

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

APR 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 1998)

MD Docket No. 98-36

To: The Commission

COMMENTS

SMALL BUSINESS
IN TELECOMMUNICATIONS

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Table of Contents

Summary of the Filing	i
The Commission's Authority Is Limited	2
Fee Categories	3
Deadbeats And Payment Units	7
Small Business Adjustments Should Be Provided	8
Conclusion	11

Summary of the Filing

Small Business In Telecommunications respectfully requests that the Commission modify its regulatory fee proposals to comply with statute and otherwise serve the public interest.

The Commission is not authorized by law to impose on one fee payor the burden of subsidizing the fees assessed against another payor. The Commission should recalculate its fees to avoid all subsidies among regulatory fee payors.

The Commission should clarify the categories of licensee whose service is defined as CMRS Mobile Service and CMRS Messaging Service. The services included in each category should reflect the logical basis for the establishment of each category.

The Commission should revise its description of a “feeable” unit for a CMRS station. The description should not include a unit which is not capable of receiving message service or data service from the CMRS system or reseller.

Adjustments to the Commission’s fees should be provided to foster the provision of competitive service by small businesses. As it provides bidding credits to small businesses and very small businesses in its auctions, the Commission should provide appropriate regulatory fee discounts to these entities to take into account the reduced burdens which these entities place on the Commission.

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COMMENTS

Small Business in Telecommunications (SBT), by its attorneys, respectfully submits its Comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in the above referenced proceeding (FCC 98-40 Released March 25, 1998). In support of its position, SBT shows the following.

SBT is a nationwide, non-profit association, dedicated to representing its hundreds of members across the United States before the Commission to provide the perspective of small business entities which will be affected by the Commission's Rules and policies. SBT's members provide a spectrum of goods and services to consumers, business and public safety entities, providing vital entrepreneurial growth and competition within the marketplace. Since SBT members hold limited resources, SBT hereby respectfully requests that the Commission be fully cognizant of the effect that any proposed fee collection policies might have in creating barriers to market entry for small business, or which might limit the growth of small business. As a general statement, SBT avers that the Commission's efforts in adopting fee schedules

should be fair, reasonable, and taken in view of the agency's duty to assure the continued entrance and growth of new and existing small competitors.

SBT commends the Commission for a generally good performance of an extraordinarily difficult cost accounting task. The Commission's intent to serve the public interest well comes through with clarity in its NPRM. There are, however, four areas in which the Commission should give further thought to its proposals and revise its plans accordingly.

The Commission's Authority Is Limited

Section 9(b)(1)(A) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §158(b)(1)(A) authorizes the Commission to adjust its fees "to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities". At paragraphs 17 and 18 of the Commission's Notice of Proposed Rulemaking, the Commission proposed to cap increases in fees at 25 percent. At paragraph 18, the Commission stated that "this results in a certain amount of subsidization between fee payer classes". While Section 158(b)(1)(A) authorizes the Commission to take into account factors that are reasonably related to the benefits provided to the payor of the fee, the Commission is not authorized to take into account benefits that are provided to someone other than the payor of the fee. That is, the Commission is not authorized to impose a fee on a payor which in any way subsidizes the Commission's activities which benefit anyone other than the payor.

The Commission's exemption from regulatory fees for amateur radio licensees, governmental entities, licensees in the public safety radio services, and non-profit groups is clearly within the Commission's authority, see, 47 U.S.C. §158(h). Section 9(d) of the Act, 47 U.S.C. §158(d), provides authority for the Commission to waive, reduce or defer payment of a fee, but nothing authorizes the Commission to require one category of payors to subsidize the benefits received by a different category of payor. The Commission should take the opportunity provided by the instant proceeding to collect fees from each payor which are related only to the benefits provided to payors of that class. Since the proposed cap on fee increases and the resulting imposition of a subsidy burden on some classes of payors is not authorized by law, the Commission should not adopt the proposed cap, but rather, should impose fees on each category of regulatee only in accord with the statute.

In this section, SBT has not been concerned with increases or decreases of fees, as such. Whether the fees are increased or decreased is not material to SBT's point. Rather, SBT is concerned solely with the Commission's unauthorized proposal to impose fees on one class of persons which would subsidize the benefits provided by the Commission's activities to a different class of persons.

Fee Categories

Section 9(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §158(b)(3), authorizes the Commission to amend the Schedule of Regulatory Fees "to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking

proceedings or changes in law." At paragraphs 28 through 31, the Commission's proposal is not consistent with the basis on which it has stated that it assesses fees on various categories of Commercial Mobile Radio Service licensees. SBT agrees with the Commission's belief that determination of the appropriate fee for a particular SMR licensee would not serve the public interest well, however, the Commission needs to clarify the basis for its classifications of Commercial Mobile Radio Service stations and to make its rules consistent with its stated basis.

