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

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In the Matter of)
Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 2001)

To: The Commission)

MD Docket No. 01-76 /

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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**PETITION FOR RECONSIDERATION OF
COMSAT CORPORATION**

Pursuant to 47 C.F.R. § 1.429, COMSAT Corporation ("COMSAT") hereby petitions for reconsideration of Paragraphs 29, 39, 42, and 43, and Attachment A Paragraph 22 of the *Report and Order* in the above-captioned proceeding, *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, FCC 01-196, MD Docket No. 01-76, 66 Fed. Reg. 36177 (July 11, 2001) ("FY 2001 Order"). The present petition is timely filed. See 47 C.F.R. § 1.429(d).

For the first six years following the 1993 enactment of 47 U.S.C. § 159 (1994 & Supp. 2000) ("Section 9"), the FCC consistently held that INTELSAT space stations were not subject to Section 9 space station regulatory fees because such satellites were not U.S-regulated facilities.¹ In *Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and*

¹ See *Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, 9 F.C.C. Rcd 5333 (1994); *Assessment and Collection of Regulatory Fees for Fiscal Year 1995, Report and Order*, 10 F.C.C. Rcd 13512 (1995); *Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Report and Order*, 11 F.C.C. Rcd 18774 (1996), *rev'd in part by, COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997); *Assessment and Collection of Regulatory Fees for Fiscal Year 1997, Report and Order*, 12 F.C.C. Rcd 17161 (1997), *modified in other respects by, Amendment of the Schedule of Applications Fees Set Forth in Section 1.1102 (Wireless Services) of the Commission's Rules*, 13 F.C.C. Rcd 17150 (1998); *Assessment and Collection of Regulatory Fees for Fiscal Year 1998, Report and Order*, 13 F.C.C. Rcd 19820 (1998), *modified by, PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999); *Assessment and*

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Order, 15 F.C.C. Rcd 14478 (2000) (“*FY 2000 Order*”), the Commission reversed its longstanding position, and held, for the first time, that INTELSAT space stations are now subject to such fees, and that COMSAT must pay those fees in full—even though these satellites are not regulated by the FCC and COMSAT used only 17 percent of their capacity in fiscal year 2000.

In July 2000, COMSAT timely filed a petition for judicial review of the *FY 2000 Order*. Subsequently, on May 29, 2001, in connection with that petition for review, COMSAT filed its opening brief in the United States Court of Appeals for the District of Columbia Circuit challenging the *FY 2000 Order*’s imposition of space station regulatory fees on COMSAT in connection with INTELSAT space stations. Two days later, on June 1, 2001, COMSAT filed an *ex parte* letter for inclusion in the present docket, to which it attached a copy of its D.C. Circuit brief to the Commission for consideration in connection with the rulemaking proceeding concerning regulatory fees for the following fiscal year, fiscal year 2001.²

The following month, while proceedings on COMSAT’s petition for review of the *FY 2000 Order* remained pending before the D.C. Circuit, the Commission released the *FY 2001 Order*, which is the subject of the present petition. The *FY 2001 Order*, like the *FY 2000 Order*, seeks to assess Section 9 space station regulatory fees against COMSAT in connection with INTELSAT space stations.

Collection of Regulatory Fees for Fiscal Year 1999, Report and Order, 14 F.C.C. Rcd 9868 (1999).

² By May 29, 2001, when COMSAT filed its petitioner’s brief concerning the *FY 2000 Order* in the D.C. Circuit Court of Appeals, the Commission had already issued its *Notice of Proposed Rulemaking* in the next annual regulatory fees rulemaking proceeding, for fiscal year 2001. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Notice of Proposed Rulemaking*, FCC 01-97, MD Docket No. 01-76 (Mar. 29, 2001) (“*FY 2001 NPRM*”), excerpted in, 66 Fed. Reg. 19682 (Apr. 16, 2001).

