

**Before the
Federal Communications Commission
Washington, DC 20554**

In re)
)
Assessment and Collection of Regulatory) MD Docket No. 03-83
Fees for Fiscal Year 2003)

To: The Commission

COMMENTS

Arch Wireless Operating Company, LLC, Allied National Paging Association, American Association of Paging Carriers, Metrocall Holdings, Inc. and WebLink Wireless I, L.P. (collectively, “Joint Commenters”), hereby comment on the Commission’s Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding regarding the assessment and collection of regulatory fees for fiscal year (“FY”) 2003.¹ The Joint Commenters comprise a representative cross-section of the U.S. messaging industry.² As explained herein, the Commission’s methodology for assessing regulatory fees violates Section 9 of the Communications Act of 1934, as amended (the “Act”), and will negatively impact the ability of the messaging industry to conduct its business.

¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, MD Docket No. 03-83, FCC 03-64, Notice of Proposed Rulemaking (rel. Mar. 24, 2003) (“*NPRM*”).

² Allied National Paging Association and the American Association of Paging Carriers are trade associations that represent nationwide, regional and local wireless messaging carriers. Arch Wireless Operating Company, LLC, Metrocall Holdings, Inc., and WebLink Wireless I, L.P. are the three largest wireless messaging carriers in the United States.

I. THE COMMISSION'S CURRENT METHODOLOGY FOR APPORTIONING ANNUAL REGULATORY FEE REQUIREMENTS VIOLATES SECTION 9(i) OF THE ACT

Section 9(a)(1) of the Act directs the Commission to “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.”³ Section 9(b)(3) of the Act, provides that the “Commission *shall* [make permitted amendments to] the Schedule of Regulatory Fees” each year to comply with Section 9(b)(1)(A) of the Act which requires that such fees: 1) be based on the number of full-time equivalent employees performing the kinds of regulatory activities specified in Section 9(a)(1); and 2) are “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”⁴ Section 9(i) of the Act further provides that the “Commission *shall* develop accounting systems necessary to making the adjustments authorized by [Section 9(b)(3)].”⁵

By its own admission, the Commission does not utilize any cost-accounting methodology to apportion regulatory fee revenue requirements among the various industry segments, and has not done so since 1999.⁶ For this year, the *NPRM* does not even make a passing reference as to whether the Commission is even considering doing so for FY 2003.⁷ Failing to develop and

³ 47 U.S.C. § 159(a)(1).

⁴ 47 U.S.C. §§ 159(b)(1)(A), (b)(3) (emphasis added).

⁵ 47 U.S.C. § 159(i) (emphasis added). Although permitted amendments are entirely within the Commission’s discretion, the requirement that the Commission utilize cost-accounting systems to determine whether such amendments are warranted is mandatory.

⁶ *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, Report and Order, 14 FCC Rcd 9868, ¶ 24 (1999).

⁷ The Commission announced in 2001 that it was in the process of planning a new cost accounting system for FY 2002. *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, Notice of Proposed Rulemaking, 24 CR (P&F) 2011, ¶ 7 (2001). In 2002, the timetable for the new system was pushed back until FY 2004. *Assessment and Collection of Regulatory* (continued on next page)

implement a cost-accounting methodology to apportion regulatory fee revenue requirements among regulated industry segments is a clear violation of the statute,⁸ and an immediate remedy is warranted.⁹

II. THE CURRENT METHODOLOGY DOES NOT TAKE INTO ACCOUNT THE AMOUNT OF COMMISSION RESOURCES BEING EXPENDED FOR INDUSTRY SEGMENTS AND AS SUCH, THE METHODOLOGY APPORTIONS A DISPROPORTIONATE AMOUNT OF THE TOTAL REGULATORY FEE REVENUE REQUIREMENT ON THE MESSAGING INDUSTRY

Were the Commission to make cost-based adjustments to its regulatory fee categories, as the Act requires, the amount of revenue the Commission would be collecting from the CMRS Messaging Services category would decrease dramatically. It takes no amount of detailed analysis to immediately realize that the Commission has radically reduced the resources it

Fees for Fiscal Year 2002, Notice of Proposed Rulemaking, 27 CR (P&F) 2023, ¶ 8 (2002). In this year's *NPRM*, no mention is made of whether or when the Commission intends to implement a cost-accounting system in fulfillment of its obligations under Section 9(i) of the Act.

