

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Assessment and Collection of) MD Docket No. 03-83
Regulatory Fees For Fiscal Year 2003)

To: The Commission

PETITION FOR RECONSIDERATION OR CLARIFICATION

Pursuant to Section 1.106 of the Commission's Rules, Sky Television, L.L.C. ("Sky") hereby petitions for reconsideration or clarification of the Report and Order, FCC 03-184, in the above-captioned docket released July 25, 2003 (the "Report and Order") concerning regulatory fees and classifications for Fiscal Year 2003.¹

Specifically, Sky seeks clarification or reconsideration of the Commission's rejection of the proposal that the Commission adopt an additional regulatory fee classification for single-channel full-service broadcast television stations and assess a fee for single-channel stations that is 50 percent of the fee assessed against stations with paired NTSC/DTV allotments. *See* Comments of Sky Television, L.L.C. (filed April 25, 2003) (for the Commission's convenience, Sky is attaching a copy of the Comments to this Petition).

¹ The Report and Order was published in the *Federal Register* on August 13, 2003, 68 Fed. Reg. 48446 (2003).

In rejecting Sky's proposal, the Commission stated:

The Commission's broadcast television regulatory fees are already designed to only capture the costs of analog broadcast activities. Although DTV licensees are subject to Section 8 application fees, the Commission does not yet assess Section 9 regulatory fees to recover the costs of the agency's DTV-related activities. Therefore, there is no need for the Commission to take action on this matter, because the analog-only regulatory fee category that WSKY-TV requests is already in effect.

Report and Order at ¶ 25. Sky first seeks clarification of this language, which can be interpreted two or three ways.

Literally, paragraph 25 of the Report and Order says that the Commission does not even attempt to recover the costs of the Commission's DTV-related regulatory activities. If this interpretation is correct, and if the statement is true, then the Commission is in violation of Section 9 of the Communications Act, which mandates the Commission to recover regulatory costs without distinguishing between analog television and DTV-related costs.

The language in paragraph 25 also could mean that none of the \$269,000,000 revenue requirement for the agency as a whole that is recovered through regulatory fees, including the \$14,955,050 revenue requirement assigned to full-service television stations, is intended to offset the Commission's regulatory activities with respect to DTV. The Report and Order contains no citation to any source for this statement, so Sky has no way of evaluating its accuracy. On its face, however, the statement does not appear to be plausible, because \$269,000,000 is all but \$2,000,000 of the amount that Congress appropriated to the Commission for Fiscal Year 2003. Public Law No. 108-7, 117 Stat. 95.

It would appear therefore that notwithstanding the statement in paragraph 25 of the Report and Order, the Commission does in fact attempt to recover the costs of its DTV-related regulatory activities and that collections under Section 9 are used to offset these costs. Sky nevertheless requests clarification of the Commission's position.

It has also been informally suggested to Sky that what the Commission meant in paragraph 25 is that it does not assess Section 9 regulatory fees against DTV construction permits and licenses. This interpretation is not supported by the language itself, and the Commission has never previously stated that it does not assess fees for DTV authorizations. If true, however, this policy also violates Section 9, which contains no exception for DTV construction permits and licenses.² Sky seeks clarification if this is what the Commission meant in paragraph 25.

In any event, this interpretation of paragraph 25 is entirely unresponsive to the issue that Sky raised in its Comments in this proceeding. Sky is aware that the Commission does not assess a separate regulatory fee for DTV allotments. This policy makes sense in that DTV allotments do not exist separate from the paired analog allotment. In the Comments, however, Sky faulted the Commission for failing to distinguish between television stations with paired DTV allotments ("two-channel stations") and stations with no paired DTV allotment ("single-channel stations"). If paragraph 25 means simply that stations with single allotments and stations with paired allotments are assessed the same amount, then paragraph 25 does nothing more than restate the facts that led Sky to file its Comments in the first place. It does not explain

² Section 9(g) provides only for exceptions to the charges assessed against TV licenses and construction permits for governmental and nonprofit entities. 47 U.S.C. § 159(h). There is no exception for DTV authorizations.

why the Commission's failure to distinguish between two-channel stations and single-channel stations complies with Section 9.

