**ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2021**

# United States Court of Appeals for the District of Columbia Circuit

**No. 20-1234**

TELESAT CANADA, *et al.*,

*Petitioners,*

*v.*

THE FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

*Respondents.*

On Petition for Review of Final Agency Action of the Federal Communications Commission in *Assessment and Collection of Regulatory Fees for Fiscal Year 2020 and Assessment and Collection of Regulatory Fees for Fiscal Year 2019,* 85 Fed. Reg. 37364 (June 22, 2020)

# OPENING BRIEF OF PETITIONERS

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# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

## A. Parties, Intervenors, and Amici Curiae[1]

These cases involve the following parties:

**Petitioners**:

Telesat Canada ("Telesat") is a privately held company organized under the laws of Canada; Eutelsat S.A. ("Eutelsat") is a *société anonyme* organized under the laws of France; Kinéis is a joint stock company established under the laws of France; Hiber Inc., ("Hiber") is a corporation organized under the laws of the State of Maryland; Inmarsat Group Holdings Ltd. ("Inmarsat") is a limited company organized under the laws of the United Kingdom.

**Respondents**:

The Federal Communications Commission ("FCC" or "Commission") and the United States of America

## B. Ruling Under Review

This case involves final agency action of the Federal Communications Commission: *Assessment and Collection of Regulatory Fees for Fiscal Year 2020* and *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report

[1] Appendix A of the *R&O* (JA 225) (as defined below) identifies the parties filing comments and reply comments below.

and Order and Notice of Proposed Rulemaking, FCC 20-64, 35 FCC Rcd 4976 rel. May 13, 2020) and published on June 22, 2020, at 85 Fed. Reg. 37364 (JA 190-307) (the "*R&O*").

### C. Related Cases

This case has not been before this Court or any other court. However, this Court has previously passed upon the statutory provisions at issue in: *PanAmSat v. FCC*, 198 F.3d 890 (D.C. Cir. 1999) and *Comsat v. FCC*, 114 F.3d 223 (D.C. Cir. 1997).

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners state as follows:

**Telesat.** Telesat is a privately held corporation organized under the laws of Canada. Loral Space & Communications Inc. ("Loral"), a public company, through its wholly owned subsidiary Loral Holdings Corporation, holds 62.65% of the equity of Telesat. Loral, through its previously mentioned subsidiary, holds a 32.63% voting interest for all matters. Canada's Public Sector Pension Investment Board ("PSP"), through its wholly owned subsidiary Red Isle Private Investments Inc., a Canadian company, holds 36.67% of the equity of Telesat. PSP is a Canadian Crown corporation established by the Canadian Parliament. PSP holds a 67.37%

voting interest for all matters except the election of the board of directors, and a 29.37% voting interest for the election of the board of directors. John P. Cashman, a citizen of Canada and Ireland, holds a 31.16% voting interest solely for the election of the board of directors.

**Eutelsat.** Eutelsat is a *société anonyme* organized under the laws of France. 96.37% of Eutelsat's share capital is held by Eutelsat Communications S.A., the publicly traded parent of Eutelsat. In addition, the Russian Satellite Communications Company ("RSCC") holds 3.38% of the shares issued by Eutelsat and 0.25% of the shares of Eutelsat are held by other non-Eutelsat entities. RSCC and these other entities have no control over Eutelsat. All shareholdings of Eutelsat (other than the 0.05% of such shares held by Eutelsat's employees and executives) are a result of the privatization of Eutelsat, formerly an intergovernmental organization. 19.98% of the share capital of Eutelsat Communications S.A. is held by Bpifrance Participations. Approximately 50% of Bpifrance Participations' share capital is held by the *Caisse des Dépôts et Consignations* (the "CDC") and approximately 50% of its share capital is held by the French State. 7.58% of the share capital of Eutelsat Communications S.A. is held by *Fonds Stratégique de Participation*. 6.73% of the share capital of Eutelsat Communications S.A. is held by China Investment Corp. ("CIC") through Flourish Investment Corporation (0.014%), Best Investment Corporation (0.035%) and

Fullbloom Investment Corporation (6.68%), all organized under the laws of the People's' Republic of China. To the best of Eutelsat Communications S.A.'s knowledge, no other shareholders own, directly or indirectly, more than 10% of its share capital or voting rights.

**Hiber.** Hiber is a corporation organized under the laws of the State of Maryland. Hiber B.V., a Netherlands corporation, through its wholly-owned U.S. subsidiary Hiber US Holding Inc., owns 100% of the shares of Hiber. The following Netherlands corporations have an interest in Hiber B.V. greater than 10%: TUWA B.V. (23%), Stg Administratiekantoor Magnitude Space (19%), Finch Capital Fund II Cooperatief U.A. (19%), Hartenlust Space B.V. (12%), and Magnitude B.V. (12%).

**Kinéis.** Kinéis is a joint stock company established under the laws of France. Its largest shareholder (32%) is *Collecte Localisation Satellites* ("CLS"), originally established as a wholly-owned subsidiary of the French space agency, *Le Centre National d'Études Spatiales* ("CNES"). CNES continues to hold a 34% stake in CLS and also holds a 26% direct stake in Kinéis. No publicly held company holds a 10% or greater direct or indirect interest in Kinéis.

**Inmarsat.** Inmarsat is a limited company organized under the laws of the United Kingdom. It has been acquired by a consortium of four entities each of which holds a 25% voting interest in Inmarsat being (i) funds advised by Apax; (ii)

funds advised by Warburg Pincus or its affiliates; (iii) Canada Pension Plan Investment Board; and (iv) Ontario Teachers' Pension Plan Board ("OTPP"), and they hold the shares indirectly through a series of wholly-owned subsidiaries: (1) 2684343 Ontario Limited, a Canadian corporation; (2) CPP Investment Board Private Holdings (4) Inc., a Canadian corporation; (3) WP Triton Co-Invest, L.P., a Cayman Islands exempted limited partnership; and (4) Triton LuxTop, a Luxembourg limited liability company.

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# GLOSSARY OF TERMS

Inmarsat: Inmarsat was a non-profit intergovernmental organization established in 1979 to operate a satellite communications network for the maritime community. Inmarsat was privatized in 1998.

PanAmSat: PanAmSat Corporation operated a fleet of communications satellites until it was acquired by Hughes Electronics.

Separate System: The "Separate Satellite System Policy" permitted the launch of satellites that would compete with Intelsat/Inmarsat, though their activities initially were restricted to specialized markets. Later they were permitted to provide a full array of international satellite services and Intelsat/Inmarsat were fully privatized.

## JURISDICTIONAL STATEMENT

Public notice has been given and the *R&O* is final for purposes of court review.[2] Jurisdiction and venue are proper in this circuit of the U.S. Court of Appeals.[3]

## STANDING STATEMENT

Petitioners participated in the agency proceedings below in which they showed the Commission lacks authority under Section 9 to impose regulatory fees on non-U.S. licensed space stations. Nevertheless, in an order following the *R&O*,[4] the Commission required Petitioners to pay the following regulatory fees on their non-U.S. licensed space stations: Telesat – approximately $ 588,750.00;[5]

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[2] 47 C.F.R. § 1.4(b)(1).

[3] *See* 28 U.S.C. § 2342(1) 28 U.S.C. § 2343. Section 9a includes a proviso that "[a]ny adjustment or amendment to a schedule of fees under section 159 of this title is not subject to judicial review." 47 U.S.C. § 159a (formerly codified at 47 U.S.C. § 159(b)). This proviso does not shelter from judicial review challenges to the FCC's authority to act under Section 9. *Comsat v. FCC*, 114 F.3d at 227 (D.C. Cir. 1997).

[4] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2020*, Report and Order and Further Notice of Proposed Rulemaking, FCC 20-120 (rel. Aug. 31, 2020).

[5] Due to anomalies, Telesat is working with FCC staff to rectify its 2020 regulatory fee obligation.

