Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Assessment and Collection of Regulatory Fees for Fiscal Year 2020	)	MD Docket No. 20-105
	)	
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Assessment and Collection of Regulatory Fees for Fiscal Year 2019	)	MD Docket No. 19-105
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	)	

To: The Commission

JOINT COMMENTS OF THE STATE BROADCASTERS ASSOCIATIONS

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Their Attorneys in This Matter

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JOINT COMMENTS OF THE STATE BROADCASTERS ASSOCIATIONS

The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The

New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations") by their attorneys in this matter, hereby file these Joint Comments in response to the Commission's Notice of Proposed Rulemaking released May 13, 2020 in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

With the release of the *FY2020 NPRM*, the FCC launches the next round of the decades-old struggle to divvy up the financial burden of its operations among a select few categories of its regulatees that have long been deemed able to withstand the economic burden. As the *FY2020 NPRM* acknowledges, however, this year is unusual, and this time around, an untold number of Commission regulatees may well crack under the weight of those regulatory fees.[2] While the FCC's appropriation has remained almost unchanged since 2012 and is exactly the same as FY 2019, the *FY2020 NPRM* once again inexplicably proposes to increase the fees paid

[1] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2020*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 20-105, FCC 20-64 ("*FY2020 NPRM*") (rel. May 13, 2020).
[2] *Id*. at ¶ 73-74.

by broadcasters. There is no basis for such an increase, and the practical impact of increasing broadcaster regulatory fees in a pandemic year will be harmful to both stations and the public.

Moreover, rather than attempt to address the inherent inconsistencies and inequities in the regulatory fee process, which is especially important in this pandemic year, the *FY2020 NPRM* appears intent on discouraging large-scale requests to reduce/postpone the fees while placing blame for contributing to the financial ruin of some local broadcasters on the Commission's onerous statutory mandate.

But the FCC is far from powerless here. While it has long expressed a preference for making only incremental changes in its regulatory fee schedule,[3] this year it must come to terms with the seismic change in its statutory mandate wrought by the RAY BAUM's Act of 2018[4] ("RBA"). This year, the Commission cannot escape making the statutorily-required examination of the FCC's benefit to broadcasters when setting its fees.

In doing so, it must also recognize that it has always been fundamentally unfair to impose the costs of all of the Commission's other activities (unrelated to broadcasting) on an industry that it has made one of the most heavily regulated, and the only one that cannot merely pass regulatory fee costs on to the public as a bill line-item (along with an added "Administrative Fee for Paying Government Regulatory Fees" line-item).

More than ever, the Commission's energies are invested in creating new services that generate huge auction profits with few concomitant ongoing regulatory obligations. In some cases, the Commission's efforts are specifically designed to permit unlicensed uses, increasing

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[3] *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 7057, 7064, ¶ 15 (2017) ("*FY2017 Report and Order*").

[4] Pub. Law No. 115-141 § 102, 132 Stat. 348, 1082-86 (2018) (codified at 47 U.S.C. §§ 159, 159A).

interference and competition to broadcasters while depriving the Commission of the regulatory fees such new licenses would annually bring, and which are therefore instead funded by—you guessed it—broadcasters.[5]

As the RBA requires, the Commission MUST find ways to bring those who truly are benefiting from the Commission's work into the regulatory fee payment scheme. The Commission has faulted broadcasters in the past for not presenting ready-made and actionable solutions for how to do that.[6] While broadcasters have tried to do so, after more than 25 years of wrestling with this regulatory fee regime, it remains the case that only the FCC has the data concerning its FTE allocations to inform such decisions, and the Commission has perennially refused to release it.[7] In any event, the RBA requires that regulatory fees be based upon the benefit derived from the FCC's activities, not upon a regulatee's skill in assisting the Commission to meet the FCC's own statutory mandates. The FCC has demonstrated its ability to innovate on many occasions; it is time to bring those skills to bear on its most fundamental mission—funding its operations.

