CED-77-70
5-6-77

REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES

RELEASED

Establishing A Proper Fee Schedule Under The Independent Offices Appropriation Act, 1952

Federal Communications Commission

GAO believes that sufficient guidance is contained in recent United States Court of Appeals decisions from which a proper fee schedule can be established for services provided by Government agencies. As a result, contrary to the Federal Communications Commission's position, GAO believes the Commission can make a good-faith effort to recalculate its fee schedules and refund only the excess portion of the $164 million collected in fees from 1970 through 1976.

CED-77-70

MAY 6, 1977

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-145252

The Honorable Ernest F. Hollings
Chairman, Subcommittee on
Communications
Committee on Commerce, Science
and Transportation
United States Senate

The Honorable Lionel Van Deerlin
Chairman, Subcommittee on
Communications
Committee on Interstate and
Foreign Commerce
House of Representatives

Pursuant to your joint request of March 2, 1977, we reviewed the Federal Communications Commission's actions since the U.S. Court of Appeals for the District of Columbia Circuit ordered the Commission on December 16, 1976, to recalculate its 1970 and 1975 fee schedules. The fee schedules were established under standards of the Independent Offices Appropriation Act, 1952. The court further ordered the Commission to refund money which it collected that exceeded the permissible standard.

As agreed with your office, we are specifically reporting on (1) actions the Commission has taken since the December 1976 court rulings and (2) guidance contained in the court cases from which the Commission can attempt to recalculate and refund fees. Although the court decisions had direct impact only on the Commission's fee schedule, we have also provided our observations on the possible impact on other Government entities which collect fees pursuant to the 1952 act.

As your office requested, we have not obtained formal agency comments. However, we discussed the matters presented with agency officials and have considered their comments in the report. As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of

a Federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report. We will be in touch with your offices in the near future to arrange for release of the report to set in motion the requirements of section 236.

Comptroller General
of the United States

DIGEST

ESTABLISHING A PROPER FEE SCHEDULE UNDER THE INDEPENDENT OFFICES APPROPRIATION ACT, 1952
FEDERAL COMMUNICATIONS COMMISSION

CED-77-70
May 6, 1977

Report to Chairmen, Senate Subcommittee on Communications, Committee on Commerce, Science and Transportation and House Subcommittee on Communications, Committee on Interstate and Foreign Commerce pursuant to their joint request. The report concerns the Federal Communications Commission's actions since the U.S. Court of Appeals for the District of Columbia Circuit ordered the Commission on December 16, 1976, to recalculate its 1970 and 1975 fee schedules. The fee schedules were established under the standards of the Independent Offices Appropriation Act, 1952. The court further ordered the Commission to refund money which it collected that exceeded the permissible standard.

We reported that sufficient guidance is contained in recent U.S. Court of Appeals decisions from which a proper fee schedule can be established and that the Commission could make a good-faith effort to recalculate its fee schedule and refund only the excess portion of the $164 million in fees collected from 1970 through 1976.

We noted that the court decisions are relevant to other regulatory agencies which collect fees under the Independent Offices Appropriation Act, 1952.

We also suggested that possible Congressional action could take the form of revamping the Independent Offices Appropriation Act, 1952, or enacting new legislation in lieu of the act.

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ESTABLISHING A PROPER FEE SCHEDULE UNDER THE INDEPENDENT OFFICES APPROPRIATION ACT, 1952
FEDERAL COMMUNICATIONS COMMISSION

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REGULATORY ACTIVITIES

A proper fee schedule under the Independent Offices Appropriation Act, 1952 can be established.

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REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES

ESTABLISHING A PROPER FEE SCHEDULE UNDER THE INDEPENDENT OFFICES APPROPRIATION ACT, 1952 Federal Communications Commission

D I G E S T

GAO believes that sufficient guidance is contained in recent United States Court of Appeals decisions from which a proper fee schedule can be established. As a result, contrary to the Federal Communications Commission's position, GAO believes the Commission can make a good faith effort to recalculate its fee schedules and refund only the excess portion of the $164 million in fees collected from 1970 through 1976.

In March 1964, the Commission established its first schedule of filing fees, under standards set by the Independent Offices Appropriation Act, 1952, for applicants seeking the authority to operate radio stations, for example.

In response to congressional and executive branch urging to adopt higher fees, the Commission in August 1970 amended its fee schedule to recover its total operating costs. The Commission again revised its fee schedule in March 1975 after the U.S. Supreme Court in 1974 imposed certain limitations on fee collections. Later, the fee schedules were again challenged; and, on December 16, 1976, the U.S. Court of Appeals for the District of Columbia Circuit ordered the Commission to recalculate the 1970 and 1975 fee schedules and refund the excess money which the Commission had collected. (See p. 2.)

The Commission interpreted the court decisions to require that fees not only be based on costs but also on the "value conferred" upon the people or organizations paying the fees.

The Commission stated that, in any fee proceeding, it has not been able to determine the value that the Commission's actions have conferred upon these people. (See p. 6.)

The Commission, therefore, on December 22, 1976, notified both House and Senate legislative and appropriations committees that it was issuing an order suspending all fee collections, effective January 1, 1977. In addition, the Commission formed a fee refund task force to develop plans covering options on refunding of fees collected from 1970 through December 31, 1976. (See p. 7.)

GAO does not believe that the Court of Appeals requires the Commission to measure separately the "value conferred" upon the people paying the fee. Instead, based upon interpretation of the court decisions, the Commission can establish a proper fee schedule based solely upon cost. (See p. 9.)

Accordingly, the Commission should implement a new fee schedule and, using the methods developed to implement the new fee schedule, recalculate the 1970 and 1975 fee schedules and refund any excess fees collected.

POSSIBLE IMPACT ON OTHER AGENCIES

Although the Court of Appeals' decisions only immediately and directly affect the Commission's collection of fees, the decisions are revelant to other regulatory agencies which collect fees under the Independent Offices Appropriation Act, 1952.

Because of time constraints, GAO did not evaluate actions taken by other Federal agencies, but GAO believes that the Commission's experiences clearly indicate that user charges are susceptible to challenge in the courts. (See p. 16.)

POSSIBLE CONGRESSIONAL ACTION

Rather than allowing the extent of cost recovery under the Independent Offices Appropriation Act, 1952 be resolved through repeated litigation, the Congress may wish to provide additional legislative guidance. If action is taken in this direction, however, it should not be pursued at the exclusion of the Commission's making a good-faith attempt to comply with the orders of the Court of Appeals. Congressional action could take the form of revamping the Independent Offices Appropriation Act, 1952, or enacting new legislation in lieu of the act.1/

1/If the Congress desires to revamp the Independent Offices Appropriation Act, 1952, or enact new legislation in lieu of the act, then it should be mindful that a distinction exists between enacting legislation assessing a tax and legislation imposing a fee. The Supreme Court in National Cable Television Association v. United States, indicated that the Congress has the Constitutional authority to enact legislation that assesses both a tax and a fee.

Contents

ABBREVIATIONS

FCC	Federal Communications Commission
GAO	General Accounting Office
IOAA	Independent Offices Appropriation Act, 1952
NCTA	National Cable Television Association
NRC	Nuclear Regulatory Commission

CHAPTER 1

INTRODUCTION

The Communications Act of 1934 established the Federal Communications Commission (FCC) as an independent agency. FCC regulates interstate and foreign communications to make available a rapid, efficient, nationwide and worldwide wire and radio communications service.

