

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 9)
of the Communications Act)
)
Assessment and Collection of)
Regulatory Fees for the 1994)
Fiscal Year)

MD Docket No. 94-19

TO: The Commission

Comments of the
National Association of Broadcasters

The National Association of Broadcasters ("NAB")¹ submits these comments on the *Notice of Proposed Rulemaking* in this proceeding. Since the Commission concluded (*Notice ¶¶ 7-8*) that Congress has left it with little discretion in implementing the regulatory fee requirements for Fiscal Year 1994, issues relating to changes in the fee schedule for future years are not addressed in the *Notice*. NAB will comment briefly on a few of the implementation questions that affect the first year of the regulatory fee program.

¹ NAB is a nonprofit incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's broadcasting industry.

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Television Satellite Stations Should Be Treated as Translators or Other Secondary Television Stations

In Paragraph 67 of the *Notice*, the Commission proposes to assess the same fee for satellite television stations as will be paid by other full-power television stations in the same market. Imposing a full regulatory fee on satellite television stations unfairly penalizes stations in geographically large markets that seek to provide service across their entire market. The Commission's proposal imposes great costs on stations that entail little, if any, regulatory costs for the Commission. It appears, therefore, to be contrary to Congress' objective in Section 9 of the Act which was intended to require FCC-regulated entities to pay for the costs of their regulation. It also imposes substantial disincentives to providing efficient broadcast service across thinly populated areas.

In *Television Satellite Stations*, 6 FCC Rcd. 4212 (1991), the Commission recognized that satellite stations are stations that transmit all, or virtually all, of the programming of a parent station. Generally, satellites provide service to an area that has no television service, or where additional television service would not be feasible economically. *Id.* at 4212. For the most part, therefore, satellite stations have the same role and perform the same functions as television translator stations, but for the fact that satellite stations operate at full power.

Low power translator stations, however, will only be required to pay an annual regulatory fee of 135 dollars. *Notice* ¶ 71. By contrast, the smallest fee for a full-power television station is 4,000 dollars for UHF stations in markets below the top 100. *Id.* ¶ 67. Although one satellite station might provide substantially greater geographic coverage than one low-power translator, even if a station operated a number of translators so as to

equal the coverage of a satellite station, the total fees which would be payable for those translators would be only a fraction of the fees the parent station would incur to operate a satellite. Indeed, if a station in a small market which covered a large area operated several satellite stations, its total fee burden might exceed the fees that a VHF station in the top ten markets would pay, despite the fact that the total population it serves would be only a fraction of the large market station's. Such a result would be at odds with the Congressional determination that stations in larger markets with greater revenue bases should bear a higher portion of the fee burden. The differential fee burden the Commission proposes for satellite stations, as compared to low-power translators, thus would have the effect of discouraging more efficient use of one channel to reach a large number of unserved or under-served viewers, and favoring instead the less efficient use of multiple low-power channels for the same purpose.

Moreover, since satellite stations function primarily as translators, they impose little independent regulatory burden on the Commission. Most regulatory issues, such as children's television and political broadcasting, will be handled at the parent station level, and only a few technical and engineering issues may arise concerning operation of the satellite station. For that reason as well, the Commission should not require licensees of satellite television stations to pay a fee designed to recoup to the Government the full cost of regulating a regular television station.

Instead of treating satellite stations as if they were regular full-power stations, the Commission should require satellite television station licensees for 1994 to pay the fee imposed on low-power television stations, since satellite stations and low-power translator stations have similar functions. In later years, if appropriate, the Commission can adjust

the fees to be paid for satellite television stations to reflect any additional regulatory burdens from those stations or to reflect their higher power.

In this connection, we also note the apparent discrepancy in the statutory treatment of radio and television licensees. The fees that will be paid by television stations are adjusted to reflect differing market sizes; by contrast, all class C FM stations will pay the same amount, whether they are licensed to Chicago or a small community in South Dakota. While the Commission observes (*Notice* ¶ 8) that it does not have the authority to amend the payment schedule for Fiscal Year 1994, we urge that it promptly move to adjust the radio payment schedule to reflect market size in the proceeding to establish fees for subsequent fiscal years.

The Commission Should Establish One Method for Determining Television Markets

In Paragraph 69 of the *Notice*, the Commission recognizes that Arbitron is no longer providing television rating information and, thus, will no longer update its television market map which the Commission has used for several regulatory purposes. *See, e.g.*, 47 C.F.R. §§ 73.658(k), 73.3555(d)(3)(i), 76.51, 76.55(e)(1). We agree that another means of establishing television market rankings needs to be established to avoid having fees and other regulatory decisions rest on an increasingly outdated Arbitron list. It may be that the Nielsen equivalent listing of Designated Market Areas (DMAs) will be the best choice. Whatever choice is made by the Commission, however, the decision should not be made piecemeal, with the risk that differing means of determining markets will be created for different rules. Instead, the Commission should adopt one uniform approach to establishing television markets for all of its rules.