The Commission began assessing regulatory fees for CMRS operators by including all CMRS operators in the same class. Then, at paragraph 39 of its Notice of Proposed Rulemaking in MD Docket No. 96-186, _____ FCC Rcd. _____ (1997), the Commission stated that Destineer, Inc. had observed that

with the exception of two-way paging services, our CMRS Mobile Services fee category includes only broadband services which provide two-way interactive voice communications. Destineer recommended establishing a CMRS Messaging Service to include all narrowband services, including two-way paging services.

In its Report and Order in MD Docket No. 96-186, 12 FCC Rcd. 17161 (1997) (the R&O), concerning Fiscal Year 1997 Regulatory Fees, the Commission stated that it was "persuaded from the comments that a revision of our CMRS fee categories to distinguish broadband mobile services from narrowband services would serve the public interest," *id.* at para. 60. The Commission decided that "the distinguishing characteristic between the CMRS Mobile Services fee category and the CMRS Messaging Services fee category will be the amount of bandwidth that we have authorized". The Commission further explained that

licenses authorizing the provision of services on narrowband spectrum will be subject to the CMRS Messaging Services fee, regardless of the services offered

on that spectrum. It should also be noted that our NPRM inadvertently placed CMRS licensees operating in the 220-222 MHz [band] and interconnected Business Radio Services in the CMRS Mobile Services fee category. Both should be included in the CMRS Messaging Services fee category,

id at para. 61. The Commission then proceeded to explain its revision of the payment unit estimates, specifically referring to Narrowband PCS as included in the CMRS Messaging Services category, *see*, para. 62.

In its Part 22 Rules, the Commission divided the Personal Communications Service into two categories, namely, Broadband PCS and Narrowband PCS. Broadband PCS stations are authorized with up to 30 MHz of bandwidth, 47 C.F.R. §24.229. Narrowband PCS stations are authorized with bandwidths up to 50 kHz per channel, 47 C.F.R. §24.129. The Commission is obligated to treat all similarly situated persons similarly. Because the basis for the Commission's distinction between the CMRS Mobile Services fee category and the CMRS Messaging Services category is authorized bandwidth, and because the Commission clearly classified Narrowband PCS stations as being in the CMRS Messaging Services category, the Commission should clarify that all CMRS stations which are authorized with channel bandwidths not exceeding 50 kHz are within the CMRS Messaging Services category.

The need for clarification is presented by paragraphs 28 through 30 of the Commission's NPRM. At paragraph 28 of the NPRM, the Commission, consistent with its actions in the R&O, stated that its fee schedule

will consider the nature of services offered only to the extent that services offered on broadband spectrum and services offered on narrowband spectrum will be subject to different categories of fee payment. Thus, licenses authorizing

operations on broadband spectrum would be subject to the CMRS Mobile Services fee, regardless of the services offered on that spectrum by the licensee. Further, licenses authorizing the provision of services on narrowband spectrum would be subject to the CMRS Messaging Services fee, regardless of the services provided on that spectrum.

Despite the clarity of the Commission's determination to classify licenses according to channel bandwidth, the Commission, apparently inadvertently, proposed at paragraph 29 of the NPRM to classify Specialized Mobile Radio Service and Public Coast Service within the CMRS Mobile Services fee category.

The greatest channel bandwidth authorized to any Specialized Mobile Radio System or Public Coast station is 25 kHz, see, 47 C.F.R. §80.205 and 47 C.F.R. §90.209. Twenty-five kilohertz is exactly equal to the amount of channel bandwidth assigned to a Business Radio Service licensee, *id.*, but is less than one half the bandwidth of a Narrowband PCS channel. Since SMR systems and Public Coast stations are authorized with substantially less channel bandwidth than Narrowband PCS stations,¹ the Commission should clarify that SMR systems and Public Coast stations are within the CMRS Messaging Services fee category.

¹ Further, not all SMR stations operate on exclusive channels. Many SMR-Conventional stations share a channel with other licensees. Although SMR-Trunked stations should be entitled to exclusive use of a channel, the Commission has, in many instances, authorized additional trunked stations at less than 55 miles, without granting a waiver of its rules in authorizing the additional station.

In this section, SBT has not been concerned with increases or decreases of fees, as such. Rather, this section has been concerned solely with the Commission's proper classification of SMR and Public Coast stations.

Deadbeats And Payment Units

At paragraph 16 of Attachment H to the NPRM, the Commission provided a description of a "feeable" unit for a CMRS station. The Commission stated that a

unit becomes "feeable" if the end user or assignee of the unit has possession of the unit and the unit is capable of transmitting or receiving voice or non-voice messages or data and the unit is either owned or operated by the licensee of the CMRS system or a reseller, or the end user of a unit has a contractual agreement for the provision of a CMRS service from the licensee of a CMRS system or a reseller of a CMRS service.

