November 4, 2021

Legal Memorandum

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# Tech Industry Mobilizes Against NAB Request for FCC to Include

# “Big Tech” Companies in Annual FCC Regulatory Fee Calculus

Recent comments by those in or related to the technology industry have strongly opposed an NAB request for the FCC to begin requiring regulatory fee payments from certain unlicensed spectrum users—namely, “big tech” companies. The FCC teed up NAB’s request in a recent [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-21-98A1.pdf) (the “NPRM”) looking toward potential modifications to the FY 2022 FCC regulatory fee regime and beyond. Opening comments on the NPRM were due on October 21, 2021, with reply comments due Friday, November 5, 2021.

Background*.* As broadcasters are unavoidably aware, every year the FCC collects from various entities—including broadcast licensees—regulatory fee payments in amounts particularized to the characteristics of each regulatory fee payor and tied to the FCC’s annual appropriation from Congress. The Communications Act requires the FCC to collect such fees to recover the regulatory costs associated with Commission functions, including—among other things—salaries and expenses; overhead; statutorily required tasks that do not directly equate with oversight and regulation of a particular regulatee but instead benefit the Commission and the industry as a whole; administrative costs such as rent, utilities, and equipment; and costs incurred in regulating entities that are exempt from paying regulatory fees (for example, NCE broadcast stations). The FCC assesses fees based on a determination of the full-time equivalent (“FTE”) number of employees performing Commission functions, with room for adjustment to account for factors “reasonably related” to the benefits being provided by the FCC to the payors of the fees.

 Generally speaking, across the past several decades the FCC’s allocation of regulatory fees amongst payors has been closely tied to the number of FTEs in each of the Commission’s “core bureaus” (currently, the Media Bureau, the Wireless Telecommunications Bureau, the Wireline Competition Bureau, and the International Bureau). FTEs can be either “direct” or “indirect,” with indirect FTEs being allocated proportionally across all core bureaus. For instance, the FTEs from the FCC’s Enforcement Bureau are classified as indirect; so, too, are FTEs from the Office of Engineering and Technology (“OET”). Notably, however, many times such “indirect” FTEs can be expended due to requests or actions by unlicensed spectrum users, such as broadband companies deploying devices in TV white spaces or large technology companies petitioning the FCC for access to spectrum currently used by broadcasters.

NAB Position*.* With the foregoing in mind, earlier this year NAB urged the FCC to begin to impose regulatory fee payments on big tech companies who “utilize Commission resources and profitably derive direct benefits from Commission proceedings in which they actively participate.” The NPRM responds to NAB’s request by expressly soliciting comments on whether and, if so, how the FCC should include large technology companies in the regulatory fee payor base.

Tech Group Opposition*.* Many of the comments submitted thus far have been filed by tech industry groups in opposition to NAB’s proposal. Among the various arguments advanced in those comments, several of the most prevalent include:

(1) the benefits received by licensed spectrum users justify the imposition of regulatory fees, whereas the *lack* of benefits to unlicensed spectrum users render the imposition of regulatory fees inappropriate (e.g., unlicensed users are not afforded interference protection and thus any “benefits” from regulations related to interference protection flow solely to licensed users);

(2) there is no clear method for determining which users of unlicensed spectrum should be subject to fees or how those fees would be assessed and collected (e.g., imposing regulatory fees on *all* users of unlicensed spectrum would sweep in a tremendous number of entities, such as “smart” device manufacturers, and would thus create administrative difficulties in assessment and collection);

(3) unlicensed spectrum users already shoulder regulatory “costs,” including by utilizing FCC-recognized labs and Telecommunication Certification Bodies (rather than Commission staff) to obtain various operating certifications; and

(4) imposing fees on Big Tech and other currently unlicensed entities may have a chilling effect on innovation and accessibility of technology in the future.

On the other side of the argument, several commenters have lauded the FCC for being open to recalibrating its reg-fee regime to accommodate the rapidly evolving landscape of the communications marketplace. And, of course, NAB filed comments in support its proposal, arguing that “it makes little sense to delay imposing regulatory fees on Big Tech companies that actively participate in Commission proceedings, benefit economically from the Commission’s activities (often at the expense of other regulatees), and actively compete with broadcasters and other regulatory fee payors for advertising revenues.”

We will continue to monitor this issue, particularly as reply comments roll in for the November 5, 2021, deadline.

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# C-Band Relocation Payment Clearinghouse Announces that It Has Begun to Pay Reimbursement Claims

In welcome news for broadcasters, the C-band Relocation Payment Clearinghouse (the “RPC”) recently [announced](https://cbandrpc.com/guidance/Communications/Cband_RPC_Press_Release_10-25-2021_RCC_Paying_Claims.pdf) (the “Announcement”) that “it has begun to pay claims filed by incumbent earth station operators related to the C-band relocation program.” Although the Announcement does not specify the types of claims that have thus far been paid, the RPC has previously indicated that lump sum payments are likely to be processed before actual cost reimbursements. Regardless—if you are a broadcaster with a qualifying incumbent earth station (e.g., a C-band downlink dish that is taking part in the C-band transition and entitled to reimbursement), we strongly encourage you to expeditiously take all necessary steps to set up your reimbursement account in the RPC’s Coupa payment portal so that you may begin to submit claims for reimbursement. As noted in the Announcement, “[t]he sooner [broadcasters] file their claims, the sooner they can receive reimbursement or lump sum payments.”

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# **November 2nd to 9th, 2021:** Filing Window for Applications for New

# NCE FM Station Construction Permits on FM Reserved Band;

# 10-Application Limit Applicable to Filing Window

During the brief seven day period between November 2 and November 9, NCE broadcasters are presented with a relatively infrequent opportunity—as we have previously written, an FCC filing window to apply for one or more new FM stations in the reserved band (i.e., channels 201 to 220 / 87.9 MHz to 91.9 MHz) will be open from **12:01 AM ET on November 2nd to 6:00 PM ET on November 9th, 2021**. The last such window occurred nearly fifteen years ago in 2007.

Applications will only be accepted from eligible non-profit educational organizations, and applicants may not file more than 10 applications in the window. Applications must be filed electronically via the FCC’s Licensing and Management System (“LMS”), as described more fully in the FCC’s [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-885A1.pdf) announcing the filing procedures. The application is relatively robust, and requires applicants to make various technical and legal certifications and showings, some of which are nuanced. Accordingly, we strongly encourage any NCE broadcasters interested in filing to confer with legal counsel and appropriate technical consultants, and to act expeditiously to ensure that they do not miss the filing window.

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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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