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February 13, 1995

VIA HAND-DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Assessment and Collection of Regulatory Fees for Fiscal Year 1995
MD Docket No. 95-3

Dear Mr. Caton:

With respect to the above matter, I enclose an original and nine (9) copies of the comments of Hertz Technologies, Inc. for filing. We request that each Commissioner be furnished with a copy of Hertz' comments.

I also enclose an extra copy and request that it be stamped "received" and returned via the messenger.

Thank you for your attention to this matter.

Sincerely,

John W. Butler
rmc

John W. Butler

JWB:rmc
Enclosures

cc: Rebecca L. Reed
Allan Danzig, Esq.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In The Matter of	)	
	)	
Assessment and Collection	)	MD Docket No. 95-3
of Regulatory Fees for	)	
Fiscal Year 1995	)	

COMMENTS OF HERTZ TECHNOLOGIES, INC.

I. Introduction

On January 12, 1995, the Federal Communications Commission ("FCC" or "Commission") issued a Notice of Proposed Rulemaking ("NPR") in the above-referenced docket. In the NPR the Commission set forth proposed regulatory fees to be collected for Fiscal Year 1995 pursuant to section 9 of the Communications Act, 47 U.S.C. § 159. The NPR requested comments on the proposed fees. Hertz Technologies, Inc. ("Hertz"), by its undersigned attorneys, respectfully files these comments in response to the Commission's request.

II. Identity and Interest of Hertz Technologies, Inc.

Hertz Technologies, Inc. is a switchless reseller of toll telecommunications services. Hertz has an effective tariff on file with the Commission and provides interstate telecommunications throughout the continental United States. As a reseller, Hertz would be subject to the fees as proposed in paragraphs 54-60 of the NPR. For the reasons set forth below,

Hertz opposes expansion of the regulatory fees to cover resellers.

III. Inclusion of Resellers is Not Authorized By the Statute

47 U.S.C. § 159(b)(3) states:

> Permitted amendments. In addition to the adjustments required by paragraph (2), the Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). In making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law. Increases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review.

Although the Commission cites 47 U.S.C. § 159(b)(1)(A) and (b)(3) generally for the authority to revise the Schedule (NPR at para. 2), it appears that the addition of resellers to the Schedule is proposed under subsection (b)(3). This is the case because (b)(2), one of the two amendment provisions referenced in (b)(1)(C), applies only to "proportionate increases or decreases." That section contemplates changing of assessments within the statutorily defined classifications in the existing Schedule, not the addition of new classifications. This leaves only the authorization in (b)(3).

Turning to (b)(3), the first step in the Commission's decision to make a permissive (as opposed to mandatory under (b)(2)) adjustment is to determine that the Schedule requires

amendment in order to comply with the requirement in (b)(1)(A) that the fees collected cover the amount appropriated for covered activities. The Commission presumably already has made this determination after review of the FY 1995 appropriation for the agency. Having made that determination, the Commission may add, delete, or reclassify services in the Schedule "to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law." 47 U.S.C. § 159(b)(3) (emphasis added).

As the underlined language indicates, the Commission's authority to add a service to the Schedule is limited to those situations where a regulation or change in law so dictates. As the Commission itself recognizes, its resale policy and its recognition of the existence of resellers dates from at least 1977. See Resale and Shared Use of Common Carrier Services, 60 FCC Rcd 2d 588 (1977), cited at NPR para. 56 n.19. Hertz knows of no rulemaking or change of law that has occurred since the enactment of 47 U.S.C § 159 that in any way impacts resellers so as to justify their addition to the Schedule as a "new service." To the contrary, resellers have been around for many years, and their existence was as well known to Congress in 1993 when it passed the Budget Reconciliation Act as it is today. Had Congress intended to include resellers, it would have. Because the statute sets forth a clear standard for addition of services

to the Schedule, and that standard has not been met[1/] or even addressed here, the addition of resellers by the Commission is not authorized.

IV. Inclusion of Resellers Would Lead to Double Counting of Usage and Would Unfairly Penalize Resellers

Because resellers by definition employ the services of facilities-based carriers, assessing fees against resellers would result in fees being collected twice -- once from the underlying carrier, and again from the reseller. A closely related, but different, effect is that resellers would pay the regulatory fee twice -- once as part of the cost of the service from the underlying carrier, and again directly through the fee. This will result in a resale penalty that will both increase the cost to the end user and also reduce the difference between the reseller's rate and the typically higher rate of the facilities-based carrier. These combined effects are inequitable, will damage resellers' ability to compete in the marketplace, and will impede the price competition that has been at the center of the

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1/ In explaining its decision to include resellers, NPR at para. 56, the Commission states that its actions prohibiting restrictions on resale and its "market surveillance" have fostered the growth of the resale industry. While these statements may be true, they indicate more regulation of the facilities-based carriers from whom resellers purchase service than they do regulation of resellers themselves. More important, these statements do not address the explicit statutory requirements regarding addition of services to the Schedule.

Commission's resale policy.[2/] Furthermore, these undesirable results reinforce the conclusion that Congress' omission of resellers from the original schedule was a conscious choice that may not be changed by the Commission.

V. If the Commission Does Include Resellers, It Should Employ the "Customer Units" Calculation For Determining Fees

The Commission has requested comments "concerning the most efficient and equitable method for assessment of regulatory fees." As discussed in part III, supra, Hertz believes that the Commission does not have statutory authority to levy regulatory fees of this type against resellers. Should the Commission disagree and adopt a Schedule that includes resellers, however, Hertz urges the Commission to adopt the "number of customer units" calculation set forth in paragraph 59 of the NPR.

The issue of equity, or, more accurately, inequity, has been addressed in part IV, supra. With respect to efficiency, both for carriers and the Commission, the "customer unit" method of calculating fees is superior to the "minutes of use" alternative proposal. Minutes of use information, because it requires manual sorting and collection of data, would increase the burden associated with calculation of fees by carriers. The associated administrative costs would add no revenue to the total

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2/ It is ironic that these anti-competitive results would be directly at odds with the benefits of resale that the Commission cites as the reason why resellers should have to pay the fees in the first place. See footnote 1, supra. Put another way, the fee undercuts the policy which is the basis of the fee. This is not in the public interest.

collected, but would increase the cost to the carriers and, ultimately, their customers. This is not in the public interest. In addition, because of the inherently more detailed and numerous data compilations associated with minutes of use calculations, such a regime would be more difficult for the Commission to monitor and verify.

For these reasons, and because the alternative proposal is, as the Commission recognizes, a significant change in procedure whose utility has not been demonstrated, Hertz recommends that the customer unit method be used should the Commission decide to amend the Schedule to include resellers.

VI. Conclusion

For the foregoing reasons, Hertz Technologies, Inc. recommends that resellers not be added to the Schedule of Regulatory Fees. Should the Commission decide otherwise, Hertz requests that the customer unit calculation method be used.

Respectfully submitted,

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