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[5] *See, e.g., In the Matter of Unlicensed Use of the 6 GHz Band; Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz*, Report and Order and Notice of Proposed Rulemaking, ET Docket No. 18-295, GN Docket No. 17-183, FCC 20-51 (rel. Apr. 20, 2020); *Unlicensed White Space Device Operations in the Television Bands*, Notice of Proposed Rulemaking, ET Docket No. 20-36, FCC 20-17 (rel. March 2, 2020); *Unlicensed Operation in the TV Broadcast Bands*, Second Memorandum Opinion and Order, 25 FCC Rcd 18661 (2010); *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).

[6] *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 8189, 8194, ¶ 14 (2019) ("*FY2019 Report and Order*").

[7] The Government Accountability Office has criticized the lack of transparency in the FCC's regulatory fee process (*see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-686, FEDERAL COMMUNICATIONS COMMISSION: REGULATORY FEE PROCESS NEEDS TO BE UPDATED (2012)), yet little has changed, making it difficult for broadcasters to know precisely what they are paying for, whether revisions they propose will bring about any greater fairness or efficiency, and whether the process even meets the standards of the Administrative Procedure Act.

Finally, the Commission should undertake several small but important modifications to its processes and procedures that will help those least able to pay *any* regulatory fee amount, which will be especially important this year, as the economic impact of the Covid-19 pandemic takes a heavy toll. The first of these is to rectify the fee waiver, reduction and deferral procedures to stop punishing those most unable to pay current fees—i.e., those in default from prior years. Second, in considering requests for reduction or waiver of fees, the FCC should grant waivers of the fees due for any month(s) a broadcaster was off the air, in recognition of the fact that a silent station cannot earn the advertising revenues with which to pay its regulatory fees. Third, the Commission should streamline its fee waiver and deferral procedures so those in financial extremis are able to access them. Lastly, the FCC should reduce the need for currently exempt broadcasters to resort to the fee waiver and deferral procedures by being proactive in increasing the de minimis fee threshold proportionally with any fee increases in categories that are currently exempt, so that those regulatees who currently do not pay fees are not suddenly confronted with a debilitating fee they did not expect and over which they have no control.

I. The Commission Should Reject Any Increases in Broadcast Regulatory Fees for FY 2020

As discussed below, the FCC's annual appropriation for FY 2020 is no larger than it was for FY 2019. Yet, inexplicably, the FCC proposes to increase annual regulatory fees for broadcasters again this year. Recalling that broadcasting is an advertising-supported industry and that shuttered businesses do not advertise, the expectation that broadcasters can continue to provide service to the public while also paying more in regulatory fees is simply out of touch with reality. As has been widely reported, radio broadcasters are already going off-air at an

alarming rate due to the coronavirus pandemic and its impacts.[8] Moreover, the mere suggestion that broadcasters pay higher regulatory fees this year highlights how lopsided the FCC's regulatory fee process has been over the years, a situation the FCC has steadfastly refused to address despite broadcasters' entreaties that it do so.

The Commission should therefore avoid falling back upon standard operating procedures in the assessment of regulatory fees as it has proposed to do in the *FY2020 NPRM*. Instead, it should use this extraordinary moment to acknowledge that these procedures are not meeting the Commission's stated fairness and sustainability goals[9] when they mete out financial burdens that will predictably force more broadcasters off the air. The first step of that process is to recognize that burdening broadcasters with even greater regulatory fees in 2020 is neither sustainable nor justified, and must be rejected at the outset.