⁸ *See*, H. CONF. REP. NO. 103-213, at 499, reprinted in 1993 U.S.C.C.A.N. 378, 1188.

⁹ In 1997, the Commission developed an accounting system to identify its regulatory costs and to establish regulatory fees based on these costs. *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, Notice of Proposed Rulemaking, 12 FCC Rcd 7168, ¶ 7 (1997). This system, which was used in FYs 1997 and 1998, “relied upon information derived from the [Commission’s] personnel/payroll system and the [Commission’s] fiscal accounting system as the basis for recording direct and indirect costs, separately and combined, for every major category of service subject to a [regulatory] fee.” *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, Report and Order, 12 FCC Rcd 17161, ¶ 13 (1997). In 1999, however, the Commission abandoned use of this system, arguing that if it determined not to make any permitted amendments to the Schedule of Regulatory Fees pursuant to Section 9(b)(3) of the Act, then “use of the cost accounting system to support such amendments was not necessary.” *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, Report and Order, 14 FCC Rcd 9868, ¶ 24 (1999). This conclusion directly contradicts the statute which *requires* the Commission to develop cost-accounting systems to determine whether permitted amendments to the Schedule of Regulatory Fees are justified. Although the ultimate decision whether to make permitted amendments is discretionary, the obligation for the Commission to implement and utilize cost accounting systems when exercising this discretion each year is not. Further, the Joint Commenters note that although adjustments to regulatory fees pursuant to Section 9(b)(3) of the Act are specifically exempted from judicial review, no such exemption applies to the Commission’s obligations under Section 9(i).

expends on regulating the messaging industry while contemporaneously redirecting significant resources to regulate just about every other industry sector subject to regulatory fees.¹⁰

Specifically, the Commission has virtually eliminated site-by-site licensing for new commercial messaging facilities, has transitioned to auctions and market area licensing as a means to award new authorizations (processes which are supported by auction revenues, not regulatory fees), has implemented electronic application procedures that have greatly reduced the need for staff review of routine filings, and virtually no enforcement actions have been taken against messaging carriers in the last few years. Further, it has been several years since the Wireless Bureau had a dedicated Narrowband Branch to regulate messaging carriers. In fact, the Commission no longer even analyzes messaging as a distinct industry sector in its annual CMRS competition reports.¹¹ The dearth of work being performed by Commission staff on behalf of

¹⁰ The Commission's shift of resources away from the messaging industry has been coincidental with messaging's well-documented difficulties in the past several years. In that time, almost all of the national paging carriers (including PageNet, Arch, TSR Wireless LLC, Mobilemedia Communications, Weblink Wireless and Metrocall) have filed for bankruptcy protection (although many have been able to successfully reorganize). The total number of paging subscribers has sharply declined (from highs of 40,850,000 in 1997 to 19,700,000 in 2003), opportunities in the capital markets are no longer as plentiful as they once were, and the primary infrastructure providers (Glenayre and Motorola) have essentially abandoned the field.

Nonetheless, the messaging industry is prepared to face these challenges. Numerous carriers – national, regional and local - remain dedicated to providing their end users with low-cost, highly reliable messaging services as well as new technologies like wireless internet access. New manufacturers have arisen to fill the void created by Glenayre and Motorola and carriers have formed new national organizations to represent the industry and the vital services it provides. However, under the current conditions, the industry simply cannot absorb (nor should it be required to absorb under any circumstances) such inequitable obligations as those imposed by the proposed Regulatory Fee increase. While the paging industry seeks no favors from this Commission, it does not expect to be disproportionately burdened either.

¹¹ See, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fifth Report, 15 FCC Rcd. 17660 (2000).

messaging is in stark contrast to the plethora of resources devoted to almost every other sector of the communications industry.

