

oversight and regulation of the industry in these areas.”³ It therefore seeks comment on ITTA’s proposal either to add wireless voice services to the ITSP category or to re-assign Bureau FTEs as indirect for regulatory fee purposes.⁴ As discussed below, ACA believes that the Commission has sufficient legal authority to reallocate ITSP FTE activities and related fees as proposed by ITTA. This is especially the case because Bureau FTEs are engaging in identifiable activities involving and benefitting wireless providers. In addition, ACA believes that ITTA’s proposal is an acceptable method by which the Commission can assure that the burdens of the Bureau’s work are fairly and equitably distributed. However, the Commission also can opt for other methods that would satisfy the statutory mandate.

I. THE COMMISSION HAS LEGAL AUTHORITY TO ADOPT ITTA’S PROPOSAL TO REALLOCATE BUREAU FTE ACTIVITIES AND RELATED FEES AND OTHER PROPOSALS THAT ACHIEVE A SIMILAR OUTCOME

Regarding the Commission’s legal authority to adopt ITTA’s proposal to reallocate Bureau FTE activities and related fees or other proposals that achieve a similar outcome, the Commission has long found that Section 9 of the Communications Act, as amended, gives it broad authority to impose regulatory fees to recover costs caused by service providers⁵ and that “the plain wording of the statute requires the Commission to calculate fees based on what FTEs

³ See *id.*, ¶ 33.

⁴ See *id.*

⁵ See *e.g.* *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-140, MD Docket No. 07-81, ¶¶ 13-14 (rel. Aug. 8, 2007) (“2007 Order”).

are doing.”⁶ The Commission, for instance, used this authority in 2007 to make a permitted amendment pursuant to section 9(b)(3) and impose fees on providers of interconnected VoIP services in the same manner as they are imposed on ITSPs.⁷ The Commission based this decision on the fact that “Interconnected VoIP providers create costs at the Commission by participating in rulemaking proceedings, waiver petitions, and other matters.”⁸ Consistent with this authority, the Commission tentatively concluded two years ago that ITTA’s proposal to combine wireless voice with the ITSP category is “a permitted amendment as defined in section 9(b)(3) of the Act.”⁹

In comments filed last year, CTIA challenged the Commission’s tentative conclusion, arguing that it “fails to make the showing necessary to make the change it proposes,” that is, the Commission needs to find there are “changes in law and regulation that, in turn, change the relationship between the a particular category of regulates and the staff-hours spent regulating them.”¹⁰ CTIA, however, does not argue that there have not been changes in law and regulation that have resulted in Bureau staff undertaking tasks covering wireless voice service providers. In fact, it is indisputable that there have been such changes. As discussed in the next section, over

⁶ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2013 et al.*, Report and Order, FCC 13-110, MD Docket No. 13-140 *et al.*, ¶ 18 (rel. Aug. 12, 2013).

⁷ See *2007 Order*, ¶ 20.

⁸ See *id.*, ¶ 19.

⁹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2014 et al.*, Notice of Proposed Rulemaking, Second Further Notice of Proposed Rulemaking, and Order, FCC 14-92 *et al.*, MD Docket No. 14-92, ¶ 40 (rel. June 13, 2014).

¹⁰ See Comments of CTIA – The Wireless Association, MD Docket No. 14-92 *et al.*, at 7 (July 7, 2014).

the past decade,¹¹ Bureau staff have spent considerable and increasing time on proceedings, such as reforming Lifeline support, intercarrier compensation, and pole attachments, that have a direct effect on wireless voice service providers. Moreover, the Commission recently launched a major proceeding to enact further Lifeline reforms, and it has pending proceedings dealing with intercarrier compensation, pole attachments, and other matters where wireless providers are involved.¹² Further, as a result of these proceedings, Bureau staff today spend considerable time ensuring wireless providers comply with the rules. Thus, as the result of many changes in law and regulation in aggregate over time, many recent and pending changes, and many compliance activities, the Bureau engages in numerous activities involving wireless providers, all of which support the Commission’s tentative legal conclusion that ITTA’s proposal is a “permitted amendment.”¹³

¹¹ The statute does not limit the timeframe in which the Commission can find that there have been changes in law and regulation nor does the statute require that there be a single dramatic change in law or regulations.

¹² *See Lifeline and Link Up Reform and Modernization et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, WC Docket No. 11-42 *et al.* (rel. June 22, 2015); *see also e.g. Wireline Competition Bureau Seeks Comment on Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic*, Public Notice, DA 14-1808, CC Docket No. 01-92 *et al.* (rel. Dec. 10, 2014).

