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AN UPDATE ON COMMUNICATIONS LAW & ISSUES
May 2021

Increases Proposed for 2021 Regulatory Fees

The FCC has begun the mandatory process of collecting regulatory fees for the fiscal year ending September 30, 2021. Congress has instructed the Commission to offset its operating costs this year by collecting $374 million from the entities that it regulates. By comparison, the figure collected for fiscal year 2020 was $339 million. The FCC has no discretion about the total amount that it must collect. However, it does have the ability to decide how much to charge the various categories of its regulatees. The proposals for how to divide the burdens for this fiscal year are set out in *Notice of Proposed Rulemaking* (FCC 21-49) in Docket 21-190.

Under the FCC's proposal, fees will be calculated on the basis of staff time, measured in full time equivalents ("FTEs"), estimated to be necessary to serve each regulated entity. The Commission identifies the number of FTEs employed within each of its four core bureaus (Media, International, Wireless Telecommunications, and Wireline Competition), and further subdivides them within each core bureau to account for regulatory fee categories of regulatees. The FTEs in the non-core bureaus and offices will be appropriated proportionately among the core bureaus. These calculations result in the appropriation among the core bureaus of

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Digital AM Report Form Now Available

In October 2020, the FCC amended its rules to permit AM radio stations to operate in an all-digital mode. No advance application is required to be filed with the Commission and no advance consent is required. However, 30-days advance notification to the FCC is required. The Commission created a new Form 355-AM for this purpose. While the rules allowing voluntary all-digital AM broadcasting became effective in January, the new version of the Form 355-AM had to be reviewed and approved by the Office of Management and Budget under the Paperwork Reduction Act. Until now, stations submitting this notification had to include exhibits with the old version of the form to provide additional information. The review has now been completed and the new Form 355-AM became effective on April 29. The form is

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Noncommercial FM Filing Window Will Be November 2 – 9

The FCC's Media Bureau has scheduled a filing window from November 2 to November 9 (closing at 6 p.m. Eastern Time) for applications for new noncommercial FM stations and applications for major changes to such stations. This action was announced in a *Public Notice* (DA 21-463). This filing window will be limited to proposals for stations in the portion of the FM band reserved for noncommercial broadcasting, from 88 MHz to 92 MHz. The Bureau announced that it would provide additional detailed information about filing procedures and requirements in a future public notice.

In a simultaneously released *Public Notice* (FCC 21-43) in Docket 20-343, the full Commission affirmed and adopted its previously announced tentative conclusion that applicants in this filing window will be limited to a maximum of 10 applications. During a public comment period, proposals had been submitted by commenters to set the maximum at five applications per party on the one hand, and on the other,

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FCC Solicits Comment on CALM Act Rules

By way of a *Public Notice* (DA 21-447) in Docket 11-93, the FCC's Media Bureau has invited comment from consumers and the television industry on whether any updates are needed to the Commission's rules implementing the Commercial Advertisement Loudness Mitigation (CALM) Act. The CALM Act was enacted just over 10 years ago to protect viewers from excessively loud commercials. In 2011, the Commission adopted implementing rules (Sections 73.682(e) and 76.607(a)) that require television stations and multichannel video programming distributors ("MVPDs") to ensure that all commercials are transmitted to consumers at the appropriate loudness level in accordance with the industry standard mandated in the statute.

The FCC incorporated into its rules by reference and made mandatory the Advanced Television Systems Committee A/85 Recommended Practice, which describes how the television industry can monitor and control the audio of digital television programming. The rules establish a safe harbor for both locally inserted commercials (stations and MVPDs will be deemed in compliance if they demonstrate that they use certain equipment in the ordinary course of business), as well as for embedded commercials that television stations and MVPDs pass through from programmers (compliance can be demonstrated through certifications and periodic testing).

