

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Assessment and Collection of Regulatory)	MD Docket No. 19-105
Fees for Fiscal Year 2019)	
To: The Commission		

JOINT COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS

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SUMMARY

The 50 State Broadcasters Associations (the “State Associations”) hereby submit these Comments in response to the Commission’s Notice of Proposed Rulemaking proposing regulatory fees for Fiscal Year 2019 (“FY 2019 NPRM”). While recognizing the challenges faced by the Commission in setting appropriate regulatory fees each year, the State Associations note that in order for the process to be successful, the Commission must (1) utilize accurate data, (2) implement a methodology that accurately assesses the “benefits provided” by the Commission to each class of regulatee, and (3) ensure sufficient transparency in the process to permit regulatees and the public to spot and bring to the Commission’s attention any errors in the data or methodology.

As noted in these Comments, the FY 2019 NPRM contains a serious error in the data used for radio regulatory fee calculations, resulting in artificially inflated fees for radio regulatees. These Comments also discuss in detail errors and inconsistencies in the methodology used to determine the portion of Commission costs assessed to the Media Bureau, and specifically, to radio and television stations. These errors and inconsistencies appear to force commercial radio and television stations to bear the *entire* cost of the Commission’s regulation of fee-exempt broadcast stations, while also burdening them with a substantial portion of the cost of regulating fee-exempt entities in *non*-broadcast fee categories. Consistent with its fee treatment of other categories of regulatees, the cost of the Commission’s regulation of fee-exempt broadcast stations should be spread across all Commission regulatees and not compartmentalized within the Media Bureau, or worse, only among commercial broadcasters.

While the above errors in data and methodology would need to be corrected under any rational regulatory fee regime, they are particularly inconsistent with the new obligations placed upon the Commission by the RAY BAUM’S Act of 2018 (“RBA”). Indeed, despite the fundamental changes made to the Commission’s regulatory fee responsibilities by the RBA, the

FY 2019 NPRM not only fails to reflect those changes, but adheres to the Commission's pre-RBA approach, perpetuating a rather opaque process that can generate peculiar and arbitrary results. The RBA requires the Commission to alter its approach to setting regulatory fees, and the FY 2019 regulatory fees ultimately adopted need to conform to the RBA's requirements.

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado 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 Comments in response to the Commission’s Notice of Proposed Rulemaking released May 8, 2019, in the above captioned proceeding (“FY 2019 NPRM”).¹

INTRODUCTION

In the FY 2019 NPRM, the Commission sets forth, and seeks comment on, its proposed regulatory fee assessments for the current fiscal year, just as it has done annually since 1994. Unlike in prior years, however, the Commission also asks for comment on the impact of the passage of the RAY BAUM’S Act of 2018² (“RBA”) on the Commission’s regulatory fee authority and this annual regulatory fee ritual. While noting the changes to the language of its regulatory fee authority contained in the RBA, the Commission’s approach to the assessment and collection of regulatory fees for FY 2019 remains largely unchanged from that of prior years. As discussed below, however, the RBA makes subtle but important changes that cannot be ignored, and which necessarily must be incorporated into the Commission’s assessment of regulatory fees this year and in the future.

In these Comments, the State Associations address not only the implications of the RBA, but errors in both the data and process used to calculate this year’s proposed broadcast regulatory

¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Notice of Proposed Rulemaking, MD Docket No. 19-105, FCC 19-37 (rel. May 8, 2019).

² Pub. Law No. 115-141 § 102, 132 Stat. 348, 1082-86 (2018) (*codified at* 47 U.S.C. §§ 159, 159A).

fees, and equally important, the lack of information in the FY 2019 NPRM that would allow the public (including regulatees) to comment in a useful manner on the FY 2019 regulatory fee proposals. As discussed below, this lack of transparency into the fee-setting process is not a new issue, but is particularly problematic in the FY 2019 NPRM. The implications are numerous, inconsistent with the RBA, and discussed at length below.

