

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

In the Matter of)	
)	
Procedures for Assessment and Collection of Regulatory Fees)	MD Docket No. 12-201
)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2008)	MD Docket No. 08-65
)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ respectfully submits these comments in response to the Notice of Proposed Rulemaking (Notice) “In the Matter of Procedures for Assessment and Collection of Regulatory Fees and Assessment and Collection of Regulatory Fees for Fiscal Year 2008.”² The Commission should adopt a comprehensive approach toward reforming its regulatory fee structure, with reform encompassing updates to the calculation of full-time employees (“FTEs”) and proper allocation of the costs of the support bureaus. On September 10, 2012, the United States Government Accountability Office (“GAO”) released a report entitled “Federal Communications Commission, Regulatory Fee Process Needs to Be Updated” (“GAO report”) making several recommendations consistent with those of

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See Notice of Proposed Rulemaking, In the Matter of Procedures for Assessment and Collection of Regulatory Fees (MD Docket No. 12-201) and Assessment and Collection of Regulatory Fees for Fiscal Year 2008 (MD Docket No. 08-65), released July 17, 2012.

USTelecom in the instant comments.³ The Commission should heed the calls of industry and GAO and promptly reform its fee structure.

I. Regulatory Fee Reform Should be Promptly Completed and Implemented

USTelecom strongly supports the timely completion of this proceeding to allow the implementation of a reformed fee structure in FY 2013. Interstate Telecommunications Service Providers (“ITSPs”) and others have been assessed on a system developed in 1994 and an FTE calculation last updated in 1998.⁴ The wireline telephone revenue that makes up the ITSP fee category peaked in 2000 at \$74.1 billion, and was only \$39.5 billion in 2011.⁵ So those assessed in the ITSP category have been paying excessive fees for over a decade.⁶ The Commission has the opportunity to correct this inequity going forward, and it should do so promptly to enable implementation of the new fees for FY 2013.

The GAO report encourages the FCC to promptly address the age of the data used in assessing regulatory fees and explicitly states that the “FCC’s inaction in updating its FTE analysis is inconsistent with federal guidance on user fees.”⁷ It notes that OMB Circular A-25 “directs agencies that have user fees to review the user fees biennially in order to assure, among other things, that existing charges are adjusted to reflect unanticipated changes in costs or market

³ See “Federal Communications Commission, Regulatory Fee Process Needs to Be Updated” (GAO report) (GAO-12-686), (rel. September 10, 2012).

⁴ See *Notice* at para. 8.

⁵ See Report and Order, *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, 15 FCC Rcd. 14478, MD Docket No. 00-58, para. 32 (rel. July 10, 2000), Report and Order, *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, 27 FCC Rcd. 8390, MD Docket No. 12-116 (rel. July 19, 2012).

⁶The GAO report at page 18 notes that “any cross subsidization that is occurring [is] not because of a decision to promote a policy goal but because the FTE analysis on which FCC bases its fees is obsolete.”

⁷ *Id* at page 16.

values.” The GAO report goes on to say that “The fact that the Communications Act directs FCC to base its fees on FTEs does not negate the applicability of the guidance regarding the regularity with which the basis of the fees (i.e., FTEs) should be reviewed.”⁸ The GAO report also notes that “according to federal financial-accounting standards, cost information should be reported in a timely manner and on a regular basis and should be reliable and useful in making decisions.”⁹ The GAO report concludes that the Commission’s decision not to update its data since fiscal year 1998 “has resulted in FCC not having FTE information that is timely, reliable, or comparable from year to year to guide its decisions on how to divide regulatory fees.”¹⁰

A new fee structure should be fully implemented as soon as possible. It is not necessary to phase-in implementation of new fees, even if such revised fees would result in substantially higher fees for one or more fee categories. ITSP fee payers have been over-assessed for more than a decade, and thus other categories of fee payers have been under-assessed for that same period. Phase-in of a new system would just unnecessarily perpetuate this unfair allocation. It has been obvious to all FCC regulatory fee payers for several years that substantial adjustments to the fee system are long overdue, and therefore such payers should be prepared to adjust their appropriate fee payments.

