

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 2000)

MD Docket No. 00-58

To: The Commission

**CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
PETITION FOR EXPEDITED RECONSIDERATION
OR IN THE ALTERNATIVE, CLARIFICATION**

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SUMMARY

In the *Notice of Proposed Rulemaking*, the Commission proposed changing the methodology for calculating the Interstate Telephone Service Provider (“ITSP”) regulatory fee to reflect the replacement of the FCC Form 431 by the Form 499-A. While CMRS licensees filed the Form 431, to date they have not been subject to the regulatory fee imposed on ITSPs. Rather, they have been (and remain) subject to a per-mobile unit regulatory fee. Nowhere in the *NPRM* or the *Report and Order* did the Commission affirmatively state that it intended to subject wireless licensees providing mobile wireless services to the ITSP regulatory fee. In a Public Notice released August 2, 2000, however, the Commission indicated that CMRS licensees may be subject to the ITSP fee payment. The Commission’s decision to impose the ITSP regulatory fee on CMRS providers violates Section 9 of the Communications Act and the APA and reconsideration is necessary.

The Commission’s apparent decision to impose the ITSP regulatory fee on CMRS providers contravenes its limited discretion to amend the fee schedule under Section 9 of the Communications Act. Section 9(b)(3) of the Act enumerates certain prerequisites that must be met prior to implementation of a “permitted amendment” to the fee schedule. The Commission’s elimination of the Form 431 alone does not constitute a rule change warranting the imposition of the ITSP regulatory fee on CMRS providers and, in any event, the Commission makes no effort to determine whether such a change is warranted. The Commission’s rule change also contravenes the Commission’s original basis for adopting different fee units for CMRS and wireline carriers. The elimination of the Form 431 may warrant a change in the ITSP regulatory fee methodology, but not the applicability of the fee to CMRS licensees.

The Commission’s decision to apply the FY 2000 regulatory fee to CMRS providers also contravenes the Administrative Procedure Act. First, the Commission failed to provide adequate notice of the rule change ultimately adopted. To the extent *any* notice was provided, CMRS licensees were left to decipher inartful and inconsistent guidance as to the Commission’s intended changes. The Commission also left the impression that fees for only certain entities would be subject to a permitted amendment. Meaningful comment on the rule change was not possible. Finally, the Commission provided no explanation, much less a reasoned explanation, for its rule change.

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Pursuant to Section 405 of the Communications Act, 47 U.S.C. § 405, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the Cellular Telecommunications Industry Association ("CTIA")¹ hereby seeks reconsideration or, in the alternative, clarification, of changes made to the Fiscal Year 2000 ("FY 2000") regulatory fee schedule for Interstate Telephone Service Providers ("ITSPs").² Specifically, the Commission on reconsideration should make clear that the *Report and Order* in the above-referenced proceeding does not require licensees already subject to a per-mobile unit regulatory fee under the Commercial Wireless Radio Services category to also pay the revenue-based fee for ITSPs. This would simply restate

¹CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all CMRS providers and manufacturers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

²*Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and Order*, MD Docket No. 00-58, FCC 00-240 (rel. July 10, 2000), 65 Fed. Reg. 44576 (July 18, 2000) ("*Report and Order*").

the Commission's established policy toward CMRS licensees. Finally, given the looming September 20, 2000 deadline for regulatory fee payments, and the ambiguous and often contradictory guidance provided by the Commission in this proceeding as to CMRS providers' ITSP regulatory fee payment obligations, CTIA is (1) seeking expedited action on the instant petition and (2) separately requesting issuance of an Order staying payment of ITSP regulatory Fees by CMRS carriers pending consideration of this Petition. Such interim action is necessary given the likelihood that the substantial payment amounts involved may be exacerbated by penalties resulting from CMRS licensees' non-payment of this contested regulatory fee obligation.

BACKGROUND/INTRODUCTION

Section 9 of the Communications Act imposes strict limits on the Commission's discretionary authority to amend the regulatory fee schedule, and the Administrative Procedure Act ("APA"), in turn, sets forth the means by which the Commission may lawfully exercise that limited authority. The APA envisions rulemaking proceedings which provide the opportunity for affected parties to meaningfully comment on a proposed rule change, and an Order which clearly delineates the reasoning for any changes ultimately adopted. Neither the Commission's original notice nor the *Report and Order* lived up to these modest requirements, and its failure to meet these requirements underscores how the Commission has exceeded its Section 9 authority in this instance. Indeed, it was a Public Notice released well after the *Report and Order* which first suggested, albeit confusingly, that CMRS licensees would be subject to the ITSP regulatory fee *in addition to* the per-mobile unit fee already imposed upon them.