I. The Proposed FY 2019 Regulatory Fees for Radio Fee Categories Are Based on Erroneous Data and Must be Corrected

Each year, the Commission determines the amount of regulatory fees it must collect from each type of regulatee subject to its fee authority through a process that is described in more detail below. After the Commission has established the aggregate amount due from a particular fee category (*type* of regulatee), it determines the amount that each *individual* regulatee must pay by dividing the aggregate fee amount for that fee category by the number of regulatees, or “payment units,” in that category of fee.³

In the case of broadcast licensees, the payment units generally equate to a single broadcast authorization, typically a radio or television station license. There are certain broadcast station licenses that are by statute exempt from the collection of regulatory fees such as those licensed as noncommercial educational (NCE) radio and television stations, those held by nonprofit or governmental entities, and those in the Low Power FM (“LPFM”) service. According to the FCC’s Broadcast Station Totals information, at the start of the current fiscal year, there were 17,668 full power and LPFM broadcast radio stations in the United States. Of these, the FCC identifies 6305 as NCE FM or LPFM stations and thus statutorily exempt from the collection of regulatory fees.⁴

³ See e.g., *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 27 FCC Rcd 8458, 8461-62 (2012) (“*Reform NPRM*”).

⁴ See FCC News Release, *Broadcast Station Totals as of September 30, 2018* (rel. Oct 3, 2018). The FCC’s Broadcast Station Totals information does not identify how many radio station licensees are exempt due to their

Based on this information, one would expect that the number of radio stations then remaining subject to regulatory fees would be approximately 11,363. Instead, this year's stated radio station payment units (excluding construction permits) total only 9458, which is a statistically and mathematically significant difference of some 17%.⁵

While that discrepancy alone raises serious questions about the fee calculation, an examination of past Commission fee assessments also makes clear that something has definitely gone awry with the radio data used in the FY 2019 NPRM. The chart below indicates the number of payment units upon which the FCC has based its fee calculations in the radio fee categories over the past seven years:

Fee Category	2019 Units⁶	2018 Units ⁷	2017 Units ⁸	2016 Units ⁹	2015 Units ¹⁰	2014 Units ¹¹	2013 Units ¹²
AM Class A	61	63	65	66	65	67	68
AM Class B	1,389	1523	1523	1535	1505	1483	1454
AM Class C	773	872	870	889	889	882	837
AM Class D	1,256	1503	1492	1492	1492	1522	1406
FM Classes A, B1 & C3	2,904	3166	3150	3122	3132	3107	2935

status as nonprofit or governmental entities. However, commercial radio stations may be operated by nonprofit or government entities, which means that the number of NCE FM and LPFM stations does not represent the universe of exempt stations, the implications of which are discussed further below.

⁵ *FY 2019 NPRM* at Appendix A.

⁶ *Id.*

⁷ *Assessment and Collection of Regulatory Fees for Fiscal Year 2018*, Report and Order and Notice of Proposed Rulemaking, 33 FCC Rcd 5091 (2018) ("*FY 2018 NPRM*") at Appendix A.

⁸ *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Notice of Proposed Rulemaking, 32 FCC Rcd 4526 (2017) at Appendix A.

⁹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2016*, Notice of Proposed Rulemaking, 31 FCC Rcd 5757 (2016) at Appendix A.

¹⁰ *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Notice of Proposed Rulemaking, Report and Order, and Order, 30 FCC Rcd 5354 (2015) ("*FY 2015 NPRM*") at Appendix B.

¹¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Notice of Proposed Rulemaking, 29 FCC Rcd 6417 (2014) at Attachment A.

¹² *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Notice of Proposed Rulemaking, 28 FCC Rcd 7790 (2013) at Attachment A.

