

FCC Moves to Add New Fees (and Lower the Cost of Others)

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The Federal Communications Commission (“FCC” or the “Commission”) has released a [Notice of Proposed Rulemaking](#) (NPRM) proposing the first major overhaul of FCC application fees in 30 years. Licensees (and hopeful licensees) should take heed: while certain fees are proposed to be lowered, many are proposed to increase, some by a substantial amount. Of particular interest are numerous new fees proposed for certain applications that, until now, have had no associated filing fees.

For example, wireless providers might feel some heartburn digesting the FCC’s proposal to begin charging application fees of “geographic-based services that do not have fees [such as] the Advanced Wireless Service, Broadband Personal Communications Service, and the 600 MHz, 700 MHz, 3.5 GHz, and 3.7-4.2 GHz Services...” The fee for Common Carrier tariff filings is slated to be lowered from \$960 to \$930, but the FCC proposes new, more substantial fees for “complex” tariff filings -- as much as \$6,540 for large local exchange carriers (LECs) and \$3,270 for smaller entities. If the FCC gets its way, Voice over Internet Protocol (VOIP) providers will have to start paying a fee for numbering authorization.



On the broadcast media side, filing fees for Class A television stations are proposed to be moved from the Low Power TV (LPTV) category to the full power TV category, raising fees for minor facilities changes from zero to \$1,335, and license assignments would increase from \$160 to \$1,245. New fees would be imposed on pre-auction short-form radio and TV applications and on applications for declaratory rulings to permit foreign media ownership, and FM translator minor change application fees would increase from zero to \$210. Satellite operators might be the only group that sees a substantial gain from the proposed fee changes: whereas they currently pay \$136,930 to apply to launch a communication satellite, the FCC proposes to reduce the fee to \$3,555.

The proposed new fees all have their genesis in the RAY BAUM’S Act of 2018, which directs the Commission to, among other things, evaluate fees and propose changes to better reflect actual costs associated with the processing of applications by the Commission. The FCC explains what it thinks its costs are, but with no explanation or analysis of how it came up with the numbers. As seen in ongoing disputes between the National Association of Broadcasters and the FCC over annual regulatory fees, there are real questions about the Commission’s methodologies when it comes to cost calculations. And it begs the question: were the staff costs used to come up with regulatory fees the same ones used here? In other words, is the FCC proposing to charge licensees fees *twice* for the *same* staff hours?

We encourage FCC license holders to review the proposed fee changes and consider commenting if they feel the changes are not justified. The deadline for comments has not yet been announced but likely will be within the next 60 days.

RMLC and SESAC Strike New Music License Agreement

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The uncertainty regarding the rates that commercial radio broadcasters will pay to play music in the repertoire of SESAC, Inc. (SESAC) is over. Following extensive negotiations, the Radio Music License Committee (RMLC) and SESAC reached a [new agreement](#) extending the rates and terms of their existing music license agreement for commercial radio stations. That comes as welcome news for the radio industry, as the current rates were the result of a heavily litigated arbitration process and reflected a significant reduction of the rates that SESAC previously had demanded that radio broadcasters pay for its catalog.

The new agreement, which is retroactive to 2019 and expires in 2022, largely rolls forward the prior rates and terms for public performances of works in SESAC’s repertoire that are made via radio broadcasting and “New Media Transmissions,” which include not only non-subscription transmissions over the Internet, wireless data networks, or similar means (such as simulcasting) but also:

- (a) “transmissions in response to a request by a listener or user for playback or replay of previously transmitted Radio Broadcasting programs or radio-style podcasts”; and
- (b) “ancillary, incidental audio-visual content displayed in conjunction with New Media Transmissions on or through [a] Station’s ... primary website.”

The RMLC-SESAC license fee remains at 0.2557% of net revenue, and All-Talk stations, as defined in the agreement, will continue to pay a rate of 0.0575% of revenue. Stations also will continue to file Annual Reports, which will be due by April 1 of the year following the year for which the report covers. Therefore, the 2020 Annual Report will be due on April 1, 2021.