These rules have been in effect for a number of years and have been revisited only once since going into effect, at which point minor changes were adopted. The FCC seeks comment on the extent to which these rules have been effective in preventing loud commercials. The Commission solicits input from all stakeholders on whether the CALM Act rules are effectively serving their intended purpose and on specific areas in which commenters believe updates are needed given improvements in technology or new industry practices. Comments filed will help inform the Commission's determination of whether to take additional actions—and if so, what measures should be proposed or taken—in furtherance of the purpose of the CALM Act to prevent television stations and MVPDs from transmitting commercial advertisements at louder volumes than the program material they accompany.

The deadline for filing comments in Docket 11-93 is June 3. Reply comments will be due by July 9.

Rules Proposed for New Wireless Mic Technology

The FCC has proposed amendments to its rules to allow the implementation of a new technology for wireless microphones to be deployed on a secondary basis in spectrum allocated to television broadcasting as well as other frequencies. In a *Notice of Proposed Rulemaking* (FCC 21-46) in Docket 21-115, the Commission proposes to define a new class of wireless microphones which electronics manufacturer Sennheiser Electronic Corporation has termed as a "Wireless Multi-Channel Audio System" ("WMAS"). WMAS digitally combines the signals of multiple wireless microphones into a wider channel than currently permitted for wireless mics in the TV bands. This proceeding is an outgrowth of a Petition for Rulemaking on this topic that Sennheiser filed with the FCC in 2018.

Under the FCC's current rules for wireless microphones, each device operates on a discrete channel with a bandwidth of 200 kilohertz. Sennheiser explains that WMAS digitally combines the signals from multiple devices into a six-megahertz channel. This eliminates intermodulation and permits denser spectrum use while lowering the average power spectral density across the channel. To ensure that the full benefit of spectral efficiency is realized, Sennheiser urges the FCC to require WMAS devices to operate with a minimum of 12 wireless microphones in a six-megahertz channel. Sennheiser asserts that this technology would improve spectrum efficiency by accommodating a larger number of devices in a six-megahertz channel and thereby help to mitigate what is described as a severe shortage of spectrum for wireless microphones.

The FCC proposes that the six-megahertz channel occupied by any individual WMAS device in the television band would be completely contained within one television channel and would not be permitted to spill into an adjacent channel. As with currently authorized wireless mics in the television band, WMAS would operate on a secondary basis. The Commission emphasizes that it does not intend to alter existing spectrum rights or expectations regarding access to and availability of spectrum for all users, including broadcast television.

The FCC asks for public comment on this proposal, including a variety of technical aspects concerning the deployment and use of WMAS devices. Comments will be due 30 days after notice of this proceeding is published in the Federal Register. The deadline for reply comments will be 60 days after that publication.

DISH Faces Discrimination Allegation

The United States District Court in Indianapolis has denied DISH Network's motion to dismiss a lawsuit in which the plaintiff, Circle City Broadcasting ("CCB"), alleges that DISH discriminated against it in the course of retransmission consent negotiations. DISH argued that CCB's Complaint failed to state a claim for which relief could be granted, citing Section 12(b)(6) of the Federal Rules of Civil Procedure.

CCB is an African American-owned company that purchased two television stations in the Indianapolis market, WISH-TV and WNDY-TV, from Nexstar Broadcasting, Inc. After the ownership transition, DISH declined to enter into a retransmission consent agreement for the stations comparable to the agreement it had had with Nexstar. CCB claimed that DISH offered it only "pennies on the dollar compared to the rates it [DISH] paid the prior broadcaster, Nexstar," a white-owned company. CCB was joined in the suit by the National Association of Black Owned Broadcasters.