In the *Report and Order*, the Commission adopted a CMRS Mobile Services fee of \$0.30 per mobile unit in order to collect just over \$25 million for the “CMRS Mobile Services sector.” This represents a reduction in the per-unit fee from \$0.32. A fee of \$0.04 per mobile unit was adopted for CMRS Messaging Services.³ No changes in the methodology for calculating fees in these CMRS categories were proposed in the *NPRM*, nor was there any suggestion that the costs of regulating licensees in the applicable services have increased significantly.⁴ Indeed, the paragraphs of the *NPRM* in which the Commission set apart the proposed changes to the regulatory fee schedule did not describe any “permitted amendments” to CMRS licensees’ regulatory fee obligations.

The Commission did, however, change its methodology for determining FY 2000 fees for ITSPs. In previous years, the Commission calculated ITSP fee obligations based on a factor of aggregate gross interstate revenues reported in carriers’ FCC Form 431 TRS Fund Worksheets.⁵ While CMRS carriers, like other common carriers, were required to submit the Form 431, the Commission expressly excluded CMRS licensees from the ITSP fee.⁶ Indeed, this CMRS exemption from the separate ITSP regulatory fee was explicitly acknowledged again just last

³*Id.* ¶ 37.

⁴*Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and Order*, MD Docket No. 00-58, FCC 00-117, Att. F ¶¶ 14-15 (rel. April 3, 2000) (“*NPRM*”).

⁵*NPRM* ¶ 18.

⁶*Assessment and Collection of Regulatory Fees for Fiscal Year 1995, Report and Order*, MD Docket No. 95-3, 10 FCC Rcd. 13512, 13552-13558, ¶¶ 118, 135 (“*1995 Order*”). Fees for CMRS licensees and ITSPs were initially considered as a subset of the different fees assessed on common carrier services generally. *See id.* at 13539-13560; *Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, 9 FCC Rcd. 5333, 5362-67 ¶¶ 86-98 (1994).

year.⁷ With the consolidation of the Form 431 into the Form 499-A, the Commission now assesses the fee based on information submitted in the latter and, as with the Form 431, CMRS providers also file the Form 499-A.⁸ Unlike previous years, however, the Commission has apparently decided to assess the ITSP fee on CMRS licensees -- a fact which became evident to such licensees only in the Commission's August 2, 2000 Public Notice describing common carriers' ITSP fee obligations.⁹

The Commission's guidance to CMRS licensees in this proceeding as to the applicability of the ITSP regulatory fee has been at best, ambiguous, and at worst, inconsistent. The *Report and Order* exempts mobile wireless carriers with no "local or non-satellite toll service;"¹⁰ "local" and "toll" are terms traditionally associated with wireline, not CMRS service.¹¹ Moreover, the conclusion that the *Report and Order* exempts CMRS licensees from ITSP regulatory fees is bolstered by statements in both the *NPRM* and *Report and Order*. In those decisions, the Commission states that ITSPs subject to the fee include "wireless telephone service carriers that

⁷Public Notice, *FY 1999 Common Carrier Regulatory Fees*, at 2 (rel. Aug. 2, 1999) ("[t]his requirement does not apply to wireless carriers and mobile resellers governed by the commercial wireless radio services").

⁸*Report and Order* ¶ 31.

⁹Public Notice, *FY 2000 Common Carrier Regulatory Fees*, at 2, 7, 11 (rel. Aug. 2, 2000) ("*2000 Common Carrier Public Notice*").

¹⁰*Report and Order* ¶ 31. In the *NPRM*, the Commission similarly states that carriers "exempt from paying the interstate telephone service provider regulatory fees" include "interstate service providers that have mobile service . . . revenue, but no local or toll service." *Id.* ¶ 21.

¹¹See *GTE Service Corporation v. FCC*, No. 97-1538 (D.C. Cir. July 14, 2000) (noting that CMRS carriers "do not use exchanges"); see also *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061, 1998 (1998) ("traditional categories of offerings" are "local, interexchange, and commercial mobile radio services"), *rev'd on other grounds, U S WEST v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

provide *fixed local or toll services*.”¹² The *NPRM and Report and Order* therefore reinforce the impression that CMRS licensees that do not provide fixed services are *not* subject to ITSP regulatory fees -- thus continuing the CMRS exemption from previous years.