¹³ The Commission recently added a new subcategory in the cable television and Internet Protocol TV (IPTV) regulatory fee category for direct broadcast satellite (DBS) providers based on its findings that cumulative changes in law and regulation over time have resulted in Media Bureau FTEs working on issues and proceedings that include DBS as well as other multichannel video programming distributors (“MVPDs”). *See Assessment and Collection of Regulatory Fees for Fiscal Year 2015 et al.*, Notice of Proposed Rulemaking, Report and Order, and Order, FCC 15-59, MD Docket No. 15-121 *et al.* ¶¶ 31-32 (rel. May 21, 2015) (“2015 Fee Order”) (“Analysis of the oversight and regulation of MVPDs (including the DBS industry) by the Media Bureau in various rulemaking proceedings reveal a cumulative effect of changes in law that have taken effect since the

II. WIRELINE COMPETITION BUREAU STAFF SPEND SUBSTANTIAL AND INCREASING AMOUNT OF TIME UNDERTAKING WORK FOR WIRELESS VOICE SERVICE PROVIDERS

For many years, Bureau FTEs have engaged in numerous activities that benefit wireless providers and that work should continue, if not increase, as wireless providers expand their presence in the telecommunications market. ITTA, in its filings, points to perhaps the most obvious activity – Lifeline reform and compliance – a regulatory realm where wireless providers receive the lion’s share of universal service support¹⁴ and where the Bureau conducts substantial oversight to protect against waste, fraud, and abuse.¹⁵ A review of the primary Lifeline docket (WC Docket No. 11-42) shows wireless providers participated extensively in this docket just in 2015. For instance, Tracfone, a wireless provider and the largest recipient of Lifeline support, so far this year has submitted more than 30 filings, and other wireless providers and CTIA have in aggregate submitted dozens.¹⁶ Some of these filings are comments and *ex partes*, which Bureau staff need to consider in adopting new rules, while others are reports, which Bureau staff need to

Commission adopted the current DBS regulatory fee structure in 1996. Due to these changes, we find that the DBS providers should be included in the same fee category as the other MVPDs, such as cable television and IPTV...A permitted amendment under section 9(b)(3)...does not require a sudden increase in regulation or oversight over a defined period of time. Circumstances have changed in the almost 20 years since the Commission first addressed the issue of DBS regulatory fees...With this Report and Order, we recognize the changes in fact and law since the adoption of the DBS fee in 1996 cumulatively require us to adopt a permitted amendment to ensure that DBS providers contribute equitably to the FTE burden of MVPD oversight.”)

¹⁴ See *Universal Service Administrative Company, 2014 Annual Report* at 40, available at: <http://www.usac.org/about/tools/publications/annual-reports/default.aspx> (“USAC Report”).

¹⁵ See e.g. Comments of ITTA, MD Docket No. 15-121 *et al.*, at 4 (June 22, 2015).

¹⁶ See WC Docket No. 11-42, available at FCC Electronic Comment Filing System.

review to ensure compliance. Further, as an indication of the extent of Bureau involvement, at least in dealing with adopting new rules, in a recent meeting with Tracfone on Lifeline reform, six Bureau employees attended,¹⁷ and in meeting earlier in the year, four Bureau employees attended along with one employee from the Wireless Telecommunications Bureau, one employee from the Office of Strategic Planning and Policy Analysis, and one employee from the Office of Managing Director.¹⁸ The Bureau also is deeply involved with ensuring wireless providers comply with the Lifeline rules.¹⁹

Wireless providers also participate extensively in the other universal service programs overseen by the Bureau. For instance, while the amount of traditional high-cost support accessed by wireless providers is declining, significant support is still being provided, and wireless providers are filing numerous *ex partes* and reports on accessing support.²⁰ In addition, wireless providers are seeking access to high-cost support through the Connect America Fund Phase II

¹⁷ See *Ex Parte* Letter from Mitchell F. Brecher, Counsel to Tracfone, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42 (Sept. 21, 2015). See also, Comments of ITTA, MD Docket No. 15-121 at 4 (June 22, 2015) (“There are 172 FTEs in the Wireline Competition Bureau.”).

¹⁸ See *Ex Parte* Letter from Mitchell F. Brecher, Counsel to Tracfone, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42 (May 8, 2015).

¹⁹ See e.g. *Lifeline and Link Up Modernization and Reform*, Order, DA 13-1441, WC Docket No. 11-42 (rel. June 25, 2013).

