



July 17, 2020

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of *Ex Parte* Communication, MD Docket No. 20-105

Dear Ms. Dortch:

On July 15, 2020, Larry Walke, Emily Gomes and the undersigned of the National Association of Broadcasters (NAB), had two separate telephone conferences, the first with Tom Horan and James Bradshaw of the Media Bureau, and Deena Shetler and Sarah Stone of the Office of the Managing Director, and the second with Michael Carowitz of Chairman Pai's Office, Tom Horan, Deena Shetler and Sarah Stone, to discuss the Report and Order and Notice of Proposed Rulemaking in the above-referenced proceeding regarding proposed regulatory fees for Fiscal Year 2020.¹ In light of the ongoing pandemic's dramatic effect on certain industries within the Commission's purview, NAB requests that the Commission not raise any industry segment's contribution, apart possibly from any planned increases due to previously determined changes in policy.

The FCC's regulatory fee process remains a frustrating, impenetrable exercise despite repeated calls for more transparency and justification of how the fees are calculated.² In particular, NAB reiterated our objections that while there has been no change to the Commission's budget compared to FY2019, and only a negligible increase in the

¹ *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 (*rel.* May 13, 2020) (Notice).

² See, e.g., Joint Comments of the Named State Broadcasters Associations at 7-14, MD Docket No. 19-105 (Jun. 7, 2019) (calling for regulatory fees to be sufficiently transparent to permit informed comment by the public); Government Accountability Office, *Federal Communications Commission: Regulatory Fee Process Needs to be Updated*, GAO 12-686 at 24 (Aug. 2012) available at: <https://www.gao.gov/assets/600/593506.pdf> (concluding that the FCC's regulatory fee process lacked transparency and reporting that the lack of information in Commission regulatory fee notices and orders limited the ability of industry stakeholders to provide input into the regulatory fee process) (GAO Report).

1 M Street SE
Washington DC 20003 3512
Phone 202 429 5300

number of Media Bureau employees, for the second consecutive year radio broadcasters are being forced to shoulder a disproportionate, unjustified and unduly burdensome fee increase.³ In fact, it appears that this increase is the result of flaws in the Commission's methodology for apportioning regulatory fees, which collectively amount to a failure to assess fees in a manner that takes into account the benefits provided to the payor, as required by statute.⁴ These missteps include, but are not limited to:

- The Commission's insistence on apportioning indirect FTEs in proportion to each of the four core bureau's direct FTEs, rather than examining what functions such indirect FTEs perform over the course of the year and apportioning fees based on the results of that examination. The current methodology not only fails to comport with the Administrative Procedure Act, but also suffers constitutional infirmities. For example, the Commission's current approach results in broadcasters arbitrarily paying for a higher percentage of FTEs in offices such as the Office of Engineering and Technology (OET), which is largely focused on unlicensed spectrum issues and provides little to no benefits to broadcasters;
- No explanation of exactly how the work of certain Commission employees is characterized. For example, is staff working on TV broadcaster repacking designated as benefitting broadcasters – who were forced to move frequencies – or wireless companies, the true beneficiaries of the work. Moreover, the Commission does not discuss if these employees are even paid out of regulatory fees or if their time spent working on repacking is considered auction work;
- No discussion or justification of the apportionment within the Bureaus and Offices to which industry work is attributed. For example, which functions or staff in the Media Bureau are dedicated to over-the-air broadcasters, to satellite radio or to cable or DBS providers? When ACA Connects files yet another missive on retransmission consent, is that handled by an FTE assigned to cable or broadcast payors? The Commission fails to describe how they are apportioned in such circumstances and its rationale for doing so;
- The Commission's failure to broaden its base of payors to include the numerous well-funded technology companies that participate actively in Commission proceedings, generate significant work for Commission staff, and profit from

³ See Comments of NAB at 4-6, MD Docket No. 20-105 (Jun. 11, 2020) (NAB Comments); Reply Comments of NAB at 2-5, MD Docket No. 20-105 (Jun. 29, 2020) (NAB Reply Comments).

⁴ See 47 U.S.C. § 159(d).

Commission activity without contributing any regulatory fees to support those activities;⁵ and

- The unlawful failure to account for application fees already paid by broadcasters in assessing regulatory fees, effectively resulting in broadcasters paying twice for the work done to process such applications.⁶

NAB restated that the Commission's current regulatory fee process does not pass muster under the Administrative Procedure Act and raises serious constitutional questions as well. Moreover, these problems have been exacerbated by the ongoing coronavirus pandemic. As multiple commenters have highlighted, the pandemic has had a devastating financial impact on the radio broadcasting industry in particular, which depends on local advertising revenue that has now dried up to fund its operations.⁷ Unlike many other FCC regulatees, radio broadcasters have no ability to pass regulatory fees on to consumers and instead must pay these fees out of their already depleted operations budgets.⁸

Though NAB acknowledged the Commission is under time pressure to complete the rulemaking, and thus addressing some of the larger problems, while necessary, may not be feasible in this proceeding, NAB urged the Commission to take action now to eliminate regulatory fee increases for broadcasters. These are extraordinary times that more than justify a slight deviation from the Commission's usual approach to regulatory fees. The pandemic has devastated many industries, no more than radio. The Commission certainly has the power to freeze regulatory fees – and thus not impose any increases – under the statute.⁹

⁵ See NAB Comments at 9-13.

⁶ NAB Reply Comments at 4-5; Joint Comments of the State Broadcasters Associations at 14-15, MD Docket No. 20-105 (Jun. 12, 2020) (State Broadcasters Associations Comments).

⁷ See, e.g., NAB Comments at 7-8; State Broadcasters Associations Comments at 5-6; Comments of the New Jersey Broadcasters Association, MD Docket No. 20-105 (Jun. 8, 2020); Joint Comments of the Colorado Broadcasters Association, Florida Association of Broadcasters, Oregon Association of Broadcasters, and Puerto Rico Broadcasters Association at 2-3, MD Docket No. 20-105 (Jun. 12, 2020).

⁸ See GAO Report at 21.

⁹ Under 47 U.S.C. § 159(d), the FCC must “take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities.” Given that no new benefits have been conferred on the broadcasting industry, the Commission certainly could adjust the fees so that there is no increase this fiscal year.

Accordingly, because there has been no increase in the amount that the Commission is required to collect for FY2020 and given the unprecedented nature of the coronavirus crisis, barring a predetermined policy change to shift fees, no industry segment should be forced to pay more regulatory fees than they did in FY2019. The Commission should therefore freeze its allocation of regulatory fees amongst the four core bureaus at the FY2019 level. This approach is both feasible and fair and would require only minor adjustments to account for increases or decreases in the number of payors within each industry segment. In addition, such an approach would be administratively simple to implement in time for the collection of regulatory fees for FY2020.

NAB also discussed various temporary reforms to the FCC's processes to ease the regulatory fee burden on broadcasters given the current economic crisis. NAB expressed its support for simplified information collection and administrative requirements that would efficiently streamline the process for radio broadcasters to obtain an extended payment plan or hardship waiver.

Please do not hesitate to contact us with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs
National Association of Broadcasters

cc: Michael Carowitz
Tom Horan
James Bradshaw
Deena Shetler
Sarah Stone