

COMMENTER	§22.509: 1st-come, 1st-served application processing.	
RADIOFONE	Opposes	May actually provide incentive for preemptive strike filings. Modify to allow existing licensee to file MX app. if frequency is within 40 miles of proposed site; if both carriers have legitimate interests in the frequency, use lottery or paper hearing procedures. Also, FCC may lack statutory authority to adopt this rule.
RVC		
SKYTEL	Opposes	
SBA	Opposes	FCC may unintentionally <u>increase</u> number of apps. filed - note MMDS. Decreases ability of small systems to expand.
SNR SYSTEMS	Supports	But only if modified to allow existing co-channel licensees and permittees within 108 Km (67 miles) to file MX application within 30 days of PN.
SNET	Supports	Modify to allow existing licensee whose system covers the majority of a market to file competing application within 30 days of PN.
SW BELL		"Lotteries make up less than 1% of all applications filed." Modify to allow 30-day window for filing MX applications.
TELOCATOR	Opposes	Unless modified to allow co-channel licensees within 250 Km of proposed facilities to file MX application within 30 days of PN. Proposal will force expansion for regulatory, rather than business reasons; will force increase in number of apps. filed (note 220-222 MHz proceeding).
USTA		
U.S. WEST	Opposes	Will result in increased applications <u>and</u> petitions to deny. Instead, adopt limit on settlement payments and modify this proposal to allow licensees to respond to applications filed within 40 miles of their authorized stations.
VANGUARD		

COMMENTER	§§22.132, 22.147: Conditional Grant.	
BRYAN CAVE	Opposes	
ALLTEL		
AAALA		
TASC		
BELL ATLANTIC		Opposes §22.132(c) requirement that an applicant seeking reconsideration of issuance of a conditional grant "reject the partial or conditional grant and return the ... authorization." If interference results because of inaccurate technical exhibits, FCC can order the license to be modified.
BELLSOUTH	Opposes	
BIBY		
CTIA		Clarify whether proposal applies to cellular service. Limit conditional period to 1-2 years.
CENDEL		
CLAIRCOM		
COMP COMM		
du TREIL		
GTE SERVICE CORP.		

COMMENTER	§§22.132, 22.147: Conditional Grant.	
HATFIELD & DAWSON		
IDM		
JOYCE & JACOBS	Opposes	
MCCAW		
METROCALL	Opposes	See Telocator.
NEW PAR		
NYNEX MCC	Supports	
PAC BELL		
PACTEL CELLULAR		
PAC-WEST		
PAGE AMERICA GROUP		
PAGNET		
PETERS CONSULTING ENGRS.		Technical certification should be signed by person responsible for completing the technical portion of the application and should include statement that the signator is familiar with Part 22 technical rules.
PETROCOM		

COMMENTER	§§22.132, 22.147: Conditional Grant.	
RADIOFONE	Opposes	Proposal circumvents §312 of Act; notes that APA §552(a)(2)(c) appears to require FCC to maintain official database as prerequisite to conditional grants. Need to define "actual interference" and clarify that it must be caused by errors or omission in the technical portion of the application.
RVC		
SKYTEL		
SBA	Opposes	FCC shouldn't rely on small businesses to perform regulatory oversight. Also, limits financing. Alternative: order to cease operations.
SMR SYSTEMS		Modify so that conditions automatically expire after 12 months. Limits financing; discriminates against new entrants.
SNET	Supports	But modify so that conditions automatically expire 12 months after service commences in the absence of a formal complaint of interference prior to then.
SW BELL	Opposes	Modify to make conditional period shorter, e.g., one year. Do not apply retroactively.
TELOCATOR	Opposes	Alternative: Limit period of time that carrier would be required to shut off facilities for interference reasons without notice and opportunity for hearing, to one year from commencement of service to the public (or from PN of Form 489 filing).
USTA		
U.S. WEST	Opposes	Alternative: Unconditionally grant applications based on technical showings without FCC verification (thereby affording interference protection and relative certainty while reducing processing time). If interference results, FCC may modify license pursuant to §316 of the Act.
VANGUARD		

COMMENTER	§22.507(a): Prohibitions on use of multi-frequency transmitters and §22.507(b) shared use of transmitters for different services.	
BRYAN CAVE	Opposes	
ALLTEL		
AALA		
TASC		Clarify that 22.507(a) doesn't apply to cellular service, which would preclude use of frequency-agile transmitters.
BELL ATLANTIC		
BELLSOUTH	Opposes	Delete 22.507(a).
BIBY		
CTIA		
CENTEL		
CLAIRCOM		
COMP COMM		
du TREIL		
GTE SERVICE CORP.		