Subsequent to release of the *FY 2001 Order*, COMSAT filed its Reply Brief in the D.C. Circuit judicial review proceeding concerning the *FY 2000 Order*. That Reply Brief is attached hereto. *See* Reply Brief for the Petitioner, *COMSAT Corp. v. FCC, et al.*, No. 00-1548 (D.C. Cir. filed July 27, 2001) (Ex. A). At present, all briefing on COMSAT's petition for review of the *FY 2000 Order* has been completed. *See* Order Establishing Briefing Schedule, *COMSAT Corp. v. FCC*, No. 00-1458 (D.C. Cir. Feb. 5, 2001) (Ex. B). Oral argument in that proceeding is scheduled for October 16, 2001. *Id.*

For the substantive reasons described in COMSAT's D.C. Circuit briefs and its filings with the FCC, reconsideration of the *FY 2001 Order* is warranted. The Commission should set aside its decision to assess fees on the INTELSAT satellites. Alternatively, in the event that the D.C. Circuit reverses the provisions of the *FY 2000 Order* challenged by COMSAT, the corresponding provisions of the *FY 2001 Order* would *then* merit reconsideration even if the Commission disagrees *at present* with COMSAT's substantive arguments. For this reason, if the Commission is not prepared to grant reconsideration at this time, COMSAT respectfully requests that the present petition be held in abeyance pending the D.C. Circuit's resolution of COMSAT's pending petition for review of the *FY 2000 Order*. Because the issues raised in that action overlap substantially with those presented in the present petition, the D.C. Circuit's disposition of that petition likely will assist the Commission substantially in resolving the present petition. The Commission has recognized that it "serve[s] the public interest [to] . . . conserv[e] the Commission's and the parties' resources." *MCI Telecommunications Corp. v. US West*, 14 FCC Rcd. 21496, ¶ 3 (2000). Here, the resources of the Commission and the parties clearly would be conserved by holding the present petition in abeyance pending the D.C. Circuit's disposition of COMSAT's pending petition for review.

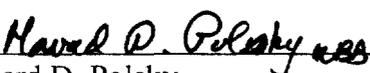
Reconsideration is warranted because the FCC is precluded by law from assessing space station regulatory fees on the basis of INTELSAT space stations that were not regulated by the Commission during the pertinent fiscal year. *See* Reply Brief for the Petitioner, *COMSAT Corp. v. FCC, et al.*, No. 00-1548 (D.C. Cir. filed July 27, 2001) (Ex. B); *see also* Initial Brief for the Petitioner, *COMSAT Corp. v. FCC, et al.*, No. 00-1548 (D.C. Cir. filed May 29, 2001) (attached to *Ex Parte* letter filed June 1, 2001 in MD Docket No. 01-76).

Reconsideration is also warranted because even if, *arguendo*, regulatory fees on INTELSAT space stations are appropriate in fiscal year 2001, COMSAT's share of such fees should be no greater than COMSAT's 19 percent utilization share of the space segment capacity of the INTELSAT satellite system in fiscal year 2001. *See id.*

CONCLUSION

For the foregoing reasons, COMSAT respectfully requests Commission reconsideration of Paragraphs 29, 39, 42, and 43, and Attachment A Paragraph 22, of the *FY 2001 Order* in the above-captioned proceeding. Alternatively, if the Commission is not prepared at this time to grant such reconsideration, COMSAT respectfully requests that the present petition be held in abeyance pending resolution of COMSAT's related petition for judicial review of the *FY 2000 Order*, which is now pending before the U.S. Court of Appeals for the D.C. Circuit.

Respectfully submitted,


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EXHIBIT A

ORAL ARGUMENT SCHEDULED FOR OCTOBER 16, 2001
No. 00-1458

**BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMSAT CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, Respondents,

and

PANAMSAT CORPORATION, Intervenor

**ON PETITION FOR REVIEW OF A FINAL RULEMAKING ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION**

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION AND SUMMARY

The Federal Communications Commission (“FCC” or “agency”) does not attempt to demonstrate that its imposition of space station fees on INTELSAT satellites is targeted to recover costs associated with regulating those satellites. The reason for this failure is apparent: there *are* no such costs, because INTELSAT satellites are not subject to FCC jurisdiction.¹ Rather, the agency admits that its unprecedented imposition of this fee on COMSAT is an attempt to recover the same costs it sought to recover when it created the unlawful “Signatory Fee,” which this Court invalidated in its 1997 *COMSAT* decision. The FCC reads that decision as authorizing it to collect these same costs so long as it does so by including them in an existing fee category. But there has been no change in the agency’s regulatory activities that could justify expanding the scope of the space station fee. And, in any event, the FCC fails to explain how the costs it incurs as a result of COMSAT’s Signatory relationship with INTELSAT can

¹ On July 18, 2001, INTELSAT completed privatization of its commercial operations and transferred ownership of its satellites to a successor entity, Intelsat LLC, which then became an FCC licensee. At the same time, COMSAT ceased to be the U.S. Signatory to INTELSAT. Except in one respect (*see infra* Section III, at p. 23), none of these recent changes has any bearing on this appeal, which deals with the Commission’s authority to assess fees for fiscal year 2000. Thus, for ease of reading, this brief is written in the present tense, even though certain statements do not reflect current reality.

properly be classified as reimbursable costs for regulating “Radio Facilities” under Part 25 of its Rules.