Notwithstanding the inclusion of certain types of podcasts under the definition of New Media Transmissions, stations should proceed with caution before relying only on the SESAC license agreement when producing content such as podcasts. A SESAC license covers public performance rights, but including music in a podcast, which can be downloaded, played on demand, etc., may raise other copyright issues relating to reproductions and derivative works. Therefore, the delivery of podcasts may require other copyright licenses in addition to a public performance license from SESAC.

The rates and terms reflected in the RMLC-SESAC agreement represent the RMLC’s hard-fought efforts to reduce the fees demanded by SESAC to somewhat more competitive levels as a result of antitrust litigation filed against SESAC several years ago, which culminated in settlement and an arbitration process, where these rates were first set. Stations that do not opt in to the RMLC-SESAC license agreement may end up paying significantly higher license fees than those that the RMLC was able to obtain. Be aware, however, that the agreement between RMLC and SESAC allows the RMLC to charge stations an administrative fee.

Keep in mind that license agreements negotiated between the RMLC and both ASCAP and BMI will expire at the end of 2021. (Note: The National Religious Broadcasters Music License Committee negotiates separately with ASCAP and BMI.)

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Spectrum Scarcity? What Spectrum Scarcity?

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The Federal Communications Commission (“FCC”) under Chairman Pai has been nothing if not relentless in its quest to seek out underused or vacant spectrum and repurpose it for 5G uses. To that end, the FCC adopted at its September 30, 2020 open meeting some pre-holiday gifts for spectrum-hungry carriers. By two [Report and Orders/ Further Notices of Proposed Rulemaking](#) (“NPRM”) the FCC is planning to make 150 MHz of prime mid-band spectrum available for commercial use. Having already reallocated the low hanging spectrum fruit which was free of incumbent users, the FCC is now increasingly having to look at evicting current users who are not making sufficient use of the spectrum to justify their incumbent status.

The first band is the 3.3 – 3.55 GHz band. This band is now sparsely populated by federal government defense radar users on a primary basis, private radiolocation and amateur operator users on a secondary basis, and experimental Special Temporary Authorities on a non-interfering interruptible basis. The FCC will move some of the incumbents to other nearby bands while amateur users will be left to use other available frequencies wherever they can find them. Some federal use will necessarily remain in the target 3.45 – 3.55 portion of the band, but the FCC and the National Telecommunications and Information Administration (“NTIA”) are confident that these operations can coexist with private operations as long as the special defense needs are satisfied. This will then make the 100 MHz between 3.45 and 3.55 available to be auctioned for private use.

Although this latter reallocation of this band is not a done deal – the NPRM seeks comment on the proposal – the FCC is sufficiently confident enough that the reallocation will take place that it is proposing not only the spectrum reallocation, but service rules and even auction procedures to speed the process of getting the spectrum into private hands. Typically, this process can involve multiple steps with separate NPRMs, comment cycles, and interim decisions before an auction is actually ready to take place. The later steps are now relatively routine and this NPRM offers no surprises. Here the FCC has consolidated several of these tiny steps into a single bound, which moves the process along refreshingly quickly.

The second band under consideration is the 4940-4990 MHz band. This band is currently restricted to public safety entities who make relatively sparing use of it. The Commission here is proposing the novel approach of having each state have a single “State Lessor” which would be authorized to lease the spectrum to any user – public safety or non-public safety. The State Lessor would designate a State Band Manager (possibly itself) to lease out spectrum to other public safety and commercial operators and make sure that all the sub-lessees play nicely together. In some respects the Manager is like the 700 MHz Guard Band manager concept because it delegates many of the FCC’s statutory duties such as resolving interference complaints and licensing spectrum lessees to a state or private entity. Whether the FCC can delegate its duties to other entities in this way is a metaphysical question that will concern thoughtful lawyers if this plan is adopted. In the meantime, the lack of affordable equipment and the problem of how to accommodate existing incumbents while making this 50 MHz of spectrum useful to others are major challenges that will have to be resolved if this interesting plan is to take flight.

