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

In the Matter of

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Implementation of Section 9
of the Communications Act-
Regulatory Fees

) MD Docket No. 94-19
)
)

To: The Commission

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JUL 8 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR RECONSIDERATION

Dennis C. Brown and Robert H. Schwaninger, Jr. ("we" or "Brown and Schwaninger"), on behalf of numerous clients subject to payment of Regulatory Fees, respectfully request that the Commission reconsider one part of its Report and Order (R&O) (FCC 94-140 Released June 8, 1994) in the above captioned matter. In support of our position, we show the following.

A Third Category of Regulatory Fees Cannot Be Created By The Commission

In Paragraph 38 of its R&O the Commission stated that

In Section 9(a), the general authority provision, Congress broadly empowered us "to assess and collect regulatory fees...." Subsection 9(f) requires only that our rules include specific provisions providing for advance payments in the case of small fees and installment payments for larger ones. Nothing in that section, or in logic, compels a conclusion that every fee must necessarily fall within a category of either "large" or "small." Section 9(f) is simply silent regarding any other substantive aspect of our fee collection system, including whether other categories of fee payments may be established.

There is a great deal in Section 9(f) of the Communications Act of 1934, as amended, 47 U.S.C. §159, in Section 9(b) of the Act, and in logic that compels a conclusion that the

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Commission is not authorized to establish a new category of fees. We will explain our reasoning herein.

All Fees Large and Small

Congress stated in Section 9(f) that the Commission shall prescribe appropriate rules and regulations and that "such rules and regulations shall permit payment by installment in the case of fees in large amounts, and in the case of fees in small amounts, shall require the payment of the fee in advance for a number of years" (emphasis added) This section clearly requires that whatever rules and regulations the Commission makes to carry out the provisions of this section "shall permit" payment as stated above. A rule changing the payment structure cannot, by its nature, be valid, because any rule that changed the payment structure would no longer permit payment in the manner prescribed by Congress. Changing the payment structure violated the direct mandate which Congress stated in Section 9(f). Therefore, the Commission was in error in stating that, "nothing in that section . . . compels a conclusion that every fee must necessarily fall within a category of either 'large' or 'small'," R&O at 38.

The Sounds of Silence

Section 9(b)(2) of the Act, Mandatory Adjustment of Schedule, addresses what adjustments the Commission "shall" make in terms of the Schedule of Regulatory Fees. Section 9(b)(3), Permitted Amendments, addresses what adjustments the Commission will make "if the Commission determines that the Schedule requires amendment." Neither of

these sections, which define the extent of the power given to the Commission by Congress regarding the establishment and adjustment of regulatory fees and service categories, provides for the changing of the structure of payment of those fees for those service categories. Since Congress took care to create a section discussing Mandatory Adjustments and another section discussing Permitted Amendments and a third discussing regulations, which contains a method of payment, it is clear that if Congress had intended to authorize the adjustment of the payment structure that the Commission undertook, it would have expressly granted that authority. However, Congress was silent and silence does not equate to authority.

Another factor that indicates that Congress did not simply assent through silence to the new payment structure is that the Commission undertook a large and fundamental change from the structure that Congress provided. If Congress had intended to allow the Commission to handle the payment structure in such a radically different way, Congress would have set up such a very general payment structure and would have expressly provided liberal authority for change. The structure, as created by Congress, is such that a party is locked in to a set fee for a number of years. The change that the Commission made would open the door for the Commission to designate any and all categories of fees as neither small nor large, completely divesting Congress's work of all its force and effect. This would allow all fees to become annual fees and as a result the Commission would gain the ability to reassess those fees on a yearly basis, simply by changing the description of each fee to a standard fee at its whim. Such a fundamental change cannot be interpreted as within the

intent of Congress through Congress's silence. This is especially true when taking into consideration the limitations that the Commission has placed on perceiving intent through silence with regard to other areas in this section.

The Commission has pointed to the Schedule of Regulatory Fees, which was specifically designated for change at the Commission's discretion, and observed that "Congress did not intend that we change the amounts or the services established . . . for 1994. We do not believe that Congress would have enacted Section 9(g) intending that we immediately amend the service classification or fee amounts in its schedule." It is irreconcilable that silence about changing the Schedule of Regulatory Fees in 1994 expressed an intention by Congress that it should not be changed but the same silence about changing the payment structure expressed an intention by Congress that it should be changed at will. There is no consistency to these two positions except, perhaps, excessive indulgence by the Commission in its Taoistic interpretations of silence by Congress.

If the service fee schedule in Section 9(g) was enacted for a purpose then the payment structure in Section 9(f) was enacted for a purpose as well and that purpose was to set up a payment structure that allows for the payment of a fixed sum, up front or in installments, that covers a period of years, and that will not be interfered with by any other rules and regulations the Commission might find it necessary to make. It should be allowed to serve that purpose, just as the service fee schedule is being allowed to do, until such time as Congress directs otherwise.

Note on Anonymous Regulatees

Finally we should note that the Commission states, at the end of paragraph 38, that it is entitled to create standard fee payments because "some regulatees are subject to payment of neither large or small fees" But, the Commission failed to explain who these regulatees are or why they are subject to neither small or large fees. We have been given a conclusion by the Commission with no substance on which to base its validity. Therefore we have no choice but to suggest that the Commission's determination was arbitrary and capricious and lacking in factual foundation.

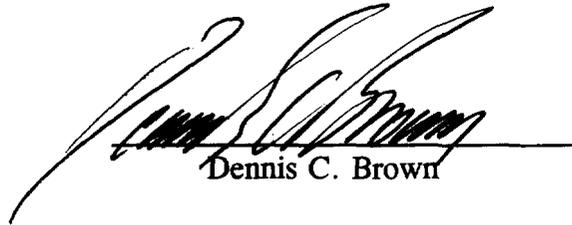
Judicial Review is Not Precluded

The Mandatory Adjustment of the Schedule of Regulatory Fees, as provided for by Congress in Section 9(b)(2), states that "increases or decreases in fees made by adjustments pursuant to this paragraph shall not be subject to judicial review." The instant Petition For Reconsideration deals with an attempt by the Commission to exceed the limits of its authority as provided for by Congress under Section 9(f). The Commission's action under reconsideration was not taken with respect to increases or decreases in fees made by adjustments pursuant to Section 9(b)(2) and therefore judicial review of the Commission's action is not precluded.

Conclusion

There is no valid purpose and no authority from Congress for a change in the payment structure at this time. For this and all the foregoing reasons, we respectfully request that the Commission reconsider its creation of a third category of regulatory fees.

Respectfully submitted,



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