Eutelsat –$686,875.00;[6] Kinéis -- $0;[7] Hiber -- $0;[8] Inmarsat -- $588,750.00[9] Unless the *R&O* is reversed on appeal, Petitioners will be unable to recover these amounts and will have to make similar regulatory fee payments in future years. Accordingly, the Petitioners are suffering a direct and tangible injury resulting from the *R&O*.

## STATEMENT OF ISSUES

1. Whether the Commission lacked authority under Section 9 of the Communications Act, as originally promulgated, 47 U.S.C. § 159, to impose regulatory fees on satellites not licensed by the FCC.

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[6] In regards to quantifying prospective 2021 regulatory fee obligations, Eutelsat has two other satellites which were not made subject to the regulatory fee obligations for 2020 but which would potentially become subject to this framework during 2021 if the FCC action to impose such fees on non-U.S. licensed space stations is permitted to stand. A third satellite may also become subject to 2021 regulatory fee obligations subject to the determination of an FCC petition for declaratory ruling. A further satellite has been removed from operation.

[7] Kineis has no current regulatory fee obligation as its market access petition is still pending with the FCC.

[8] Hiber did not owe Section 9 regulatory fees for 2020, but it expects to owe in 2021 something comparable to the $223,500 fee assessed on non-geostationary satellite systems in 2020.

[9] The six satellites for which Inmarsat paid Section 9 regulatory fees include two space stations for which it was not billed (but should have been) by the FCC. Inmarsat did not pay a regulatory fee for a space station for which it had been billed but should not have been.

2. Whether amendments to Section 9 in "RAY BAUM'S Act," Consolidated Appropriations Act, 2018, Division P, Title I, Public Law No. 115-141, § 102, 132 Stat. 348, 1082-86 (2018), authorized the Commission to impose regulatory fees on satellites it has not licensed.

3. Whether the Commission violated the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), when it changed its decades-old interpretation of Section 9 based on a legal theory it first propounded long after the Notice of Proposed Rulemaking was released and the comment period closed.

4. Whether an agency may change a well-established statutory interpretation once that interpretation has been incorporated into subsequent legislation or otherwise implicitly adopted by Congress.

5. Whether the *R&O* otherwise violated Section 706 of the APA, 5 U.S.C. § 706, in that it was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

## STATUTES AND REGULATIONS

1. The governing statute was promulgated as Section 9 of the Communications Act, *see* Section 6002(a) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 (Aug. 10, 1993), originally codified at 47 U.S.C. § 159 (1995).

2. Section 9 was subject to general amendments in 2018, *see* Consolidated Appropriations Act, 2018, Division P, Title I, FCC Reauthorization, Public Law No. 115-141, § 102, 132 Stat. 348, 1082-86 (2018), and now is codified at 47 U.S.C. §§ 159, 159a (2019).

3. The Commission's rules pertaining to Section 9 are codified at 47 C.F.R. §§ 1.1151 *et seq.*

## INTRODUCTION

Petitioners operate satellites that countries other than the United States have licensed. For nearly thirty years, the Commission maintained that its authority to assess and collect "space station" fees under Section 9 is limited to space stations it directly licenses pursuant to Title III of the Communications Act.[10] The Commission relied primarily on this unequivocal statement in Section 9's legislative history: "the [Conference] Committee intends that fees in this [space station] category be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will only apply to space stations directly licensed by the Commission under Title III of the Communications Act."[11]

Time and again, the Commission reaffirmed this interpretation.[12] Congress, which at least indirectly revisits Section 9 each year in the budget process before the FCC adopts regulatory fees for that year, has left the Commission's interpretation undisturbed.

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[10] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, Report and Order, 10 FCC Rcd 13512, 13549-51 (1995) ("*1995 Order*").

[11] Conference Report H. Rept. No. 213, 103d Cong., 1st Sess. 499 (1993) ("*1993 Conference Report*").

[12] *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, Report and Order, 14 FCC Rcd 9868, 9882-83 (1999) ("*1999 Order*"); *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 10767, 10781 (2014) ("*2014 Order*").

More than a quarter of a century after the adoption of Section 9, the Commission reversed course and decided it could impose regulatory fees on space stations it does not directly license under Title III.[13] In support of its action, the Commission has alternated between two legal theories, one of which requires believing Congress meant something different from what it explicitly said and the other of which requires believing Congress meant something it never said. The Commission did not even articulate the second of the theories publicly until the eve of decision. The Commission's changed position is procedurally and substantively flawed, and the *R&O* should be vacated in relevant part.

## STATEMENT OF THE CASE

In 1993, Congress directed the Commission, in Section 9 of the Communications Act, to collect annual regulatory fees to defray the operational costs associated with "enforcement activities, policy and rulemaking activities, user information services, and international activities."[14] The original version of Section 9 included a fee schedule and required the FCC to revise the schedule each year by "proportionate increases or decreases to reflect . . . changes in the amount

[13] *R&O*, 35 FCC Rcd at 4979-4988 ¶¶ 7-26 (JA 193-202).

[14] Section 6002(a) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397 (Aug. 10, 1993), 47 U.S.C. § 159(a)(1) (1995) ("*1993 Budget Act*").

appropriated for the performance" of the specified activities, and to account for "unexpected increases or decreases in the number of licensees or units subject to payment of such fees."[15] The original schedule included "Space Station" fee categories for "geosynchronous orbit" satellites and "low Earth orbit" satellite systems.[16]

The Commission has held on multiple occasions that the term "space stations," as used in Section 9, encompasses only satellites the FCC directly licenses pursuant to Title III of the Communications Act. The Commission first recognized this principle at the dawn of the regulatory fee era:

> Congress stated with respect to space station fees that: "the Committee intends that fees in this category be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will only apply to space stations directly licensed by the Commission under Title III of the Communications Act."[17]

The Commission revisited this issue on several occasions and, until the *R&O*, always reaffirmed this view.[18]

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[15] 47 U.S.C. § 159(b)(2) (1995).

[16] *Id.* § 159(g). A geosynchronous orbit satellite has an orbit that is synchronized with the rotation of the Earth. Objects in low Earth orbit, by contrast, are not so synchronized.

[17] *1995 Order*, 10 FCC Rcd at 13550 (citing the *1993 Conference Report*).

[18] *See, e.g., 1999 Order*, 14 FCC Rcd at 9882-83; *2014 Order*, 29 FCC Rcd at 10781.

This Court, when presented with a case involving whether Comsat Corporation ("Comsat") was subject to Section 9 space station regulatory fees, appeared to agree that the Commission's fee authority is coterminous with its Title III licensing jurisdiction.[19] The Court held that "Comsat must seek FCC authorization under Title III" for its space station operations such that "imposing § 9 fees on Comsat is consistent with the FCC's Title III licensing jurisdiction."[20]

Meanwhile, Congress, which revisits Section 9 at least indirectly each year by establishing the amount the Commission should seek to recover pursuant to Section 9, never has questioned the FCC's interpretation of the statute.[21]

One of the Commission's two legal theories turns on whether Congress, when it enacted Section 9 in 1993, could have imagined that any satellites not directly licensed under Title III, other than those operated by Intelsat and Inmarsat, would serve the United States. When the first satellite systems were being deployed in the early 1970s, the governments of Canada and the United States already were, at the highest levels, considering issues relating to when, and under

[19] *See PanAmSat v. FCC*, 198 F.3d 890 (D.C. Cir. 1999).

[20] *Id*. at 895-96 (emphasis original, internal citations omitted).

