought by the RBA was so glaringly obvious that the court found it decisionally important *despite the fact that the FCC did not make that argument*, with the court noting that "[t]he Commission did not rely on the Ray Baum's Act's use of the term units rather than licensees."[36]

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[34] *Id.* at 5 (emphasis added).

[35] *FY2020 Report and Order* at 4-5 ¶¶ 9-10 (citations omitted). The *FY2019 Report and Order* basically rejected the notion that the RBA had changed anything about the Commission's fee collection powers and responsibilities, simply stating that "we find the fee assessment structure dictated by the statute fundamentally remains unchanged." *FY2019 Report and Order* at 8193 ¶ 7.

[36] *Telesat Canada* at 5.

Rather than respond to the changes created by the RBA, the FCC has steadfastly adhered to its long-held fee-setting approach, simply noting in its *FY2019 Report and Order*:

> We reject the arguments of the State Broadcasters that the RAY BAUM'S Act fundamentally changed how the Commission should calculate regulatory fees and that we are no longer required to base regulatory fees on the direct FTEs in core bureaus. Given the Act's requirement that fees must "reflect" FTEs *before adjusting fees to take into account other factors*, we find FTE counts by far the most administrable *starting point* for regulatory fee allocations.[37]

Setting aside the *FY2019 Report and Order*'s questionable premise that "direct FTEs in core bureaus" correspond to benefits, even as a "starting point," none of the above is responsive to the finding made by the court in *Telesat Canada* that allocating regulatory fees only among licensees, as opposed to all FCC beneficiaries, is inconsistent with the RBA. The *FY2021 NPRM* is therefore fundamentally flawed. The extent of those flaws was, as NAB noted in its comments, most recently made apparent by the Commission's effort to increase fees on broadcasters in order to cover the FCC's budget increase resulting from the Broadband DATA Act.[38] Rarely has the disconnect between the benefits received and the regulatory fees charged to broadcasters been so obvious.

If the FCC insists on attempting to continue to rely on the arbitrary approach of using direct FTEs in its core (i.e., licensing) bureaus as its "starting point," then as the court made clear in *Telesat Canada*, the ending point must still reflect the "touchstone" of benefits received. The Commission can point to no increased benefits to broadcasters justifying the significant jump in proposed regulatory fees for FY 2021. Indeed, there has never been a year where the destination

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[37] *FY2019 Report and Order* at 8193 ¶ 9 (citations omitted; emphasis added).

[38] *See 2021 NAB Comments* at 11-12.

of those increased FCC budget costs and associated benefits has been more apparent, and it is not broadcasting.

The Commission should therefore eliminate, consistent with the requirements of the RBA, the proposed increase in broadcaster regulatory fees for FY 2021. However, it cannot stop there. It must also expand beyond its current mindset of collecting essentially all of its regulatory fees from licensees, and instead expand the universe of payors to all those receiving FCC benefits, as urged by NAB[39] and required by the RBA.

II. Under the RBA, Forcing Broadcasters to Pay Regulatory Fees for Commission Activities Unrelated to Broadcasting Cannot Be Justified

The principal benefit that many regulatees of the Commission receive is interference protection which allows them to operate their businesses. Broadcasters are no different except that they provide their service to the public for free while competing against those who, by and large, charge their customers a subscription or service fee, enabling them to simply pass on the costs of the FCC's regulatory activities to the public as a bill line-item. Broadcasters, in contrast, have no option but to eat the entire cost.

Moreover, as detailed in previous filings with the Commission by the State Associations,[40] much of the regulatory activity of the FCC for which broadcasters must pay actually creates *impediments* to the profitable operation of their businesses and therefore decreases the value of the licenses they hold, thereby reducing the benefit received from the FCC's activities.

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[39] *Id.* at 12-14.

[40] *See 2020 State Association Comments* at 10-15.

But there are even more glaring instances where broadcasters have been assessed costs for activities that are completely unrelated to the broadcast industry. For example, as the State Associations previously noted,[41] the Commission reallocated 38 FTEs who work on Universal Service Fund matters from direct FTEs of the Wireline Competition Bureau to indirect obligations of all four core bureaus (causing broadcasters to suddenly be responsible for nearly 20% of their cost). It is simply indefensible in any regulatory fee regime whose "touchstone" is the benefit delivered to broadcasters to place such unrelated costs on broadcasters, particularly where the actual result is broadcasters subsidizing a fund that is then used to subsidize the operating expenses of competitors. The rationale provided for the reallocation was that the Universal Service Fund benefits regulatees of almost every bureau, including wireless, broadband, satellite, and cable,[42] and that the regulatory fee process will never be "pure."[43] The Universal Service Fund serves a public interest purpose, just like broadcasters, but oddly, broadcasters subsidize the operation of the Universal Service Fund, but the beneficiaries of that fund don't return the favor.[44]

It simply defies logic that the Commission could not recognize and address the inequity of adding the equivalent of more than 13 FTEs to the Media Bureau while not at least attempting to assure that none of those added FTEs were assessed against broadcast fee categories. While

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[41] *See 2019 State Association Comments* at 13-14.

