

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ submits these comments regarding the Forest Service's Proposed Rule concerning the imposition of an annual programmatic administrative fee for new and existing communications use authorizations to cover the costs of administering the Agency's communications use program.² NAB believes the Forest Service's current proposal is unlawful, inequitable, and undermines the public interest.

Citing the "need for wireless connectivity for teleworking, tele-education, telehealth, and telemedicine," and the need for the Forest Service to "do its part by ensuring it has the necessary staff and expertise to administer its communications use program,"³ the Proposed Rule seeks to collect an additional "annual programmatic administrative fee of \$1,400 per communications use authorization for wireless uses such as television and radio broadcasting, cellular telephone, and microwave" to cover the costs of administering the Forest Service's communications use program.⁴ The Forest Service asserts that its proposal is consistent with directives that it "expedite broadband development on NFS lands to increase connectivity in rural America"⁵ and is further required by section 8705 of the 2018 Farm Bill

¹ The National Association of Broadcasters (NAB) is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² Department of Agriculture, Forest Service, Proposed Rule, RIN 0596-AD44, 86 FR 72540, (December 22, 2021) (Proposed Rule).

³ Proposed Rule at 72540.

⁴ *Id.* at 72541.

⁵ *Id.* at 72544.

which directs the Forest Service to implement a structure of fees for “issuing communications use authorizations, based on the cost to the Forest Service of any maintenance or other activities required to be performed by the Forest Service as a result of the location or modification of the communications facility.”⁶

While NAB agrees that providing increased broadband access to rural communities is an important objective, the Proposed Rule undermines television viewers’ access to critical news and information in the process by drastically increasing the total fees broadcasters serving rural populations pay for communications use authorizations. Over-the-air broadcast television and radio are important sources of news and information to Americans, particularly for households with limited income in rural and tribal areas. Some “full-power” (primary)⁷ broadcasters successfully serve large populations from communications sites on Forest Service lands, such as Mt. Wilson near Los Angeles and Sandia Crest near Albuquerque. Other lower-power (but still primary) broadcast stations, often family-run or non-profit, are licensed to serve small communities from Forest Service communication sites. Regardless of power level, all primary broadcast stations have federally-mandated coverage, program, and record-keeping requirements,⁸ making service of small communities much more economically challenging. Often, it is not economically feasible to build and operate a primary station that

⁶ *Id.* at 72540-72541; 43 U.S.C. § 1761a(c)(3)(B).

⁷ Primary broadcast stations are licensed by the FCC under 47 CFR § 73, excluding Class A Television and Low-Power FM stations.

⁸ For example, broadcasters must comply with a number of affirmative public interest programming and service obligations including coverage of issues facing their communities and must keep records of programming used in providing significant treatment of such issues. Broadcasters must also comply with statutory political broadcasting requirements regarding equal opportunities, charges for political advertising, and reasonable access for federal candidates. In addition, television broadcasters must provide children’s educational and informational programming under the Children’s Television Act of 1990.

serves only a small community, especially when the broadcaster is unlikely to receive the necessary advertising support from that community.

As part of their commitment to public service, however, many broadcasters licensed to larger cities voluntarily serve small communities and sparsely populated areas using secondary "translator" stations,⁹ which make available the same news, entertainment, and emergency information being provided to their primary service areas to listeners and viewers located in small, distant or difficult-to-reach areas.¹⁰ To facilitate this service, many broadcasters have entered into lease agreements with the Forest Service to place translator facilities on Forest Service land.¹¹ In addition to serving small communities and sparsely populated areas, translator stations are often linked together in a "daisy-chain" fashion with one translator station relaying programming to the next. In some cases, the "daisy-chain" of linked translators can be 15 stations, each serving a discrete rural area. As a result, the loss of a single translator will break the chain, eliminating service to all of the communities and rural areas served by the subsequent translator stations. NAB believes that translator stations comprise the bulk of over-the-air broadcast facilities located on NFS lands.