CCB alleged that DISH engaged in intentional racial discrimination in contracting, thereby depriving CCB of its statutory civil rights to make and enforce contracts. CCB asserted that the transition from Nexstar had been "seamless." It said that the stations suffered no reduction in the value and quality of the programming. According to CCB, there was immediate improvement because CCB added value to both stations, including the production of "more local news content than any station in the country," the live broadcast of local high school sporting events, "enhanced college and professional sporting events coverage," and adding "the only multi-cultural reporter" and "the only medical reporter" in the state of Indiana. While CCB was unable to persuade DISH to agree, it did secure a long-term agreement with cable television service provider Comcast. On these allegations, CCB pleaded the probability that but for DISH's racial discrimination, the two parties would have entered into a carriage agreement.

In its motion to dismiss the suit, DISH argued that CCB had not shown that there was no reason other than discrimination to explain its refusal to offer CCB the same carriage deal that it had with Nexstar. It suggested that there were other factors that affected its view of the value of carrying CCB's stations. Notably, Nexstar owns some 200 stations nationwide, reaching 40% of U.S. households and thus commands far more leverage than a broadcaster that owns two local stations unaffiliated with any of the four major networks.

Citing precedent, the court concluded that the plaintiffs had pled enough in the way of facts to present a minimal circumstantial case for intentional discrimination. At this early stage of this proceeding, the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to proceed to trial to offer evidence in support of its claims. The plaintiff's claim need only be plausible. At this stage, the plaintiff does not have to prove probability.

With the denial of the motion to dismiss, this litigation can proceed. However, DISH indicated in a footnote in its pleadings that it intended to file a motion for summary judgment on the basis of the pleadings. In finding for the plaintiffs in this order, the court also observed that "whether the plaintiffs' claims can survive summary judgment is a matter for another day."

This decision is *Circle City Broadcasting v DISH Network*, 2021 U.S. Dist. LEXIS 61593.

FM Allotments Reinstated

The Audio Division of the FCC's Media Bureau has released an *Order* (DA 21-446) reinstating six previously occupied, but now vacant, allotments to the FM Table of Allotments. These allotments were formerly occupied by authorizations that have been cancelled. They now join the queue to be available for sale in a future auction. These allotments are listed below.

COMMUNITY	CHANNEL
Visalia, CA	241A
Yampa, CO	277C3
Carrizozo, NM	261C2
Beulah, ND	250A
Girard, TX	248C3
Kermit, TX	289C3

DEADLINES TO WATCH

License Renewal, FCC Reports & Public Inspection Files

June 1 — Deadline to file license renewal applications for radio stations in **Arizona, Idaho, Nevada, New Mexico, Utah,** and **Wyoming** and television stations in **Michigan** and **Ohio.**

June 1 — Deadline to place EEO Public File Report in Public Inspection File and on station's Internet website for all nonexempt radio and television stations in **Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia,** and **Wyoming**.

June 1 — Deadline for all broadcast licensees and permittees of stations in **Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia,** and **Wyoming** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).

June — Radio stations in **Arizona, Idaho, Nevada, New Mexico, Utah** and **Wyoming**, and television stations in **Michigan** and **Ohio** begin broadcasting post-filing announcements within five business days of acceptance of application for filing and continuing for four weeks.

July 10 — Deadline to place quarterly Issues/Programs List in Public Inspection File for all full service radio and television stations and Class A TV stations.

July 10 — Deadline for noncommercial stations to place quarterly report re third-party fundraising in Public Inspection File.

July 10 — Deadline for Class A TV stations to place certification of continuing eligibility for Class A status in Public Inspection File.

Proposed Amendments to the Television Table of Allotments

The FCC is considering petitions to amend the digital television Table of Allotments by changing the channels allotted to the communities identified below. The deadlines for submitting comments and reply comments are shown.