Fee Category	2019 Units ⁶	2018 Units ⁷	2017 Units ⁸	2016 Units ⁹	2015 Units ¹⁰	2014 Units ¹¹	2013 Units ¹²
FM Classes B, C, C0, C1 & C2	3,075	3128	3114	3139	3143	3139	3110
AM Construction Permits	3	9	10	15	29	30	51
FM Construction Permits	67	109	113	179	182	185	170

As shown, after a relatively steady number of station payment units in each category for the past six years, the number dropped in every single category for 2019, in some cases by hundreds of stations, with the total number of payment units “lost” just between 2018 and 2019 adding up to 845 missing radio stations and construction permits. While there may be some variation from year to year, the prior six years of data indicate such year to year variations tend to be small, and nothing like the dramatic drop between 2018 and 2019.¹³ For the AM Class B category, the 2019 numbers represent a decrease of 8.8% in the number of payment units over 2018. For the AM Class C category, the decrease is 11.4%. For AM Class D, the decrease is the greatest at 16.5%. The two FM classes have decreases of 8.3% and 1.7%, respectively.

Given the FCC’s methodology of dividing its aggregate fee assessment for the fee category by the number of stated payment units in that category, even if nothing else changed, such a dramatic drop in the number of payment units across which the category fee is divided results in a

¹³ While it is possible that some of the substantial difference between the Commission’s published “Broadcast Station Totals” and the Commission’s stated number of radio payment units for FY 2019 reflects the Commission’s predictions regarding the number of stations that will fail to timely pay their regulatory fees in FY 2019, that would make little sense given: (1) there is no reason to expect the number of non-compliant stations to suddenly jump in 2019 compared to the Commission’s stated payment unit numbers from each of the past six years; (2) the Commission’s redlight system ensures that the FCC will receive those fees sooner or later, militating against any “bad debt” deduction in the number of predicted payment units; and (3) to the extent the Commission seeks to counterbalance late regulatory fee payments that will not arrive in FY 2019 (a timing issue), those should already be more than counterbalanced by late FY 2018 (or 2017) fees arriving in 2019, for which the Commission also charges the tardy payor a 25% late penalty, interest, and a separate administrative fee. Indeed, if predicted late payments are the source of the Commission’s drop in stated radio payment units for FY 2019, it is guaranteed the Commission is overcharging radio stations in FY 2019 by not taking late payments, interest, and bonus payments (because of the 25% penalty) from past years that are received in FY 2019 into account. Moreover, the fact that commenters are left to speculate as to whether this is what the Commission is doing, and how much this one factor may be reducing the stated number of payment units, demonstrates the serious lack of transparency that undercuts the very utility of seeking public comment on the Commission’s fee proposals.

dramatic increase in the regulatory fee for each individual station. If this artificially higher fee is then paid by every commercial radio station, the FCC will collect significantly more revenue from radio stations than it costs to regulate radio—a violation of the very principle behind the collection of apportioned regulatory fees.

In light of the dramatic disparity between the number of payment units assumed for purposes of the 2019 fee calculation and the number that has existed over the past six years, the radio regulatory fees must be recalculated downward by incorporating the correct number of radio payment units over which the category fee will actually be divided, and an explanation provided for any significant deviation from prior years. Without such information, the fee calculation effectively becomes a “black box”, making it impossible for the public (including stakeholders such as regulatees) to usefully comment on the Commission’s regulatory fee proposals and depriving the Commission of the input public comment is intended to provide.

In that regard, it would be useful for the Commission to fully explain not just the sudden drop in radio payment units from prior years, but how the Commission’s stated 9528 radio payment units for 2019 can be squared with the Commission’s previously published commercial radio station total of 11,363 (*not* counting construction permits), presenting a 16.2% drop between the actual number of commercial radio stations and the number of radio payment units used for the FY 2019 NPRM fee calculations. While some of that difference will consist of commercial radio licenses held by non-profit entities that do not pay regulatory fees, for that to explain the entire difference would require that one out of every six commercial radio stations in the country be licensed to a non-profit entity. The more information the Commission can provide on this fundamental disconnect in its fee calculations, the more useful the public’s input would be.

