Virginia Association of Broadcasters
Legal Review

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Legal Memorandum

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Headlines:

Proposed Regulatory Fees for Fiscal Year 2020 Scheduled for Consideration at FCC's May 2020 Open Meeting: Radio May See Fee Increase; Television Likely to See Fees Based Entirely on Population

Last week, the Commission released a draft Report and Order and Notice of Proposed Rulemaking (the "Draft Notice") that contemplates proposed regulatory fees for Fiscal Year 2020 ("FY 2020"). The Draft Notice is set to be considered for adoption at the Commission's May 2020 open meeting, although the form and substance of the Draft Notice may ultimately change in the intervening period. Of particular significance to broadcasters, if adopted in its current form, the Draft Notice would propose (1) setting regulatory fees for radio stations approximately 4% to 5% higher than the corresponding FY 2019 fees; and (2) using, for the first time, a methodology to calculate full-power television stations' regulatory fees based solely on population.

Notably, the Commission in the Draft Notice does not focus on the COVID-19 pandemic, or the financial hardships broadcasters are facing as a result of the public health crisis. Some broadcasters have advocated for a waiver of regulatory fees in light of the pandemic; the Commission has shown no appetite for such a waiver. To the contrary, Chairman Pai blogged last week about the agency's mandate to collect reg fees, writing: "Unlike most federal agencies, the FCC actually covers its own operational costs by assessing fees on companies we regulate. The Commission is required by Congress to assess regulatory fees each year in an amount that can reasonably be expected to equal the amount of its appropriation."

Bear in mind, we are talking about a Draft Notice of Proposed Rulemaking here. So, even if the Commission adopts the Draft Notice as-is, broadcasters would still have the opportunity to comment on it prior to the Commission ultimately issuing a 2020 regulatory fees Order, which would come sometime in the next several months.

The Draft Notice's Regulatory Fee Amounts for Radio Broadcast Stations. Based on a review of the Draft Notice when it comes to FY 2020 regulatory fees for radio broadcast stations, it appears that most radio stations would see a proposed 4% to 5% fee increase if the Draft Notice is adopted as currently drafted. (As broadcasters may remember, last year the Commission initially proposed fees for radio broadcast stations that were approximately 20% higher than the prior year; however, after advocacy from NAB and others, the fees assessed were ultimately lowered to an approximately 8% to 9% increase from FY 2018.)

Below please find a chart comparing the FY 2019 regulatory fees that were ultimately adopted for radio stations, followed by the Draft Notice's proposed FY 2020 radio station regulatory fees.

FY 2019 RADIO STATION REGULATORY FEES						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	$950	$685	$595	$655	$1,000	$1,200
25,001 – 75,000	$1,425	$1,000	$895	$985	$1,575	$1,800
75,001 – 150,000	$2,150	$1,550	$1,350	$1,475	$2,375	$2,700
150,001 – 500,000	$3,200	$2,325	$2,000	$2,225	$3,550	$4,050
500,001 – 1,200,000	$4,800	$3,475	$3,000	$3,325	$5,325	$6,075
1,200,001 – 3,000,000	$7,225	$5,200	$4,525	$4,975	$7,975	$9,125
3,000,001 – 6,000,000	$10,825	$7,800	$6,775	$7,450	$11,950	$13,675
>6,000,000	$16,225	$11,700	$10,175	$11,200	$17,950	$20,500

FY 2020 RADIO STATION REGULATORY FEES						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	$1,000	$715	$620	$680	$1,075	$1,250
25,001 – 75,000	$1,500	$1,000	$930	$1,000	$1,625	$1,875
75,001 – 150,000	$2,250	$1,600	$1,400	$1,525	$2,425	$2,825
150,001 – 500,000	$3,375	$2,425	$2,100	$2,300	$3,625	$4,225
500,001 – 1,200,000	$5,050	$3,625	$3,125	$3,450	$5,450	$6,325
1,200,001 – 3,000,000	$7,600	$5,425	$4,700	$5,175	$8,175	$9,500
3,000,001 – 6,000,000	$11,400	$8,150	$7,050	$7,750	$12,250	$14,250
>6,000,000	$17,100	$12,225	$10,600	$11,625	$18,375	$21,375