COMMENTER	§22.507 (a): Prohibitions on use of multi-frequency transmitters and §22.507 (b) shared use of transmitters for different services.	
HATFIELD & DAWSON		
IDM		
JOYCE & JACOBS		
MCCAW	Opposes	Other proposed rules will effectively prevent warehousing.
METROCALL	Opposes	Disadvantages common carriers vis-a-vis private carriers. FCC should consider forfeitures and revocation to deter warehousing.
NEW PAR		
NYNEX MCC		
PAC BELL		
PACTEL CELLULAR		
PAC-WEST	Opposes	Modify to limit the prohibition to apply only where a channel is assigned to a single licensee or its affiliates.
PAGE AMERICA GROUP	Opposes	
PAGNET	Opposes	Permit frequency-agile transmitters. Concern that use of one frequency on such a transmitter blocks use of another frequency, is not valid because of "store and forward" technology.
PETERS CONSULTING ENGRS.	Opposes	Valid engineering reasons justify such transmitters. Modify rules governing allocation of additional channels instead.

COMMENTER	§22.507(a): Prohibitions on use of multi-frequency transmitters and §22.507(b) shared use of transmitters for different services.	
PETROCOM		
RADIOPHONE		
RVC		
SKYTEL	Supports	Prohibition should not include use where one of the frequencies is authorized for network paging and the other is authorized for non-network use.
SBA	Opposes	Other policies will prevent warehousing. FCC must examine less burdensome alternatives.
SMR SYSTEMS		Allow use in situations that are not conducive to warehousing; e.g., at one location when the same licensee is operating several single transmitters at other locations in an integrated system; when independent licensees want to share a dual-licensed multi-frequency transmitter; where a single licensee's geographically distinct, separate channel, wide area paging systems overlap.
SNET	Opposes	First-come, first-served rule, one-year prohibition on refile for authorization that terminated due to failure to construct, and limits on settlement payments are sufficient safeguards. Alternative: allow multi-frequency transmitters only by paging operators whose operations cover a majority of a market.
SW BELL	Opposes	Alternative: allow dual-frequency transmitters. Also, delete 22.375.
TELOCATOR	Opposes	Would place common carrier at competitive disadvantage vis-a-vis private carriers. (Delete 22.375.) Notes that FCC examined this issue in Declaratory Ruling context in 1989.
USTA		
U.S. WEST		Should not apply to Rural Radiotelephone Service.

COMMENTS	§22.507(a): Prohibitions on use of multi-frequency transmitters and §22.507(b) shared use of transmitters for different services.	
VANGUARD		

FCC Authority and Standards for Imposing Application Fees

The past efforts of the Commission to discourage the filing of applications by insincere applicants for purely speculative purposes simply by adopting financial qualification standards, construction deadlines, brief application filing windows and restrictions on alienation have been largely unsuccessful. The experiences in the cellular RSA lotteries, the 220 to 222 MHz private radio filings, and the IVDS lotteries all indicate that application preparers and applicant speculators are undeterred by licensing mechanisms of this nature.

The Commission has, however, previously recognized one solution to its problem. In adopting the cellular RSA rules, the agency properly acknowledged that "[a] larger filing fee would probably reduce the number of RSA applications filed". Third Report and Order, 2 FCC Rcd 2440, 2447 n. 16 (1988). This is certainly true. Unscrupulous application mills would be less successful in hawking FCC filing opportunities as "get rich quick" schemes if investors had to lay out substantial money on the front end to participate. Also, insincere applicants with no wherewithal, and no business plan which would enable them to attract investor capital, would be less likely to participate if there was a substantial entry fee.

PacTel Paging believes the Commission has the statutory authority to set narrowband PCS fees at a sufficiently high level

to discourage insincere applicants without eliminating meaningful licensing opportunities for small businesses, entrepreneurs and new market entrants. This memorandum explores this issue.