We would also be remiss if we failed to note the particular damage that exaggerated radio regulatory fees can cause. Far more than most Commission regulatees, many radio stations are

small businesses where every dollar is critically needed, and unlike most non-broadcast regulatees, such stations—who serve the public interest, convenience and necessity by providing free, over-the-air programming to consumers—can’t just pass their regulatory fees on to subscribers or users as a line item in a billing statement. As a result, even a properly calculated regulatory fee has a far greater impact on a typical radio station as compared to other types of FCC regulatees. An erroneously inflated fee is therefore even more harmful to these licensees and, consequentially, the public they serve.

II. Regulatory Fees Must Be Reformed to Be Consistent Across Regulatees and Bureaus, and Sufficiently Transparent to Permit Informed Comment by the Public

The dramatic change in the number of radio station payment units for FY 2019 combined with the inability of commenters to assess the basis for that change raises another issue with which the FCC has struggled in assessing regulatory fees—transparency. The Commission began a reform effort in 2008 and sought comments on how it could improve the regulatory fee process to better reflect industry, regulatory and Commission organizational changes that had occurred since 1994.¹⁴ That effort took on renewed importance in 2012 with the release of a Government Accounting Office (“GAO”) report identifying a number of problems with the FCC’s fee process that made it difficult for regulatees to know the factors and criteria that were used in the fee calculations for their own fee category, or to understand how changes to fees in other fee categories affect what they pay in their own fee category.¹⁵

The Commission’s process to date has been to divide its total appropriations target for the year among the regulatees of the four “core” bureaus—Wireline Competition, Wireless

¹⁴ See, *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6388 (2008).

¹⁵ U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-686, FEDERAL COMMUNICATIONS COMMISSION: REGULATORY FEE PROCESS NEEDS TO BE UPDATED (2012) (“GAO Report”).

Telecommunications, Media, and International—based on the number of Full Time Equivalent employees (“FTEs”) in each of those bureaus. The FTEs in each of the four “core” bureaus are considered “direct” obligations of the regulatees of that bureau.¹⁶ All the remaining FTEs whose salaries must be captured via regulatory fees are considered “indirect” employees of the four “core” bureaus. These indirect obligations are assessed against the regulatees of the four “core” bureaus in proportion to the number of FTEs employed by that bureau. In other words, the regulatees of the bureaus that have the most employees end up paying more than the regulatees of other bureaus not only because “their” bureau has more FTEs, but because they then end up paying the biggest share of the Commission’s “overhead” as well, including such things as the cost of the Commission’s move to new office space.

Not surprisingly, given the extent of broadcast regulation, the Media Bureau has one of the largest numbers of FTEs. Because of this, regulatees of other bureaus have over the years mastered the art of persuading the Commission to move those bureaus’ employees for regulatory fee purposes from “direct” FTEs of that bureau to “indirect” FTEs, with the result that the regulatees of the Media Bureau have often ended up shouldering the largest share of these additional “overhead” costs. Broadcasters and other Media Bureau regulatees therefore face a stacked deck whereby their ability to comment in the absence of process transparency is largely limited to debating how fees should be allotted among Media Bureau regulatees, rather than addressing whether Media Bureau regulatees as a whole are paying disproportionately more than regulatees

¹⁶ Bureau employees whose work can be assigned to specific fee categories are treated as direct employees of such categories and those bureau employees whose work cannot be assigned to specific categories are treated as indirect employees. Therefore, the assessment for each fee category is composed of direct FTEs and indirect FTEs from both inside and outside of the core bureau. *Reform NPRM* at 8461.

of other bureaus for (in the words of the statute¹⁷) the “benefits provided” them by the Commission that warrant regulatory fees.