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Assessing the Benefits of the \$100 Million Connected Care Pilot Program

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The Federal Communications Commission's ("FCC" or "Commission") Wireline Bureau on September 3, 2020, released a [Public Notice](#) providing additional information regarding the upcoming \$100 million Connected Care Pilot Program. You will recall that the Commission launched the pilot in April – joining it together in the [same order](#) approving the COVID-19 Telehealth Program ([FCC 20-44](#)). The *Public Notice* largely re-states the general outlines of the new pilot program: what is and is not eligible, who is eligible, and the overall purposes of the program. The *Public Notice* also notes the application process is not likely to begin before November 2020, but suggests *interested applicants can and should begin preparing now*. Thus, while the Commission awaits final Office of Management and Budget ("OMB") approval for the actual application form, the just-released *Public Notice* provides a good overview of what a successful application process will likely need to include.

The purpose of this blog post is not to restate the *Public Notice* or the Connected Care order, but to highlight some important characteristics of the program to help you assess its potential benefits. First, while the Connected Care pilot program offers an 85% flat-rate subsidy (compared to 65% in the Commission's Rural Health Care program), the application process will be involved and, post-award there will be significant project administrative burdens and eventually clinical data reporting obligations. In addition, the 85% subsidy is just that: a subsidy which takes the form of disbursements to eligible service providers in exchange for those service providers providing eligible entities with discounted services. The FCC does not disburse funding directly to applicants.

Second, the Connected Care pilot program will have a two-tiered approval process similar to the [Rural Health Care pilot program](#) that ran from 2007 to 2012:

1. Submit project application to FCC for approval;
2. FCC will evaluate and provide selected projects with a funding "award";
3. Selected projects must then apply to the Universal

Service Administrative Company ("USAC") for funding and follow the Rural Health Care program procurement process:

- a. Project conducts a rule-compliant competitive procurement;
 - b. Project applies for funding;
 - c. USAC issues funding commitment based on the scope of the procurement;
 - d. Project invoices USAC to draw down funding against the commitment;
 - e. Multiple-funding commitments will be allowed (up to the award amount);
4. Project funds must be expended with three-years.



The scope of what is eligible for the 85% subsidy is somewhat narrow:

1. Patient broadband internet access services (*e.g.*, home or mobile broadband service) used "primarily, but not exclusively" for health care (*i.e.*, no cost allocation required) (see [FCC 20-44](#) at ¶ 58, n.142);
2. Health care provider broadband data connections (but not connections between health care providers which are supported through the traditional [Rural Health Care program](#)).
3. Other connected care "information services" (see [FCC 20-44](#) at ¶ 61);
4. Certain network equipment (*e.g.*, equipment necessary to make a supported broadband service function such as routers; but not end-user devices such as smartphones, tablets, computers, or medical equipment).

Lastly, while eligible applicants include either rural or non-rural health care providers, the projects must support patients located in rural areas that are either low income or veterans (see [Public Notice](#) at 5-6).

Upcoming FCC Broadcast Deadlines for October – December

Broadcast Deadlines:

December 1, 2020

Radio License Renewal Applications Due – Applications for renewal of license for radio stations located in Colorado, Minnesota, Montana, North Dakota, and South Dakota must be filed in the LMS. These applications must be accompanied by Schedule 396, the EEO Program Report, also filed in LMS, regardless of the number of full-time employees.

Radio Post-Filing Announcements – As of this writing, radio stations licensed in Colorado, Minnesota, Montana, North Dakota, and South Dakota must begin broadcasts of their post-filing announcements concerning their license renewal applications on December 1. These announcements must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF within seven days, or by February 23. It is, however, possible that the updated rules governing public notices will go into effect during the period of the announcements, in which case, stay tuned for updates on transition to the new requirements.

Television License Renewal Applications Due – Applications for renewal of license for television stations located in Alabama and Georgia must be filed in LMS. These applications must be accompanied by Schedule 396, the Broadcast EEO Program Report, also filed in LMS, regardless of the number of full-time employees.

Television Post-Filing Announcements – Under current regulations, television stations licensed in Alabama and Georgia must begin broadcasts of their post-filing announcements concerning their license renewal applications on December 1. These announcements must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF within seven days, or by February 23. As noted above, however, it is possible that the updated rules governing public notices will go into effect during the period of the announcements, in which case, stay tuned for updates on transition to the new requirements.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees and located in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont must place EEO Public File Reports in their OPIFs. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.