DOCKET FILE COPY ORIGINAL

ANN BAVENDER*
ANNE GOODWIN CRUMP*
VINCENT J. CURTIS, JR.
PAUL J. FELDMAN*
ERIC FISHMAN*
RICHARD HILDRETH
EDWARD W. HUMMERS, JR.
FRANK R. JAZZO
CHARLES H. KENNEDY*
KATHRYN A. KLEIMAN
BARRY LAMBERGMAN
PATRICIA A. MAHONEY
M. VERONICA PASTOR*
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
MARVIN ROSENBERG
KATHLEEN VICTORY*
HOWARD M. WEISS

*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

HILDRETH@ATTMAIL.COM

ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)

RETIRED
RUSSELL ROWELL
EDWARD F. KENEHAN
FRANK U. FLETCHER

OF COUNSEL
EDWARD A. CAINE*

WRITER'S NUMBER
(703) 812-
0471

RECEIVED

FEB 1 3 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

February 13, 1995

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MD Docket No. 95-3
Regulatory Fees for Fiscal Year 1995

Dear Mr. Caton:

Transmitted herewith on behalf of Mid-State Television, Inc. and WNAL-TV, Inc. are an original and four copies of their "Joint Comments" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with the undersigned.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Howard M. Weiss
Counsel for
Mid-State Television, Inc. and
WNAL-TV, Inc.

AGC/bi
Enclosures

No. of Copies rec'd 0+4
List ABCDE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
FEB 13 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Assessment and Collection	)	MD DOCKET NO. 95-3
of Regulatory Fees for	)	
Fiscal Year 1995	)	

Directed to: The Commission

JOINT COMMENTS

Vincent J. Curtis, Jr.
Howard M. Weiss
Anne Goodwin Crump

Attorneys for
MID-STATE TELEVISION, INC. and
WNAL-TV, INC.

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street
Eleventh Floor
Rosslyn, Virginia 22209
(703) 812-0400

February 13, 1995

SUMMARY

Mid-State Television, Inc. ("Mid-State"), licensee of Station WMFD(TV), Mansfield, Ohio, and WNAL-TV, Inc. ("WNAL-TV"), licensee of Station WNAL-TV, Gadsden, Alabama, by their attorneys, submit their Joint Comments with regard to the proposed schedule of regulatory fees for fiscal year 1995 as set forth in the Commission's Notice of Proposed Rulemaking, FCC 95-14, released January 12, 1995.

Mid-State and WNAL-TV both are the licensees of small stations in communities located at the fringe of larger markets. The Commission's proposed regulatory fee schedule is fundamentally unfair to stations so situated. Although the stations are licensed to small communities far removed from the central city in the market, they are charged the same regulatory fee as those stations located in the central city. But these stations do not place a signal over the central city and attract only a small fraction of the audiences and revenues enjoyed by stations located in or providing service to the central city. Commenters' operations and programming are necessarily focused entirely on their communities of license and the immediate environs. They do not identify with the market in which they are arbitrarily placed by Arbitron, a company which no longer rates TV stations.

Therefore, such fringe stations should be afforded relief from the large regulatory fees that would be due under the Commission's proposed schedule. The stations could be considered as serving their own distinct markets and charged accordingly. Eligibility for inclusion in the fringe station category could be determined by either lack of Grade B coverage of the market's primary city or lack of an audience share in the primary city of greater than five percent. In the alternative, the Commission's regulatory fee schedule could be restructured so that television stations would be charged a fee based on the number of people within their Grade B contours. Either of these

alternatives would serve the purpose of the regulatory fee scheme better and be more equitable than the current scheme.