Although SBT believes that it understands what the Commission intended, an element of uncertainty remains.

Consider the following situation: The end user owns a paging receiver or a two-way unit and has entered into a contractual agreement with the CMRS operator. However, the end user has not paid its bill for service in a timely manner and, pursuant to the agreement, the CMRS operator has suspended service to the unit, pending collection of the amount due. The suspension of service is usually performed by the CMRS operator's removing the unit from its system's computer list of units to which service will be provided or by disabling the circuitry which is required for a certain mobile unit to gain access to the CMRS system. Thus, although the unit may be capable of transmitting or receiving, it is not capable of receiving service from the CMRS system or reseller. While the CMRS operator may deem the agreement still to be

in force and while the unit may be objectively "capable of transmitting or receiving" (although not in association with the CMRS operator's system), there can be no assurance that the unit will be served by the CMRS station during Fiscal Year 1998, or ever again.

Under the Commission's proposed description, the unit would appear to be feeable, even though the unit is not receiving service from the CMRS operator on the date for ascertaining the number of feeable units. Holding such a unit to be feeable would not be fair to the CMRS operator or its active subscribers, because the CMRS operator will require no regulatory services from the Commission with respect to that inactive unit. Nearly all CMRS operators have the ability to deny service, electronically, to units for which timely payments of service charges have not made. The CMRS operator's denial of service to a non-paying unit should be determinative of the operator's liability to pay a regulatory fee for that unit. Accordingly, SBT suggests that the Commission revise its description of a feeable unit to state that a

unit becomes "feeable" if the end user or assignee of the unit has possession of the unit and the unit is capable of receiving voice or non-voice message service or data service from the CMRS system or reseller and the unit is either owned or operated by the licensee of the CMRS system or a reseller, or the end user of a unit has a contractual agreement for the provision of a CMRS service from the licensee of a CMRS system or a reseller of a CMRS service.

The suggested revision will prevent the deadbeat customer from subjecting the CMRS operator to an unfair fee burden.

Small Business Adjustments Should Be Provided

Pursuant to its obligations to foster the competition provided by small businesses, the Commission should exercise its authority pursuant to 47 U.S.C. §158(d) to reduce the amount

Commission should exercise its authority pursuant to 47 U.S.C. §158(d) to reduce the amount of the regulatory fee which is assessed against small businesses. The Commission has adopted schedules of bidding credits which it has applied to small businesses in its spectrum auctions for the express purpose of fostering the participation of small businesses in the telecommunications industry. Building on that precedent, the Commission should adjust its schedule of regulatory fees to reduce the fees assessed against small businesses and very small businesses.

The burden of regulation falls harder on a small carrier than a large. As a percentage of revenue, the cost burden of complying with the Commission's regulations falls more heavily on the small carrier than the large. While the large carrier has sufficient revenues to hire personnel specifically to attend to regulatory affairs, including compliance with technical and operational requirements, participation in rule making proceedings, and litigation and lobbying before the agency, the small business must do all of these things with the support of a small number of end user units. At the same time that the burden of day-to-day compliance and dealings with regulation falls more heavily on a small business, a small business is much less likely than a large operator to impose burdens on the Commission. The Commission is presented with the necessity of providing services each day to some large carriers for which it is to be compensated by the regulatory fee, but for many small businesses, years go by between the times that they require services from the Commission which are compensated by the regulatory fee. In establishing its regulatory fees, the Commission should take into account the smaller burden which small business imposes on its resources and the relatively greater burden

which the Commission's regulation imposes on small business and provide a reduced regulatory fee for small businesses.

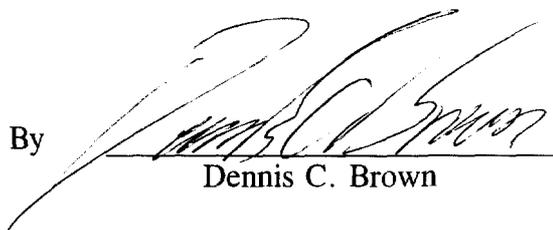
SBT suggests that the Commission should reduce the regulatory fee by 25 percent for small businesses whose annual revenues have not exceeded \$15 million dollars. The Commission should reduce the regulatory fee by 35 percent for small businesses whose annual revenues have not exceeded \$3 million. These adjustments will take into account the relative burdens of the Commission's regulation and will help to foster competition by small business in telecommunications.

Conclusion

For all the foregoing reasons, SBT respectfully requests that the Commission impose Regulatory Fees only on the basis of the benefits that are provided to the payor of the fee, clarify that interconnected SMR stations and Public Coast stations are within the CMRS Messaging Services fee category, revise its description of a feeable unit, and adjust its regulatory fees for small business in telecommunications.

Respectfully submitted,
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