



August 14, 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 August 11, 2020, Gordon Smith and the undersigned of the National Association of Broadcasters (NAB), had a telephone conference with Chairman Ajit Pai and his media advisor, Alex Sanjenis, to discuss the Report and Order and Notice of Proposed Rulemaking in the above-referenced proceeding regarding proposed regulatory fees for Fiscal Year 2020.<sup>1</sup> In light of the extraordinary challenges presented by the ongoing pandemic,<sup>2</sup> 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.<sup>3</sup> The Commission undoubtedly has the discretion to retain last year's schedule of fees, and NAB believes it also has the responsibility to do so.

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<sup>1</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 (*rel.* May 13, 2020) (R&O and NPRM).

<sup>2</sup> 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. See, e.g., Comments of NAB at 7-8, MD Docket No. 20-105 (June 11, 2020) (NAB Comments); Joint Comments of the State Broadcasters Associations at 5-6, MD Docket No. 20-105 (June 12, 2020); Comments of the New Jersey Broadcasters Association, MD Docket No. 20-105 (June 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 (June 12, 2020). 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. See Government Accountability Office, *Federal Communications Commission: Regulatory Fee Process Needs to be Updated*, GAO 12-686 at 21 (Aug. 2012) available at: <https://www.gao.gov/assets/600/593506.pdf>.

<sup>3</sup> See, e.g., R&O and NPRM at ¶¶ 33-48 (discussing reclassification of indirect International Bureau FTEs as direct FTEs to account for decision to assess fees on non-

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Despite no change to the Commission's budget for FY2020, and a de minimis increase in the number of Media Bureau employees (less than one employee), radio broadcasters are being forced to shoulder a disproportionate, unjustified and unduly burdensome fee increase for the second consecutive year. As detailed in NAB's earlier filings, the NPRM provides no meaningful justification as to why the increase it plans to impose on the radio industry is related to the benefits that the industry receives from the Commission.

Historically, the Commission has apportioned regulatory fees based on the percentage of direct full-time employees (FTEs) employed by each of the four core bureaus. The FCC further allocates the costs associated with other "indirect FTEs" in proportion to each of the four core bureau's direct FTEs, *regardless of the functions these employees actually perform*. This 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 no benefits whatsoever to radio broadcasters. Indeed, NAB cannot recall a case in recent memory where OET expended resources to work on an issue impacting the radio industry.

NAB also emphasized that the FCC has the statutory flexibility, discretion and indeed, responsibility, to avoid such an increase.<sup>4</sup> Subsection (c) of 47 U.S.C. § 159 governs "Adjustment[s] of schedule" for the Commission's regulatory fees:

**(c) Adjustment of schedule**

(1) **In general.** For each fiscal year, the Commission shall by rule adjust the schedule of regulatory fees established under this section to—

- (A) reflect unexpected increases or decreases in the number of units subject to the payment of such fees;
- and
- (B) result in the collection of the amount required by subsection (b).

As is plain, subsection (c) does not require the fee changes proposed by the Commission. The Commission did not, nor could not, detail any "unexpected increases

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U.S. licensed space stations and policy decisions regarding the apportionment of fees amongst International Bureau regulatees).

<sup>4</sup> See NAB Comments at 4-6; Reply Comments of NAB at 2-5, MD Docket No. 20-105 (June 29, 2020) (NAB Reply Comments).

or decreases" in the payors of regulatory fees as required under subsection (c)(1)(A).<sup>5</sup> In addition, since the amount being collected is the same as the prior fiscal year, no adjustment is necessary under subsection (c)(1)(B).

Presumably, the Commission has proposed its changes based on 47 U.S.C. § 159(d), which permits adjustments to the fee schedule

if the Commission determines that the schedule requires amendment so that such fees 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.

This clause is triggered when the Commission decides that the schedule must be amended to reflect its distribution of FTEs, with an eye towards the benefits received by fee payors. While the Commission appears to have tentatively made the first determination – that there is a meaningful shift in the number of full-time employees within the bureaus and offices – the NPRM never discusses the second piece of subsection (d), that this calculation must be “adjusted to take into account factors that are reasonably related to the benefits provided to the payor . . . by the Commission's activities.”

The latter clause is not optional. If the Commission determines that there are fewer employees in one or more bureaus and thus seeks to adjust the fee schedule, it *must* then also consider whether those changes impacted the benefits received by the payors.

The NPRM fails to address this second step. Had it done so, it would have likely concluded that no change was necessary amongst the payor industries. To NAB's knowledge, there has not been a fundamental change in “benefits provided” to any one industry. And that is certainly true for the radio industry: they have in no way received more benefits as a result of any reduction of employees in the Wireless or Wireline Bureaus or the fact that the Media Bureau has 0.9 more employees.

The force of this argument is magnified by the Commission's failure to even try to quantify the extent to which any industry receives benefits from the offices not directly related to the function of an identified industry. For example, as it stands now, the radio industry pays for a share of OET's full-time employees (in relation to its share of the

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<sup>5</sup> One exception to this would be adjustments to the schedule made to account for the Commission's decision to assess fees on non-U.S. licensed space stations.

Media Bureau and the other payors). Radio, however, receives no benefits whatsoever from OET. And here, NAB is not defining benefits as “positive things received”; rather, it is an issue that could affect the radio industry.<sup>6</sup>

Had the NPRM completed the required analysis under the second clause, it would have taken into account whether there was any change in benefits received and clearly concluded that there was no change for the radio (or television) industries. The NPRM’s blind adherence to the full-time employee model undermines its ability – and responsibility – to assess fees fair and equitably.<sup>7</sup>

As NAB detailed in its comments, as part of that analysis, the Commission should recognize the extreme challenges the COVID-19 pandemic has imposed on the radio industry. It has gutted many operations, resulting in layoffs, with stations being forced to power-down and others driven into debt or even off the air. Of all times, now is not the one for the Commission to turn its back on its duty to consider that the radio industry has not received any additional benefits from the work of the Commission during FY2020.

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<sup>6</sup> By way of comparison, the television industry in some sense could be argued to have “benefitted” under the statute for OET’s work on the 6 GHz proceeding, even though the proceeding will almost certainly harm television broadcasters. At least there, OET was required to evaluate arguments raised by the television industry. But OET has not had more than a de minimis role for any proceeding affecting the radio industry in recent memory.

<sup>7</sup> Notably, the NPRM continues to approach regulatory fees as if Congress never passed the RAY BAUM’S Act. The RAY BAUM’S Act deleted previous references to the core bureaus, freeing the Commission to “assess and collect regulatory fees at such rates as the Commission shall establish in a schedule of regulatory fees that will result in the collection, in each fiscal year, of an amount that can be reasonably be expected to equal the amounts” of the Commission’s annual appropriation. 47 U.S.C. § 159(b).

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: Chairman Ajit Pai  
Alex Sanjenis