
BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1234

TELESAT CANADA, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioners are Telesat Canada, Eutelsat S.A., Kinéis, Hiber Inc., and Inmarsat Group Holdings Ltd. The respondents are the Federal Communications Commission and the United States of America. There are no intervenors or amici. All parties appearing before the Federal Communications Commission are listed in Appendix A of the ruling under review.

2. Rulings under review.

In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2020; Assessment and Collection of Regulatory Fees for Fiscal Year 2019, Report and Order and Notice of Proposed Rulemaking, 35 FCC Rcd 4976 (2020) (JA __).

3. Related cases.

The order on review has not previously been before this Court. Counsel is not aware of any related cases that are pending before this Court or any other court.

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GLOSSARY

Commission or FCC	Federal Communications Commission
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151, <i>et seq.</i>
FY	fiscal year
<i>FY 2019 FNPRM</i>	<i>Assessment and Collection of Regulatory Fees for Fiscal Year 2019, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 8189 (2019) (JA __)</i>
<i>Order on Review</i>	<i>Assessment and Collection of Regulatory Fees for Fiscal Year 2020; Assessment and Collection of Regulatory Fees for Fiscal Year 2019, Report and Order and Notice of Proposed Rulemaking, 35 FCC Rcd 4976 (2020) (JA __)</i>
RAY BAUM'S Act	Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, Consolidated Appropriations Act, 2018, Pub. L. 115-141, 132 Stat 348, Division P—RAY BAUM'S ACT OF 2018, Title I, § 102 (2018)

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BRIEF FOR RESPONDENTS

INTRODUCTION

Section 9 of the Communications Act, 47 U.S.C. § 159, directs the Federal Communications Commission (“FCC” or “Commission”) to recover the total amount of the appropriations that fund its activities through regulatory fees assessed and collected from entities that benefit from those activities. In the *Order on Review*,¹ the Commission held that it had the

¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2020; Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order and Notice of Proposed Rulemaking, 35 FCC Rcd 4976 (2020) (JA).

authority to impose regulatory fees on entities operating non-U.S. licensed space stations (“satellites”) that have been granted access by agency order to the U.S. market to recover the costs of agency regulatory activities benefitting these satellites, and that it should do so. The Commission acknowledged that its decision was a reversal of its prior views, based on a statement in section 9’s legislative history, that it lacked such authority. But it explained that its prior interpretation was based on a misreading of that legislative history, and that nothing in the text of the statute exempts non-U.S. licensed space stations with U.S. market access—who benefit substantially from the Commission’s activities—from regulatory fees.

Petitioners are companies which operate space stations that have been granted access to the U.S. market by the Commission. They contend that the Commission’s prior view, according to which they enjoyed a non-statutory exemption from regulatory fees, was correct; that in any event, Congress ratified that view; and that the Commission did not give adequate notice that it would change its position. None of Petitioners’ arguments is borne out by the statute, its legislative history, or the proceedings in this case.

The petition for review should be denied.

JURISDICTION

The *Order on Review* was adopted on May 12, 2020, released on May 13, 2020, and published in the Federal Register on June 22, 2020. *See* 85 Fed. Reg. 37364 (2020).

On July 2, 2020, Telesat Canada, Eutelsat S.A., Kinéis, Hiber Inc., and Inmarsat Group Holdings Ltd. (collectively “Petitioners”) timely filed a joint petition for review under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

We note, however, that petitioner Kinéis filed comments only in a related proceeding a month after the *Order on Review* was adopted. As such, Kinéis is not a “party aggrieved” entitled to invoke the Court’s jurisdiction to challenge the *Order on Review*. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983).

QUESTIONS PRESENTED

1. Did the Federal Communications Commission lawfully impose regulatory fees on non-U.S. licensed space stations that have been granted access to the U.S. market?
2. Did Congress ratify, through inaction, the Commission’s prior contrary interpretation that it lacked the authority to impose such fees?

3. Did the Commission provide adequate notice to interested parties that it might reevaluate its decision to exempt non-U.S. licensed space stations with U.S. market access from regulatory fees?

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the appendix to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. Section 9 of the Communications Act

In 1993, Congress amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (“Communications Act” or “Act”), by adding section 9, which required 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.” Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6003, 107 Stat 312, 397 (1993) (codified at 47 U.S.C. § 159(a) (1994)).

In doing so, Congress set a schedule of regulatory fees that the Commission should “assess and collect,” “until amended by the Commission.” 47 U.S.C. § 159(g) (1994). Among the categories in that schedule were two applicable to “space station[s],” *i.e.*, satellites. Congress

also specified that the fees established under the statute “shall not be applicable to (1) governmental entities or nonprofit entities; or (2) to amateur radio licenses under part 97 of the Commission’s regulations (47 C.F.R. Part 97).” 47 U.S.C. § 159(h) (1994).

B. The Commission’s Prior Examination Of Its Authority To Impose Regulatory Fees On Non-U.S. Licensed Satellites.

In 1995, the Commission determined that a subsidiary of Comsat, a satellite operator, was not subject to regulatory fees for space stations it managed that were owned by two international organizations, INTELSAT and INMARSAT.² *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13512, 13550 ¶110 (1995). In reaching this conclusion, the Commission relied on a single passage in a House Committee report stating the Committee’s intent that space station fees “will only apply to space stations directly licensed by the Commission under Title III of the

² The International Telecommunications Satellite Organization, or INTELSAT, was established by treaty to operate a global satellite telecommunications system, *see* 15 U.S.T. 7305 (1964); 23 U.S.T. 3813 (1971). The International Maritime Satellite Organization, or INMARSAT, was established by international agreement to provide improved maritime communications by means of satellite communications, *see* 36 U.S.T. 1 (1979), but subsequently expanded beyond that sphere. The Communications Satellite Corporation (Comsat), a private corporation, became the U.S. representative to INTELSAT and INMARSAT. *See Comsat v. FCC*, 77 F.3d 1419, 1420 (D.C. Cir. 1996).

Communications Act,” and “not . . . to space stations operated by international organizations subject to the International Organizations Immunities Act, 22 U.S.C. section 228 et seq.” *Ibid.* (quoting H.R. Rep. No. 207, 102d Cong., 1st Sess. 26 (1991)).³ Based on this language, the Commission found that “Congress intended that Comsat . . . would be subject to a space [station regulatory] fee only for its licensed operations,” and that “Congress did not intend for the Commission to assess a fee per space station for the space . . . facilities of Intelsat and Inmarsat.” *Ibid.*

In 1999, in light of adopted and proposed changes to the status of INMARSAT and INTELSAT, the Commission addressed assertions that “non-U.S. licensed satellite service providers who operate in the U.S. should be assessed regulatory fees.” *Assessment and Collection of Regulatory Fees*

³ The language in the House Report was incorporated in the Conference Report in the 1993 Omnibus Budget Act that adopted section 9. H. Conf. Rep. No. 213, 103d Cong., 1st Sess. 499 (1993). As the Commission noted, both INTELSAT and INMARSAT were subject to the International Organizations Immunities Act. 10 FCC Rcd at 13550 n.30 (citing Exec. Order No. 11,966, 42 Fed. Reg. 4331 (1977); Exec. Order No. 12,238, 45 Fed. Reg. 60,877 (1980)).

for Fiscal Year 1999, Report and Order, 14 FCC Rcd 9868, 9883 ¶39 (1999).⁴

The Commission reiterated that section 9’s “legislative history provides that only space stations licensed under Title III may be subject to regulatory fees,” and because non-U.S. licensed space stations “are not licensed under Title III,” the Commission concluded that “we cannot include operators of non-U.S. licensed satellite space stations among regulatory fee payers.” *Ibid.*

In 2013, the Commission reexamined the issue. It sought comment on “whether regulatory fees should be assessed on non-U.S. licensed space station operators providing service in the United States,” and, specifically, “whether the Commission should revisit the Commission’s 1999 conclusion that the regulatory fee category for space stations . . . covers only Title III license holders.” *Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Notice of Proposed Rulemaking and Further Notice of Proposed

⁴ In 1997, pursuant to international agreements, the FCC established a formal process by which non-U.S. licensed space station operators could request access to the U.S. market. *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 FCC Rcd 24094 (1997) (“*DISCO II*”). See 47 C.F.R. § 25.137.