Section 9(b)(3) of the Communications Act requires the Commission to add new classifications for regulatory fee purposes to reflect changes in services and to reclassify services to reflect changes arising from rulemaking proceedings or changes in law. In the Comments, Sky pointed out that the Commission's prior decisions to grant a paired digital allotment to most, but not all television stations, represents a fundamental change in the broadcast television allotment scheme sufficient to require a change in the Schedule of Regulatory Fees under Section 9(b)(3).³ As Sky explained in detail in its Comments in this proceeding, it is clear that there have been changes in the nature of full-power television broadcast services since 1993 as a consequence of Commission rulemaking proceedings. In 1997, the Commission granted a paired digital allotment to all licensees and permittees of full service broadcast stations as of April 3, 1997. In 1998, the Commission confirmed that it would not grant a paired digital allotment to new broadcast television stations – i.e., to stations with original construction permits granted after April 3, 1997.⁴ The Report and Order, however, contains no discussion of Section 9(b)(3) nor any explanation why the Commission does not believe it applies here.

³ See *PanAmSat Corp. v. FCC*, 198 F.3d 890, 897-99 (D.C. Cir. 1999) (Commission's decision to include non-common carriers in the international circuit category beginning FY 1997 is justifiable on the basis of changes in the Commission's services that flow from earlier rulemakings).

⁴ *Fifth Report and Order, Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12816 (1997) (initial DTV licenses limited to full service broadcast television station permittees and licensees as of April 3, 1997), *recon. denied, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6865 (1998) (new NTSC permittees will not be awarded a second channel to convert to DTV, but may convert on their single 6 MHz channel), *further recon. denied, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1355-57 (1998).

Moreover, the Commission has added new classifications for regulatory fee purposes even where there has been no underlying change in the service or the law. For example, in 1995, the Commission added categories for satellite television station licenses and construction permits even though there had been no change in the nature of the service or in the law with respect to such stations. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13512, 13534-35 (1995). If there is justification for a separate category for satellite television stations, which have a paired digital allotment if granted as of April 3, 1997, then there is even a more compelling reason for a separate category for single-channel stations.⁵

The Report and Order also contains no explanation why, in setting the amount of the regulatory fee for the new single-channel television station category, the Commission has ignored the mandate of Section 9(b)(1)(A), which requires the Commission to take into account the benefits provided to the payor by the Commission's regulatory activities.⁶ The Report and Order does not dispute the fact that much of the Commission's current regulatory activities with respect to broadcast television do not benefit single-channel stations and that single-channel stations are using only one-half of the spectrum used by stations with paired NTSC/DTV allotments.⁷

⁵ *See also Implementation of Section 9 of the Communications Act: Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 10 FCC Rcd 12763 (1995) (reduced FY 1994 fees for satellite television stations that had filed petitions for reconsideration or waiver or reduction), *recon. granted*, 12 FCC Rcd 10621 (1997) (Commission retroactively reduced FY 1994 regulatory fees for all satellite television stations).

⁶ *See Comments* at 5-7.

⁷ *See Comments* at 5. The Commission itself has told Congress that one of its "high growth areas" is "high definition digital television." FY 2003 Budget Estimates to Congress at 9, which can be found at www.fcc.gov/Reports/fcc2003budget.html.

ATTACHMENT

Comments of Sky Television, L.L.C.



**The FCC Acknowledges Receipt of Comments From ...
 Sky Television, L.L.C.
 ...and Thank You for Your Comments**

Your Confirmation Number is: '2003425578568 '		
Date Received: Apr 25 2003		
Docket: 03-83		
Number of Files Transmitted: 1		
File Name	File Type	File Size (bytes)
COMMENT	Adobe Acrobat PDF	807732
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therefore the first year that WSKY-TV will be required to pay a regulatory fee as a licensee.¹

WSKY-TV is one of the handful of full-service broadcast stations authorized to operate on only one channel. In other words, WSKY-TV has no paired DTV allotment. Of the 1,719 authorized full-service broadcast television stations as of December 31, 2002,² all but 90 to 100 stations have been allotted two channels — one NTSC and one DTV. The remaining 90-100 stations — stations whose construction permits were granted after April 3, 1997 — are allotted only one channel.³

