

FCC MAIL SECTION

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

FORWARDED COPY ORIGINAL
FCC 95-257
SECTION

In the Matter of)
JUN 23 1 29 PM '95)
Implementation of Section 9)
of the Communications Act)
DISC)
Assessment and Collection of)
Regulatory Fees for the 1994)
Fiscal Year)

JUN 23 3 45 PM '95
MD Docket No. 95-19

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1995; Released: June 22, 1995

By the Commission:

Table of Contents

<u>Topic</u>	<u>Paragraph Numbers</u>
I. Introduction	1
II. Discussion	2-24
1. Small Entities	2-5
2. Payment Schedules	6
3. Nonprofit Entities	7
4. Confidentiality	8-9
5. Bearer Circuits	10-11
6. Waiver Issues	12-24
III. Ordering Clauses	25-27

I. Introduction

1. In the Implementation of Section 9 of the Communications Act, 59 F.R. 30984 (June 16, 1994), 9 FCC Rcd 5333 (1994) (FY 1994 Report and Order), the Commission adopted rules to implement Section 9 of the Communications Act, as amended, 47 U.S.C. § 159. Those rules provide for the assessment and collection of regulatory fees to recover the cost of the Commission's enforcement, policy and rulemaking, user information and international activities. 47 U.S.C. § 159(a). Now before the Commission are petitions for reconsideration and clarification of

the FY 1994 Report and Order.¹ We also consider several issues arising from petitions for waiver, reduction or exemption of the regulatory fees assessed for the 1994 fiscal year (FY 94). As discussed below, we grant reconsideration to clarify the standards under which waivers, reductions or exemptions will be granted. We also broaden the scope of the exemptions for nonprofit entities.

II. Discussion

2. Small Entities. Fireweed Communications Corp. contends that the Commission failed to provide adequate notice of the proposed rules to small businesses as required by 5 U.S.C. § 609. These arguments were fully considered in the FY 1994 Report and Order, and to the extent that Fireweed asserts that we erred in the FY 1994 Report and Order, its arguments are without merit.

3. We properly rejected Fireweed's contention that our efforts to distribute the NPRM to small businesses were inadequate. As noted in the FY 1994 Report and Order, 9 FCC Rcd at 5337 n.6, 5 U.S.C. § 609 requires that we "assure that small entities have been given an opportunity to participate in the rulemaking." Although the statute lists appropriate measures which the Commission may use to ensure that small entities have such an opportunity to participate, the Act does not require the Commission to follow any specific procedure. Thus, our distribution of the NPRM to the media, trade press and other entities was consistent with the requirements for providing

¹ A list of the parties filing petitions for reconsideration are set forth in Appendix A. Additional informal comments were filed which are contained in the proceeding docket files. Withers Broadcasting Company of Texas also filed a Petition for Deferment of Payment of the regulatory fees pending action on its Petition for Reconsideration. We will consider Withers' petitions for deferment and for reconsideration, as well as the Petition for Reconsideration filed by Fant Broadcasting Company of Nebraska, Inc. as requests for waiver or reduction of the regulatory fees. The merits of these requests will be ruled on by the Managing Director pursuant to delegated authority. 47 C.F.R. § 0.231(c). Southwestern Bell Telephone Company requested that the Commission clarify whether the regulatory fees can be passed on to subscribers as exogenous costs. Southwestern Bell's request was referred to the Chief, Common Carrier Bureau. In Price Cap Treatment of Regulatory Fees, 9 FCC Rcd 6060 (Com. Car. Bur. 1994), the Bureau waived the rules to permit exogenous treatment of the regulatory fees.

notice to small businesses. Fireweed also argues that the publication of the Daily Digest on Internet does not satisfy Section 609 because the Daily Digest is an unofficial announcement. This argument is without merit. Section 609 does not require that any particular types of official announcements be made. The publication on Internet met the objective of Section 609 by providing many small entities who subscribe to Internet with notice of the rulemaking. Finally, Fireweed's contention that the Commission made no attempt to reduce the cost and complexity of participating in the rulemaking is simply in error. The proceeding was open to all interested parties and the Commission fully considered hundreds of informal comments.

