Access to Capital Subcommittee Recommendation to the
Federal Communications Commission's
Advisory Committee on Diversity for Communications in the Digital Age:

Recommendation on Application and Regulatory Fees

Presented to the full Committee by the Access to Capital Subcommittee, by Unanimous Vote, October 23, 2008

Adopted by the full Committee, by Unanimous Vote, October 28, 2008

Summary

The Advisory Committee recommends that the Commission expeditiously develop rules affording eligible entities a rebuttable presumption of eligibility for waivers, reductions or deferrals of the fees the Commission imposes on applicants and regulatees.[1] For the purpose of such new rules, an "eligible entity" could be defined as a socially or economically disadvantaged business ("SDB"),[2] as an entity provided essential services to isolated populations,[3] as an entity

[1] This recommendation emerged from the Commission's En Banc Hearing on Communications Financing, held July 29, 2008 at the Schomburg Center for Research in Black Culture, New York, NY.

[2] For certain of the Commission's policies promoting broadcast ownership diversity, an "eligible entity" is defined by using the SBA's definition of small businesses, the Commission has sought comment on a proposal to define eligible entities as SDBs. See Promoting Diversification of Ownership in the Broadcasting Services (Report and Order and Third Further Notice of Proposed Rulemaking), MB Docket Nos. 07-294 et seq., 23 FCC Rcd 5922, 5950 ¶¶80-81 (2007) ("Diversity Order"). The Advisory Committee has advocated use of the SDB paradigm where constitutionally permissible. See, e.g., Advisory Committee on Diversity for Communications in the Digital Age, "Further Recommendation on a Tax Incentive Program" (April 25, 2006) (advocating "a Federal program that would use the deferral of Federal capital gains tax liability as an incentive to make available to socially and economically disadvantaged persons and businesses the opportunity to acquire assets necessary to enter the broadcasting and telecommunications marketplace be adopted as part of, or as a complement to, the new telecommunications legislation presently under consideration.")

[3] Regulatees providing services deemed vital to public service and public safety because they provide service to underserved or socially isolated populations, such as Indian reservations and non-English speakers. See, e.g., Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and Recommendations to the Federal Communications Commission (2007) at 41 (recommending that the Commission promptly find a mechanism to resolve technical and financial hurdles in the EAS system to ensure that non-English speaking people or people with disabilities have access to public warnings, if readily achievable); see also Review of the Emergency Alert System (Second Report and Order and Further Notice of Proposed Rulemaking), EB Docket No. 04-296), 22 FCC Rcd 13275, 13306-07 (2007).

that incubates eligible entities,[4] or as a small business that has individually faced and (where relevant) overcome disadvantages.[5] Due to current economic conditions that threaten the economic viability of eligible entities (however defined), this rulemaking should be expedited and the effective date for applicable fee relief should be retroactive to the date on which the NPRM was published in the Federal Register.

The Commission's Statutory Obligations and Flexibility Regarding Fee Collections

The Communications Act specifies two types of fees to be collected by the FCC: application and other processing fees, which are paid by applicants for Commission authorizations, and regulatory fees,[6] which are paid by licensees and other regulatees.[7] Almost all of the fees collected by the Commission are regulatory fees.[8]

The Commission indirectly finances its operations through these fees - primarily through regulatory fees.[9]

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[4] Companies incubating eligible entities might also deserve relief when such incubation provides the "benefit of an incentive for eligible entity financing." Diversity Order, 23 FCC Rcd at 5943 ¶56. Therein the Commission created "an incentive plan under which a company financing or incubating an eligible entity would be guaranteed a priority if it files for a duopoly simultaneously with other entities in a market that can support only one additional duopoly. This vested priority in a duopolization queue would reward the large broadcaster that had incubated or financed an eligible entity if it filed simultaneously for a duopoly with a non-incubating entity." Id. The Commission concluded that "in this situation, a general statement of policy that grants priority to entities funding or incubating eligible entities would promote ownership diversity." Id.

[5] A useful short-term definition of an eligible entity is addressed in a draft report and recommendation of the Subcommittee on Eligible Entities, adopted by the full Committee at its October 28, 2008 meeting. That report recommends that in the short-term, the Commission establish a system of Full File Review that defines an eligible entity in a way that takes into account the disadvantages an individual applicant has faced and, where relevant, has overcome. The Commission has sought comment on how to design a Full File Review system. See Diversity Order, 23 FCC Rcd at 5951-52 ¶85.

[6] 47 U.S.C. §158 (implemented by 47 C.F.R. §§1.1101-1119).

[7] 47 U.S.C. §159 (implemented by 47 C.F.R. §§1.1151-1181).

[8] See FCC News Release, "FCC Examines Fees Used to Fund Commission Budget" (August 1, 2008) ("For Fiscal Year 2008, the Commission received an annual appropriation from Congress for $313 million, with all but $1,000,000 collected through regulatory fees.")

[9] See 47 U.S.C. §§159(b)(1)(B) (providing that regulatory fees "be established at amounts that will result in collection, during each fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal year" for the performance of the Commission's operating bureaus and offices"; see also 47 U.S.C. §159(b)(2)(B) (providing that the same approach is to be used when the Commission adjusts fee amounts from year to year).

