



May 1, 2020

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Notice of Ex Parte Communication, MB Docket Nos. 17-264, 17-105, 05-6; MD Docket Nos. 20-105 and 19-105

Dear Ms. Dortch:

On April 29, 2020, Rick Kaplan and the undersigned of the National Association of Broadcasters (NAB) participated in a telephone conference with Michelle Carey, Holly Saurer, Albert Shuldiner, Lisa Scanlan, Tom Nessinger, Ari Rangel, Barbara Kreisman and Shaun Maher of the FCC's Media Bureau. On the same day, we held a telephone conference with Joel Miller of the Office of Commissioner O'Rielly, and on Thursday, April 29, we spoke with Alexander Sanjenis of the Office of Chairman Pai.

During the calls, NAB representatives emphasized the need for greater flexibility as the Commission works to modernize its rules governing public notice of broadcast applications.<sup>1</sup> NAB explained that the current Draft Order is more burdensome and disruptive while being less helpful to consumers than the current outdated rules. NAB reiterated that it is critical that the Commission allow broadcasters flexibility in the precise placement of an "FCC Applications" link or tab on the homepage, rather than requiring for the first time ever that a link of this kind be in a specified location – in this case placed at the *top* of every broadcaster's home page. We observed that if all of a station's other FCC-related information (e.g., links to the station's online public file, closed captioning contact information, EEO reports and contest rule disclosures) appears in one place, while application notices must appear somewhere else, the mandate will confuse members of the public, rather than informing them.<sup>2</sup> We reiterated that placing an "FCC Applications" tab or link at the top of a station's homepage is inconsistent with the format, style and design of many broadcaster

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<sup>1</sup> *Amendment of Section 73.3580 of the Commission's Rules Regarding Public Notice of the Filing of Applications*, Draft Order, FCC-CIRC2005-03, MB Docket Nos. 17-264, 17-105, and 05-6 (rel. Apr. 22, 2020) (Draft Order).

<sup>2</sup> Along these lines, we observed that stations also should be given the option of grouping all of their FCC-related information together on a single page that may be labeled "FCC Information" or "FCC Documents" (or other appropriate name chosen by the station).

websites, and that it would be unduly burdensome for stations to have to alter their Content Management Systems to accommodate this change.<sup>3</sup> We also observed that although FCC rules require a variety of information to appear on station's websites, the Commission has never before dictated the particular placement of information on websites beyond stating that an online public inspection file link must be on a station's home page, and that contest rule information must appear "conspicuously" on a station's home page.<sup>4</sup> Even the current rule requiring newspaper notices does not dictate where in the paper the notice must appear. The new standard, if adopted, would be an unprecedented expansion of the Commission's regulations.

We also explained that requiring stations to maintain an "FCC Applications" tab/link on their websites at all times, regardless of whether they have pending applications, is unduly burdensome and serves no apparent public purpose.<sup>5</sup>

Finally, we stated that consumer apps are relatively new for many stations and that apps are constantly evolving.<sup>6</sup> Requiring placement of application notices in station apps – in addition to on their websites – will impede stations' ability to innovate and evolve to meet consumer needs and expectations. At this time, the Commission does not regulate station apps or require any content to be placed in apps. Indeed, we know of no FCC regulations affecting any apps used by any communications providers, even though many important consumer notices are required of multichannel video

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<sup>3</sup> Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Esq., Secretary, FCC, MB Docket Nos. 17-264 et al., at 2 (filed Feb. 10, 2020).

<sup>4</sup> See, e.g., 47 C.F.R. § 73.2080(c)(6)(EEO); 47 C.F.R. § 79.1(i)(1)(closed captioning contact), 47 C.F.R. § 73.3526(b)(ii)(2)(public file); 47 C.F.R. § 73.1216(b)-(c)(contest disclosures).

<sup>5</sup> Draft Order at ¶ 14 and FTN 50 ("To the extent that there are no pending applications requiring online public notice, the link or tab should link to a page indicating that there are no pending applications subject to the posting requirement. The page must indicate when it was last updated.").

