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

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 1998	)	MD Docket No. 98-36

MEMORANDUM OPINION AND ORDER

Adopted: April 1, 2003 **Released:** April 9, 2003

By the Commission:

1. By this order, we address the question of whether and in what amount COMSAT Corporation should be required to pay the geosynchronous space station regulatory fee identified in section 9 of the Communications Act, 47 U.S.C. § 159(g), for Fiscal Year 1998.

I. BACKGROUND

2. On December 21, 1999, the United States Court of Appeals for the District of Columbia Circuit set aside and remanded our 1998 fee order[1] to the extent that it treated COMSAT as exempt from the section 9 space station regulatory fee. Panamsat Corp. v. FCC, 198 F.3d 890 (D.C. Cir. 1999). The court held that:

> . . . the statute [i.e., section 9] does not require – and may not permit – Comsat's exemption from space station regulatory fees. Nor would the legislative history change the result, assuming the statute to be ambiguous enough to allow its consideration.

Panamsat, 198 F.3d at 895.

3. Prior to the court's ruling, the Commission had treated COMSAT as exempt from the section 9 fee with respect to the satellites it operates as the United States Signatory to INTELSAT. The Commission relied on the following language contained in H.R. Rep. No. 207, 102d Cong., 1st Sess. 26 (1991), incorporated by reference in H.R. Conf. Rep. No. 213, 103d

[1] Assessment and Collection of Fees for Fiscal Year 1998, 13 FCC Rcd 19820 (1998).

Cong., 1st Sess. 499 (1993):

The Committee intends that fees in this category [space stations] 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. [e.g., INTELSAT].

See, e.g., Assessment and Collection of Fees for Fiscal Year 1995, 10 FCC Rcd 13512 (1995). Pursuant to this language, the Commission did not view COMSAT's operation of the INTELSAT space stations as "directly licensed" by the Commission, although the Commission routinely grants COMSAT Title III authorizations to operate the satellites. Id. See also Communications Satellite Corp., 46 FCC 2d 338 (1974) (establishing procedures for COMSAT to obtain Commission authorization to participate in the construction and operation of INTELSAT facilities, pursuant to Title III and section 214 of the Communications Act and section 201(c) of the Communications Satellite Act). The court, however, disagreed with the Commission's reasoning in this regard and held that:

> . . . it seems perfectly reasonable to say under these circumstances that the Commission "licenses" Comsat's operation of Intelsat satellites. Thus, the legislative history's embrace of fees for satellites "directly licensed by the Commission under Title III" seems reasonably to encompass Comsat.

Panamsat, 198 F.3d at 896. The court thus made clear that the Commission's former rationale for treating COMSAT as exempt from the regulatory fee with respect to INTELSAT space stations is invalid and that COMSAT's liability for fees must be reconsidered.

II. DISCUSSION

4. **COMSAT's liability.** We must now consider whether and in what amount COMSAT should be required to pay the space station regulatory fee. In this regard, while the court invalidated our former rationale for treating COMSAT as exempt from the fee, it left open the possibility that:

> Perhaps there is some ambiguity in the coverage of the "space station" category in § 9, such that the Commission might "permissibly" read the statute as allowing a Comsat exemption.

Panamsat, 198 F.3d at 896.[2] Subsequent events, however, have effectively resolved any doubt left by the court's opinion in Panamsat as to the propriety of assessing the fee against COMSAT.

[2] Elsewhere, however, the Court states: "The plain terms of § 9 . . . clearly do not require an exemption for Comsat, and there is no obvious hook in the language on which to hang an exemption." Panamsat, 198 F.3d at 895.

5. In our fiscal year 2000 fee order, the Commission concluded that COMSAT should be held liable for the full amount of the section 9 regulatory fee. Assessment and Collection of Fees for Fiscal Year 2000, 15 FCC Rcd 14478 (2000), aff'd sub nom. COMSAT Corp. v. FCC, 283 F.3d 344 (D.C. Cir. 2002) (2000 Fee Order). The Commission concluded that COMSAT's INTELSAT operations should be considered "directly licensed" within the meaning of section 9 and were not the equivalent of foreign-licensed space stations that are exempt from the fee. 15 FCC Rcd at 14486-87 ¶¶ 19-20, 14489 ¶ 24. Moreover, the Commission rejected the argument that the section 9 space station fee was intended to apply only to facilities subject to the technical and other regulations set forth in Part 25 of the Commission's rules. The Commission found that the reference to Part 25 in section 9 is essentially clerical; that is, it simply calls attention to the section of the rules most relevant to the fee, but does not reflect a substantive limitation. 15 FCC Rcd at 14487-88 ¶¶ 21-22.

6. As an additional matter, the Commission concluded that there is no basis to discount the fee charged Comsat based on the level of its usage of INTELSAT's system (reportedly 17.01 percent of INTELSAT's transponder capacity). The Commission found it significant that: (1) the Commission had previously rejected proposals to base the space station fee on the number of transponders used rather than the number of space segments, and (2) COMSAT's situation is distinguishable from that in Columbia Communications Corp., 14 FCC Rcd 1122 (1999), in which fees were discounted pursuant to a waiver. 15 FCC Rcd at 14490 ¶ 26.