Congress has authorized the Commission, in projecting the fee amounts to be collected in the aggregate to meet its operating budget, to "take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest[.]"[10] Congress has afforded the Commission similar flexibility in projecting its aggregate collections of application and other processing fees.[11]

The Commission is only permitted to exempt certain specific categories of applicants – noncommercial and governmental entities – from fee payments.[12] However, the Commission may waive or defer application and other processing fee payments "in any specific instance for good cause shown, where such action would promote the public interest."[13]

The same waiver and deferral conditions that apply to application and other processing fees also apply to regulatory fees, except that the Commission may "waive, reduce or defer" regulatory fees,[14] while it may only "waive or defer" application and other fees.[15]

Applying the public interest test in the statute, thus far the Commission has only specifically recognized one justification for waiver or deferral of an application or processing fee: "financial hardship."[16] However, the statute does not bar the Commission from recognizing additional justifications, such as promoting ownership diversity, or providing public safety and security.

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[10] 47 U.S.C. §159(b)(1)(A).

[11] No public interest aggregate fee adjustment, such as the adjustment the Commission is expressly authorized to make for regulatory fees (see 47 U.S.C. §159(b)) (aggregate regulatory fee public interest adjustment)) is expressly contemplated for application and other processing fees. However, the statutory language governing application and other processing fees does not require the Commission to precisely project aggregate collections of these fees. See 47 U.S.C. §158(e) (providing that application fee collections "shall be deposited in the general fund of the Treasury to reimburse the United States for amounts appropriated for use by the Commission in carrying out its functions under this Act"). The statute is silent on whether the Commission must take the extent of the Commission's total budget into account when annually adjusting application and other processing fees. See 47 U.S.C. §158(b). Presumably this omission is due to the fact that the great bulk of fee collections are regulatory fees as opposed to application and other processing fees.

[12] See 47 U.S.C. §158(d)(1) (governing application and other fees, and implemented by 47 C.F.R. §1.1114), and 47 U.S.C. §159(h) (governing regulatory fees, and implemented by 47 C.F.R. §1.1162).

[13] 47 C.F.R. §1.1117(a) (implementing 47 U.S.C. §158(d)(2)).

[14] 47 U.S.C. §159(d) (emphasis supplied).

[15] 47 U.S.C. §158(d)(2).

[16] 47 C.F.R. 47 C.F.R.§1.1117(c) (application and other processing fees); 47 C.F.R. §§1.1166(c) and (d) (regulatory fees).

The Commission has interpreted the statute governing waivers and deferrals of application and processing fees as permitting it to waive or defer an application or other processing fee only for an individual applicant and not for an entire class of applicants.[17] Therefore, if the Commission were to make a finding that financial hardship, or another public interest factor applying to or experienced by entire class of applicants, justified fee waivers, reductions or deferments for essentially all of the applicants in that class, the Commission would still need to require each applicant in the class to file an individual request for such relief. Such a system of case-by-case relief would place the burden of prosecuting a fee petition on small entities, and such a system would be costly for the Commission to administer. However, the Commission could make this process much less cumbersome by declaring that in a request for fee relief, an applicant may show that it is a member of a class of eligible entities that the Commission has determined to be entitled to a rebuttable presumption of eligibility for a the waiver, reduction or deferral of the fee.

The Impact of Regulatory Fees on Small Businesses

Some of the regulatory fees are substantial elements of a small company's budget.[18] In today's financial climate, even a small fee can have a substantial impact on a small business' bottom line. A small business must pay the same fee amounts as the amounts paid by a large company. Therefore, fees represent a much higher proportion of the income or assets of small businesses than large businesses. In this way, the fee structure can impair the Commission's ability to fulfill Congress' direction to promote ownership diversity and lift market entry barriers.[19]

An amendment to the Commission's rules to provide SDBs with waivers or deferrals of application and processing fees, and with waivers, reductions or deferrals of regulatory fees, would be a desirable means of providing these businesses relief in today's economy. The impact of such fee relief would extend well beyond its immediate revenue impact on SDBs, because lenders, investors and sellers of assets would read the Commission's initiative as a vote of confidence by the agency in SDBs. In this way, fee relief would have much the same

[17] See, as to application and other processing fees, 47 C.F.R. §1.1117(b) (interpreting 47 U.S.C. §158(d)(2), and providing that "requests for waivers or deferrals will only be considered when received from applicants acting in respect to their own applications. Requests for waivers or deferrals of entire classes of services will not be considered.") See, as to regulatory fees, 47 C.F.R. §1.1166 (interpreting 47 U.S.C. §159(d), and providing that "[r]equests for waivers, reductions or deferrals of regulatory fees for entire categories of payors will not be considered.")

[18] For example, the 2008 regulatory fee for a Class A FM station is $2,275, and for a full power UHF station in markets 50-100 the 2008 regulatory fee is $6,800. See Assessment and Collection of Regulatory Fees for Fiscal Year 2008, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 08-65, FCC 08-182 (released August 8, 2008), Attachment B.