[21] The most recent Congressional review occurred in the Consolidated Appropriations Act, 2020, Pub. L. No. 116-93 (signed by the President on December 20, 2019).

what circumstances, trans-border satellites services would be permitted.[22] Initially, permission for these operations was granted on an *ad hoc* basis mainly for spillover coverage because Intelsat, which at the time was an intergovernmental, treaty-based organization, had a monopoly over most international fixed satellite services.[23] The United States led the way in efforts to break this monopoly by introducing competition from commercial satellite systems separate from Intelsat. The Commission established its separate systems policy in response to a 1984 Presidential Determination that satellite systems separate from Intelsat, providing service between the U.S. and international points, "are required in the national interest."[24]

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[22] *See* Letter from Bertram Rein, Deputy Assistant Secretary of Bureau of Economic and Business Affairs, U.S. Department of State, to Kenneth Williamson, Minister of Embassy of Canada (Nov. 7, 1972) (JA309-311); Letter from Bertram Rein to Dean Burch, Chairman, FCC (Nov. 9, 1972) (JA 308-). *See also Rules and Policies Pertaining to a the Non-Voice, Non-Geostationary Mobile-Satellite Service*, 8 FCC Rcd 8450, 8454 (1993) ("arrangements for U.S. licensees to access foreign space stations for either domestic or international use have been made on a bilateral, government-to-government basis [and the Commission believes it] will best be able to determine the extent to which such access should be permitted by continuing this approach").

[23] *See, e.g.*, *Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service*, 8 FCC Rcd 8450, 8454 (1993); *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd 24094, 24099 (1997) ("*DISCO II*").

[24] Presidential Determination No. 85-2 (Nov. 28, 1984), 49 Fed. Reg. 46,987. The separate systems policy was written into law as part of the Foreign Relations

The first separate system satellite was launched by PanAmSat in 1988.[25] Although PanAmSat was U.S.-licensed, the FCC, in implementing the separate systems policy, plainly contemplated that non-U.S. licensed separate systems also would serve the United States. In an early separate systems decision released in 1985, eight years before Section 9 was enacted, the FCC took note of "planned regional satellite systems for the Middle East and Africa and certain European Domestic satellite systems which would have 'footprints' that would cover much of the eastern half of the United States and Canada and, thus, would be capable of providing transatlantic service."[26] In sum, when Congress enacted Section 9 in 1993, non-U.S. licensed satellite systems separate from Intelsat already were serving the United States and the U.S. government had been taking affirmative measures for eight years to facilitate additional U.S. services from such satellite systems.

Subsequently, in a proceeding that became known as "*DISCO II*," the Commission adopted rules to standardize foreign satellite access to the U.S.

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Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 146(g), 99 Stat. at 426.

[25] *PanAmSat*, 198 F.3d at 892.

[26] *Establishment of Satellite Systems Providing International Communications*, 101 FCC.2d 1046, 1055 (1985) (the "*Separate Systems Order*").

market.[27] The Commission stated its *DISCO II* framework "largely replace[d] the Commission's [then] current approach of reviewing applications involving foreign-licensed satellites based on the individual circumstances before it."[28] It drew a distinction for this purpose between commercial systems and the Intelsat and Inmarsat systems.[29] Since *DISCO II*, the number of foreign-licensed satellites serving the United States has grown dramatically, to the great benefit of U.S. consumers.[30]

Although it is not uncommon for people to speak of a U.S. market access "grant" or "authorization" for a foreign-licensed satellite as a shorthand term when such a satellite is permitted to serve the United States, in reality the Commission does not issue Title III licenses or other authorizations to the operators of non-U.S. licensed satellites. Rather, the authority to use non-U.S. licensed satellites to serve the United States resides with individual earth station operators, who hold Title III licenses for their earth stations. Under the Commission's *DISCO II* procedures,

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[27] *DISCO II*, 12 FCC Rcd 24094 (1997).

[28] *Id*. at 24099 ¶9.

[29] *Id*. at 241010 ¶17.

[30] *See R&O* 35 FCC Rcd at 4983 ¶ 17 (JA 197-198).

the Commission modifies the licenses of these earth station operators to add non-U.S. licensed satellites as points of communication.[31]

There are two avenues for such license modifications: an application can be filed to add a foreign-licensed satellite as a point of communication to an individual earth station license or a petition for declaratory ruling can be filed seeking an FCC determination that all routinely-licensed earth stations may add a foreign-licensed satellite as a point of communication.[32] In either case, a showing must be made that the foreign-licensed satellite complies with the Commission's technical requirements.[33]

Under the rules the Commission adopted in the *R&O*, a foreign satellite operator could become subject to FCC space station regulatory fees even if it takes no affirmative steps to serve the U.S. market. For example, a foreign satellite operator might provide space segment capacity to a customer that could be used to

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[31] *DISCO II*, 12 RCC Rcd at 24100 ¶16 ("[W]e will not require space stations licensed by another country or administration to obtain separate and duplicative U.S. space station licenses. Rather, we will license earth stations located in the United States to operate with these satellites.").

[32] 47 C.F.R. § 25.137. *See also Comprehensive Review of Licensing and Operating Rules for Satellite Services*, Second Report and Order, 30 FCC Rcd 14713, 14796 at ¶ 250 (2015) *see also Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order, 18 FCC Rcd 10760 (2003), *and Amendment of the Commission's Space Station Licensing Rules and Policies*, Second Order on Reconsideration, 31 FCC Rcd 9398 (2016).

[33] 47 C.F.R. § 25.137(b).

serve the United States, Canada, or Mexico. If the customer served only Canada or Mexico, the satellite operator would not be subject to U.S. regulatory fees. But if the customer applied to add the foreign satellite as a point of communication for even a single FCC-licensed earth station, the satellite operator would become liable for the full regulatory fee.[34]

Any such regulatory fee would be duplicative for many satellite operators. For example, Telesat operates a fleet of geostationary orbit space stations, some of which are licensed in the United States by the FCC, while others are licensed in Canada by Innovation, Science and Economic Development.[35] Telesat pays Section 9 regulatory fees to the FCC for its facilities licensed in the United States, and it pays fees of a similar magnitude to Innovation, Science and Economic Development for its facilities licensed in Canada.

The Commission's original legal theory, as stated in the *2019 FNPRM* below,[36] is that because RAY BAUM'S Act[37] eliminated a reference to "licensees"

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[34] *R&O*, 35 FCC Rcd at 4989 (JA 203).

[35] Innovation, Science and Economic Development Canada specifically administers and regulates launch and operation of Canadian satellite systems.

[36] *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 8199 (2019) (JA 10-133) ("*2019 FNPRM*") (internal citations omitted).

[37] *See* Consolidated Appropriations Act, 2018, Division P, Title I, FCC Reauthorization, Public Law No. 115-141, § 102, 132 Stat. 348, 1082-86 (2018) (codified at 47 U.S.C. §§ 159, 159A) ("RAY BAUM'S Act").

in what is now subsection 9(c)(1)(A) of the Communications Act, which governs annual adjustments to the regulatory fee schedule, it was permitted, or perhaps required, to impose regulatory fees on non-U.S. licensed satellites.[38] The FCC offered no other legal rationale in the *2019 FNPRM* for changing its well-established interpretation of its Section 9 statutory fee authority.

In their comments and reply comments in the rulemaking below, Petitioners demonstrated how the Commission's reasoning was flawed:

- The Commission's interpretation of subsection 9(c)(1)(A) conflicted with the plain meaning of that subsection and its associated legislative history, neither of which refers to foreign-licensed satellites or the space station regulatory fee.
- The Commission maintained that after Congress removed the word "licensees" from Section 9, the words that already were in Section 9 and remained should be read to give it authority to impose regulatory fees on space stations the Commission does not directly license under Title III, but those same words previously were found not to give it such authority.
- By removing the word "licensees" from Section 9, Congress narrowed the Commission's authority. One cannot derive a new source of authority from a language change the only effect of which is to narrow the Commission's authority.
- Subsection 9(c)(1)(A) does not even address which services are subject to regulatory fees. It only addresses how to adjust regulatory fees each year for services that are already subject to those fees.

[38] *2019 FNPRM*, 34 FCC Rcd at 8213 (JA 34).

In an *ex parte* meeting with FCC staff that occurred only days before the Commission released a draft *R&O*,[39] Petitioners learned that the Commission had changed its legal theory. It was not, Petitioners were informed, that RAY BAUM'S Act had expanded the Commission's Section 9 authority.

