



PUBLIC NOTICE

Federal Communications Commission
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DA-07-495

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

Consolidated Omnibus Budget Reconciliation
Act of 1985, 5 FCC Rcd 3558, 3572-73
(1990)]

PUBLIC NOTICE

Released: February 1, 2007

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

**NOTE: ANY QUESTIONS REGARDING
THIS REPORT SHOULD BE DIRECTED
TO THE REVENUE AND RECEIVABLES
OPERATIONS GROUP AT (202) 418-1995.**

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. A public notice of these fee decisions is published in the FCC record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

AM Radio 1490, Inc. - KOGN (AM) Request for refund of FY 2006 regulatory fees. **Granted** (December 15, 2006) [*See* 47 C.F.R. 1.1162(e); Assessment and Collection of Regulatory Fees for Fiscal Year 2006, 21 FCC Rcd 8092, ¶ 50 (2006)]

MilkyWay Communications, LLC Request for waiver of application fees. **Denied** (December 15, 2006) [*See* 47 U.S.C. §158(d)(2); 47 C.F.R. §1.1117(a); Establishment of a Fee Collection Program to Implement the Provisions of the

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

December 15, 2006

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Thomas Gutierrez, Esq.
Lukas, Nace, Gutierrez & Sachs, Chtd.
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102

Re: MilkyWay Communications, LLC
Request for Waiver of Application Fees
Fee Control No. RROG-06-00007535

Dear Mr. Gutierrez:

This is in response to your request filed April 24, 2006 (*Request*), on behalf of MilkyWay Communications, LLC (MilkyWay) for a waiver of the application fees associated with the assignment of 476 Multiple Address System (MAS) authorizations. Our records reflect that you have not paid the \$109,480.00 in total application fees at issue here (\$230.00 per call sign). For the reasons stated herein, we deny your request.

You recite that the “application . . . includes 476 virtually identical call signs . . . [and that e]ach of these involves a geographic area license awarded by the Commission via competitive bidding more than three years ago.”¹ You assert that “[t]he theory behind the varying fees that the Commission provides for in its schedule is that the greater the effort required, the higher the associated fee should be.”² You maintain that although the Commission generally does not impose filing fees on the assignment or transfer of licenses that were granted pursuant to competitive bidding, “for no reason that has ever been articulated publicly by the Commission . . . there are a handful of services[, including MAS,] for which filing fees are required for assignment or transfer applications, even when the licenses at issue were awarded pursuant to competitive bidding.”³ You assert that even though “these services existed prior to the advent of auctions, and had filing fees associated with them . . . [,] that fact in no way supports the disparate treatment provided to geographic area licenses awarded via auction[.]”⁴ You

¹ *Request* at 1.

² *Id.* at 2; *see also id.* at 4 (“the rationale behind filing fees is that those who benefit from the application of Commission resources that directly benefit only a limited and clearly defined group should compensate the Commission for the cost of such efforts”); *id.* at 5 (“the associated application fees were intended only to make the Commission whole for the cost of its efforts”).

³ *Id.* at 2.

⁴ *Id.* at 3, n.2.

claim that the application fees at issue here constitute approximately one hundred percent of the auction price for the spectrum being assigned, and that the assignment of "other, similarly situated services" involved no filing fees at all.⁵ Finally, you maintain that the "transaction itself is not particularly complex [and] that there is but a single transaction to be analyzed once [and that the analysis, once completed, can be applied to all of the] call signs in the single application at issue."⁶

The Commission has discretion to waive filing fees upon a showing of good cause and a finding that the public interest will be served thereby.⁷ We construe our waiver authority under section 8 of the Communications Act, 47 U.S.C. §158(d)(2), narrowly and will grant waivers on a case-by-case basis to specific applicants upon a showing of "extraordinary and compelling circumstances."⁸

We find that you have failed to establish good cause for waiver of the application fees. To begin with, we reject your basic premise that the fees in question may only reflect the cost of processing the application. Specifically, regarding your assertions that the assignment at issue is a single, noncomplex transaction and that the cost of processing the application does not correspond to the associated application fees, it is well-established that "there is 'no justification in the statute or legislative history for apportioning fees in accordance with the actual work done on any particular application.'"⁹ Thus, Congress

⁵ *Id.* at 3-4.

⁶ *Id.* at 5.

⁷ See 47 U.S.C. §158(d)(2); 47 C.F.R. §1.1117(a); *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 5 FCC Rcd 3558, 3572-73 (1990).

⁸ See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 958 (1987) (1987 Report and Order); *Sirius Satellite Radio, Inc.*, 18 FCC Rcd 12551 (2003) (*Sirius*).