Rulemaking, 28 FCC Rcd 7790, 7809 ¶49 (2013).⁵ Ultimately, the Commission “decline[d] to adopt these proposals,” concluding instead that “[a]dditional time . . . is needed to provide an opportunity to more closely examine and consider these proposals and the record in future fiscal year regulatory fee proceedings.” *Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Procedures for Assessment and Collection of Regulatory Fees*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 10767, 10781 ¶34 (2014).

C. The RAY BAUM’S Act.

In 2018, as part of the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 (“RAY BAUM’S Act”),⁶ Congress amended section 9 and added section 9A to the Communications Act.⁷ As

⁵ See also *Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, Second Further Notice of Proposed Rulemaking, and Order, 29 FCC Rcd 6417, 6433 ¶48 (2014) (seeking “additional comment on whether regulatory fees should be assessed on non-U.S. licensed space station operators granted access to the market in the United States”).

⁶ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 Division P—RAY BAUM’S Act of 2018, Title I, § 102 (2018).

⁷ 47 U.S.C. § 159; 47 U.S.C. § 159a.

amended, section 9 preserved the Commission’s authority to “assess and collect” regulatory fees so as to recover the costs of carrying out the agency’s activities, 47 U.S.C. § 159(b), and to adjust or amend the schedule of fees as needed to do so. 47 U.S.C. §§ 159(c), (d). And Congress continued to exempt governmental or nonprofit entities and amateur radio licensees from the imposition of regulatory fees, while adding “noncommercial radio station[s] or noncommercial television station[s]” to the list of parties “to which fees are not applicable.” 47 U.S.C. § 159(e).

II. THE PROCEEDING BELOW

In 2019, the Commission again sought “comment on whether we should or must assess regulatory fees on non-U.S. licensed space stations serving the United States under section 9, given that non-U.S. licensed space stations appear to benefit from the Commission’s regulatory activities in much the same manner as U.S. licensed space stations.” *Assessment and Collection of Regulatory for Fiscal Year 2019*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 8189, 8213 ¶64 (“*FY 2019 FNPRM*”) (JA).

In seeking comment, the Commission observed that notwithstanding “the regulatory benefits provided by the Commission to non-U.S. licensed space stations serving the United States,” “they do not incur the regulatory

fees paid by operators of U.S.-licensed space stations.” *Id.* ¶63 (JA). The Commission acknowledged that it had “previously declined to assess regulatory fees on non-U.S. licensed space stations,” because they were not “licensed under Title III” of the Act, and that it had sought comment on the issue in 2013 and 2014, but ultimately took no action. *Id.* at 64 (JA). The Commission asked whether the changes made by the RAY BAUM’S Act, which direct the agency to adjust fees in line with the number of “units” subject to the payment of such fees, but no longer speaks of “licensees,” might be relevant to whether the Commission “may or must assess such fees” on non-U.S. licensed space stations. *Ibid.* (JA). Compare 47 U.S.C. § 159(b)(2)(A) (1994) with 47 U.S.C. § 159(c)(1)(A).

The Commission also sought “comment on whether assessing non-U.S. licensed space stations would promote regulatory parity among space station operators,” *id.* ¶65 (JA), and whether it is “fair or equitable to grant one class of space station operators a non-statutory exemption from fees that another class of similarly situated operators must pay[.]” *Ibid.* (JA).

III. THE ORDER ON REVIEW

In the *Order on Review*, the Commission concluded that “we can and should adopt regulatory fees for non-U.S. licensed space stations with U.S. market access.” *Id.* ¶10 (JA). In reaching this conclusion, the Commission

first examined the “statutory text.” *Ibid.* (JA). The Commission observed that the statute contemplates the imposition of fees “that reflect the ‘benefits provided to the payor of the fee by the Commission’s activities,’” *ibid.* (quoting 47 U.S.C. § 159(d)), and that it expressly designates “the subset of regulatees that must be exempted from regulatory fees,” – a subset which does not include non-U.S. licensed space stations with U.S. market access. *Ibid.* (citing 47 U.S.C. § 159(e)(1) (“Parties to which fees are not applicable”)). In addition, the Commission noted, “[it] has consistently rejected consideration of waiving the regulatory fee for classes of regulatees.” *Ibid.* (citing 47 C.F.R. § 1.1166). In light of the Commission’s “mandate to collect fees from its regulatees, coupled with a limited list of exempt entities and narrow waiver authority,” the Commission concluded that “nothing in the text of the statute supports maintaining a blanket exception from regulatory fees for non-U.S. licensed space stations granted market access.” *Ibid.* (JA).

The Commission acknowledged that it had previously taken the position that non-U.S. licensed space stations were exempt from regulatory fees “based . . . on legislative history from 1991,” but found it appropriate to “re-evaluate this conclusion at this time.” *Id.* at ¶13 (JA). The Commission explained, however, that there was “a very different marketplace and regulatory environment” in 1991 “than now exists.” *Id.* at ¶15 (JA). In 1991,

satellite services in the United States were mainly provided by two “treaty-based international governmental organizations,” INTELSAT and INMARSAT, that were subject to “a unique set of initiatives . . . to develop the global communications satellite systems” and that “benefited from a framework of protections based in statute, treaty and Commission policy.” *Ibid.* (JA). Moreover, the Commission did not adopt a formal process “for granting market access to non-U.S. licensed space stations” until 1997, several years after section 9 was enacted. *Id.* ¶16 (JA). INTELSAT and INMARSAT are no longer international governmental organizations, but commercial enterprises, *id.* ¶17 (JA), and there are a number of other commercial satellite operators, including Petitioners in this case, with U.S. market access that compete with U.S. licensed satellite operators. *Ibid.* (JA).

In light of these developments, the Commission found that the 1991 legislative history on which the Commission had previously relied “is no longer relevant” because it applied to “two International Governmental Organizations that no longer exist,” and not to “commercial non-U.S. licensed satellites with general U.S. market access” – a category that “did not exist at the time.” *Ibid.* (JA). In short, the Commission concluded, “the legislative history of the Act poses no bar to assessing regulatory fees on non-U.S. licensed space stations with U.S. market access.” *Ibid.* (JA).

The Commission also found that policy considerations supported imposing regulatory fees on non-U.S. licensed space stations that have been granted access to the U.S. market. The Commission explained that it “devotes significant resources to processing the growing number of market access petitions of non-U.S. licensed satellites and that they benefit from much of the same oversight and regulation by the Commission as U.S. licensed satellites.” *Id.* ¶21 (JA). Among other things, the Commission explained, “processing a petition for market access requires evaluation of the same legal and technical information as required of U.S. licensed applicants.” *Ibid.* (JA). Moreover, “non-U.S. licensed space stations also benefit from the Commission’s oversight efforts,” which “provide[] a fair and safe environment for all participants in the U.S. marketplace.” *Ibid.* (JA). And “the Commission’s adjudication, rulemaking, and international coordination efforts benefit all U.S. marketplace participants by evaluating and minimizing the risks of radiofrequency interference, increasing the number of participants in the U.S. satellite market, opening up additional frequency bands for use by satellite services, providing a level and uniform regime for mitigating the danger of orbital debris, and streamlining Commission rules that apply to all providers of satellite services in the United States, whether through U.S. licensed or non-U.S. licensed space stations.” *Ibid.* (JA). The Commission

thus found that “the significant benefits” that flow to non-U.S. licensed satellites with U.S. market access as a result of the Commission’s regulatory activities “support[s] including them in regulatory fees.” *Ibid.* (JA).