[42] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 7057, 7061-62 ¶ 10 (2017).

[43] *Id.* at 7062 ¶ 11.

[44] It should be noted that the subsidy these regulatees receive from Media Bureau regulatees also includes other indirect FTEs such as personnel in the Enforcement Bureau, *id.* at 7061-62 ¶ 10, which has ballooned in size, in part to deal with fraud in the USF program, a program that, again, broadcasters have no part in. *See, e.g., FCC Votes to Create New Fraud Division Within the Enforcement Bureau; Expert Team to Focus on Fighting Waste, Fraud, & Abuse in Universal Service Fund Programs*, News Release (February 4, 2019).

the Commission claims to need easily administrable solutions,[45] it appears that it already reassigns **fully half** of the Wireless Telecommunications Bureau's FTEs to auctions, making clear that such "subdivisions" of a core bureau's FTEs can be readily implemented. Even setting aside the touchstone of benefits delivered, when a clear inequity is being perpetrated, some of the FCC's "administrability" must give way to fairness.

Here, the State Associations echo the concerns raised by NAB in its Comments. First, there is a real concern that the assignment of half of the Wireless Telecommunications Bureau's FTEs to auctions has made them disappear for purposes of billing WTB regulatees for the "benefit" of their work.[46] If true, that would be yet another example of a badly broken regulatory fee system. Similarly, as was the case with the 38 USF FTEs discussed above, the State Associations agree with NAB that broadcasters should have no responsibility for paying regulatory fees attributable to the $33 million portion of the allocation related to the Broadband DATA Act.[47]

Nor is the harm resulting from the FCC failing to fix the situation a theoretical one. With the significant increase in broadcast regulatory fees hitting all broadcasters, including the smallest ones, the fact that the increases proposed this year are so significant as to leave few if any broadcasters eligible for the de minimis exception means that some of the smallest broadcasters will effectively see their regulatory fee jump from $0 to over $1000 – something

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[45] *See, e.g., FY2019 Report and Order* at 8194-95 ¶ 14. The Commission has lamented that it cannot accurately categorize most of its employees' work because they work on a variety of matters not attributable to a single fee category, bureau, or even year. *Id.* at 8196 ¶ 18. Therefore, the Commission's current fee process is not easily administrable and is of questionable accuracy in any event.

[46] *2021 NAB Comments at* 11-12.

[47] *Id.* at 5-10.

few will have budgeted for and the payment of which in a pandemic year will be particularly challenging. Each year, the FCC returns millions upon millions of dollars in "excess" regulatory fee payments to the Treasury that it has **over-collected** from regulatees, including broadcasters.[48] That may be small change to the multi-billion dollar telecommunications behemoths that merely pass their regulatory fee costs on to their customers as a monthly line-item on their bills, but it is an enormous sum to a small rural radio station.

It is inconceivable that after decades of government policies to encourage the availability of radio and television service to every community in the country,[49] Congress intended to deprive local communities of access to free over-the-air broadcast service through the imposition of burdensome regulatory fees on broadcasters. The Commission's fee approach, as well as its failure to implement the RBA, is promoting just that result. Regulatory fees are harming free broadcast service in small and rural markets,[50] ironically by forcing broadcasters to subsidize their competitors in the name of achieving "universal service."

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[48] *See, e.g.*, *Federal Communications Commission 2021 Budget Estimates to Congress*, at 59 ("On October 1, 2019, the Commission transferred over $13.7 million in excess collections from FY 2019 to the General Fund of the U.S. Treasury to be used for deficit reduction.") (available at https://www.fcc.gov/document/fy-2021-fcc-budget-estimate) (last visited June 16, 2021).

[49] *See, e.g.*, *Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167 (1952) (establishing policies for the allotment of television stations under Section 307(b)); *Revision of FM Assignment Policies and Procedures,* Second Report and Order, 90 F.C.C.2d 88 (1982) (adopting priorities for the allotment of radio stations under Section 307(b)); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2567 (2011) (establishing the Urbanized Service Area Presumption to help ensure radio station licenses are not awarded to well-served urbanized areas at the expense of rural communities).