II. The RBA Mandates a Fundamental Change in How Regulatory Fees Are Assessed

Looking more broadly, rather than merely addressing the extreme financial situation facing broadcasters in FY 2020 in an ad hoc manner, the Commission must revisit its regulatory fee assessment procedures in light of the passage of the RBA. As originally set forth in Section 9 of the Communications Act,[10] Congress mandated that the Commission recover the costs of its enforcement, policy and rulemaking, user information services, and international activities by:

> determining the full-time equivalent number of employees performing [those activities] within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission, adjusted to take into account factors

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[8] *See, e.g.*, *April Saw a Big Spike in Stations Going Silent. Many Cited Coronavius as the Culprit*, INSIDE RADIO (April 29, 2020) (http://www.insideradio.com/free/april-saw-a-big-spike-in-stations-going-silent-many-cited-coronavirus-as-the-culprit/article_2f02ff68-89d7-11ea-aade-af03426f49c2.html).

[9] *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 27 FCC Rcd 8458, 8459, ¶ 3 (2012) ("*Reform NPRM*").

[10] 47 U.S.C. § 159(a)(1) (2017).

> that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest."[11]

As has been discussed at length in prior filings,[12] based on this language, the Commission traditionally has divided its annual appropriation among the regulatees of the named bureaus (as reorganized into what the Commission now calls its four "core" bureaus: Wireline Competition, Wireless Telecommunications, Media, and International[13]) in proportion to the number of Full Time Equivalent employees ("FTEs") in each of those bureaus, excluding FTEs attributable to the Commission's auctions program, which is separately funded.[14] The FTEs in each of the four core bureaus are considered "direct" obligations of the regulatees of that bureau.[15] All of the Commission's remaining employees are then considered "indirect" obligations, and their "cost" is split among regulatees in proportion to the number of FTEs employed by each regulatee's core bureau.

This "split" mechanism has an enormous impact on regulatory fees, with the allocation (made by the Commission with unfettered discretion and no apparent oversight) of a mere 311 of the Commission's FTEs among four core bureaus determining who bears the cost for the more than 955 indirect FTEs, as well as the cost of all physical and IT resources of the agency. Unfortunately, the Commission continues to withhold all information relating to those FTEs,

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[11] *Id.*

[12] *See* Joint Comments of the Named State Broadcasters Associations, MD Docket No. 19-105 (filed June 7, 2019), at 7-8.

[13] *FY2020 NPRM* at n.147.

[14] *See, e.g., Reform NPRM* at 8461, ¶ 7.

[15] Bureau FTEs are further broken down among the fee categories within each bureau, with those bureau employees whose work can be assigned to a single category being treated as direct employees of that category and those bureau employees whose work cannot be assigned to only one category being treated as indirect employees. Therefore, the assessment for each fee category is composed of direct FTEs and indirect FTEs from both inside and outside the core bureau. *Id.*

thereby preventing commenters from providing insight into whether those employees have been appropriately allocated among regulatees. The default result is that industries like broadcasting that struggle under heavy regulation are made to carry the lion's share of the costs of running the Commission, even those costs that have nothing to do with broadcasting. [16]

The RBA made profound changes to this regulatory fee mandate, giving the FCC far greater flexibility in creating its initial schedule of fees while directing the FCC to amend that schedule whenever needed to assure that the schedule remains focused *on the benefits to the payor of the fees received from the work of the Commission*. In this regard, there is now a complete disconnect between the regulatory fees proposed for broadcasters in the *FY2020 NPRM* and the requirements of the RBA.

Specifically, as amended by the RBA, the Communications Act at Section 9(b) now provides that the Commission "shall assess and collect regulatory fees at such rates as the Commission shall establish in a schedule of regulatory fees that will result in the collection, in each fiscal year, of an amount that can reasonably be expected to equal the amounts"[17] of the

