

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

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

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

June 7, 2019

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby submits the following comments in response to the Commission’s Notice of Proposed Rulemaking concerning regulatory fees for Fiscal Year 2019.²

The Commission has a checkered history when it comes to clearly explaining the basis for its collection of regulatory fees. In 2012, the Government Accountability Office concluded that the FCC’s regulatory fee process lacked transparency and reported 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.³ Unfortunately, the current NPRM suffers from the same confounding flaws.

¹ The National Association of Broadcasters (NAB) is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Notice of Proposed Rulemaking, MD Docket No. 19-105, FCC 19-37 (Oct. 24, 2018) (NPRM).

³ Government Accountability Office, *Federal Communications Commission: Regulatory Fee Process Needs to be Updated*, GAO 12-686 at 24 (August 2012) available at: <https://www.gao.gov/assets/600/593506.pdf>.

The NPRM proposes extraordinary regulatory fee increases for radio stations for Fiscal Year 2019, while providing little or no explanation. Instead, the NPRM offers only conclusory statements about the Commission's operations and its allocations of regulatory expenses. What morsels of information the Commission has provided are left unexplained and, if anything, appear to contradict other publicly available Commission data. As a result, commenters responsible for paying these taxes for regulation are left with no ability to provide meaningful input in this proceeding because the Commission has withheld or obscured the basis for its proposals. We urge the Commission to immediately provide further information to allow stakeholders to constructively participate in this proceeding. Without such data, the comment process is virtually worthless.

More fundamentally, we urge the Commission to take this opportunity to reconsider the basis on which it determines which entities are subject to regulatory fees. The Commission is not bound to collect regulatory fees solely from licensees. Under the current as well as proposed framework, however, licensees subsidize companies – including well-funded competitors – who benefit from the Commission's activities but do not contribute towards their funding. These regulatory free riders leverage Commission proceedings and the hard and ongoing work of Commission staff to develop profitable business models without contributing regulatory fees. By expanding the base of contributors, the Commission can significantly lower the regulatory taxes currently paid by some licensees while making its collection as a whole more accurately reflect the work of the Commission and those who benefit from that work.

II. THE NPRM PROVIDES LITTLE BASIS FOR MEANINGFUL COMMENT

The RAY BAUM'S Act altered and streamlined the Commission's statutory obligations regarding regulatory fees in two ways.⁴ First, the Act removed the specific reference to "licensees" in the discussion of how the Commission should scale up or down the payment of regulatory fees. While the Commission is still required to take into consideration the number of "units" subject to the payment of regulatory fees, Congress chose to eliminate the reference to licensees.⁵ Second, the Act eliminated an outdated schedule of regulatory fees, leaving the straightforward principle that regulatory fees should reflect the benefits the Commission's activities provide to the payor.⁶

Unfortunately, the NPRM implementing that directive is anything but straightforward. While the NPRM describes in general terms the basis for the establishment of proposed regulatory fees, the NPRM's reasoning shows a lack of supporting data and useful explanation that deprives commenters of the opportunity to provide meaningful input into this proceeding.

A. The Increase in Radio Regulatory Fees is Disproportionate

As a threshold matter, NAB understands the Commission's obligation to establish regulatory fees that recover amounts approximately equal to the Commission's appropriation each year.⁷ With a roughly \$17 million increase in budget for the 2019 fiscal year,⁸ the

⁴ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. P—RAY BAUM'S Act of 2018, §§ 401-404, 132 Stat. 348, 1087-90 (2018) (RAY BAUM'S Act).

⁵ NPRM at ¶ 9.

⁶ *Id.* at ¶ 8 citing 47 U.S.C. § 159(d).

⁷ NPRM at ¶ 6.

⁸ *Id.* at ¶ 1.

Commission must either raise the regulatory fees for at least some categories of payors – or expand the base of contributors.

However, while the overall budget is expanding by a modest 5.3 percent, the impact on the radio industry is more severe, with regulatory fee increases of 18-20 percent for most stations.⁹ For example, AM Class C stations serving less than 25,000 listeners face a 20 percent hike in fees.¹⁰ FM Classes B, C, C0, C1 and C2 serving between 25,000-75,000 listeners are subjected to a 21.2 percent increase.¹¹ AM Class D stations with greater than 6 million served, see a proposed 20.1 percent fee increase.¹²

Curiously, other categories of Media Bureau contributors do not face similar fee hikes. For example, the NPRM proposes an 11.7 percent increase for Cable TV Systems, including IPTV.¹³ The NPRM provides no coherent explanation for the steep and disproportionate increase directed to radio licensees. Absent additional information, commenters cannot reasonably provide meaningful feedback in response to the NPRM.