II. Regulatory Fees Should be Adjusted Annually

Regulatory fees should be adjusted annually to reflect changes in FTE counts and any changes to the Commission’s organizational structure. Such changes can be substantial and so they should be reflected in an updated fee factor as soon as practicable. While the GAO report notes that OMB Circular A-25 recommends biennial fee updates, the report also provides the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at page 17.

example of another fee-funded federal agency, the Nuclear Regulatory Commission, which updates its cost analysis for its larger fee categories annually and its smaller fee categories biennially. However, the particularly dynamic nature of the communications industry may be reflected in more frequent reallocations of FTEs among the bureaus, necessitating an annual recalculation to ensure fairness among payer categories. The NRC's policy of adjusting a large proportion of fees annually similarly reflects the need for equity among payers. The FTE counts for the Wireline Competition Bureau (WCB) changed significantly between 2008 and 2011, the most recent years for which data is available. The Notice states that a tentative recalculation of the FTEs for the WCB for the end of fiscal year 2011 is 276, which would result in a fee allocation of 27.7%,¹¹ while as recently as 2008, the last FTE figures released by the Commission showed the Wireline Competition Bureau's FTEs comprising 21.35% of the total FTEs of the four core bureaus¹² representing 23 percent of the Commission's FY 2008 costs,¹³ including a portion of the indirect costs incurred by the Commission's support offices and support bureaus. The difference in fee allocation for the WCB between 2008 and 2011 reflects an increase of more than 20%. It is not unreasonable to assume that as the USF/ICC Transformation Order is implemented, and legacy regulation of wireline telephony diminishes to reflect changes in technology and in the market for telecommunications, the proportion of FTEs allocated to the WCB will be reduced as well. ITSP payers should not be locked into what may

¹¹ See para. 24 and FN 18 of the Notice.

¹² See Attachment C to Public Notice released September 3, 2008, by the Office of the Managing Director, *Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking Adopted on August 1, 2008* ("Attachment C").

¹³ See Attachment A to Public Notice released September 3, 2008, by the Office of the Managing Director, *Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking Adopted on August 1, 2008* ("Attachment A").

be an unusually high level of WCB employees, and thus a higher regulatory fee allocation, due to the current anomalous situation.

Moreover, there may be organizational changes that would migrate FTEs from the core bureaus to the non-core bureaus, potentially changing the allocation to the ITSP category. The Enforcement Bureau and the Public Safety and Homeland Security Bureau, for example, were created since the last FTE calculation was implemented and further changes are certainly possible. There should be no delay in reflecting such changes in the calculation of the regulatory fee allocation since the very creation of a non-core bureau recognizes that its function is common to most or all Commission regulatees and not specific to the regulatees of that core bureau.

Both the potential for significant changes in the FTEs assigned to core bureaus such as the WCB and the possibility of organizational changes which move functions out of the core bureaus militate for frequent periodic updating of the regulatory fee allocation. The allocation should be calculated and updated annually. The Commission already has an annual proceeding in which it calculates and assesses regulatory fees, so all that would be required would be to include an allocation based on updated FTEs to that process.

III. FTEs in the Core Bureaus Should be Allocated Directly to its Regulatees, and FTEs in the Non-Core Bureaus Should be Allocated Indirectly in the Same Percentage as a Core Bureau's Direct FTE Percentage is to the Total Direct FTEs of All the Core Bureaus

USTelecom supports the current cost-assignment methodology based on the presumption that work of FTEs in the four core bureaus should not be treated differently depending on whether an employee is “directly” involved in a feeable activity or “indirectly” involved, as in a support capacity. Such an approach is easy to administer and avoids the subjectivity inherent in evaluating the activities of a particular bureau to decide how the resources and associated costs related to a particular proceeding should be allocated among regulatees of that bureau and other

bureaus. If anything, this approach over-allocates FTEs and costs to ITSP fee payers, since proceedings addressing high-cost and low income universal service and intercarrier compensation cover more than regulatees of the WCB but the personnel working on these issues are mainly housed in the WCB. However, from the point of view of administrative simplicity and sustainability, this approach should prove to be most fair in the long run, contributing to the sustainability of the rules adopted pursuant to this Notice.

This approach should be applied to all bureaus, including the International Bureau. The fact that the activities of the International Bureau may not be completely directed at the regulatees of the Bureau puts that Bureau and those regulatees in no different position than other bureaus and their regulatees, as evidenced by the examples of proceedings in the WCB noted above. Therefore, the FTEs and associated costs attributable to the International Bureau should not be allocated any differently than those of the other bureaus. Moreover, the Notice does not assert that the work of the Strategic Analysis and Negotiations Division of the International Bureau, as highlighted in the Notice, does not benefit International Bureau regulatees, only that it benefits all classes of providers.¹⁴ If the function performed by that Division is truly more akin to a non-core function, perhaps the Commission should consider moving it out of the International Bureau to reflect its non-core mission. Unless and until that happens, it should be treated just like any other function of any other core bureau which crosses over to the regulatees of other bureaus.