Faced with these difficulties, the FCC argues that the issues in this proceeding have already been decided by this Court. It reads the 1999 *PanAmSat* decision, which carefully avoided addressing whether COMSAT must pay Section 9 fees on account of INTELSAT satellites, as virtually compelling the imposition of such fees on COMSAT. The FCC does so by reiterating the truism that COMSAT is not “exempt” from paying Section 9 fees. COMSAT agrees: it is not “exempt.” Indeed, COMSAT has paid millions of dollars in such fees on a variety of facilities subject to Section 9. But the question here is whether INTELSAT satellites—which the FCC admits it does not regulate—may serve as the basis for imposing additional Section 9 fees on COMSAT.

Despite the care with which the *PanAmSat* Court sought to steer away from deciding this issue, there are some statements in *PanAmSat* which could be read as indicating that INTELSAT facilities are subject to Section 9 fees. Those statements are *dicta* and, in some cases, are factually incorrect. For instance, the Commission repeatedly cites the *PanAmSat* Court’s passing observation that it is “hard to see” why, if COMSAT must pay Section 8 application fees for INTELSAT satellites, it is not also subject to Section 9 regulatory fees for the

same facilities. In most cases, such an assumption would be reasonable, but in this context it is mistaken.

Ordinarily, the filing of a space station application would suggest that the space station thereafter would be subject to continuing regulatory oversight. That is certainly true with respect to facilities licensed pursuant to 47 C.F.R. Part 25. But it is *not* true in the case of space stations operated by INTELSAT. Rather, in its FCC applications, COMSAT merely seeks review of its investment in INTELSAT satellite and launch vehicle procurements. The cost of that review is covered by Section 8 application fees, and the Commission incurs no additional costs after it reviews the applications because it lacks jurisdiction over the subject facilities.

The FCC treats the *PanAmSat* case as if it overruled the Court's earlier decision in *COMSAT*. It did not. Thus, the Court is now faced with the task of harmonizing its two prior decisions. This can best be accomplished by focusing first on the text of Section 9—as the *PanAmSat* Court directed when it rejected the FCC's position on the basis that the agency's analysis elevated legislative history over statutory text. Once this task is undertaken, it quickly becomes apparent that the FCC cannot square the imposition of space station fees on INTELSAT satellites with the statutory language limiting such fees to "Space Station[s] (per

operational station in geosynchronous orbit) (47 CFR Part 25).” 47 U.S.C. § 159(a) (1994 & Supp. 2000).

The Commission tries to dismiss the Part 25 parenthetical as a meaningless “clerical” notation. But that is not how courts read statutes. Moreover, the FCC has failed to explain why, if the Part 25 parenthetical does *not* limit imposition of space station fees to satellites subject to the FCC’s jurisdiction, the agency must not also impose those fees on other non-U.S. satellites.

Finally, even if there is a justification for imposing space station fees on COMSAT in connection with INTELSAT satellites, the FCC has failed to justify its refusal to prorate those fees to reflect that, unlike other payers of this fee, COMSAT does not own or operate the satellites upon which it is being called to pay fees, and it and uses only 17 percent of those satellites’ capacity.