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[16] A noteworthy example of the real-life impacts of a process that saddles broadcasters with such a large proportion of the Commission's costs can be found in the Commission's recent reallocation of 38 FTEs who work on Universal Service Fund matters from direct FTEs of the Wireline Competition Bureau to indirect obligations of all four core bureaus. *FY2017 Report and Order* at 7061-7064, ¶¶ 9-15. The rationale for the reallocation was that the Universal Service Fund benefits regulatees of almost every bureau, except the Media Bureau. The Commission simply shrugged off the inequity to broadcasters of that reallocation, apparently accepting that FTE allocations can never be "pure." *Id.* at 7062, ¶ 11. But, that reallocation was more than impure. While providing universal service is a public good, it is one that is paid for by monies collected from the American public. It is a good provided by regulatees who pass their regulatory fee costs through to subscribers on their bills. So, with the reallocation of those 38 USF FTEs to indirect FTEs, those regulatees pulled off the ultimate regulatory fee hat trick. They now receive a nearly 40% subsidy on the cost of the FCC FTEs who make the whole program possible, courtesy of Media Bureau regulatees like broadcasters, the one group that gets zero benefit from the USF. However, when broadcasters requested that FTEs associated with regulation of noncommercial broadcast stations get similar indirect status (as a group that also provides a broad public benefit but whose regulatory costs are borne solely by Media Bureau commercial regulatees), that request was inexplicably rejected. *FY2019 Report and Order* at 8196, ¶ 19. The Commission should revisit this issue as well.

[17] 47 U.S.C. § 159(b).

Commission's annual appropriation. Gone is any reference to FTEs or specific bureaus or offices of the Commission, leaving the Commission free to identify and assess all users of its services for the costs of their regulatory activity.

Then, under Section 9(d), the RBA directs the Commission to *amend* its schedule when necessary "so that such fees reflect the full-time equivalent number of employees within the bureaus and offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[18] The FCC has stated that it believes that the fact that FTEs are mentioned before the word "adjusted" means that the FCC's headcount is the key factor in determining how to assess annual regulatory fee obligations.[19] That interpretation, however, ignores the fact that FTEs are not even *mentioned* in the provision requiring the Commission to set fees, and instead show up only in the section of the law requiring amendment of the fees where the benefits provided by those FTEs no longer correspond to the benefits provided to the fee payor. The focus of Section 9(d), then, is not on raw FTEs, but on adjusting regulatory fees so that the work of those FTEs is assessed through the lens of the benefit they deliver to the payor. If the fees don't correlate with the benefit delivered, they must be amended to correct that mismatch.

III. An Adjustment Is Both Necessary and Overdue

If all regulatees received the same benefit from the Commission—for example, the ability to use their transmission equipment, wired or wirelessly—to deliver their service to the public without RF interference, then perhaps a simple focus on raw FTEs without further adjustment might be adequate. That regulatory model fairly describes many beneficiaries of Commission

[18] 47 U.S.C. § 159(c).

[19] *FY2019 Report and Order* at 8193, ¶ 8.

services, particularly those permitted to use spectrum without a license. But it is entirely inapplicable to broadcasting.

Reduced to its essence, the benefit to broadcasters of the Commission's activities is the ability to carry on a business of charging advertisers, not the public, to cover the broadcaster's cost of providing a free information and entertainment service to the American public. This is achieved through the Commission's work to create and maintain interference-free reception by viewers and listeners of free over-the-air broadcast signals. Broadcasters already pay on an application by application basis for much of this work through the payment of application processing fees. Much of the remainder of what is covered by their payment of regulatory fees is not a benefit to the broadcaster. Filling out and filing ownership report forms (which also carry an application fee despite the fact that the FCC does not process or grant them), quarterly issues/programs reports, Children's Television Programming Reports, commercial limits certifications, employment outreach reports, Class A television continuing eligibility certifications, and maintaining a public inspection file, are examples of FCC-imposed tasks that no business would perform in the absence of a regulatory mandate.

These layers of regulatory requirements and costs reduce the value of the FCC "benefit"—interference-free spectrum—by making broadcast operations less profitable, or increasingly for many small radio stations, entirely unprofitable. In a world where stations are valued and sold based on a multiple of broadcast cash flow, these regulations reduce that cash flow, and regulatory fees reduce it in the most direct manner possible, on a dollar for dollar basis.

