September 28, 2020

Legal Memorandum

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# Fiscal Year 2020 Regulatory Fee Payments Due TODAY,

# MONDAY, SEPTEMBER 28

We write this morning with a final reminder that all regulatory fee payments for fiscal year 2020 are due no later than **11:59 PM, ET, TODAY—Monday, September 28, 2020**. (As we’ve reported, the previous deadline was September 25, but the FCC released a [Public Notice](https://docs.fcc.gov/public/attachments/DA-20-1131A1.pdf) late last week extending the deadline until today.)

Please keep the following information in mind if you have yet to complete and submit your 2020 regulatory fee payments:

* Broadcasters must pay the FY 2020 regulatory fees using the Commission’s automated filing and payment system, called Fee Filer, which is available at the following link: <https://www.fcc.gov/licensing-databases/fees/fee-filer>.
* The FCC will impose a late payment penalty of 25% of any unpaid amount of regulatory fees owed—and that penalty will be assessed beginning tomorrow.
* 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 larger amounts will be rejected. This limit applies to single payments, divided payments, and to combined payments of more than one bill. So, broadcasters paying an amount above $24,999.99 must 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*”; that *de minimis* threshold for FY 2020 regulatory fees is $1,000 and less.
* You can find the amount of your FY 2020 regulatory fees in the FCC’s [Report and Order](https://docs.fcc.gov/public/attachments/FCC-20-120A1.pdf) Appendix C (which includes fees for, among other things, all radio, LPTV, Class A TV, and TV and FM Translators and Booster stations) and Appendix G (which includes fees for all full-power TV stations). Additional resources regarding payment methods and procedures are available at <http://www.fcc.gov/regfees>.

*Payment Flexibility in Light of the COVID-19 Pandemic*. The Commission has announced the availability of several forms of potential relief intended to assist regulatees (including broadcasters) who have been financially harmed by the COVID-19 pandemic. We have received informal FCC staff guidance that any request for additional COVID-19 flexibility and relief must be filed no later than today’s payment deadline. The forms of potential relief include the following:

* The FCC will not require separate filings for requests for fee waivers, reductions, deferrals, or extended payment terms (i.e., installment payment requests) for financial hardship, and instead will accept single submissions requesting any combination (or all) of the foregoing forms of relief. Stations who might need such flexibility should submit them electronically by today—Monday, September 28—to [2020regfeerelief@fcc.gov](mailto:2020regfeerelief@fcc.gov) (or discuss the situation with FCC counsel).
* If the Commission grants an installment payment request, the Commission will also decrease the interest rate the Commission charges on installment payments to an unspecified “nominal rate,” and the Commission will waive the typical requirement to provide a down payment in order to be eligible for installment payments.
* The Commission has partially waived its “red light” rule by permitting regulatees with outstanding debts owed to the Commission to nonetheless request waivers, reductions, deferrals, and installment payment terms for FY 2020 fees. (Please note, however, that regulatees for whom the red light rule is waived will be required to resolve all delinquent debt currently owed prior to obtaining FY 2020 regulatory fee relief.)

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# TV Broadcasters Must Make Triennial Carriage Elections

# by Thursday, **October 1, 2020**

TV broadcasters face another extremely important deadline this week: This Thursday, **October 1, 2020,** is the deadline for TV broadcasters to make their triennial carriage elections for the January 1, 2021–December 31, 2023, carriage election cycle. As we’ve reported, the elections that television stations must make by October 1 mark their first elections under the Commission’s new, streamlined carriage election procedures.

*Background*. Last year, the Commission jettisoned the “old” requirement that broadcast television stations make their triennial retransmission consent/must-carry elections to MVPDs in written notices sent via certified mail. Instead, all carriage elections are now made 100% electronically. (You’ll recall that the first deadline regarding the new election procedures passed a couple of months ago; by July 31, 2020, television stations were required to post an email address and phone number for carriage-related inquiries in the field titled “Carriage Election Contact Information” near the bottom of the front page of each station’s OPIF.)

*New Procedures Applicable to 2020 Carriage Elections*. The Commission’s new election procedures change various important aspects of how TV broadcasters must make their carriage elections, including as follows:

* On or before October 1, 2020 (and for each must carry/retransmission consent election deadline thereafter), each station is required to upload to its OPIF an election statement indicating whether the station elects retransmission consent or mandatory carriage with respect to each MVPD for the forthcoming election cycle. This can be accomplished utilizing one single election statement covering all MVPDs. Any notices of change in carriage election (described further below) must be attached to the statement. (*Note:* For broadcast groups of more than one station, each station will have to upload its own complete election statement. Therefore, even if the group intends to elect retransmission consent with respect to multiple system operators (“MSOs”) in multiple markets, each station must include that MSO on its own election statement. For example, if Cable Operator A carries a group’s stations in more than one market, then each station carried by Cable Operator A must include Cable Operator A on its election statement.)

The election statement must remain in the station’s OPIF for the complete three-year election cycle to which the statement applies, in this case through December 31, 2023. Once a station has uploaded its election statement—unless the station is changing its carriage election from the prior cycle, as described below—the station need take no further action other than responding to MVPD inquiries concerning the station’s carriage election.

