Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

JOINT COMMENTS OF NEXSTAR BROADCASTING, INC. & GRAY TELEVISION, INC.

I. INTRODUCTION.

Nexstar Broadcasting, Inc. ("Nexstar") and Gray Television, Inc. ("Gray" and, collectively with Nexstar, "Commenters") hereby submit the following comments in the above-captioned proceeding. Commenters take issue with the Federal Communications Commission's ("FCC" or "Commission") proposal to impose upon broadcast television satellite stations the same regulatory fees that are applied to full-power broadcast television stations.[1] As demonstrated below, this proposal inexplicably upsets a decades-long policy and practice of charging a reduced flat fee to satellite stations and, in the process, raises regulatory fees for these stations by multiple orders of magnitude.[2] The Commission's about-face is unjustified, given the continued differences between full-power stations and satellite stations. Perhaps this is why, in

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[1] In the Matter of Assessment & Collection of Regulatory Fees for Fiscal Year 2019, *Notice of Proposed Rulemaking*, MD Docket No. 19-105, FCC 19-37, ¶ 21 (rel. May 8, 2019) ("NPRM").

[2] The 2018 satellite television station fee was $1,500 across all markets. *See* NPRM, Appendix G. The 2017 fee assessment order provided a list of all licensed satellite television stations. *In the Matter of Assessment & Collection of Regulatory Fees for Fiscal Year 2017*, 32 FCC Rcd. 4526, Appendix E (2017) ("2017 Fee Classification Order"). Even a cursory comparison of the NPRM's proposed fees for the satellite stations listed in the 2017 order shows that the Commission's elimination of a separate satellite station fee would cause regulatory fees for such stations to skyrocket. For example, WWCW, a Nexstar station serving Lynchburg, VA, will be subject to a proposed fee of $11,849—a 690% increase from 2018. *Compare* NPRM, Appendix C (p. 54) *with* NPRM, Appendix G.

proposing to reverse course after nearly 25 years, the NPRM spends a mere four words referring to the new approach while failing even to acknowledge the sea change it is proposing—much less explain why the change is warranted. The proposed elimination of a separate flat fee for satellite stations is unjustified as a matter of policy, would be arbitrary and capricious if implemented, and has been insufficiently noticed to regulatees. For all these reasons, the Commission should not adopt the proposal and should instead revert to its decades-long practice of imposing a lower fee on satellite stations.

II. THE FCC HAS IMPOSED SEPARATE REGULATORY FEES ON SATELLITE STATIONS FOR DECADES, CORRECTLY RECOGNIZING THAT THESE STATIONS WARRANT SEPARATE TREATMENT.

In 1995, the Commission determined that "Television Satellite Stations (authorized pursuant to Note 5 of Section 73.3555 of the Commission's Rules) that retransmit programming of the primary station will be assessed a fee separate from the fee for fully operational television stations."[3] The FCC made this decision for two reasons. First, the FCC noted that after it initially imposed commercial television fees on satellite stations, Congress added a separate fee category exclusively for satellite stations in the FCC's 1994 reauthorization bill.[4] Second, the

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[3] *In the Matter of Assessment & Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd. 13512, ¶ 60 (1995) ("1995 Fee Classification Order").

[4] *Id.* Congress imposed a mere $500 fee on satellite stations, as compared to the other commercial television fees in the statutory fee schedule, which ranged from $4,000 to $18,000. Omnibus Budget Reconciliation Act of 1993, PUB. L. NO. 103–66, § 6003 August 10, 1993, 107 Stat 31. Each of the statute's fee provisions were subject to amendment by the Commission. *Id.* Even when the FCC briefly imposed identical fee obligations on satellite stations, it indicated that it was willing to grant fee reductions on a case-by-case basis where (1) a licensee would be required to pay a higher fee for its satellite station than for its parent station; or (2) payment of the fee would diminish a licensee's ability to continue to serve the public. *In the Matter of Implementation of Section 9 of the Commc'ns Act*, 9 FCC Rcd. 5333, ¶ 82 (1994) ("1994 Fee Classification Order"); *see also In the Matter of Implementation of Section 9 of the Commc'ns Act*, 12 FCC Rcd. 10621, ¶ 2 (1997) (recognizing "that satellite television stations generally serve rural or sparsely populated areas and that requiring the payment of separate fees for both

