



Pillsbury Winthrop Shaw Pittman LLP  
1200 Seventeenth Street, NW | Washington, DC 20036 | tel 202.663.8000 | fax 202.663.8007

Scott R. Flick  
tel: +1.202.663.8167  
scott.flick@pillsburylaw.com

August 19, 2021

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
45 L Street, NE  
Washington, DC 20554

**Re: Notice of Ex Parte Communication, MD Docket No. 21-190**

Dear Ms. Dortch,

On August 17, 2021, the undersigned and representatives of the State Broadcasters Associations held a telephone conference with Diane Holland of the office of Commissioner Starks concerning the proposed annual regulatory fees for broadcasters in *Report and Order and Notice of Proposed Rulemaking*, MD Docket No. 21-190, FCC 21-49 (*released* May 4, 2021). In attendance on the telephone conference were: Wendy Paulson, President of the Minnesota Broadcasters Association; Bob Houghton, President of the Georgia Association of Broadcasters; Dewey Bruce, President of the Montana Broadcasters Association; Mark Gordon, President of the Missouri Broadcasters Association; and Lauren Lynch Flick of Pillsbury Winthrop Shaw Pittman LLP.

During the teleconference, the State Broadcasters Associations discussed the financial challenges faced by broadcasters, particularly small market radio stations, and the impact of the proposed increases in regulatory fees for FY2021 on their operations. The Associations stressed the important role these broadcasters play in their local communities, particularly given the loss of local newspapers in many areas. In smaller markets and rural areas, a radio station may be the only source of local news and information, including coverage of local government and school board meetings, elections, and high school sports. They are also often the only counterbalance to social media “information” that is frequently neither local nor accurate.

These broadcasters support their communities in other ways as well, such as helping replace in-person fundraising events that were cancelled due to Covid restrictions, but which local charities need in order to raise funds to help local youth and families.

August 19, 2021

Page 2

These stations are also often themselves the organizers of local community civic activities such as blood drives, as well as drives for back to school supplies and coats to help those struggling in their communities.

These stations, like all broadcasters, see operational costs creep up over time, making survival more difficult as local “Main Street” advertisers disappear and are replaced by national or international Internet sellers that don’t advertise on local media. However, they rarely see costs increase by double digit percentages year over year except with regard to annual regulatory fees. Such increases are especially challenging after the huge revenue downturns of the past two years.

As the Associations noted on the call, the Commission’s published Broadcast Totals show a loss of at least 122 full-power commercial AM and FM radio stations since 2019, demonstrating the increasingly precarious situation many stations face. The fact that the Commission’s most recent auction, Auction 109, failed to attract a bidder for any of the offered AM station authorizations and for a third of the FM station authorizations further confirms an increasingly obvious fact—that the FCC’s proposal to charge broadcasters 16% of its operating costs while those same broadcasters hold only 0.07% of the spectrum regulated by the Commission is an unsustainable approach to funding the Commission’s operations.

The State Broadcasters Associations therefore urged the Commission to hold the line on any increases in annual regulatory fees for broadcasters for FY2021. They noted that the increases broadcasters face are due almost entirely to the Commission’s decision to treat its work under the Broadband DATA Act as Commission “overhead,” to be spread across all FCC regulatees despite the fact that broadcasters have no connection to, and do not benefit from, that work in any way. As this work was specifically earmarked by Congress to be done by FTEs of bureaus other than the Media Bureau, requiring broadcasters to cover a significant portion of this cost is incompatible with the RAY BAUM’s Act requirement that regulatory fees be tied to the benefit delivered to the payor. In addition, requiring broadcasters to cover those costs is entirely inconsistent with the FCC’s traditional FTE-centric approach to regulatory fee apportionment, as it ignores the fact that those FTEs fall entirely outside of the Media Bureau, and it is hardly challenging to identify the Bureaus from which those FTEs will come and the industry sectors that will benefit from their work.

Finally, given the D.C. Circuit’s recent *TeleSat Canada* decision confirming that under the RAY BAUM’s Act, the benefits delivered to the payor must be the “touchstone” for setting regulatory fees, and that the Commission’s obligation to charge regulatory fees extends to *any* beneficiary of Commission activities, not just

those holding FCC licenses, the Commission's traditional license-centric approach to setting regulatory fees is neither legal nor sustainable. As a practical matter, licenses are a poor yardstick of FCC benefits. Continuing the Commission's traditional regulatory fee approach merely forces broadcasters to subsidize through excessive regulatory fees their fiercest competitors—social media and technology companies that consume vast amounts of the Commission's time and resources while paying no regulatory fees whatsoever. This subsidy is particularly offensive when some of these resources broadcasters are paying for are being used to encroach on broadcaster's spectrum through *unlicensed* uses, reducing the "benefit" of that spectrum to broadcasters while simultaneously benefitting technology companies who conveniently avoid having to pay for the cost of those proceedings since they are not an FCC licensee.

Quite simply, the current approach violates the RAY BAUM's Act, but even if it did not, it is a doomed approach as the Commission is merely pricing those industries it has chosen to regulate via licenses out of existence while encouraging the growth of their regulatory fee-free competitors. That is not a healthy long-term plan for either broadcasters or the FCC. The time has come for the Commission to accept the RAY BAUM's Act directive that it diversify its portfolio of regulatory fee payors. The State Broadcasters Associations therefore urged the Commission to promptly launch a proceeding to examine how to bring its regulatory fee processes into compliance with the RAY BAUM's Act by expanding its universe of regulatory fee payors and acknowledging that the amount of the fees must be governed not by legacy formulas and approaches, but by the "touchstone" of the benefit the Commission is delivering to the payor.

By expanding the universe of payors, the Commission can reduce the impact of the fees on any one particular industry, like broadcasting, while achieving greater fairness for all. The State Broadcasters Associations noted that creating and implementing a RAY BAUM's Act-compliant regulatory fee approach should necessarily be a careful and thoughtful one, and the current three-month annual regulatory fee-setting process simply does not provide the time necessary for the FCC to solicit and consider sophisticated approaches for such a revised fee system. It is therefore important for the Commission to promptly launch a separate proceeding to commence that effort and ensure a thoughtful process in which all may participate, bringing the same level of Commission energy and creativity that resulted in the FCC's Broadcast Spectrum Auction design.

Such a revised regulatory fee-setting system is well within the Commission's capabilities, but necessarily will take more than three months. It has, however, been three years since the RAY BAUM's Act was adopted, and particularly in light of the

August 19, 2021

Page 4

*Telesat Canada* decision, the Commission can no longer disregard the need to move forward in implementing that statute's regulatory fee-setting directives.

Please feel free to contact the undersigned with any questions.

Respectfully,

/s/  
Scott R. Flick

cc: Diane Holland (via email)