Table of Contents

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection	)	MD DOCKET NO. 95-3
of Regulatory Fees for	)	
Fiscal Year 1995	)	

Directed to: The Commission

JOINT COMMENTS

Mid-State Television, Inc. ("Mid-State"), licensee of Station WMFD(TV), Mansfield, Ohio, and WNAL-TV, Inc. ("WNAL-TV"), licensee of Station WNAL-TV, Gadsden, Alabama, by their attorneys, hereby respectfully submit their Joint Comments with regard to the proposed schedule of regulatory fees for fiscal year 1995 as set forth in the Commission's Notice of Proposed Rulemaking, FCC 95-14, released January 12, 1995. With respect thereto, the following is stated:

I. THE CURRENT METHOD OF CALCULATING REGULATORY FEES FOR COMMERCIAL TELEVISION STATIONS IS UNFAIR TO SMALL STATIONS LOCATED AT THE FRINGE OF LARGE MARKETS

1. Mid-State and WNAL-TV both are the licensees of small stations in communities located at the fringe of larger markets. As set forth below, the Commission's proposed regulatory fee schedule is basically unfair to stations so situated. Although the stations are licensed to small communities well removed from the central city in the market, they are charged the same regulatory fee as those stations located in the central city. The fringe stations, however, can serve only a small fraction of the market and, thus, can attract only a correspondingly small share of the audience and revenues enjoyed by stations located in the central city. Therefore, Mid-State and WNAL-TV submit

that fundamental fairness requires changes in the proposed regulatory fee schedule. One possible method would be for the Commission to consider fringe stations as serving their own, distinct markets. Eligibility for such fringe station treatment could be determined either on the basis of Grade B contours or audience share, as set forth below. Alternatively, the Commission could restructure the method by which commercial television regulatory fees are calculated so that they are based on population within the Station's Grade B contour.

A. The Commission's Exclusive Use of the Television and Cable Factbook is Overly Rigid.

2. The Commission has proposed to assess annual regulatory fees for commercial television stations based upon the stations' market rankings as published by Warren Publishing in the 1994 Edition of the Television and Cable Factbook (No. 62) (the "Factbook"). This is the same method which was used as the basis for determining fiscal year 1994 annual regulatory fees for commercial television stations. In Section 6003 of the Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, 6003(a), 107 Stat. 397, Congress set forth a schedule of regulatory fees based on a television station's numerical market rank. Nevertheless, the Commission's method of determining a station's market rank based solely upon the Factbook's listings is overly simplistic and unfairly burdens small stations located well outside the central city of a market. Congress also provided that regulatory fees should be adjusted based on such factors as service area coverage. 107 Stat. 398.

3. Recognizing that uniform federal regulatory requirements have in many instances created disproportionate burdens on small businesses, Congress passed the Regulatory Flexibility Act, Pub.L. No. 96-354, 94 Stat. 1164, to require agencies to take small businesses into account. Thus, the Act as amended requires the Commission to carry out its regulatory activities with sufficient

flexibility to avoid unfairly placing disproportionate burdens on small businesses. The Commission should, therefore, move beyond rigid reliance on Factbook market rankings as the exclusive method, without exception, of determining the annual regulatory fee owed by a particular station.

B. The Factbook's Market Determinations Are Based on Outdated Information.

4. The Factbook's determinations of which stations fall into which markets are based upon Arbitron's designations of Areas of Dominant Influence ("ADI's"). Decades ago, Arbitron assigned each county in the United States to one ADI. Since that time, however, circumstances have changed which make it virtually impossible for a newer station to develop its own ADI. The increased number of television stations, dramatically increased cable penetration, and changed Arbitron rules make it exceedingly unlikely that a station would ever develop an audience presence large enough to create a new television ADI. There is nothing in Congress' statutory guidelines which limits the Commission to the use of only Arbitron-designated markets. In view of the fact that these designations in many cases do not reflect present reality, the Commission should re-examine the desirability of clinging to Arbitron's determinations. Moreover, Arbitron is no longer provides television ratings information. Therefore, with each passing year, Arbitron's ADI rankings will become more and more inaccurate.