The Commission also concluded that imposing regulatory fees on non-U.S. licensed space stations with U.S. market access would serve to “fulfill[] Congress’s mandate that the Commission recover the costs associated with its activities, since market access by non-U.S. licensed space stations has become a significant portion of the satellite services,” and the current exemption “places the burden of regulatory fees . . . solely on the shoulders of U.S. licensees.” *Id.* ¶26 (JA). Thus, “assessing the same regulatory fees on non-U.S. licensed space stations with market access as we assess on U.S. licensed space stations” will not only “better reflect the benefits received by these operators through the Commission’s adjudicatory, enforcement, regulatory, and international coordination activities,” but will also “promote regulatory parity and fairness among space station operators by evenly distributing the regulatory cost recovery.” *Id.* ¶26 (JA).

Accordingly, the Commission decided that space station regulatory fees “will be assessed on any non-U.S. licensed space station that has been granted market access . . . as of July 16, 2020.” *Id.* ¶32 (JA).

This petition for review followed.

SUMMARY OF ARGUMENT

Under section 9 of the Communications Act, Congress required the Commission to recover the total amount of its annual appropriation by assessing and collecting regulatory fees that reflect the “benefits provided to the payor of the fee by the Commission’s activities.” 47 U.S.C. § 159(d). When the statute was originally enacted, Congress established an initial schedule of regulatory fees for two types of “space stations.” Those two categories, which make no reference to the manner of their licensing, have continued unchanged in the Commission’s rules. At the same time, Congress set forth a list of entities that were exempted by statute from regulatory fees. Though Congress amended that list in 2018 to include an additional category of exempt entities, it has never listed non-U.S. licensed space stations among them.

1. In the *Order on Review*, the Commission decided that, beginning in fiscal year 2020, non-U.S. licensed space stations that have been granted U.S. market access will be assessed regulatory fees. In making this decision, the Commission first looked to the text of section 9. It found that, in light of its obligation to recover the costs of its activities from its regulatees, and the fact that Congress has never included space stations, however licensed, in the list of exempt entities, there was no statutory bar to the imposition of regulatory

fees on space stations granted access to the U.S. market. In doing so, the Commission acknowledged that it was changing its prior view, which had been based on a single passage in a 1991 House Committee report. The Commission found that it had misunderstood that passage, which addressed a very different marketplace in which satellite services in the U.S. was provided by two treaty based international governmental organizations, INTELSAT and INMARSAT.

Turning to policy considerations, the Commission also concluded that the need to level the playing field and promote regulatory parity among space stations in the U.S. market, as well as to fulfill Congress's mandate that the Commission recover the costs associated with its activities that benefit space stations with U.S. market access, supports the assessment of regulatory fees.

2. Petitioners contend that the Commission's original view of the statute was correct, and that the agency lacks authority to impose regulatory fees on non-U.S. licensed space stations, even those that have been granted access to the U.S. market. But the Commission, like any federal agency, is entitled reasonably to change its views, so long as it acknowledges the change and explains the basis for it. The Commission did so here.

Petitioners next argue that by failing to disturb the Commission's prior interpretation of the statute, Congress ratified that view and divested the

agency of the ability to change its mind. But congressional silence is just that—silence, and for that reason is a perilous basis for inferring legislative intent. This is particularly so when, as here, Congress has set forth—and revisited—a list of entities expressly exempted from regulatory fees that does not include non-U.S. licensed space stations. Finally, Petitioners contend that the Commission failed to provide adequate notice that it might reevaluate its authority to impose regulatory fees on non-U.S. licensed space stations granted access to the U.S. market. But that argument is belied by the terms of the *FY 2019 FNPRM*, which made clear that such an option was being considered—as petitioners well understood by filing numerous comments in the proceeding on that very issue.

STANDARD OF REVIEW

Petitioners’ challenge to the Commission’s interpretation of section 9 of the Communications Act, 47 U.S.C. § 159, is reviewed under the standards articulated in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the Court must determine “whether Congress has directly spoken to the precise question at issue.” 467 U.S. at 842. If so, the Court, “as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. But, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is

whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. at 843.

The Court must deny the petition for review unless Petitioners demonstrate that the *Order on Review* is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action.” *LaRouche’s Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 737 (D.C. Cir. 2006), quoting *Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The scope of review “is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT IT HAS THE AUTHORITY TO ASSESS SPACE STATION REGULATORY FEES ON NON-U.S. LICENSED SPACE STATIONS GRANTED U.S. MARKET ACCESS.

A. The Commission Reasonably Concluded That, Despite Its Prior Contrary Interpretation, Section 9 Does Not Prohibit It From Subjecting Non-U.S. Licensed Space Stations With U.S. Market Access To Space Station Regulatory Fees.

Section 9 of the Communications Act requires the Commission to “assess and collect regulatory fees to recover the costs of carrying out [its activities].” 47 U.S.C. § 159(a). The statute currently identifies three

categories of entities “to which fees are not applicable”: (1) governmental or nonprofit entities, (2) amateur radio licensees, and (3) noncommercial radio or television stations. 47 U.S.C. § 159(e).

Since 1993, when section 9 was first enacted, the Commission’s schedule of regulatory fees has included two separate categories of regulatory fees for “space stations.” *See* 47 U.S.C. § 159(g) (1994); 47 C.F.R. § 1.1156(a). Neither as originally enacted, nor as set forth in the Commission’s rules, has the text of either category distinguished between U.S. licensed and non-U.S. licensed satellites. *See* Opening Brief of Petitioners (“Pet. Br.”) at 19 (agreeing that “the reference in the fee schedule to ‘space stations’” is not “further defined”).

In concluding that it may impose regulatory fees on non-U.S. licensed space stations with U.S. market access, the Commission started with the “statutory text” – in particular, its direction to collect fees “that reflect the ‘benefits provided to the payor of the fee by the Commission’s activities.’” *Order on Review* ¶10 (JA) (quoting 47 U.S.C. § 159(d)). As the Commission explained in detail, “non-U.S. licensed space stations benefit from the Commission’s regulatory activities in much the same manner as U.S. licensees.” *Id.* ¶19 (JA). *See generally id.* ¶21 (JA) (describing the benefits to non-U.S. licensed satellite operators from the Commission’s

procedures for granting U.S. “market access,” the agency’s “oversight” and “enforcement” activities, and its “adjudication, rulemaking, and international coordination efforts”).

The Commission also looked at the fact that the statute contains a specific list of those “regulatees that must be exempted from regulatory fees”—governmental or nonprofit entities, amateur radio licensees, and noncommercial radio and television stations, *see* 47 U.S.C. § 159(e). The list does not include non-U.S. licensed space stations with U.S. market access. *Order on Review* ¶10 (JA). That omission is telling. It is well settled that Congress’s specification of express exemptions in a statute weighs against implying additional exemptions in the absence of a contrary legislative intent. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). *Accord TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1259 (D.C. Cir. 2007). In light of a “framework where the Commission has a mandate to collect fees from its regulatees, coupled with a limited list of exempt entities,” the Commission reasonably concluded that “nothing in the text of the statute supports maintaining a blanket exception from regulatory fees for non-U.S. licensed space stations granted market access,” *Order on Review* ¶10 (JA), and that there is thus “no statutory bar to adopting a new

regulatory fee for non-U.S. licensed space stations with U.S. market access,” *id.* ¶11 (JA).

The Commission acknowledged that it had previously taken the position that section 9 did not authorize the imposition of regulatory fees on non-U.S. licensed space stations, based on a statement contained in a House Committee report when the statute was enacted. *Order* ¶¶13-14 (JA). *See FY 1999 Report and Order*, 14 FCC Rcd at 9883 ¶39; *FY 1995 Report and Order*, 10 FCC Rcd at 13550 ¶110. That statement was: “The Committee intends that fees in this category be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will apply only to space stations directly licensed by the Commission under Title III of the Communications Act. Fees will not be applied to space stations operated by international organizations subject to the International Organizations Immunities Act, 22 U.S.C. Section 288 et seq.” H.R. Rep. No. 207, 102d Cong. 1st Sess. 26 (1991). *See* H. Conf. Rep. No. 213, 103d Cong., 1st Sess. 499 (1993) (incorporating by reference, “[t]o the extent applicable, the appropriate provisions of the House Report (H.R. Rep. 102-207)”).