<sup>6</sup> Stations' deployment of apps varies greatly. While 93 percent of television stations have deployed at least one app, recent data show that only 63 percent of radio stations have apps. See Bob Papper, 2019 RTDNA/Hofstra University Newsroom Study, Lots Going On with TV and Mobile, <https://www.rtdna.org/uploads/files/2019%20RTDNAHofstra%20Survey%20TV%20and%20mobile.pdf>; RTDNA, 2019 Research: Local TV and Radio News Strengths (May 15, 2019), [https://www.rtdna.org/article/2019\\_research\\_local\\_tv\\_and\\_radio\\_news\\_strengths](https://www.rtdna.org/article/2019_research_local_tv_and_radio_news_strengths). See also NAB Comments, MB Docket Nos. 17-264 et al. (Nov. 18, 2019) at 14-15 (NAB Comments).

programming distributors, common carriers, and wireless providers—many of whom rely on apps to interact with consumers.<sup>7</sup> Given the wide range of consumer notices required of multiple communications providers, the use of apps across the entire communications industry, and the lack of record evidence that regulation of broadcasters' apps will achieve the Commission's goal (only one commenter in the proceeding supported expanding application notices to apps), it would be premature for the Commission to regulate broadcasters' use of apps for the first time here. If the Commission wanted to consider expanding required public notices to apps, it would be more appropriate, both practically and as a matter of administrative law, for the Commission to commence a separate proceeding to consider whether some or all of these notices – for all industries – should be made available via provider apps. Singling out broadcaster apps without any record evidence concerning consumer use of

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<sup>7</sup> See, e.g., 47 C.F.R. § 63.71 (procedures for discontinuance, reduction or impairment of service by domestic carriers); 47 C.F.R. § 64.2008 (notice required for use of customer proprietary network information); 47 C.F.R. § 76.1601 (notice required for deletion/repositioning of broadcast signals by cable operators); 47 C.F.R. § 76.1602 (general cable customer service information notices); 47 C.F.R. § 76.1603 (cable rate and service changes); 47 C.F.R. § 76.1604 (charges for customer service changes); 47 C.F.R. § 76.1618 (availability of cable basic tier service); 47 C.F.R. § 76.1620 (availability of signals); 47 C.F.R. § 76.1621 (cable equipment compatibility offer); and 47 C.F.R. § 76.1622 (consumer education program on compatibility).

broadcaster apps<sup>8</sup> or consumer reliance on broadcaster-generated public notices to learn of broadcaster applications<sup>9</sup> would be arbitrary and capricious.

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<sup>8</sup> The Draft Order observes that apps have been in existence for 11 years. Draft Order at FTN 55. This has no bearing on broadcasters' development and deployment of apps or their audiences' adoption of apps, which, for many, has yet to occur. See NAB Comments at 14-15 (93 percent of television and 63 percent of radio stations have deployed apps). The only party on record in support of the use of apps for public notices, Common Frequency (CF), offers zero evidence that any broadcaster app is any more popular than any broadcaster website. Reply Comments of CF in MB Docket Nos. 17-264 et al. (Dec. 1, 2019) at 5-7. Instead, it cites an article about the use of apps generally (which is primarily focused on time spent using social media/chat apps such as Facebook and WhatsApp) and the Alexa ranking of two apps that aggregate programming of various radio stations, which is inapposite. CF Reply Comments at 5 (citing Ron Palmeri, *Why We Don't Surf the Web Anymore And Why That Matters*, Forbes (Feb. 22, 2016), 10. Consumers accessing radio via these apps will certainly hear the on-air notices contemplated in the Draft Order, but would not see any notices added to station apps, so it is unclear why this data point is at all relevant to the potential placement of notices in station apps. Even if it were relevant, the Alexa rank of aggregators says nothing about the popularity of station apps or the value of distributing notices via apps.

<sup>9</sup> As NAB has previously explained, the notices do not result in public comment. See Comments of National Association of Broadcasters, MB Docket Nos. 17-264, 17-105, 05-6 (Dec. 29, 2017) at 8-9. NAB reviewed the 389 full power television license renewal applications filed in 2012 using the FCC's Consolidated Database System and found that only six applications – or 1.5 percent – were the subject of any public comment (drawing seven total filings). See Petition to Deny License Renewals of Citizens for Responsibility and Ethics in Washington, FCC File Nos. BRC DT–20120531AKE et al. (Aug. 22, 2012); Letter from Bradley Snow, FCC File Nos. BRC DT–20120531AKE et al. (Aug. 28, 2012) (Snow Letter); Letter from Bob Terpstra, FCC File Nos. BRC DT–20120531AKE et al. (Sept. 6, 2012) (Terpstra Letter); Informal Objection of Bright House Networks, FCC File No. BRC DT-20120927AKV (Sept. 23, 2013); Letter from Bob Campell, Mayor of DuFuniak Springs, FL to William T. Lake, Chief, Media Bureau, FCC, FCC File No. BRC DT20120927AKV (Sept. 30, 2013); Letter from J. Gordon Bengston, FCC File No. BRC DT20120530AIF (May 16, 2012); Letter from Herbert Max Bradley, FCC File No. BRC DT20120730AFS (Aug. 5, 2012) (Bradley Letter). Those who did file likely did not rely on broadcaster-generated notices to learn of the applications (e.g., filings by a Washington, D.C.–based watchdog group, a major cable provider, and a mayor supporting the cable operator's position). Even comments filed by the general public appear to rely on Internet information sources. Of the four comments filed by individuals, two included references to the FCC file numbers associated with the