5. Because the Commission has chosen to use only Arbitron's ADI designations, a number of small stations located in communities many miles from the core large cities are grouped into the same market with those cities, even though the small stations may not actually provide service (programming or technical) to the central city of the market. Nevertheless, these fringe area stations are required to pay the same regulatory fee as stations located in the primary city in the market. They therefore suffer an unfair monetary burden which could in many cases threaten their

continued existence, or at the very least diminish the cash flow needed to provide service to their communities of license. Indeed, both Mid-State and WNAL-TV sought a reduction in their annual regulatory fees for fiscal year 1994 and petitioned for deferral of the payment of the fees based on financial inability to pay the large fees called for by the Commission's regulatory fee schedule.

C. WMFD(TV) Should Not Be Included in the Cleveland Market.

6. As stated above, Mid-State is the licensee of WMFD(TV), Mansfield, Ohio. WMFD(TV) operates on Channel 68 in Mansfield, Ohio, as an independent station. Mansfield is located in Richland County, Ohio, which is included in the extreme southwest corner of the Cleveland ADI. Accordingly, while WMFD(TV) is considered to be in the twelfth ranked market, this placement is patently inequitable and contrary to reason.

7. Although WMFD(TV) is technically located within the Cleveland ADI, it is able to serve only about eight percent (8%) of the households located within that ADI. WMFD(TV)'s Grade B contour does not even reach the city limits of Cleveland, but rather falls approximately 25 miles short of the outermost edge of the Cleveland city limits. Accordingly, WMFD(TV) does not have any significant viewership in Cuyahoga County, the county in which Cleveland is located. Television and Cable Factbook, Vol. 62, at A-918. Moreover, WMFD(TV) is unable to significantly expand its coverage area because of Canadian protection requirements and other technical limitations. Thus, WMFD(TV) is limited to serving the area immediately around Mansfield in north central Ohio. The station does not and cannot serve more than a tiny fraction of the ADI in which it is technically located.

8. WMFD(TV)'s community of license, Mansfield, has a population of approximately 55,000. Richland County has approximately 49,300 television households. This represents only 3.5

percent of the approximately 1.4 million television households located within the Cleveland ADI. Given the fact that the station is located in a small community at a considerable distance from Cleveland (approximately 65 miles), WMFD(TV) concentrates its service on Mansfield and the north central Ohio area. It does not primarily focus its attention on Cleveland in its news, public affairs, or other programming.

9. Because WMFD(TV) is located in a small community well removed from the financial center of the ADI, it is unable to generate the revenues that other stations within the ADI enjoy. The economics of Mansfield and the surrounding area preclude the station from ever being able to develop revenues on a par with stations licensed to Cleveland or its suburbs. The area in which WMFD(TV) sells local advertising is limited to Mansfield, Richland County, and the surrounding north central Ohio area. The station receives little, if any, advertising revenues from local Cleveland businesses. WMFD(TV) has been on the air only since May 31, 1992. Prior to that time the station had been dark since June 12, 1989, leaving the community of Mansfield without any local full-power television service. WMFD(TV) now provides Mansfield with local programming. The station has not yet become profitable, however. Mid-State estimates that when it becomes well established its annual revenues will, at best, be in the $1 million to $2 million range, as opposed to the $25 million to $35 million annual revenues for an independent UHF station in Cleveland. See Media Week, March 21, 1994. At best, WMFD(TV)'s projected revenues represent only about eight percent of the revenues of an independent UHF station located in Cleveland. Therefore, Mid-State can ill afford to pay any regulatory fee, much less the $15,250 fee that would be due if WMFD(TV) were considered to be a part of the Cleveland ADI. If Mid-State is required to pay such a large fee, it will be forced to cut back on its public service. For example, the fee for stations in the Cleveland market approximates

a news person's salary at WMFD(TV). Thus, local news and public affairs programming on WMFD(TV) would necessarily suffer if the station were required to pay those funds to the government rather than to expend them on its programming.