ARGUMENT

I. THE FCC IS STATUTORILY PRECLUDED FROM IMPOSING SECTION 9 SPACE STATION FEES ON INTELSAT SATELLITES.

In *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), this Court was asked to decide whether COMSAT is “exempt” from paying Section 9 space station fees. *See* FCC Br. at 23-24 (quoting question presented in *PanAmSat*). The Court correctly answered “no.” *See infra* Section II (analyzing *PanAmSat*

decision). Now, the FCC, as well as Intervenor PanAmSat, would have this Court believe that the instant case raises, once again, the identical issue decided in *PanAmSat*: namely, whether COMSAT is exempt from paying Section 9 fees. *See, e.g.*, FCC Br. at 18-19, 22-24, 27; *see also* PanAmSat Br. at 5-7, 12.² It does not. Rather, the question presented here is whether Section 9 *precludes* the FCC from imposing space station fees on unregulated INTELSAT satellites. For the following reasons, the answer is “yes.”³

² Indeed, PanAmSat (though not the FCC) asserts that COMSAT’s appeal is barred by the doctrines of *res judicata* and collateral estoppel. PanAmSat Br. at 6. PanAmSat is wrong. Because no Court has ever considered the merits of COMSAT’s present statutory arguments, “there is no possibility that *issue* preclusion would bar them.” *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 77-78 (D.C. Cir. 1997) (emphasis in original) (citation omitted). Rather, “the lack of [past] merits consideration defeats any application of issue preclusion.” *Id.* at 78. Moreover, “[t]he general principle of *claim* preclusion . . . that a final, valid judgment on the merits precludes any further litigation *between the same parties* on the same cause of action” cannot apply where COMSAT was not notified of—and did not participate in—the *PanAmSat* proceeding. *Id.* (emphasis added); *see also* *Restatement (Second) of Judgments* §§ 17, 24 (1982) (same). Even if COMSAT had participated in *PanAmSat*, claim preclusion would not bar the present proceeding because *PanAmSat* concerned the FCC’s assessment of regulatory fees for fiscal year 1998, but the present litigation concerns regulatory fees for fiscal year 2000. It is axiomatic that “each successive enforcement of a statute—such as each year a taxpayer is subjected to a tax—creates a new cause of action.” *Stanton*, 127 F.3d at 78.

³ The FCC’s brief abandons any reliance on the ORBIT Act as an independent basis for imposing any liability on COMSAT. *See* FCC Br. at 19 (acknowledging that “COMSAT’s liability for the fee arises from Section 9—not
(continued)

A. The FCC Does Not Regulate INTELSAT's Satellites As "Radio Facilities," And Thus Incurs No Costs As The Result Of Such Regulation.

The *Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and Order*, 15 F.C.C. Rcd 14478, 65 Fed. Reg. 44576 (2000) ("FY 2000 Order") (J.A. ___), does not identify *any* Section 9 costs that arise from the FCC's regulation of INTELSAT satellites. Nor could it, for there are none. As explained in COMSAT's Initial Brief, Section 9's text unambiguously imposes space station fees only on "radio facilities" regulated pursuant to "47 CFR Part 25." 47 U.S.C. § 159(g) (table) (1994 & Supp. 2000). The FCC, however, does not regulate INTELSAT's "radio facilities"—pursuant to "47 CFR Part 25" or otherwise. COMSAT Br. at 27-32; *see FY 2000 Order*, 15 F.C.C. Rcd at 14487 (J.A. ___) ("INTELSAT's facilities are not subject to the licensing provisions of Part 25.").

Indeed, during the time period at issue here, the FCC was *precluded by law* from regulating INTELSAT satellites. In particular, the International Organizations Immunities Act ("IOIA") explicitly provides that:

International organizations, *their property and their assets, wherever located, and by whomsoever held*, shall enjoy the same immunity . . . as is enjoyed by foreign governments. . . .

from the ORBIT Act"); *accord id.* at 37. Thus, the only remaining contested issue is the FCC's power to impose these fees under Section 9.

22 U.S.C. § 288a(b) (1994 & Supp. 2000) (emphasis added); *see also* Exec. Order No. 11996, 42 Fed. Reg. 4331 (Jan. 24, 1977) (designating INTELSAT as an immune international organization). It is beyond dispute that the INTELSAT satellites are “property” and “assets” owned not by COMSAT but by the immune international organization INTELSAT. *Compare Agreement Relating to the International Telecommunications Satellite Organization “INTELSAT,”* Art. V(a), done Aug. 20, 1971, 23 U.S.T. 3813, 3822 (“INTELSAT Agreement”) (“INTELSAT shall be *the owner* of the INTELSAT space segment and of all other property acquired by INTELSAT.”) (emphasis added) *with id.* Art. V(b), 23 U.S.T. at 3823 (COMSAT merely “shall *have an investment share*” in INTELSAT) (emphasis added). Thus, INTELSAT satellite “assets” are immune under IOIA from regulatory oversight and national taxation (including regulatory fees), even if, *arguendo*, these assets can be said to be “held” by COMSAT. *See* COMSAT Br. at 4-5, 9-11 (discussing 22 U.S.C. § 288 *et seq.*); *see also* INTELSAT Agreement, Art. XV(b), 23 U.S.T. at 3855 (“INTELSAT and its property shall be exempt in all States Party to this Agreement from all national income and direct national property taxation and from customs duties on communications satellites and components and parts for such satellites to be launched for use in the global system.”).