⁹ *PanAmSat Corporation*, 19 FCC Rcd 18495, 18498 (2004); see also *id.* at 18497 ("consistent with congressional intent and established precedent, application fees are not adjusted to reflect the actual work done on any particular application"); see also *Lockheed Martin Corp.*, 16 FCC Rcd 12805, 12807 (2001) (*Lockheed*); see also 1987 Report and Order, 2 FCC Rcd at 949 (stating that "processing costs were but one factor in the rough calculus that resulted in the legislated fees"); see also *Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985*, 3 FCC Rcd 5987 (1988) (recognizing that "the amount of a fee represents the Commission's estimate, accepted by Congress, of the average cost to the Commission;" declining to "make individualized determinations of the 'appropriate fee,'" although the actual cost may be more or less in individual situations; and indicating an intent to "levy the fee as determined by Congress . . . except in unusual cases in which the public interest requires otherwise.").

and the Commission have made clear that the existence of “compelling and extraordinary circumstances” – not the amount of resources expended in an individual case – should be the touchstone for determining whether a refund should be granted. We collect fees based on a schedule established by Congress to recover a portion of the expenses we incur in processing applications.¹⁰ Each applicant is expected to pay the statutory filing fee appropriate to the type of application at issue.¹¹ We therefore do not consider it extraordinary or compelling that the cost of processing the application at issue allegedly does not correspond to the associated application fees, nor do we expect that the application fees will necessarily reflect the work done on the applications. Moreover, despite your allegation that the transaction is not complex and requires little analysis, this does not obviate the necessity for a full and substantive review by Commission staff of each application.¹² MilkyWay’s further allegation that it purchased at auction the spectrum at issue here at a cost roughly comparable to the instant application fees is equally unpersuasive. The prices paid at auction for spectrum relative to the application fees associated with the assignment of that spectrum are irrelevant to whether a waiver of the statutorily-mandated application fees is in the public interest, particularly given the variable and unpredictable circumstances driving bidding decisions and the valuation of spectrum.¹³ Accordingly, we find that your request does not warrant a waiver of the application fees on these grounds.

With respect to your assertion that there is “no reason”¹⁴ to justify the Commission’s disparate treatment in imposing application fees involving the transfer and assignment of licenses awarded by competitive bidding, we point out that Congress established the application fee for the assignment of MAS applications on a per call sign basis in section 8(g)(3)(e) of the Communications Act, 47 U.S.C. §158(g)(3)(e).¹⁵ As the Commission has also pointed out, “Congress has not granted the Commission the authority to amend the application fee schedule.”¹⁶ The Commission had no authority to impose fees in

¹⁰ *Sirius*, 18 FCC Rcd at 12554.

¹¹ *Id.* at 12555.

¹² See, e.g., Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, FCC, to Ruth Milkman and Stephen J. Berman (Mar. 10, 2005) (rejecting contention that applicant should pay only one filing fee for 116 allegedly identical requests for relief).

¹³ Moreover, you have not demonstrated that payment of the aggregate fees constitutes a hardship for MilkyWay.

¹⁴ *Request* at 2.

¹⁵ See also 47 C.F.R. §1.1102(5)(i).

¹⁶ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8127 (1994).

cases involving the "other similarly situated services" that you cite because Section 8 of the Act does not include these services in the statutory fee schedule. Given that Congress did not elect to assess application fees associated with assignments and transfers in certain other services, the fact that those services may be subject to competitive bidding does not persuade us to waive the rule provisions governing the application at issue here. Further, as the Commission has stated, "our waiver authority is not intended to correct perceived inequalities in the statute itself, but for good cause shown in individual situations."¹⁷ For all these reasons, we therefore find that MilkyWay has not shown sufficiently extraordinary or compelling circumstances as to warrant a waiver of the fees associated with its MAS assignment application. Accordingly, we deny your request.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,



Mark A. Stephens
Chief Financial Officer

¹⁷ *Lockheed*, 16 FCC Rcd at 12807.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RRG-06-0000-7535

In the matter of:

Applications of MilkyWay Communications,
LLC and Wireless America, LLC for a Partition
and Assignment of Licenses

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FC WAIVER TRACKING
CNTL# 7535

REQUEST FOR WAIVER OF FILING FEES

MilkyWay Communications, LLC ("MilkyWay"), by counsel and pursuant to Section 1.3 and 1.1117 of the Commission's rules, hereby request a waiver of the filing fee of \$109,480.00 provided in Section 1.1102 with respect to the associated application that includes 476 virtually identical call signs. Each of these involves a geographic area license awarded by the Commission via competitive bidding more than three years ago.

I. Introduction and General Background

The Commission's filing fees schedule for applications of this nature (i.e. for the assignment or transfer of Multiple Address System ("MAS") authorizations) is set forth in 47 C.F.R. Section 1.1102. Given that MAS licenses are here involved, the Commission's schedule provides for a filing fee payment of \$109,480.00!¹ Waiver of that very substantial fee is hereby requested. Good cause for the relief sought is provided below.