Rather, the Commission now was taking the position that it had misread the *1993 Conference Report* and, in fact, that satellites licensed by other administrations always had been subject to Section 9 fees. This position was based on a never-before stated assumption that Congress could not have imagined in 1993 that any satellites not directly licensed under Title III, other than those operated by Intelsat and Inmarsat, would serve the United States.

Recognizing that time was short, Petitioners prepared and submitted an *ex parte* filing addressing the Commission's new legal theory,[40] but to no avail, as a draft *R&O* was released later that same day that propounded the new theory. The final version of the *R&O* rests on the Commission's new-found legal theory.

Thus, without providing a meaningful opportunity for the multiple participants in the *ex parte* meeting to comment on its new legal theory, and without even providing notice of the new theory to other potentially interested

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[39] The Commission releases draft versions of items to be taken up at its open meetings.

[40] *See* Letter from Joseph A. Godles to Marlene H. Dortch, Secretary, FCC (Apr. 22, 2020) (JA 180-184) ("*April 22 Ex Parte*").

parties, the Commission radically changed its long-held interpretation of Section 9 and extended regulatory fees to satellites licensed by other administrations.

## SUMMARY OF ARGUMENT

For nearly 30 years, based on express language in the legislative history, the Commission consistently held that its authority to impose space station regulatory fees is limited to satellites it directly licenses under Title III of the Communications Act. Congress has ratified the Commission's interpretation both implicitly and explicitly.

In its *2019 FNPRM*, the Commission theorized that because RAY BAUM'S Act eliminated a reference to "licensees" in the provision governing annual adjustments to the regulatory fee schedule, it now was permitted, or perhaps required, to impose regulatory fees on non-U.S. licensed satellites. This theory conflicts with the plain meaning of RAY BAUM'S Act, which makes no reference to foreign-licensed satellites or the space station regulatory fee. The theory also improperly looks to a provision that narrowed the Commission's authority, by removing its ability to adjust the fee schedule based on changes in the number of licensees, as a new source of authority. The provision, moreover, merely authorizes the Commission to adjust regulatory fees in cases in which they apply and does not speak to whether particular services, such as those provided via

foreign-licensed satellites, are subject to the fees. Finally, the Commission's theory conflicts with principles of statutory construction under which (i) Congress is presumed not to intend to effect significant changes in legal rights or obligations absent a clear statement, which was absent here, indicating such a purpose and (ii) a word in a statute (in this case, "units," which RAY BAUM'S Act left untouched) cannot be given opposite meanings at different points in time.

In the *R&O*, the Commission abruptly abandoned its original theory and also abandoned its longstanding interpretation of the regulatory fee statutory provision. The Commission now maintains that the legislative history evinces only an intent to exclude the satellites of two intergovernmental organizations that later were privatized – Intelsat and Inmarsat – from the space station fee, rather than excluding any satellite the Commission does not directly license under Title III of the Communications Act.

The Commission's new theory is procedurally deficient because it was adopted without observing APA requirements for notice and the opportunity to comment. The theory is substantively deficient because it is based a false premise. The theory presupposes that when Congress enacted the original regulatory fee schedule in 1993, the only satellites it could have envisioned that would serve the United States but would not be directly licensed by the FCC were Intelsat and Inmarsat satellites. In fact, foreign-licensed satellites separate from Intelsat and

Inmarsat already were serving the United States at that time, as the Commission recognized in its very first regulatory fee order, in which it determined it lacked authority to impose regulatory fees on such satellites.

The Commission suggests in the *R&O* that the regulatory fee statute's use of the term "space station" is so clear that the statute's legislative history should be ignored. This position conflicts with this Court's approach in the *PanAmSat* case, in which the Court had under consideration the same space station fee provision that is at issue here and took the provision's legislative history into account. The position also overlooks ambiguities in the statute that leave doubt as to whether for fee purposes Congress meant "space stations" to include foreign-licensed space stations. In particular, the fee categories Congress established generally are limited to services the Commission directly licenses and omit services the Commission regulates but does not directly license. The legislative history provides guidance for resolving these ambiguities.

# ARGUMENT

## I. FROM THE OUTSET, SECTION 9 LIMITED THE FCC'S SPACE STATION REGULATORY FEE AUTHORITY TO SATELLITES THE COMMISSION DIRECTLY LICENSES UNDER TITLE III.

### A. The FCC Correctly Concluded that Congress Intended to Limit Section 9 Space Station Fees to Satellites Licensed Under Title III.

In the *1993 Budget Act,* Congress adopted an initial statutory fee schedule, which the Commission was to adjust each year to reflect the amounts appropriated by Congress in the budget and to reflect "unexpected increases or decreases in the number of licensees or units subject to payment of such fees."[41] The fee schedule identified several dozen categories of services subject to regulatory fees, including two "space station" categories: one for geostationary orbit satellites and one for low Earth orbit satellite systems.

With one understandable exception,[42] the fee schedule identified only radio-based services the Commission directly licenses under Title III of the Communications Act and common carrier services the Commission directly authorizes under Title II of the Communications Act. By the same token, the fee

[41] 47 U.S.C. § 159 (1995).

[42] The fee schedule listed cable television services, which are authorized by local franchising authorities, not the FCC, but which are franchised based on a framework that is dictated by Title VI of the Communications Act and the Commission's implementing rules.

schedule did *not* include many services the Commission regulates but does not directly license. Congress' schedule did not, for example, impose fees on television networks, internet service providers, television set manufacturers, or unlicensed radio services.

Although Congress did not specify a geographic scope, it is reasonable to assume the fee schedule was not meant to cover service provided in foreign jurisdictions. It would have made little sense, for example, for the FCC to impose Section 9 fees on Canadian cable television systems.[43]

With respect to satellite services, however, the text of Section 9 leaves room for doubt, as the only textual guidance is the reference in the fee schedule to "space stations," which are not further defined. Did Congress mean to exclude foreign-licensed space stations because the FCC does not directly license them, or because of their extra-territoriality? Section 9 does not say.

Questions regarding the scope of the Section 9 "space station" category were before this Court in the 1999 *PanAmSat* case, which is discussed in greater detail below. Although the case was decided on a legal distinction between space

[43] Although rarely explicit, statutes presumptively include territorial limits. *E.g.*, *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (legislation, "unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States").

stations for which the operator had Title III authority and those for which no Title III authority was required, at the most basic level the issue in the case was whether there is any textual limit to the term "space station" as it is used in Section 9. As counsel for the Commission cautioned, absent some defining principle, an overly broad interpretation of the "space station" fee category would require the FCC to "extract § 9 fees when, for example, Comsat and other U.S. companies use Canadian and Mexican satellites."[44] Although the underlying assumption of the argument was that it would be nonsensical to attempt to assess Canadian or Mexican satellites for space station fees, the text of the statute offers no such limitation.

Fortunately, as the FCC recognized when it first grappled with the question, the *1993 Conference Report* provides explicit guidance:

> Specifically, Congress stated with respect to space station fees that: "the Committee intends that fees in this category be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will only apply to space stations directly licensed by the Commission under Title III of the Communications Act."[45]

Thus, with regard to space stations, the Commission concluded that its Section 9 authority extends only so far as its Title III jurisdiction.

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[44] *PanAmSat,* 198 F.3d at 895.

[45] *1995 Order,* 10 FCC Rcd at 13550 (citing the *1993 Conference Report*).