[50] *See, e.g.*, *The Pandemic's Silent Impact on Radio: 78 Fewer Licensed Commercial Stations,* INSIDE RADIO (April 7, 2021) (http://www.insideradio.com/free/the-pandemic-s-silent-impact-on-radio-78-fewer-licensed-commercial-stations/article_11b0211e-976b-11eb-ad8d-1712bbf21edd.html) (last visited June 17, 2021).

III. The FCC's Proposal Concerning TV Regulatory Fees Is at Odds With the RBA

In the *FY2021 NPRM*, the FCC asked for comment on a proposal to establish a handful of fee tiers into which the Commission will slot television broadcasters based on ranges of population served by the television station.[51] But, as NAB pointed out in its Comments in this proceeding,[52] a tiered fee approach would effectively guarantee that no television broadcaster pays a fee that actually reflects the size of the audience the station serves – the one true (and easily quantifiable) "benefit" a television station receives from the FCC's regulatory activity. As NAB notes, within each tier, the stations in the top half of the tier will be subsidized by the stations in the bottom half.

Moreover, the FCC's vague concern regarding the effort of calculating and listing individual fees for each licensed television station seems odd given that the Commission would still have to track stations' coverage populations in order to put them into their proper fee tier. After having just implemented this more precise approach to assessing regulatory fees *among* TV stations (with much work left to do on calculating the portion of FCC benefits received *by* TV stations as a group), it makes little sense to revert to a less accurate approach, particularly one that further disconnects the fees charged from one of the few easily quantifiable benefits the FCC provides to such stations. In a world where such figures are maintained in a machine-readable format, attaching the electronic file of station coverage populations that the FCC would otherwise have to take the extra step of converting into a tier table seems neither overly

[51] *FY2021 NPRM* at 14-15 ¶¶ 32-33.

[52] *2021 NAB Comments* at 15.

burdensome nor a step in the right direction in attempting to accurately assess the benefit the FCC is delivering.

IV. The RBA Also Changed How the FCC Must Handle Noncommercial Educational Broadcast Station Regulatory Costs

As the court in *Telesat Canada* noted, the RBA

> added the power to adjust fees based on factors "reasonably related to the benefits provided to the payor of the fee by the Commission's activities." And another fee exemption was added for "noncommercial radio station[s] or noncommercial television station[s]."[53]

Notably, Congress in the RBA did not say "noncommercial radio station[s] or noncommercial television station[s] shall be exempt from regulatory fees and the costs of regulating them shall be borne solely by commercial radio and television stations." It simply exempted them as a category, making the cost of regulating them the very definition of FCC "overhead" that should be spread across all regulatory fee payors, as the Commission has repeatedly done with the costs of providing benefits to those from which the Commission has arbitrarily elected (in violation of the RBA) not to collect regulatory fees.

In contrast to those parties, however, the RBA itself prohibits the Commission from collecting regulatory fees from noncommercial radio and television stations. Rather than treat this cost as general FCC overhead as Congress clearly intended in exempting them, however, the FCC has inexplicably placed these regulatory costs upon commercial broadcasters, even though they receive no greater "benefit" from the operation of noncommercial stations than any other FCC regulatee.

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[53] *Telesat Canada* at 2.

Nor is this violation of the very touchstone of the RBA accidental. The State Associations previously requested that FTEs associated with regulation of noncommercial broadcast stations get similar indirect status (as a group that also provides a broad public benefit but whose regulatory costs are borne solely by Media Bureau commercial regulatees).[54] That request was rejected, with the Commission merely noting an example of cross-subsidization of a much smaller number of entities (150 ISTPs versus thousands of noncommercial stations) in the *telecommunications* world (which again, unlike broadcasters, can just pass those costs on to their customers as a bill line-item), followed by the non sequitur that "all of the regulatees in that fee category, whether they pay regulatory fees or not, benefit from the oversight and regulation of that bureau."[55] If that is indeed the case, then other bureaus should not be allowed to charge the greatest portion of their indirect FTE costs to the Media Bureau, since those bureaus' regulatees are ostensibly benefiting from their particular bureau's "oversight and regulation."

Stated differently, if that is the result the Commission believes is required by its FTE-focused rather than benefits-focused approach, then it merely further demonstrates the reason the RBA changed that approach. If telecommunications providers can address such added costs by simply passing the bill on to their customers, it merely confirms that the benefit received by broadcasters from being regulated is less, as an increasing number can no longer afford to pay for their own regulation and the regulation of thousands of noncommercial stations, while also paying the largest share of other industries' indirect FTEs. The FCC has an opportunity to correct that, and should do so.

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[54] *See 2019 State Association Comments* at 12-14.

[55] *FY2019 Report and Order* at 8196 ¶ 19.