Utilizing Forest Service land to provide these important services is not costless. Broadcasters have invested resources in maintenance and other costs necessary to keep their equipment operational on Forest Service land. In addition, pursuant to their lease

⁹ A "translator" is a low-power station, which relays or re-transmits over a limited area the content from a primary station that is usually licensed to serve a large community. See FSH 2709.11_90, Section 90.5, "Low Power Broadcast Use" and FSH 2709.11_90 Section 97, "Description of and Use Codes for Communications Uses."

¹⁰ Secondary broadcast stations are licensed by the FCC under 47 CFR § 74.

¹¹ For example, a TV translator station located at Desert Mountain near West Glacier, MT serves West Glacier, a community of just 227 people that depends on seasonal tourism and has a total coverage area of 6,966 households.

agreements, broadcasters currently pay the Forest Service annual rental fees based on the “fair market value of the rights and privileges granted by each communications use authorization.”¹² Fair market value is determined in part by the type of communication use and size of the community served pursuant to the authorization.¹³

With little or no advertising or donor support from small or sparsely populated areas, there is no incentive beyond their commitment to the public interest for broadcasters to provide these free services to these communities. The addition of the annual programmatic fee would increase the total fee liability for existing broadcast uses serving smaller communities by up to nearly eight-fold in some cases. Unlike other commercial communications use authorization holders, broadcasters cannot pass these increased costs on to consumers. Given that broadcasters are still dealing with the adverse economic impacts of the Covid-19 pandemic, such a substantial unplanned increase in fee liability will force broadcasters to make difficult decisions regarding whether it makes economic sense to maintain these operations, potentially resulting in the loss of essential broadcast services in rural and remote areas. Such an outcome would contravene federal policy to make broadcast television and radio services available throughout the nation.¹⁴

The Forest Service’s proposal fails to acknowledge adequately these realities and suffers from other flaws that must be addressed as set forth in greater detail below. First, there is no statutory justification for the Forest Service to assess the new fee on existing

¹² Proposed Rule at 72541.

¹³ See Rental Fee Schedule for Communications Uses, Calendar Year 2022, available at: <https://www.fs.fed.us/specialuses/documents/2022RentalFeeScheduleForCommunicationsUses.pdf> (2022 Rental Fee Schedule).

¹⁴ See e.g., Notice of Inquiry, Notice of Proposed Rule Making and Memorandum Opinion and Order, FCC 61-833, 26 FR 6130. (FCC Docket 14185) (June 21, 1961).

communications use authorizations. The Forest Service should therefore modify the Proposed Rule to make clear that the annual programmatic fee will be assessed only on communications use authorizations issued *after* the new regulations go into effect. To the extent that the Forest Service moves forward with its unlawful proposal to assess fees on existing communications use authorizations, it should allow for a phase-in period to give broadcasters and other existing communications use authorizations time to make the changes necessary to continue serving communities that have come to rely upon their services.

In addition, the Proposed Rule fails to provide sufficient information regarding the nature of the uses at its communications sites to enable commenters to provide meaningful comment on the impacts of the Proposed Rule on communications use authorizations and the public or potential alternatives to a uniform annual programmatic fee. Given the adverse impacts of the Proposed Rule on the continued provision of broadcast services to underserved communities, the Forest Service should make this information available so that commenters can better advise the Forest Service on the impacts of its Proposed Rule on the provision of communications services and suggest alternative approaches.

As an alternative to the Proposed Rule, NAB suggests that the Forest Service consider tying the annual programmatic fee to its existing rental fee schedule.^{15 16} As discussed further below, subject to review of additional information that may be provided by the Forest Service, NAB believes that existing rules and policies that are linked to highest value use, market size, and related factors are a reasonable approach for assessing fees. This approach to fee

¹⁵ 2022 Rental Fee Schedule.

¹⁶ See U.S. Forest Service Handbook FSH 2709.11 – Special Uses Handbook, Section 31.22b (Forest Service Handbook)

assessment has proven acceptable to communications users for over two decades and may be a reasonable alternative to the proposed uniform programmatic fee.