Section 9 contains no suggestion that Congress intended to abrogate or repeal either the IOIA or the INTELSAT Agreement.⁴ Accordingly, this Court should decline the FCC's invitation to construe Section 9 as having repealed by implication both of those enactments. *Cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) ("superior values, of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws, prompt the . . . rule that legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, absent a clearly expressed congressional intention to the contrary") (internal quotations omitted).

B. The FCC May Not Reinstate, Under A Different Name, The Same Unlawful "Signatory Fee" That This Court Previously Struck Down.

The FCC's brief makes clear that the costs it seeks to recover by imposing space station fees on INTELSAT satellites are not the same costs that it incurs in

⁴ Indeed, if the statute were ambiguous on this point, the legislative history makes plain Congress's intent that Section 9 should be construed harmoniously with the IOIA and the INTELSAT Agreement. *See* H.R. Rep. No. 102-207, at 26 (1991) (Section 9 regulatory "[f]ees will not be applied to space stations operated by international organizations subject to the [IOIA]."), *incorporated by reference in* Conf. Rep. H.R. Rep. No. 103-213, at 499 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1188 (emphasis added).

regulating U.S.-licensed satellites.⁵ Rather, they are the same costs of overseeing COMSAT's Signatory activities that it previously sought to recover, and that this Court invalidated in *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997).⁶ FCC Br. at 23 ("the Commission has repeatedly pointed out that it incurs expenses relating to Comsat's signatory status"); *id.* at 22 (noting that the Commission incurs costs overseeing COMSAT's activities as U.S. Signatory); *see FY 2000 Order*, 15 F.C.C. Rcd at 14489 (J.A. ___) ("the costs attributable to space station oversight include costs directly related to INTELSAT signatory activities [and] . . . are distinct from those recovered by other fees that Comsat pays, such as application fees, fees applicable to international bearer circuits, fees covering Comsat's non-Intelsat satellites, and earth station fees"); *see also FCC Report to*

⁵ As explained in COMSAT's Initial Brief, at 27-29, the FCC regulates U.S.-licensed satellites pursuant to Part 25 primarily by ensuring compliance with technical standards and by assigning particular satellites to particular orbit locations. It performs none of these functions with respect to INTELSAT satellites.

⁶ Significantly, the FCC has made no recent effort to quantify the costs of its Signatory oversight. The last time it did so, in 1996, those costs amounted to only \$233,425. *Assessment and Collection of Regulatory Fees For Fiscal Year 1996, Report and Order*, 11 F.C.C. Rcd 18774, 18790 (1996), *rev'd in other respects*, *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997).

Congress as Required by The Orbit Act, FCC 01-190 (June 15, 2001)

§ 1.B.Regulatory Fees (J.A. ___) (same).

The FCC treats this Court's recent *PanAmSat* decision as having overruled its earlier decision in *COMSAT*. *But see LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court. That power may be exercised only by the full court."). *But PanAmSat* did not reverse this Court's holding in *COMSAT* that Section 9 allows the FCC to impose new regulatory fees only "to reflect additions, deletions, or *changes in the nature of its services* as a consequence of Commission rulemaking proceedings or changes in law." *COMSAT Corp.*, 114 F.3d at 225 (quoting 47 U.S.C. § 159(b)(3) (1994)) (emphasis added); *cf. id.* (Section 9's requirement of a nexus between new regulatory fees and new regulatory services "clearly limits the Commission's authority to promulgate amendments under [Section 9]"). To the contrary, the *PanAmSat* Court *confirmed* that a decision to subject new payers to existing fees is only "justifiable on the basis of changes in the Commission's service that flow from earlier rulemakings." *PanAmSat*, 198 F.3d at 898 (holding that the agency could subject non-common carriers to Section 9 bearer circuit fees only in light of

regulatory changes permitting the “steady expansion of services” offered by the entities and a concomitant increase in the need for FCC oversight).