Commission explained that "a separate fee for Television Satellite Stations would take into account the public interest factors reflected in comments filed" in the 1994 regulatory fee proceeding.[5] These factors included the facts that (1) "Congress intended the Commission to charge license fees based on the regulatory burden they impose, yet satellite stations require much less regulatory oversight than full powered stations;" and (2) applying full-power television station fees to satellite stations "would place an unfair and illogical burden on small market licensees who use satellite television stations to reach remote areas in their markets."[6]

Today, the satellite station fee applies to all licensed satellite stations, regardless of how much programming they retransmit.[7] Indeed, since 1995, for regulatory fee purposes, the Commission has defined satellite stations as stations "commonly owned, authorized under note 5 of section 73.3555 of the Commission's rules, and also shown as such in the Television and Cable Factbook."[8]

III. THE COMMISSION'S PROPOSAL TO BREAK WITH DECADES OF PRECEDENT AND DRASTICALLY INCREASE FEES FOR SATELLITE STATIONS IS ARBITRARY AND CAPRICIOUS.

After nearly 25 years of setting a separate fee for satellite stations, the Commission proposes to peremptorily obliterate this distinction.[9] However, the Commission does not acknowledge the substantial change that its proposal embodies and offers no substantive

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full service and satellite stations could result in small market station licensees paying higher fees than larger market stations").

5 *Id.*

6 1994 Fee Classification Order, ¶ 81.

7 NPRM, Appendix G (showing that 2018 regulatory fee applied to "Satellite Television Stations (All Markets)"). In 1991, the Commission abolished its policy "of limiting the amount of local programming that TV satellite stations may originate." *In the Matter of Television Satellite Stations Review of Policy & Rules*, 6 F.C.C. Rcd. 4212 (1991) ("1991 Satellite Policy Statement").

8 2017 Fee Classification Order, ¶ 20.

9 NPRM, ¶ 21.

discussion of its reversal of this decades-long policy. Rather, the Commission offers this change in the stroke of four words: "including each satellite station," buried within a discussion of changes to full-power station fees.[10] With these four words, the Commission states its intention to massively increase regulatory fees for satellite stations—sometimes by more than 1,000%.[11] The Commission's total failure even to acknowledge this significant change, let alone provide a reasoned basis for it, renders its implementation arbitrary and capricious. Moreover, by only briefly mentioning this shift in an out-of-place section covering full-power stations, the FCC failed to provide adequate notice of this proposal.

A. There is no justification for imposing identical fees on satellite stations and full-power stations.

The Commission's initial reasoning for imposing separate regulatory fees on satellite stations remains applicable today. Just as in 1995, satellite stations require less regulatory oversight, and imposition of full-power station fees to satellite stations would run contrary to the public interest, given the role of satellite stations in serving small, largely rural markets with a relative scarcity of broadcast television stations.

Commission regulation of satellite stations continues to consume a very limited portion of the agency's resources in regulating the broadcast television industry overall.[12] And if

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10 *Id.*

11 KBTX-TV—a Gray station in Bryan, Texas—will be subject to a 1300% higher fee. *Compare* NPRM, Appendix C (p. 28) (setting KBTX-TV regulatory fee at $21,399) *with* NPRM Appendix G *and* 2017 Fee Classification Order at Appendix E (listing KBTX-TV as a satellite television station); *also compare* NPRM, Appendix C (p. 47) (setting the regulatory fee for station WJLP, Middletown Township, NJ regulatory fee at $104,246) *with* NPRM, Appendix G (noting that 2018 regulatory fee for satellite stations was $1,500) *and* 2017 Fee Classification Order at Appendix E (listing WJLP as a satellite television station).

12 *See In the Matter of Streamlined Reauthorization Procedures for Assigned or Transferred Television Satellite Stations*, No. 17-105, 2019 WL 1199325, at ¶ 18 (Rel. Mar. 12, 2019) ("Reauthorization Streamlining Order") (recognizing that "transactions involving television satellite stations usually comprise a very small percentage of the total number of

anything, FCC regulation of satellite stations has decreased in recent years. In 2014, the Commission eliminated "annual regulatory fees for satellite television construction permits," noting that it had not received any new applications for such permits in many years.[13] Moreover, earlier this year, the FCC streamlined the procedures for reauthorizing satellite stations that are assigned or transferred, greatly simplifying the process and corresponding regulatory burden for the Commission.[14] By statute, FCC regulatory fees must "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."[15] Accordingly, there is no reasonable basis for abruptly deciding to treat satellite stations as equivalent to full-power stations for regulatory fee purposes, and doing so would violate the Communications Act.

