

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

In the matter of
Accipiter Communications, Inc.
Request for Refund of Filing Fee
Fee Control No. 9609138140117001

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2001

Released: October 4, 2001

By the Commission:

1. This memorandum opinion and order denies the Application for Review filed January 17, 2001 by Accipiter Communications, Inc. ("Accipiter"). Accipiter seeks review of the Managing Director's denial of its petition for reconsideration of the letter ruling rejecting Accipiter's request for a fee waiver.

BACKGROUND

2. Accipiter sought a waiver and refund of the \$5,665 filing fee submitted in connection with its petition for waiver of the Commission's Part 36 data collection rules. In its request for refund of the fee, Accipiter stated that it had received authorization to provide local telephone exchange service to portions of the State of Arizona. It further stated that Accipiter was a "small, newly-formed company" that planned to provide "initial service to a high-cost rural service area," and that "the imposition of a filing fee in this instance would increase the overall cost of service . . . and impose an unnecessary financial burden which Accipiter's subscribers would ultimately bear, contrary to the Commission's goals and policies." Accipiter sought a waiver of Sections 36.611 and 36.612 of the Commission's rules pertaining to historical cost data collection so that it could receive expedited Universal Service Fund support upon initiation of service on the basis of its current costs.

3. In an initial letter ruling, the Managing Director misinterpreted Accipiter's rule waiver request, however, and mischaracterized it as a petition for waiver of the Commission's freeze on study area boundaries to enable Accipiter to initiate service to previously unserved areas, and thus mistakenly granted the refund based upon a decision by the Common Carrier Bureau that rendered such petitions unnecessary. See Request for Clarification (Definition of "Study Area"), 11 FCC Rcd 8156, 8160-61 (CCB 1996). In a subsequent letter ruling, the Managing Director corrected his error and stated:

[G]iven that your waiver request actually is based solely on a compelling financial hardship, we believe that a more detailed showing is required. Specifically you should submit information such as a balance sheet, profit and loss statement, [and] a cash flow projection (with and without the receipt of anticipated USF support).

Accordingly, the Managing Director vacated his earlier ruling and denied Accipiter's request for waiver and refund pending submission of a documented showing of financial hardship.

4. Accipiter sought reconsideration, which the Managing Director also denied. The Managing Director found that Accipiter's argument in support of reconsideration was essentially repetitive of its previous contention that imposition of the filing fee in connection with its request for waiver of Sections 36.611 and 36.612 represents a significant expense for Accipiter and ultimately for Accipiter's residential customers. The Managing Director therefore reiterated his holding that Accipiter's request for a fee refund must be supported by a satisfactory showing of financial hardship, which Accipiter had not submitted.

5. In its Application for Review, Accipiter argues that a fee waiver is warranted because its showing meets the Commission's public interest standard. Accipiter maintains that the Managing Director's mistaken belief that its underlying petition was seeking a waiver of the frozen study area boundaries, rather than the Part 36 "USF timing rules," should not have affected his ruling on the merits of the fee waiver request because the standard is the same. In support of its contention that a waiver is in the public interest, Accipiter relies on the Managing Director's Letter to U S West Communications, Inc. (September 20, 1996), where, it asserts, a waiver was granted because the fee was large relative to the small number of access lines in question. Accipiter also cites Daniel R. Goodman, Receiver, 10 FCC Rcd 8537 (1995), which involved a waiver granted to a court-appointed receiver on behalf of allegedly defrauded licensees. Its situation is "even more compelling" than the ones cited, Accipiter contends, because its customers would have to bear the brunt of increased costs resulting from imposition of the fee. Accipiter concludes that the Commission should reinstate the Managing Director's initial ruling granting a fee waiver, and it repeats its objection to the Managing Director's request that it submit additional financial information in order to justify a waiver.

DISCUSSION

6. We conclude that the Managing Director correctly denied Accipiter's fee waiver request and its petition for reconsideration. Although the Commission has discretion to "waive . . . payment of charges in any specific instance for good cause shown, where such action would promote the public interest," 47 U.S.C. §158(d)(2); see also 47 C.F.R. §1.1117(a), this waiver authority is construed narrowly. See Fee Decisions of the Managing Director, 7 FCC Rcd 4708, 4718 (1992) (GTE letter); Establishment of a Fee Collection Program, 3 FCC Rcd 5387 at ¶5 (1988) (fee represents average cost of processing and will only be waived in most unusual cases). Moreover, in applying the good cause requirement, we have stated that waivers will be permitted "on a case by case basis in extraordinary and compelling circumstances upon a showing that a waiver . . . would override the public interest in reimbursing the Commission for its regulatory costs." Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5344 ¶ 29 (1994). We disagree with Accipiter that it has met this standard.

7. The Managing Director initially granted Accipiter a fee waiver premised on an erroneous understanding of its request for expedited Universal Service funding. Regardless of the nature of its underlying petition, however, Accipiter's prayer for relief from payment of the filing fee rests squarely on its claim that the ultimate cost of the fee must be borne by its residential customers. By itself, this does not provide good cause for a waiver on the facts presented here. The Commission already takes into account operating expenses, including items such as filing fees, in calculating

universal service support for carriers, such as Accipiter. See 47 C.F.R. § 36.611(e). In other words, Accipiter has not shown “extraordinary and compelling circumstances” that outweigh the public interest in recouping the cost of the Commission’s regulatory services. The U S West letter ruling relied on by Accipiter is clearly distinguishable from the instant case. As the Managing Director explained in his reconsideration denial:

[The U S West] ruling, in contrast to Accipiter's request for expedited Universal Service funding to allow it to speed service to unserved customers, involved a transfer of a telephone service territory serving only 19 access lines for the sum of one dollar. The holding of that ruling is limited to a finding that imposition of a filing fee in those circumstances would significantly increase the overall cost of an otherwise nominal cost transaction and impose a substantial financial burden on the regulatee.

Accipiter has not shown that the fee represents a substantial financial burden under the present circumstances. Similarly inapposite is Daniel R. Goodman, Receiver, cited by Accipiter, which involved the receiver's petition for waiver of SMR construction deadlines. There the Commission granted fee waivers totaling over \$400,000 to the receiver on behalf of 4,000 SMR licensees because the petition was filed in an attempt to limit the financial harm to the licensees caused by the alleged fraudulent conduct of the receivership companies. See 10 FCC Rcd at 8541-42. No comparable “extraordinary and compelling circumstances” or equities exist here.

8. The Commission has held that it will grant a waiver predicated on financial need "only when the impact of the regulatory fee will affect a regulatee's ability to serve the public." Implementation of Section 9 of the Communications Act, 10 FCC Rcd 12759, 12761-62 (1995). Accipiter has made no showing that payment of the fee will impair its ability to serve the public. Indeed Accipiter has steadfastly refused to support its request for a fee refund with a satisfactory showing of financial hardship, even when directed to provide such information, and under circumstances where the purported "proprietary" nature of the documentation could be protected from public disclosure. See 47 C.F.R. § 0.459. We conclude, therefore, that Accipiter has provided no basis for a fee refund.

9. ACCORDINGLY, IT IS ORDERED That the application for review filed January 17, 2001 by Accipiter Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary