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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 9 of the Communications Act	)	MD Docket No. 94-19
	)	
Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year	)	
	)	

COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA") hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] CTIA is a trade association whose members provide Commercial Mobile Radio Services, including the licensees providing cellular service over 95 percent of to the United States, Canada, and Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry. CTIA and its members have a direct and vital interest in the outcome of this proceeding.

In this docket, the Commission has proposed rules and regulations to implement section 9 of the Communications Act of

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[1] Implementation of Section 9 of the Communications Act, MD Docket No. 94-19, Notice of Proposed Rulemaking, FCC 94-46 (released March 11, 1994)("Notice").

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1934.[2] Section 9 authorizes the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services, and international activities. The purpose of this rulemaking is to implement the Commission's procedures for collecting regulatory fees.

CTIA supports the Commission's proposal to adopt the statutory Schedule of Regulatory Fees for fiscal year 1994.[3] As the Notice describes in more detail, the Budget Act's amendments to section 9(b)(1)(C) of the Communications Act, 47 U.S.C. § 159(b)(1)(C), requires the Commission to collect the regulatory fees established by Congress for fiscal year 1994, and any

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[2]Section 9 was added to the Communications Act by section 6003(a) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 (approved August 10, 1993). Section 9 of the Communications Act is codified at 47 U.S.C. § 159.

[3]The Statutory Schedule of Regulatory Fees is set forth in section 9(g) of the Communications Act, 47 U.S.C. § 159(g), and is attached to the Notice as Appendix A. Common Carrier Bureau radio facilities are assessed a fee of $60 per 1,000 subscribers. While this category includes cellular radio, public mobile, and Personal Communications, SMR licensees are assessed a flat annual regulatory fee of $16 and categorized in the Statutory Schedule of Regulatory Fees as a Private Radio service. As the Commission has recognized in the Notice, the Budget Act amendments to section 332 of the Communications Act created a new regulatory framework for all mobile services which has caused the Commission to reclassify many private land mobile radio services, including "ESMRs" and many "SMRs." See Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, FCC 94-31 (released March 4, 1994)("CMRS Order"). These changes "undoubtedly [will require] amendments to the Schedule of Regulatory Fees" after fiscal year 1994. See Notice, n.10.

adjustments to the statutory fee schedule must be made after the 1994 fiscal year.[4]

CTIA is concerned, however, that the Notice and proposed rules do not address certain very important issues associated with the Congressional decision to assess regulatory fees based on a common carrier's number of subscribers.

First, while the Commission proposes to establish fixed dates on which regulatory fees will be due, the Notice is silent as to the date when carriers must measure the actual number of their subscribers. In the wireless industry, where growth rates of more than 40% a year are the norm, to insure uniform and fair fee assessments, a common "census" date must be established. To best achieve the objectives set forth in the Initial Regulatory Flexibility Analysis,[5] the Commission should require common carrier licensees to pay regulatory fees for the new federal fiscal year based on the number of subscribers at calendar year-end, i.e., December 31. Since carriers routinely measure (and often report) subscribership on a calendar year basis, this is the most efficient and least burdensome date the Commission can adopt.

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[4]CTIA agrees that the relevant Budget Act provisions and legislative history requires the Commission, for fiscal year 1994, to adopt the fee amounts established by the Schedule of Regulatory Fees approved by Congress. According to the Conference Report, "[t]he Commission is given authority to review these fees after one year and make recommendations for their adjustment." H.R. Rep. No. 213, 103d Cong., 1st Sess. 499 (1993)(emphasis added). See Notice at ¶¶ 3-10.

[5]See Notice, Appendix B.

While a ten month lag may strike some as needlessly long, CTIA's experience in conducting a voluntary data survey of its member carriers indicates that many companies require at least two months to close their calendar year books and measure their subscribership at year-end. An additional period of time, typically measured in weeks, is needed to tabulate and report subscriber data in a uniform manner. This suggests that March 1 is the earliest practical date the Commission can establish for carriers to report year-end numbers of subscribers.

The Budget Act amendments require the Commission to make annual adjustments to the Schedule of Regulatory Fees (1) to equal the amounts appropriated by Congress for any fiscal year after fiscal year 1994, (2) to reflect changes in the Commission's enforcement, policy and rulemaking, information services, and international activities, (3) to reflect any unexpected increase or decrease in the number of licenses or units subject to regulatory fees, and (4) to reflect other changes and factors.[6] In order to comply with the statutory mandate to base any adjustments to the Schedule of Regulatory Fees on these factors, the Commission will have to use data collected from carriers well in advance of the date the Commission establishes as the payment deadline. In addition, section 9(b)(4)(B) requires that the Commission must provide Congress with advance notice of any amendment to the Schedule of

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[6] See Notice at ¶¶ 4-5 and notes 6-10; see generally, 47 U.S.C. § 159(b).