Completing the Change in Reg Fee Calculation Methodology for Television Broadcast Stations. Until recently, television broadcast stations paid regulatory fees based on the market they serve, as defined by Nielsen Designated Market Areas ("DMAs"). Two years ago, however, the FCC adopted a new methodology for how regulatory fees would be assessed for full-power broadcast television stations in 2019 and beyond. The new methodology bases fee calculations on the actual population served by the station's noise limited service contour ("NLSC"), instead of DMAs. You may recall that, in order to facilitate the transition to the new fee structure, the FY 2019 regulatory fees were "blended"—i.e., based partly on the historical DMA methodology and partly on the new population-based methodology.

Now, for FY 2020, the Draft Notice contemplates assessing fees solely by using the actual-population methodology, which is calculated using the population covered by the station's projected NLSC multiplied by a factor of $ .007837 (the FY 2019 multiplication factor was slightly lower, at $.007224). The Draft Notice contains a comprehensive appendix which lists all relevant fee information for each television licensee. However, because the Draft Notice may change prior to adoption, we will wait and send you a comprehensive memorandum (including a finalized version of the TV licensee appendix) once a final version of the Draft Notice is adopted, complete with proposed fee amounts. For now, television stations should note that the relevant appendix in the Draft Notice (Appendix G, if you want to take a look) suggests that TV reg fees for FY 2020 may differ substantially from those assessed for FY 2019.

To reiterate, the Draft Notice may change prior to the Commission's consideration of it at the May open meeting. And, again, even if the FCC adopts the Draft Notice as-is, we expect that NAB and others will be commenting on the proposed regulatory fees in the hopes of keeping them as low as possible, particularly given the COVID-19 pandemic and its impact on broadcasters' revenues.

Commission Issues Draft Order that Would Revise Local Public Notice Requirements and Procedures for Broadcast Applications

It appears as though wholesale revisions may be coming in the not-too-distant future to the local public notice procedures broadcasters are required to follow when filing FCC applications. According to a Draft Second Report and Order (the "Draft Order") that the Commission is scheduled to consider at its May 13, 2020, open meeting, the FCC may soon fundamentally alter various aspects of its local public notice rules and procedures. Among other things, the Draft Order would: generally harmonize the public notice requirements across all FCC applications that require such notice; do away with newspaper publication requirements and pre-filing announcements; require more frequent, but shorter, post-filing announcements; and, broadly, move the focus of the notice procedures online, where the public can easily access and view applications under Commission consideration.

Note: at this point, the Draft Order is just that—a draft; none of the rule changes set forth in the Draft Order have been approved by the Commission as of this writing.

Background. Per decades-old federal law, applicants for certain broadcast authorizations are required to give notice of the filing of their applications in the principal area that a station serves (or will serve). As broadcasters are no doubt aware, the FCC's current local public notice rules are, generally, outdated—and they fail to harmonize with many of the Commission's other, more up-to-date rules. For example, several aspects of the local public notice rules still direct the public to local broadcasters' studios to review copies of FCC applications despite the realities that broadcasters are no longer required to maintain a main studio, and must file their applications electronically and maintain their public inspection files online. Last year, the FCC sought comment on multiple substantive revisions to its local public rules to address such disconnects created by the current, outdated requirements; the Draft Order, if adopted, would enact many of those proposed revisions.