A cursory review of the Commission's Daily Digest confirms this conclusion. For example, the Commission expended considerable resources on preparations for WRC-03, E-911 and local number portability implementation, Part 68 hearing aid compatibility requirements, Part 22 cellular service technical rules, ultra-wideband devices, third generation wireless services, 800 MHz public safety issues, wholesale revisions to international settlement rates, Do-Not-Call Act implementation, pay-per-call, rate of return access charge reform, slamming, cramming, section 271 petitions, broadcast flag, plug and play, media ownership rules, the Biennial and Triennial Review proceedings, *etc.* As the Commission is well aware, none of these matters involve the messaging industry.

Despite expending enormous resources on international, broadcast, landline and broadband CMRS regulatory and enforcement issues/proceedings and negligible resources on messaging issues, and contrary to the plain language of Section 9 and its corresponding legislative history, each year OMD routinely increases the regulatory fee revenue requirement for messaging in lockstep with the annual percentage increase of total regulatory fee payments Congress directs the Commission to collect.¹² While this approach certainly simplifies OMD's workload, it does not comply with Section 9 of the Act.

¹² The Commission has previously stated that "Section 9(a) does not require that we base our fees solely on benefits to regulatees or that the fees recover from an entity only its particular cost of regulation." *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, Report and Order, 13 FCC Rcd 19820, ¶ 15 (1998). This conclusion, however, is directly contrary to the relevant statutory language and the legislative history which requires that there be a reasonable relationship between the Commission's cost of regulating a particular industry segment and the total regulatory fee revenue requirement assessed on that industry segment. *See*, H. CONF. REP. NO. 103-213, at 499, reprinted in 1993 U.S.C.C.A.N. 378, 1188 (The Commission is permitted to "make changes to the fee schedule . . . when it determines that such changes are necessary to (continued on next page)

The Commission's repeated failure to adhere to its obligations under Section 9(i) of the Act will have a very direct and harmful impact on the ability of the messaging industry to do business and remain the low-cost option for one and two-way messaging services. It has been well documented before the Commission and the SEC that the messaging industry operates on razor thin margins. Any regulatory fee increases must either be absorbed by the already financially weakened carriers, or passed along to subscribers which invariably results in increased customer churn, further reducing an already shrinking subscriber base. While churn is not unusual in the communications industry, its impact on messaging customers and the messaging industry, which increasingly is the provider of choice for emergency first responders (*e.g.*, public safety, utilities companies, hospitals, *etc.*), cannot be easily justified as an acceptable and collateral cost of the Commission's flawed regulatory fee regime.¹³

III. THE COMMISSION MUST TAKE IMMEDIATE ACTION TO REMEDY ITS ONGOING STATUTORY VIOLATION

As Commissioner Copps stated in his concurring statement to last year's regulatory fee order:

I am concerned that that the Commission does not address when or how it would adjust regulatory fees to take into account changes to the cost of regulating various services. The paging industry argues that it faces a 60 percent per unit increase in regulatory fees this year due to a declining subscriber base, notwithstanding reduced regulatory resources devoted to paging. Today's order . . . fails to address the underlying concern about

ensure that such fees are reasonably related to the benefits provided to the payor of the fee by the Commission's activities.”).

¹³ In the broadband CMRS industry, churn generally results in customers migrating between competing broadband carriers. In the messaging industry, however, churn frequently results in customers dropping messaging service altogether, particularly when the totality of government fees (*e.g.*, universal service, number portability, state and local telecommunications taxes, *etc.*) pushes the cost of service up to a point where customers don't want to pay for both a messaging unit and a wireless phone. The result being that the customers who rely on messaging the most (*e.g.*, first responders) are left to absorb an increasing proportion of government fees.

revisions to the Commission's methodology. I take some comfort, however, that the Commission plans to have in place a new accounting system in the near future¹⁴

Now, nearly a year later, the Commission is once again gearing up to assess regulatory fees, and none of these concerns has been addressed. The *NPRM* makes no mention of how FY 2003 regulatory fees for the CMRS Messaging Services category were adjusted to reflect changes in regulatory costs, nor is there any mention of whether or when the Commission anticipates implementing a cost-accounting system in satisfaction of its statutory obligations despite repeated, unfulfilled promises that it was in the process of doing so.¹⁵ This situation needs to be immediately addressed since the inequities flowing from the Commission's statutory violation are compounding exponentially.