In the *R&O*, the Commission has abandoned that position. The Commission now maintains it "can and should adopt regulatory fees for non-U.S. licensed space stations with U.S. market access"[46] because (i) the "exceptions" in Section 9(e)(1) do "not include operators of non-U.S. licensed space stations with U.S. market access"[47] and (ii) although RAY BAUM'S Act codified the FCC's prior regulatory exemption for noncommercial radio and television stations, it did not add non-U.S. satellites to the statutory list of exceptions.[48] Thus, the Commission concluded, "nothing in the text of the statute supports maintaining a blanket exception from regulatory fees for non-U.S. licensed space stations granted market access."[49]

The issue, however, is not, nor has it ever been, whether space stations licensed by other administrations are "exempt" from Section 9. The exceptions listed in Section 9(e)(1) apply to a limited number of entities and services licensed by the FCC – governmental entities, nonprofit entities, amateur radio licensees licensed under Part 97 of the Commission's rules, and noncommercial radio and television stations - that otherwise would be responsible for Section 9 fees. As the Commission recognized from the outset, on the other hand, and as discussed

[46] *R&O*, 35 FCC Rcd at 4980-4981 ¶ 10 (JA 194-195).

[47] *See id.* ¶ 10 & n.32.

[48] *Id.*

[49] *Id.*

above, non-U.S. licensed satellites are not encompassed within its Section 9 authority and, thus, no "exemption" is required.

This Court recognized this distinction in the *Comsat* case. The central question in *Comsat* was whether a provision of Section 9 that forecloses judicial review of rate adjustments precluded the court from reviewing the Commission's decision to impose on Comsat a new "signatory fee."[50] This Court noted that, were it to accept the Commission's argument in favor of preclusion, it would suggest that "the Commission could impose a tax on an unregulated railroad or a tax on an individual for eating ice cream" but avoid review "so long as the FCC claimed to be acting under Section 9."[51] The Court characterized that as a "preposterous position, one that [it would] not countenance."[52]

That is, there is an antecedent question to any FCC action purportedly taken pursuant to Section 9: does the Commission have authority to act in the first instance? If it does not, then there is no quibbling about what specific provisions of Section 9 may require or prohibit. As a result, one is unsurprised to find that Section 9(e)(1) does not list an exception for "individuals eating ice cream" or

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[50] *Comsat*, 114 F.3d at 227. The review preclusion proviso originally was codified at 47 U.S.C. § 159(b)(2). A similar review preclusion proviso now is codified at 47 U.S.C. § 159a(a).

[51] *Comsat*, 114 F.3d at 227.

[52] *Id.*

"unregulated railroad[s]"; the FCC has no authority to assess such entities for regulatory fees under Section 9. It is similarly unsurprising that there is no textual exception for other entities that are not directly licensed by the FCC — such as space stations licensed by other countries.

It should go without saying that any number of entities and services the FCC regulates but does not directly license – television networks, internet service providers, television set manufacturers, and unlicensed radio services – have representatives that participate in FCC proceedings and do so with an expectation of benefit. It also should go without saying that *countless* individuals, companies, trade associations, *ad hoc* advocacy groups, public interest organizations, Hollywood studios, schools and universities, *etc.*, participate in FCC proceedings and do so with an expectation of benefit. Such actions do not make them subject to direct FCC licensing and do not subject them to Section 9 regulatory fees.[53]

Indeed, the fact that one is otherwise subject to, and must abide by, FCC rules does not confer authority upon the Commission to assess one for regulatory fees. Just as an "individual eating ice cream" while using an unlicensed radio transmitter must operate the device in accordance with FCC rules, a non-U.S.

[53] *Cf. R&O*, 35 FCC Rcd at 4980-4982, 4986 ¶¶ 10, 12, 21 (JA 194-196, 200) ("the active participation of operators of non-U.S. licensed space stations in [FCC] adjudications and rulemakings . . . demonstrates that they recognize benefits from Commission action to their operations within the U.S. market, since they would not participate in such proceedings if they held no possibility of benefit from them").

licensed space station, when operating lawfully within the U.S., must comply with all applicable FCC requirements. Neither the individual eating ice cream nor the space station's operator, however, by that fact is brought within the ambit of the FCC's Section 9 authority.

In short, the FCC is groping for a limiting principle to define which among all of the space stations orbiting the earth it has authority to reach under Section 9 when, in fact, the limiting principle has been obvious from the dawn of the regulatory fee era: Congress intended for the Commission to collect Section 9 space station only in the case of space stations licensed directly pursuant to Title III.

### B. The FCC's Original Interpretation of Section 9 Has Been Reaffirmed Repeatedly

Notwithstanding the unequivocal direction in the *1993 Conference Report*, and the Commission's early and definitive interpretation of Section 9, the question arose repeatedly over the past twenty-five years whether the Commission could or should impose space station fees on satellites licensed by foreign administrations. On each such occasion, until the most recent, the Commission reaffirmed its conclusion that its space station fee authority under Section 9 is limited to satellites licensed pursuant to Title III.[54]

[54] *See, e.g., 1999 Order*, 14 FCC Rcd at 9883 ("Clearly, legislative history provides that only space stations licensed under Title III may be subject to

The issue has, at least indirectly, been the subject of litigation before this Court. First, in *Comsat Corp. v. FCC*, Comsat challenged an FCC amendment to the Section 9 schedule that would have added a "signatory fee" to be paid by Comsat based on its use of Intelsat and Inmarsat space segment.[55] The Commission responded, in part, by asserting that the review preclusion provision of what was then Section 9(b)(2) sheltered its amendment from judicial review. This Court rejected that proposition, holding that:

> [t]he no-review provision . . . merges consideration of the legality of the Commission's action with consideration of this court's jurisdiction in cases in which the challenge to the Commission's action raises the question of the Commission's authority to enact a particular amendment. Where, as here, we find that the Commission has acted outside the scope of its statutory mandate, we also find that we have jurisdiction to review the Commission action."[56]

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regulatory fees."); *2014 Order*, 29 FCC Rcd at 10781 ("Adopting a fee category for non-U.S.-licensed space stations raises significant issues regarding our authority to assess such a fee as well as the policy implications if other countries decided to follow our example."). In *Streamlining Licensing Procedures for Small Satellites*, 34 FCC Rcd 13077, 13091 ¶ 105 (rel. Aug. 2, 2019) (the "*Small Sat Order*"), the FCC made use of new authority under RAY BAUM'S Act to create a new fee category for a "small satellite" service. The fees in this category *would* apply both to FCC licensees and to non-U.S. systems authorized to access the U.S. market pursuant to newly adopted service rules. As such, the *Small Sat Order* is factually distinct from the case at bar and, in any event, the Joint Petitioners would not have had standing to challenge the *Small Sat Order* on appeal.

[55] *Comsat*, 114 F.3d at 223.

[56] *Id.* 114 F.3d at 227. Accordingly, finding that the Commission had acted without lawful basis, this Court vacated the amendment.

The Court described the Commission's position as "preposterous" because it would, in effect, have shielded from review *any* action taken by the Commission purportedly under the rubric of Section 9.[57] Here, as in *Comsat*, Petitioners challenge the Commission's authority under Section 9 to impose regulatory fees on space stations licensed by other administrations. Just as it was preposterous to suppose that the Commission might exercise Section 9 authority over an unregulated railroad, it is similarly nonsensical for the Commission to attempt to assess regulatory fees based on space stations over which it has no direct jurisdictional authority.

Two years later, the question now before the Court was more closely implicated. In the *PanAmSat* case, the Court was faced with the question of whether Comsat itself could be required to pay Section 9 fees based on its use of Intelsat and Inmarsat satellites. Although the Court, in addressing this issue, found no ambiguity in the statute with respect to Comsat, it nevertheless took into account the language in the *1993 Conference Report* limiting the Commission's space station regulatory fee authority to space stations licensed under Title III. The Court found this limitation to be inapplicable, noting that Comsat *was* a Title III

[57] *Id.*

licensee and that "imposing § 9 fees on Comsat [was] consistent with the FCC's Title III licensing jurisdiction."[58]

The ambiguity analysis for foreign-licensed space stations is distinct from the ambiguity analysis the Court engaged in with respect to Comsat. Given Congress' apparent intent in the Section 9 fee schedule to limit regulatory fees to services the Commission directly licenses and authorizes under Titles II and III of the Communications Act,[59] there was no ambiguity when it came to Comsat, a Title III licensee. One cannot discern from the Section 9 fee schedule, on the other hand, whether Congress intended to apply the space station fee to satellites that, because they are licensed by other countries, are not licensed under Title III. It is appropriate in this case, therefore, to resort to the *1993 Conference Report*.