The Commission found it “appropriate to re-evaluate [its] conclusion,” because it had misunderstood the import of the Committee report. *Order on Review* ¶13 (JA). *See id.* at ¶¶15-17 (JA). As the Commission explained, in

1991, when the Committee report was written, most satellite services in the United States were provided by INTELSAT and INMARSAT, two “treaty-based international governmental organizations” that were subject to the International Organizations Immunities Act, *Order on Review* ¶15-16 (JA), and therefore fell within the contemplation of the Committee. But the U.S. satellite market is “very different” now. *Id.* ¶15 (JA). INTELSAT and INMARSAT are now private commercial enterprises, and a host of other commercial non-U.S. licensed satellite operators—including the Petitioners in this case—offer service in the United States. *Id.* ¶17 (JA).

Moreover, at the time of the Committee report, there was no “formal process for granting market access to non-U.S. licensed space stations.” *Id.* ¶16 (JA).⁸ In stating that fees “will apply only to space stations directly licensed by the Commission under Title III of the Communications Act,” H.R. Rep. No. 207, at 26, the Committee thus had no occasion to address whether fees could be imposed on space stations granted U.S. market access

⁸ In 1997, the United States adopted the World Trade Organization’s Agreement on Basic Telecommunications Services, which obligated the U.S. to open its satellite markets to foreign systems licensed by other WTO member countries. The same year, in accordance with those obligations, the Commission adopted procedures to give U.S. market access to satellite systems licensed by other countries. *DISCO II*, 12 FCC Rcd 24094 (1997); 47 C.F.R. § 25.137. See *Order on Review* n.49. (JA).

by Commission order, since that process first came into existence six years later.

Petitioners contend that “by the time Section 9 was enacted foreign-licensed space stations had been providing service in the United States for years.” Pet. Br. 38. But as the Commission explained, those examples involved the “very limited provision of service . . . upon a showing that existing U.S. domestic satellite capacity was inadequate to satisfy specific service requirements,” and approval was obtained on a “case-by-case” basis after “bilateral, government to government” discussions. *Order on Review* ¶17 (JA). Those limited circumstances bear no resemblance to the current marketplace, under which “non-U.S. licensed space stations . . . provide commercial service in the United States . . . under the same regulatory framework as their U.S. licensed counterparts.” *Ibid.* (JA).

For instance, the grant of U.S. market access to a non-U.S. licensed space station involves a Commission approval under Title III of the Communications Act. *DISCO II*, 12 FCC Rcd at 24098 ¶7 (“As required by Title III of the Communications Act of 1934 . . . we will examine all requests [for market access] to determine whether grant of authority is consistent with the public interest, convenience and necessity”). *See Order on Review* n.58 (JA).

In light of the Committee’s focus on INTELSAT and INMARSAT, and the Title III approval process for market access, the Commission reasonably found that the legislative history of section 9 “poses no bar to assessing regulatory fees on non-U.S. licensed space stations with U.S. market access.” *Order on Review* ¶17 (JA).⁹

Petitioners suggest that this Court’s decision in *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), supports their view of section 9’s legislative history and the Committee report. Pet. Br. at 26-27. The opposite is true. In *PanAmSat*, the Court questioned the Commission’s reliance on the legislative history of section 9 to exempt Comsat from regulatory fees. 198 F.3d at 895. The Court stated that the statute “plainly does not require – and may not permit – Comsat’s exemption from space station regulatory fees.” *Ibid.* (“there is no obvious hook in the [statutory] language on which to hang an exemption”). As to the legislative history, even if taken “as gospel,” the

⁹ The text of a Committee report, even one incorporated in a Conference Report, is not the text of the statute itself. Likewise, legislative history cannot “cloud a statutory text that is clear.” *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Carlson v. Postal Regulatory Comm’n*, 938 F.3d 337, 350 (D.C. Cir. 2019). Here, contrary to Petitioners’ assertion, the Commission did not fail “to take into account the intent Congress expressed in the 1993 *Conference Report*.” Pet. Br. at 28. It simply found that, “based on a fuller and more accurate analysis of the context,” the report did not foreclose the imposition of regulatory fees on non-U.S. licensed space stations with U.S. market access. *Order on Review* ¶18 (JA).

Court found it not “conclusive.” *Id.* at 896. Instead, because of the Committee’s focus on INTELSAT and INMARSAT, the Court found the legislative history contained an “ambiguity” as to the intent to cover other satellite operators. *Ibid.* The Court accordingly ordered the Commission to reconsider its decision to exempt Comsat from regulatory fees. *Id.* at 897.¹⁰

Finally, Petitioners contend that it is “reasonable to assume the fee schedule was not meant to cover service provided in foreign jurisdictions.” Pet. Br. at 19. But the fees imposed on non-U.S. licensed space stations with market access cover services that are subject to regulation by the Commission within its jurisdiction. The fees do not involve foreign-licensed satellites providing services only in foreign countries. *See Order on Review* ¶ 30 (JA) (stating that a non-U.S. licensed space station that provides communications solely “in foreign territories and/or over international waters” would not “fall within the category of a non-U.S. licensed space station with access to the U.S. market for regulatory fee purposes”). It was entirely reasonable for the

¹⁰ Petitioners’ reliance on *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997), *see* Pet. Br. 25-26, is equally misplaced. *Comsat* involved the Commission’s attempt to impose a “signatory fee” on COMSAT. This Court held that, in the absence of a rulemaking proceeding or other change in law, such a signatory fee fell outside the Commission’s authority to amend the regulatory fee schedule. 114 F.3d at 227-28. The case did not involve the scope of the regulatory fee schedule itself.

Commission to determine that regulatory fees should be imposed on satellites that subject themselves to the Commission's jurisdiction by requesting and obtaining its approval to become a full participant in the U.S. satellite marketplace.

B. The Commission Reasonably Concluded That Non-U.S. Licensed Space Stations With U.S. Market Access Should Be Subjected To Regulatory Fees.

It has long been settled that “an administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding.” *Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir. 1976) (upholding the Commission's reversal of position where it found prior decisions “were based on an erroneous reading” of Communications Act “legislative history”). Of course, in doing so, an agency must ordinarily “display awareness that it *is* changing position,” but it “need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Instead, “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and the agency *believes* it to be better, which the conscious change of course adequately indicates.” *Ibid.*; *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 23-24 (2019).

In the *Order on Review*, the Commission acknowledged that it had previously taken the position that section 9 prohibited the imposition of regulatory fees on non-U.S. licensed space stations with U.S. market access. *Order on Review* ¶13 (JA). It explained, however, that a reexamination of the statute’s text, in conjunction with a reevaluation of the legislative history, had caused it to reach the opposite conclusion. *Id.* ¶¶10-17 (JA).

The Commission also explained that there are weighty policy considerations favoring assessing regulatory fees on non-U.S. licensed space stations with market access. *Id.* ¶19 (JA). Chief among these is “the fact that . . . non-U.S. licensed space stations benefit from the Commission’s regulatory activities in much the same manner as U.S. licensees.” *Ibid.* See also *PSSI Global Servs, LLC v. FCC*, No. 20-1142, slip op. at 8 (D.C. Cir. Dec. 18, 2020) (“the FCC gives market access grants the same protection that it gives to full Commission licenses”).