The recently-released Public Notice purportedly providing guidance on FY 2000 Common Carrier Regulatory Fees, however, appears inconsistent with this conclusion. Indeed, this document is particularly problematic in that the opening paragraph effectively “waves off” CMRS licensees, stating that they need *not* “carefully review this Public Notice” as “[s]eparate Public Notices for . . . commercial wireless licensees are available.”¹³ On the next page, however, the Commission states that “[a]lthough wireless carriers pay wireless regulatory fees, wireless carriers may also owe common carrier regulatory fees if they have sufficient interstate and international revenues.”¹⁴

As discussed below, application of the ITSP regulatory fee to CMRS licensees is contrary to the Commission’s Section 9 statutory mandate and would constitute a substantial change in the rules made without adequate notice and opportunity for comment. Reconsideration of the *Report and Order* to eliminate CMRS licensees’ obligation to pay the FY 2000 ITSP regulatory fee is therefore necessary. In the alternative, and to the extent that the Commission has unintentionally expanded the applicability of the ITSP regulatory fee to CMRS licensees, it should clarify that CMRS licensees are *not* subject to this requirement.

¹²*NPRM* Att. F ¶ 33, *Report and Order* Att. F ¶ 33 (emphasis added). The Worksheet for calculating ITSP fee obligations includes entries for purely mobile service revenues. *Id.*

¹³*2000 Common Carrier Public Notice* at 1.

¹⁴*Id.* at 2.

DISCUSSION

I. APPLICATION OF THE INTERSTATE SERVICE PROVIDER FEE TO CMRS LICENSEES IS CONTRARY TO SECTION 9 OF THE COMMUNICATIONS ACT

A. The Commission Has Exceeded Its Limited Section 9 Discretion to Amend the Regulatory Fee Schedule

Section 9(b)(3) of the Act provides in relevant part that, in addition to so-called “mandatory” adjustments to the fee schedule, the Commission may make so-called “permitted amendments,” as follows:

[T]he 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.¹⁵

Section 9(b)(1)(A), in turn, provides in relevant part that fees “take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest.”¹⁶

The United States Court of Appeals for the District of Columbia Circuit has recently held that Section 9(b)(3) affords the Commission only limited discretion in amending its fee schedule.¹⁷ Indeed, the Commission’s identification of “rulemaking proceedings or changes in

¹⁵47 U.S.C. § 159(b)(3) (emphasis added).

¹⁶*Id.* § 159(b)(1)(A).

¹⁷*COMSAT Corporation v. FCC*, 114 F.3d 223, 225, 227 (D.C. Cir. 1997).

law” warranting a permitted amendment is “a *requisite* for changes in regulatory fees.”¹⁸ As discussed in the following section, both the *NPRM* and the *Report and Order* in this proceeding are devoid of an explanation of how reclassifying CMRS licensees as subject to the ITSP regulatory fee would promote compliance with Sections 9(b)(1)(A) and (b)(3) of the Act. Without such a reasoned explanation, the Commission has exceeded the bounds of its limited discretion to amend CMRS fee schedule.

B. The Commission’s Elimination of the Form 431 Does Not Provide a Lawful Basis for a Permitted Amendment Subjecting CMRS Licensees to the ITSP Regulatory Fee

The Commission accurately described the substitution of the Form 431 for the Form 499-A as merely a change in the applicable form used for purposes of calculating ITSP obligations, not a substantive change in the applicability of that fee. In discussing its proposed changes to the FY 2000 fee schedule for ITSPs, the Commission stated as a basis for revising the methodology that:

In 1999 . . . the Commission amended its rules and required contributors [to TRS, universal service, NANPA, and LNP shared costs] to file only a single form FCC Form 499-A, Telecommunications Reporting Worksheet, and eliminate FCC Form 431, TRS Fund Worksheet. Previously, Form 431, TRS Fund Worksheet, was used to obtain base revenue data from which telephone services regulatory fees were calculated. Because of this *form change*, it is no longer feasible to obtain base telephone services revenue data using adjusted gross interstate revenues as derived from data previously provided on FCC Form 431, TRS Fund Worksheet.¹⁹

The Commission correctly notes in the *NPRM* and *Report and Order* that CMRS providers, including cellular, PCS, and paging services, all file the Form 499-A. This is merely a truism,

¹⁸See *PANAMSAT Corporation v. FCC*, 198 F.3d 890, 893 (D.C. Cir. 1999) (emphasis added, citing *COMSAT*, 114 F.3d at 227-28).

