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June 18, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Re: *Proposed FY 2003 Regulatory Fees*
MD Docket No. 03-83
Ex Parte Submission

Dear Ms. Dortch:

On Wednesday, June 18, 2003, Kenneth D. Patrich and the undersigned, counsel for Arch Wireless (Arch) met with Barry Ohlson, Legal Advisor to Commissioner Adelstein. The purpose of the meeting was to discuss the issues set forth in the attached, consistent with the Comments filed by Arch and other messaging carriers in the above-referenced docket.

If you have any questions, please contact the undersigned.

Sincerely,

WILKINSON BARKER KNAUER, LLP

By: Carolyn W. Groves

Attachment

cc: Audrey Rasmussen (w/attachment)
Christine McLaughlin (w/attachment)
Ken Hardman (w/attachment)

PROPOSED FY 2003 REGULATORY FEES
MD DOCKET NO. 03-83
EX PARTE SUBMISSION

June 18, 2003

THE COMMISSION'S AUTOMATIC, ANNUAL INCREASES IN THE REGULATORY FEE AMOUNTS COLLECTED FROM THE MESSAGING INDUSTRY VIOLATE SECTIONS 9(a)(1) AND 9(b) OF THE COMMUNICATIONS ACT

- Sections 9(a)(1) and 9(b) of the Act, collectively, require the Commission to (i) collect regulatory fees to recover the costs of engaging in enforcement, policy and rulemaking, user information and international activities for industries which it regulates, and (ii) to derive the regulatory fees to be collected by determining the full-time equivalent number of employees performing these regulatory activities. Pursuant to Section 9(b)(3), the Commission is authorized to make "Permitted Amendments" to the Schedule of Regulatory Fees in order to comply with Section 9(b). Further, Section 9(i) requires the Commission to develop accounting systems in order to make adjustments under 9(b)(3). Although the fee increases or decreases made under Section 9(b)(3) are not subject to judicial review, the Commission's failure to comply with Sections 9(a), 9(b) and 9(i) is judicially reviewable. (*see* Attachment A for excerpts from Section 9 of the Act).

- The Commission has not determined the full-time equivalent number of employees engaged in messaging-related regulatory activities since 1999. Two things have occurred since then:

  The Commission has engaged in dramatically fewer messaging-specific regulatory activities in the last three years. For example, there is virtually no site-by-site licensing which means far fewer staff are engaged in reviewing and processing applications. Most filings, whether they be licensing or transaction related, have been handled via the Universal Licensing System for several years. New licenses have been awarded via auction since 2000. With one minor exception, there have been no messaging-specific rulemaking or policy proceedings in the last few years. There have been no formal complaints filed against messaging carriers in the last eighteen months. Finally, the Commission is not engaging in any international activities for messaging.

  Conversely, the proportionate share of the regulatory fees collected from the messaging industry is increasing in lock step with the proportionate share of fees being collected from those industry segments consuming the majority of the Commission's resources (*see* Attachment B for a sampling of the numerous non-messaging specific proceedings ongoing at the Commission).

- The messaging industry realizes the Commission is increasing the per-industry regulatory fee amounts by exactly the same percentage the Commission's annual fiscal budget increases; however, this approach does not comport with the mandates of Section 9 of the Act which require that the Commission assess fees based on the amount of regulatory activity being performed, and costs incurred to do so, for particular industry segments.

- This issue has been brought to the Commission's attention in Comments filed in response to FY Regulatory Fee Notices of Proposed Rulemaking in both 2002 and 2003. Last year, Commissioner Copps actually expressed concern that the Commission "does not address when or how it would adjust the regulatory fees to take into account changes to the cost of regulating various services."[1]

- This year's FY 2003 Notice of Proposed Rulemaking does not mention, let alone address, the issue.

- The problems arising from the Commission's failure to address the issues summarized herein has reached a critical juncture. The progressively increasing, non-cost based regulatory fee revenue requirement imposed on the messaging industry is having a direct and harmful impact on the industry and its ability to remain the low-cost option for one and two-way messaging services.