What the Draft Order Would Do. Citing the Commission's continuing efforts to modernize its media regulations, the Draft Order states that its revisions to the local public notice rules and procedures are designed "to simplify broadcasters' local public notice obligations in a manner that reduces costs and burdens on applicants, while facilitating robust public participation in the broadcast licensing process." If adopted by the Commission as written, the Draft Order would significantly revise the Commission's local public notice rules, including by making the following changes:

- **Online Notice:** The Draft Order would replace the requirement that notice of the filing of certain applications be published in a newspaper, instead requiring "written notice" to be posted on a publicly accessible website for 30 continuous days, beginning within five business days of the FCC's acceptance of the application for filing. Broadcasters would be required to create a conspicuous link or tab labeled "FCC Applications" that links to a separate page containing the full notice text described below, with the link or tab placed both (1) at the top of the station's homepage and (2) if the station has a mobile app, on that app's opening screen.

Acknowledging that not all broadcasters have a website dedicated solely to each station, the Draft Order would establish a "hierarchy" or sorts for notice publication online such that the broadcaster would have to post the notice on the first website available to the station according to the following: "(1) the website of the applicant station; (2) the website of the applicant station's licensee; (3) the website of the applicant station's parent entity or, if there is no applicant-affiliated website (4) on a locally targeted, publicly accessible website," as specifically defined by the new rules. (In other words, if an applicant didn't have a station website, it would have to post the notice on the licensee's website; if it didn't have a licensee website, it would have to post the notice on the parent entity's website; and so on.) Additionally, noncommercial educational stations would continue to be exempted from written public notice—including the Draft Order's new written notice procedures—unless the NCE station has not commenced program operations or is off-the-air.

- **Required Notice Text:** The Draft Order would modify the text that is required in public notices, providing a generally concise script with several slight variations to account for: (1) the hyperlinking capabilities of online posting versus static on-air announcements; (2) stations with and without an online public inspection file; and (3) stations that are currently silent or not yet authorized to broadcast. Generally speaking, the text of the notice variations in the Draft Order is shorter than the text that is currently required; the text would also direct (or provide a hyperlink for) the public to view the relevant application online.

- **On-Air Announcements:** The Draft Order would entirely do away with on-air pre-filing announcements for radio and television station license renewal applications, and it would alter the requirements for broadcasters' airing of on-air post-filing announcements. We'll provide more detail regarding those post-filing requirements if and when the Commission adopts the Draft Order. In addition, within seven days of broadcasting the final post-filing announcement, stations would still be required (as they are by the current local public notice rules) to upload to their OPIF the list of dates and times the required on-air announcements were broadcast; however, stations would no longer be required to upload the on-air script used for the announcements (thus removing the current requirement to upload such scripts). Further, television broadcasters would be required to display the entire text of the on-air post-filing announcement on screen while the text is audibly read by an announcer.

Importantly, although the Draft Order would in many ways simplify the local public notice procedures, it would not alter broadcasters' need to remain vigilant in providing adequate public notice and to maintain sufficient documentation that they provided such notice. The Draft Order suggests that broadcast applicants "should consider maintaining appropriate records of online notices"—such as screenshots, or certification(s) from any staff member(s) responsible for posting the notice to verify that the notice was posted—which could prove very useful in the unlikely event that an application were to be contested for failure to adhere to the Commission's local public notice rules.

A few final words of caution: this memo does not provide a comprehensive summary of every single one of the many changes the Draft Order would make and, again, at this point, the Draft Order has yet to be adopted and is therefore subject to modification prior to the

Commission's May open meeting. We will continue to monitor this important item and let you know more after the changes are considered by the full Commission.

FCC Expands Unlicensed Broadband Operations in 6 GHz Band, Despite Broadcasters' Interference Concerns

Over the past several years, broadcasters have had a fair amount of success in getting the FCC to understand how proposed Commission actions regarding the reallocation of various spectrum bands might affect TV and radio operations—and then persuading the Commission to act accordingly. Unfortunately, the FCC appears to have been less receptive to broadcasters' concerns in adopting a recent Report and Order and Further Notice of Proposed Rulemaking (the "Order") that expands unlicensed broadband operations in the 6 GHz spectrum band. Although the text of the Order suggests the FCC intended to appropriately account for broadcasters' sustained advocacy on the issue, the practical effect of the Order appears to subordinate broadcasters' interference concerns in favor of broadband deployment.