FCC activities are divided into four major fields:

1. Broadcast: television, standard radio broadcast, frequency modulation broadcast, and related auxiliary services

2. Common carrier: telephone, telegraph, and submarine cable--both wire and radio and interstate and foreign

3. Safety and special services: marine, aeronautical, public safety, amateur, disaster, industrial, and land transportation

4. Cable television

In carrying out the activities in each of these fields FCC (1) licenses radio, television, and related services, (2) licenses safety and special radio services, (3) performs inspections of radio stations, and (4) administers radio operator examinations. Also, for the common carrier services, FCC regulates the rates and practices of telephone, telegraph, and cable companies and approves or disapproves proposed mergers and acquisitions of properties and extensions and reductions in service. In March 1964 FCC established its first schedule of filing fees for applicants seeking operating authorities or approvals of other proposed actions.

The fee schedule was revised in August 1970 and again in March 1975 after the Supreme Court in 1974 imposed certain limitations on fee collections. Subsequently, the fee schedules were again challenged; and on December 16, 1976, the U.S. Court of Appeals for the District of Columbia Circuit ordered the FCC to recalculate the 1970 and 1975 fee schedules and refund any excess fees. On January 1, 1977, FCC suspended the collection of all fees.

AUTHORIZING LEGISLATION AND EARLY FEE SCHEDULES

The Independent Offices Appropriation Act, 1952, (IOAA) (31 U.S.C. 483a) provides FCC and other Federal agencies with the authority to prescribe a fee, charge, or price for services the agency provides to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses) in which the fee is determined to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts.

In 1959 the Bureau of the Budget 1/ formulated Circular A-25 which described general policies for the executive branch concerning the charges to be made against recipients of certain Government services and property. The circular states that a reasonable charge should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

FCC first established fee schedules pursuant to the IOAA in 1964. These schedules set nominal charges for filing with FCC that produced revenue equivalent to approximately 25 percent of its annual appropriation. In 1970, in response to congressional and executive branch urging to adopt higher fees to make FCC more self-sustaining, FCC amended its fee schedule to recoup its total operating costs. For the first time this fee schedule imposed filing fees and an annual fee of 30 cents per subscriber on cable television operators.

SUPREME COURT CASES OF 1974

The annual fee assessed against members of the cable industry was struck down by the United States Supreme Court on March 4, 1974, in National Cable Television Association v. United States (NCTA v. U.S.) 415 U.S. 336 (1974). That case and a companion case decided the same day, Federal Power Commission v. New England Power Co. (New England Power) 415 U.S. 345 (1974), established standards which agencies must meet to charge fees under the IOAA.

1/ On July 1, 1970, the Bureau of the Budget became part of the Office of Management and Budget.

In NCTA v. U.S. the Court found that FCC assessment of 30 cents per subscriber was calculated to reimburse the total cost (direct and indirect) of regulating the cable television industry, regardless of whether each individual operator had received any "special benefit" from that regulation. The Court held that IOAA intended fees to be based on "value to the recipient" and not on "public policy or interest served or other pertinent facts;" therefore, it determined that FCC's failure to use this measure made the 30 cent assessment a tax, which the agency had no power to levy. The Court sent the case back to FCC to reappraise the annual fee imposed on the cable industry to make the fee consistent with the Court's decision.

In the New England Power case, the Court further declared that the "special benefit" concept requires some "nexus" or link between the agency and the person assessed a fee other than the fact that the agency regulates the industry or the agency adopts some practice that generally benefits the entire industry. The Court held that:

> "no charge should be made for services rendered, 'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.'"

The cases constitute the only Supreme Court interpretations of the IOAA, and taken together with the statute they set the standard to measure the FCC fees.

After the Supreme Court invalidated the 1970 annual fee assessed against members of the cable television industry, FCC suspended annual fee collections for cable television systems stating that the appropriate annual fee for calendar year 1973 would be published after further proceedings. FCC also ordered that all cable television annual fees ($4.2 million) which had been collected pursuant to the 1970 schedule be refunded. On January 15, 1975, FCC adopted a revised fee schedule which became effective on March 1, 1975.

U.S. COURT OF APPEALS

The 1970 fee schedule and the 1975 schedule were challenged, and on December 16, 1976, the U.S. Court of Appeals for the District of Columbia Circuit ordered FCC to recalculate the 1970 and 1975 fee schedules and to refund any excess fees. The Court of Appeals directed FCC to (1) clarify the justification for all of its fees, (2) explain the basis for the fees, (3) recalculate the fees accordingly, and

(4) refund any excessive amounts collected under the 1970 and 1975 fee schedules. In this regard, the court noted specifically that FCC should retain the maximum portion of the fees collected that would be permissible under the principles announced in the NCTA v. U.S. and New England Power cases and under the statute. Shortly thereafter, FCC announced it was suspending the collection of all fees effective January 1, 1977.

SCOPE

We made our review at FCC headquarters in Washington, D.C. We reviewed pertinent legislation, FCC documents and reports, and applicable court decisions and interviewed FCC officials.

Because of time constraints, we did not evalutate actions taken by other Federal agencies which assess fees under the IOAA. We have, however, provided our observations on the possible impact the court and FCC actions may have on these agencies.

CHAPTER 2

FCC'S REACTION

TO THE COURT OF APPEALS DECISIONS

On December 20, 1976, 4 days after the Court of Appeals for the District of Columbia Circuit ordered FCC to recalculate its fees, FCC's General Counsel and Executive Director in a joint memorandum to the FCC Commissioners noted that it would be extremely difficult for FCC to comply with the court order. The memorandum further noted that FCC should stop collecting fees and should refund those fees collected from 1970 through 1976. The total fees collected during this period was about $164 million. The total collected by each FCC bureau or office is shown in the schedule below.

Bureau/office	Fee collections (millions)
Safety and Special Radio Services Bureau	$ 70.6
Broadcast Bureau	47.5
Common Carrier Bureau	31.9
Field Operations Bureau	9.4
Office of Chief Engineer	4.4
Cable Television Bureau	.3
	$164.1

In response to the joint memorandum the FCC Chairman, on December 22, 1976, established a task force to develop plans covering options on refunding fees collected since 1970. The task force members, however, appear to have been uncertain as to the purpose and direction of their effort. In our opinion, the task force was little more than an informal structure to assess the administrative problems of refunding the fees collected. The task force made no concerted attempt to recalculate fees based on the court's decisions.

POSITION ADOPTED IN JOINT MEMORANDUM

In responding to the court's decisions, the joint memorandum noted that FCC faces an extremely difficult task in

revising its fee schedules. Specifically, it noted difficulty in applying the court's standards in two areas.

> "* * *First, the allocation of costs to the smallest practical unit when read in conjunction with the statement that 'we expect this unit will be classes of carriers or applicants or grantees or services which the Commission has already singled out for separate treatment for its 1975 schedule,' would require a comprehensive cost accounting system. This system would, presumably, allow us to single out those classes of licensees for which we propose fees and build up the expenses of our programs for these appropriate classes at the smallest practical unit of cost. We do not have such a system today, and we have no need to adopt one other than for the purpose of calculating fees. Cost accounting systems are obviously widespread in manufacturing industries where a complete accurate cost total of each product must be known if a profitable price is to be established. Outside of the fee program, the Commission's financial management program does not face this question. If the Commission wished to adopt a cost accounting system it could probably implement one, with the assistance of several cost accountants, within 12 to 24 months. The cost of implementation, however, would probably be several hundred thousand dollars, and the Commission's annual accounting costs would thereafter be increased. Moreover, even if we could establish a legal schedule for future fees, we do not have the necessary accounting information which would allow us to go back and extract cost accounting data for past years. Therefore we are unable to comply with the court's suggestion that we recompute the fees collected under the 1970 and 1975 schedules and refund that portion not lawfully collected."

> "* * *The second major difficulty lies in the concept that the fees must be calculated to return not only the cost basis, but also must reasonably reflect the costs of the services performed and the value conferred upon the payor. We have not, to this point in any fee proceeding, been able to determine the value that our actions conferred upon the payor. Nor do we have any method of separating out expenses incurred which benefit an independent public interest as the court requires. We believe that these are subjects which can be litigated, under these guidelines, indefinitely."

Thus, with this as background, action was recommended in the joint memorandum which would minimize further impact on FCC's workload and the chance for further litigation. To accomplish this, recommendations were made to (1) end the collection of fees, (2) refund in full the fees collected under the 1970 and 1975 fee schedules, (3) consult with all FCC bureaus and offices to establish guidelines for a refund program, and (4) make no appeal. Specifically, it was noted that if FCC is to continue to collect fees, the Congress will have to pass a new statute which either sets forth the specific fees to be collected or establishes a method which will not require FCC to "unscramble eggs."

FCC'S TASK FORCE FOR FEE REFUNDS

In response to the recommendations of the joint memorandum, FCC's Chairman, on December 22, 1976, notified both House and Senate legislative and appropriations committees that FCC was issuing an order suspending all fee collections, effective January 1, 1977. In addition, the Chairman noted that FCC had formed a fee refund task force to develop plans covering FCC's options on refunding of fees collected from 1970 through December 31, 1976.

The task force, which consisted of eight members, was chaired by the Chief of the Financial Management Division. The members represented each of FCC's bureaus and several offices. The task force's only meeting was on December 22, 1976, when members were given copies of the joint memorandum as policy guidance and directed to provide data on the administrative impact of the refund.

We concluded from our discussion with task force members, that uncertainty existed as to the purpose and direction of the task force's efforts. Some members felt that the only charge given them was to determine the administrative problems associated with a complete fee refund. In this regard, a complete refund could include some dollar cutoff which would ease the administrative problems of the bureau or office. Other members told us that the bureaus were welcome to comment on the possiblity of recalculating fees based on the court's decision.

On February 2, 1977, the responses from task force members were incorporated into a second joint memorandum from FCC's General Counsel and Executive Director to the FCC Commissioners. It was noted that no purpose would be served by attempting to modify the schedule of fees to comply with the court decisions and that FCC should refund all fees of more than $5 collected since August 1, 1970. This course of action was cited not only because it would be

substantially simpler from an administrative standpoint but also because FCC did not have adequate data to recalculate partial refunds. However, according to task force members, no concerted attempt was made to recalculate partial refunds.

One task force member, however, made an attempt to recalculate the costs for his bureau and apply these costs to the 1970 and 1975 fee schedules. Officials of that bureau informed us that although the calculations were rough, they could be refined and that portions of the 1970 and all but one of the 1975 fees could be lawfully retained under the court decisions.

Other task force members told us that although no attempt was made to recalculate their fees, by making assumptions and reconstructing procedures in effect in 1970 through 1976 they could possibly recalculate the 1970 and 1975 fee schedules.

APPEAL TO THE SUPREME COURT

After the Court of Appeals rendered its decisions on December 16, 1976, the Federal Government had until March 16, 1977, to appeal the decisions to the Supreme Court. To allow more time to consider the decisions, the Government, through the Department of Justice requested an extension of this date.

On March 8, 1977, the Supreme Court granted the Government an extension through May 15, 1977. On April 14, 1977, FCC notified the Department of Justice that Supreme Court review is in all likelihood unobtainable primarily because the Government would not be able to demonstrate legal error. As of May 3, 1977, the Department of Justice had not decided whether to appeal the decisions.

CHAPTER 3

CRITERIA PROVIDED TO FCC BY THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In its four decisions dated December 16, 1976, the Court of Appeals did not attempt to delineate how FCC, in reviewing its 1970 and 1975 fee schedules, must act to comply with the requirements of the Independent Offices Appropriation Act, 1952, as interpreted by the Supreme Court in 1974. The reason cited for the general rather than specific comments was that the Government presented insufficient records to the court making it impossible to determine the dollar or precise percentage range for a proper fee. Accordingly, the court attempted to allow FCC as much latitude as it felt permissible in complying with its instructions.

We believe a reasonable interpretation of the court's rulings is that it intends that FCC:

--Separate regulatees into "recipient classes," that is, the smallest practical unit.

--Calculate the cost basis for each fee to be assessed against each recipient class by particularizing (identifying) its costs, including all "necessary" expenses and excluding any expenses it incurred to serve an independent public interest, and making a public explanation of the criteria used to include or exclude particular costs.

--Apportion, with respect to each fee, the identified necessary costs against the members of each recipient class.

We believe also that the court provided sufficent guidance for FCC to separate regulatees into recipient classes and to calculate the cost basis for each fee assessed. With respect to apportioning the identified necessary costs against members of each recipient class for each particular fee, we are aware that the court could not be specific as to how this might be accomplished. The court, however, provides FCC with sufficient guidance to make a good faith effort to develop a permissible method of apportioning these costs among each recipient class.

A detailed analysis of the Court of Appeals' decisions is provided in appendix I.

RECIPIENT CLASSES

To promulgate a fee schedule that will comply with the court's remand orders, FCC first must separate regulatees who pay fees into the smallest practical unit. In doing so, the court noted that

> "* * *in most cases, we expect this unit will be classes of carriers or applicants or grantees or services which the Commission has already singled out for separate treatment in its 1975 fee schedule."

The court said that the solution is not to group dissimilar entities together and indicated, for example, that FCC may permissibly separate classes among carriers. Those carriers who apply to FCC for a permit to extend lines under 47 U.S.C. § 214 (1970) may properly be placed in two separate classes that do not overlap thereby avoiding duplication of charges. The first class would be for all applicants seeking extension of lines; the second for those applicants who may require hearings. The first class would be expected to reimburse FCC for handling the application papers. The second class would be expected to reimburse FCC for administrative law judges and certain hearing expenses.

No fee should be charged to a private party when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting the general public.

COST BASIS

In calculating a cost basis for each fee assessed against the members of each recipient class, FCC must identify each service that it provides. In doing so, FCC must exclude expenses it incurs to serve an independent, rather than an incidental, public interest.

The court did not define the independent public interest that must be excluded from the cost basis of a fee. Instead, the court specified those expenses which clearly could be included in the cost basis for a particular fee. It noted that FCC could charge for those public interest expenses necessarily incurred to provide services to its

regulatees. Expenses necessarily incurred by FCC are those that assist regulatees in complying with statutory requirements. For example, tariff filings, equipment certification, acceptance, approval, and hearings that are an integral part of the application for an operating license, extension of lines, or discontinuance of service are each required by statute. The court held that FCC may fully recoup the necessary costs it incurs to assist regulatees to comply with these statutes.

The necessary expenses noted above include both direct and indirect costs that FCC incurs in providing specific services to each regulatee in a particular class. Indirect costs include overhead expenses incurred in maintaining a competent staff to perform the essential service even though the payor may make little use of that service. Direct contact with FCC is not necessary in order for a person to be charged so long as FCC can identify the recipient as being among a particular class that benefits from special services or agency expenditures which protect their operations.

The court made clear that when establishing a cost basis FCC should consider the costs of necessary hearings, even though the hearings may not prove to be beneficial to an applicant seeking a license or permit. Because of the court's belief that the FCC trial staff in many hearings presumably represents an independent public interest, some or all of their expenses might be excluded from the permissible basis of the hearing fees, depending on the nature of the hearings.