This reality is manifested in the sharply rising per unit fee amounts for messaging. The increase proposed in the *NPRM* for the CMRS Messaging Services category from \$0.08 to \$0.11 per unit represents a 37.5% increase from FY 2002, which in turn is 60% higher than the FY 2001 fee. In fact, since FY 1999 – the year the Commission discontinued use of its previous cost accounting methodology – the per unit CMRS Messaging Services fee has increased 175% (*i.e.*, from \$0.04 to \$0.11 per unit).¹⁶ Such a disproportionate increase in per unit fees for the messaging industry at a time when Commission resources addressing the messaging industry are dwindling, exposes the dangers posed by the Commission's failure to implement any cost

¹⁴ *Assessment and Collection of Regulatory Fees for Fiscal Year 2002*, Report and Order, 17 FCC Rcd 13203 (2002) (concurring statement of Comm'r Copps).

¹⁵ *See supra* note 7.

¹⁶ By contrast, the per unit fee for CMRS Cellular has *decreased* by 18.75% over that same time period despite the fact that the Commission has clearly devoted more resources to that segment of the industry than it has to messaging.

accounting procedures and its reliance on a lockstep approach to apportion the regulatory fee revenue requirement and increasing per unit fees.¹⁷

The Joint Commenters request that the Commission immediately review and revise the regulatory fee revenue requirement allocated to messaging based on a cost-accounting methodology, consistent with Section 9(i) of the Act. If implementation of such a system cannot occur before the Commission is statutorily obligated to collect and remit FY 2003 regulatory fees, then the Joint Commenters request that the Commission make a permitted amendment to the CMRS Messaging Services fee category that is more consistent with the very limited resources being expended to regulate the messaging industry.

In the alternative, the Joint Commenters recommend that the Commission adopt a revenue-based regulatory fee assessment mechanism as an interim solution pending Commission compliance with Section 9 of the Act.¹⁸ Such an approach would be consistent with the manner in which regulatory fees are assessed on other industry segments such as long distance carriers,¹⁹ as well as the way in which the Commission assesses fees for numerous other purposes such as

¹⁷ It also reveals the inequities imposed by relying on a per unit assessment model which punishes industries with declining customer bases (*i.e.*, those who can least afford the additional burdens) while rewarding those industry segments that are enjoying ever-increasing market penetration. Even more troubling is that it appears that the OMD is assessing higher regulatory fees than would otherwise be required to cover shortfalls resulting from non-payment. Thus, responsible carriers (like the Joint Commenters) who pay their regulatory fees are being charged annual fees based on artificially inflated costs because the Commission is failing to enforce its rules. Indeed, the Joint Commenters are unaware of any reported cases in which the Commission has ever prosecuted an enforcement action for non-payment of regulatory fees. This is particularly ironic given that regulatory fees, in part, are targeted to defray the Commission's costs for precisely these sorts of activities.

¹⁸ By way of illustration, such a system could apportion the total regulatory fee revenue requirement for wireless services among the various wireless fee categories on the basis of gross revenues.

¹⁹ For example, the Interstate Telecommunications Services Provider fee is \$.00198 per revenue dollar. *See NPRM* at Attachment D.

universal service and TRS. While any of the foregoing approaches is likely to result in some comparatively more-regulated industry segment realizing minor increases in their FY 2003 fees, this is precisely the outcome envisioned by Congress and mandated by Section 9 of the Communications Act.

CONCLUSION

In light of the foregoing, the Joint Commenters urge the Commission to immediately reevaluate the regulatory fee revenue requirement it should collect from the messaging industry, based on a cost-accounting methodology. If there is not enough time for the Commission to do this before it must collect and remit FY 2003 fees, then the Joint Commenters request that the Commission make a permitted amendment to the Schedule of Regulatory Fees and reduce the per-unit fee amount for messaging, commensurate with the fact that the Commission expends negligible resources regulating the messaging industry. In the alternative, the Joint Commenters request that the Commission adopt a gross revenue methodology for assessing messaging regulatory fees.

Respectfully submitted,

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