[19] See, inter alia, 47 U.S.C. §151 (promoting racial and gender nondiscrimination), 47 U.S.C. §257 (lifting market entry barriers), and 47 U.S.C. §309(j)(3)(B) (promoting ownership diversity by designing a system of competitive bidding by "avoiding excessive concentration of licenses" and by "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women[.]")

transaction-incenting impact that the former Tax Certificate Policy produced,[20] although on a smaller scale.

A Precedent for Fee Relief to Promote Ownership Diversity

There is precedent for fee relief to promote ownership diversity. In 1975, the permittee of the first minority owned television station sought a waiver of the $22,500 license fee for WGPR-TV in Detroit. In WGPR, Inc.,[21] the Commission denied the waiver request, with Commissioners Hooks and Quello dissenting. Commissioner Quello issued a statement that precisely captured the equities facing the Commission today vis-à-vis disadvantaged small businesses:[22]

> The majority decision, while correct in a strict legal and policy sense, fails to grasp the real significance of this issue. Here we have the first black-owned and black-operated television venture in the nation. This enterprise is being inaugurated in a well-developed television market where competition is established. The new venture will be facing that competition with a new UHF facility. The odds against success appear to be overwhelming given the obvious problems of programming, staffing, capitalizations, etc….
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> It is obvious that the Commission cannot and should not undertake to guarantee the success of WGPR-TV or any other television station. Nor, in my opinion, should we condone the failure of this unique venture by applying the same standard that we would apply to a venture with a virtual guarantee of success. There are significant and special public interest and social considerations here. The Commission should extend every reasonable effort to encourage the viability of the nation's first black-owned TV station….
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> The courts have ruled that minority ownership of broadcast properties must, under certain circumstances, be considered a positive factor in this Commission's deliberations.[23] I believe that this is one of those instances where special consideration is warranted and that mitigation or outright waiver of the fee is justified….

The WGPR decision is ripe to be overruled since it relies on an unfortunate 1965 decision, Ultravision Broadcasting Co.,[24] which established needlessly stringent financial qualifications tests for broadcast applicants. At Chairman Fowler's initiative, the Commission overruled Ultravision in 1981 because Ultravision "conflicts with Commission policies favoring minority

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[20] See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978). Congress repealed the Tax Certificate Policy in 1995. Self-Employed Persons Health Care Deduction Extension Act of 1995, Pub. L. No. 104-7, 2, 109 Stat. 93 (1995).

[21] 54 FCC2d 297 (1975).

[22] Id. at 298.

[23] Commissioner Quello cited TV 9, Inc. v. FCC, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974) and Garrett v. FCC, 513 F.2d 1056 (1975).

[24] 1 FCC2d 544 (1965).

ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses."[25]

Potentially Eligible Classes of Applicants for Fee Relief

In principle, regulatory fee exemptions, waivers and deferrals could be offered to any of three deserving classes of applicants:

1. Eligible entities, as described above.[26]

2. Companies incubating SDBs might also deserve relief when such incubation provides the "benefit of an incentive for eligible entity financing."[27]

Recommendation

The Advisory Committee on Diversity for Communications in the Digital Age recommends that the Commission issue a Notice of Proposed Rulemaking (NPRM) that would tentatively conclude that socially and economically disadvantaged small businesses, companies incubating socially and disadvantaged small businesses, and regulatees providing multilingual service or service to Indian reservations, should generally be entitled to a rebuttal presumption of eligibility for waivers or deferrals of application and other processing fees, and for waivers, reductions or deferrals of regulatory fees. The NPRM should seek comment on these issues:

1. the classifications of entities whose members would be rebuttably presumed eligible for individual fee relief;

2. which types of fees should be subject to relief;

3. whether fee relief should be offered in the form of waivers, or reductions, or deferrals;

4. the aggregate extent to which fee waivers, reductions or deferrals could be offered without materially impairing the Commission's ability to generate financing for its own

[25] Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301) and Modification of Processing Standards for Determining the Financial Qualifications of Broadcast Station Purchasers, 87 FCC2d 200, 201 (1981).

[26] See n. 2 supra.

[27] Id. at 5943 ¶56 (2007). Therein the Commission created "an incentive plan under which a company financing or incubating an eligible entity would be guaranteed a priority if it files for a duopoly simultaneously with other entities in a market that can support only one additional duopoly. This vested priority in a duopolization queue would reward the large broadcaster that had incubated or financed an eligible entity if it filed simultaneously for a duopoly with a non-incubating entity." Id. The Commission concluded that "in this situation, a general statement of policy that grants priority to entities funding or incubating eligible entities would promote ownership diversity." Id.

operations, inasmuch as the Commission's budget requirements may limit its flexibility in offering fee relief; and

5. the amounts of reductions of specific fees, and the lengths of deferrals of specific fees, that would be appropriate.

Due to current economic conditions that especially threaten the economic viability of small and specialized businesses, the NPRM should proceed on a fast track. Further, the NPRM should provide that the effective date for applicable fee relief would be retroactive to the date on which the NPRM was published in the Federal Register.

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