¹⁹*NPRM* ¶ 18 (emphasis added).

however, and simply reflects the fact that CMRS providers have reporting and payment obligations separate and apart from regulatory fees.²⁰ Importantly, the Commission does not determine how this “form change” would warrant any adjustment in CMRS providers’ regulatory fee obligations -- as Section 9(b)(3) requires. Indeed, the Commission is entirely silent on the issue. This paragraph does *not* in any way put CMRS carriers on notice that they may be subject to the ITSP -- particularly given their previous exemption from the ITSP fee *and* status as Form 431 filers.

Further, adding CMRS providers to the ITSP category simply because they report interstate end user revenues as telecommunications carriers would contravene the Commission’s original basis for adopting different fee units for CMRS and wireline carriers. The Commission expressly determined in 1995, pursuant to its discretion under Section 9(b)(3), that a *revenue-based* regulatory fee was appropriate to non-CMRS common carriers, while a *per-mobile unit* fee was appropriate for CMRS licensees. For wireline-based carriers, the Commission determined that:

A revenue based allocation will effectively spread the cost recovery burden of the fee requirement in proportion to the benefits realized by those carriers subject to our jurisdiction. We find that assessing fees by interstate gross revenues is reasonably related to the benefits of the regulation that these carriers receive. . . . Interstate revenues are widely reported and more easily verifiable than customer units . . . and, therefore, avoid the need for burdensome reporting requirements.²¹

In contrast, the Commission opted for a substantially different payment unit for CMRS carriers:

²⁰Moreover, CMRS licensees’ payment obligations relating to the Form 499-A -- universal service, NANPA support, TRS, and shared LNP costs -- are based on fundamentally different statutory objectives and requirements than Section 9 regulatory fees. *See* 47 U.S.C. §§ 225(d)(3), 251(e)(2), 254(d).

²¹1995 *Order* at 13558.

In order to assure that all cellular/mobile units in operation are, in fact, assessable as customers, we are revising our fee structure to assess the fee based on mobile units or telephone numbers provided by a licensee as a more equitable payment formulation because it better reflects actual usage of our frequency assignments and related benefits of our regulation.²²

The Commission expressly “recognize[d] that the fees for mobile service providers are assessed in a manner different from the fee for users of the interstate network”²³ While the Commission stated that it may consider “reliance on gross revenues as *the* mechanism for determining fees for other carriers, including mobile carriers” in years after FY 1995, at no time since has it reconsidered the per-mobile unit assessment for CMRS providers.²⁴ By holding out the possibility of utilizing a revenue-based assessment as “the” mechanism, the Commission clearly indicated that it would *either* use gross revenues *or* use per-mobile units but that it would not simultaneously subject CMRS carriers to both.

Thus, discussing the elimination of the Form 431, without more, cannot be deemed an announcement that the Commission viewed the form change as a basis for subjecting CMRS licensees to the ITSP fee. Furthermore, and critically for purposes of Section 9 compliance, the Commission provides *no* justification for reversing its original determination that CMRS providers should not be subject to the ITSP fee. In short, the Commission did not attempt in the *NPRM* or the *Report and Order* to demonstrate that the equities or the nature of the Commission’s regulation of CMRS providers has changed significantly to warrant a permitted amendment to their regulatory fee obligations. The underlying form change may justify a permitted amendment to the ITSP regulatory fee *methodology*, but it cannot justify the expansion of the

²²1995 Order at 13541.

²³*Id.* at 13543.

²⁴*Id.* at 13559 n.41 (emphasis added).

fee's *applicability* to CMRS carriers. The Commission therefore did not meet its Section 9 burden and thus does not have statutory authority to impose the ITSP on CMRS providers.