Background. For some time the FCC has been searching for ways to "bridge the digital divide" (that is, to expand high-speed Internet access for rural and tribal areas), and in so doing has targeted various segments of spectrum to be repurposed in order to accommodate increased wireless and/or broadband use. The Commission targeted the swath of spectrum known as the 6 GHz band in a 2018 Notice of Proposed Rulemaking, in which the Commission proposed to open up portions of the band's 1200 megahertz (from 5.925 to 7.125 GHz) for unlicensed, uncoordinated use, including wireless broadband.

Importantly, however, broadcasters already have deployed—and rely on—significant electronic newsgathering operations in the 6 GHz band. For years, broadcasters have used the 6 GHz band for essential broadcast auxiliary services, including video relays (e.g., from the location of a newsworthy event to a satellite news truck, fixed receive site, or a temporary relay site) and the operation of certain wireless microphones.

Several swaths of the upper-end of the 6 GHz spectrum (the so-called "U-NII-6" and "U-NII-8" bands) are especially critical to existing broadcast operations. For example, those bands make it possible for viewers to watch courtside player interviews, court-level game coverage, or interviews with policy makers or public safety officials during breaking news or special events, such as political conventions. And, as NAB and others indicated in comments to the Commission, coordinating such inherently unpredictable broadcaster uses of the band with other terrestrial uses to avoid interference is extremely difficult. Additionally, many such uses do not require a license because they are separately authorized as "short-term operations" under the Commission's rules, thus making it extremely difficult to quantify the full scope of day-to-day broadcaster deployment in those bands.

The Commission's 6 GHz Order. In response to the Commission's 2018 proposal, NAB and others pointed out the interference and other concerns discussed above, and they further explained to the Commission that the primary study presented in the record that favored permitting additional unlicensed operations in the 6 GHz band contained multiple flaws—and those flaws may have caused the study to drastically underestimate the amount of potential interference such newly

permitted operations in the 6 GHz band would cause to broadcaster operations. The recent Order, however, gives precious little credit to NAB's concerns. Instead, the FCC in the Order determines that expanding unlicensed operations "will have little potential of causing harmful interference to [electronic newsgathering] operations." Fundamentally, the Order's primary focus is on the potential for expanded unlicensed operations to enable broadband deployment for "smartphones, tablet devices, laptops, and Internet-of-things (IoT)," as well as "connecting appliances, machines, meters, wearables, and other consumer electronics as well as industrial sensors for manufacturing."

In response to the Order, NAB emphasized the importance of protecting electronic newsgathering operations from interference, especially in light of the recent, invaluable breaking news coverage broadcasters have been providing during the COVID-19 pandemic. NAB released a statement that included the following: "Unlike in other recent proceedings, the Commission did not bring stakeholders together to seek compromise. Moreover, the Order represents an inexplicable departure from existing precedent. Rather than require unlicensed proponents to prove they will not cause harmful interference, the Commission shockingly forgoes any independent analysis that interference won't be too bad or happen too often. This 'fingers crossed' approach is bad policy and not what is required under law."

The provisions of the Order don't take effect immediately; certain aspects of the Order will become effective sixty days after the Order's publication in the Federal Register. Whether any groups will seek reconsideration of the Order, or challenge the Order's legitimacy (or any parts of it), is uncertain at this time. We'll keep you posted.

Commission Proposes Expanding Its Video Description Rules to DMAs 61 Through 100 Over Next Four Years

The FCC last week adopted a Notice of Proposed Rulemaking that seeks comment on the potential expansion of the agency's video description rules to an additional 10 designated market areas (DMAs) per year for the next four years, starting in January 2021. Certain of the current video description rules apply to broadcast television stations in the top 60 markets. The stated aim of the Notice's proposal is to ensure that more visually impaired or blind individuals "can be connected, informed, and entertained by television programming."