The FTE costs of the non-core bureaus and offices should be treated as indirect costs and allocated among each of the core bureaus in the same percentage as that bureau's direct FTE percentage is to the total direct FTE costs of all the core bureaus. The Commission is correct

¹⁴ *See Notice* at para. 27.

that the work of the employees in the non-core bureaus supports the work of all the core bureaus,¹⁵ so it is not unreasonable and is administratively simple to allocate those costs to each core bureau in the same percentage as that bureau's direct FTE percentage is to the total direct FTE costs of all the core bureaus.

IV. The FCC Should Ask Congress for Authority to Refund Past Excess Fees and Reduce the Fee Requirement in the Amount of Future Excess Fees in the Year Following Their Collection

The Commission should ask Congress for the authority to refund past excess fees and reduce the fee requirement in the amount of future excess fees in the fiscal year in which the excess fee collection is recognized, which presumably would be the following fiscal year. As of fiscal year 2011, the FCC had deposited excess fee collections in the amount of approximately \$66 million into an account with the Dept. of Treasury.¹⁶ Those excess fee collections should be rebated to the payers in proportion to their payment. Given the overpayment of the ITSP category for the last decade due to the lack of use of updated FTEs, those same payers should be refunded the excess fee collections based on the same formula used for those years to ensure that the payments are properly and fairly allocated. However, in the future, with a reformed system that updates FTEs relatively frequently, it may be simpler for the agency to just reduce its revenue requirement in the year following any excess collection of fees. Such a process is necessary and equitable given the "FCC's tendency to over collect rather than under collect regulatory fees over the past 10 years."¹⁷ According to GAO, officials at all five agencies it had examined with respect to their fee collection processes had adopted a form of annual adjustment

¹⁵ *Id* at para. 21.

¹⁶ *See* Federal Communications Commission Fiscal Year 2013 Budget Estimates at page 32.

¹⁷ *Id.*

or “true-up” mechanism, such that any excess fees collected are either applied as an adjustment to the next year’s fees or are refunded.¹⁸

V. Conclusion

The payers of the ITSP fee have been shouldering a disproportionately large portion of FCC regulatory costs for more than a decade. The Commission itself has recognized that fact by initiating and proposing to continue¹⁹ the limitation on the ITSP fee increase that would otherwise result from application of the current allocations and factors. ITSP revenues peaked in 2000 at \$74.1 billion, are estimated by the Commission to be only \$39.5 billion in 2011, and presumably will be even less in 2012. But during those years, the ITSP customer’s share of the FCC’s costs has gone up, not down.

There should be no further delays in the Commission’s reform of its regulatory fee calculation process. It should be completed promptly and implemented for the FY 2013 fee collection process.

Fees should be recalculated annually to prevent a recurrence of the lengthy misallocation of the regulatory fee obligation. The fee calculation should be based on the current cost-assignment methodology, which is based on the presumption that work of FTEs in the four core bureaus should not be treated differently depending on whether an employee is “directly” involved in a feeable activity or “indirectly” involved, as in a support capacity. This solution is easy to administer and avoids the subjectivity inherent in evaluating the activities of a particular bureau to decide how the resources and associated costs related to a particular proceeding should be allocated among regulatees of that bureau and other bureaus.

¹⁸ *Id* at page 34.

¹⁹ *See Assessment and Collection of Regulatory Fees for 2012*, para. 11, MD Docket No. 12-116, released May 4, 2012.

It is not unreasonable to treat the FTE costs of the non-core bureaus as indirect costs of the core bureaus in the same percentage as that bureau's direct FTE percentage is to the total direct FTE costs of all the core bureaus. The work of the employees in the non-core bureaus supports the work of all the core bureaus and it would be administratively difficult to try to apportion that work specifically to each core bureau.

Finally, the Commission should request authority from Congress to rebate and/or true-up collection of any excess fees. The current account holding excess fees should be refunded to fee payers in proportion to their past payments.

Respectfully submitted,

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September 17, 2012