August 20, 2021

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Notice of *Ex Parte* Communication, MD Docket No. 21-190

Dear Ms. Dortch:

On August 18, 2021, the undersigned of the National Association of Broadcasters (NAB), had a teleconference with Acting General Counsel P. Michele Ellison, Chin Yoo, Andrea Kelly, William "Bill" Richardson, Keith McCrickard and Anjali Singh, all of the Office of the General Counsel to discuss the Report and Order and Notice of Proposed Rulemaking in the above-referenced proceeding regarding proposed regulatory fees for Fiscal Year 2021.[1]

During the meeting, NAB again noted that the Notice of Proposed Rulemaking (*Notice*) in the above-referenced proceeding ignored that the Commission is required by 47 U.S.C. § 159(d) to adjust its regulatory fees "to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities." Under Section 9 of the Communications Act, the Commission must not only analyze the changes in the number of full-time equivalent employees (FTEs) across the agency, but also must adjust the resulting fees based on "the benefits provided to the payor of the fee."[2] Apart from a very brief discussion of "benefits provided" in the context of non-geostationary orbit (NGSO) satellite systems, the *Notice* blows past this obligation as if Congress never mandated it.

This error infects the entire *Notice* – as discussed in more detail below – but is particularly acute when considering Congress's unusual step of earmarking $33 million for broadband mapping beyond the Commission's general appropriation. The *Notice*'s treatment of the $33 million could not possibly be more violative of the statute. First, it makes no attempt to tie which FTEs are working on broadband mapping to the fees associated with that project. If it had, it would have recognized that the Media Bureau has no role in the project and therefore Media Bureau regulatees are not responsible for contributing to its overall cost. Second, even beyond the first-step FTE examination, had the *Notice* bothered even acknowledging its "benefits provided" obligation under § 159(d), it undoubtedly would have concluded that

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

[2] *Id.*

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broadcasters should not have to contribute to the $33 million broadband mapping cost because they receive no benefits whatsoever from that effort. The *Notice*'s failure to exempt broadcasters from that $33 million is a blatant violation of the statute.

The "benefits provided" omission is even starker given that this analysis has taken on additional importance following the Ray Baum's Act.[3] In 2018, Congress eliminated additional considerations beyond the benefits received by the payors. As the D.C. Circuit explained in *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), under the prior version of Section 9, FCC regulatory fees "[we]re derived from a number of 'factors,' including the number of Commission employees in various 'bureaus,' and '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*.'" *PanAmSat Corp. v. FCC*, 198 F.3d 890, 894 (1999) (citing prior version of 47 U.S.C. § 159(b)(1)(A)) (emphasis added). The current version of the regulatory fees statute removes everything after "the Commission's activities," thereby focusing the Commission solely on the benefits provided to the entities being assessed fees rather than permitting the FCC to also consider the generalized public interest, among other things. Unfortunately, the *Notice* proceeds as if Congress never amended the statue.

The *Notice*'s failure to adjust regulatory fees to account for the benefits received by the payor of the fee is even more problematic in light of how the Commission has chosen to allocate regulatory fees in the first instance. The Commission continues to base its entire allocation of regulatory fees solely on the number of direct FTEs in the four core bureaus of the Commission, despite the fact that Congress no longer specifically identifies the bureaus from which the Commission should base its full-time equivalent employee count.[4] Prior to the change, Congress identified the "Private Radio Bureau, Mass Media Bureau, [and] Common Carrier Bureau" (later reorganized into the Wireline Competition, Wireless Telecommunications, Media, and International Bureaus) as the basis for the FTE count. Under the current statute, Congress has broadened the FTE inquiry significantly, by stating that the Commission "shall" amend the regulatory fee schedule to reflect the FTEs "within the bureaus and offices of the Commission."

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[3] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141. Div. P—RAY BAUM'S Act of 2018, §§ 401-404, 132 Stat. 348, 1087-90 (2018).

[4] See *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, 34 FCC Rcd 8189 (10) at n.32 (Aug. 27, 2019) (explaining the changes made by the Ray Baum's Act and noting that references to the core bureaus were eliminated in the new Section 9).