The Commission’s activities in processing market access petitions and overseeing space and earth station operations, as well as the Commission’s “adjudication, rulemaking and international coordination efforts,” benefit all U.S. marketplace participants—U.S. and non-U.S. licensed—by “provid[ing] a fair and safe environment” for their operations. *Id.* ¶21 (JA) (Commission efforts “minimize[e] the risks of radiofrequency interference,” “increase[e]

the number of participants in the U.S. satellite market,” “open[] up additional frequency bands for use” by satellites, and “provid[e] a level and uniform regime for mitigating the danger of orbital debris”). Petitioners do not dispute that they benefit, in myriad ways, from the Commission’s regulatory activities.

The Commission also found that assessing a regulatory fee on non-U.S. licensed space stations “would promote regulatory parity” by ensuring that fees are imposed on similarly situated participants in the U.S. marketplace. *Order on Review* ¶¶22-23 (JA). *See id.* at ¶6 (JA) (*Order on Review* “level[s] the playing field among space stations”). That equitable consideration further supported the Commission’s decision.

In sum, given the Commission’s determination that it had the authority to impose regulatory fees on non-U.S. licensed space stations with U.S. market access, the benefits that Commission activities provide to such space stations, and the reasons for ensuring a level playing field for all participants in the U.S. satellite marketplace, the Commission reasonably decided to impose such fees on non-U.S. licensed space stations starting with fiscal year 2020. *Order on Review* ¶32 (JA).

II. CONGRESS DID NOT RATIFY THE COMMISSION'S PRIOR INTERPRETATION OF SECTION 9.

Petitioners contend that, by leaving the Commission's prior interpretation of section 9 undisturbed, Congress "implicitly ratified the Commission's original interpretation of its Section 9 authority." Pet. Br. at 46. But Congress has never addressed that interpretation. And such congressional silence is of limited utility in statutory interpretation. *See Chisholm*, 538 F.2d at 361 ("attributing legal significance to Congressional inaction is a dangerous business"). *See Public Citizen v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 668 (D.C. Cir. 2003) (emphasizing the need for "extreme care"). As the Commission explained, while such silence "may have some bearing on the interpretation of a statute, it neither requires that an agency's interpretation be cemented in stone, . . . nor forecloses an agency from changing its interpretation." *Order on Review* ¶18 (JA). *See Boy's Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241-42 (1970) ("[I]n the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of [an earlier decision], the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision").

In this case, moreover, Congress has never revised the indications in the text of the statute that non-U.S. licensed space stations with U.S. market

access are not categorically exempt from regulatory fees. Thus, section 9 has from the start directed the Commission to assess and collect regulatory fees to recover the costs of its regulatory activities, *see* 47 U.S.C. § 159(a) (1994); and identified a list of exceptions to the fee schedule that has never included non-U.S. licensed space stations, *see* 47 U.S.C. § 159(h) (1994). These aspects of the statute, which have remained in place since its enactment, are inconsistent with the notion that Congress intended to divest the Commission of the authority to impose regulatory fees on non-U.S. licensed space stations who have been granted approval by the Commission to serve the U.S. market.

In the alternative, Petitioners contend that Congress explicitly ratified the Commission's prior interpretation of section 9 by "carrying over the Section 9 fee schedule" in the RAY BAUM'S Act. Pet. Br. at 50. But the RAY BAUM'S Act simply provided that "[a] regulatory fee established under section 9 of the Communications Act of 1934, as such section is in effect on the day before [the Act's effective date], shall remain in effect . . . until such time as the Commission adjusts or amends such fee under subsection (c) or (d) of such section 9." Pub. L. 115-141, div. P, title I, § 102(d)(2), 132 Stat. 1086 (2018). That provision does nothing to endorse the Commission's prior interpretation of section 9, nor does it "re-enact" the statute, Pet. Br. at 50. Instead, the carryover provision contemplates that the

Commission will be able to adjust or amend the schedule going forward. In the *Order on Review*, the Commission did just that. As the Commission found, its subjecting of non-U.S. licensed space stations with U.S. market access to regulatory fees “is an amendment as defined in section 9(d) of the Act,” and therefore required its submission to Congress 90 days in advance of its effective date. *Order on Review* ¶34 (JA). See 47 U.S.C. § 159a(b)(2).

Other revisions to section 9 resulting from the RAY BAUM’S Act only serve to underscore that Congress did not deprive the Commission of the authority to impose regulatory fees on non-U.S. licensed space stations granted permission to serve the U.S. market. For one thing, Congress revised the statute to make clear that, in amending the regulatory fee schedule, the Commission should take account of “the benefits provided to the payor of the fee by the Commission’s activities,” 47 U.S.C. § 159(d). Equally important, Congress added a category of entities (noncommercial radio and television stations) to the list of those statutorily exempt from regulatory fees, see 47 U.S.C. § 159(e)(1)(C), but continued to leave non-U.S. licensed space stations with U.S. market access off that list. In sum, far from endorsing the

Commission's prior interpretation of section 9, Congress preserved the statutory basis for the Commission's reasonable interpretation in this case.¹¹

III. THE COMMISSION PROVIDED AMPLE NOTICE THAT IT WAS THINKING OF RECONSIDERING ITS PRIOR INTERPRETATION OF SECTION 9.

Finally, Petitioners contend that the Commission failed to give adequate notice and an opportunity to comment on its revised interpretation of section 9. Pet. Br. at 33-37. That argument is unavailing.

The Administrative Procedure Act requires that agencies provide parties to a rulemaking with notice that includes "either the terms or substance of the proposal or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). "The final rule need not be the one proposed in the [Notice of Proposed Rulemaking]. Rather, '[a]n agency's final rule need only be a logical outgrowth of its notice.'" *Agape Church, Inc. v. FCC*,

¹¹ Petitioners briefly assert that they "have made business plans and adjusted their behavior" in accordance with the Commission's prior determination that they were exempt from regulatory fees. Pet. Br. at 45. *See also id.* at 46 n.97. But as the Commission explained, companies that have been granted U.S. market access "have no vested right to an unchanging regulatory framework." *Order on Review* ¶25 (JA). *See also PSSI Global Servs, LLC v. FCC*, No. 20-1142, slip op. at 12 (D.C. Cir. Dec. 18, 2020) (satellite operators "hold 'no vested right to any specific terms' of their market access grants" citing *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001)). Just because Petitioners have been free from regulatory fees until now, does not mean the Commission is precluded from exercising the authority granted by Congress to recover the costs of Commission activities that benefit them.

738 F.3d 397, 411 (D.C. Cir. 2013) (citing *Covad Commc 'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)). And a rule is deemed a logical outgrowth of a proposed rule if “interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments during the notice-and-comment period. *Ne. Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004).

In its notice of proposed rulemaking here, the Commission sought comment on whether it “should or must assess regulatory fees on non-U.S. licensed space stations serving the United States under section 9, given that non-U.S. licensed space stations appear to benefit from the Commission’s regulatory activities in much the same manner as U.S. licensed space stations.” *FY 2019 FNPRM* ¶64 (JA). It also asked, “whether assessing non-U.S. licensed space stations would promote regulatory parity among space station operators,” *id.* ¶65 (JA), and whether it is “fair or equitable to grant one class of space station operators a non-statutory exemption from fees that another class of similarly situated operators must pay,” *Ibid.* (JA). The Commission also acknowledged that it “has previously declined to assess regulatory fees on non-U.S. licensed space stations,” but sought comment on whether, nonetheless, “we may or must assess such fees.” *Id.* at ¶64 (JA).