Further, it is only necessary for FCC to measure the cost basis for each fee assessed; it need not separately measure "value conferred upon the payor." We believe that the court uses the term value conferred to interpret the value to the recipient standard established by the Supreme Court. The court intends that value derived, which is a measure of a tax, be distinguished from value conferred. By basing a fee on costs, the court avoids requiring FCC to establish a fee schedule that impermissibly taxes payors.

APPORTIONMENT OF COSTS

The court only requires that the fee assessed against members of a particular class reasonably reflect the costs

the agency incurred to provide necessary services. The court emphasized:

> "It should also be stated that we are not requiring exact calculations, just reasonable approximations. The ability to recoup both 'direct and indirect costs to the Government' [language of the IOAA which remains valid after NCTA v. U.S. along with the value to the recipient standard] does allow for some range and latitude in effecting a reasonable attribution of costs."

In one instance the court criticized FCC's methods of formulating the 1975 annual authorization fee. FCC began with its total budget and eliminated whole offices or activities which it found to be too far removed from the direct regulatory function. Then, for example, it assessed cable television operators for the total cost of operating FCC's Cable Television Bureau plus a pro-rata share of certain general support activities. This total was multiplied by 44.6 percent which represented the percentage of each activity that was devoted to application processing for which a fee could be recovered. The court indicated that the method used to arrive at the 44.6 percent must be explained, suggesting that a "time cost study" would be useful. The court then concluded that FCC had gone at its task backwards, starting with totals then eliminating items. The court stated that FCC should have selected expenses directly or indirectly related to the particular service thus justifying the assessment of a fee and then added up such items.

The court specifically noted that this is not to say that FCC must calculate the exact cost of servicing each individual. Any computation must necessarily be based on numerous approximations and can only be expected to be accurate within reasonable limits. The court held that:

> "It is sufficient for FCC to identify the specific items of direct or indirect costs incurred in providing each service or benefit for which it seeks to assess a fee, and then to divide that cost among the members of the recipient class in such a way as to assess a fee which is roughly proportional to the 'value' which that member has thereby received."

The court stressed that if a fee is calculated in a proper manner, it should be a reasonable approximation of the particular costs which FCC identifies as being expended to benefit the recipient.

Because of the "bare record" before the court, it was only able to give FCC general guidance regarding permissible methods of apportioning costs among the members of a recipient class for each particular fee. Nevertheless, the court did offer a few thoughts concerning appropriate ways to apportion costs among members of a recipient class.

--The most extreme method of apportioning costs, in terms of expense and time involved, would be to calculate the exact cost incurred by FCC to service each individual class of recipients. The court, instead, noted that FCC may probably reasonably justify a minimum fee for small stations, and may well be able to demonstrate increases in the cost of regulating cable systems as the number of subscribers grows. The court does, however, observe that if an annual fee is established on a per subscriber basis, then economies of scale might result, making the per subscriber cost of regulation less for a larger system even though the total amount of fees assessed for that system might be greater.

--FCC may use a fee base with inherent ability to pay features if such base also reasonably reflected varying cost factors that benefited individual recipients. The court cautions, though, that ability to pay is frequently used as a justification for levying a tax but is of very limited value in assessing a fee which is supposedly related as closely as reasonably possible to the cost of servicing each individual recipient.

Concerning how FCC might be able to devise a fee schedule comprised of fees that consider economies of scale for larger regulatees, minimum fees for smaller regulatees, and inherent ability to pay features for impecunious regulatees, the court suggests that for each category of service, FCC may wish to develop a sliding scale using the cost of work performed as a proper measure.

CHAPTER 4

CONCLUSIONS

While neither the issues nor the solutions are clear cut, we believe that the decisions handed down on December 16, 1976, by the United States Court of Appeals for the District of Columbia Circuit, provide sufficient guidance from which FCC can make a good-faith effort to devise a new fee schedule based on the "value to the recipient" standard. Further, by taking such action, FCC will be in a more positive position from which it can reassess its 1970 and 1975 fee schedules. Mindful of the court's statement than "any computation such as these must necessarily be based on numerous approximations and can only be expected to be accurate within reasonable limits", FCC, using the methods developed to implement a new fee schedule, can then proceed to recalculate the 1970 and 1975 fee schedules and refund any excess fees.

FCC makes three basic arguments for rejecting any further attempt to recalculate a fee schedule. First, major difficulty lies in the concept that the fees must be calculated to return not only the cost basis but also must reasonably reflect the costs of the services performed and the value conferred upon the payor. Second, a comprehensive cost accounting system would be needed to single out the classes of licensees for which FCC proposed fees--thus allowing FCC to build up the expenses of its programs for those appropriate classes at the smallest practical unit of cost. Third, any method developed to exclude expenses incurred which benefit an independent public interest as the court required could be litigated indefinitely.

It is true that the fees must be calculated to reflect the costs of the services performed. However, we do not believe that the court requires FCC to measure separately by some other means the value conferred upon the payor. We believe that the court uses the term "value conferred" to interpret the value to the recipient standard established by the Supreme Court. The court intends that value derived, which is a measure of a tax, be distinguished from value conferred. By basing a fee on costs, the court avoids requiring FCC to establish a fee schedule that impermissibly taxes payors.

It is also true that some additional cost data would be needed to comply with the court orders. There is, however, little doubt, as even FCC pointed out, that a

system to accumulate such data can be implemented. Specifically, GAO's Policy and Procedures Manual for Guidance of Federal Agencies, Title 2, Section 16, addresses the subject of cost accounting for Federal agencies. Section 16.4 states that accounting for costs is required where reimbursement for services performed is to be at cost or when sales prices are primarily based on cost. Adequate cost accounting is also required when full recovery of costs from customers or users of services is a statutory requirement. We see no reason why the court would not be willing to wait a reasonable length of time for FCC to implement such a system. Once the system is implemented, FCC will be in a stronger position to recalculate and refund fees.

We recognize that action FCC takes to recalculate fees and refund certain amounts may be the subject of further litigation. Such action could take the form of (1) a challenge in the Supreme Court to the rulings of the Court of Appeals, (2) a challenge to the manner in which FCC seeks to comply with the Court of Appeals' orders, and (3) a challenge at any Federal judicial level against any attempt by FCC to establish in 1977 fee schedules which apply retroactively.

The court has, however, stated that it is not requiring FCC to engage in retroactive rulemaking. There is always the possibility of litigation relating to any regulatory authority that establishes rules and regulations based on broad enabling legislation. This possibility, however, should not impede FCC's good-faith efforts to implement a fee schedule consonant with the Court of Appeals' orders.

In our opinion, to determine if (1) FCC should implement a new fee schedule and recalculate and refund fees under the IOAA as interpreted by the courts, or (2) as proposed by FCC, it should reject totally the concept of collecting fees under the IOAA and wait for the Congress to enact specific legislation establishing fees for FCC, certain basic questions must be considered. Which is least costly to the Government? Which is most likely to provide for fee assessments in a timely manner? Which is likely to allow for maximum flexibility when cost or other circumstances change?

Given these basic questions and the existing circumstances, we conclude that FCC should proceed to establish a new fee schedule based on guidance provided by the IOAA as interpreted by the courts. This conclusion is based on the following considerations.

--The Court of Appeals' decisions of December 16, 1976, provide guidance from which FCC can make a good-faith effort to devise a new fee schedule based on the "value to the recipient" standard.

--FCC has noted that the cost to implement a system from which it can obtain necessary accounting data would be several hundred thousand dollars. A refund, however, excluding some dollar value cutoff as proposed by FCC, could result in the return of as much as $164 million in addition to the administrative cost of implementing the refund program. We recognize that a recalculation of fees based on the court's decision will result in some fee refunds. However, we believe that a recalculated schedule of fees, based on sound accounting principles, will provide (1) a basis from which to assess the court's remand order, and (2) the flexibility to deal with problems of changing costs.