However, the Commission's entire fee schedule reflects only the work performed by FTEs in the four core bureaus of the Commission – a mere 22% of the Commission's FTEs.[5] Put differently, the Commission's entire regulatory fee construct is based on an analysis of less than one-fourth of Commission operations. The Commission makes no effort to even try to quantify the extent to which any industry benefits from the offices and bureaus not directly related to the function of an identified industry (i.e. the other 78% of Commission FTEs).[6] There is simply no consideration of the fact that the Consumer and Governmental Affairs Bureau, Office of Engineering and Technology or Office of Economics and Analytics have very little (and in some cases nothing) to do with broadcasters.[7] The Commission's allocation of regulatory fees solely based on FTEs therefore ignores its statutory mandate to determine who is benefiting from the work of all of the bureaus and offices of the Commission and make adjustments to the fee schedule accordingly.

The Commission's disregard for the statute also implicates the non-delegation doctrine, which requires Congress to specifically direct agencies when delegating legislative authority. Likewise, agencies must adhere to such delegations. "Courts have frequently held in other contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will."[8] This issue arose in the FCC context in *National Cable Television Ass'n v. United State*s, 415 U.S. 336 (1974). There, the Supreme Court addressed the challenges with Congress's attempted delegations of authority to administrative agencies. It noted that the Court had previously stated that a legislative action concerning fee assessment is not "'a forbidden delegation of legislative power,'" if "'Congress shall lay down by legislative act an

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[5] *See* NPRM at ¶¶ 22-23 (explaining how indirect FTEs are allocated in proportion to the number of direct FTEs in each of the four core bureaus and noting that there are 327 direct FTEs in each of the core bureaus); FCC FY 2022 Budget Estimates to Congress at 13 (May 2021) (indicating that in FY 2021 there were 1,472 total FTEs in the bureaus and offices of the Commission).

[6] As NAB has pointed out for years, the Commission's approach of allocating FTEs on a proportional basis does not adequately reflect the work that is performed by the bureaus and offices of the Commission. For instance, the Media Bureau is responsible for 36% of the costs associated with the Office of Engineering and Technology (OET) which is focused on unlicensed spectrum proceedings, while the primary beneficiaries of such proceedings (unlicensed spectrum users) pay nothing. *See, e.g.*, Comments of NAB, MD Docket 19-105, at 7 (June 7, 2019).

[7] Note that the FTEs in this bureau and the two offices combined almost equal the total number of direct FTEs in the "core" bureaus.

[8] *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 675 (1976).

intelligible principle to which the person or body authorized to fix such rates is directed to conform.'"[9]

Thus, a regulatory fee assessment regime is a proper delegation of congressional authority only if it provides "an intelligible principle" to guide the agency in its fee assessment. This naturally requires an agency's faithful adherence to that intelligible principle; indeed, it has a heightened responsibility to do so to avoid an unconstitutional delegation of congressional power. Applied here, it is critical for the Commission to follow the principle set forth in Section 9, which requires the Commission to account for "the benefits provided to the payor" once it has determined the current FTE allocation. The NPRM does not lay out any such analysis, and if anything, its pin-the-tail-on-the-donkey approach to assessing fees for Bureaus and Offices that have little or nothing to do with broadcasters (and this similarly applies to most, if not all, industries) without any further adjustment to account for the benefits provided, if accepted, would certainly result in an unconstitutional delegation of authority.

It is well past time for the Commission to change its unlawful and unjust approach to regulatory fees. At the very least, the Commission must exempt broadcasters from contributing to the Commission's broadband mapping efforts under the Broadband DATA Act. As the D.C. Circuit recently stated, "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."[10] Even a cursory look at the benefits equation demonstrates unequivocally that broadcasters have nothing to do with Congress's special appropriation. The Commission must rectify its' error and simply remove the Media Bureau contribution to this purely broadband-centric exercise.

Please do not hesitate to contact us with any questions.

Respectfully submitted,

Rick Kaplan
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National Association of Broadcasters

[9] *Id.* at 342 (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

[10] *Telesat Can. v. FCC*, 999 F.3d 707, 713 (D.C. Cir. 2021).

cc: Michele Ellison, Chin Yoo, Andrea Kelly, William Richardson, Keith McCrickard and Anjali Singh