I. Statutory Authority for Regulatory Fees

In 1985, Congress amended the Communications Act of 1934, 47 U.S.C. §§ 151, et seq. (the "Communications Act") by adding a new Section 8. Comprehensive Omnibus Budget Reconciliation Act of 1985, 100 Stat. 82, 118-21, Pub. L. 99-272, §§ 5002(e), (f) (the "1985 Budget Act"). Section 8 requires the Commission to "assess and collect charges at such rates as the Commission shall establish," and includes a "Schedule of Charges" setting fees for various functions provided in connection with communications services regulated by the Commission. See 47 U.S.C. §§ 158(a), (g). Congress authorized the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. § 158(f).^{1/}

The House Report noted that litigation over the Commission's authority to impose fees had caused the Commission to suspend the imposition of fees in 1977, and stated that "[i]t is the intent and understanding of Congress" that the "specific fee authority" of Section 8 "will supersede any authority the FCC would otherwise have ...to impose additional fees over and above those provided for under this Reconciliation Act." H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 433 (1985).

^{1/} The current Schedule of Charges and related rules are contained in 47 C.F.R. §§ 1.1101-1.1117 (1991).

Section 8 further requires the Commission to review the Schedule of Charges every two years and to make fee adjustments in accordance with a formula based upon changes in the Consumer Price Index. 47 U.S.C. § 158(b)(1). Any fee increase or decrease resulting from this review is not subject to judicial review. 47 U.S.C. § 158(b)(2).

In 1989, Congress approved increases in the Schedule of Charges. Omnibus Budget Reconciliation Act of 1989, 103 Stat. 2124, Pub. L. 101-239, § 3001 (the "1989 Budget Act"). The legislative history of the 1989 Budget Act establishes that these fees are based upon estimates of the cost to the Commission of regulating different services. H. Rep. No. 101-247, 101st Cong., 1st Sess. 3, reprinted in 1989 U.S. Code Cong. & Admin. News 1906, 2267. "[F]ees based on cost of regulatory principles are an appropriate mechanism by which a portion of the FCC's regulatory expenses may be recaptured. The Committee made an explicit decision to meet its Reconciliation obligations by retaining a fee structure that is based on the cost of regulation. In order to accomplish this objective, the Committee adopted the increases in fees which the FCC was implementing under its discretionary authority...." Id. at 2267.

II. Fee Programs Established Under Authority of Section 8 of the Communications Act

Following enactment of the 1985 Budget Act and Section 8 of the Communications Act, the Commission issued a Notice of Proposed Rule Making seeking comment on the new statutory

provisions. Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 51 FR 25792 (July 16, 1986).. In the NPRM, the Commission stated that the statutory schedule of charges is "based primarily on the Commission's cost of providing [regulatory] services," and that "[e]ach fee is intended to recover only those costs attributable to providing the [regulatory] service to the public." 51 FR 25792 at ¶¶ 7, 19.

With respect to fee amounts, the Commission stated that it would "not consider comments directed toward changing the dollar amount of the fees." 51 FR at 25793 ¶ 6. The Commission's rationale for this decision was that it had "worked extensively with [communications providers] and Congress prior to the passage of this legislation to ensure that the charges, to the extent possible, reflect the cost of processing authorizations to the Commission. The fees set out in the Schedule of Charges represent a congressional determination that these charges represent the best approximation of our processing costs."^{2/} Id.

The Commission ultimately affirmed that its "charges are based primarily on the Commission's cost of providing ...

^{2/} The Commission noted that Congress "had available to it FCC Staff cost analyses prepared for the Fee Refund program and later updated to factor in new services, changes in application processing technology, personnel cost, etc." 51 FR at 25793 ¶ 24 and n.30 (citing the Notice of Inquiry, Fee Refunds and Future FCC Fees, 69 FCC 2d 741, 747-755 (1978), regarding cost calculation).

regulatory services." Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("Fees I"), 2 FCC Rcd 947, 948 (1987), Supplemental Order, 2 FCC Rcd 1882 (1987), recon. granted in part, 3 FCC Rcd 5987 (1988). In response to comments "that certain fees are too high or have no link to processing costs," the Commission stated only that "these fees are now statutory and may be changed only through a future action by the Congress. We recognize that some of the underlying processing costs and procedures on which we based our fee recommendations to Congress have changed or will change in the future.... Thus, the Commission's processing costs were but one factor in the rough calculus that resulted in the legislated fees." 2 FCC Rcd at 948-949.

Addressing Petitions for Reconsideration of the Fees I decision, the Commission acknowledged complaints "that a given fee in no way reflects the amount of actual effort expended by the Commission on a particular application or type of application," but again explained "that the amount of the fee represents the Commission's estimate, accepted by Congress, on the average cost to the Commission of providing the service." 3 FCC Rcd 5987, 5987 (1988).

