

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 1996)

MD Docket No. 96-84

To: The Commission

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**COMMENTS OF BERNSTEIN & McVEIGH ON
NOTICE OF PROPOSED RULEMAKING, REQUEST
FOR PARTIAL REFUND OF ALL 1995 REGULATORY FEES
AND WAIVER OF COMMISSION RULE 1.1160**

The firm of Bernstein & McVeigh, communications attorneys ("B&M"), hereby comments on the Commission's Notice of Proposed Rulemaking in the captioned proceeding, FCC 96-153, released April 9, 1996 (the "1996 NPRM").

For the reasons expressed below, B&M requests the Commission to refund, or, alternatively, to credit toward the assessment and collection of regulatory fees for Fiscal Year 1996, one-twelfth of all the regulatory fees collected by the Commission for Fiscal Year 1995, since those fees were not expended by the Commission in the provision of regulatory services to licensees and permittees.¹

¹ B&M represents a number of clients who are required to pay regulatory fees. These Comments are submitted on their behalf as well as for all similarly situated Commission licensees and permittees who were obliged to pay for regulatory services which were not and could not be performed for a period of 34 days during late 1995 and early 1996.

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To the extent necessary to effectuate such a partial refund or credit, B&M respectfully requests the Commission to waive § 1.1160 of its Rules.²

In support whereof, the following is shown.

Background

The Omnibus Budget Reconciliation Bill of 1993 (Public Law No. 103-66, 107 Stat. 2126) became effective in August 1993. As a consequence, Section 9 was added to the Communications Act, 47 U.S.C. § 159. Public Notice, "FCC to Implement Regulatory Fees," No. 34722, September 1, 1993.

Section 9 directs the Commission to "assess and collect regulatory fees to recover the costs of the following agency regulatory activities: enforcement activities, policy and rulemaking activities, user information activities, and international activities." 47 U.S.C. § 159(a)(1). These activities comprise the substantial majority of the Commission's operational functions.

Section 9 includes a Schedule of Regulatory Fees, 47 U.S.C. § 159(g), structured to ensure recovery of the aforementioned operational costs. This Schedule was revised in June 1995 and became effective September 18, 1995; the 1996

² Rule 1.1160 pertains to "Refunds of regulatory fees."

NPRM proposes further revisions to the Schedule following notice and comment in this proceeding.³

Both Congress and the Commission have emphasized that the sole objective of assessment and collection of regulatory fees is the recovery of costs incurred by the agency in carrying out its statutorily imposed functions. 47 U.S.C. §§ 159(a)(1) and 159(b)(1)(A); Implementation of Section 9 of the Communications Act (NPRM), March 11, 1994, at paras. 1-2, (R&O), 9 FCC Rcd 5333, 5335 ¶ 3 (1994); Assessment and Collection of Regulatory Fees for Fiscal Year 1995 (R&O), 78 RR 2d 151 (1995), ¶¶ 1, 20-22 (the "1995 R&O"). The fees charged must be reasonably related to the benefits provided to the payors or they are contrary to law. 47 U.S.C. § 159(b)(1)(A); 1995 R&O, at ¶ 18.

The Commission itself recognized in the 1995 R&O, at ¶ 20, advertng to Skinner v. Mid-American Pipe Line Co., 490 U.S. 212 (1989), that:

Section 9 . . . requires us to take into account factors reasonably related to the benefits provided to the payor of the fee by these activities. . . . Thus, our revisions to the Regulatory Fee Schedule in establishing regulatory guidelines for FY 1995 satisfy the Court's concerns and guidelines regarding unauthorized taxation of persons subject to a fee requirement.

³ 47 U.S.C. § 159(b)(2) and (3) mandate that the Schedule be adjusted for each successive fiscal year.

It is therefore axiomatic that collecting regulatory fees in excess of the costs actually incurred by the Commission in performing its regulatory services constitutes illegal and unauthorized taxation. Licensees and permittees forced to pay a year's worth of regulatory fees have a reasonable expectation that they will receive a year's worth of regulatory services in return. That has not been the case over the past half-year.

Recent Events

As is widely known, the Commission (along with much of the rest of the federal government) was officially shut down for significant periods in November and December 1995, and January 1996: specifically, from November 14-20, December 15-January 6, and January 8-10, 12.⁴ The first two shutdowns arose from the dispute between Congress and the Executive Branch on the federal budget; the last such closure was the consequence of the infamous "Blizzard of '96."

For a total of 34 days -- more than a month -- during Fiscal Year 1996, the Commission was officially not in operation when it was otherwise supposed to be.⁵ No regulatory

⁴ Source: Office of Management and Budget.

⁵ For the budgetary shutdowns a skeleton staff of "essential employees" was at the Commission during business hours for emergency purposes. It is inarguable, though, that few if any "enforcement activities, policy and rulemaking activities, user information activities [or] international activities," 47 U.S.C. § 159(a)(1), were performed for which regulated licensees or permittees received any benefit.

functions were undertaken by the Commission during these closures; thus, no regulatory expenses were incurred *and there are no related regulatory costs to be recovered*. Requiring licensees and permittees to pay regulatory fees for these 34 days of official shutdown, when no regulatory business could be conducted, constitutes unauthorized and illegal taxation.