The Commission's filing fees are generally designed to compensate the Commission for time and resources that need to be expended in order to process an application. See generally, e.g. In the matter of Amendment of the Commission's rules Relating to the Schedule of Fees, 28

¹ The filing fee per call sign is \$230.00. (\$230.00 X 476 = \$109,480.00)

FCC 2d. 139 (1971). The theory behind the varying fees that the Commission provides for in its schedule is that the greater the effort required, the higher the associated fee should be. *Id.*

The Commission has also (wisely, and properly) determined that, for the most part, there are no filing fees associated with the assignment or transfer of licenses that were awarded pursuant to competitive bidding. See 47 C.F.R. § 1.1102. This makes sense in that the licenses awarded pursuant to competitive bidding have already been paid for. Unfortunately, and for no reason that has ever been articulated publicly by the Commission or any operating bureau, there are a handful of services for which filing fees are required for assignment or transfer applications, even when the licenses at issue were awarded pursuant to competitive bidding. Without known exception, these are the relatively low-cost services such as 218-219 MHz, paging, and MAS, where application filing fees constitute a far greater percentage of license value than would be the case with more valuable licenses.²

II. The Waiver Standard

The Commission has authority to waive its rules whenever there is "good cause" to do so. 47 C.F.R. §§ 1.3; 1.925. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F. 2d 1153, 1159 (D.C. Cir. 1969) ("WAIT Radio"). As further explained in WAIT Radio, the Commission is charged with administration of its responsibilities consistent with the "public interest." That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad

² Many, if not all, of these services existed prior to the advent of auctions, and had filing fees associated with them. Whereas that fact in no way supports the disparate treatment provided to geographic area licenses awarded via auction, it is unclear whether that nexus may have contributed to them being subjected to extra costs. In any event, the licenses here at issue were all awarded via competitive bidding, and have been bought and paid for in full.

range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. Waivers are a legitimate vehicle to accomplish this. In fact, the Commission's right to waive its rules is not unlike an obligation in that it is a *sine qua non* to its ability to promulgate otherwise rigid rules. It is the necessary "safety valve" that makes the system work. See, WAIT Radio at 1157, 1159.

A waiver of the Commission's rules applicable to wireless services is appropriate whenever a party demonstrates either (1) that the underlying purpose of the rule would not be served or would be frustrated by its application in the instant case, and that grant of a waiver would be in the public interest, or (2) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

Section 1.1117 of the rules provides added guidance with respect to when application filing fees may be waived. In particular, fees may be waived whenever "good cause is shown and where a waiver or deferral of the fee would promote the public interest." As demonstrated below, all of these criteria are here met.

III. Good Cause Exists for a Waiver

As set forth above, without a waiver, the filing fee for the subject application would be \$109,480.00. That fee would constitute approximately 15% of all of the amount paid for the spectrum at auction. When one considers that only a portion of the spectrum that was obtained is being assigned, the filing fee approximates the total amount paid for the spectrum at issue.

The above amount is considerable when viewed in either absolute terms (i.e. \$109,480.00) or as a percentage (approximately 100%) of the auction price for the spectrum being assigned. It is even more extreme when viewed in the context of other, similarly situated

services. In stark contrast is the proceeding in which NextWave Telecomm, Inc. ("NextWave") assigned one portion of its New York BTA PCS license to Cingular Wireless, LLC. There, the consideration was approximately \$1 Billion and there were no filing fees. 19 FCC Rcd 2570 (2004). Similarly, when NextWave later sold several licenses to Verizon Wireless for approximately \$3 Billion, no filing fees were there required either. 19 FCC Rcd 23,797 (2004).

To be sure, argument could be raised that each transfer or assignment proceeding involves somewhat different facts, or that the Commission's rules simply provide for different treatment based upon there being different services. But neither of those distinctions justifies disparate treatment here. Reviewing courts have been particularly clear that, given that there will virtually always be some difference in facts between any two cases, mere differences do not, in and of themselves, justify disparate treatment. Rather, only differences that are "relevant to the purposes of the Federal Communications Acts" can support discriminatory treatment. Melody Music Inc. v FCC, 345 F2d 730, 733 (D.C. Cir. 1965). Here, there are none. Thus, there is no justification here for the imposition of a huge filing fee. The removal of such an impermissible difference in treatment itself constitutes "good cause" for grant of the instant waiver. Similarly, disparate treatment (as currently exists) would be inconsistent with established Commission efforts to eliminate, rather than to perpetuate, different treatment of different services that reflects nothing more than historical accident. See, e.g. 47 C.F.R. § 1.900 et seq.

There is a second, wholly independent, good cause justification for grant of the waiver. As discussed above, the rationale behind filing fees is that those who benefit from the application of Commission resources that directly benefit only a limited and clearly defined group should compensate the Commission for the cost of such efforts. The provision of such services was

never intended to constitute a Commission "profit center." Rather, the associated application filing fees were intended only to make the Commission whole for the cost of its efforts.