As an example, where we apply a common deal multiple of 7 times broadcast cash flow, it can fairly be said that every dollar paid in regulatory fees directly reduces the value of that station by seven dollars. Likewise, every dollar spent complying with regulatory burdens

reduces the value of that station by seven dollars. Next, by layering on multiple ownership restrictions, the Commission artificially limits the pool of potential buyers, further depressing the sale value of a station, and further reducing the benefit of that broadcast license.

We need not debate whether these regulatory burdens are useful or beneficial to the public, because that is beside the point in setting regulatory fees. The point is that the bulk of the money spent on FTEs with regard to broadcasting is not spent on producing a benefit for the fee payor, but on reducing the benefit derived from an FCC license in an economically visceral way.

And it is not difficult to quantify the adverse economic impact of those regulatory burdens. The entire premise of the Broadcast Incentive Auction was that the Commission could purchase spectrum burdened by broadcast regulations, remove those regulations, and sell it for much more. Ultimately, the FCC paid $10.1 billion to clear 84 MHz of broadcast spectrum, and sold 70 MHz of it for broadband use at a price of $19.8 billion.[20] However, that enormous difference actually understates the reduction in benefit the FCC's broadcast rules impose. For the spectrum auction to succeed, it needed to pay broadcasters more for their spectrum than they could have sold it for as part of a going broadcast business (otherwise those broadcasters would have already sold their stations to a broadcast buyer). So we can discern that broadcast regulations reduce the "benefit" of a broadcast license by at least half, and likely more, in comparison to spectrum not so encumbered.

Unfortunately, the FCC has long been setting broadcast regulatory fees based not on the actual diminished value of that regulatorily-burdened benefit, as required by the RBA, but by

[20] *See The Incentive Auction "by the Numbers"*, FCC Fact Sheet (rel. Apr. 17, 2017) (https://www.fcc.gov/document/fact-sheet-incentive-auction-numbers).

including in the broadcaster FTE count *the cost of the personnel involved in creating and enforcing those value-diminishing burdens*. Even more perverse is that major beneficiaries of these broadcast regulations are cable, satellite, and similar Commission regulatees, all of whom competitively benefit from the FCC increasing broadcaster costs while reducing broadcaster flexibility, but who fail to pay for that added FCC benefit.

Again, this is not a question of whether these regulations are wise, justified, or otherwise benefit the public, but merely their economic reality, which is to reduce the value/benefit of a broadcast license, and then reduce it further by annually charging broadcasters not just for the benefits, as required by the RBA, but paradoxically, for the cost of these burdens as well. That is simply wrong.

Compounding that harm is the fact that broadcasters are nearly unique in lacking a subscriber base to which they can pass on that regulatory fee burden. Nor can they merely raise the cost of advertising to cover it, as they compete in advertising sales against those who don't have artificially inflated regulatory fees, and increasingly, against those who don't pay FCC regulatory fees at all.

But even if the FCC were to ignore the RBA and continue to treat the burden as an inseparable part of the benefit without adjusting the value attributed to that benefit, then surely the justification for assessing regulatory fees needs to be different for broadcasters—a service that uniquely uses its spectrum to provide a free local service to the public rather than merely maximizing the value of that spectrum like nearly every other form of FCC regulatee. Whether viewed from the RBA perspective of a burdened (lessened) benefit or, from a policy standpoint, of the public benefit of enticing entities into offering free content to the public despite the

corresponding regulatory burdens, broadcast regulatory fees should be among the lowest, not the highest, FCC regulatory fees.

Indeed, it is inconceivable that after decades of government policies to encourage the availability of radio and television service to every community in the country,[21] Congress intended to deprive local communities of access to free over-the-air broadcast service through the imposition of burdensome regulatory fees on broadcasters.

