



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey &
Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434)
977-3716

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Legal Memorandum

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FCC Extends FY 2019 Regulatory Fee Payment Deadline: Payment of FY 2019 Regulatory Fees Now Due September 27

We begin this memo with some breaking news: the FCC today released a [Public Notice](#) announcing that it is extending the deadline by which broadcasters must pay their fiscal year (“FY”) 2019 regulatory fees—to **September 27 at 11:59 p.m. EDT**. (The deadline had been tomorrow, September 24.)

Broadcasters must pay the FY 2019 reg fees using the Commission’s automated filing and payment system, called Fee Filer. When paying your reg fees, remember the following:

- The FCC will impose a late payment penalty of 25% of any unpaid amount of regulatory fees owed—and that penalty will be assessed on the first day following the deadline for paying the FY 2019 fees. Timely payment is critical!
- All payments must be made by wire transfer or online via ACH (Automated Clearing House) payment, or credit card. Other forms of payment, including checks, will be rejected.
- The maximum amount that can be charged on a credit card for transactions with federal agencies—including the FCC—is \$24,999.99. Attempted transactions for amounts greater than \$24,999.99 will be rejected. This limit applies to single payments, divided payments, and to combined payments of more than one bill. Thus, broadcasters who need to pay an amount greater than \$24,999.99 will need to use debit cards (Visa or MasterCard) or make payment by ACH or wire transfer.
- The FCC exempts regulated entities from paying regulatory fees when their total fee obligation is considered “*de minimis*.” The *de minimis* threshold is currently \$1,000.

Change in Methodology for Television Broadcast Stations. In addition, as we’ve reported, the FCC adopted a new methodology last year for how regulatory fees would be assessed for full-power broadcast television stations in 2019 and beyond. Instead of using DMAs to calculate television stations’ regulatory fees, the FCC will base reg fee calculations on the actual population served by the station’s noise limited service contour (“NLSC”). In order to facilitate the transition to the new NLSC-based fee structure, the FY 2019 regulatory fees take into account both DMA size and the actual population covered by the station; this year’s fees for full-power television stations, therefore, are calculated on an average of (1) the fee that would be assessed using the DMA methodology, and (2) the fee that would be assessed using the actual-population, NLSC methodology.

Breaking News: Third Circuit Court of Appeals Rejects FCC’s Deregulatory Actions on Media Ownership; Court Remands Orders Back to Agency

We continue with some more breaking news. The Third Circuit Court of Appeals on Monday released an opinion (“Opinion”) in which it vacated and remanded back to the FCC certain of the Commission’s Orders that sought to deregulate local media ownership, including the agency’s 2017 [Order on Reconsideration](#) (“Order on Reconsideration”), which significantly liberalized the local media ownership rules by eliminating some of them and reforming others.

Note: we will provide a deeper analysis of what the Opinion means for broadcasters in the coming days, as the immediate impact crystalizes. Here, however, is a quick take on it:

Among other things, the FCC orders at issue eliminated (1) the newspaper/broadcast cross-ownership rule; (2) the radio/television cross-ownership rule; and (3) the “Eight-Voices” component of the local television ownership rule. Without ruling definitively on the merits of the Commission’s deregulatory action on those rules, two judges on the three-judge panel found that

the FCC failed to adequately consider the effect that its actions and resulting rules would have on ownership of broadcast media by women and racial minorities. Specifically, the Opinion calls the FCC’s analysis of the effect its “sweeping rule changes will have on ownership of broadcast media by women and racial minorities . . . [s]o insubstantial that we cannot say it provides a reliable foundation for the Commission’s conclusions.” In light of that failure, the Opinion finds the FCC’s actions “arbitrary and capricious”—which is the legal standard by which agency action is measured—and therefore impermissible.

The Opinion also vacates the FCC’s establishment of an “incubator program” in a 2018 Order designed to encourage entry of new and diverse voices in the broadcast industry, and it vacates the definition of “eligible entity” from the Commission’s 2016 Second Report and Order adopted under Chairman Tom Wheeler. The FCC actions at issue were taken in the wake of the agency’s required 2010 and 2014 Quadrennial Review proceedings.

The third judge on the panel disagreed with his colleagues on the bench. He found that in eliminating the newspaper/broadcast and radio/television cross-ownership rules and the Eight-Voices prong of the local television ownership rule, and in establishing the incubator program, the FCC “balanced competing policy goals and reasonably predicted the regulatory changes dictated by the broadcast markets’ competitive dynamics will be unlikely to harm ownership diversity.”

In a [statement](#) released shortly after the Opinion’s release, Chairman Pai indicated that the agency intends to appeal the Third Circuit’s decision and voiced his frustration with the Opinion: “For more than twenty years, Congress has instructed the Federal Communications Commission to review its media ownership regulations and revise or repeal those rules that are no longer necessary. But for the last fifteen years, a majority of the same Third Circuit panel has taken that authority for themselves, blocking any attempt to modernize these regulations to match the obvious realities of the modern media marketplace. It’s become quite clear that there is no evidence or reasoning—newspapers going out of business, broadcast radio struggling, broadcast TV facing stiffer competition than ever—that will persuade them to change their minds.”