The Commission itself plainly has perceived ambiguity to be an issue warranting a review of the legislative history. Time and again for nearly 30 years, it looked to the *1993 Conference Report* for guidance on the meaning of the Section 9 space station fee. Even the last-minute theory the Commission introduced in the *R&O* is dependent on language in the *1993 Conference Report*.

In any event, the Court looked to the *1993 Conference Report* in the *PanAmSat* case even when it found ambiguity to be lacking. No matter how it

[58] *PanAmSat*, 198 F.3d at 896.

[59] *See* Section I.A, above.

views the ambiguity question in this case, therefore, it is appropriate to take into account the intent Congress expressed in the *1993 Conference Report*.

In sum, based on an understanding that Congress intended it to collect Section 9 fees only from those it directly licenses, for more than a quarter of a century the FCC did not require entities that provide satellite services within the United States using non-U.S. satellites to remit regulatory fees. That understanding never has been upended or fundamentally questioned by this Court. Had the Commission's apprehension of congressional intent been erroneous, it is reasonable to assume Congress might have taken *some* action to set the Commission right. It has not.

## II. RAY BAUM'S ACT DOES NOT ADDRESS THE COMMISSION'S AUTHORITY TO IMPOSE REGULATORY FEES ON NON- U.S. LICENSED SPACE STATIONS.

Although it ultimately relied upon a different theory, the Commission asked in the *2019 FNPRM* whether changes made to Section 9 by RAY BAUM'S Act meant that the Commission may, or even must, require regulatory fee contributions for non-U.S. licensed satellites serving the U.S. market.[60] It did not.

RAY BAUM'S Act made a number of amendments to the content and structure of Section 9 (now Sections 9 and 9a). However, it made no reference to foreign-licensed satellites or the space station regulatory fee. Any attempt to

[60] *2019 FNPRM*, 34 FCC Rcd at 8213-14 (JA 34-35).

extend regulatory fees to foreign-licensed space stations based on RAY BAUM'S Act, therefore, would conflict with the plain meaning of the statute.

This conflict intensifies when one considers the manner in which the Commission extended regulatory fees to non-U.S. licensed space stations. The Commission held in the *R&O* that regulatory fees do not apply to communications with non-U.S. licensed space stations solely for tracking, telemetry and command purposes.[61] It similarly held that regulatory fees apply to communications via non-U.S. licensed space stations with some aircraft terminals but not others.[62] To accept the Commission's initial theory, therefore, one would have to believe not only that Congress intended to extend regulatory fees to foreign-licensed satellites without even mentioning them, but also that it meant to extend the fees only to certain foreign-licensed satellites but not others. That is a lot to read into Congress' silence on this issue.

The *2019 FNPRM*, moreover, relied upon a provision in RAY BAUM'S Act that actually limited the Commission's authority to make "adjustments" to the schedule of fees. Prior to RAY BAUM'S Act, Section 9(b)(2)(A) directed the Commission to adjust the fees "to reflect … unexpected increases or decreases in the number of licensees or units subject to payment of such fees." The revised

[61] *R&O*, 35 FCC Rcd at 4990 ¶ 30 (JA 204).

[62] *Id.*

language, now in Section 9(c)(1)(A), requires the Commission to adjust the rates "to … reflect unexpected increases or decreases in the number of units subject to the payment of such fees." That is, whereas the Commission formerly was authorized to make rate adjustments based either on changes in the number of licensees *or* on changes in the number of units, its authority is now more circumscribed in that it may only account for changes in the number of units. One cannot derive a new source of authority from a language change the only effect of which is to narrow the Commission's authority.

In addition, as a textual matter the *2019 FNPRM* conflated two distinct questions. First, which services are subject to Section 9 fees? Second, how are fees to be allocated among these services? Adjusting numbers of "units" is significant only with respect to the second question and says nothing about which services are subject to the Commission's regulatory fee authority.

The interpretation of RAY BAUM'S Act proposed in the *2019 FNPRM* also would violate fundamental principles of statutory construction. Even assuming that the deletion of the word "licensees" was not merely an editorial rectification,[63]

[63] Congress struck from Section 9 the word *licensees*, not *licenses*. But the number of *licensees* has never been a significant issue with respect to the calculation of regulatory fees. The former reference to *licensees*, therefore, had been extraneous from the outset.

this textual modification cannot support extending the space station fee to foreign-licensed satellites.

Congress is presumed not to intend to effect significant changes in legal rights or obligations absent a clear statement indicating such a purpose.[64] Here, there is no legislative history suggesting such a purpose, the statute has not been altered in a way that would evidence such a purpose, and the amendment at issue is in a subsection of Section 9 that does not even address the underlying question. In short, the inference proposed in the *2019 FNPRM* required an assumption "that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect."[65]

In addition, the *in pari materia* canon of construction imposes a strong presumption that a term used over time in the same statute is to be given a consistent meaning.[66] Accordingly, the term *units* should be construed to have the same meaning in both the prior version of Section 9 and the amended version. The Commission repeatedly concluded that non-U.S. licensed satellites are *not units* within the meaning of Section 9 and, therefore, that they are not to be assessed

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[64] *E.g.*, *Finley v. United States*, 490 U.S. 545, 554 (1989); *3M Co. v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994).

[65] *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994).

[66] *See Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005); *Smith v. United States*, 508 U.S. 223, 234-36 (1993); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 521-25 (1994).

"space station" regulatory fees. The fact that Congress eliminated the reference to *licensees* in subsection 9(c)(1)(A) does not somehow convert those same satellites into Section 9 *units*.

Thus, for many years and through many appropriations cycles, the Commission maintained that Section 9 permits it to reach only U.S.-licensed space stations. Congress never has reversed that conclusion and when, in 2018, it amended Section 9 in RAY BAUM'S Act, Congress was notably silent on the scope of the space station fee. Instead, it made only an ancillary change to language dealing with fee adjustments. No inference of a profound alteration in the statutory scheme is warranted.

## III. THE LEGAL THEORY UPON WHICH THE COMMISSION ULTIMATELY RELIED WAS PROCEDURALLY FLAWED AND BASED ON REVISIONIST HISTORY.

The comments and reply comments filed in response to the *2019 FNPRM* provided an ample record on whether RAY BAUM'S Act enlarged the Commission's Section 9 space station fee authority.[67] Based on that record, the Commission apparently concluded that RAY BAUM'S Act afforded it no such

[67] *See R&O*, 35 FCC Rcd 4981 ¶¶ 11-12 (JA 195).

new authority.[68] In an otherwise standard administrative proceeding, that would have been the end of the matter. In this case, it was not.

Instead, the FCC in the *R&O* rested its decision to impose Section 9 fees on non-U.S. satellites on an entirely new legal theory: It is not, the Commission now asserts, that RAY BAUM'S Act afforded it new authority to reach beyond its Title III jurisdiction in assessing Section 9 fees. Rather, the FCC now maintains, it had such authority since the inception of Section 9 and it previously was misreading the *1993 Conference Report*.[69] The Commission's leap to that conclusion in the *R&O* is procedurally improper, premised on a flawed revision of history, and entirely unsustainable.

### A. Implementing a Fundamental Change in the Law Based on a Legal Theory for which there was No Notice or Opportunity to Comment Fails the Most Fundamental Minimum Standards of Administrative Law.

The Administrative Procedure Act ("APA") requires, among other things, that agencies provide notice of proposed rules with "reference to the legal authority under which the rule is proposed," and allow "interested persons an opportunity to participate in the rule making."[70] The Senate report on the APA explains that

[68] *Id*. ¶ 12 (JA 195) ("we tend to agree that [RAY BAUM'S Act] *does not imply* a change in who could be assessed") (emphasis original).