Truthfully, this fundamentally unfair approach to regulatory fees has persevered because broadcasters remain a public-spirited group, appreciate that the FCC has a job to do, and in the early years when such fees did not have to cover the full Commission appropriation, could afford to pay even unfairly inflated regulatory fees. As unregulated competition arrives from every direction, however, that is no longer the case. An economic downturn like the historic one we are experiencing now is merely the latest example of the challenges broadcasters face. The advertising base that supports free over-the-air broadcasting has all but dried up while the public flocks to the critical news, information, and entertainment broadcasters continue to provide in these tough times. For radio in particular, the well has begun to run dry, with numerous stations shutting down in the face of overwhelming economic devastation.[22] For these operators, an FCC

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[21] *See, e.g, Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167 (1952) (establishing policies for the allotment of television stations under Section 307(b)); *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 F.C.C.2d 88 (1982) (adopting priorities for the allotment of radio stations under Section 307(b)); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2567 (2011) (establishing the Urbanized Service Area Presumption to help ensure radio station licenses are not awarded to well-served urbanized areas at the expense of rural communities).

[22] *See, e.g., April Saw a Big Spike in Stations Going Silent. Many Cited Coronavius as the Culprit*, INSIDE RADIO (April 29, 2020) (http://www.insideradio.com/free/april-saw-a-big-spike-in-stations-going-silent-many-cited-coronavirus-as-the-culprit/article_2f02ff68-89d7-11ea-aade-af03426f49c2.html).

license is not the golden egg it might once have been when their only competition for advertisers was newspapers.

Yet, despite these facts, after nearly 25 years of rulemaking proceedings, studies, and tweaking of various regulatory fee formulae, Media Bureau regulatees are carrying approximately 40% of the Commission's total costs,[23] and perhaps more when application fee payments are considered. More specifically, the Commission has proposed that broadcasters by themselves pay FY 2020 regulatory fees of $56,920,000, representing 17% of the FCC's proposed FY 2020 budget. To put that in perspective, as we conclude the TV repack, radio and TV broadcasters combined will have approximately 210 MHz of spectrum cumulatively allocated for their services out of *300 GHz* of allocated spectrum.[24] In other words, broadcasters are using just 0.07% of allocated spectrum, while covering at least 17% of the FCC's entire budget *and* offering a free service to the public.

Meanwhile, the FCC has not only continued repacking TV licensees into a smaller spectrum band, inevitably increasing interference, but has been using broadcasters' regulatory fee payments to fund rulemakings intended to increase the number of white spaces devices sharing their spectrum and thereby creating the risk of yet further interference. So, looping back around to where this discussion started, the one benefit the Commission can provide to

[23] While the *FY2020 NPRM* pegs the percentage at 37.30%, that is of the FCC's appropriation, which exceeds the Commission's budget request by several million dollars. Therefore, of what the Commission actually expects to need for its FY 2020 operations, media's portion is closer to 40%. *See* FCC, Fiscal Year 2020 Budget in Brief (March 2019) at 5 ("The Commission requests $335,660,000 in budget authority from regulatory fee offsetting collections") (https://docs.fcc.gov/public/attachments/DOC-356607A2.pdf).

[24] *See* United States Frequency Allocations, NTIA (Jan. 2016) (https://www.ntia.doc.gov/files/ntia/publications/january_2016_spectrum_wall_chart.pdf).

broadcasters—interference free spectrum—continues to be diminished while the Commission proposes inexplicably higher regulatory fees for broadcasters. This cannot continue.

IV. Immediate Action Steps Toward a More Defensible Regulatory Fee Structure

In light of the above, the broadcast annual regulatory fee schedule that has been established through the Commission's Section 9(b) process truly defies logic. Broadcasters' regulatory fee burden has increased year over year in almost every year and in every category since 2012, even though the Commission's appropriation remained the same (or dropped) in all but two years, where its appropriation increased largely to cover the temporary costs associated with its office move.[25]

Moreover, broadcaster regulatory fees continue to increase despite *decreases* in both the amount of spectrum broadcasters occupy and in their freedom from interference. And broadcaster annual regulatory fees go up even though broadcasters are paying ever-increasing *application* fees as well.[26] Besides the gross unfairness of such an approach, its ultimate impact over time is the senseless destruction of free local broadcast service while providing the benefit of fee-free unlicensed spectrum to behemoth tech companies that are the very entities diverting the lifeblood of broadcasting—advertising dollars—from local stations.

[25] From 2012 to 2015, the Commission's appropriation was $339,844,000 each year. In 2016 and 2017, its appropriation increased to $384,012,497 and $356,710,992, respectively. In 2018, the appropriation dropped to $322,035,000 before settling at the $339,000,000 amount for both FY 2019 and FY 2020.

[26] While the Commission has said that application fees and regulatory fees are not interchangeable and that it must collect its full appropriation regardless of application fees received (*see, e.g., FY2019 Report and Order* at 8205, ¶ 42), one cannot assess the full contribution broadcasters are making, the diminished *benefit* they receive as a result, and, quite simply, the extent to which they are paying for the whole of the FCC's budget, without considering the application fees that they also pay.

It's time to correct that situation. While it may take time for the FCC to devise and implement an approach that fully addresses the benefits being received by non-licensees, there are steps the Commission can immediately take to at least reduce the harm to broadcasters and broadcast service. As a result of the RBA, Section 9(d) provides the means by which to "adjust" the illogical results arising from the Commission's regulatory fee schedule. What's more, it demands that the Commission make such adjustments where it is clear, as here, that something is terribly out of whack.

First, to the extent it has not already done so, the Commission should immediately remove all FTEs whose work is paid for through application fees from the direct FTE count assessed against broadcasters. The work of these individuals is already paid for. It is unfair to require any regulatee to pay twice for their (admittedly excellent) work, and then have those already double-dipped employees be triple-dipped by inflating the headcount used to calculate Media Bureau regulatees' portion of all "indirect FTEs" as well.[27] At a bare minimum, if the Commission cannot determine what number of FTEs these paid-up employees represent and remove them from the direct FTE headcount, then it should issue a credit against the amount of regulatory fees it otherwise collects from broadcasters each year in an amount that equals the ownership report and application filing fees paid by broadcasters in that year.

Second, to the extent it does not already do so, the Commission should treat any rulemaking or other proceeding that has the potential to reassign spectrum to a use other than the one it is currently allocated for, including amendments to the FM and TV Table of Allotments, as being part of its auction program and remove the FTEs involved in those proceedings from the

[27] For example, the filing fees paid with a single broadcast merger can easily cover the cost of at least one FTE for that year. If not removed, that one FTE will be considered a "direct" employee of the Media Bureau and add yet further to the proportion of indirect FTEs that Media Bureau regulatees must fund.

direct headcounts of the core bureaus. As a result of the Commission's auction authority, any new use of spectrum will be auctioned off, generating millions, or more likely, billions, of dollars for the US Treasury. The work of the FCC's FTEs on such proposals should be funded through the FCC's "auction budget" and not be charged against the Commission's existing regulatees.

In that regard, the Commission has asked how it can possibly capture the benefit to new entrants and beneficiaries of its work if those entities do not yet (or ever) hold licenses against which the FCC can charge regulatory fees. The Commission has used this administrative challenge as a reason to continue to charge its overhead in modernizing spectrum usage and enabling unlicensed uses to its existing regulatees. But, if the Commission does not charge these costs against the auctions program, the old guard of regulatees, the licensees who lose rather than gain in these spectrum proceedings, see their benefits diminish while paying for all of the Commission's activities designed to create opportunities for others, including for the US Treasury. If the Commission waits until the auction occurs, and then only recoups the costs of running the auction and any reimbursement process, then years of prior work, legal analysis, engineering study, and rulemaking processes will have unfairly been charged at about a 40% rate to Media Bureau regulatees.