V. Complying With the RBA Is Not the Impossible Task the Commission Has Posited

The D.C. Circuit made clear in *Telesat Canada* that the touchstone for determining who should pay regulatory fees is not who holds an FCC authorization, but who benefits from the FCC's operations. It's as simple as that. And, as both NAB and the State Associations have repeatedly noted in their regulatory fee comments, that has been the case since passage of the RBA. *Telesat Canada* merely affirmed that fact.

In response, the Commission has responded that "neither NAB nor the State Broadcasters explain how to allocate indirect FTE in a way that better reflects the 'benefits to the payor.'"[56] Of course, the RBA places that burden on the Commission to accomplish, not its regulatees, who continue to ask that the FCC make the process less opaque, better facilitating useful input from the private sector.

However, based on what limited information has been disclosed over the years, the State Associations can offer some thoughts for the FCC to consider. In no particular order, and recognizing that some will be easier than others:

1. The costs of any rulemaking that results in an auction get charged to the self-funding auctions allocation, and it funds subsequent reallocation rulemaking proceedings, whether resulting in an auction or not.[57] The FCC is effectively running a spectrum auction "business" which should be able to cover its overall operating costs from auction proceeds.

2. The costs of applications FTEs should be removed from the calculus, since the FCC is already required by Section 158(a) of the Communications Act of 1934 to recover those costs though application fees.

[56] *See, e.g., id.* at 8194-95 ¶ 14.

[57] *See 2020 State Association Comments* at 16-18.

3. As major economic beneficiaries of the FCC's equipment authorization rules, equipment manufacturers and distributors should be included in the universe of regulatory fee payors.

4. As major economic beneficiaries of FCC proceedings making unlicensed spectrum available, manufacturers and distributors of devices using such spectrum should be included in the universe of regulatory fee payors.[58]

5. Filers of "new technology" petitions should be included in the universe of regulatory fee payors if such filing is not already covered by an application fee. If the FCC is concerned about discouraging such petitions, calibrate the regulatory fee to the number of such filings annually.

6. To the extent a party is not already subject to regulatory fees (e.g., as a licensee) and is the subject of a successful enforcement action (robocallers, pirate radio operators, operators of jamming devices or other devices creating interference in a willful manner), include them in the universe of regulatory fee payors. If being regulated is considered a benefit to a broadcaster that is worthy of regulatory fees, it should be no different for such other parties.

Ultimately, the RBA requires the FCC to analyze who benefits from its operations and how, and to broaden the universe of contributors beyond simply FCC licensees. To the extent the FCC believes that its authority granted under the RBA is insufficient to fully implement some of the above options or other efforts by the FCC to broaden the universe of regulatory fee contributors, and that further congressional action is required, the State Associations and

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[58] *See, e.g.,* FCC ACTS TO SPEED ACCESS TO NEW WIRELESS TECH DEVICES, *Updated Rules Provide a New Framework for Innovators to Market, Import, and Pre-Sell Tech Devices Earlier in the FCC Review Process*, News Release (released June 17, 2021) ("The Report and Order adopted today continues the Commission's ongoing efforts to review and revise the FCC Office of Engineering and Technology's equipment authorization program, which ensures that newly developed smartphones, wireless headphones, Wi-Fi routers, and other devices comply with FCC rules. . . . This action modernizes the Commission's review process to ensure that it keeps pace with the rate of innovation by expanding opportunities to import, market, and conditionally sell radiofrequency equipment prior to the equipment completing the equipment authorization process. The new rules will allow manufacturers to gauge consumer interest for new products and take advantage of new mechanisms for marketing devices—like crowdfunding—while ensuring that the Commission retains appropriate oversight over the proper authorization of such devices.").

broadcasters in general would be pleased to work with the Commission and Congress in seeking to accomplish that.

As noted above from a review of the Commission's own website,[59] licensing is becoming a smaller part of the FCC's operations, and if the Commission is going to be able to support its many missions, expanding the universe of regulatory fee contributors is essential, as merely increasing broadcasters' regulatory fees year after year will eventually result in diminishing returns – not just for the FCC, but for the public that relies on broadcasters as one of the last free services in a subscription world. While the RBA requires the FCC to change its approach regardless, it is also in the best interests of the Commission to diversify its base of regulatory fee payors.

[59] *See supra* Notes 27-28 and associated text.

CONCLUSION

For the reasons stated above, the State Associations respectfully request that the Commission reject the *FY2021 NPRM*'s proposal to increase broadcasters' regulatory fees for 2021, and amend its proposed FY 2021 regulatory fee schedule and its regulatory fee processes consistent with these Joint Reply Comments.

Respectfully submitted,

THE STATE BROADCASTERS ASSOCIATIONS

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