When the GAO issued its report in 2012, the FCC was still basing its regulatory fees on FTE data from FY 2008. The GAO recommended that the Commission update its FTE numbers more frequently and that it work to align its assessments more closely with the FTEs actually tasked with work for each fee category.¹⁸ In 2014, the Commission committed to updating its FTE numbers, along with its payment unit numbers, annually. It also committed to updating its allocations among the four “core” bureaus biennially.¹⁹

With the exception of this year, the Commission has followed up on its FTE commitment by publishing in each year’s regulatory fee NPRM the total FTEs assigned to each bureau, minus those whose work is paid for by auctions and therefore not relevant to regulatory fees.²⁰ However, this information alone does not provide the level of detail necessary to fully assess the impact of FTE reassignments on individual fee categories. For example, in FY 2015, the Commission asked for comment on more precisely aligning Media Bureau FTEs to the work they do for regulatees in the radio services as opposed to the television services so the regulatory fee division between the two services could be adjusted accordingly.²¹ NAB requested additional information regarding the then-current alignment of Media Bureau employees with each service to assist it in responding to that request.²²

¹⁷ 47 U.S.C. §159(d).

¹⁸ *GAO Report* at 36.

¹⁹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 10767, 10774 (2014).

²⁰ *See e.g., FY 2018 NPRM* at n.10.

²¹ *FY 2015 NPRM* at 5359.

²² *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Report and Order and Further Notice of Proposed Rulemaking, 30 FCC Rcd 10268, 10279 (2015).

In response, the FCC noted that the Media Bureau had, at that time, 25 FTEs in its front office, 51 in the Audio Division, 27 in the Industry Analysis Division, 13 in the Engineering Division, 29 in the Policy Division, and 24 in the Video Division.²³ However, the Commission noted that “some” of the FTEs in the Industry Analysis and Policy Divisions also work on cable matters. Thus, even with this most detailed data to date (corresponding information has not been provided for 2019), it is not possible for broadcasters to determine the division of FTEs among Media Bureau fee categories. “Some” Industry Analysis and Policy Division employees work on matters for cable regulatees as well as broadcast regulatees, but how the Commission takes that nebulous fact into account when fees are assessed to individual fee categories does not appear to be knowable outside the Commission.

For FY 2019, the Commission has not given specific FTE numbers attributable to each bureau due in large part to its reassignment of 95 FTEs (64 of which are not auction-funded) from various locations within the FCC to the newly-created Office of Economics and Analytics (“OEA”) that is said to benefit all bureaus.²⁴ Presumably at least some of those 64 FTEs were previously direct FTEs of the Media Bureau for which Media Bureau regulatees will no longer be solely responsible. However, because Media Bureau regulatees must shoulder 36% of the cost of all indirect FTEs this year,²⁵ their reassignment is the rough equivalent of adding 23 direct FTEs (36% of 64) to the Media Bureau. Therefore, it appears that if fewer than 23 former Media Bureau direct FTEs were included in the reassignment to OEA, Media Bureau regulatees’ fee burden would increase. If more than 23 Media Bureau FTEs are reassigned, Media Bureau regulatees’

²³ *Id.* at 10279-80.

²⁴ *FY 2019 NPRM* at n.45.

²⁵ *Id.* at ¶ 13.

fee burden could decrease.²⁶ The point, however, is that the FY 2019 NPRM did not explain the details or methodology behind this FTE shuffle, which means it is impossible for commenters to know that information, much less to intelligently comment on whether the fee burden was allocated appropriately.