As noted, the 1989 Budget Act increased all existing fees and imposed new fees on additional regulatory services. The result was a doubling of revenues from the fee program and a nearly threefold increase in the number of applications requiring

fees. Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989 ("Fees II"), 5 FCC Rcd 3558 (1990), recon. granted in part, 6 FCC Rcd 5919 (1991). The Commission again noted that it had "worked with Congress to ensure that, to the best extent possible, fees reflect only the direct cost of processing the typical application or filing." 5 FCC Rcd at 3574.^{3/} The new fee schedule established multiples of a fee based on the number of frequencies, stations, call signs, waivers, etc. requested by an applicant. Id.

As explained below, recent Commission proceedings cite the statutory Schedule of Charges as authorizing the application fees established in those proceedings. Attempts before the Commission to change those fees have been unsuccessful, and no court litigation has arisen challenging the Commission's fees established under authority of the 1985 and 1987 Budget Acts.

III. Fees Established in Recent Commission Proceedings

A. Booster Stations: In 1987, the Commission did not impose a fee for TV booster applications, because it did "not have the authority to institute fees for services that were not included in the Schedule of Charges added as new section 8 to [the Communications Act]." FM Booster Stations and Television Booster Stations, 2 FCC Rcd 4625, 4634 (1987).

^{3/} The Commission pointed out, however, that "Congress did adopt a minimum fee of \$35 that may not reflect the actual cost of processing." 5 FCC Rcd at 3574.

B. Part 22: The Commission's initial fees for cellular systems and domestic public land mobile radio services ("DPLMRS") were established in the fee program proceeding instituted after the 1985 Budget Act passed. See 2 FCC Rcd at 971-72. With respect to the fee of \$200 per transmitter in the DPLMRS, the Commission stated that "[c]onsistent with the Communications Act's mandate to require these fees on the basis of the number of transmitters requested, we will require that applicants submit \$200 for each such transmitter listed on Form 401." Id. at 972. The Commission cited the "Conference Report at [page] 429." Id. at 972, 986 n.185.

With respect to cellular, the Commission initially adopted a fee of \$200 per cellular system. 2 FCC Rcd at 972. In the Third Report and Order in the cellular rulemaking proceeding, the Commission declined to adopt higher application fees, which had been proposed as a method of deterring speculative applications, finding that "imposition of the \$200 filing fee has [not] caused a significant reduction in the number of applications filed." 4 FCC Rcd 2440, 2442 (1988). The Commission did concede that "[a] larger filing fee would probably reduce the number of RSA applications filed," id. at 2447 n.16, but stated that "the fee is set by Congress" and could only be increased pursuant to 47 U.S.C. § 158(b)(1). Id.

C. Part 21: The Commission did not change filing fees for applications for Part 21 authorizations when it adopted a one-step licensing procedure to replace the old procedure

whereby applicants first filed an application for a construction permit authorization and later filed an application for a license to operate. The new procedure required filing an application for a license conditioned on the subsequent filing of a certification of completion of construction. "The new ... procedure ... does not modify the substantive efforts of the staff in reviewing the applications.... While this consolidation clearly lessens the burden on the public..., the same work is required of Commission staff to review and issue these authorizations. This effort is simply consolidated at the time the staff reviews the application for an initial license conditioned upon construction."

Clarification of Part 21 Filing Fee Requirements and Application Form Use, 64 RR 2d 471, 472 (1988).

D. 220-222 MHz: In its Report and Order in the 220-222 MHz proceeding, the Commission found that "each ... nationwide filing[] will be, in terms of substance and processing, the equivalent of many separate applications." Rather than require 350 or 700 applications (one for each 5 or 10 channel nationwide application), however, the Commission required only one application, but stated: "This one ... [application] ... still constitutes the filing of a minimum of 350 or 700 applications that will be assigned separate file numbers and, if granted, given separate call signs. Thus, the fee for filing for nationwide systems must be calculated by multiplying \$35 by the number of call signs needed (one call sign per channel per market) for each license." 6 FCC Rcd 2356, 2364 (1991). The

Commission stated "[t]hese initial fees are consistent with our fee schedule." Id. In a Memorandum Opinion and Order addressing Petitions for Reconsideration of the Report and Order, the question of fees and fee amount did not arise. 7 FCC Rcd 4484 (1992).