- It is anticipated, moreover, that unless the system for apportioning the regulatory fee revenue requirement is brought into compliance with Section 9 of the Act, the inequities discussed herein will worsen in the coming years, as Commission budget requirements (for matters unrelated to the messaging industry) continue to increase while the number of messaging subscribers continues to decline.

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[1] *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, Report and Order, MD Docket No. 02-64, 17 FCCR 13203, Separate Statement of Commissioner Michael Copps (2002).

THE INEQUITIES STEMMING FROM THE COMMISSION'S ONGOING STATUTORY VIOLATIONS DISSERVE THE PUBLIC INTEREST AND MANDATE AN IMMEDIATE SOLUTION – POSSIBLE REMEDIES

- The Commission should immediately implement a cost-accounting methodology for apportioning the regulatory fee revenue requirement on messaging. Such a methodology will surely result in a smaller total revenue requirement for messaging and a related reduction in the per unit assessment.

- If there is not enough time for the Commission to implement a cost-based methodology for assessing FY 2003 regulatory fees, it could make a permitted amendment to the Schedule of Regulatory Fees pursuant to Section 9(b)(3) of the Act. The Commission last analyzed the costs it was incurring to regulate messaging in 1999. Because the Commission is now engaged in no more (and in fact less) messaging-related activity than in 1999, it would be logical to reduce the 2003 per unit fee to at least the .04 per unit fee adopted in 1999. Alternatively, the Commission could apportion to messaging the 1999 $1,514,031 regulatory fee revenue requirement which would result in a per unit fee of .07 for FY 2003 (based on the units in service reported in the FY 2003 Regulatory Fee *NPRM*).

- A third option is for the Commission to adopt a gross revenue methodology for assessing regulatory fees for the messaging industry, consistent with what the Commission did for the Interstate Telephone Services Provider Fee category in 1995 when it determined that an interstate "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."[2]

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[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, Report and Order, 10 FCC Rcd 13512, ¶ 134 (1995).

ATTACHMENT A

EXCERPTS FROM SECTION 9 OF THE COMMUNICATIONS ACT

Section 9(a)(1) of the Act, RECOVERY OF COSTS, states: " The Commission, in accordance with this section, shall assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities."

Section 9(b) of the Act, ESTABLISHMENT AND ADJUSTMENT OF REGULATORY FEES, **subparts (1) and 1(A)** state: "The fees assessed under subsection (a) *shall be derived by determining the full-time equivalent number of employees performing the activities described in subsection (a)* within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau and other offices of the Commission, *adjusted to 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[.]" (emphasis added)

Section 9(b)(3), PERMITTED AMENDMENTS, states: "[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)." (emphasis added)

Section 9(i) of the Act, ACCOUNTING SYSTEM, states: "The Commission *shall* develop accounting systems necessary to making the adjustments authorized by subsection (b)(3)." (emphasis added)

ATTACHMENT B

The following is just a sampling of the non-messaging specific regulatory activities consuming a lion's share of the Commission's resources.

- Local Number Portability (WT Docket No. 01-184)
- Ultra-Wideband Devices (ET Docket No. 98-153)
- 800 MHz Rebanding (WT Docket No. 02-55)
- Spectrum Policy Task Force (ET Docket No. 02-135)
- Revisions to the Media Ownership Rules (MB Docket No. 02-277)
- International Settlements Policy Reform/International Settlement Rates (IB Docket Nos. 02-324 and 96-261)
- Broadband over Power Lines (ET Docket No. 03-104)
- Revising Satellite Licensing Procedures (IB Docket Nos. 02-34)
- Preparations for WRC-03
- Section 271 Applications
- Slamming and Cramming Complaints
- The Triennial Review
- Secondary Markets (WT Docket No. 00-230)
- Unlicensed Spectrum Allocation (ET Docket No. 03-122)
- E-911 (CC Docket No. 94-102) (Rule Scope, Non-Service Initialized Handsets, Digital TTY Compatibility)
- Implementation of Section 255 and Resolution of Related Complaints