By any measure, the *FY 2019 FNPRM* provided Petitioners a full and fair opportunity to comment on whether the Commission should revisit the issue of its authority to impose regulatory fees for non-U.S. licensed space stations. And indeed, Petitioners (save Kinéis) submitted numerous comments in the proceeding in response to the notice that addressed that very issue. *See, e.g.*, Comments of Telesat Canada (Dec. 6, 2019), at 1 (JA) (Commission assertion of authority to impose regulatory fees on non-U.S. licensed satellites would be “unlawful and ill-advised”); Comments of Eutelsat S.A. (Dec. 6, 2019), at 1 (JA) (“imposition of regulatory fees . . . on foreign-licensed satellites authorized to serve the United States is not supported by the facts, would be contrary to the Commission’s statutory authority, and would be inconsistent with sound public policy”); Reply Comments of Inmarsat (Jan. 6, 2020), at 5 (JA) (Commission must refrain from imposing such fees “as a matter of law and policy”).¹²

Petitioners nonetheless contend that the Commission wrongly provided notice and sought comment “based on one legal theory and then reli[ed] on

¹² *See also* Reply Comments of Telesat Canada (Jan. 6, 2020), at 1-10 (JA ___); Ex Parte of Eutelsat, Inmarsat, Kepler, OneWeb and Telesat Canada (Mar. 23, 2020) & Att. 2 (JA); Ex Parte of Telesat Canada, Inmarsat, Eutelsat and Kepler (Apr. 22, 2020), at 1-4 (JA); Ex Parte of Eutelsat, Inmarsat, OneWeb, Myriota, Kepler and Hiber (May 7, 2020), at 1-3 (JA).

another legal theory.” Pet. Br. at 35. Petitioners mischaracterize the notice, which asked generally “whether [the Commission] should or must assess regulatory fees on non-U.S. licensed space stations service the United States.” *FY 2019 FNPRM* ¶64 (JA). This question was broad enough to encompass any and all possible legal theories. The Commission, to be sure, did observe that a “change made to section 9 by the RAY BAUM’S Act requires the Commission to consider increases and decreases in the ‘number of units’ subject to payment of regulatory fees, but does not state ‘licensees.’” *Ibid.* (JA). But the Commission did not limit its request for comment to the effect of that change, and ultimately made nothing of it. *Order on Review* ¶12 (JA).¹³

This is hardly a “bait and switch” (Pet. Br. at 36). It is instead an unexceptional example of an agency refining its proposal in response to comments. Petitioners contend that the Commission’s failure to follow up on its observation about the elimination of the term “licensees” from section 9

¹³ Petitioners take pains to contend that the elimination by Congress in the RAY BAUM’S Act of the term “licensees” from the Commission’s authority to adjust fees did not, as the Commission suggested in the notice, expand the Commission’s authority to impose fees on non-U.S. licensed space stations. Pet. Br. at 30-32. But since the Commission did not rely upon that change in deciding it had the authority to impose such fees, *see Order on Review* ¶12 (JA), Petitioners’ arguments are beside the point.

by the RAY BAUM'S Act violated the Administrative Procedure Act's requirement that the notice of proposed rulemaking "include reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2). But the notice stated that it sought comment on whether the Commission should impose regulatory fees on non-U.S. licensed space stations "under section 9" of the Communications Act. *FY 2019 FNPRM* ¶ 64 (JA).¹⁴

The Administrative Procedure Act does not require that every aspect of the Commission's analysis must be set forth in the notice of proposed rulemaking, nor does it prohibit the agency from refining its analysis after evaluating the comments the rulemaking proceeding has engendered. That is why rules can be validly promulgated so long as they are a "logical outgrowth" of the initial proposal. *See, e.g., Agape*, 734 F.3d at 412. Nor does the agency have to put parties on notice of each of the specific "reasons for changing course." *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 509 (D.C. Cir. 2019). The Commission's notice here complied fully with the requirements of the Administrative Procedure Act.

¹⁴ In contrast, in *Global Van Lines, Inc. v. ICC* (cited Pet. Br. at 36), the agency had not sought comment on, nor cited, the statutory provision under which it defended its action in court. 714 F.2d 1290, 1297 (5th Cir. 1983). Instead, the statutory provision on which the agency relied "appeared for the first time in the [agency]'s appellate brief." *Ibid.*

CONCLUSION

For the reasons above, the petition for review should be dismissed with respect to petitioner Kinéis, and otherwise should be denied.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Pamela L. Smith, hereby certify that on December 28, 2020, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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STATUTORY APPENDIX

Communications Act Provisions:

47 U.S.C. § 159

47 U.S.C. § 159a

47 U.S.C. § 159 (1994)

FCC Rules:

47 C.F.R. § 1.1156(a)

47 C.F.R. § 1.1166

47 C.F.R. § 25.137

47 U.S.C.

§ 159. Regulatory fees

(a) General authority

The Commission shall assess and collect regulatory fees to recover the costs of carrying out the activities described in section 156(a) of this title only to the extent, and in the total amounts, provided for in Appropriations Acts.

(b) Establishment of schedule

The Commission shall assess and collect regulatory fees at such rates as the Commission shall establish in a schedule of regulatory fees that will result in the collection, in each fiscal year, of an amount that can reasonably be expected to equal the amounts described in subsection (a) with respect to such fiscal year.

(c) Adjustment of schedule

(1) In general

For each fiscal year, the Commission shall by rule adjust the schedule of regulatory fees established under this section to--

- (A) reflect unexpected increases or decreases in the number of units subject to the payment of such fees; and
- (B) result in the collection of the amount required by subsection (b).

(2) Rounding

In making adjustments under this subsection, the Commission may round fees to the nearest \$5 increment.

(d) Amendments to schedule

In addition to the adjustments required by subsection (c), the Commission shall by rule amend the schedule of regulatory fees established under this section if the Commission determines that the schedule requires amendment so that such fees reflect the full-time equivalent number of employees within the bureaus and 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. In making an amendment under this subsection, the Commission may not change the total amount of regulatory fees required by subsection (b) to be collected in a fiscal year.

(e) Exceptions

(1) Parties to which fees are not applicable

The regulatory fees established under this section shall not be applicable to--

- (A) a governmental entity or nonprofit entity;
- (B) an amateur radio operator licensee under part 97 of the Commission's rules (47 CFR part 97); or
- (C) a noncommercial radio station or noncommercial television station.

(2) Cost of collection

If, in the judgment of the Commission, the cost of collecting a regulatory fee established under this section from a party would exceed the amount collected from such party, the Commission may exempt such party from paying such fee.

(f) Deposit of collections

(1) In general

Amounts received from fees authorized by this section shall be deposited as an offsetting collection in, and credited to, the account through which funds are made available to carry out the activities described in section 156(a) of this title.

(2) Deposit of excess collections

Any regulatory fees collected in excess of the total amount of fees provided for in Appropriations Acts for a fiscal year shall be deposited in the general fund of the Treasury of the United States for the sole purpose of deficit reduction.

§ 159a. Provisions applicable to application and regulatory fees

(a) Judicial review prohibited

Any adjustment or amendment to a schedule of fees under subsection (b) or (c) of section 158 of this title or subsection (c) or (d) of section 159 of this title is not subject to judicial review.

(b) Notice to Congress

The Commission shall transmit to Congress notification--

(1) of any adjustment under section 158(b) or 159(c) of this title immediately upon the adoption of such adjustment; and

(2) of any amendment under section 158(c) or 159(d) of this title not later than 90 days before the effective date of such amendment.

(c) Enforcement

(1) Penalties for late payment

The Commission shall by rule prescribe an additional penalty for late payment of fees under section 158 or 159 of this title.

Such additional penalty shall be 25 percent of the amount of the fee that was not paid in a timely manner.

(2) Interest on unpaid fees and penalties

The Commission shall charge interest, at a rate determined under section 3717 of Title 31, on a fee under section 158 or 159 of this title or an additional penalty under this subsection that is not paid in a timely manner. Such section 3717 shall not otherwise apply with respect to such a fee or penalty.

(3) Dismissal of applications or filings

The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee under section 158 or 159 of this title or any interest or additional penalty under this subsection.

(4) Revocations

(A) In general

In addition to or in lieu of the penalties and dismissals authorized by this subsection, the Commission may revoke any instrument of authorization held by any licensee that has not paid in a timely manner a regulatory fee assessed under section 159 of this title or any related interest or penalty.