²⁰ See *USAC Report* at 7; see also filings in WC Docket No. 10-90, available at FCC Electronic Comment Filing System.

program.²¹ Wireless providers too are participants in the E-rate program, which is overseen by the Bureau, and seek greater access to funding as that program is reformed.²²

While the universal service programs may be the most prominent areas where the Bureau undertakes activities benefitting wireless providers, there are many other matters. For example, two wireless trade associations, CTIA and PCIA, have had a significant presence in the Bureau's pole attachment proceeding (WC Docket No. 07-245).²³ Wireless providers participated in the Bureau's intercarrier compensation reform proceeding (WC Docket No. 10-90)²⁴ and the rural call completion proceeding (WC Docket No. 13-39),²⁵ and one of the largest wireless providers, Sprint, participates in the Bureau's special access proceeding (WC Docket No. 05-25).²⁶ Wireless providers also are engaged with the Bureau on such regulatory matters as number portability, 911 access, and customer proprietary network information. In sum, there is more than sufficient evidence to indicate that Bureau FTEs are engaged in extensive activities dealing with and benefitting wireless providers, which should trigger the proposed reallocation of these activities and related fees or other proposals that would achieve a similar outcome.

²¹ See e.g. Letter from David LaFuria, Counsel for United States Cellular Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (Oct. 23, 2015).

²² See e.g. Comments of United States Cellular Corporation, WC Docket No. 13-184 (Sept. 16, 2013); Letter from David LaFuria, Counsel for Rural Carriers, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-184 (June 21, 2014).

²³ See WC Docket No. 07-245, available at FCC Electronic Comment Filing System.

²⁴ See WC Docket No. 10-90, available at FCC Electronic Comment Filing System.

²⁵ See WC Docket No. 13-39, available at FCC Electronic Comment Filing System.

²⁶ See WC Docket No. 05-25, available at FCC Electronic Comment Filing System.

III. THE COMMISSION HAS VARIOUS OPTIONS TO ENSURE THAT BURDENS IMPOSED UPON THE WIRELINE COMPETITION BUREAU, INCLUDING THOSE IMPOSED BY WIRELESS PROVIDERS, ARE ASSESSED IN A FAIR AND EQUITABLE AND COMPETITIVELY NEUTRAL MANNER

In the *FNPRM*, the Commission seeks “comment on ITTA’s proposals to (i) combine wireless voice and wireline services into the ITSP category and, alternatively, to (ii) re-assign certain Wireline Competition Bureau FTEs as indirect for regulatory fee purposes.”²⁷ The Commission also notes that it could create a new sub-category of the ITSP category for wireless voice providers²⁸ – an approach the Commission recently adopted to assess Media Bureau fees on DBS providers for the first time after finding that Media Bureau FTEs work on issues and proceedings that include DBS as well as other MVPDs.²⁹ In sum, the Commission has various options to account for the burdens wireless providers impose on Bureau personnel and adopt regulatory fees that reflect those burdens.

That said, as the Committee discusses in the *FNPRM*, assessing wireless providers for Bureau activities will require the Commission to resolve certain issues. First, the ITSP fee assessment is based on wireline carrier revenues, while wireless providers pay existing fees on a per subscriber basis. ACA believes the contrast in these current assessments should not be a barrier. ACA notes that its cable operator members pay regulatory fees for Media Bureau FTEs based on the number of cable subscribers. However, most cable operators also pay fees for their

²⁷ See *FNPRM*, ¶33.

²⁸ See *id.*, ¶ 34. Further, the Commission could even decide to re-assign Bureau FTEs as direct.

²⁹ See *2015 Fee Order*, ¶ 6.

provision of interconnected VoIP service (on a revenue basis). Wireless voice providers should be able to be assessed and pay on a similar basis.

Should the Commission not adopt the “combined revenue” approach, it can reassign Bureau FTEs by undertaking a close examination of actual activities. The Commission has sufficient experience conducting this examination in reassigning FTEs for other bureaus. Finally, the Commission could create a new subcategory for wireless providers in the ITSP regulatory fee category that would offset ITSP fees, an approach that it took in assessing the Cable and IPTV fees on DBS providers.³⁰

³⁰ *See id.*, ¶ 9. In this decision, the Commission assessed fees on DBS in a two part process. First, it made clear it has authority to create the fee subcategory, and then it conducted a rulemaking to determine what the fee should be. The Commission could follow the same process here.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

A handwritten signature in black ink, appearing to read "Ross J. Lieberman". The signature is fluid and cursive, with a large initial "R" and "L".

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