B. The Number of FY 2019 Payment Units for Radio is Unexplained and Unsupported

One conceivable explanation for why radio station regulatory fees would rise significantly out of proportion to the increase in the agency’s budget may be that the Commission believes are fewer radio stations subject to regulatory fees, meaning that the remaining stations must bear a higher share of the increased burden. Indeed, the NPRM lists

⁹ NPRM at Appendix B at 26.

¹⁰ *Id.*(increases from \$555 in 2018 to \$660 for 2019).

¹¹ *Id.* (increases from \$1,650 in 2018 to \$2,000 for 2019).

¹² *Id.* (increases from \$12,225 in 2018 to \$12,400 for 2019).

¹³ *Id.*

a total of 9,458 payment units for all AM and FM radio stations,¹⁴ a decrease of nearly 800 payment units from FY 2018's total of 10,255.¹⁵ For AM and FM stations, the NPRM explains that payment units are licensed stations.¹⁶ The problem, however, is that there are not 800 fewer radio stations operating this Fiscal Year. Indeed, the Commission's most recent broadcast station totals show 11,375 AM and commercial FM radio stations.¹⁷ The Commission's station totals from the same period in 2018 show 11,374 AM and commercial FM radio stations, essentially an identical number.¹⁸ It's as if these 800 stations boarded Oceanic Flight 815, mysteriously never to be seen again.

In the absence of any further information that would allow commenters to validate the Commission's methodology and calculations, commenters are left to speculate and traffic in Commission rumors. Is the reduction of nearly 800 payment units, despite no apparent corresponding reduction in radio stations subject to regulatory fees, due to possible non-payment by approximately 800 stations in 2018? If non-payment by 800 stations is the explanation, did those stations eventually pay, and if so, how is this late-paid extra money accounted for? Did the Commission initiate any enforcement action to collect regulatory fees? Why should stations that did pay have to shoulder the burden of those that did not? Such an outcome would be fundamentally unfair, penalizing those stations that comply with their obligations to subsidize delinquent stations that, despite non-payment of required regulatory

¹⁴ *Id.*

¹⁵ *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order, 33 FCC Rcd 8497 at Appendix B (2018).

¹⁶ NPRM at Appendix D.

¹⁷ *Broadcast Station Totals as of March 31, 2019*, News Release (April 2, 2019) available at: <https://www.fcc.gov/document/broadcast-station-totals-march-31-2019>.

¹⁸ *Broadcast Station Totals as of March 31, 2018*, News Release (April 9, 2019) available at: <https://docs.fcc.gov/public/attachments/DOC-350110A1.pdf>.

fees, apparently continue to operate and retain their licenses. And even if this is the approach, why do only other radio stations have to pick up the tab and not all payors? The Commission provides no explanation that could shed light on any of these questions.

Alternatively, are the broadcast station totals the Commission releases inaccurate, and the Commission believes there are in fact 800 fewer radio stations operating now than there were a year ago? Or has the Commission changed something in the way it determines which stations are considered payment units and which are not? For example, could the recent increase in the de minimis threshold for annual regulatory fee payors offer a partial explanation for the reduction in radio station fee payors?¹⁹ Again, the NPRM provides no explanation, depriving stakeholders of the opportunity to provide input into the development of final regulatory fees.

C. The Commission Does Not Adequately Explain Its Full Time Employee Calculations

The NPRM explains that, “the calculation and allocation of [full time employees (FTEs)] across regulatory fee categories is, by statute, at the heart of the Commission’s methodology in calculating regulatory fees.”²⁰ However, the NPRM provides no information that would allow informed comments regarding the allocation of FTEs to radio issues, again leaving commenters to speculate as to the basis for the Commission’s proposed regulatory fees.

For example, if the reason the number of payment units has decreased, as discussed above, is due to a reduction in the number of radio stations subject to regulatory fees, why has the Commission not reduced the number of FTEs in the Media Bureau to reflect a

¹⁹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 7057, 7071-74 (2017).