(B) Notice

Revocation action may be taken by the Commission under this paragraph after notice of the Commission's intent to take such action is sent to the licensee by registered mail, return receipt requested, at the licensee's last known address. The notice shall provide the licensee at least 30 days to either pay the fee, interest, and any penalty or show cause why the fee, interest, or penalty does not apply to the licensee or should otherwise be waived or payment deferred.

(C) Hearing

(i) Generally not required

A hearing is not required under this paragraph unless the licensee's response presents a substantial and material question of fact.

(ii) Evidence and burdens

In any case where a hearing is conducted under this paragraph, the hearing shall be based on written evidence only, and the burden of proceeding with the introduction of evidence and the burden of proof shall be on the licensee.

(iii) Costs

Unless the licensee substantially prevails in the hearing, the Commission may assess the licensee for the costs of such hearing.

(D) Opportunity to pay prior to revocation

Any Commission order adopted under this paragraph shall determine the amount due, if any, and provide the licensee with at least 30 days to pay that amount or have its authorization revoked.

(E) Finality

No order of revocation under this paragraph shall become final until the licensee has exhausted its right to judicial review of such order under section 402(b)(5) of this title.

(d) Waiver, reduction, and deferment

The Commission may waive, reduce, or defer payment of a fee under section 158 or 159 of this title or an interest charge or penalty under this section in any specific instance for good cause shown, where such action would promote the public interest.

(e) Payment rules

The Commission shall by rule permit payment--

(1) in the case of fees under section 158 or 159 of this title in large amounts, by installments; and

(2) in the case of fees under section 158 or 159 of this title in small amounts, in advance for a number of years not to exceed the term of the license held by the payor.

(f) Accounting system

The Commission shall develop accounting systems necessary to make the amendments authorized by sections 158(c) and 159(d) of this title.

§ 159. Regulatory fees (1994)**(a) General authority**

(1) Recovery of costs

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.

(2) Fees contingent on appropriations

The fees described in paragraph (1) of this subsection shall be collected only if, and only in the total amounts, required in Appropriations Acts.

(b) Establishment and adjustment of regulatory fees

(1) In general

The fees assessed under subsection (a) of this section shall--

(A) be derived by determining the full-time equivalent number of employees performing the activities described in subsection (a) of this section 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;

(B) be established at amounts that will result in collection, during each fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal year for the performance of the activities described in subsection

(a) of this section; and

(C) until adjusted or amended by the Commission pursuant to paragraph (2) or (3), be the fees established by the Schedule of Regulatory Fees in subsection (g) of this section.

(2) Mandatory adjustment of schedule

For any fiscal year after fiscal year 1994, the Commission shall, by rule, revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect, in accordance with paragraph (1)(B), changes in the amount appropriated for the performance of the activities described in subsection (a) of this section for such fiscal year. Such proportionate increases or decreases shall--

(A) be adjusted to reflect, within the overall amounts described in appropriations Acts under the authority of paragraph (1)(A), unexpected increases or decreases in the number of licensees or units subject to payment of such fees; and

(B) be established at amounts that will result in collection of an aggregate amount of fees pursuant to this section that can reasonably be expected to equal the aggregate amount of fees that are required to be collected by appropriations Acts pursuant to paragraph (1)(B).

Increases or decreases in fees made by adjustments pursuant to this paragraph shall not be subject to judicial review. In making adjustments pursuant to this paragraph the Commission may round such fees to the nearest \$5 in the case of fees under \$1,000, or to the nearest \$25 in the case of fees of \$1,000 or more.

(3) Permitted amendments

In addition to the adjustments required by paragraph (2), the 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). 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 or changes in law. Increases or decreases in fees made by amendments pursuant to this paragraph shall not be subject to judicial review.

(4) Notice to Congress

The Commission shall--

(A) transmit to the Congress notification of any adjustment made pursuant to paragraph (2) immediately upon the adoption of such adjustment; and

(B) transmit to the Congress notification of any amendment made pursuant to paragraph (3) not later than 90 days before the effective date of such amendment.

(c) Enforcement**(1) Penalties for late payment**

The Commission shall prescribe by regulation an additional charge which shall be assessed as a penalty for late payment of fees required by subsection (a) of this section. Such penalty shall be 25 percent of the amount of the fee which was not paid in a timely manner.

(2) Dismissal of applications for filings

The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section.

(3) Revocations

In addition to or in lieu of the penalties and dismissals authorized by paragraphs (1) and (2), the Commission may revoke any instrument of authorization held by any entity that has failed to make payment of a regulatory fee assessed pursuant to this section. Such revocation action may be taken by the Commission after notice of the Commission's intent to take such action is sent to the licensee by registered mail, return receipt requested, at the licensee's last known address. The notice will provide the licensee at least 30 days to either pay the fee or show cause why the fee does not apply to the licensee or should otherwise be waived or payment deferred. A hearing is not required under this subsection unless the licensee's response presents a substantial and material question of fact. In any case where a hearing is conducted pursuant to this section, the hearing shall be based on written evidence only, and the burden of proceeding with the introduction of evidence and the burden of proof shall be on the licensee. Unless the licensee substantially prevails in the hearing, the Commission may assess the licensee for the costs of such hearing. Any Commission order adopted pursuant to this subsection shall determine the amount due, if any, and provide the licensee with at least 30 days to pay that amount or have its authorization revoked. No order of revocation under this subsection shall become final until the licensee has exhausted its right to judicial review of such order under section 402(b)(5) of this title.

(d) Waiver, reduction, and deferment

The Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest.

(e) Deposit of collections

Moneys received from fees established under this section shall be deposited as an offsetting collection in, and credited to, the account providing appropriations to carry out the functions of the Commission.

(f) Regulations**(1) In general**

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

(2) Installment payments

Such rules and regulations shall permit payment by installments in the case of fees in large amounts, and in the case of fees in small amounts, shall require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor.

(g) Schedule

Until amended by the Commission pursuant to subsection (b) of this section, the Schedule of Regulatory Fees which the Federal Communications Commission shall, subject to subsection (a)(2) of this section, assess and collect shall be as follows:

SCHEDULE OF REGULATORY FEES

Bureau/Category	Annual Regulatory Fee
Private Radio Bureau	
Exclusive use services (per license)	
Land Mobile (above 470 MHz, Base Station and SMRS) (47 CFR Part 90).....	\$16
Microwave (47 CFR Part 94).....	16
Interactive Video Data Service (47 CFR Part 95).....	16
Shared use services (per license unless otherwise noted).....	7
Amateur vanity call-signs.....	7
Mass Media Bureau (per license)	
AM radio (47 CFR Part 73)	
Class D Daytime.....	250
Class A Fulltime.....	900
Class B Fulltime.....	500
Class C Fulltime.....	200
Construction permits.....	100
FM radio (47 CFR Part 73)	
Classes C, C1, C2, B.....	900
Classes A, B1, C3.....	600
Construction permits.....	500
TV (47 CFR Part 73)	
VHF Commercial	
Markets 1 thru 10.....	18,000
Markets 11 thru 25.....	16,000

Markets 26 thru 50.....	12,000
Markets 51 thru 100	8,000
Remaining Markets	5,000
Construction permits	4,000
UHF Commercial	
Markets 1 thru 10.....	14,400
Markets 11 thru 25.....	12,800
Markets 26 thru 50.....	9,600
Markets 51 thru 100.....	6,400
Remaining Markets.....	4,000
Construction permits.....	3,200
Low Power TV, TV Translator, and TV Booster (47 CFR Part 74)	135
Broadcast Auxiliary (47 CFR Part 74)	25
International (HF) Broadcast (47 CFR Part 73).....	200
Cable Antenna Relay Service (47 CFR Part 78).....	220
Cable Television System (per 1,000 subscribers) (47 CFR Part 76).....	370
Common Carrier Bureau	
Radio Facilities	
Cellular Radio (per 1,000 subscribers) (47 CFR Part 22)	60
Personal Communications (per 1,000 subscribers) (47 CFR)	60
Space Station (per operational station in geosynchronous orbit) (47 CFR Part 25).....	65,000
Space Station (per system in low-earth orbit) (47 CFR Part 25)	90,000
Public Mobile (per 1,000 subscribers) (47 CFR Part 22)	60
Domestic Public Fixed (per call sign) (47 CFR Part 21).....	55
International Public Fixed (per call sign) (47 CFR Part 23).....	110
Earth Stations (47 CFR Part 25)	
VSAT and equivalent C-Band antennas (per 100 antennas)	6
Mobile satellite earth stations (per 100 antennas)	6
Earth station antennas	
Less than 9 meters (per 100 antennas).....	6
9 Meters or more	
Transmit/Receive and Transmit Only (per meter).....	85
Receive only (per meter).....	55
Carriers	
Inter-Exchange Carrier (per 1,000 presubscribed access lines).....	60
Local Exchange Carrier (per 1,000 access lines).....	60
Competitive access provider (per 1,000 subscribers)	60
International circuits (per 100 active 64KB circuit or equivalent).....	220

(h) Exceptions

The charges established under this section shall not be applicable to (1) governmental entities or nonprofit entities; or (2) to amateur radio operator licenses under part 97 of the Commission's regulations (47 C.F.R. Part 97).