II. THE FOREST SERVICE MAY NOT IMPOSE THE ANNUAL PROGRAMMATIC FEE ON EXISTING COMMUNICATIONS USE AUTHORIZATION HOLDERS

In 2018, Congress passed Section 8705 of the 2018 Farm Bill (codified at 43 U.S.C. § 1761a) to “streamline and expedite the regulatory framework necessary to utilize Federal lands for broadband infrastructure deployments” due to an increased future need for land or infrastructure “to site the antennas necessary” to “deploy facilities to support 5G wireless services, which will require more antennas spaced together.”¹⁷ The statute required the Forest Service to issue regulations to “streamline the process for considering applications to locate or modify communications facilities” on covered land; to ensure “that the process is uniform”; and to require that applications be considered and granted on a neutral and non-discriminatory basis.¹⁸ The statute directs that these regulations include “provisions for the tracking of applications”; provisions “for minimum lease terms of not less than 15 years”; a structure of fees for “submitting an application” and “issuing communications use authorizations, based on the cost to the Forest Service of any maintenance or other activities” the Forest Service are required to perform “as a result of the location or modification of the communications facility”; and provisions for the “prioritization or streamlining of the consideration of applications to locate or modify communications facilities” in previously disturbed rights-of-way.¹⁹

¹⁷ AGRICULTURE AND NUTRITION ACT OF 2018, 164 Cong Rec H 4164, 4171 (May 17, 2018) (House Report).

¹⁸ 43 U.S.C. § 1761a(b).

¹⁹ 43 U.S.C. § 1761a(c).

The Forest Service seeks to implement the requirement to have a structure of fees for “issuing communications use authorizations,”²⁰ by charging *both* new and existing communications use authorization holders a fee to cover the Forest Service’s annual costs of administering its communication site program.²¹ The Forest Service notes that, under this approach, it will need to amend existing communications use authorizations “to provide for payment of the required annual programmatic administrative fee.”²²

The Forest Service lacks legal authority to impose the new programmatic fee on communications use authorizations issued prior to enactment of the new regulations. First, the statute specifically directs the Forest Service to establish a structure of fees for “issuing communications use authorizations,” *not* to establish a structure of fees for existing and prospectively issued communications use authorizations. Where Congress’s intent is clear from the plain language of a statute, agencies “must give effect to the unambiguously expressed intent of Congress.”²³ Because the statute does not define the term “issuing,” the term should be given its ordinary meaning.²⁴ The ordinary meaning of “issuing” would apply the programmatic fee only to the supply or distribution of a communications use authorization, not to existing authorizations. By using the term “issuing,” Congress tied the fee to a future action. If Congress wanted the fee to apply to existing authorizations, it would have simply omitted the word “issuing.”

²⁰ *Id.* at § 1761a(c)(3)(B).

²¹ See Proposed Rule at 72540.

²² *Id.*

²³ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

²⁴ *Mohamed v. Palestinian Auth.*, 566 U.S. 449, 454 (2012).

Second, it is well-established that legislation is to be applied prospectively unless Congress specifies otherwise to allow parties to conform their conduct to existing law.²⁵ Consistent with this fundamental principle, the Supreme Court has routinely “declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent” due to the “unfairness of imposing new burdens on persons after the fact.”²⁶ In the absence of such clear congressional intent, a statute will not be applied retroactively to conduct occurring prior to its enactment if doing so “would impair a party’s rights or increase his liabilities for past conduct, or if it would impose new duties on a party.”²⁷

The Forest Service’s proposal plainly runs afoul of this bedrock legal principle. There is no language in Section 8705 or its legislative history²⁸ that evinces clear congressional intent that the fee be applied to communications use authorizations that were issued prior to its enactment, i.e., that Congress sought to redo the terms of every existing lease. In fact, all indications are exactly the opposite. The statute is titled “Streamlining the Forest Service process for consideration of communications facility location *applications*” indicating a focus on future applications and use authorizations.²⁹ The only temporal language in the statute itself is a directive that the Forest Service promulgate regulations no later than one year after

²⁵ See *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”).

²⁶ *Id.* at 270.

²⁷ *Id.* at 280.

²⁸ According to the legislative history, streamlining was necessary in anticipation of an influx of applications from wireless providers for land or infrastructure to further the rollout of 5g services. See House Report at 4171.

²⁹ 43 U.S.C. § 1761a (emphasis added).

December 20, 2018. Indeed, with respect to the programmatic fee specifically, Congress directed that a structure of fees be established for the “issuing” of a communications use authorization. As discussed above, the term “issuing” is unambiguous and not subject to agency interpretation. Even if the Forest Service were to determine, however, that the term “issuing” is somehow ambiguous, which it is not, “a statute that is ambiguous with respect to retroactive application is construed” to be “unambiguously prospective.”³⁰ Had Congress wanted to, it could have used language requiring the Forest Service to include a schedule of fees for overseeing or administering all new and existing communications use authorizations, but it did not. There is simply no language anywhere suggesting that the usual presumption against retroactivity should be ignored and the new fee should apply to existing authorizations rather than those issued after the regulations go into effect.³¹

Absent clear congressional direction to do so, the Forest Service’s proposal to apply the new annual programmatic fee retroactively to existing communications use authorizations would both impose new duties on and impair the rights of such authorizations and therefore would be impermissible.³² Communications use authorizations are issued for a specified term and must be re-issued upon expiration. While potential new communications use authorization applicants will be able to factor this fee into their decision making, broadcasters

³⁰ *INS v. St. Cyr*, 533 U.S. 289, 320, n. 45 (2001).

³¹ Importantly, the Forest Service has not applied the statute’s other requirements retroactively. For instance, the Forest Service has not decided it must amend existing use authorizations to provide for a minimum lease term of 15 years. There is no statutory justification for treating the fee requirement differently.

³² See *Quantum Entm’t, Ltd. v. United States DOI*, 848 F. Supp. 2d 30, 34 (D.D.C. 2012) (“When Congress does not expressly prescribe a statute’s retroactive reach, courts must consider whether such retroactive application would have an impermissible retroactive effect” which involves considering whether “retroactive application would “impair a party’s rights or increase his liabilities for past conduct, or if it would impose new duties on a party.” If “such an impermissible retroactive effect is present, it is presumed that the new statute does not apply retroactively.”)

and other existing communications use authorization holders made investment decisions necessary to serve local communities using Forest Service communications sites based on the expected fee liability to the Forest Service at the time their authorizations were issued.³³ The addition of a new fee that in some cases may double, triple or even octuple their fee liability reduces the value of existing communication use authorizations' rights and constitutes a new, unexpected duty and increased liability that impairs the investments the holders made to serve the local communities that rely on their services.³⁴ Not only is retroactive application to these authorizations therefore legally impermissible, it is also unsound as a matter of policy.

III. THE FOREST SERVICE SHOULD PHASE IN THE ANNUAL PROGRAMMATIC FEE TO MINIMIZE HARMFUL IMPACTS ON EXISTING COMMUNICATIONS USE AUTHORIZATIONS AND THE COMMUNITIES THEY SERVE

For the reasons set forth above, the Forest Service cannot legally impose the annual programmatic fee retroactively on existing communications use authorizations. If the Forest Service nevertheless chooses to move forward with its proposal to assess the fee on existing authorizations, at a minimum it should allow for a phase-in period of five years or longer to minimize the potential harmful impacts on existing authorizations and the communities they serve. For instance, the programmatic fee could be phased in such that no existing communications use authorization will see its total fee liability to the Forest Service (combining rental fees and the annual programmatic fee) increase by more than 20% in the

³³ Entities whose existing authorizations permit them to lease facility space to tenants also likely structured financial arrangements with their tenants based on fee liabilities that existed when their authorizations were issued.

³⁴ See *USA Sales, Inc. v. Office of the United States Tr.*, 532 F. Supp. 3d 921, 939 (C.D. Cal. 2021) (finding that amended bankruptcy fee schedule applied to debtor whose bankruptcy case was commenced prior to its enactment would have an impermissible retroactive effect because it would unexpectedly increase the debtor's total fee liability, whereas a debtor filing after enactment of the new schedule would have an entirely different expectation).

first year, with the remaining increase added in equal installments in the following years. This would give existing communications use authorization holders serving smaller communities time to adjust their business plans to account for the new fee and, if necessary, explore options to relocate their equipment so that they can continue to provide the valuable local news and emergency services upon which communities have come to rely.