Commissioner Geoffrey Starks offered a [much different take](#): “Today’s opinion is clear: the FCC’s approach to setting our media ownership rules needs a dramatic overhaul. We must recommit to our goals of promoting competition, localism, and diversity. We can no longer get by with the bad data and shoddy analysis – problems that have been highlighted far too often by courts and interested observers in recent years. . . . Needless to say, today’s decision will require us to go back to the drawing board on our underway 2018 Quadrennial Review, which relies upon much of the same analysis as the orders vacated by the Court today.”

The Opinion leaves some regulatory uncertainty regarding the state of play when it comes to transactions involving the purchase or sale of radio and television stations and transactions that implicate the newspaper/broadcast cross-ownership rule. Per Chairman Pai’s statement, it would appear the FCC intends to appeal the Opinion. The agency may also seek review of the Opinion by the full panel of the Third Circuit Court of Appeals (called an “en banc” review).

As mentioned, we are analyzing the Opinion and its impact and will provide more information in the coming days.

DUE TODAY – September 23: EAS “Form Three”

We begin this memo with a reminder that broadcasters must file the third and final report associated with last month’s [nationwide test of the Emergency Alert System](#) (“EAS”), called “Form Three,” by **11:59 p.m. EDT tonight, September 23**.

Form Three is the report on which stations provide detailed post-test data and describe any issues with receipt or retransmission of the nationwide test. Each station’s accurate, comprehensive completion of its Form Three report is important so that the FCC and FEMA can identify and correct problems with the EAS.

Form Three (like Forms One and Two) must be filed using the FCC’s ETRS ([EAS Test Reporting System](#)). Again, it must be filed no later than 11:59 p.m. EDT on September 23.

Commission Postpones Opening of Window to File Biennial Ownership Reports; Filing Window Will Open **November 1, 2019** and Close **January 31, 2020**

Broadcasters will have some extra time to prepare and then file their biennial ownership reports. In a recent [Order](#), the Media Bureau announced that it is postponing (and also lengthening) the ownership report filing window—for this reporting cycle only. Biennial ownership reports must now be filed between **November 1, 2019, and January 31, 2020**. The original filing window had been set for the time period of October 1, 2019 to December 1, 2019.

Importantly, the “as-of” date for the information that must be provided in the biennial ownership report remains **October 1, 2019**; that is, notwithstanding the delay in the opening of the filing window, broadcasters’ filings must still report ownership interests as they exist on October 1, 2019.

The Order explains that delaying the filing window will give the FCC more time to make technical improvements to the relevant FCC ownership reporting forms (Forms 323 and 323-E); adjusting the filing window “will ensure sufficient time to properly implement” those improvements. The Media Bureau hopes that the improvements—such as pre-filing certain information into the reports and allowing filers to copy information from previous—will “simplify the filing experience and ultimately enhance the data collection.”

Finally, the Media Bureau encourages filers “to complete and submit their [ownership reports] as early as possible during the filing window and well in advance of the extended deadline.” We would agree with that advice; just because broadcasters will now have some extra time to file their ownership reports doesn’t mean they ought to delay in submitting them!

September 25: Multiple FM, LPFM, and FM Translator Application Forms Move to FCC's LMS Filing System

The FCC recently announced that several broadcast application forms related to constructing, licensing, and/or modifying commercial and noncommercial FM, LPFM, and FM translator stations will be available for filing in the Commission's Licensing and Management System ("LMS") as of September 25. As stations will recall, the Commission is in the midst of updating its application filing systems, gradually transitioning to using LMS (from its Consolidated Database System ("CDBS")) for all broadcast applications.

In a recent [Public Notice](#) ("Notice"), the FCC explains that, as of September 25, 2019, the prior, CDBS versions of the transitioning forms **will no longer be accepted**. Below, you will find a list of the affected forms. Note that, in the LMS system, applications are identified by their purpose, rather than by the relevant Schedule number (e.g., "Application for Construction Permit for Commercial Broadcast Station" rather than "Schedule 301"). Accordingly, as of September 25, the "Application Type" field that you see below may be the most useful initial reference when searching for LMS versions of the transitioning forms:

<u>Application Type</u>	CDBS Form to be Decommissioned Sept. 25, 2019	LMS Schedule to be Used Commencing Sept. 25, 2019
Application for Construction Permit for Commercial FM Broadcast Station	Form 301 (for FM only)	Schedule 301 (for FM only)
Application for FM Broadcast Station License	Form 302	Schedule 302
Application for Construction Permit for a Low Power FM Broadcast Station	Form 318	Schedule 318
Application for a Low Power FM Broadcast Station License	Form 319	Schedule 319
Application for Construction Permit for Reserved Channel Noncommercial Educational FM Broadcast Station	Form 340	Schedule 340
Application for Authority to Construct or Make Changes in a FM Translator or FM Booster Station	Form 349	Schedule 349
Application for an FM Translator or FM Booster Station License	Form 350	Schedule 350

We'll continue to monitor the forms' transition to LMS and will let you know of any issues.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

Tim Nelson, Editor

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Stephen Hartzell
Julia C. Ambrose
Elizabeth E. Spainhour
J. Benjamin Davis
Timothy G. Nelson
Patrick Cross

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