Payment Issues

The *Notice* raises a number of issues concerning the mechanics of paying the required fees. Of greatest concern is the Commission's proposal (*Notice* ¶ 41) that, in order to be deemed timely, fee payments must be *received* at the lockbox bank by the specified due date. The Commission should revise its proposed rules so that payments will be deemed timely if they are *postmarked* by the due date.

Mail service unfortunately appears to be increasingly unreliable. Many areas of the country experienced gaps of several days or more in mail service this Winter due to inclement weather. For many stations, it will be difficult to determine when they must mail their fee payments in order to ensure that they will arrive at the lockbox by the due date, with the prospect of a 25 percent penalty if they make an incorrect estimate or there is another decline in mail service. Unlike applications which are frequently filed by communications counsel who routinely send material to the Commission's lockbox, fee payments are likely to be sent directly from licensees with less experience in estimating the time needed for mail service.

Rather than penalizing licensees for delays beyond their control or forcing them to use much more expensive private delivery services, the Commission should revise the proposed rule to deem fee payments to be timely if they are mailed by the due date. This change would allow greater certainty; as long as the payment is postmarked by the due date, the licensee will not face the prospect of late filing penalties. Further, the postmark is readily established and the Commission will avoid disputes concerning timeliness of fee payments. The impact on the Government's revenues of the minimal delay in receipt of some payments is likely to be negligible.

NAB is also concerned about the proposed requirement in Paragraph 25 of the *Notice* that a licensee seeking a waiver of the fee requirement nonetheless must include the fee with its waiver request. Particularly in this first year, where there will only be a short period between the completion of this proceeding and the end of the fiscal year, it will be impossible for a licensee to have a waiver request determined before the fee payment is due. If a station is in sufficiently dire financial circumstances to support a showing that the fee requirement should be waived, having to pay the fee along with its waiver request would have virtually the same adverse consequences on its ability to serve the public as would an unwaivable fee requirement, despite the possibility that the fee could be refunded at some uncertain future date. Congress contemplated that there will be situations in which the burden imposed by the fee requirement would be so great that it should be waived. If that provision is to have any practical effect, the Commission should not require applicants for waiver to suffer the financial burden they are seeking to have lifted.

The Commission instead should permit requests for waivers to be filed without payment of the fee. If the waiver request is denied, the Commission can require payment on a short schedule. Further, the Commission could prevent abuse of the waiver process by imposing the late payment penalty on licensees which file waiver requests in bad faith. After the fee program is established and the due dates are known well in advance, the Commission could consider whether licensees have an adequate opportunity to seek a waiver before a payment is due. Until that time, however, the Commission should permit good faith requests for waiver of fee obligations to be filed without payment of the fee.

Finally, the Commission proposes (*Notice* ¶ 99) to require payment of all fees by a licensee by cashier's check if that licensee submits one instrument on which the Commis-

sion does not receive final payment. This requirement would appear to be indefinite in duration, requiring all future payments by that licensee to be made by cashier's check. Although NAB recognizes that the Commission has a legitimate interest in avoiding time-consuming pursuit of payers who submit defective instruments, we believe that the proposal of a perpetual cashier's check requirement following one failed payment is unduly harsh.

A submitted instrument may prove defective for any number of reasons, many of which may not indicate any bad faith on the part of the payer. For example, a check on which the payer relied to cover the fee payment might not clear in a timely fashion, resulting in an inadequate balance. Since the Commission can impose a 25 percent late payment penalty for a defective payment, there already is a strong incentive for licensees to submit only valid payments. Before imposing what may be a lifetime penalty, the Commission should have before it a pattern of bad acts, not just one possibly inadvertent mistake. The Commission should change the proposed rule so that either the cashier's check requirement would not be imposed for only one improper payment, or the requirement of a cashier's check should be imposed for only a specified number of years.

Conclusion

The Commission in the *Notice* in general makes choices which are appropriate to the first year of the fee program, when it determined that the payment schedule is largely fixed by statute. As the Commission recognizes (*Notice* ¶ 6 n.12), more difficult issues will have to be addressed for later fiscal years. Even for this year, the Commission should

make the few changes we have proposed to ensure fairness in the operation of the fee program.

Respectfully submitted,

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