The public interest also still favors a separate, lower fee for satellite stations because these stations serve underserved areas. After all, by definition, satellite stations must "provide service to an underserved area" where "no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station."[16] In 1995, the Commission thus observed that applying full-power television station fees to satellite stations "would place an

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television transactions processed by the Commission and originate from a similarly small segment of the overall industry").

13 *In the Matter of Assessment & Collection of Regulatory Fees for Fiscal Year 2014*, 29 FCC Rcd. 10767, ¶ 24 (2014).

14 Reauthorization Streamlining Order, ¶¶ 16–17.

15 47 U.S.C. § 159(d).

16 Satellite stations are authorized under the 3-part test outlined in the Commission's 1991 Satellite Policy Statement: "(1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station." 1991 Satellite Policy Statement, ¶ 1; *see also* 47 C.F.R. 73.3555 n.5 (incorporating the 1991 Satellite Policy Statement into the rule).

unfair and illogical burden on small market licensees who use satellite television stations to reach remote areas in their markets."[17] In March 2019, the Commission recognized that this situation is still the case, explaining that satellite stations "typically are in rural and economically depressed areas and often in need of investment."[18] Accordingly, just as in 1995, raising these fees places an "unfair and illogical burden" on satellite stations.

Ultimately, the factors that led the Commission to classify satellite stations as a separate category with a lower regulatory fee are still present today. Consequently, imposing an identical regulatory fee on these disparate classes of stations would violate the Communications Act and be arbitrary and capricious.[19]

B. Eliminating the separate regulatory fee for satellite stations would be arbitrary and capricious because the FCC has failed to acknowledge that it is changing a longstanding policy, much less articulate a reason for doing so.

In *FCC v. Fox Television Stations, Inc.*, the Supreme Court explained that agencies are prohibited from "depart[ing] from a prior policy *sub silentio* . . ."[20] Rather, an agency must acknowledge that it is changing course and "show that there are good reasons for the new policy."[21] Where an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," the agency must "provide more substantial justification."[22]

Here, the FCC has proposed to depart from its prior policy *sub silentio*. Nowhere does the NPRM acknowledge that the Commission is proposing to obliterate a decades-old distinction

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17 1994 Fee Classification Order, ¶ 81.
18 Reauthorization Streamlining Order, ¶ 16.
19 5 U.S.C. § 706(2)(A).
20 556 U.S. 502, 515 (2009).
21 *Id.*
22 *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

between satellite stations and full-power stations. Nowhere does it state that fees for satellite stations will increase by orders of magnitude. Nowhere does the Commission explain why it believes these changes are warranted. Put simply, the NPRM fails to even acknowledge that it is changing course on satellite stations. This violation is particularly egregious, where, as here, the factual underpinnings of the prior policy have not changed and that prior policy is longstanding, resulting in "serious reliance interests that must be taken into account."[23]

C. The Commission failed to provide adequate notice of its proposed elimination of the separate satellite station fee in violation of the Administrative Procedure Act.

The Administrative Procedure Act ("APA") requires notices of proposed rulemaking to include, *inter alia*, "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[24] "Since the public is generally entitled to submit their views and relevant data on any proposals, the notice must be sufficient to fairly apprise interested parties of the issues involved . . ."[25] The D.C. Circuit has thus held that notice was insufficient where the Commission made a proposal in a footnote in the background section of a notice of proposed rulemaking.[26]

Here, the FCC's notice of its proposal to exponentially increase satellite station fees is clearly insufficient. The Commission's proposed change spans four words and is buried within a section that is otherwise exclusively focused on full-power stations, which have been irrelevant

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[23] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (citation and internal quotations omitted)).

[24] 5 U.S.C. § 553(b)(3).

[25] *Nuvio Corp. v. FCC*, 473 F.3d 302, 309–10 (D.C. Cir. 2006) (citation and internal quotation omitted).

[26] *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140–43 (D.C. Cir. 1995).

in calculating satellite station fees since 1995. Accordingly, like the background section footnote, the satellite fee proposal's brevity and misplacement impermissibly "turn the provision of notice into a bureaucratic game of hide and seek."[27]

IV. CONCLUSION.

The proposed fee increase for satellite stations is a starkly sudden departure—without adequate notice or explanation—from well-established and still-valid Commission policy and practice, and it will have significantly adverse impacts to the licensees of satellite stations. Adoption of the proposal would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[28] and the Commission should therefore dispense with that proposal and retain a separate flat regulatory fee for television satellite stations.

Respectfully submitted,

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27 *See MCI Telecommunications Corp.*, 57 F.3d at 1142.

28 5 U.S.C. § 706(2)(A).