Requiring notices to appear in station apps at all – much less at specific locations within the apps’ architecture<sup>10</sup> – would be unprecedented and unduly burdensome. The Commission would now be requiring stations to design their apps around a tab that infrequently links to any application notice.<sup>11</sup> Moreover, in many cases, requiring that a link to the application notices information be on the opening screen of an app affirmatively undermines the public interest. Currently, on that small screen, many broadcasters include breaking news, some of which would have to be pushed from that home screen to include an application notices link that would be “dead” most of the time. If the Commission determines that it is important to incorporate notice via apps at this time, it should allow stations to elect whether to provide notice either on their websites or via apps, but it should not mandate apps-based notices without undertaking a broader proceeding that considers the impact of an apps-based approach to consumer notice on the deployment of apps by broadcasters and other communications providers and how the addition of such notices will affect the consumer experience.

In addition, during our call with Mr. Miller, we urged the Commission to modify its draft regulatory fees NPRM to seek comment on whether to expand the base of contributors to regulatory fees.<sup>12</sup> As NAB previously observed, there are a large number of well-funded entities that actively participate in Commission proceedings, generate significant work for Commission staff, and profit from Commission activity without contributing

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applications, rather than merely identifying the stations’ call letters (Snow Letter, Terpstra Letter), and one included a printed page from the FCC’s website within instructions on how to file petitions to deny, informal objections and comments (Bradley Letter).

<sup>10</sup> Draft Order at ¶ 12 and FTN 43 (“we conclude that the app must contain, on its opening screen, a conspicuous “FCC Applications” link to the required online notice(s) . . . . [i]n other words, the “FCC Applications” link should appear either (1) when the user opens the app, without needing to scroll through the app screens in order to locate the link, or (2) when the user clicks the menu navigation button, as one of the menu options. The menu navigation button in most apps appears as an icon consisting of three horizontal lines, that opens a drop down menu and allows the user to directly navigate to other features or screens within the app.”).

<sup>11</sup> The Draft Order would require online notice for applications for new construction permits (and major modifications or amendments thereto); major changes to facilities (and major amendments thereto); and assignments/transfers of control. See Draft Order at Appendix A. Many stations rarely change hands or make significant operational changes necessitating these types of applications.

<sup>12</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2020*, Draft Report and Order and Notice of Proposed Rulemaking, MD Docket Nos. 20-105 and 19-105, FCC-CIRC2005-04 (rel. Apr. 22, 2020). See also NAB Comments, MD Docket No. 19-105 (Jun. 7, 2019) at 9-11.

regulatory fees to support that activity.<sup>13</sup> The Commission has spent a significant amount of time providing new opportunities for unlicensed spectrum use in recent years, most recently by opening up the entire 6 GHz band to uncoordinated unlicensed use, despite significant risk of interference to incumbent operations.<sup>14</sup> Unlicensed spectrum users and their advocates, representing some of the largest and wealthiest companies in the world, made numerous filings in that proceeding, generating substantial work for Commission staff at the expense of broadcasters, and clearly benefited from the Commission's activity. These entities should not continue to be exempt from regulatory fees. We also observed that the draft NPRM fails to consider whether any relief from regulatory fees is warranted given the extremely challenging circumstances faced by many broadcast licensees as a result of COVID-19.<sup>15</sup>

Please do not hesitate to contact us with any questions.

Respectfully submitted,



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Senior Vice President and Deputy General Counsel  
Legal and Regulatory Affairs

cc: Alexander Sanjenis, Joel Miller, Michelle Carey, Holly Saurer, Albert Shuldiner, Lisa Scanlan, Tom Nessinger, Ari Rangel, Barbara Kreisman, Shaun Maher

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<sup>13</sup> NAB Comments, MD Docket No. 19-105 (Jun. 7, 2019) at 9-11.

<sup>14</sup> *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. 24, 2020).

<sup>15</sup> See, e.g., NAB Comments in GN Docket No. 20-60 (Apr. 27, 2020) at 23-27 (discussing how local radio stations are highly dependent on local businesses for their ad revenues—businesses that are now shuttered or restricted and cannot afford to advertise); 39-41 (discussing effects of the pandemic on local TV stations). See also Peter Kafka, *The pandemic is driving media consumption way up. But ad sales are falling apart*, vox.com (Mar. 24, 2020); Lillian Rizzo, *Local TV Sees Spike in Viewers, Drop in Ads in Coronavirus Crisis*, The Wall Street Journal (Apr. 3, 2020).