E. IVDS: Here, the Commission stated that "because the service is being regulated as a personal service under Part 95..., applicants must pay a fee of \$35.00 per call sign (i.e., per [Cell Transmitter Station]." Interactive Video and Data Services, 7 FCC Rcd 1630, 1639 (1992). However, this is problematic because an IVDS applicant is required to file only one Form 155 (a fee form), regardless of the number of CTSS it proposes to construct. The Commission's solution was to "initially blanket license all applicants for a predetermined number of CTSS.... In particular, we believe a minimum of 40 CTSS per market would provide the flexibility needed for most IVDS systems. Thus, the filing fee ... will be calculated by multiplying \$35.00 by 40 CTSS [\$1400]." Id. at 1640. Forty CTSS represented a "reasonable compromise." Id. at n. 112.

The \$1400 fee was challenged in a Petition for Reconsideration asserting that the Commission lacked statutory authority because no actual application was being filed. In response, the Commission stated that the Form 155 is being used as the initial application, regardless of the number of proposed CTSS. "The fee for this application is consistent with the statute and our fee schedule. Further, we used a similar

approach to determine the filing fee in other private radio services where the applicant files a Form 155," citing the 220-222 MHz proceeding. 7 FCC Rcd 4923, 49251, FCC 92-331, ¶ 15 (rel. August 4, 1992). The Commission also stated that it arrived at the \$1400 figure after considering, among other things, the problems associated with having different filing fees for different markets. Id.

F. PCS: In the PCS NPRM, the Commission proposes that if lottery selection procedures are used, "application fees be calculated using a procedure similar to that used" in licensing the 220-222 MHz band. FCC 92-333 ¶ 89. "Applying the same methodology to 2 GHz PCS would result in an application fee of approximately \$3 million, for example, for a nationwide license to operate on one of the 30 megahertz blocks if such licenses are authorized. This figure is based on an assumption of 1200 channel pairs (12.5 kHz bandwidth) times 70 markets (as assumed for 220 MHz nationwide licenses) times \$35 per call sign, yielding a total application fee of \$2.94 million." Id. The Commission noted, "[t]hese calculations assume that PCS is defined as a private radio service. If it is classified as a common carrier, a fee of \$230 per transmitter would apply." Id. at n.60.

IV. Recommendations

Based upon the statutory authority and the applicable precedents, the Commission has a fair degree of flexibility to adopt application filing fees, either on a per

call sign or per transmitter basis, by making reasonable assumptions regarding the scope of the authorized system. In this instance, the ultimate question of whether PCS should be regulated as a private or common carrier service should take into consideration the fact that higher revenues will be generated if the service is classified as common carriage.

The Commission's ultimate objective should be to foster a ubiquitous narrowband PCS service. These means coverage throughout the 3,622,205 square miles of land and water which are encompassed within the territorial boundaries of the United States. A simple calculation provides an approximation of the number of transmitters that would be required to effect this goal. The narrowband PCS technical rules are proposed to be patterned after the Part 22 standards for 900 Mhz paging stations. PCS Notice, paras. 125-126. A class L station under these rules has a defined service area with a radius of 20 miles. See FCC Rules, Section 22.504(b)(2). This service area can be calculated to cover approximately 1256 square miles.^{4/} By dividing the total square miles in the United States by the coverage of a typical station, one can conclude that the minimum number of transmitter sites required to cover the country would be 2,884 (3,622,205 divided by 1256 = 2883.93). Assuming an application fee of \$230.00 per transmitter site, the appropriate

^{4/} This is arrived at using the formula for the area of a circle as follows: $area = 3.14 \times 20^2$

fee for a nationwide 25 kHz channel could reasonable set at \$663,320. If the nation were divided into from three to five regions for narrowband filings, fees on the order of \$221,107 to \$132,664 would be in order.

Actually, these calculations could be considered conservative. Since reliable service area contours are circular, complete coverage can be effected only by having a certain degree of overlap in adjoining contours. PacTel is in the process of refining its calculations to more closely approximate the estimated number of transmitters it would take to provide coverage of the United States. Preliminarily, PacTel anticipates a nationwide filing fee on the order of magnitude of \$1,000,000 once the need for overlap is factored in.

PacTel understands, of course, that actual coverage will not precisely correspond to this idealized grid. However, the analysis can provide a reasonable basis for establishing a per transmitter fee in conjunction with a licensing scheme in which large amounts of geography are to be encompassed by a single license.