Because of the opacity of the FTE numbers, it remains difficult to determine whether fee assessments are meeting the Commission's goals of fairness, administrability, and sustainability.²⁷

For example, the GAO Report recounts:

[I]n the fiscal year 2010 Report and Order, FCC stated that because the revenue base upon which the wireline telephone industry's fee rate is calculated had been decreasing for several years, FCC had determined it would best serve the public interest to set the wireline telephone industry's fiscal year 2010 fee rate at \$0.00349 per revenue dollar. In a footnote, FCC elaborated that because the wireline telephone industry's revenue data was lower than expected, if FCC had not decided to set the wireline telephone rate at \$0.00349 per revenue dollar, the rate would have increased to \$0.00364 per revenue dollar. However, FCC did not explain what this change in rates translated to in terms of the amount of revenue it expected to collect in fees from the wireline telephone industry. Moreover, while FCC stated in the Report and Order that reducing the fees paid by the wireline telephone industry would increase the fees paid by licensees in other service categories, and the resulting regulatory fees are detailed in FCC's Report and Order, FCC did not specifically show the fee increase for each regulatory fee category caused solely by this policy decision. In November 2011, FCC officials told us that this policy decision had resulted in reducing the total expected fees to be collected from the wireline telephone industry by approximately \$12 million, and that FCC instead attempted to collect this \$12 million by raising the rates of all the other fee categories based on the existing division of fees among fee categories. This \$12 million is reflected in the regulatory fee tables set forth in FCC's Order. *However, the limited information on how various adjustments affect each fee category reduces the ease with which industry stakeholders or other interested parties can understand the effects of FCC's current process—including the policy decisions FCC has made without any updated FTE analysis.*²⁸

²⁶ How the Commission has allotted that potential increase or decrease among the various fee categories within the Media Bureau is also unknown.

²⁷ *Reform NPRM* at 8459.

²⁸ *GAO Report* at 24-25 (*emphasis added*).

Based on the GAO’s analysis, it appears that in 2010, small rural radio stations that do not have access to subscriber/user fee income were among the industry participants that subsidized the regulatory fees of wireline carriers (whose business model, unlike radio’s, allows passing on such fees to subscribers). While the costs of regulating wireline carriers may (or may not) have decreased, broadcasters—with no ability to pass on those increased regulatory fee costs—were among the regulatees who chipped in, although the extent to which they did so is not clear. The lack of full transparency in apportioning regulatory fees has, predictably, led to such harmful results.

Despite advances in transparency the Commission has made since 2010, it is unclear how, for example, the Commission accounts for broadcasters that are statutorily exempt from regulatory fee obligations. This is a particularly important question this year because it is not clear whether the dramatically smaller number of commercial radio stations discussed above is expected to shoulder the entire cost of regulating stations that are regulatory fee-exempt, or whether that cost is, more appropriately, spread across all Commission regulatees (as was apparently done to pay for the wireline carrier “discount” in 2010).

In other words, when the FCC said that the Media Bureau had a total of 135 FTEs in 2018,²⁹ it is not clear whether the FCC had already subtracted from that number those FTEs whose work is attributable to fee-exempt NCE, non-profit and governmental radio and television stations and whether the Commission has therefore made those FTEs “indirect” obligations of *all* regulatory fee payors. It would be eminently unfair to saddle commercial broadcast stations with those costs on the theory that the non-commercial/non-profit station work is done by Media Bureau FTEs

²⁹ *FY 2018 NPRM* at n.10.

when Media Bureau regulatees are *also* paying the largest share of the “indirect” FTEs of every *other* bureau.

It is a simple principle—non-exempt regulatees should be responsible for the Commission’s cost of regulating them, and the cost of the Commission’s regulation of fee-exempt broadcast regulatees should be spread across *all* Commission regulatees and not compartmentalized within the Media Bureau, or worse, only among commercial broadcasters. Yet, a statement in the FY 2015 NPRM suggests that this compartmentalization is exactly what is happening.³⁰ The Commission’s unknown treatment of this fundamental issue of fairness (and economics) is important. More than 30% of radio stations fall into a fee-exempt category under the statute. Where that cost is allocated significantly impacts the regulatory fees of commercial broadcasters. To oversimplify a bit, if 30% of all broadcast stations are exempt from regulatory fees under the statute, and the cost of regulating those entities is spread only across commercial broadcasters, that increases the average regulatory fee for those commercial broadcasters by 30%—a substantial burden for small and rural stations in particular.

