

to an end user or resale carrier."⁵² In view of the recent redefinition of a "facilities-based international carrier" to eliminate any distinction based upon whether the underlying facility is an INTELSAT or separate satellite system, the existing loophole that could exempt non-common carrier satellite systems from international bearer circuit fees has no justification.

Left uncorrected, this loophole would place COMSAT at a significant competitive disadvantage. Given the highly competitive international market, COMSAT would stand at a significant disadvantage if its principal satellite competitors were exempt from payment of this fee, which amounts to a \$4.00 surcharge on every circuit.

The Commission should ensure that all providers of international bearer circuits pay the fee, and should recalculate its forecast of 1996 payment units to reflect the increase in the number of circuits that this change will produce. This should lead to yet another reduction in the fee.

V. JUDICIAL REVIEW OF A COMMISSION DECISION TO CREATE A NEW FEE CLASSIFICATION OR TO IMPOSE AN UNAUTHORIZED AND UNCONSTITUTIONAL TAX ON COMSAT IS NOT PRECLUDED BY SECTION 9(a)(3) OF THE COMMUNICATIONS ACT

In the event the Commission were to reject COMSAT's first two arguments, and go forward with its proposal to tax COMSAT as a "Signatory," COMSAT would have the right to challenge the Commission's determination on appeal.⁵³ Although § 9(a)(3) precludes

⁵² *1994 Fee Order*, at 5402.

⁵³ It may seem strange to point out to the Commission that its decision is capable of being appealed to a court. However, the Commission has, in the past, objected to a party's failure to present to it arguments addressing the availability or scope of judicial review. COMSAT therefore makes this argument here in order to preserve it in the event of an appeal.

judicial review of "[i]ncreases or decreases in fees made by amendments pursuant to this paragraph," the terms "increase" and "decrease" establish that the no-review clause covers only administrative adjustments to fees already existing in the schedule.⁵⁴ This section plainly does not preclude judicial review of an unauthorized creation of an entirely new category of fee-paying entities.

In addition, to the extent that the arguments that the Commission is imposing an unlawful tax are of constitutional dimension, they are not precluded from judicial review. It is doubtful whether Congress could preclude judicial review of a constitutional claim. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (A "'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Even if Congress possessed that power, courts will not impute to Congress an intent to preclude review of a constitutional claim absent explicit language indicating its desire to do so. *See Webster*, 486 U.S. at 603 ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear"). Section 9(a)(3) is devoid of any language suggesting an intention to preclude constitutional claims. A constitutional challenge to an illegal tax imposed on COMSAT would therefore be cognizable in court.⁵⁵

⁵⁴ *See* 47 U.S.C. § 159(a)(3).

⁵⁵ Moreover, permitting such challenges would not "contravene the purpose[] of the no-review clause, for [such challenges] cannot be expected to burden the courts by their volume, nor do they involve technical considerations of [agency] policy." *Johnson v. Robison*, 415 U.S. 361, 373 (1974).

VI. CONCLUSION

The Commission's statutory authority to amend the existing fee schedule does not extend to the creation of an entirely new classification in the circumstances that exist here. The Commission's proposal, therefore, is *ultra vires*. The proposed fee also constitutes an unauthorized and unconstitutional tax because the fee does not reasonably approximate the regulatory costs incurred by the Commission in conferring a specific benefit on COMSAT in its capacity as the United States Signatory to INTELSAT and Inmarsat.

Any proposed "Signatory Fee" must also be reduced to eliminate costs that may not be charged to COMSAT, as well as costs that it already pays through Section 8 application fees and Section 9 international bearer circuit fees. Finally, the bearer circuit fee is also grossly excessive and must be recalculated.

Respectfully submitted,

COMSAT CORPORATION
COMSAT International Communications

OF COUNSEL:
Richard E. Wiley
Lawrence W. Secrest, III
William B. Baker

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

By: 
Warren Y. Zeger
Howard D. Polsky
Robert A. Mansbach

6560 Rock Spring Drive
Bethesda, MD 20817

Their Attorneys

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