Here, the FCC cannot and does not claim that it provided any new regulatory services in fiscal year 2000 with respect to COMSAT’s activities, nor does it contend that there were any relevant “changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law,” 47 U.S.C. § 159(b)(3) (1994 & Supp. 2000). Instead, the agency seeks to dismiss *COMSAT* by claiming that the decision focused on the procedures by which the FCC adopted the Signatory fee. FCC Br. at 32. But the problem the Court identified in *COMSAT* was not the procedures employed—which were identical to those used to promulgate the *FY 2000 Order*—but rather the FCC’s lack of power to promulgate a new fee in the absence of a change in regulatory service provided by the agency.

Although the FCC concedes that it cannot “adopt a *new fee* in the absence of compliance with the requirements of Section 9(b)(3),” FCC Br. at 32 (emphasis in original), it now argues that *no fee* is “new” unless it has a new *name*. FCC Br. at 32. Under the FCC’s reading of *COMSAT*, the only error reversed in that case was the agency’s decision to *call* its novel 1996 fee a “Section 9 signatory fee” rather than a “Section 9 space station fee.” *See id.* 32-33. This Court should not

countenance such linguistic sleight-of-hand. Where, as here, “both logic and . . . precedent rebut the claims of any such niggardly interpretation” of a law, this Court has rejected governmental “depend[ence] upon such trivial semantic distinctions . . . [to] sidestep [the law’s] application.” *United States v. Hubbell*, 167 F.3d 552, 581 (D.C. Cir. 1999), *aff’d*, 530 U.S. 27 (2000).

INTELSAT satellites have served the United States during the entire period in which Section 9 space station regulatory fees have been assessed. Moreover, COMSAT has been the U.S. Signatory to INTELSAT throughout that entire period, and the Commission has continuously regulated COMSAT’s Signatory activities in precisely the same manner. *See COMSAT Corp., Petition Pursuant to Section 10(c) of the Communications Act for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking*, 13 F.C.C. Rcd 14083, 14088-089 (1998). Under these circumstances, the fee here is inescapably a “new fee,” albeit one imposed under an old name. *Cf. United States v. Hatter*, 121 S. Ct. 1782, 1793-94 (2001) (federal judges were unconstitutionally subjected to “new” income tax when 50-year-old Social Security tax was applied against them for the first time in 1983); *Chase Manhattan Bank v. Finance Admin. of City of New York*, 440 U.S. 447, 448-49 (1979) (national banks were unlawfully subjected to “new” property tax when preexisting city commercial rent and occupancy tax was applied

against them for the first time in 1971).⁷ The FCC may seek to avoid characterizing this novel assessment as a “new fee,” but “[a]rtful phrasing does not suffice” to avoid established legal requirements. *Hubbell*, 167 F.3d at 581.

C. The FCC May Not Lawfully Impose Fees On COMSAT (But Not On Other, Similarly Situated Companies) By Making A Wholly Artificial Distinction Between “Foreign-Licensed Satellites” And “Non-U.S.-Licensed” Satellites.

The FCC contends that the statutory language imposing space station regulatory fees only on “radio facilities” licensed by the FCC pursuant to “47 CFR Part 25” is “essentially clerical” and does *not* “reflect a substantive limitation” on the scope of Section 9. *FY 2000 Order*, 15 F.C.C. Rcd at 14487-488 (J.A. ____). But if that were true, such fees logically would need to be imposed on every one of the more than 200 geostationary space stations that orbited the earth in 2000. *See* COMSAT Br. at 8. By definition, every such space station is a “Space Station[s] (per operational station in geosynchronous orbit).” 47 U.S.C. § 159(g) (table). Thus, if the reference to Part 25 were not substantive, “[t]he plain terms of § 9.” to paraphrase the *PanAmSat* Court, “clearly [would] not *require* an

⁷ *See also Citibank, N. A. v. New York City Finance Admin.*, 372 N.E.2d 789, 791 (N.Y. 1977) (noting that the New York City commercial rent and occupancy tax at issue was enacted in 1963, but not applied against national banks until 1971).

exemption for [operational foreign space stations in geosynchronous orbit], and there [would be] no obvious hook in the language on which to hang an exemption.” *PanAmSat*, 198 F.3d at 895 (emphasis in original).⁸