(i) Accounting system

The Commission shall develop accounting systems necessary to making the adjustments authorized by subsection (b)(3) of this section. In the Commission's annual report, the Commission shall prepare an analysis of its progress in developing such systems and shall afford interested persons the opportunity to submit comments concerning the allocation of the costs of performing the functions described in subsection (a) of this section among the services in the Schedule.

47 C.F.R.

§ 1.1156 Schedule of regulatory fees for international services.

(a) Geostationary orbit (GSO) and non-geostationary orbit (NGSO) space stations. The following schedule applies for the listed services:

Table 1 to Paragraph (a)

Fee category	Fee amount
Space Stations (Geostationary Orbit).....	\$98,125
Space Stations (Non-Geostationary Orbit).....	223,500
Earth Stations: Transmit/Receive & Transmit only (per authorization or registration).....	560

§ 1.1166 Waivers, reductions and deferrals of regulatory fees.

The fees established by §§ 1.1152 through 1.1156 and associated interest charges and penalties may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of such fees, interest charges and penalties would promote the public interest.

Requests for waivers, reductions or deferrals of regulatory fees for entire categories of payors will not be considered.

(a) Requests for waivers, reductions or deferrals should be filed with the Commission's Secretary and will be acted upon by the Managing Director with the concurrence of the General Counsel. All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.

(b) Deferrals of fees, interest, or penalties if granted, will be for a designated period of time not to exceed six months.

(c) Petitions for waiver of a regulatory fee, interest, or penalties must be accompanied by the required fee, interest, or penalties and FCC Form 159. Submitted fees, interest, or penalties will be returned if a waiver is granted. Waiver requests that do not include the required fees, interest, or penalties or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.

(d) Petitions for reduction of a fee, interest, or penalty must be accompanied by the full fee, interest, or penalty payment and Form 159. Petitions for reduction that do not include the required fees, interest, or penalties or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.

(e) Petitions for waiver of a fee, interest, or penalty based on financial hardship, including bankruptcy, will not be granted, even if otherwise consistent with Commission policy, to the extent that the total regulatory and application fees, interest, or penalties for which waiver is sought exceeds \$500,000 in any fiscal year, including regulatory fees due in any fiscal year, but paid prior to the due date. In computing this amount, the amounts owed by an entity and its subsidiaries and other affiliated entities will be aggregated. In cases where the claim of financial hardship is not based on bankruptcy, waiver, partial waiver, or deferral of fees, interest, or penalties above the \$500,000 cap may be considered on a case-by-case basis.

§ 25.137 Requests for U.S. market access through non-U.S.-licensed space stations.

(a) Earth station applicants requesting authority to communicate with a non-U.S.-licensed space station and entities filing a petition for declaratory ruling to access the United States market using a non-U.S.-licensed space station must attach an exhibit with their FCC Form 312 demonstrating that U.S.-licensed satellite systems have effective competitive opportunities to provide analogous services in:

(1) The country in which the non-U.S. licensed space station is licensed; and
(2) All countries in which communications with the U.S. earth station will originate or terminate. The applicant bears the burden of showing that there are no practical or legal constraints that limit or prevent access of the U.S. satellite system in the relevant foreign markets. The exhibit required by this paragraph must also include a statement of why grant of the application is in the public interest. This paragraph shall not apply with respect to requests for authority to operate using a non-U.S. licensed satellite that is licensed by or seeking a license from a country that is a member of the World Trade Organization for services covered under the World Trade Organization Basic Telecommunications Agreement.

(b) Any request pursuant to paragraph (a) of this section must be filed electronically through the International Bureau Filing System and must include an exhibit providing legal and technical information for the non-U.S.-licensed space station of the kind that § 25.114 or § 25.122 or § 25.123 would require in a license application for that space station, including but not limited to, information required to complete Schedule S. An applicant may satisfy this requirement by cross-referencing a pending application containing the requisite information or by citing a prior grant of authority to communicate via the space station in question in the same frequency bands to provide the same type of service.

(c) A non-U.S.-licensed NGSO-like satellite system seeking to serve the United States can be considered contemporaneously with other U.S. NGSO-like satellite

systems pursuant to § 25.157 and considered before later-filed applications of other U.S. satellite system operators, and a non-U.S.-licensed GSO-like satellite system seeking to serve the United States can have its request placed in a queue pursuant to § 25.158 and considered before later-filed applications of other U.S. satellite system operators, if the non-U.S.-licensed satellite system:

- (1) Is in orbit and operating;
- (2) Has a license from another administration; or
- (3) Has been submitted for coordination to the International Telecommunication Union.

(d) Earth station applicants requesting authority to communicate with a non-U.S.-licensed space station and entities filing a petition for declaratory ruling to access the United States market must demonstrate that the non-U.S.-licensed space station has complied with all applicable Commission requirements for non-U.S.-licensed systems to operate in the United States, including but not limited to the following:

- (1) Milestones;
- (2) Reporting requirements;
- (3) Any other applicable service rules;
- (4) The surety bond requirement in § 25.165, for non-U.S.-licensed space stations that are not in orbit and operating.
- (5) Recipients of U.S. market access for NGSO-like satellite operation that have one market access request on file with the Commission in a particular frequency band, or one granted market access request for an unbuilt NGSO-like system in a particular frequency band, other than those filed or granted under the procedures in § 25.122 or § 25.123, will not be permitted to request access to the U.S. market through another NGSO-like system in that frequency band. This paragraph (d)(5) shall not apply to recipients of U.S. market access applying under § 25.122 or § 25.123.

(e) An entity requesting access to the United States market through a non-U.S.-licensed space station pursuant to a petition for declaratory ruling may amend its request by submitting an additional petition for declaratory ruling. Such additional petitions will be treated on the same basis as amendments filed by U.S. space station applicants for purposes of determining the order in which the petitions will be considered relative to pending applications and petitions.

(f) A non-U.S.-licensed space station operator that has been granted access to the United States market pursuant to a declaratory ruling may modify its U.S. operations under the procedures set forth in §§ 25.117(d) and (h) and 25.118(e).

(g) A non-U.S.-licensed satellite operator that acquires control of a non-U.S.-licensed space station that has been permitted to serve the United States must notify the Commission within 30 days after consummation of the transaction so

that the Commission can afford interested parties an opportunity to comment on whether the transaction affected any of the considerations we made when we allowed the satellite operator to enter the U.S. market. A non-U.S.-licensed satellite that has been transferred to new owners may continue to provide service in the United States unless and until the Commission determines otherwise. If the transferee or assignee is not licensed by, or seeking a license from, a country that is a member of the World Trade Organization for services covered under the World Trade Organization Basic Telecommunications Agreement, the non-U.S.-licensed satellite operator will be required to make the showing described in paragraph (a) of this section.