[69] *Id*. at 4982-4984 ¶¶ 14-17 (JA 196-198).

[70] 5 U.S.C. §§ 553(b)(2) & (c).

"agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto," while the House report adds that "the required specification of legal authority must be done with particularity."[71]

The *R&O* violated these fundamental requirements. For more than two decades, the Commission construed Section 9 to authorize the imposition of "space station" fees only upon Title III licensees. In the *2019 FNPRM*, the Commission proposed extending Section 9 regulatory fees for the first time to non-U.S. licensed space stations, citing for authority the changes made to Section 9 by RAY BAUM'S Act.[72] In the *R&O*, however, the Commission relied for authority not on RAY BAUM'S Act, but rather on a new theory that the Commission had misread the original legislative history and that, in fact, non-U.S. satellites had always been subject to Section 9 fees.[73]

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[71] S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (reprinted in Administrative Procedure Act: Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 185, 200 (1946) ("Legislative History")); Legislative History at 233, 258 (H.R.Rep. No. 1980, 79th Cong., 2d Sess. 24 (1946)); *see also, e.g., Global Van Lines, Inc. v. Interstate Commerce Comm.*, 714 F.2d 1290, 1298 (5th Cir. 1983) (the Commission's authority to promulgate the rules in question "was one of the principal matters raised" below such that the Commission's failure to articulate the legal basis that it now advances "effectively deprived the petitioners of any opportunity to present comments on what amounts to half of the case").

[72] *2019 FNPRM*, 34 FCC Rcd at 8213 (JA 34).

[73] *See R&O*, 35 FCC Rcd at 4981, 4985-4986 ¶¶ 12, 18 (JA 195, 199-200). Petitioners were informed of this new legal theory in an *ex parte* meeting with

Accordingly, the Commission acted arbitrarily and capriciously, and failed to engage in reasoned decision-making in violation of the APA, by seeking notice and comment based on one legal theory and then relying on another theory, which it had not given notice of or sought comment on, in the final agency action.

Notice and Comment rulemaking is not a *pro forma* exercise; it serves invaluable procedural and substantive functions. First and most obviously, the development of a complete record enables the responsible agency to understand properly and address the problem before it.[74] Similarly, there is a "fairness to the court" notion implicit in the APA notice-and-comment requirements. As this Court has recognized, "[b]y giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review."[75] Finally, and perhaps most fundamentally, public trust in the administrative system rests on the actual and perceived fairness of government procedures.[76] When an agency issues a final rule based on a legal theory that was not properly noticed, interested parties may well regard themselves

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FCC staff shortly before a draft *R&O* was released. Petitioners filed the *April 22 Ex Parte* addressing the new theory, but to no avail, as the draft *R&O*, which did indeed rely on the new theory, was released the same day the *ex parte* was filed.

[74] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[75] *Id.*

[76] *Id.*

as victims of a "bait and switch" and the resulting regulation as unworthy of respect.[77]

It is no answer that the *R&O* was not made final until adoption by the full Commission three weeks after the draft's release. Courts have rejected efforts to rename or re-characterize steps in the notice-and-comment rulemaking process, including FCC draft NPRMs, in an effort to establish *post hoc* conformity.[78] This Court has made it clear that final agency action must rely upon the legal authority posited in the notice of proposed rulemaking because there is an "important public interest in ensuring that an agency seriously considers whether Congress intended it to exercise a given rulemaking authority before the fact, not afterwards."[79]

In sum, notice and comment rulemaking under the APA requires that interested parties be given a fair chance to comment on the legal basis for agency

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[77] *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("we have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities").

[78] *See Citizens Telecommunications Co. of Minnesota, LLC v. FCC*, 901 F.3d 991, 1005-06 (8th Cir. 2018) (release of draft order does not constitute adequate notice under the APA); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901-02 (D.C. Cir. 1978) (rejecting an effort to re-characterize a final rule as "notice" and an order denying reconsideration as a "final rule" because the APA procedures are intended to allow parties to "comment on the rule while it is still in the formative or 'proposed' stage").

[79] *Global Van Lines, Inc.*, 714 F.2d at 1299.

action. None was provided here, and on that ground alone the Commission action should be reversed.

### B. The FCC's New Legal Theory is Based on a Flawed Factual Premise

In the *1995 Order*, adopted shortly after Section 9 was enacted and the legislative reports associated with it were made public, the Commission cited the following *1993 Conference Report* language regarding space station fees:

> The Committee intends that fees in this category be assessed on operators of U.S. Facilities, consistent with FCC jurisdiction. Therefore, these fees will apply only to space stations directly licensed by the Commission under Title III of the Communications Act. Fees will not be applied to space stations operated by international organizations subject to the International Organizations Immunities Act, 22 U.S.C. Section 288 et seq."[80]

The Commission concluded Congress meant, as the first two sentences of the quoted passage indicate, to limit Section 9 fees to "space stations directly licensed by the Commission under Title III." The third sentence, making it clear that Intelsat and Inmarsat also were not to be subject to Section 9 fees, did not confuse the Commission in 1995.

The FCC apparently believes it has a better sense now, almost thirty years later, for what Congress understood and intended in 1993 than the Commission did when it adopted the nearly contemporaneous *1995 Order*. In 2020, the FCC now

[80] *1995 Order*, 10 FCC Rcd at 13550 (citing the *1993 Conference Report*).

posits that the first two sentences of the passage are meaningless, and that the only significance of the quoted language was to ensure that the FCC did not attempt to impose regulatory fees on Intelsat or Inmarsat.[81]

The *R&O* rewrites the history of U.S. satellite services in an effort to show that, in the early 1990s, "Congress could not have been contemplating non-U.S. licensed space stations that provide commercial service in the United States on an ongoing, unrestricted basis under the same regulatory framework as their U.S. licensed counterparts."[82] Whatever it means to provide satellite service on an "unrestricted basis," however, by the time Section 9 was enacted foreign-licensed space stations had been providing service in the United States for years and, moreover, there was every reason to believe such services would expand in the future as the market for "separate systems," *i.e.*, international systems separate from Intelsat, matured.[83]

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[81] *See R&O*, 35 FCC Rcd 4983 ¶ 17 (JA 197-198) ("We find that the 1991 legislative history purportedly limiting regulatory fees to U.S. licensed satellites is no longer relevant because in stating that '[f]ees will not be applied to space stations operated by international organizations' it was not exempting from regulatory fees commercial non-U.S. licensed satellites with general U.S. market access, which did not exist at that time, but two International Governmental Organizations that no longer exist.").

[82] *Id.* at 4982-4984 ¶¶ 15-17.

[83] This is but one instance of the FCC assuming a fact into evidence. *See also Id.* at 4987-4989 ¶¶ 22, 27 (JA 201, 202-203) (accepting the suggestion, in the absence of supporting evidence in the record, that operators of space stations licensed in other jurisdictions are engaged in "regulatory arbitrage" to avoid U.S. fees).

The Commission principally relies on the fact that *DISCO II*, which established a regulatory regime that allowed for systematic access by foreign-licensed satellites to the U.S. market, was not adopted until 1997, several years after Section 9 was enacted.[84] But as the *R&O* itself concedes, before *DISCO II* satellites licensed by other administrations already were serving the United States on an *ad hoc* basis.[85] *DISCO II* merely replaced an *ad hoc* approach with a more systematic approach.[86]

Although the Commission attempts to diminish the relevance of pre-*DISCO II* satellite service via foreign satellites by characterizing it as "very limited"[87] and permitted only upon a particular demonstration of need, those efforts miss the mark. Whether satellite systems or particular space stations were being allowed to

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[84] *Id.* at 4983 ¶ 16 & n.49 (JA 197).