4. Fireweed also contends that, because of the lack of participation by small entities, the rulemaking was biased in favor of larger regulatees. In this regard, it alleges that the fees are unduly burdensome and that our waiver provisions work an undue hardship on small entities. Fireweed also protests that the waiver rules are more burdensome than the renewal procedures, because Fireweed will have to request a waiver every year, and it will be forced to disclose confidential financial information. See 47 C.F.R. § 1.1165.

5. We reject the contention that our rules are biased against small entities. To the contrary, in implementing the fee schedule, we have expressly adopted procedures for payment of fees that are designed to minimize the burden on small entities, in accordance with congressional intent. Congress provided that the Commission may grant individual waivers of the fees, and it is our policy to grant individual waivers where imposition of the regulatory fee would be inequitable or would impinge on a regulatee's ability to serve the public. To the extent that Fireweed objects to specific fees, the fees for FY 1994 were adopted by Congress, and we did not depart from the fee schedule for FY 1994.

6. Payment Schedules. Brown and Schwaninger (B&S) reassert that Congress authorized only two types of payment schedules: installment payments for large fees and payment in advance for small fees. It therefore argues there was no authority for the Commission to establish annual payment of regulatory fees without affording an opportunity to make installment payments in the case of all fees other than those designated as small fees. As we found in the FY 1994 Report and Order, Congress clearly authorized the Commission to require the annual payment of fees that are not large fees eligible for installment payments or small fees subject to advance payment. 9 FCC Rcd at 5347 ¶ 38. Brown's arguments were fully considered in the FY 1994 Report and Order and are afforded no further elaboration here.

7. Nonprofit Entities. Section 9(h) exempts nonprofit entities from the regulatory fee requirement. 47 U.S.C. § 159(h). In the

FY 1994 Report and Order, we held that the nonprofit exemption will be available only to those regulatees who establish their nonprofit status under section 501 of the Internal Revenue Code. 26 U.S.C. § 501. 9 FCC Rcd at 5340 ¶ 17. We have received requests for exemptions from the regulatory fees from regulatees that have been certified as nonprofit entities by state agencies (i.e., they hold nonprofit status at the state level) but which do not possess Section 501 IRS Certification. Thus, there are instances where bona fide nonprofit entities should be accorded exemptions under Section 9(h) even though they have not established their tax exempt status under Section 501. Therefore, while we will continue to grant an automatic exemption for nonprofit status to all Section 501 tax exempt organizations, we are amending our rules to allow entities to demonstrate nonprofit status by certification from a state or other government entity. See 47 C.F.R. § 1.1161 (c).

8. Confidentiality. The FY 1994 Report and Order, 9 FCC Rcd at 5372, ¶ 110, denied a request to amend Section 0.457 of the rules to protect the confidentiality of data submitted with regulatory fee payments. We noted that regulatees could request confidentiality for such data when they submitted their fee payments. NYNEX and Cellular Telecommunications Industry Association (CTIA) now request the Commission to reconsider this determination. As noted above, Fireweed raises a similar concern, although not related to common carriers. For FY 1994, common carrier fee calculations were based on the number of a carrier's presubscribed lines, access lines, or subscribers. The carriers argue that this information should be regarded as confidential because its can be used by competing carriers to determine the extent of market penetration and thereby gain a competitive advantage. Thus, the carriers conclude that the Commission should amend Section 0.457 of the rules to protect the confidentiality of the fee calculations.

9. The requests to amend the rules will be denied. There has been no convincing showing of a need to modify the rules. We are unaware of any FOIA requests for access to fee data. Moreover, if any regulatee perceives a need to protect information filed with the Commission from public disclosure, they can request confidential protection pursuant 47 C.F.R. § 0.459 when they file information with the Commission.

10. Bearer circuits: Sprint Corporation (Sprint) filed a petition requesting reconsideration of the language in the FY 1994 Report and Order, 9 FCC Rcd at 5367 ¶ 98, which reads:

The fee is to be paid by the facilities-based common carrier activating the circuit in any transmission facility for the purpose of service to an end user or resale carrier. Private submarine cable operators also are to pay fees

for circuits sold on an indefeasible right of use (IRU) basis or leased in their private submarine cables to any customer of the private cable operator.