10. WMFD(TV)'s placement in the Cleveland ADI is an anomaly which imposes an unfair burden on the station. Since WMFD(TV) cannot serve more than a small fraction of the ADI, it should not be considered to be a part of the Cleveland market. WMFD(TV) focuses its attention on local service to Mansfield and the immediately surrounding area. It is the only full-service commercial television station programming primarily for this service area.

D. WNAL-TV Should Not Be Included in the Birmingham Market.

11. Similarly, WNAL-TV is licensed to Gadsden, Alabama. This community is in a county technically within the Birmingham, Alabama market, which is the fiftieth ranked market. In fact, however, WNAL-TV competes only within the nearby, smaller, Anniston, Alabama market, which is ranked number 195. WNAL-TV, whose facilities are located some sixty miles from Birmingham, does not place even a theoretical Grade B signal over the city or its environs. Moreover, the hilly terrain in the area makes any coverage in Birmingham problematic at best. Likewise, the majority of Birmingham stations do not place a competitive signal over Gadsden. Indeed, no Birmingham UHF station reaches Gadsden with a serviceable signal off the air.

12. As a result, WNAL-TV's audience share numbers in Birmingham are insignificant. Rather, WNAL-TV appears in Nielson's ratings book for Anniston. The vast majority of the station's viewers are in the Gadsden-Anniston area. Because of these factors, WNAL-TV does not attempt to sell local advertising in Birmingham but instead sells only in Gadsden, Anniston, and the immediate area. Likewise, WNAL-TV focuses its programming entirely on Gadsden and Anniston. Birmingham

stations, on the other hand, provide only limited news coverage of isolated events in Gadsden and Anniston. Thus, WNAL-TV can in no way be considered to be a Birmingham station.

13. The competitive reality of the situation is illustrated by the fact that WNAL-TV broadcasts Fox programming, but it is not the Fox affiliate in the Birmingham market. Rather, that affiliation is held by a station licensed to Birmingham. Further, there is a CBS affiliate licensed to Birmingham and another CBS affiliate in Anniston, again underlining the reality that Anniston-Gadsden is a separate market from Birmingham.

14. Stations in situations such as those of WMFD(TV) and WNAL-TV are already placed in a precarious financial position. Imposition of disproportionate regulatory fees could force the reduction, or complete elimination, of the substantial public service which they now provide. They are required to compete with larger stations in the primary city in the market for programming and employees. Many of the costs for stations located in fringe areas of markets are fixed at the same level as those of stations in the larger city. For example, salary levels for employees generally are similar, and costs for equipment such as cameras and videotape recorders are the same no matter where in the market the station is located. Stations located in fringe areas are able to attract only a small fraction of the revenues generated by stations in the larger markets. As set forth above, WMFD(TV) expects to attract only about eight percent of the revenues that will be generated by stations located in Cleveland. Therefore, the potential profit margin for stations located in fringe areas is very slim, and in many cases is nonexistent. Accordingly, it is patently unfair to demand the same large regulatory fee from these stations as from those stations located in the central city of a market.

II. RELIEF MUST BE GRANTED TO FRINGE STATIONS BY CHANGING THE METHOD OF DETERMINING REGULATORY FEES

15. It is clear, therefore, that some relief must be granted to stations so situated that they technically are included in a large market but actually do not function as part of that market. Effectively, these stations serve their own, small markets. Consequently, they should be required to pay no more than the regulatory fee listed for "Remaining Markets," *i.e.*, stations licensed to communities within unranked markets, rather than that for the market in which they are nominally included.

A. A Station Should Be Considered to Serve a Separate Market Based on Lack of Grade B Coverage of the Large Market's Central City.

16. Mid-State and WNAL-TV propose that the Commission establish a separate category of payor for those television stations located in fringe areas of markets. A station could be eligible for inclusion in this category if it is not licensed to the primary community or communities in a market and if its predicted Grade B contour does not reach the city limits of the market's primary community. In areas where the terrain departs markedly from the average assumed by the Commission in predicting coverage (see, 47 C.F.R. §§ 73.658(f), (k)), the Commission also should include in the category of fringe stations those which can demonstrate that their measured Grade B contour does not reach the principal city.