--Certain factors such as personnel differences and organizational changes could be used as a basis for relating current costs with costs for 1970 through 1976.

--The benefits generated by a cost accounting system, properly designed and implemented by FCC for establishing and justifying rates and for effectively using resources, will outweigh the cost of implementing and operating the system.

POSSIBLE IMPACT ON OTHER AGENCIES--OUR OBSERVATIONS

Although the Court of Appeals' decisions only have an immediate and direct impact on FCC's collection of fees, we believe the court's decisions are relevant to other regulatory agencies which collect fees under the IOAA. We are aware, for example, that in fiscal year 1976 nine regulatory agencies, including FCC, collected approximately $63 million in user charges. Also, since the 1974 decision, three of these agencies, excluding FCC, refunded $8.9 million in fees.

Specifically, shortly after the Court of Appeals' decisions, 11 public utilities filed a suit against the Nuclear Regulatory Commission (NRC) requesting a recalculation of its fees. Although the case was dismissed because of jurisdictional reasons, NRC decided to revise its fee schedule and anticipates issuing the revised schedule by August 1977. Legal representatives for the 11 utilities have advised NRC that this revised schedule will also be challenged.

Because of time constraints we did not evaluate actions taken by other Federal agencies. We do believe, however, that FCC's and NRC's experiences clearly indicate the susceptibility of user charges to challenge in the courts. Without an attempt by FCC to establish a method to proceed using the criteria established by the courts, the validity of its or any regulatory agency's assessing fees under the IOAA as interpreted by the Court of Appeals will remain unresolved.

RECOMMENDATION TO THE CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

We recommend that the Chairman, FCC establish a new fee schedule based on the guidance provided by the IOAA as interpreted by the courts and that he use the methods developed to implement the new fee schedule to recalculate the 1970 and 1975 fee schedules and refund any excess fees.

POSSIBLE CONGRESSIONAL ACTION

Rather than allowing the extent of cost recovery under the IOAA be resolved through repeated litigation, the Congress may wish to provide additional legislative guidance. If action is taken in this direction, however, it should not be pursued at the exclusion of FCC's making a good-faith attempt to comply with the orders of the Court of Appeals. Congressional action could take the form of revamping the IOAA or enacting new legislation in lieu of the IOAA.1/

1/If the Congress desires to revamp the IOAA or enact new legislation in lieu of the IOAA, then it should be mindful that a distinction exists between enacting legislation assessing a tax and legislation imposing a fee. The Supreme Court, in NCTA v. U.S., indicated that Congress

ANALYSIS OF

FOUR DECEMBER 16, 1976,
COURT OF APPEALS DECISIONS

I. The Independent Offices Appropriation Act, 1952 (IOAA).

The IOAA, Act of August 31, 1951, ch. 376, title V, §501, 65 Stat. 290, as codified, 31 U.S.C. §483a (1970), provides the Federal Communications Commission (FCC), and other Federal agencies, the authority to assess fees for services and benefits rendered. The IOAA provides:

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and

> any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts * * *."

II. History of FCC Compliance With IOAA:

The FCC first established fee schedules pursuant to the IOAA in 1963, 34 F.C.C. 811 (1963), initially making only nominal charges for filings with the agency that produced revenue equivalent to approximately 25 percent of its annual appropriation. See 21 F.C.C. 2d 502, 503 (1970). In 1970, in response to congressional and executive branch pressures to adopt higher fees which would make the FCC more self-sustaining, the agency amended its fee schedule, 23 F.C.C. 2d 880 (1970) and for the first time imposed filing fees and an annual fee of 30 cents per subscriber upon cable television operators.

The annual fees assessed against members of the community antenna television (CATV) system were struck down by the United States Supreme Court on March 4, 1974, in National Cable Television Assn. v. United States (NCTA v. U.S.), 415 U.S. 336 (1974). That case and a companion case decided the same day, Federal Power Commission v. New England Power Co. (FPC), 415 U.S. 345 (1974), established standards that agencies must meet in order to charge fees under the IOAA.

In NCTA v. U.S., the court found that the FCC assessment of 30 cents per subscriber was calculated to reimburse the total cost (direct and indirect) to the Commission of regulating the cable television industry, regardless of whether or not each individual operator had received any "special benefit" from that regulation. Holding in effect that it was the intent of the IOAA to require fees to be based on "value to the recipient" and not upon "public policy or interest served [or] other pertinent facts," 415 U.S. at 341, 342-343, the court found that the FCC's failure to use this measure made the 30 cent assessment a tax which the agency had no power to levy. In effect, the court eliminated from the IOAA the words "public policy or interest served." As a result, the statute authorizes the head of each agency by regulation to prescribe fees taking into consideration "* * * direct and indirect cost to the Government and value to the recipient."

In the New England Power case, decided the same day as NCTA v. U.S., the Court further declared that the "special benefit" concept requires some nexus between the agency and the person assessed other than the mere fact of regulation or the adoption of some practice of general benefit to the industry as a whole. Quoting with approval a Bureau of the Budget Circular which interprets the IOAA, (Budget Circular No. A-25 (J. App. 129-34), issued Sept. 23, 1959) the court held that "no charge should be made for services rendered, 'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.'" 415 U.S. at 350. These cases constitute the only Supreme Court interpretations of the IOAA, and taken together with the statute they set the standard against which the Court of Appeals for the District of Columbia Circuit subsequently measured the FCC fees at issue in the cases decided December 16, 1976.

After the 1970 fee schedule had been invalidated by the Supreme Court, the FCC suspended collection of the annual fee for cable television systems, 46 F.C.C. 2d 12 (1974), stating that the appropriate annual fees for calendar year 1973 would be published after further proceedings. The FCC also ordered refund of all cable television annual fees collected pursuant to the 1970 schedule. 49 F.C.C. 2d 1089 (1974). On January 15, 1975, the FCC adopted a revised fee schedule to be effective March 1, 1975. 50 F.C.C. 2d 906, 924 (1975).

On December 16, 1976, the United States Court of Appeals for the District of Columbia Circuit, Judge MacKinnon writing for the court, issued four related decisions remanding to the FCC several of its orders involving the collection of fees from FCC regulatees. They are: (1) National Cable Television Association, Inc., et al., v. Federal Communications Commission, (NCTA), No. 75-1053 (D.C. Cir., December 16, 1976); (2) National Association of Broadcasters, et al. v. Federal Communications Commission (NAB), Nos. 75-1087, et al. (D.C. Cir. December 16, 1976); (3) Capital Cities Communications, Inc., et al. v. Federal Communications Commission (CCC), Nos. 75-1503, et al. (D.C. Cir. December 16, 1976); and (4) Electronics Industries Association, et al. v. Federal Communications Commission and United States (EIA), Nos. 75-1120, et al. (D.C. Cir. December 16, 1976).

The Court of Appeals directed the FCC to establish a proper justification for its fees, to explain the basis for the fees, to recalculate the fees accordingly, and to refund any excessive amounts collected under the 1970 and 1975 fee schedules. Shortly thereafter, the FCC announced it was suspending the collection of all fees effective January 1, 1977.

By letter dated December 22, 1976, to the Honorable John M. Slack, Chairman, Subcommittee on State, Justice, Commerce and Judiciary, House Committee on Appropriations, FCC Chairman Richard E. Wiley explained that it would be extremely difficult for the FCC to formulate a fee schedule under the new standards imposed by the Court. He said that the Commission had established a task force to develop plans for making refunds to regulatees as required by the Court of Appeals. In a memorandum to the Commission dated February 2, 1977, the General Counsel and the Executive Director of the FCC recommended refunding all those fees in excess of $5 collected since 1971. The amount potentially refundable on this basis would be $127 million.

In response to Chairman Wiley's expressed intention to refund the fees concerned, Senator Ernest F. Hollings and Representative Lionel Van Deerlin, by letter dated March 2, 1977, to Chairman Wiley, strongly urged the FCC not to initiate a refund program before (1) reviewing the prospects for an appeal to the Supreme Court, and (2) allowing the GAO the opportunity to examine the FCC's accounting system to determine independently the possibility of compliance with the Court of Appeals order. The Senator and Congressman wrote the Comptroller General, by letters dated March 2, 1977, and requested that GAO review the FCC fee schedules, its accounting system, and significant changes, if any, made by the FCC in its system following the NCTA Supreme Court decision.

III. Questions and Answers

QUESTION 1: What are the criteria that the FCC must meet in order to promulgate a fee schedule that will comply with the remand orders of the United States Court of Appeals for the District of Columbia Circuit?

ANSWER: We believe the court intends that the FCC do the following:

First, the FCC must separate regulatees who pay fees into "the smallest practical unit," EIA, slip op. p. 17. The court stated that,

> "* * * in most cases, we expect this unit will be classes of carriers or applicants or grantees or services which the Commission has already singled out for separate treatment in its 1975 fee schedule."

The court said that "* * * the solution is not to group dissimilar entities together." The court further indicated that, if it is feasible, the FCC may permissibly separate classes among, for example, carriers, services and activities. With respect to activities, the court noted that one permissible classification would be for "* * * those individuals whose applications and acts require hearings." For example, a regulatee who applies to the FCC for a permit to extend lines under 47 U.S.C. §214 (1970) may properly be placed in two separate classes that do not overlap and, therefore avoid duplication of charges. NCTA, slip op. p. 13. The first class would be for all those applicants seeking extension of lines. The second class would be for all those applicants who require hearings. The first class would be expected to pay the FCC fees that reimburse the agency for, inter alia, "* * * the mechanical handling of the paper * * *" incident to the application for extension of lines. EIA, slip op. p. 18, n. 17. The second class would be expected to reimburse the agency for "* * * a substantial portion of the expenses of the administrative law judges and certain hearing expenses. * * *" EIA, slip op. p. 18.

Caution should be exercised to insure that the payor of a fee is "identifiable." EIA, slip op. p. 12. To state this requirement another way, "* * * no fee should be charged to

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a private party 'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.'" Id., p. 12.

Second, the FCC must calculate the cost basis for the services provided to each class of regulatees. The FCC must identify "* * * the activity that justifies each particular fee it assesses." NCTA, slip op. p. 12. To accomplish this, the FCC must examine its internal necessary expenses and, with respect to each class of regulatees serviced "* * * set forth the maximum particularization of costs it can conveniently make * * *." EIA, slip op. p. 17. In this regard, the court stated that

> "* * * the FCC can include in the cost basis of its fees only those expenses which the agency incurs to confer value on the payor. In National Cable, [the court] explained that the 'value conferred' measure of a valid fee means that the fee assessed cannot exceed the cost of service rendered. * * *" EIA, slip op. p. 13.

Included among necessary expenses are those which the FCC incurs in order to assist persons to comply with their statutory duties such as the "mechanical handling of the paper." EIA, slip op. p. 18, n. 17. Also see NCTA, slip op. p. 20. The necessary expenses may include both "direct and indirect * * *" costs that the FCC incurs in providing specific services to each regulatee in a particular class. Indirect costs may include overhead expenses "* * * incurred in maintaining a competent staff to perform the essential service when it is furnished [even though the payor] may make little use of that service," EIA, slip op. pp. 18-19. Direct contact with the FCC is not necessary in order for a person to be charged so long as the recipient can be identified by the FCC as being among a particular class that benefits "* * * from specific services or agency expenditures which protect their operations." NCTA, slip op. pp. 15, 18.

Examples provided by the court of improper standards to measure direct and indirect costs include but are not limited to: (1) the convenience of not facing competing applicants,

since this measure is not related to the costs of services furnished by the FCC. CCC, slip op. pp. 7, 8. If anything, the court observes, the absence of competing applicants would keep FCC costs at a minimum and tend to reduce the cost basis of a particular fee; (2) the consideration for the sale or transfer of a license, since that results in a tax that is based on "value derived" by the recipient. CCC, slip op. p. 8; (3) the values created by licensees out of their licenses, NAB, slip op. p. 44, n. 28, because that results in a tax that, again, is based on "value derived" by the recipient; and (4) probably the number of subscribers, viewers, or listeners of a regulatee, or the gross revenues of a regulatee because that may result in a tax. NCTA, slip op. p. 30.

The FCC must be sure to exclude from its calculations expenses it incurs to serve an independent rather than an incidental public interest. By only charging for necessary services, the FCC should easily be able to satisfy this requirement. In EIA slip op. p. 19, n. 17, however, the court did indicate that the expenses of the FCC's trial staff might be subject to exclusion.

The FCC must make a public explanation of the aforementioned specific direct and indirect expenses included in the fee it intends to assess against each class of payor. The agency must explain the criteria used to include or exclude particular terms so that, if the fees are challenged, the court can determine if the FCC acted properly. NCTA, slip op. pp. 22, 23. The court indicated that

> "* * * the FCC is required to show the particular costs which they are assessing against the recipients [payors of an 'individual fee'] so as to assure them that they are paying only for the specific expenses which are incurred in connection with the services of granting them their operating authority." NCTA, slip op. p. 22.

Third, with respect to each particular fee, the FCC must apportion the remaining particularized necessary costs against the members of the class to be assessed that fee. The costs assessed against the members of each class

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> "* * * may include a pro-rata share of any expenses for regulatory activities which are necessary in order to grant [in this instance, a certificate of compliance under 47 C.F.R. §76.11(a) (1957)], but cannot include those expenses independently required to protect the public." NCTA, slip op. p. 14.

In the two summaries provided to assist the FCC in establishing a valid fee schedule, EIA, slip op. p. 17 and NAB, slip op. p. 53, the court requires that the FCC set a fee for each class which "reasonably reflects" the cost of services performed or value conferred upon the regulatees of each class. Again, in EIA at slip op. p. 13, supra, the court stated that the "value conferred" measure of a valid fee means that the fee assessed cannot exceed the costs incurred by the FCC in rendering necessary services to the members of the class concerned.

The court only requires that the fee to be assessed against the members of a particular class reasonably reflect the costs incurred by the agency to provide necessary services. The court emphasized:

> "It should also be stated that we are not requiring exact calculations, just reasonable approximations. The ability to recoup both 'direct and indirect costs to the Government' [language of the IOAA which remains valid after NCTA along with the value to the recipient standard] does allow for some range and latitude in effecting a reasonable attribution of costs." NAB, slip op. p. 46, n. 28.

In NCTA at slip op. p. 23, the court criticized the FCC's method of formulating the 1975 annual authorization fee. The FCC began with its total budget and eliminated whole offices or activities which it found to be too far removed from the direct regulatory function. Cable television operators were assessed the total cost of operating the Cable Television Bureau plus a pro-rata share of certain general support activities, all multiplied by an unexplained 44.6 percentage. The court indicated that the 44.6 percentage must be explained,

suggesting that a "* * * time cost study explanation * * *" would be useful in explaining "* * * why 44.6 percent was chosen to represent that portion of the previously calculated total costs which could be recovered through a fee. Perhaps, most importantly, there was no explanation of the criteria used in eliminating certain costs and retaining others." The court then concluded that the Commission had gone at its task backwards, starting with totals and eliminating items, rather than selecting expenses directly or indirectly related in a significant degree to the particular service justifying assessment of the fee, and then adding up such items.

> "This is not to say that the Commission must calculate the exact cost of servicing each individual [emphasis added]; that would be an all but impossible task. [A footnote refers to Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964) cert. denied, 379 U.S. 966 (1965) and Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 589 (1945). The Seventh Circuit, in Aeronautical stated that "* * * Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science."] Any computation such as those must necessarily be based on numerous approximations and can only be expected to be accurate within reasonable limits. It is sufficient for the Commission to identify the specific items of direct or indirect costs incurred in providing each service or benefit for which it seeks to assess a fee; and then to divide that cost among the members of the recipient class (here, Cable operators) in such a way as to assess each a fee which is roughly proportional to the 'value' which that member has thereby received. * * * " NCTA, slip op. pp. 23-24. (Emphasis added.)

The court stressed that "* * * If a fee is calculated in a proper manner, it should be a reasonable approximation of the attributable costs which the Commission identifies as being expended to benefit the recipient.* * * " NCTA, slip op. p. 25.

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Because of the "bare record" EIA, slip op. p. 17, NCTA, slip op. p. 22, before the court, Judge MacKinnon was able to give the FCC "* * * only the most general guidance regarding permissible methods of apportioning costs among the members of a recipient class for each particular fee." Nevertheless, the court did offer a few thoughts concerning appropriate ways to apportion costs among members of a recipient class.

The most extreme method of apportioning costs, in terms of expense and time involved, would be to calculate the exact cost incurred by the FCC to service each individual class of recipients. The court, instead, notes that the FCC may "* * * probably reasonably justify a minimum fee for small stations, and may well be able to demonstrate increases in the cost of regulating cable systems as the number of subscribers grows." The court does, however, observe that if an annual fee is established on a per-subscriber basis, then "* * * economies of scale might result, making the per-subscriber cost of regulation less for a larger system (even though the total fee for that system might be greater).* * *" NCTA, slip op. p. 31.

The FCC may use a "* * * fee base with inherent ability to pay features if such base also reasonably reflected varying cost factors that benefitted individual recipients.* * *" NCTA, slip op. p. 31. The court cautions, though, that

> "* * * Ability to pay is frequently used as a justification for levying a tax but is of very limited value in assessing a fee which is supposedly related as closely as reasonably possible to the the cost of servicing each individual recipient.* * *" NCTA, slip op. p. 31.

With respect to how the FCC might be able to devise a fee schedule comprised of fees that reflect consideration of economies of scale for larger regulatees, minimum fees for smaller regulatees, and inherent ability to pay features for impecunious regulatees, the court suggests that for each category of service, the FCC may wish to develop a "* * * sliding scale using a proper measure--i.e., the cost of work performed * * *." The court hesitates, though, stating: "Whether

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it is feasible to separate the Commission's activities into various classes based on increasing costs and complexity, we do not know. If the agency can do so, such a fee schedule would be valid under the statute." (Emphasis added.) EIA, slip op. p. 17. It would appear that only the FCC, working with the assistance of accountants and other individuals trained in the vagaries of cost accounting methods, can ultimately determine whether such a sliding scale might be feasible.

QUESTION 2: Assuming that there are sufficient criteria for the FCC to establish a valid fee schedule, what guidance does the Court of Appeals provide to determine how to exclude from the cost basis for each fee assessed any expenses incurred to serve an independent public interest?

ANSWER: The Court of Appeals provided no concrete rule on this point. However, it appears from the decisions that FCC need not attempt to determine quantitatively exactly how to measure an independent public interest. Instead, it is sufficient for the FCC to charge for necessary services. That is, the FCC may assess fees to reimburse the agency for costs incurred in assisting persons to comply with their statutory duties. In so doing, the FCC, we believe, will remain well within the scope of a permissible cost basis for a fee.

Justice Douglas, writing for the majority in the Supreme Court's NCTA v. U.S. decision, focused attention on distinguishing between a fee and a tax. He held that taxation is a legislative function that may be based solely on ability to pay without regard to "benefits bestowed" by the Government. A fee, however, is incident to a voluntary act on the part of the payor; and the public agency performing those services normally may exact a fee for a grant which "bestows a benefit on the applicant, not shared by other members of society." NCTA v. U.S. pp. 340-41. Justice Douglas cautioned that it would be impermissible to assess a fee against members of an industry to recoup the FCC's costs for its oversight in safeguarding the public interest. NCTA v. U.S., p. 341.

Judge MacKinnon, writing for the majority in EIA, was confronted with a record containing "insufficient data." Consequently, he could provide only some "general guidelines" for the FCC. EIA, slip op. p. 11.

First, he stated that the private payor must be "identifiable." No fee should be charged to a private party "'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public.'" Cf. FPC, pp. 350-51.

Second, a fee can only charge "* * * for those expenses which are necessary to service the applicant or grantee. Expenses incurred to serve some independent public interest cannot, under NCTA be included in the cost basis for a fee, although the Commission is not prohibited from charging an applicant or grantee the full cost of services rendered to an applicant which also result in some incidental public benefits." (Emphasis added.) EIA, slip op. p. 14.

Judge MacKinnon then provided a hypothetical example in which he explained that a fee can be assessed for tariff filings and for equipment testing since both activities are "* * * required by statute, and the FCC is entitled to charge for services which assist a person in complying with his statutory duties.* * * " EIA, slip op. p. 15.

> "Tariff filings are required by 47 U.S.C. §203(a) (1970). * * * Similarly, equipment certification, acceptance, and approval is required by 47 U.S.C. §302a (1970) and 47 C.F.R. §2.803 (1975) * * * Other commission fees * * * can be justified by the statutory requirement of a permit for construction of new or extended lines or the discontinuance of service by a common carrier, 47 U.S.C. §214 (1970), and by the requirement of an operating license and station construction permit under 47 U.S.C. §§301, 319 (1970).* * *" EIA, slip op. pp. 15-16.

In NCTA slip op. p. 14, Judge MacKinnon stated that the "* * * issuance of a certificate of compliance under 47 C.F.R. §76.11(a) is a service rendered by the FCC to the cable operators, and the agency is fully justified in seeking reimbursement of any expenses incurred in performing that service.* * *" This statement indicates that necessary expenses may also include those that the FCC incurs in complying with duties

required by regulations set by the FCC not specifically required by statute. Further, the court in NCTA, at slip op. p. 29, stated that the FCC could include in its cost basis for each fee assessed "* * * those attributable direct and indirect costs which the agency actually incurs in regulating (servicing) the industry.* * *" Again, there is no mention of the need for the FCC to restrict itself only to seeking reimbursement for expenses it incurs to assist a person in complying with his statutory duties. Accordingly, a reasonable interpretation of the court's holding is that the FCC may seek reimbursement for expenses it incurs to assist a person in complying with his statutory and regulatory duties.

The Court of Appeals did state that the FCC "* * * is not limited to charging for activities that are beneficial to an applicant, but can include in its fee the cost of any service that is necessarily rendered to him.* * *" EIA, slip op. p. 18, n. 17. (Emphasis added.)

Judge MacKinnon indicated that there might be one limitation to the inclusion of the cost of all hearings (held, e.g., in connection with the aforementioned statutes) in the cost basis of the fees for each bureau. The holding of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) precludes charging the expenses of the FCC's trial staff to opposing litigants. Further, the court indicated that "* * * the trial staff presumably represents an independent public interest, and some or all of their expenses might therefore be excluded from the basis of the fees * * *." EIA, slip op. p. 19, n. 17.

QUESTION 3: Must the FCC, after categorizing regulatees into the smallest practical classes of service recipients and establishing a cost basis for each necessary service provided by the agency, proceed separately to measure the value conferred upon the payor?

ANSWER: We do not believe that the Court of Appeals intended that the FCC measure the value conferred upon the payor as a condition precedent to establishing a permissible cost basis for fees. Instead, we believe it is sufficient to measure only the costs incurred.

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The source of the confusion whether the FCC is required to measure not only the cost basis for each fee but also the value conferred stems from the court's speaking in one decision (EIA, slip op. pp. 19-20) of "* * * the cost of the services performed and value conferred upon the payor * * *" and in others (NAB, slip op. p. 53, NCTA, slip op. pp. 28-29) of the "* * * cost of services performed or value* * *" transferred to the payor.

We think it is reasonable to assume that "the cost of the service performed" and "the value conferred upon the payor" are opposite sides of the same coin. We are reasonably satisfied that the Court of Appeals, by referring to both "cost of the service performed" and "value conferred upon the payor," was simply trying to give some additional perspective as to how the agency might better be able to establish a permissible rate. The concern of the court was that the FCC might properly establish a permissible cost basis only to fall, impermissibly, into the realm of a tax by establishing a fee that was not reasonably related to the costs necessarily incurred by the FCC. See, generally, NCTA, slip op. p. 29. In an attempt to make the distinction between a permissible fee and an impermissible tax, Judge MacKinnon stated:

> "In order to assure this required relationship between the fee-rate and the services rendered, as we interpret the Supreme Court opinion, the agency must look not at the value which the regulated party may immediately or eventually derive from the regulatory scheme but at the value of the direct and indirect services which the agency confers. This means, for example, that a fee, in order not to be a tax cannot be justified by the revenues received or the profits which cable operators have made from their franchises, but must be reasonably related to those attributable direct and indirect costs which the agency actually incurs in regulating (servicing) the industry. Tangential costs that bear no nexus to the service

> rendered cannot be recovered by citing the benefits derived by the beneficiaries from their operation of their licenses. * * *" (Emphasis in original.) NCTA, slip op. p. 29.

Hence, the phrase "value conferred" is to be distinguished from "value derived" just as a fee is to be distinguished from a tax. Having drawn this distinction, however, the court leaves specifically unanswered how one might measure "value conferred." Instead, Judge MacKinnon indicates that a proper rate is one that reasonably reflects a proportion of costs necessarily incurred by the FCC. He explains, in responding to a concurring opinion:

> "The concurrence also states that it does not read NCTA as requiring 'the proportion-of-cost basis' as the only acceptable method of determining a fee. That may well be so. It may be possible that a proper fee may be fashioned on other lines. * * * The fee must bear some reasonable relation to the cost or it ceases to be a fee and NCTA does indicate that it cannot go beyond being a 'fee.'
>
> * * * * *
>
> "As to whether it is possible under NCTA to promulgate 'value to the recipient' fee schedules not initially related to costs, we express no opinion." NAB, slip op. pp. 44-45, n. 28.

While it may be possible to establish a fee calculated to return by some means other than reference to a permissible cost basis the "value conferred upon the payor," we think it unnecessary for the FCC to risk judicial disapproval by attempting to create such a scheme. Instead, we recommend that the fees be calculated at rates that, as best as is reasonably possible, reflect the necessary costs incurred by the FCC in assisting an individual regulatee to comply with its statutory and regulatory duties.

QUESTION 4: Assuming that the FCC is able to establish a fee schedule that is approved by the United States Court of Appeals for the District of Columbia Circuit, can the FCC lawfully retain any portion of the money collected under the agency's 1970 and 1975 fee schedules?

ANSWER: The Court of Appeals intends that the FCC "* * * should retain the maximum portion of the fees collected [under the 1970 fee schedule] that would be permissible under the principle announced in NCTA, New England Power, and the [IOAA].* * *" NAB, slip op. pp. 52-53.

The court, further, intends that the FCC review its 1975 fee schedule to determine what portion of the fees collected under that schedule were permissible. The court noted "* * * However, it remains to be seen whether the Commission can justify charging fees in the amount it has attempted to do in the 1975 fee schedule.* * *" EIA, slip op. p. 16.

The court provided a summary to the FCC instructing how to recalculate the 1970 fee schedule in NAB slip op. p. 53 and noted at note 41, slip op. p. 53, that the summary should be applied to all four of the companion cases in computing a valid fee under the IOAA. After indicating that its directions, with respect to recalculating the 1970 fee schedule, should apply equally to recalculating the 1975 fee schedule, the court then expressly states, "* * * In taking this action, we are not asking the FCC to engage in 'retroactive rulemaking.' * * * The procedures on remand are intended to produce no new rule which would impose new obligations or involve additional parties; they will merely calculate the amount of the refund which will effectuate the statutory intent of the IOAA.* * *" NAB, slip. op. p. 54 n. 42.

In NCTA, slip op. p. 3, the court was asked to rule whether the FCC could promulgate in 1975 a schedule of annual fees to to be collected from all television operators that would have retroactive effect back to March 29, 1974, when collections under the 1970 fee schedule were suspended. The court deferred answering this narrow question that involved only one type of fee until the FCC devised a valid fee schedule.

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To summarize, the FCC's 1970 and 1975 fee schedules, according to the Court of Appeals, may be valid to some extent. The amounts to be retained by the FCC hinge on the agency's recomputing a fee that the court considers permissible, in the event the question is litigated. By so ruling, the court does not intend that the FCC promulgate a new fee schedule having a retroactive effect; rather, the court intends that the FCC recalculate the 1970 and 1975 fee schedules and refund only amounts that were impermissibly collected.

ROOM B-331
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Congress of the United States
House of Representatives
Subcommittee on Communications
of the
Committee on Interstate and Foreign Commerce
Washington, D.C. 20515

March 2, 1977

Elmer B. Staats
Comptroller General
General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Staats:

On December 16, 1976, the United States Court of Appeals for the District of Columbia, in a series of four related decisions, ruled that current Federal Communications Commission fee schedules were inadequate under standards promulgated by the Supreme Court in National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974). The Court of Appeals directed the Commission to clarify the justification for its fees, to explain the basis for the fees, to recalculate the fees accordingly, and to refund any excessive amounts collected under the old fee schedules.

Shortly after these decisions, the FCC announced that it was suspending the collection of all fees, effective January 1, 1977. The Commission has taken the position that it is incapable of complying to the full extent of the Court's order. The FCC has stated that its cost accounting system is inadequate to enable it to meet the criteria articulated by the Court and that it has no alternative but to refund all fees above $5 -- a total of $127 million.

We request that your office (1) review the FCC fee schedules (giving consideration to the standards set by the Independent Offices Appropriation Act of 1951, 31 U.S.C. §483(a), and to the concerns raised by the courts); (2) review the FCC's accounting system and evaluate its adequacy; and (3) determine whether the FCC made any significant changes in its system following the Supreme

APPENDIX II

Court's decision in National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974).

In addition to this review, we would appreciate it if you would recommend (1) specific changes which you feel are necessary in the FCC's accounting system; and (2) alternatives to the FCC's fee schedule which meet the criteria established by statute and by the courts.

We have asked our staffs to cooperate with you in developing your review more fully.

Thank you for your cooperation.

Sincerely,

Ernest F. Hollings
Chairman, Senate Subcommittee
on Communications

Lionel Van Deerlin, M.C.
Chairman, House Subcommittee
on Communications

/hsk

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