Admittedly, some rulemaking petitions or proposals may not result in an auction. Some may involve the reassignment of spectrum to benefit public safety or other exempt services for which auction payments will never be received. But they are part of the larger auction universe that has been so remunerative to the U.S. government, and which will continue to be so even without requiring broadcasters to subsidize it. Just as fair regulatory fees may be the price of being in the broadcast business, covering the costs of spectrum proceedings that may result in

spectrum reallocations and auctions needs to be the FCC's cost of being in the auction business. More specifically, since there is generally no benefit, only detriment, to existing regulatees from such proceedings, continuing to send the bill for such proceedings to existing regulatees directly conflicts with the RBA's mandate to correlate regulatory fees with the benefit received by the payor.

V. The FCC Should Ensure That Its Processes Do Not Disadvantage Small Payors Seeking Relief

As the Commission acknowledged,[28] payors may be especially challenged in trying to meet their regulatory fee obligations this year. The FCC's processes should not add to that challenge. Recently, the FCC changed its fee waiver procedure so that any party already in default on payments to the Commission cannot seek a waiver of the current year's fees.[29] The unfortunate effect of this policy is that those who are in the most need are denied the opportunity to present their case to the FCC, recover their financial footing, and be able to resume making payments in future years. Instead, their debts will pile up, accruing interest and penalties, and all without any way for the debtor to communicate its situation to the FCC and seek any appropriate relief.

The FCC should revisit this policy and, particularly for this extraordinary pandemic year, allow those with existing unpaid FCC debts to file requests for waiver so that, if warranted, the FCC can extend relief. Allowing debtors to file for the waiver does not mean that the FCC must grant it, and their debtor status might weigh against awarding relief in individual cases. But to

[28] *FY2020 NPRM* at ¶ 73.

[29] *See, e.g.*, Regulatory Fee Fact Sheet, Procedures for Filing Requests for Waiver, Deferral and Reduction of Annual Regulatory Fees (rel. Sept 18, 2019) at 2.

foreclose the opportunity to make this showing and receive any relief seems shortsighted given the importance of preserving broadcast service in these difficult times.

Similarly, when considering requests for waiver, deferral, or reduction of regulatory fees, the FCC should take into account any month(s) that a broadcast station was off the air during the fiscal year, and the impact of being dark on the broadcaster's ability to create a steady stream of advertising revenues with which to pay its regulatory fees. The Commission has said that bankruptcy or receivership may be evidence of financial hardship warranting regulatory fee relief, but that it is not determinative of that fact, and entities seeking regulatory fee relief must submit financial documentation to support their requests for relief.[30] While many businesses can continue to operate while in bankruptcy or receivership, a broadcast station that is off the air is entirely without revenue. The Commission should therefore waive fees that would have otherwise accrued during periods of time that a station is off the air.

With respect to the mechanics of seeking regulatory fee relief, the FCC should simplify its processes to avoid foreclosing relief to those who need it. According to the FCC's rules, anyone seeking a waiver of regulatory fees must file a Petition for Waiver and pay the fees at the time of the filing, or file a separate Petition for Deferral of payment of the fees.[31] The FCC should streamline these requirements to allow payors to file a simple letter request combining both the request for waiver and the request for deferral into a single filing. Such a process will be less burdensome for both the regulatee and the FCC.

Finally, the FCC should be proactive in tracking the impact of annual regulatory fee increases on payors who currently fall below the $1,000 de minimis threshold. While the

[30] *See FY2019 Report and Order* at 8202, ¶ 51.
[31] *Id.*

Commission's appropriation has remained steady, increases in various broadcast fee categories occur every year and payors in those categories have little warning and no ability to control whether their category will be one that is suddenly assessed a fee of more than $1,000. Without constant vigilance, the ever-creeping nature of the FCC's regulatory fee assessments will completely undo its de minimis waiver policy and potentially plunge small licensees who have not budgeted for a regulatory fee into financial disarray.

CONCLUSION

For the reasons stated above, the State Associations respectfully request that the Commission amend its proposed FY 2020 fee schedule and its regulatory fee processes consistent with these Joint Comments.

Respectfully submitted,

THE STATE BROADCASTERS ASSOCIATIONS

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