COMMUNITY	STATION	PRESENT CHANNEL	PROPOSED CHANNEL	COMMENTS	REPLY COMMENTS
Oswego, IL	WAOE	---	10	May 12	May 27
Peoria, IL	WAOE	10	---	May 12	May 27
St. George, UT	KMYU	9	21		May 13
Jonesboro, AR	KAIT	8	27		May 17
Hannibal, MO	KHQA-TV	7	22		May 17
Amarillo, TX	KVII-TV	7	20		May 17
Freeport, IL	------	---	9	May 24	June 7
Schenectady, NY	WRGB	6	35	May 24	June 7
Bristol, VA	WCYB-TV	5	35	May 24	June 7
Eugene, OR	KVAL-TV	13	28	May 27	June 11
Boise, ID	KBOI-TV	9	20	May 28	June 14
Missoula, MT	KECI-TV	13	20	June 1	June 14
Eagle River, WI	------	----	26	June 1	June 14
New Orleans, LA	WYES-TV	*11	*28	June 2	June 17
Butte, MT	KTVM-TV	6	20	June 9	June 24
Redding, CA	KRCR	7	15	FR+30	FR+45
Quincy, IL	WGEM-TV	10	19	FR+30	FR+45

** Channel reserved for noncommercial broadasting*
FR+N means the filing deadline is N days after publication of notice of the proceeding in the Federal Register.

DEADLINE FOR ANALOG LOW POWER TV AND TV TRANSLATOR STATIONS TO TRANSITION TO DIGITAL MODE

JULY 13, 2021

DATES FOR AUCTION 109

UPFRONT PAYMENTS DUE	**6:00 PM ET, JUNE 16**
MOCK AUCTION	**JULY 23**
BIDDING BEGINS	**JULY 27**

DEADLINES TO WATCH

Deadlines for Comments in FCC and Other Proceedings

(All proceedings are before the FCC unless otherwise noted.)

DOCKET	COMMENTS	REPLY COMMENTS
Docket 15-94; NOI (FCC 21-36) Emergency Alert System	May 14	June 14
Docket 21-90; NPRM (FCC 21-49) Regulatory fees proposed for FY 2021	June 3	June 18
Docket 11-93; Public Notice (DA 21-447) Rules implementing CALM Act	June 3	July 9
Docket 20-443; NPRM (FCC 21-13) Allocating terrestrial mobile services to share spectrum with satellite services	FR+30	FR+60
Docket 21-115; NPRM (FCC 21-46) Updating rules for wireless microphones	FR+30	FR+60

FR+N means the filing deadline is N days after publication of notice of the proceeding in the Federal Register.

Paperwork Reduction Act Proceedings

The FCC is required by the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection with certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

TOPIC	COMMENT DEADLINE
Short form application for assignments & transfers of control, Form 2100, Schedule 316	June 11
Closed-captioning in Internet-delivered video programming	June 14
Self-identification re mid-term EEO review, Section 73.2080(f)(2)	June 22
Equipment tests, Section 73.1610	July 6

Cut-Off Date for AM and FM Applications to Change Community of License

The FCC has accepted for filing the applications identified below proposing to change the community of license for each station. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **June 22, 2021**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL	FREQUENCY
Paris, KY	Stamping Ground, KY	WGKS	245	96.9
Stamping Ground, KY	Paris, KY	WXLO	241	96.1
Horseheads, NY	Enfield, NY	WMTT-FM	266	101.1
Monterey, TN	Algood, TN	WLIV-FM	245	96.9
Seattle, WA	Kent, WA	KKDZ	N/A	1250

FILING WINDOW FOR APPLICATIONS FOR NEW AND MAJOR CHANGES TO NONCOMMERCIAL FM STATIONS

NOVEMBER 2 – 9, 2021

Increases Proposed for 2021 Regulatory Fees *continued from page 1*

the portion of the total amount to be collected as follows: Media Bureau, 36.39%, $136.1 million; International Bureau, 8.56%, $32 million; Wireless Telecommunications Bureau, 22.33%, $83.5 million; and Wireline Competition Bureau, 32.72%, $122.4 million. Within each bureau, the bureau's allocation is divided among regulatory fee categories. The amount assigned to each category is then divided among the individual entities within the category. This is the methodology that the Commission has repeatedly used in the past, but continues to invite comment about it.