There are two general cost elements of any assignment application processing. The first, and apparently most resource-intensive, component of the process is an analysis of the contemplated transaction. Here, the transaction itself is not particularly complex, especially in light of the types of transactions that are now somewhat common place in the telecommunications industry. Yet, we do not argue for relief on that basis alone. Rather, we note that there is but a single transaction to be analyzed once, and only once. Once that analysis has been completed, it can be immediately and effortlessly applied to each of the other call signs in the single application at issue. The application filing fee of \$230.00 per call sign, which we stipulate may be appropriate for a single call sign, is simply not also appropriate for each of 476 call signs included in a single application.

The other cost component of application processing involves altering the Commission's ULS to reflect grant. Whereas this has always been a very small portion of overall processing costs, with automation it has now become a minute portion of it. As such, it in no way supports imposition of the filing fee here at issue!

IV. Unique and Unusual Circumstances Also Justify Grant of This Waiver

It is beyond question that the facts here are unique and unusual. Although MilkyWay effectively owns a single 100 kHz nationwide MAS license for the BC Block, plus additional licenses in many larger markets, the Commission has issued 176 separate call signs for MilkyWay's BC Block spectrum – solely because prior to the auction the Commission could not be certain whether that spectrum would be licensed to one or to multiple entities. That alone

causes the application fees for the BC Block to increase 176 fold! "Unique and unusual" aptly defines that.

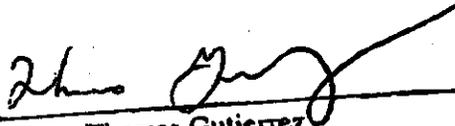
A filing fee for \$109,480.00 for a single transaction, where the spectrum being assigned is valued only at approximately that same cost, is also unique and unusual. Lastly, and as discussed above, it is most unusual, if not technically unique, for there to be any filing fees for the assignment of spectrum that was licensed via an auction.

V. Conclusion

For all of the above reasons, law, equity and common sense all support grant of the waiver requested herein. Accordingly, MilkyWay urges that it be granted.

Respectfully submitted

MILKYWAY COMMUNICATIONS, LLC

By: 
Thomas Gutierrez

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April 24, 2006

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STAMP & RETURN

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

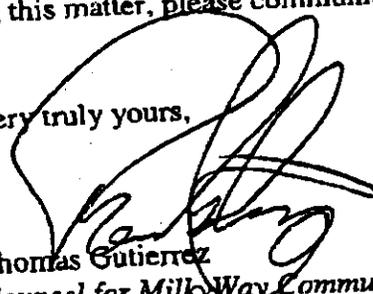
Federal Communications Commission
Office of Secretary

Dear Ms. Dortch,

On behalf of MilkyWay Communications, LLC ("MilkyWay") and pursuant to a request from staff in the Wireless Telecommunications Bureau, please find the enclosed Waiver Request associated with one assignment and disaggregation application for 476 MAS call signs. The waiver has been included in an application (File No. 0002561510) recently filed and the general subject has been discussed with counsel in both the Office of Managing Director and the Wireless Telecommunications Bureau.

Should you have any question regarding this matter, please communicate directly with the undersigned.

Very truly yours,


Thomas Gutierrez
Counsel for MilkyWay Communications, LLC

Enclosure

cc: Kathy Massey, Esq.
Mark Reger
Allan Sacks, Esq.

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January 2, 2004

RECEIVED -03

JAN - 2 2004

Andrew S. Fishel, Managing Director
Federal Communications Commission
Washington, DC 20554

Federal Communication Commission
Bureau / Office

Re: Request for Filing Fee Refund

Dear Mr. Fishel:

On behalf of Edward S. Morgan, this is to request a refund of \$800, which is one-third of the \$2,400 filing fee paid in connection with a broadcast multi-station application for consent to a transfer of control of Radio Lake Placid, Inc. from Kathryn O'K. Nardiello to Edward S. Morgan. Three stations were included on one Form 315:

WLPW(FM), Facility ID 54653, BTC-20030530BOI
WIRD(AM), Facility ID 54652, BTCH-20030530BOJ
WRGR(FM), Facility ID 56078, BTCH-20030530BOK

A fee of \$2,400 was paid -- \$800 for each station. Documentation of the fee payment is attached.

On July 2, 2003, the Commission released its Report and Order in MM Docket No. 02-277, amending its multiple ownership rules. The application complied with the new rules. However, on September 3, 2003, the U.S. Court of Appeals for the Third Circuit issued a stay, directing the Commission to process applications under the old multiple ownership rules. In order to comply with the old rules, Mr. Morgan had to delete WIRD from the application, which he did by amendment dated November 1, 2003.