²⁰ NPRM at ¶ 10.

reduction in the amount of work the Bureau must perform? If the reason for the increase, which is well above the percentage increase for the agency as a whole, is an influx of new employees in the Media Bureau, how many new employees are there? What are their roles, and how do their functions benefit radio licensees?

Furthermore, while the NPRM is not a model of clarity on this point, it appears that the NPRM's allocations of *indirect* FTEs – FTEs working in offices or Bureaus that are not directly attributable to a particular set of licensees – are determined on a proportional basis with the allocation of *direct* FTEs within the core Bureaus.²¹ That is, the NPRM appears to state that Media Bureau licensees are responsible for 35.93 percent of the Commission's total FTEs because they are responsible for that percentage of direct FTEs.²² But the NPRM provides no explanation as to why there should necessarily be a one-to-one correlation between a regulated entity's responsibility for direct and indirect FTEs. Is it truly accurate to suggest that broadcast licensees generate nearly 36 percent of the work performed by, for example, the Office of Engineering and Technology (OET)? That seems extraordinarily unlikely given OET's heavy involvement in unlicensed spectrum proceedings. Further, as discussed in greater detail below, the NPRM makes no effort to consider how entities that have not traditionally been considered eligible for regulatory fees might bear responsibility for the efforts of some direct and indirect FTEs. If they do not, licenses are effectively taxed to allow the Commission to work on matters that, at best, do not have anything to do with one or more licensees.

²¹ *Id.* at ¶ 11, n. 42; *id.* at ¶ 13.

²² *Id.* at ¶ 13.

III. THE COMMISSION SHOULD CONSIDER EXPANDING THE BASE OF REGULATORY FEE CONTRIBUTORS

As described above, the RAY BAUM's Act updated the Commission's statutory responsibility to collect regulatory fees in two ways. The Act eliminated the outdated schedule of regulatory fees, leaving only the direction that regulatory fees should reflect the benefits the Commission's activities provide to the payor.²³ It also specifically removed the reference to "licensees" as the entities from which the Commission should collect fees.²⁴ With these changes, Congress opened the door for the Commission to reexamine which entities should contribute regulatory fees based on how they benefit from the Commission's activities. Yet because the Commission clings to its existing, outdated basis for fee collection, it ignores a large group of often well-funded entities that participate actively in Commission proceedings, generate significant work for Commission staff, and profit from Commission activity without contributing regulatory fees to support that activity. The Commission should take this opportunity to revisit its regulatory fee structure by expanding the base of contributors for regulatory fees to more accurately reflect the Commission's activities and create a fairer, more predictable basis for regulatory fees going forward.

For many years, the Commission has dedicated a significant and increasing level of attention to providing new opportunities for unlicensed spectrum. The Commission has devoted multiple rulemaking proceedings to developing and updating rules for unlicensed operation in television white spaces.²⁵ In recent years the Commission has made unlicensed

²³ *Id.* at ¶ 8 citing 47 U.S.C. § 159(d).

²⁴ *Id.*

²⁵ See, e.g., *Amendment of Part 15 of the Commission's Rules for Unlicensed White Space Devices*, Report and Order and Order on Reconsideration, ET Docket Nos. 16-56, 14-165, GN Docket No. 12-268, FCC 19-24 (March 20, 2019); *Amendment of Parts 15, 73 and 74 of the*

spectrum available in the 5 GHz band²⁶ and above 95 GHz,²⁷ and the Commission currently has an open rulemaking proceeding proposing to open 1200 MHz in the 6 GHz band.²⁸

In these proceedings, unlicensed spectrum users and their advocates have generated significant Commission activity and placed significant demands on limited Commission resources. As it stands now, radio and TV stations, among others, are paying for the FCC staff to handle this work. For example, the Commission recently certified Nominet as a white spaces database provider. After seeking comment on Nominet's proposal²⁹ and seeking further comment following a public testing period,³⁰ Commission staff *continue* to devote significant resources to ensuring the accuracy of Nominet's database following revelations that the database initially contained significant inaccuracies.³¹ Yet Nominet is not required to contribute regulatory fees to support the substantial work its request generated and continues to generate – all to allow Nominet to offer its database services for a fee.

Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band For Use By White Space Devices and Wireless Microphones, Notice of Proposed Rulemaking, 30 FCC Rcd 6711 (2015); Unlicensed Operation in the TV Broadcast Bands, Second Memorandum Opinion and Order, 25 FCC Rcd 18661 (2010).

²⁶ *Revision of Part 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band, First Report and Order, 29 FCC Rcd 4127 (2014).*

²⁷ *Spectrum Horizons, First Report and Order, ET Docket No. 18-21, FCC 19-19 (March 21, 2019).*

²⁸ *Unlicensed Use of the 6 GHz Band, Notice of Proposed Rulemaking, 33 FCC Rcd 10496 (2018).*

²⁹ *Office of Engineering and Technology Seeks Comment on Nominet UK Proposal to be Designated as a White Space Database Administrator, Public Notice, 33 FCC Rcd 5966 (2018).*

³⁰ *Office of Engineering and Technology Requests Comment on the Public Trial of the Nominet UK White Space Database System, Public Notice, 33 FCC Rcd 7450 (2018).*

³¹ *Petition for Reconsideration of the National Association of Broadcasters, ET Docket No. 04-186 (Oct. 19, 2018).*

WISPs and database providers that operate in unlicensed bands the Commission has helped to foster are for-profit entities, and the Commission should certainly consider making them subject to regulatory fees. But the Commission need not and should not stop there. We urge the Commission to consider collecting fees from other parties in the telecommunications ecosystem that profitably derive direct benefits from Commission proceedings in which they actively participate – including proceedings which they sometimes initiate.

For example, over the past decade, Google has submitted over 700 filings to the Commission. Over the same period, Microsoft has submitted over 600 filings, Qualcomm has submitted over 400, Intel and Broadcom have each submitted over 100, and Facebook, Amazon, Apple, the Dynamic Spectrum Alliance and the Internet Association have each submitted dozens of filings in various Commission proceedings. Thousands of filings, including comments, petitions and ex parte notifications following meetings with Commissioners or Commission staff, have been submitted to the Commission by these entities, generating countless hours of work by Commission staff – and yet these entities do not pay a dime to support that work. To add insult to injury, many of those entities use this savings to fund so-called “public interest” groups, who work to undermine licensees, creating even more work for the Commission for which only licensees have to pay.

The Commission continues to rely on regulatory fees collected from licensees to subsidize these regulatory free riders, many of whom compete directly or indirectly with those paying licensees. Thus, broadcast stations pay regulatory fees to support Commission consideration of rulemakings intended to set aside spectrum in the television band for unlicensed users supported by multinational corporations. And broadcast stations also pay for Commission efforts to consider allowing new unlicensed uses supported by Facebook,

Amazon, Apple, Cisco, Intel, Qualcomm, Microsoft and Broadcom that risk interference to transmitters networks and programmers use to cover live sporting events and breaking news.

In light of the revisions to the Commission's statutory obligations, the Commission has an opportunity and responsibility in this proceeding to rebalance its approach to regulatory fees by broadening the base of contributors and rationalizing fees to better reflect the actual distribution of Commission activities. We urge the Commission to undertake a broader review of the basis for its regulatory fees in this proceeding rather than to continue to rely on an outdated focus on licensees as the only entities that generate Commission work, and to consider expanding the fee base to include other entities that clearly benefit from Commission activities.

IV. CONCLUSION

The NPRM imposes significant and disproportionate regulatory fee increases on radio stations. Worse, the reasoning behind these increases is impenetrable as the NPRM fails to provide sufficient explanation or data to justify the proposed fees. The data the NPRM does provide does not appear consistent with other Commission data and the NPRM does not even attempt to reconcile the disparity. Under these circumstances, commenters have no meaningful opportunity to provide input or feedback on the Commission's proposed fees.

More fundamentally, the NPRM reflects a failure to update the regulatory fee process to match changes in the underlying statute. The Commission has a golden opportunity to modernize its fee schedule to more accurately reflect the work the Commission performs. We urge the Commission to take this opportunity to rationalize its regulatory fee schedule by broadening the base of contributors to include regulatory free riders that benefit from work the Commission performs but contribute nothing to support those efforts.

Respectfully submitted,

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

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June 7, 2019