The regulatory fees for full power broadcast television stations are based on the specific population within the station's service area. This year, the Commission proposes to set the fee for each station by multiplying the service area population by $0.008525. Last year, the multiplier was $0.007837. The population data are derived from the Commission's TVStudy database. Using this formula, the FCC has calculated the proposed fee for each full power station. For stations in Puerto Rico, the Commission proposes to take into account the objectively measurable reduction of 16.9% in the island's population since the population was counted for the figures used in the TVStudy. The proposed fee for each station can be found in Appendix F attached to the *Notice of Proposed Rulemaking*, available on the FCC's website at https://www.fcc.gov/document/assessment-and-collection-regulatory-fees-fiscal-year-2021.

The table at the end of this article shows the regulatory fees proposed for fiscal year 2021 for most types of authorizations of interest to broadcasters other than full power television licenses. For comparison, the fees imposed for fiscal year 2020 are also shown. There is an increase for every type of authorization.

The FCC seeks comment on whether it should extend to the FY 2021 regulatory fee season the temporary measures adopted for FY 2020 to provide relief to regulatees whose businesses have suffered financial harm due to the pandemic. Such measures included waivers, deferrals, installment payment plans and reduced interest on late payments. The Commission has only granted financial hardship waivers in the past when the requesting party has shown that it lacks sufficient funds to pay the regulatory fee and simultaneously to maintain service to the public.

Looking forward to 2022, the FCC proposes to streamline the fee calculation procedure for full power television licenses. The Commission observes that the current methodology for determining the television regulatory fees has been burdensome for both the Commission and licensees. After researching the specific population within the service area, a precise fee is calculated for each station. The list of the stations and their respective fees runs for 50 pages, all of which must be published in the Federal Register. Aside from the resources devoted to developing this list, the Commission says that it has been the source of considerable confusion for fee payers.

The Commission proposes a solution to these problems which would become effective for fiscal year 2022. Under this proposal, television stations would be categorized in broad tiers related to ranges of the size of the service area population rather than pegging each station to its specific service area population. This arrangement would be similar to that used for radio. The table below shows the population tiers and the suggested regulatory fee for a full power television station in each tier. This is a proposal for 2022 and would have no effect upon the fee schedule for fiscal year 2021.

PROPOSED TELEVISION FEE TIERS FOR FY 2022

POPULATION SERVED	PROPOSED FEE
0-75,000	$ 400
75,001-150,000	925
150,001-500,000	2,625
500,001-1,500,000	8,175
1,500,001-3,000,000	18,000
3,000,001-5,000,000	32,225
5,000,001-7,000,000	50,975
7,000,001-10,000,000	70,150
10,000,001-15,000,000	93,100
15,000,001+	154,525

The Commission is required by law to collect the $374 million total set by Congress. However, it has discretion in most other matters regarding the collection process and solicits public comment on these proposals. Comments on this proposal must be submitted by June 3. June 18 is the deadline for reply comments.

Upon evaluation of the comments, the FCC will adopt a fee schedule and set a payment due date, which will probably fall in September. Fees will be calculated on the basis of the status of the authorization as of October 1, 2020. Nonprofit and governmental entities are exempt from regulatory fees, even with respect to commercial stations that they may own.

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Increases Proposed for 2021 Regulatory Fees *continued from page 6*

PROPOSED FCC REGULATORY FEES FOR FISCAL YEAR 2021

TYPE OF AUTHORIZATION	PROPOSED FY2021	ACTUAL FY2020
Full Power TV Construction Permit	$5,150	$ 4,950
Class A TV, LPTV, TV/FM Translator & Booster	350	315
AM Radio Construction Permit	660	610
FM Radio Construction Permit	1,150	1,075
Satellite Earth Station	585	560