Regulatory Fees "not later than 90 days before the effective date of such amendment."[7]

Combining all of these factors, CTIA proposes that the Commission establish December 31 as the date when carriers must conduct a census of their subscribers; that carriers be required to report their year-end number of subscribers to the Commission on March 1, that the Commission provide Congress with notice of any amendments to the fee schedule by July 1, and that carriers remit their standard fee (or first installment payment, depending on classification) on October 1, the first day of the federal fiscal year.

CTIA's second concern is that the Notice does not address the need to safeguard the confidentiality of subscriber data reported to the Commission by wireless carriers. The Commission recently has concluded that there is sufficient competition in the wireless marketplace to justify forbearance from tariffing requirements.[8] In support of this conclusion, the Commission found that "cellular providers do face some competition today, and the strength of competition will increase [in] the near

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[7] 47 U.S.C. § 159(b)(4)(B).

[8] See CMRS Order, at ¶ 75.

future,"[9] and that tariff filings in a competitive environment can inhibit competition.[10]

Just as the price information set forth in tariff filings can be a barrier to competition, the availability of information that provides a carrier with accurate data concerning the subscriber count of its competitors can have an anticompetitive effect. This is particularly true in markets where one or more competitors report data only for that single market, either because they operate in only a single market, or because the licensee is a partnership whose data cannot be aggregated with multiple filings.[11]

Unfortunately, while section 0.459 of the Commission's rules permits any person submitting information or materials to the Commission to request that such information not be made routinely available for public inspection,[12] under sections 0.451 and 0.453(i) of the Rules,[13] files containing reports required by FCC Rules and Regulations are presumed to be routinely available for public inspection at the Common Carrier Bureau, Industry

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[9] CMRS Order at ¶ 175.

[10] CMRS Order at ¶¶ 175-178 ("even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate prices").

[11] The Notice provides that applicants will be able to use a single payment instrument to cover multiple applications, although applicants must identify each "item" separately on FCC Form 159 or 159-S. Notice at ¶ 98.

[12] 47 C.F.R. § 0.459.

[13] 47 C.F.R. §0.451 and § 0.453(i).

Analysis Reference Room. This creates a legal presumption against confidentiality.

If a record or report is included in a category specified in section 0.457 of the Commission's rules,[14] the records are not routinely available for public inspection; in other words, there is a presumption against disclosure of the information. In particular, section 0.457(d) is specifically applicable to trade secrets and commercial or financial information. Under this provision, the Commission is authorized to withhold from public inspection "materials which would not customarily be released to the public by [the person who submitted them]." 47 C.F.R. § 0.457(d). Section 0.457(d)(i)-(iv) of the rules further identify specific categories of reports that are to be shielded from public disclosure. These include, inter alia, financial reports submitted by licensees of broadcast stations pursuant to § 1.611 of the Commission's rules, including fees computed from information contained in financial reports submitted pursuant to § 1.611;[15] schedules 2, 3, and 4 of financial reports submitted for cable television systems pursuant to § 76.403 of the Commission's rules;[16] and annual fee computation forms submitted for cable television systems submitted pursuant to §76.406 of the rules.[17]

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[14] 47 C.F.R. § 0.457.

[15] 47 C.F.R. § 0.457(d)(1)(i).

[16] 47 C.F.R. § 0.457(d)(1)(iii).

[17] 47 C.F.R. § 0.457(d)(1)(iv).

Just as the Commission previously has shielded from public disclosure specific categories of reports and fee computations that contain sensitive commercial and financial information, the Commission should amend its rules to include, as a new subsection of Rule § 0.457(d)(1), a provision that specifically will shield from public disclosure reports and regulatory fee computations based on a common carrier's number of subscribers.

Conclusion

To insure uniformity and minimize the burden on licensees who must comply with the Commission's rules for the collection of regulatory fees, the Commission should establish December 31 as the date on which all Commercial Mobile Radio Service providers must conduct a count of their subscribers for reporting purposes. CTIA also asks the Commission to amend its rules to shield from public disclosure reports and regulatory fee computations based on a common carrier's number of subscribers. A rule change is needed to preserve the confidentiality of this commercially sensitive information, and to prevent this information from being used in a way that might dampen competition.

Respectfully submitted,

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Certificate of Service

I, Robert F. Roche, hereby certify that on this 7th day of April, 1994, copies of the foregoing Comments of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

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