Background. The FCC's video description rules for television stations have been in effect for several years. As broadcasters likely know, "video description" is the term given for the audio-narrated descriptions of important visual elements in a television program inserted into natural pauses between a program's dialogue. The video description rules apply to all television stations, including low power television stations, subject to any exceptions and exemptions that are otherwise applicable. Among the key provisions of the video description rules, the Commission currently requires certain television broadcast stations—those affiliated with the top-four commercial television broadcast networks and located in the top 60 television markets—to provide 50 hours of video-described programming per calendar quarter during prime time or on children's programming, as well as an additional 37.5 hours of video-described programming per calendar quarter at any time between 6 a.m. and midnight.

In October 2019, the FCC released its Second Report to Congress on video description (as required by the Twenty-First Century Communications and Video Accessibility Act of 2010) (the "2019 Report") regarding recent developments in the video description marketplace. In that 2019 Report, the Commission found that the blind and visually impaired derive significant benefits from video description and that the record indicated that there is "no basis" to conclude that those benefits wouldn't extend to DMAs outside of the top 60. Note that Congress equipped the FCC with authority to phase in its video description regulations for up to an additional 10 DMAs each year if the Commission determines that the costs of such an expansion are "reasonable." The 2019 Report left open for comment and analysis the issue of whether costs associated with such an expansion would be reasonable for broadcasters, program owners, providers, and distributors of video-described content to bear.

What the Notice Proposes. The Notice proposes—and requests comments on the reasonableness of—expanding the Commission's video description regulations to 40 additional markets by phasing them in for an additional 10 DMAs each year for four years, beginning on January 1, 2021. (Per the Notice, any further expansion beyond DMA 100 could occur only if the Commission were to make a future determination of "reasonableness" and perform a future analysis of the costs associated with such further expansion.) Specifically, the Notice asks interested parties to weigh in on its tentative conclusion that "the costs of implementing the video description regulations in markets 61 through 100 are reasonable," including by addressing the following issues:

- The Commission's 2019 Report found that costs for implementing video description in the top 60 markets have remained stable since 2017, and therefore are "minimal" relative to total programming expenses and network revenues, even after the Commission increased the required number of video-described programming hours over the past few years. Accordingly, the Notice seeks comment on the 2019 Report's conclusion that "costs should be manageable for network affiliates that receive programming via a network feed and simply pass through any video description."

- The Notice also seeks comment on whether expanding video description will cause broadcasters to incur additional technical costs, such as those incurred for purchasing additional equipment.

- The Notice invites comment from program owners, providers, and distributors of video description content "on the costs of creating video-described programming for network affiliates in markets 61 through 100."

- The Notice also seeks comments "on the benefits of expanding" the video description requirements; in particular, whether and at what point the benefits would outweigh any costs caused by the proposed expansion. On this point, the Notice specifically requests data concerning the amount of video-described programming currently available in DMAs 61 through 100 as compared to the amount that would be available if the Commission were to adopt the proposed expansion, as well as comments that "specify" the benefits consumers would derive from such an expansion.

- The Notice also proposes to use an updated Nielsen determination rather than the rankings on which the rules currently rely—which are from 2015—in determining which additional

DMAs would be subject to expanded video description requirements. Along those same lines, the Notice seeks comment on the deadlines by which any such "phase in" should occur, particularly given the potential discrepancy between Nielsen rankings in 2015 as compared to 2020.

Finally, it's important to note that although the Notice tentatively concludes that expanding video description beyond the top 60 DMAs is warranted, comments submitted in response to the Notice may have a meaningful impact on whether the Commission sticks to that tentative conclusion. In particular, Commissioner O'Rielly wrote separately to emphasize the importance of weighing the costs and benefits of such an expansion, noting that the FCC should be mindful of "adding further requirements to smaller market stations," which "do come at a cost," especially given the economic toll to many stations caused by COVID-19.

Comments in the proceeding will be due 30 days after publication in the Federal Register, and reply comments will be due 45 days after publication. We will continue to monitor and advise you of significant developments in this proceeding.

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