PROPOSED FY 2021 REGULATORY FEES FOR RADIO

POPULATION SERVED	AM CLASS A	AM CLASS B	AM CLASS C	AM CLASS D	FM A, B1, C3	FM B,C,C0,C1,C2
0-25,000	$ 1,050	$ 760	$ 660	$ 725	$ 1,150	$ 1,325
25,001-75,000	1,575	1,150	990	1,100	1,725	2,000
75,001-150,000	2,375	1,700	1,475	1,625	2,600	2,975
150,001-500,000	3,550	2,575	2,225	2,450	3,875	4,475
500,001-1,200,000	5,325	3,850	3,350	3,675	5,825	6,700
1,200,001-3,000,000	7,975	5,775	5,025	5,500	8,750	10,075
3,000,001-6,000,000	11,950	8,650	7,525	8,250	13,100	15,100
6,000,000+	17,950	13,000	11,275	12,400	19,650	22,650

ACTUAL FY 2020 REGULATORY FEES FOR RADIO

POPULATION SERVED	AM CLASS A	AM CLASS B	AM CLASS C	AM CLASS D	FM A, B1, C3	FM B,C,C0,C1,C2
0-25,000	$ 975	$ 700	$ 610	$ 670	$ 1,075	$ 1,225
25,001-75,000	1,475	1,050	915	1,000	1,625	1,850
75,001-150,000	2,200	1,575	1,375	1,500	2,425	2,750
150,001-500,000	3,300	2,375	2,050	2,275	3,625	4,150
500,001-1,200,000	4,925	3,550	3,075	3,400	5,450	6,200
1,200,001-3,000,000	7,400	5,325	4,625	5,100	8,175	9,300
3,000,001-6,000,000	11,100	7,975	6,950	7,625	12,250	13,950
6,000,000+	16,675	11,975	10,425	11,450	18,375	20,925

Digital AM Report Form Now Available *continued from page 1*

to be filed electronically in the FCC's Consolidated Database System ("CDBS").

The 30-day advance-notice period is for (1) potentially affected stations to collect baseline data on the current listenable coverage area to support any subsequent interference complaint, and (2) notifying the public about the change in service, including the fact that there will no longer be an analog signal. The Form 355-AM is to be used in connection with the following changes: (1) the commencement of new all-digital operation, (2) an increase in nominal power for an all-digital AM station, or (3) a transition from core-only to enhanced operating mode. The FCC will publish notifications in a public notice, and the new operation may not begin until 30 days after the date of the public notice.

Advance notice is not required for other types of changes in digital operations, but the Form 355-AM must be filed within 10 days of implementing other changes, including (1) any reduction in nominal power of an all-digital AM station, (2) transition from enhanced to core-only operating mode, or (3) reversion from all-digital to hybrid or analog operation.

A station commencing new all-digital operations must use the 30-day period between notification and start-up to provide reasonable notice to the listeners that the station will be converting to all-digital operations and that the analog signal will terminate. Stations have flexibility in their choice of how to notify their audiences, including on-air and website announcements. The FCC will presume notice is sufficient if the broadcaster provides at least the same amount of notice as that required for most other types of applications.

Noncommercial FM Filing Window Will Be November 2 – 9 *continued from page 1*

to all allow an applicant to file 10 "primary applications" and an unlimited number of additional "non-primary" applications. The non-primary applications would be limited to areas outside of the home counties of any rated Nielsen Audio market, and would be subject to dismissal if they became involved in a mutually exclusive group that could not be resolved by way of a technical amendment. The Commission concluded that the 10-application cap would strike a reasonable balance between encouraging new service to the public and curbing speculation, with an eye toward mitigating the prospect for delay related to resolving mutually exclusive groups.

The Commission's normal attribution rules will govern how applications may be counted against an applicant's 10-application limit. For instance, the participation of a corporation's officer or board member in an unrelated application will cause the corporation to have an attributable interest in the otherwise unrelated application which will count as part of its 10-application cap. If the Commission finds that an applicant has an attributable interest in more than 10 applications, it will dismiss all but the first 10 to be filed.