The FCC, of course, does not seek to assess Section 9 regulatory fees on every satellite orbiting the earth. It does not even seek to impose Section 9 fees on those foreign-licensed satellites that actually serve the United States. This is true even though the FCC undoubtedly incurs costs in creating and maintaining the regulatory regime under which those space stations are allowed to access the U.S. market. See COMSAT Br. at 34-35 & n.18; see also *Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations To Provide Domestic and International Satellite Service in the United States, Report and Order*, 12 F.C.C. Rcd 24094 (1997), *modified on reconsideration in other*

⁸ The FCC cannot ignore the reference to Part 25 merely because it appears in a parenthetical. See *Duquesne Light Co. v. EPA*, 698 F.2d 456, 467 (D.C. Cir. 1983) (rejecting statutory interpretation that “would render the parenthetical superfluous”); *Ass’n of American R.R. v. ICC*, 564 F.2d 486, 495 (D.C. Cir. 1977) (dismissing interpretation that “renders the parenthetical limitation surplusage”). Moreover, the argument that the statutory phrase “47 CFR Part 25” might be characterized as a “technical term” or “term of art” does not vest the FCC with special discretion to “interpret” the provision out of existence. See *Meredith v. Fed. Mine Safety & Health Review Comm’n*, 177 F.3d 1042, 1053 (D.C. Cir. 1999) (“[T]he presence of a difficult question of statutory construction does not necessarily render that provision ambiguous for purposes of *Chevron*.”).

respects, 15 F.C.C. Rcd 7207 (1999), *corrected by*, 15 F.C.C. Rcd 5042 (2000), *petition for review pending*, No. 98-1011 (D.C. Cir. filed Jan. 12, 1998); *New Skies Satellites, N.V.*, FCC 01-107, 2001 WL 300717 (Mar. 29, 2001) (authorizing 5 existing plus one planned Netherlands-licensed satellites to serve the United States); *European Telecommunications Satellite Organization*, DA 00-1741, 2000 WL 1154045 (FCC Aug. 11, 2000) (authorizing two French-licensed satellites to serve the United States). Nor are Section 9 fees imposed on U.S. companies that own interests—even controlling interests—in foreign-licensed satellites. *See* COMSAT Br. at 34-35. Yet COMSAT, a 20 percent shareholder and 17 percent user of INTELSAT, is being asked to pay space station fees on every satellite in the INTELSAT system.

The *FY 2000 Order* seeks to justify this disparate treatment by concocting a distinction between *foreign*-licensed satellites (which remain outside the coverage of Section 9, according to the FCC) and “other” *non-U.S.*-licensed satellites (*i.e.*, INTELSAT alone), which are now purportedly subject to fees. *See* COMSAT Br. at 32-37 (discussing *FY 2000 Order*, 15 F.C.C. Rcd at 14487-488 (J.A. ___)). But there is no language in Section 9—or anywhere else—to support this strained distinction. This Court should not countenance a statutory interpretation which can only be arrived at by treating COMSAT differently from all other similarly

situated companies. As the Supreme Court recognized in *United States v. Clark*, 445 U.S. 23, 27-31 (1980), a statute must be construed to apply similarly to similarly situated persons. Any other interpretation “raises serious equal protection problems that this Court must seek to avoid by adopting a saving statutory construction not at odds with fundamental legislative purposes.” *Id.* at 31. See *Justin v. Jacobs*, 449 F.2d 1017, 1022 (D.C. Cir. 1971) (interpreting statutes to avoid different application to similarly situated persons); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987) (recognizing “the importance of treating parties alike . . . when the agency vacillates without reason in its application of a statute or the implementing regulations”).

II. THE *PANAMSAT* COURT DID *NOT* DECIDE WHETHER SECTION 9 REQUIRES COMSAT TO PAY REGULATORY FEES IN CONNECTION WITH INTELSAT SPACE STATIONS.

To justify its imposition of space station fees on COMSAT, the FCC misinterprets the *PanAmSat* decision throughout its brief. For example, the Commission asserts that the *PanAmSat* Court “concluded” that COMSAT must pay Section 9 space station fees “for its participation in the Intelsat system.” FCC Br. at 7. This effort to treat *PanAmSat* as having resolved the question of Section 9’s application to INTELSAT satellites flies in the face of the *PanAmSat* Court’s deliberate decision to narrow its ruling.