At present, the Schedule of Regulatory Fees does not distinguish between television stations with paired DTV allotments (“two-channel stations”) and stations with no paired DTV allotment (“single-channel stations”). With one exception, the Commission has not changed the classifications for full-service broadcast television stations since Congress enacted Section 9 of the Communications Act in 1993, 47 U.S.C. § 159(b)(3), and all television stations are classified for regulatory fee purposes by band — either VHF or UHF — and market size. The one exception is the separate classification for satellite television stations, which the Commission added in 1995.⁴

¹ WSKY-TV is located in the Portsmouth-Norfolk-Newport News DMA, which is the 42nd market. WSKY-TV operates on VHF Channel 4. Therefore, the proposed regulatory fee for FY 2003 for WSKY-TV is \$30,125.

² See FCC News Release, “Broadcast Station Totals as of December 31, 2002” (released January 13, 2003).

³ Sky understands from informal conversations with Commission staff that there are about 90-100 single-channel full-service television stations. This is less than 6 percent of the 1719 authorized full service television stations. See FCC News Release, “Broadcast Station Totals as of December 31, 2002” (released January 13, 2003).

⁴ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13512, 13534-35 (1995).

II. Discussion

Under Section 9(b)(3) of the Communications Act, the Commission is required to add new classifications for regulatory fee purposes to reflect changes in services. Section 9(b)(3) requires the Commission to:

amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A) [of Section 9(b)]. 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 on changes in law.

In other words, the Commission must reclassify services to reflect changes arising from rulemaking proceedings or changes in law.⁵

It is clear that there have been changes in the nature of full-power television broadcast services since 1993 as a consequence of Commission rulemaking proceedings. In 1997, the Commission granted a paired digital allotment to all licensees and permittees of full service broadcast stations as of April 3, 1997. In 1998, the Commission confirmed that it would not grant a paired digital allotment to new broadcast television stations – i.e., to stations with original construction permits granted after April 3, 1997.⁶

⁵ See *COMSAT Corp. v. FCC*, 114 F.3d 223, 227-28 (D.C. Cir. 1997) (vacated Commission's addition of a "signatory fee" classification for COMSAT because there had been no change in the nature of services as a consequence of a rulemaking or change in law). *But see Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13512, 13534-35 (1995) (Commission created new classifications for satellite television licenses and construction permits under its "authority to make permissive amendments to our regulatory fees" to "take into account public interest factors reflected in comments filed in the proceeding to adopt the FY 1994 Schedule of Regulatory Fees," notwithstanding that there had been no change in the nature of the service as a consequence of a rulemaking proceeding or other change in law); *Implementation of Section 9 of the Communications Act: Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 10 FCC Rcd 12759, 12763 (1995) (reduced FY 1994 fees for satellite television stations that had filed petitions for reconsideration or waiver or reduction), *recon. granted*, 12 FCC Rcd 10621 (1997) (Commission retroactively reduced FY 1994 regulatory fees for all satellite television stations).

⁶ *Fifth Report and Order, Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12816 (1997) (initial DTV licenses limited to full service broadcast

The grant of a paired digital allotment to most, but not all television stations, is a fundamental change in the broadcast television allotment scheme, which is clearly sufficient to require a change in the Schedule of Regulatory Fees under Section 9(b)(3). *See PanAmSat Corp. v. FCC*, 198 F.3d 890, 897-99 (D.C. Cir. 1999) (Commission's decision to include non-common carriers in the international circuit category beginning FY 1997 is justifiable on the basis of changes in the Commission's services that flow from earlier rulemakings). In 1995, the Commission added categories for satellite television station licenses and construction permits even though there had been no change in the nature of the service or in the law.⁷ If there is justification for a separate category for satellite television stations, which have a paired digital allotment if granted as of April 3, 1997, then there is even a more compelling reason for a separate category for single-channel stations.

In setting the amount of the regulatory fee for the new single-channel television station category, the Commission must take into account the fact that much of its current regulatory activities with respect to broadcast television do not benefit single-channel stations and that single-channel stations are using only one-half of the spectrum used by stations with paired NTSC/DTV allotments. Section 9(b)(1)(A) of the Communications Act, 47 U.S.C. § 159(b)(1)(A), requires the Commission to adjust 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, including such factors as service area coverage, shared

television station permittees and licensees as of April 3, 1997), recon. denied, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6865 (1998) (new NTSC permittees will not be awarded a second channel to convert to DTV, but may convert on their single 6 MHz channel), further recon. denied, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1355-57 (1998).