IV. THE FOREST SERVICE FAILS TO DISCLOSE THE INFORMATION USED TO DETERMINE IMPACTS ON THE NUMBER OF USE AUTHORIZATIONS OR ON THE PUBLIC, AND PROVIDES INSUFFICIENT INFORMATION FOR AFFECTED ENTITIES TO EVALUATE ALTERNATIVE OPTIONS

The Forest Service is required to conduct regulatory impact and flexibility analyses and consider alternatives that may maximize net benefits of any proposed rule.³⁵ In explaining its evaluation of the impacts of the Proposed Rule, the Forest Service quantified the number of communications use authorizations (4,159) and the number of unique entities holding those authorizations (1,448, including 645 small businesses, 187 small government entities, and 248 small organizations). The number of entities is then further broken down into businesses (765), governments and agencies (384), organizations (266), and individuals or households (33).³⁶ The Forest Service noted that “[t]here is potential for existing or future customers to alter their decisions about obtaining a communications use authorization in response to the cost of the annual programmatic fee” but states that the effect of these decisions “is likely to be small or hard to measure.”³⁷ The Forest Service concluded that “[t]he proposed rule is

³⁵ Proposed Rule at 72543-72544.

³⁶ *Id.* at 72544.

³⁷ *Id.*

therefore not expected to trigger significant changes in the number of communications use authorizations or the output of communications services under those authorizations.”³⁸

The Forest Service possesses and presumably used detailed records of the entities and types of wireless uses at each of its 1,367 communications sites to develop the Proposed Rule and to evaluate its impact on the number of communications use authorizations and quantity of communications services provided to the public. However, by failing to publish information regarding the types of entities and categories of wireless uses at each of its communication sites,³⁹ the Forest Service has prevented the public from offering meaningful comment on the Forest Service’s analysis of the Proposed Rule’s impacts.⁴⁰ Specifically, from the published information, it is not possible to determine which entities or entity types, categories of wireless use, or wireless sites will be most impacted by the proposed rules and which communities could lose access to valuable broadcast services. Further, the agency provides no alternative analysis as required.⁴¹ and the information in the Proposed Rule is insufficient to allow affected parties to analyze the benefits of potential alternatives.

NAB believes that there are reasonable and more equitable alternatives to assessing a uniform fee amount to all wireless use authorizations, and that the Forest Service should have developed and considered other alternative proposals. For instance, NAB suggests one possible alternative proposal in Section V that the Forest Service could consider. However,

³⁸ *Id.*

³⁹ Indeed, on January 22, 2022, NAB inquired about this information and the Forest Service reported that information concerning the entities or types of entities at each Forest Service communications site is not publicly available.

⁴⁰ See *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 55 (D.D.C. 2017) (“[W]hen an agency relies on data that is critical to its decision-making process, that data must be disclosed in order to provide the public an opportunity to meaningfully comment on the agency’s rulemaking rationale.”).

⁴¹ E.O. 12866, Section 1(a) and Section 6(a)(3)(C)(iii), September 30, 1993.

without a complete list of users, station callsigns, or at least information regarding the number and types of uses (whether broadcast, cellular, private mobile, etc.) at the Forest Service's various communications sites, it is difficult for NAB to assess whether this alternative would adequately mitigate the expected detrimental impacts the Proposed Rule will likely have on broadcast services and the communities they serve. NAB therefore urges the Forest Service to develop and publish an alternative schedule for the programmatic fee based upon this potential alternative prior to moving forward with adopting a final rule.