7. On March 22, 2002, the United States Court of Appeals for the District of Columbia Circuit denied review of the 2000 Fee Order. The court held, applying the Chevron doctrine,[3] that the Commission's decision to impose a section 9 space station fee on COMSAT represented a reasonable interpretation of the statute and that it should be upheld. 283 F.3d at 347-48. The court also upheld the Commission's decision not to prorate the fee based on how much of the capacity of INTELSAT's satellites was used by COMSAT. Id. At 348-49. In light of the court's decision, we see no need to entertain further argument as to whether COMSAT should be deemed liable for the regulatory fee for fiscal year 1998. Consistent with the Commission's interpretation of the statute, upheld by the court, COMSAT should have been assessed the section 9 regulatory fee for fiscal year 1998.

8. **Procedural matters.** Following issuance of the court's opinion in Panamsat, COMSAT and Panamsat submitted letters to the Commission's General Counsel raising several issues.[4] For the reasons stated above, we will not discuss the parties' arguments further to the extent that they concern the issues resolved by the COMSAT case. We will, however, consider these letters to the extent that they raise two additional arguments: (1) whether imposition of a fee for fiscal year 1998 would constitute improper retroactive rulemaking or violate the prior "notice" requirement of the Administrative Procedure Act (APA), 5 U.S.C. § 553, and (2) whether COMSAT should pay fees for fiscal years other than 1998.

[3] See Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984).

[4] Letter from Warren Y. Zeger [COMSAT] to Christopher J. Wright, Esq., General Counsel (Jan. 27, 2000); Letter from Henry Goldberg [Panamsat] to Mr. Christopher J. Wright (Feb. 15, 2000); Letter from Warren Y. Zeger to Christopher J. Wright, Esq., General Counsel (Feb. 25, 2000); Letter from Henry Goldberg to Mr. Christopher J. Wright (Feb. 29, 2000).

9. COMSAT argues that applying the regulatory fee to it for Fiscal Year 1998 would constitute improper retroactive rulemaking, such as the Supreme Court disapproved in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). COMSAT contends that the notice of proposed rulemaking for the Fiscal Year 1998 fee proceeding did not provide notice as required by the Administrative Procedure Act that a fee would be assessed against COMSAT. See 5 U.S.C. § 553(b), (c). COMSAT further argues that the Report and Order issued for Fiscal Year 1998 did not impose a fee and that COMSAT received no notice of and was not a party to Panamsat's appeal of the 1998 fee order. Panamsat responds that, in view of the court's decision, the Commission has an obligation to recompute the fees chargeable for Fiscal Year 1998. Panamsat observes that section 9 requires the Commission to collect fees sufficient to recover the total cost of its regulatory activities and to apportion these fees based on the costs and benefits attributable to various classes of regulated entities. According to Panamsat, the Commission's failure to assess a fee against COMSAT resulted in Panamsat having to pay COMSAT's fair share. Panamsat suggests that COMSAT should also pay fees for other fiscal years.

10. We believe that assessing a regulatory fee against COMSAT for Fiscal Year 1998 would not constitute improper retroactive rulemaking or otherwise violate the APA. Pursuant to section 9, and contingent on amounts specified in yearly Appropriation Acts, the Commission must initiate a new rulemaking during each fiscal year to determine the amount of fees due for that year. See 47 U.S.C. § 159(a), (b)(2). The Commission's final decision concerning the amount of the fees is normally issued several months prior to the end of the fiscal year for which the fees are collected, and, generally speaking, the fees themselves normally must be paid just prior to the end of the fiscal year. (The payment of certain fees, including those in the private wireless service and some license fees, are treated differently.) These rulemakings are prospective in character in that they apply only to the amounts that will be due in the future for the fiscal year at issue. In this regard, they are no more retroactive than any action newly adopting a fee or tax that applies to preexisting property rights. As courts have noted:

> Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax . . . may upset the reasonable expectations that prompted those affected to acquire property . . . .

DIRECTV v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997), quoting, Landgraf v. USI Film Products, 511 U.S. 244, 270 n.24 (1994).

11. In this case, the rulemaking for Fiscal Year 1998 remains a pending proceeding insofar as it concerns Panamsat's appeal and the court's remand. It retains its prospective character, despite the passage of time, because, as long as the proceeding remains pending, the space station regulatory fee for Fiscal Year 1998, as applied to COMSAT, was never finally determined prospectively.[5] Moreover, COMSAT will not be unfairly penalized for its failure to

[5] The fact that we are reexamining our prior interpretation of the statute does not make our action impermissibly retroactive. See National Mining Association v Department of Labor, 292 F.3d 849, 868 (D.C. Cir. 2002) (distinguishing an action that merely corrected the application of principles in effect when costs were incurred with actions that "changed the legal landscape").

pay the fee by the due date originally established for Fiscal Year 1998 (or for any other past conduct).[6] Any payment dates for COMSAT will be adjusted in accordance with our conclusions in this proceeding. This case is, thus, distinguishable from cases in which agencies have been faulted for initiating rulemakings to impose additional fees for past years in which the fee schedule was already final and had not been challenged at the time of adoption. See Air Transport Association of America v. CAB, 732 F.2d 219, 227 (D.C. Cir. 1984) (disapproving new rule that "offset" refunds of fees by amounts underpaid under prior final rule). Accordingly, we do not agree that imposition of a fee here would be improperly retroactive.