II. THE COMMISSION'S APPLICATION OF THE FY 2000 ITSP REGULATORY FEE TO CMRS PROVIDERS CONTRAVENES THE SAFEGUARDS OF THE ADMINISTRATIVE PROCEDURE ACT

A. The Commission Did Not Provide Adequate Notice of the Proposed Rule Change

The Commission's apparent decision to apply the ITSP fee to CMRS licensees, ostensibly made pursuant to Section 9 and its Section 4(i) rulemaking authority,²⁵ substantively changed CMRS providers' regulatory obligations and therefore constitutes a rule change requiring notice and opportunity for comment pursuant to the APA.²⁶ It is a tenet of administrative law that an agency "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."²⁷ Further, courts generally admonish agencies that notice should "be clear and to the point."²⁸ The Commission never acknowledged the fundamental change in its policy of exempting CMRS carriers from payment of ITSP regulatory fees in the *NPRM* or *Report and Order*; not until the *2000 Common Carrier Public Notice* -- released *two weeks* after the *Report and Order* -- did the Commission first discuss this policy change.

To the extent that the Commission even hinted that it was proposing a rule change, it left affected CMRS licensees to decipher inartful and inconsistent guidance as to its intended

²⁵See *Report and Order* ¶ 50.

²⁶See 5 U.S.C. §§ 553(b)-(c); *Truckers United for Safety v. Federal Hwy. Admin.*, 139 F.3d 934, 938-939 (D.C. Cir. 1998).

²⁷*Florida Power and Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989).

²⁸*McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 13212 (D.C. Cir. 1988).

changes. In the main text of the *NPRM*, the Commission states that ITSPs “that have mobile service . . . revenue, but no local or toll service” are among the entities that “*are exempt*” from the ITSP regulatory fee.²⁹ Given that the rules at the time expressly *exempted* CMRS providers from payment the ITSP regulatory fee, the Commission’s statement in the *NPRM* can only be read as an explanation of that exemption. Further, Attachment F, titled “*Detailed Guidance on Who Must Pay Regulatory Fees*,” the Commission states that “wireless telephone service carriers,” including CMRS licensees, “that provide *fixed local or toll services*” must pay the ITSP regulatory fee.³⁰ Based on the *NPRM*, it would appear that the Commission intended that CMRS licensees providing fixed non-CMRS services (as they are expressly authorized to do under the Commission’s rules)³¹ would be subject to the wireline-based ITSP fee, while CMRS licensees providing mobile services would continue to be subject to the per-mobile unit CMRS regulatory fee.³² (Such an outcome might make sense, to the extent that it ensures that CMRS licensees providing fixed non-CMRS services would not evade regulatory fee requirements; based on the *2000 Common Carrier Public Notice*, however, this does not appear to be the Commission’s intent.)

²⁹*NPRM* ¶ 21 (emphasis added).

³⁰*NPRM* at Att. F ¶ 33 (emphasis added).

³¹*See* 47 C.F.R. §§ 22.901(d), 24.3.

³²*See NPRM* ¶ 21 n.29 (stating that mobile service providers “may be subject to payment of regulatory fees under other categories . . .”). Indeed, disparate regulatory fee standards for mobile versus fixed or wireline carriers are perfectly consistent with the Commission’s overall common carrier regulatory scheme. For various reasons involving technology and market competitiveness, Congress and the Commission have traditionally treated CMRS common carrier licensees differently than other common carriers in a number of areas, including (just to name a few) tariffing, slamming, number portability, truth-in-billing, and (until August 2, 2000) regulatory fees. *See* 47 U.S.C. §§ 332(c)(3), (c)(8); 47 C.F.R. §§ 20.15(b)-(e) (tariffing/Title II), 52.31 (number portability), 64.1100(a)(3) (slamming), 64.2400(b) (truth in billing).

Tucked away well toward the back of the 55-page *NPRM*, near the back of Attachment F, the Commission placed a worksheet that requires “Interstate Telephone Service Providers” -- a category of carriers which, based on the language in the *NPRM*, would *exclude* CMRS licensees providing mobile services -- to report mobile service related revenues. Assuming *arguendo* that the proposed fee calculation worksheet provides, at best, *something* of an indication that the Commission intended to change the rule, the Commission did not describe the proposed rule change with *any* specificity, much less the reasonable specificity required under the APA.³³ It is not enough for the Commission to leave clues of its intent scattered in a few places in a lengthy *NPRM*; rather, the “[c]omponent parts [of a proposed rule must be] collected together in such a fashion as to enable the parties to anticipate and adequately comment on the” proposal.³⁴ Here, meaningful comment on what might be deemed the component parts of the Commission’s proposed rule change is impossible, as its various descriptions of the applicability of the ITSP to CMRS carriers fee are minimal, ambiguous and inconsistent.

Finally, and perhaps most telling, was the treatment (or, more appropriately, non-treatment) of the ITSP regulatory fee applicability issue in paragraphs 15-19 of the *NPRM*. In those paragraphs, the Commission made the conscious decision to set apart its proposed Section 9 “permitted amendments” from other provisions in the *NPRM*. Given the stringent requirements imposed on the Commission’s Section 9 discretion in this regard, setting apart the proposed permitted amendments was a sensible means of focusing the reader’s attention as to precisely what the Commission intended to change. Significantly, permitted amendments to CMRS providers’ fees were *not* set apart, in headings or otherwise, and the landmark change of

³³See *Horsehead Resource Development v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

³⁴See *id.* at 1268.

applying ITSP fees to CMRS carriers was neither listed nor described in those paragraphs.³⁵ The proposed changes to the ITSP clearly discussed a proposed change in the *methodology* for calculating ITSP fee -- but *not* a proposed change in the fee's *applicability*. The Commission thus left the impression that "only the regulations identified for possible modification would be changed" while leaving only opaque hints of its intent to change the rule at issue inconspicuously buried elsewhere in the *NPRM*.³⁶ Given the statutory limitations on rule changes set forth in Section 9(b)(3), however, a concerted effort by the Commission to clearly identify *and* justify a proposed change would be an essential component of adequate notice. No such effort was made here.

B. The Commission Has Not Provided a Reasoned Explanation for the Rule Change

Under the APA, the Commission may change its rules, but "must cogently explain why it has exercised its discretion in a given manner' and that explanation must be 'sufficient to enable [a court] to conclude that the [agency's action] was the product of reasoned decisionmaking.'"³⁷ If, in fact, the Commission intended to apply ITSP fees to CMRS licensees, the record is bereft of an explanation of its decision. As noted above, the first time the Commission explicitly (albeit obliquely) acknowledged that a change had occurred was not until well after release of the *Report and Order*. The subsequently released Public Notice cannot remedy a change in the Commission's regulatory fee rules which failed to meet its Section 9 and APA

³⁵*NPRM* ¶ 10 ("proposals made by Commission staff concerning "Permitted Amendments" to the Fee Schedule . . . are discussed in paragraphs 15-19 and are factored into our proposed FY 2000 Schedule of Regulatory Fees, set forth in Attachment D.").

³⁶*See AFL-CIO v. Donovan*, 757 F.2d 330, 339 (D.C. Cir. 1985).

³⁷*A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983)).

obligations.³⁸ It is therefore impossible to ascertain whether the decision was “the product of reasoned decisionmaking.”³⁹ By failing to provide the requisite reasoned explanation, the Commission’s rulemaking fails to pass APA muster.

CONCLUSION

If the Commission truly intended to impose ITSP regulatory fees on CMRS licensees for the first time, it was incumbent upon the Commission to do so in a manner that was consistent with its Section 9 authority and the APA. In contravention of these statutory requirements, however, the Commission provided merely opaque hints of the possibility of such a rule change in lieu of squarely addressing the issue in the *NPRM* and providing a reasoned explanation in the *Report and Order*. Thus, the Commission must, on reconsideration, exempt CMRS providers from the payment of the ITSP regulatory fee. Furthermore, given the ambiguous and contradictory guidance provided in the *NPRM*, *Report and Order* and the *2000 Common Carrier Public Notice*, and the quickly approaching fee filing deadline, CTIA urges the Commission to

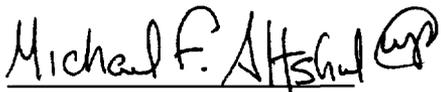
³⁸Indeed, rather than clarify matters, a CMRS licensee reading the opening paragraph of the Public Notice would be lulled into believing that, as in years past, the ITSP regulatory fees did not apply to them.

³⁹*See Motor Vehicle Mfrs.*, 463 U.S. at 52; *United States Telecom Ass’n v. FCC*, No. 99-1442, Slip Op. at 36 (D.C. Cir. Aug. 15, 2000). Furthermore, the need for the Commission to adequately explain its decision is particularly acute given the Section 9 statutory prerequisites for Permitted Amendments. *See United States Telecom Ass’n*, Slip Op. at 36 (“[t]he Commission’s failure to explain its reasoning is particularly serious in view of CALEA’s unique structure”).

expeditiously issue an Order staying payment of ITSP regulatory fees by CMRS carriers pending consideration of this Petition.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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