V. PROGRAMMATIC FEES COULD REASONABLY BE BASED ON EXISTING RULES AND POLICIES TIED TO THE HIGHEST VALUE USE, MARKET SIZE, AND RELATED FACTORS

In establishing its schedule for determining annual rental fees for communications uses authorized on National Forest System Lands, the Forest Service carefully avoided establishing a uniform fee schedule that could significantly increase fees for some authorization holders, especially those in rural areas.⁴² In this way, the Forest Service provided for the necessity of communications services in rural areas while shifting the economic burden to better balance the public interest. The present programmatic fee proposal fails to differentiate between different types and intensities of use and market size, and risks disenfranchising persons located in rural areas that are not otherwise economic for broadcasters to serve. Harming members of the public by removing access to these small primary and secondary broadcast services cannot have been the intention of this programmatic fee proposal but will be the inevitable result.

⁴² See *Fee Schedule for Communications Uses on National Forest System Lands*, 60 FR 55090 (Oct. 27, 1995).

Present Forest Service policy is to grant a full waiver of rental fees to broadcasters that are non-commercial⁴³ or that provide for the safety, health, and welfare of a broad segment of the public with no customer charges.⁴⁴ When such fees are charged, they are based upon the type of communications use and the size of the Randally Metropolitan Area (RMA) or community population served from the site.⁴⁵ Translator and other low-power broadcast facilities are typically charged a small fraction of the rental fee charged for full-power (primary) broadcast stations. For example, a TV translator serving a community of less than 25,000 persons would be charged \$177.82 annually, or about 0.2% of the rent charged a full-power (primary) TV station serving a population of over 5,000,000, even though both stations may transmit identical programming.⁴⁶ This differentiation in fees is in the public interest because it encourages TV and FM broadcasters to extend their coverage into small communities and rural areas that would otherwise go unserved. The proposed uniform programmatic fee would thus increase the total annual fees charged to cover areas of rural America by nearly eight-fold. Without an offset in advertising income or other support, continuing to cover such rural areas in the face of such a dramatic increase in fees makes no business sense and it can be

⁴³ See U.S. Forest Service Handbook FSH 2709.11 – Special Uses Handbook, Section 31.22b (Forest Service Handbook)

⁴⁴ *Id.* Section 31.22b5. NAB would not be opposed to similar waivers of the proposed annual programmatic fee. However, the Forest Service should reject any arguments in the record that the costs associated with communications use authorizations receiving waivers should be shifted to commercial uses. Section 8705 requires that the programmatic fee be based on the costs the Forest Service incurs as a result of the “location or modification of the communications facility” associated with a particular communications use authorization that the Forest Service issues. See 43 U.S.C. § 1761a(c)(3)(B). Accordingly, commercial communications use authorization holders should not be forced to pay for costs resulting from the location or modification of unrelated communications use facilities.

⁴⁵ Forest Service Handbook, Section 95.21.

⁴⁶ See “Rental Fee Schedule for Communications Uses, Calendar Year 2022, available at: <https://www.fs.fed.us/specialuses/documents/2022RentalFeeScheduleForCommunicationsUses.pdf>

expected that many such facilities will be shut down and removed, despite the Forest Service's claims to the contrary.⁴⁷ To avoid disenfranchising listeners and viewers in rural areas, NAB believes that the Forest Service could explore a fee structure in which the annual programmatic fee mirrors the structure of existing rental fees. The Forest Service should examine and seek comment from relevant stakeholders on the impacts this alternative fee structure would have on communications use authorizations and the communities they serve.

VI. CONCLUSION

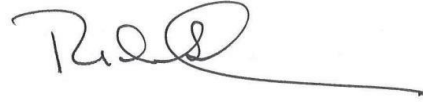
For these reasons, the Forest Service must reform the Proposed Rule to comply with the law and to minimize harmful impacts on existing communications use authorizations and the communities they serve by limiting application of the annual programmatic fee to authorizations that are issued after the regulations go into effect; phasing in any fee applied to existing authorizations; and considering alternative proposals that would better align the annual programmatic fee with market-based factors and the public interest.

⁴⁷ Proposed Rule at 72544 (“The proposed rule is therefore not expected to trigger significant changes in the number of communications use authorizations or the output of communications services under those authorizations”).

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
Emily Gomes
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