Of equal—if not greater—concern, however, is the simple fact that the Commission has not released sufficient information to even determine what the Commission is doing in this regard, much less to inform a discussion of whether that approach is harmful, unfair, inconsistent with the governing law, or simply inconsistent with the Commission’s treatment of other regulatees’ fees.

For example, in 2017, the FCC reclassified 38 FTEs in the Wireline Competition Bureau who work on Universal Service matters as “indirect” FTEs and those FTEs thereby became the shared burden of all Commission regulatees (which then placed the largest share of those expenses

³⁰ “We estimate that 10,226 radio broadcasters and 4,754 television broadcasters will pay these regulatory fees and note that among the broadcasters that are statutorily exempt from paying fees, noncommercial educational (NCE) radio stations significantly outnumber NCE television stations.” *FY 2015 NPRM* at 5359 (*footnotes omitted*).

on Media Bureau regulatees). In making this change, the FCC noted that the Universal Service programs have expanded and that wireless, broadband, cable and even satellite regulatees are eligible to participate in and benefit from the programs, and that it was therefore unfair to attribute all Universal Service FTEs to the Wireline Competition Bureau.³¹ With respect to the potential impact this reassignment would have on broadcast regulatees, who do not participate in the Universal Service program, it was simply said that regulatory fee assignments cannot always be “pure.”³² Given the Commission’s current methodology, which allocates 36% of this newly created “overhead” to the Media Bureau’s regulatees, this reassignment for FY 2019 is roughly the equivalent of adding 13 direct FTEs to the Media Bureau, with broadcasters presumably paying a substantial share of it without being provided any Commission “benefit” to justify the increased fee.³³

Whether “fair” or not, it is clear that the Commission’s policy, dating back to at least 2010, has been to spread such costs across all regulatees, regardless of which regulatees actually benefit. That being the case, since apparently the FCC has not already done so, it must identify the number of FTEs reasonably allocable to the work of regulating exempt broadcast stations and reassign them as indirect FTEs to be paid for by *all* regulatees. This would include all FTEs responsible for LPFM licensing, at least one-quarter of all Audio Division FTEs (because, at a minimum, one-quarter of all radio stations are licensed as FM NCEs), and a currently unknown number of Video Division FTEs responsible for non-commercial/non-profit TV station licensing.

³¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 7057, 7062-63 (2017).

³² *Id.* at 7063.

³³ Again, whether the Commission has allocated the cost of those FTEs solely to Media Bureau regulatees who might participate in the Universal Service programs is not clear.

III. Beyond Being Good Policy, Transparency and a Greater Degree of Precision in Setting Regulatory Fee Burdens Is Required by the RBA

In voting for the 2012 NPRM, then-Commissioner Pai said:

[T]oday's currency is convergence: Telephone companies have entered the video market, cable operators are winning voice customers, satellite operators offer competitive radio, television and broadband services, and wireless providers have unleashed a mobile revolution few if any saw coming.

The Commission must strive to keep pace with this swiftly changing industry—especially where, as here, Congress has affirmatively told us to do so in Section 9 of the Communications Act. I look forward to hearing from all interested parties about how we can update our regulatory fee structure to better reflect the current marketplace.³⁴

The RBA finally makes such a marketplace reflection possible by untethering the FCC's regulatory fee assessment process from the four "core" bureaus. Prior to passage of the RBA, Section 9 of the Communications Act of 1934, as amended, directed the Commission to recover the costs of its enforcement, policy and rulemaking, user information services, and international activities by determining the full-time equivalent number of employees engaged in those activities in the "core" bureaus and other offices of the FCC, 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."³⁵ Section 9 also gave the Commission the power to amend the fee schedule "to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."

³⁴ *Reform NPRM* at 8507 (Statement of Commissioner Pai).