Sprint asserts that this language applies the regulatory fees for active 64 Kilobyte per second international circuits to both the operators of private submarine cable systems and to the common carriers who use circuits on such systems to provide international telecommunication services. This policy results in Sprint paying two regulatory fees for the PTAT-1 cable circuits used by Sprint Communications Co. L.P. for common carrier services. Sprint complains that this results in it being double charged as both the international carrier and the private cable operator for the same private cable circuits. Sprint points out that there is no similar double charge for other common carrier cable systems, and that the double charges place it at a severe and unjustified competitive disadvantage.

11. We agree with Sprint, and we will eliminate the double charge assessments for private submarine cable system circuits used by international common carriers. We will modify the above quoted language to read:

Private submarine cable operators also are to pay fees for circuits sold on an indefeasible right of use (IRU) basis or leased to any customer other than an international common carrier authorized by the Commission to provide U. S. international common carrier services.

12. Waiver Issues. In the FY 1994 Report and Order, 9 FCC Rcd at 5344 ¶ 29, we stated that we would waive the regulatory fees "on a case by case basis in extraordinary and compelling circumstances upon a showing that a waiver . . . would override the public interest in reimbursing the Commission for its regulatory costs." While the FY 1994 Report and Order provides that applicants seeking waivers should submit documentation with relevant information, it did not establish specific standards for waivers of the fees or define with specificity what information would be required. We have received a number of requests for waiver of the regulatory fees alleging financial hardship, asserting either that the regulatees would suffer financial harm from payment of the regulatory fee, or are in bankruptcy. A number of regulatees who have alleged that payment of the regulatory fee would result in financial hardship failed to submit independent supporting documentation.² Others have relied

² See, e.g., Letters dated August 1, 1994 from Pine to Prairie Broadcasting, Inc. and Madison County Broadcasting, Inc. and; August 4, 1994 from KLRQ-FM; and Petition for Exemption from regulatory fee filed August 10, 1994 by Baldwin Broadcasting

on tax returns,³ audited financial statements, and raw, unaudited data.⁴

13. We will grant waivers of the fees on a sufficient showing of financial hardship. Mere allegations or documentation of financial loss, standing alone, will not support a waiver request. Rather, we will grant a waiver only when the impact of the regulatory fee will affect a regulatee's ability to serve the public. It will be incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fees and to maintain its service to the public. In order to establish a basis for waiver predicated on financial need, regulatees who do not initially submit an adequate showing of financial hardship, may be asked to provide information such as a balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information.

14. We have also received petitions for waivers from licensees of stations which are legally bankrupt, undergoing Chapter 11 reorganizations, or are in receivership. Evidence of bankruptcy or receivership is sufficient to establish financial hardship. Moreover, where a bankruptcy trustee, receiver, or debtor in possession is negotiating a possible transfer of a license, the regulatory fee could act as an impediment to the negotiations and the transfer of the station to a new licensee. Thus, we will waive the regulatory fees for licensees whose stations are bankrupt, undergoing Chapter 11 reorganizations or in receivership.

15. We will also grant petitions for waivers of the regulatory fees on grounds of financial hardship from licensees of broadcast stations which are dark (not operating). When a station is dark,

Company. This does not purport to be a complete list of the pending waiver requests, but rather a representative sample of those requests to demonstrate the difficulties encountered by the Commission in ruling on regulatory fee waiver requests.

³ Petition to Defer Payment and Request for Waiver of Regulatory Fees filed July 20, 1994 by Corinthians XIII.

⁴ Petition for Waiver, Deferral and Confidentiality filed August 5, 1994 by Fireweed Communications, Corp. Fireweed's request that the Commission protect the confidentiality of its financial documents will be addressed by the Managing Director in the context of its specific case.

it generally is either without or with greatly reduced revenues. Moreover, broadcast stations which are dark must request permission to suspend operation pursuant to Section 73.1740 (a)(4) of the Rules. 47 C.F.R. § 73.1740(a)(4). Petitions to go dark are generally based on financial hardship. Under these circumstances, imposition of the regulatory fees could be an impediment to the restoration of broadcast service, and it is unnecessary to require a licensee to make a further showing of financial hardship.