12. The fact that the NPRM in this proceeding did not propose to charge COMSAT the section 9 fee does not alter this result. To accept COMSAT's position that it was not afforded adequate "notice" would be to deprive the Panamsat court's opinion of any effect insofar as the court's decision invalidated the legal basis for the Commission's failure to assess a fee for FY 1998. Moreover, once the court issued its opinion on December 21, 1999, COMSAT received actual notice of the court's ruling and thus, the possibility that it would be liable for the section 9 fee in FY 1998. In response, COMSAT submitted the letters cited above fully commenting on the issue. In addition, following the remand of the Panamsat decision, COMSAT had the opportunity to comment again on the issue of its liability for the section 9 fee in the fiscal year 2000 proceeding and, indeed, it prosecuted an appeal of that decision through the court of appeals. Therefore, we find no basis to conclude that COMSAT has not been afforded clear notice and a full opportunity to comment on this issue prior to imposition of the fee.

13. On the other hand, we agree with COMSAT that Panamsat cannot be applied to fiscal years prior to 1998. Newly established law does not apply to proceedings already closed. See Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995). The rulemakings for fiscal years before 1998 have long since become final.

14. We also decline to apply Panamsat to Fiscal Year 1999. Panamsat did not challenge the Commission's failure to assess a fee in FY 1999. Further, the rulemaking for that year would have been final at the time Panamsat was decided but for a petition for reconsideration filed by the Cellular Telephone Industry Association on an issue unrelated to COMSAT.[7] Because the petition was then pending, Panamsat believes that we should treat the Fiscal Year 1999 proceeding as not yet final. COMSAT urges, in contrast, that the concept of finality of an agency action is a party-based concept. See Bellsouth Corp. v. FCC, 17 F.3d 1487, 1489 (D.C. Cir. 1994); ICG Concerned Workers Association v. United States, 888 F.2d 1455, 1458 (D.C. Cir. 1989). Accordingly, it believes that the proceeding had become final with respect to Panamsat as it pertains to the COMSAT issue. The Commission has sometimes held that the filing of a petition for reconsideration tolls the period in which the Commission may reconsider one of its actions sua sponte. See Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 48 n.51

[6] Compare with Sierra Club v. Whitman, 285 F.3d 63, 68 (D.C. Cir. 2002) (states would face fines and suits for not implementing air pollution prevention plan of which they had no notice).

[7] Petition for Reconsideration of The Cellular Telecommunications Industry Association, filed August 2, 1999. See also Public Notice, Mimeo No. 94665 (Aug. 12, 1999). The Commission subsequently disposed of this petition. Assessment and Collection of Regulatory Fees for Fiscal Year 1999, 15 FCC Rcd 19927 (2000).

(D.C. Cir. 1978). We decline, however, to apply that principle here, since Panamsat had ample opportunity to seek review of the 1999 fee order and did not do so.

15. **Further Action.** Finally, the parties' submissions raise the issue of how the amount of COMSAT's potential liability should be computed based on the 24 INTELSAT satellites in service in Fiscal Year 1998. The court, in remanding this proceeding, did not address this question. Panamsat proposes that the inclusion of COMSAT's 24 satellites in the Fiscal Year 1998 fee computation would result in a geosynchronous satellite fee of $78,200 for each COMSAT satellite. COMSAT would be liable for a total of $1,876,800 based on this figure ($78,200 x 24). COMSAT does not dispute this analysis. We will therefore apply the formula proposed by Panamsat, and direct the Office of the Managing Director to take appropriate action.[8]

III. ORDERING CLAUSE

16. ACCORDINGLY, IT IS ORDERED, That the Office of the Managing Director IS DIRECTED to take appropriate administrative action to give effect to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[8]COMSAT also requested a reduction in its fee for fiscal year 2001 pursuant to 47 C.F.R. § 1.1166. See Letter from Robert A. Mansbach to Andrew S. Fishel (Sept. 24, 2001). See also Letter from Lawrence W. Secrest, III to Ms. Marlene Dortch, Secretary (May 6, 2002); Letter from Lawrence W. Secrest, III to Ms. Marlene Dortch, Secretary (Oct. 7, 2002). In addition, in a May 6, 2002 ex parte presentation, COMSAT asked for a reduction in its fiscal year 2000 fee. These waiver requests are unrelated and will be addressed separately by the Office of Managing Director.