* If a station desires to change its carriage election from what it had elected for the current cycle ending December 31, 2020, or if the station in the current cycle defaulted to must-carry (in the case of cable operators) or to retransmission consent (in the case of satellite carriers) and desires to change that default position, then the station must email a notice of election carriage change to the applicable MVPD and upload such notice to the station’s online public inspection file by October 1, 2020.

A carriage election change notice must contain the following information:

* The station’s call sign;
* The station’s community of license;
* The station’s DMA;
* The specific change in election status that is being made;
* The station’s own email address for carriage-related questions;
* The station’s own phone number for carriage-related questions;
* The name of the appropriate station contact person;
* If the change in election status applies only to some, but not all, of a cable operator’s systems, the specific cable systems to which the carriage election applies.

Such notices should be sent to the email address provided by the MVPD in its OPIF or the FCC’s COALS database (if applicable), with a carbon copy to a specific Commission email address ([ElectionNotices@FCC.gov](file:///C:\Users\patrcros\ND%20Office%20Echo\VAULT-YQ4LR0TH\ElectionNotices@FCC.gov)). As a reciprocal obligation, MVPDs are required to verify receipt of such emails “as soon as is reasonably possible.” If a broadcaster doesn’t receive an MVPD verification, or if the broadcaster gets an indication that its initial email to the MVPD was not delivered, the broadcaster must contact the MVPD by phone to confirm its receipt or to arrange for redelivery. If the broadcaster is still unable to reach the MVPD by phone, and if the broadcaster timely and properly sent the initial notice to the MVPD’s listed email address, the Commission will consider the broadcaster’s notice to be properly delivered so long as a carbon copy was, in fact, sent to the Commission’s address and the notice was timely placed in the broadcaster’s OPIF.

* Stations must continue to comply with the various unaltered provisions of the Commission’s carriage election rules. For instance, stations cannot make inconsistent carriage elections in the same geographic area with respect to cable systems (that is, if Cable System A and Cable System B both operate in Smithville, then a station must make the same election for both cable systems in Smithville).

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# Violation of *Per Se* Good Faith Retransmission Consent Negotiating Standards May Cost TV Licensees More Than $500k Per Station

In a different development of potentially great significance relating to retransmission consent, the Commission earlier this month issued a [Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/FCC-20-122A1.pdf) (the “Order”) affirming the Media Bureau’s 2019 determination that fifteen licensees in eight television broadcast station groups (the “Licensees”) violated the Commission’s *per se* good faith retransmission consent negotiating standards.

The Commission’s proposed penalty for those violations? $512,228 for each station—the statutory maximum.

*Background*. As with the Media Bureau’s decision last year, much of the Order is difficult to decipher because the public version is heavily redacted to protect confidential information. At a broad level, it appears that the Licensees were jointly negotiating retransmission consent for their collective 18 stations with AT&T and DIRECTV (“AT&T”), and all of them were represented in negotiations by the same individual. The manner in which the negotiations (or lack thereof) unfolded caused AT&T to file a complaint with the FCC alleging that the Licensees had violated three of the Commission’s *per se* good faith retransmission consent negotiating standards by (1) refusing to negotiate, (2) unreasonably delaying negotiations, and (3) failing to respond to proposals. The Complaint also alleged that the “totality of the circumstances” surrounding the Licensees’ conduct through their negotiator separately proved a breach of the Commission’s good faith retransmission consent negotiating standards.

Upon considering the Complaint and the undisputed facts and communications in the record, the Media Bureau determined that the Licensees had indeed violated the *per se* standards. As support, the Media Bureau’s decision pointed to the fact that—among other things—the Licensees’ negotiator failed to submit even a single offer or proposal that could have resulted in carriage of the Licensee’s stations, even if accepted unchanged by AT&T. Nearly all of the Licensees filed an Application for Review in response to the Media Bureau’s decision. (One Licensee instead entered into a separate settlement with the Commission to admit liability and pay a civil penalty.)

*The Order*. The Order marks the first time that the full Commission has considered a good faith complaint and the first time the Commission has found a *per se* good faith violation. The Order’s recitation of the facts and legal analysis largely track that of the Media Bureau’s decision, however, and therefore offer little additional insight into how the *per se* standards will be applied to future, less-egregious negotiation quarrels and impasses. As discussed below, perhaps more noteworthy here is the manner in which the Commission calculated and proposes to levy the substantial forfeiture amounts.

With respect to the substance of the violations, according to the Order, the Licensees’ conduct through their negotiator breached each of the three *per se* standards that were the subject of the AT&T Complaint by fundamentally failing to offer any proposal to AT&T that would have resulted in carriage of all of the Licensees’ stations. Put differently, because the Licensees never once submitted a viable carriage proposal to AT&T, the Licensees’ conduct fell well short of each *per se* requirement: (1) to “actively participate in retransmission consent negotiations with the intent of reaching agreement” (i.e., refusal to negotiate); (2) to “agree to meet at reasonable times and locations and . . . not act in a manner that would unduly or unreasonably delay the course of negotiations” (i.e., unreasonable negotiation delays); and (3) to “respond to retransmission consent proposals and explain the[] reasons for rejecting any such proposals” (i.e., failing to respond to proposals). Similarly, the Order offers no additional analysis under the “totality of the circumstances” good faith standard. According to the Commission, because the Licensees’ conduct clearly violated the *per se* standards, there is no need to also consider that same conduct under the totality of the circumstances approach.

That brings us to arguably the most notable section of the Order, in which the Commission finds each of the stations at issue liable for the statutory maximum penalty of $512,228. In proposing the penalty, the Commission reasons that its base forfeiture amount of $7,500 for a “violation of the cable broadcast carriage rules” should be multiplied by the number of days during which the Licensees failed to negotiate in good faith—a sufficient number of days to drive each Licensee’s forfeiture level to the statutory maximum penalty of $512,228. Further, because the Commission’s rules require each individual station to negotiate in good faith, and because the harm to television viewers is multiplied with each station that goes dark, the Order determines that the statutory maximum should be applied on a station-by-station (rather than licensee-by-licensee) basis.

*Next Steps*. The Licensees now have the opportunity to seek a reduction or cancellation of their proposed forfeitures. And—importantly—a separate statement by Commissioner O’Rielly indicates that any such request for a reduction may not fall on deaf ears. Emphasizing that the Order is the first ever to propose a financial penalty for a violation of the *per se* good faith retransmission consent negotiating standards, Commissioner O’Rielly notes that “[e]ven during better days, when our country is not facing the challenges of a global pandemic, imposing the statutory maximum on individual stations by way of a novel, first-time application of the rules could be disproportionately punitive and significantly threaten the operations of these stations.” Accordingly, the Commissioner urges the FCC to “conduct a more thorough analysis of whether to adjust the proposals downward if this case proceeds.”

We will keep you apprised of any further developments.

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# FCC Considering Major Overhaul of Application Fees, Including Substantial Changes to Those for Broadcast Services and Authorizations

Broadcasters could see the first major overhaul to FCC application fees in over 30 years, according to a recent [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-20-116A1.pdf) (the “Notice”). The Notice seeks comment on a new application fee schedule that—if adopted—would increase fees for many broadcast applications while simultaneously lowering fees for many other applications. Broadcasters and other interested parties will have the opportunity to comment on the Notice’s proposals, with comments due 30 days after the Notice is published in the *Federal Register*, and reply comments due 45 days after such publication.

*Background*. From 1986 to 2018, the Commission’s application fee schedule was set by federal law and subject to periodic FCC modification only to the extent changes were required to harmonize the fee schedule with changes in the Consumer Price Index. Although Congress modified the fee schedule a handful of times during that period, many of the current application fee categories, and the fees themselves, have been effectively frozen for over 30 years.

Two years ago, however, Congress expanded the Commission’s authority to modify its application fees. Specifically, Congress now requires the Commission to (1) adopt a “schedule of application fees to recover the costs of the Commission to process applications” and (2) amend the schedule, as needed, to reflect increases or decreases in the costs of processing applications or to reflect the consolidation or addition of new fee categories. The Notice responds to that congressional directive.

*The Notice’s Proposed Changes*. The Notice proposes both global and specific revisions to the current application fee schedule, with the intent of establishing a framework for assessing application fees that is “fair, administrable, and sustainable.”

At a high level, the Notice proposes to reduce the current set of application fee categories from eight to five “functional” categories, which would be broken into: Wireless Licensing Fees, Media Licensing Fees, Equipment Approval Fees, Domestic Service Fees, and International Service Fees. Similarly, the Notice proposes reducing the total number of application fees from 450 to 167, in the hopes that consolidation will assist filers in determining the precise amount of fees owed for any application. Finally, the Notice proposes to calculate application fees based on estimates of the average direct Commission labor costs incurred when processing a typical application—i.e., the “estimate of the cost of staff that process a particular application, based on the time spent processing that application and the compensation received for that work time”—including those labor costs associated with identifiable tasks up through the first level of supervision. The Notice seeks comment on all of those proposed changes.

At a more specific level, although many application fees would decrease under the Notice’s proposals, broadcaster applications appear unlikely to fare so well. For example, with respect to commercial TV application fees, the Notice proposes the following increases (among others): full-power TV minor modification applications would increase from $1,110 to $1,335; license renewal applications would increase from $200 to $330; and short-form assignment and transfer of control applications would each increase from $160 to $405. Commercial radio application fees would be treated in a fairly similar manner—among those that would see the steepest increases: AM minor modification applications would increase from $1,110 to $1,625; AM and FM license renewal applications would increase from $200 to $325; and AM and FM short-form assignment and transfer of control applications would each increase from $160 to $425.

\* \* \* \* \*

Importantly, at this stage the Notice’s proposals are just that—proposals. Among other things, the Notice seeks comment on whether the proposed fee setting methodologies could be improved or changed to ensure that application fees accurately reflect the Commission’s cost of processing the applications, as well as whether direct costs are a reasonable methodology to be used in calculating the newly proposed fees.

We will continue to monitor this proceeding, and will notify you when the comment deadlines have been set.

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*Tim Nelson, Editor*

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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