16. We have also received requests for waivers of the regulatory fees from operators of community-based translators. These translators are generally not affiliated with commercial broadcasters, they are either nonprofit, non-profitable, or only marginally profitable, serve small rural communities, and are supported financially by the residents of the communities served. Even those translators that are nominally for profit often sell no advertising and have no way of requiring viewers who receive their signals to pay a subscriber fee. These translator licensees, as whole, are different from other classes of commercial regulatees because they have no advertising revenue and usually have no mechanism for enforcing payment from members of the public who benefit from their services. We will waive the regulatory fee for the licensee of any translator that: (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support. Waivers will also ease the regulatory burden on these regulatees. However, the burden will remain on the translator licensees to document their eligibility for the waiver.

17. A number of licensees of full operational television stations have satellite stations serving communities located in sparsely populated rural areas outside of the parent station's coverage area. They assert that their efforts to serve these sparsely populated areas have resulted in the assessment of regulatory fees that are equal to or larger than the fees for stations serving larger markets. The National Association of Broadcasters (NAB) also asks the Commission to reconsider its decision to assess the same fees against satellite stations as full-service stations. It asserts that there is no basis for determining that Congress intended satellite and full service stations to pay the same regulatory fees.

18. Congress, in adopting the Schedule of Regulatory Fees, did not distinguish between full power television stations and satellite stations, and, as we found in the FY 1994 Report and Order, Congress did not intend for the Commission to modify the

Schedule of Fees for FY 1994.⁵ We recognize, however, that because satellites are generally used to serve rural and sparsely populated areas and do not generally function as full service stations, there may be inequities in treating them as full service stations for fee purposes. In the FY 1994 Report and Order we recognized certain anomalies and we determined we would consider waiver requests from satellite licensees on a case by case basis. We held that where a licensee was required to pay a higher fee for its satellite station than for the parent station, we would entertain a petition to reduce the fee for the satellite station so that it would pay the same regulatory fee as the parent station. We also held that we would entertain requests for waiver or reduction of the fees, when the fees would diminish the licensee's ability to serve the public. 9 FCC Rcd at 5360-61 ¶ 82.

19. Withers Broadcasting Company of Texas is the licensee of small market television stations and television satellite stations. It argues that if it is required to pay the full fee for each of its satellite stations, it will pay a larger fee than a major market station. It proposes that the Commission combine its satellite fees with the fees for the parent station. Where the total number of households served by the parent and satellites is less than the number of households in a top-100 market, it proposes to pay a total fee for both the parent and the satellite stations that is equivalent to the fee for a station located outside of the top-100 markets.

20. Congress in adopting the Schedule of Fees of FY 1994 did not distinguish between the fees for full service and satellite television stations. Thus, licensees with a full-service station and satellites stations, may be assessed with separate but identical fees for their full service stations and each of their supporting satellite stations. We agree with Withers, however, that the regulatory fees can be particularly inequitable for licensees operating satellite stations. Thus, for those licensees that have timely filed petitions for reconsideration or for waiver or reduction of the regulatory fees for satellite stations, we will grant partial waivers and reduce the fees for licensees operating satellite stations so each set of parent and satellite stations will pay a regulatory fee based on the total number of television households served, and will be assessed a single regulatory fee comparable to the fee assessed stations

⁵ In the FY 1995 NPRM at ¶ 33, we proposed a reduced fee for satellite stations. However, as found in the FY 1994 Report and Order, Congress did not intend for the Commission to modify the Schedule of Fees for FY 1994. It would therefore be inappropriate to impose a reduced uniform fee for all satellite stations for FY 1994.

serving markets with the same number of television households.⁶

21. Withers also argues that the Commission should reduce the regulatory fees for certain television stations operating in large markets, but which are part of that market only because the residents in the station's service area primarily view the market's principle city's stations. These stations are generally UHF stations, they lack network affiliations, and are located outside of the principle city's metropolitan area and do not provide a Grade B signal to a substantial portion of the market's metropolitan areas. Often these stations are not carried by cable systems serving the principal metropolitan areas.