³⁵ Originally, the "core" bureaus identified by the statute were the Private Radio Bureau, Mass Media Bureau and the Common Carrier Bureau. Thereafter, the Commission reorganized and from then on, the four "core" bureaus for purposes of regulatory fee calculations have been the Wireline Competition Bureau, the Wireless Telecommunications Bureau, the Media Bureau, and the International Bureau.

As discussed above, historically the Commission has responded to its Section 9 directive by: (1) determining the portion of the entire Commission’s budget attributable to the enumerated activities of each of the four “core” bureaus, (2) calculating the allotment of “overhead” among each core bureau based primarily on the respective number of FTEs employed by that bureau, and (3) assigning those overhead costs, along with the bureau’s direct FTE costs, to the regulatees of that bureau via regulatory fees. As a result, regulatees of the bureaus with the most employees shoulder the greatest portion of the Commission’s budget. In the FY 2019 NPRM, despite passage of the RBA, the Commission has not altered this approach.

The RBA, however, revised Section 9 in subtle but important ways that the Commission cannot ignore. Section 9 as revised no longer limits the Commission’s fee determinations to the number of FTEs in the four “core” bureaus. Instead, Congress has now directed the Commission to “assess and collect regulatory fees at such rates as the Commission shall establish” so long those amounts are reasonably expected to match the amount required by each annual Appropriations Act.

Congress still expects the Commission to recoup the salaries of FCC employees because it directs that when the Commission determines that the regulatory fee schedule requires amendment, the Commission should amend the schedule “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.”³⁶ But—and this is the important part—those FTEs must now reflect *all* bureaus, and not be limited to just the four “core” bureaus.

³⁶ 47 U.S.C. § 159(d).

In 2013, the Commission reallocated the bulk of the International Bureau’s direct FTEs to indirect FTEs. At the time, the CTIA argued that the proposal created a system whereby fees were assessed not on the basis of the cost of regulating a particular service, but on a “‘fair share’ rationale that is incompatible with the Act.”³⁷ The Commission disagreed, stating that “the plain wording of the statute requires the Commission to calculate fees based on what FTEs are doing, not on where they are located.”³⁸ By removing the prior obligation to base the FCC’s regulatory fee assessments entirely on the FTE numbers in the core bureaus, Congress reinforced its intent that the Commission more fully shift its focus to the “benefits provided to the payor” and away from the “core” bureau in which an FTE resides, reducing the artificial and somewhat arbitrary impact of whether an FTE is in a core bureau or a non-core bureau.

Under the RBA’s more organic “benefits provided” approach, factors that could be considered include whether the category of regulatees has subscribers, users, or customers from which to recoup regulatory fees, or whether, in the case of television, having less spectrum flexibility because of the repack and sharing that reduced amount of spectrum with white spaces devices has reduced the “benefits provided” by a Commission license, warranting a corresponding reduction in regulatory fees.

More broadly, untethered from the FTE headcount in specific bureaus, the Commission can more easily adjust the allocation percentages between all bureaus, eliminating “impure” fee allocations such as charging Universal Service FTEs to broadcasters and capturing appropriate fees from new, unlicensed entities that receive benefits from the work of the Commission’s FTEs despite not holding an FCC-issued authorization. The RBA implements a new approach to

³⁷ *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, 28 FCC Rcd 12351, 12357 (2013).

³⁸ *Id.*

regulatory fees that the FY 2019 NPRM simply fails to incorporate, perpetuating a rather opaque historical process that can generate peculiar and sometimes arbitrary results. While it may take several years for the Commission to fully achieve the RBA's vision of a more transparent, predictable and orderly approach to regulatory fees, it is now the law of the land, and the Commission must begin in 2019 to implement the RBA's modified approach to setting regulatory fees.

CONCLUSION

For the reasons stated above, the State Associations respectfully request that the Commission amend its FY 2019 fee schedule and its regulatory fee processes consistent with these Joint Comments.

Respectfully submitted,

**THE NAMED STATE BROADCASTERS
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