Skinner v. Mid-American Pipe Line Co. Licensees and permittees by the tens of thousands have paid the government for services which they did not -- and never will -- receive.⁶

While it surely would be preferable to the payors for the Commission simply to refund the universally overpaid FY 1995 regulatory fees, a more simple and less burdensome means of adjustment suggests itself: the Commission should credit toward the FY 1996 fees one-twelfth of the FY 1995 fees which each payor has already submitted. As the 1996 NPRM makes clear, e.g., at ¶ 3, the agency is seeking to collect the same aggregate amount -- \$116,400,000 -- in regulatory fees for the upcoming fiscal year as it did for FY 1995.⁷ Basic fairness

⁶ During the two budgetary shutdowns, themselves totalling 30 days in duration, Commission staff (excepting the minuscule "essential" skeleton staff on hand to deal with emergencies) were *forbidden* by the Office of Management and Budget to carry on any of the activities for which regulatory fees were assessed and collected. It is inarguable, then, that all fees should be refunded or credited pro rata for the shutdowns.

⁷ Grant of this request would result in total refunds or credits of approximately \$10.8 million to affected licensees and permittees. Thus, the overpayment has been sizable.

dictates that each party who will have to pay such fees for the upcoming fiscal year and who has discharged a similar obligation for FY 1995 should receive a credit for regulatory activities which it previously paid for but which the Commission did not perform.

It bears repeating that, as a result of budgetary disagreements between the Executive and Legislative Branches, and due to the devastating January blizzard (which prolonged the second shutdown by yet another week), the Commission has no lawful choice but to award either partial regulatory fee refunds or credits. As Skinner and the cases cited therein establish, fees recovered in excess of those actually expended or needed constitute an illegal tax.⁸

Request for Waiver

Rule 1.1160 sets out the limited instances wherein regulatory fees will be refunded. Mandatory governmental shutdowns (whether caused by budgetary impasse or Acts of God) are not included. Moreover, § 1.1160(b) states that "[n]o pro-rata refund of an annual fee will be issued" and § 1.1160(d) states further that "[n]o refunds will be processed without a written request from the applicant, permittee, licensee or agent." In the interests of justice and administrative

⁸ It is purely coincidental that these Comments are being submitted on April 15, the day income taxes are due.

efficiency, and in order to preserve the legality of the FY 1995 regulatory fee process, these provisions should be waived per § 1.3 of the Rules for good cause shown.

First, as already pointed out, the collection of regulatory fees in excess of costs actually incurred is unlawful, in actuality a hidden and unauthorized taxation. Since no regulatory activities could lawfully be undertaken for at least 34 days in FY 1995, licensees and permittees who paid their 1995 fees with the justifiable expectation that they would be receiving concomitant regulatory services have substantially overpaid. They deserve either a partial refund or a credit. The latter is obviously the more administratively workable alternative, imposing far lesser demands upon the agency's scarce resources than does the alternative of processing and issuing tens of thousands of refund checks.⁹

Second, the Commission would confront another administrative nightmare if it opted, per Rule 1.1160(d), to refund regulatory fees only upon receipt of affected parties' written requests. Once such an opportunity was accorded, an avalanche of refund requests would surely inundate the agency.

⁹ The funds for these payments would presumably have to come from the U.S. Treasury, authorized by Congress. Given the continuing budgetary difficulties plaguing the Commission, it might prove difficult to secure these additional funds. All the more reason why a partial credit appears to be the way to go.

The processing alone would overwhelm the staff and would make the orderly conduct of regular FCC business impossible.

Awarding a blanket one-twelfth credit of FY 1995 payments toward FY 1996 regulatory fees would, on the other hand, be extremely simple to accomplish. The forthcoming Schedule of Regulatory Fees would simply reflect the credit and would reduce the amount of each such fee that would otherwise be due (in most instances, the amount would also be eleven-twelfths of the FY 1995 fee for the same service). Parties which had not paid regulatory fees for FY 1995 would be required to pay the full amount, without a credit. Such a solution would be fair, would reasonably reflect the work actually performed in connection with the Commission's regulatory activities and, most importantly, would preserve the legality of the entire 1995 regulatory fee program. It would also return some \$10.8 million to deserving payors.¹⁰

¹⁰ B&M has no wish to diminish further the agency's fiscal resources, or to weaken its administrative mission. The shutdowns were not of the Commission's making. But neither were they the fault of licensees or permittees, who were compelled to pay in advance for a year's worth of FY 1995 services they will not receive. It stands to reason that additional funding, to compensate for the decreased amount of regulatory fees to be collected for FY 1996, should be provided by Congress, so that the agency's operations may proceed full-throttle.

Conclusion

WHEREFORE, for these reasons and in the interests of justice, the Commission should refund or credit one-twelfth of the regulatory fees collected for Fiscal Year 1995 to all parties compelled to pay them. In order to accomplish this entirely justifiable and lawful result, the Commission should waive Rule 1.1160 as may be necessary.

Respectfully submitted,

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April 15, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have, this 15th day of April, 1996, served the foregoing "Comments of Bernstein & McVeigh on Notice of Proposed Rulemaking, Request for Partial Refund of all 1995 Regulatory Fees and Waiver of Commission Rule 1.1160" upon the following persons by hand delivery:

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