⁷ See n. 5 *supra*.

versus exclusive use, and other factors that the Commission determines are necessary in the public interest.

Such regulatory activities that benefit only television stations with paired NTSC/DTV allotments would include rulemaking proceedings relating to the transition from analog to digital, simulcast requirements, cable and direct broadcast satellite carriage and other issues; DTV allotment proceedings; international coordination with Mexico, Canada and other nations; waiver requests; spectrum management; and consumer information services with respect to DTV. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, 17 FCC Rcd 13203, 13205 and 13276-77 (2002) (description of FCC activities). For example, just this month, the Commission completed a rulemaking proceeding on the remedial measures to be followed when requests to extend DTV construction deadlines are denied. *Remedial Steps for Failure to Comply with Digital Television Construction Schedule*, FCC 03-77 (released April 16, 2003). This rulemaking proceeding is simply irrelevant to single-channel television stations, as the decision itself acknowledges. *Id.* at n. 25. The decision illustrates that much of the Commission's current regulatory activities benefit only television stations with paired NTSC/DTV allotments and therefore that the costs of these activities should not be allocated to single-channel stations.

Sky has no way of knowing how much of the \$14,955,050 revenue requirement assigned to full-service television stations, *NPRM* at Attachment C, is attributable to the Commission's activities with respect to DTV, and apparently the Commission also does not have access to this data.⁸ In the absence of actual cost data, Sky can only estimate

⁸ Section 9(i) of the Communications Act requires the Commission to "develop accounting systems necessary to making the adjustments authorized by subsection (b)(3)." Last year, however, the

what an appropriate allocation would be. Given the substantial Commission resources devoted to DTV, it would be safe to assume that single-channel stations should be assessed no more than 50% of the regulatory fees assessed against two-channel stations. A fee for single-channel stations of 50% of the two-channel fee is also justifiable since single channel stations use only 50% of the spectrum used by two-channel stations. *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, 12 FCC Rcd 17161, 17184-17185 (1997) (Commission created a new CMRS Messaging Service fee category, distinguishing between the CMRS Mobile Services and CMRS Messaging Services fee categories by the amount of bandwidth authorized consistent with policy to “assess fees based upon the quality of the channels provided to licensees”).

The creation of a new regulatory fee category for single-channel stations is not likely to have a significant overall revenue impact. Although there are an estimated 90 to 100 single-channel stations, many of these stations are either noncommercial stations, which are exempt from regulatory fees, or satellite stations, which are already subject to a substantially lower fee (\$1,000 for satellite TV licensees proposed for FY 2003, as compared to fees for full-service television stations ranging from \$1,425 to \$57,650, depending upon band and market rank).

III. Conclusion

In sum, Section 9(b)(3) of the Communications Act requires the Commission (1) to add or reclassify services in the Schedule of Regulatory Fees to reflect changes in the nature of services as a consequence of Commission rulemakings and (2) to adjust regulatory fees to take into account, among other things, the benefits provided to the

Commission decided “it would be best to discontinue efforts to base the schedule on our available cost data.” *Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, 17 FCC Rcd at 13206.

payor of the fee by the Commission's activities. Of the 1,719 authorized full-service broadcast television stations, all but 90 to 100 stations are authorized to operate on two channels — one NTSC and one DTV. The remaining 90 to 100 stations — stations with original construction permits granted after August 3, 1997 — are allotted only one channel. These new entrants use only 50% of the spectrum used by two-channel stations and are not beneficiaries of many of the Commission's regulatory activities with respect to DTV. Therefore, the Commission is required to add a classification for regulatory fee purposes for single-channel stations and assess such stations a fee commensurate with the benefits received. Sky suggests that because single-channel television stations use one-half of the spectrum used by stations with paired NTSC/DTV allotments, the fee assessed against single-channel stations should be no more than 50 percent the fee assessed against two-channel stations.

Respectfully submitted,

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April 25, 2003