22. The Managing Director, under delegated authority, has concluded that stations with the characteristics described above will be assessed a fee based on the number of television households served, and will be charged the same fee as stations serving markets with the same number of television households. Fees have been reduced accordingly when requested. Letter to Bradford D. Cagey, February 10, 1995; and Letter to Dr. Robert J. Pelletier, February 10, 1995. For example, El Paso, Texas, with 242,000 television households is the 100th market. 1994 Television and Cable Fact Book, p. A-2. Stations that do not serve the principal metropolitan areas within their assigned markets and serve fewer than 242,000 television households will be assessed the same regulatory fee as stations not located in the top-100 markets. In most instances, this information can be derived from the Arbitron market data in the Television and Cable Fact Book. We agree with the Managing Director's approach. Therefore, consistent with the Fact Book, we will entertain requests for reductions in the regulatory fee assessments from those licensees that have filed timely petitions for waiver or reduction of the regulatory fee.

23. COMSAT General Corporation (COMSAT) petitioned the Commission to either reduce or waive the regulatory fee for FY 1994 for its D-2 satellite. COMSAT deorbited its D-2 satellite on December 16, 1993, and, inter alia, it urges the Commission to reduce proportionally the regulatory fee to reflect the limited period in which it was in operation. Fees are assessed on an annual basis pursuant to 47 C.F.R. 1.1159(3)(b) and the

⁶ We recognize that an ongoing rule making proceeding is addressing whether Television Satellite Stations should continue to be exempt from the Commission's national television ownership restrictions. Our decision to assess a regulatory fee for Television Satellite Stations that is less than the amount for Commercial Television Stations should not be taken as a signal that any determination has been made with regard to the outcome of that proceeding.

Commission, will not issue pro rata refunds. The Managing Director is directed to deny COMSAT's request for a proportional reduction of the regulatory fee.⁷

24. Fireweed Communications Corp. argues that its television station shares its frequency with fixed station WNPG234, and that as a shared use broadcast licensee, it is not listed on the schedule of fees and should either pay no fee or a substantially reduced fee. The Commission, however, does not distinguish between broadcast stations on the basis of whether they share frequencies with other services. To the extent that the shared use may reduce its market size or result in financial need, these circumstances will be considered as a factor in any request for the Commission to either waive or reduce the regulatory fee. Accordingly, we direct the Managing Director to consider, in ruling upon Fireweed's waiver request, any impact the sharing of its frequency may have upon Fireweed's ability to pay its regulatory fee.

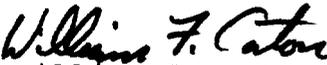
III. Ordering Clauses

25. ACCORDINGLY, IT IS ORDERED that the Petitions for Reconsideration identified in Appendix A are granted to the extent indicated herein and in all other respects are denied.

26. IT IS FURTHER ORDERED that the rule changes as specified above and in Appendix B ARE ADOPTED.

27. IT IS FURTHER ORDERED that the rule changes made herein will become effective 60 days after publication in the Federal Register. This action is taken pursuant to Section 4(i), 4(j), 9 and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 159 and 303(r).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

⁷ In all other respects, COMSAT's request for a waiver of the fee, as well as other requests for waivers discussed here, will be considered by the Office of Managing Director pursuant to its delegated authority to rule upon requests to waive, reduce or defer regulatory fees. 47 C.F.R. § 1.1165(a).

APPENDIX A

Petitions for Reconsideration were filed by:

Dennis C. Brown & Robert H. Schwaninger
Cellular Telecommunications Industry Association
Fant Broadcasting Company
Fireweed Communications
National Association of Broadcasters
NYNEX Corporation
Southwestern Bell Telephone Company
Sprint Corporation
Withers Broadcasting Company of Texas

APPENDIX B

Section 1.1161 is amended by revising paragraph (c) to read as follows:

§1.1161 General exemptions from regulatory fees.

* * *

(c) Applicants and permittees who qualify as nonprofit entities. For purposes of this exemption, a nonprofit entity is defined as: an organization duly qualified as a nonprofit, tax exempt entity under section 501 of the Internal Revenue Code, 26 U.S.C. § 501; or an entity with current certification as a nonprofit corporation or other nonprofit entity by state or other governmental authority.