17. Clearly, if a station's Grade B contour does not even reach the city limits of the principal community in a market, that station is incapable of serving more than a small percentage of the relevant market. Likewise, it also would be unable to attract more than a small fraction of the revenues that a station located in the larger city would be able to enjoy. It is only fair for the

purposes of paying regulatory fees to recognize this situation. Accordingly, stations falling into this category would be required to pay the regulatory fee for stations in "Remaining Markets."

B. A Station Should Be Considered to Serve a Separate Market Based on Lack of Audience Share in the Large Market's Central City.

18. In the alternative, the Commission could determine, upon consideration of a showing by the affected station, which stations should be considered to be fringe stations based upon audience share as determined by the Nielsen rating service. If a station were licensed to a community outside the principal community or communities of a market, and if that station achieved an audience share in the market of five percent or less, then that station would be considered as effectively not a part of the market. Obviously, if a station cannot achieve even a five percent share in the market, it is not an effective competitor in that market. Rather, again, it should be considered to be in its own, separate market.

C. The Regulatory Fee Schedule Could Be Restructured Based on Population within the Grade B Contour.

19. As another alternative, which would allow the Commission to fairly distribute regulatory fees among licensees, the Commission could restructure the method by which it determines market size. Rather than basing the regulatory fee amount on numerical market rank, the Commission could adopt a model similar to that used for cable and base the fee on the number of persons located within each station's Grade B contour.

20. To accomplish this, the Commission would add up the total number of persons within the Grade B contours of each commercial television station in the United States. The Commission then would divide the cost allocation for commercial television stations by the total number of persons within Grade B contours to determine the amount per person each station would pay.

21. The area covered by each station's Grade B contour is readily available information. Each station has a map depicting its Grade B contour on file at the Commission. Furthermore, this method of calculating the fee due would provide the fairest possible method for determining a particular station's true market size. Those stations which provide service to large numbers of people would pay a proportionately large fee. On the other hand, those stations which are able to serve only a small number of people would pay a small fee. The number of people served by each station also is indicative of that station's potential revenue stream. Thus, the regulatory fee also would be related to the station's likely ability to pay that fee.

IV. CONCLUSION

22. In sum, the Commission's current method for determining annual regulatory fees unfairly burdens small stations licensed to small communities located at the fringes of larger markets. There are two possible methods for correcting this inequity. One is to recognize that such fringe stations effectively serve their own separate markets and to require them to pay only the fee imposed upon stations in "Remaining Markets." Eligibility for this fringe station treatment could be limited to those stations not licensed to the primary city or cities in the market and which either do not have a predicted Grade B contour which reaches the city limits of the principal city or do not achieve an audience share of at least five percent. Another possible method would be to base the regulatory fee on the number of persons located within a station's Grade B contour. All stations would be charged a certain amount for each person within the Grade B contour. Whichever of these methods the Commission chooses to adopt will afford a greater degree of fundamental fairness to licensees who already are struggling to make ends meet.

23. If the Commission were not to change its method of computing regulatory fees, some of the small stations located at the fringe of markets may be forced to curtail service or go dark. Smaller communities located at a distance from large cities thus will lose valuable local broadcast service simply because they happen to be included in a large market, as defined by a ratings service which no longer measures TV audiences. Often that inclusion reflects simply that all counties have to be included in <u>some</u> market, and the county in question did not have its own television station decades ago when counties were assigned to ADI's. The Commission must recognize that circumstances change. The Commission should acknowledge such changes by further recognizing that stations technically located at the fringes of large markets actually serve their own, distinct, small markets.

Respectfully submitted,

MID-STATE TELEVISION, INC. AND
WNAL-TV, INC.

By: [signature]
Vincent J. Curtis, Jr.
Howard M. Weiss
Anne Goodwin Crump

Their Attorneys

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street
Eleventh Floor
Rosslyn, Virginia 22209
(703) 812-0400

February 13, 1995