[85] *Id. See also Vision Accomplished, Inc.*, 11 FCC Rcd 3716 (1995); *IDB Worldcom Services, Inc., et al.*, 10 F.C.C. Rcd 7278 (Int'l Bur. 1995); *AT&T et al.*, 8 FCC Rcd 2668 (Int'l Fac. Div'n 1993); *IDB Communications Group, Inc., et al.*, 6 FCC Rcd 2932 (Com. Car. Bur. 1991); *IDB Worldcom Services, Inc.*, Application File No. ITC-95-521 (filed September 12, 1995) (requesting authority to operate with a Russian-licensed satellite to provide international service); *Caribbean Telephone and Telegraph, Inc.*, Application File No. ITC-95-549 (filed October 4, 1995) (requesting authority to operate with a Mexican-licensed satellite to provide international service); *Telquest Ventures, L.L.C.*, Application File Nos. 758-DSE-P/L-96 & 759-DSE-L-96 (filed March 13, 1996) (requesting authority to operate with a Canadian-licensed DBS satellite to provide domestic and international services).

[86] *DISCO II*, 12 FCC Rcd at 24099.

[87] *R&O*, 35 FCC Rcd at 4983 ¶ 16 (JA 197).

access the U.S. market on a systematic, as opposed to an *ad hoc*, basis is of no moment. The only question is whether Congress, in enacting Section 9, could have imagined that non-U.S. licensed satellites would provide service in the United States.

Far from being an alien concept, it was in fact the policy of the United States, when Section 9 was enacted, to encourage the development of international satellite systems separate from Intelsat, and it was known that such systems were likely to include space stations and satellite systems licensed by foreign jurisdictions.[88] As early as November 28, 1984, President Reagan signed a Presidential Determination (PD No. 85-2) finding that alternative satellite systems were "required in the national interest." Subsequently, in 1985, the Department of State and the Department of Commerce jointly submitted a "White Paper" to the Commission outlining the policy grounds for the Presidential determination. In the White Paper, the administration found it would be not only technically feasible, but economically desirable to allow entry to increase competition in the international satellite services market. As the Separate Systems Order explained:

> Competition benefits the public interest when it maintains or improves a good service and enhances the economical and efficient provision of communications services. The hallmark of a competitive market is the maximization of customer choice which can be effectuated by allowing multiple entrants (*i.e.*, adopting an open entry policy with little or no entry barriers). With the power of choice, customers are better able to influence

[88] *See generally Separate Systems Order*, 101 FCC.2d at 1046.

> the types of services available simply by frequenting one service provider or another. This market pressure not only encourages service providers to be responsive to customer needs, but also encourages them to lower the price of their services in order to obtain a larger share of the market and, therefore, to maximize profits and to offer service in the most efficient and economical manner. The end result of this process is reduced rates and service more responsive to customer needs.[89]

To that end, the Commission allowed U.S. "separate systems" to begin providing international satellite service and the modern communications satellite market was born.

The United States was not alone, moreover, in promoting the development of separate systems. As the White Paper recognized, "[s]ystems separate from INTELSAT have already been established by other nations, and new ones are planned. A growing number of nations, developing as well as developed, are using, or are considering, use of separate systems to complement INTELSAT in providing their international telecommunications needs."[90] Some of these systems, the FCC acknowledged, would be capable of providing service within the United States.[91]

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[89] *Id.* at 1065.

[90] *Id.* at 1063.

[91] *Id.* at 1055 ("there are planned regional satellite systems for the Middle East and Africa and certain European domestic satellite systems which would have footprints that would cover much of the eastern half of the United States and Canada and, thus, would be capable of providing transatlantic service").

By 1993, the Commission already had identified circumstances in which foreign-licensed satellites could be used to provide service in the United States,[92] and the market had matured sufficiently to warrant Commission consideration of standardized market access regulations for particular foreign-licensed satellite systems.[93] The fact that the Commission decided not to proceed by regulation at the time, but instead to continue processing applications individually, says nothing about whether Congress was aware that foreign-licensed satellites might serve the United States.

### C. The FCC's Contemporaneous Statements Contradict its New Theory

It is odd for the Commission in 2020 to declare that "Congress [in the early 1990s] could not have been contemplating non-U.S. licensed space stations that provide commercial service in the United States" when the contemporaneous FCC, in 1995 - two years before its *DISCO II* order - clearly thought that Congress *was* contemplating exactly such service. Contrary to the revisionist history in the *R&O*, the Commission in 1995 concluded, in consideration of the *1993 Conference*

[92] *See, e.g.*, *Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service*, 8 FCC Rcd at 8454 ("In the past, arrangements for U.S. licensees to access foreign space stations for either domestic or international use have been made on a bilateral, government-to-government basis.").

[93] *R&O*, 35 FCC Rcd at 4986, n.60 (JA 198) (citing *Rules & Policies Pertaining to A Non-Voice, Non-Geostationary Mobile-Satellite Serv.*, 8 FCC Rcd at 8450).

*Report* and in view of the developing market for international satellite services, that Section 9 was not intended to reach satellites licensed by other jurisdictions that were providing service in the United States[94] — the kind of space stations the Commission now avers were unthinkable prior to *DISCO II*.

In any event, the Commission has had countless opportunities to reconsider its initial reliance on the legislative history of Section 9, most of which have arisen *after* the adoption of *DISCO II*. Yet, time and time again the Commission has relied on precisely the same language from the *1993 Conference Report* to find that Congress clearly intended Section 9 fees to be applied only to space stations licensed pursuant to Title III.[95] In fact, oddly, the Commission's major factual point is that the market has changed radically since 1993, yet it has not even attempted to grapple with the fact that the market existing today is quite similar to that which existed in 2014, the last time the FCC decided that it lacked authority to impose regulatory fees on non-U.S. licensees.

The Court should suffer no illusions about the satellite market in the early 1990s: the notion that satellites licensed outside the United States were providing,

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[94] *See Davis v. United States*, 495 U.S. 472, 484 (1990) ("we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statue and where they have been in long use").

[95] *E.g.*, *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 28 FCC Rcd 7790, 7809-10 (2013); *2014 Order*, 29 FCC Rcd at 6433-34.

and would continue to provide, service within our domestic borders was an established concept. Under the circumstances, the import of the *1993 Conference Report* is unmistakable.

## IV. AN AGENCY CANNOT REVERSE AN INTERPRETATION OF STATUTORY TEXT THAT HAS BEEN EXPLICITLY OR IMPLICITLY RATIFIED BY CONGRESS.

The foregoing leads to a central question in this case: can the FCC, without any underlying change in the factual or legal environment, declare erroneous its long-established understanding of the limits of its own authority — an understanding that had been passed upon by this Court, was allowed to remain undisturbed by Congress for twenty-five years, and was legislatively preserved by RAY BAUM'S Act in 2018? To do so reflects not reasoned decision-making, but action outside the bounds of acceptable administrative law.

### A. Congress Implicitly Ratified the Commission's Original Interpretation of Section 9.

Throughout these many years, Congress has returned to the matter of Section 9 fees annually in the budget process, and yet it never has questioned the FCC's conclusion that its authority to assess space station fees under Section 9 is co-terminus with its Title III authority. That conclusion, therefore, "comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be

disturbed except for cogent reasons."[96] Justice Lamar articulated the rationale for this rule of construction more than 100 years ago:

> [G]overnment is a practical affair, intended for practical [people]. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself -- even when the validity of the practice is the subject of investigation.[97]

Here, the understanding in the market from the outset has been that Section 9 fees would be assessed upon space stations licensed pursuant to Title III, and *only* upon those space stations. That understanding is based on an administrative interpretation of Section 9 that has been reaffirmed on numerous occasions. Parties have made business plans and adjusted their behavior accordingly. For almost thirty years Congress has given no indication that it objects to the original interpretation or that it is otherwise dissatisfied with the market structure that has emerged in accordance with it. Congress has, at minimum, implicitly ratified the Commission's original interpretation of its Section 9 authority. There is, in short,

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[96] *Udall v. Tallman*, 380 U.S. 1, 18 (1965); *see also, e.g., Haig v. Agree*, 453 U.S. 280, 299 (1981) ("Congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy"); *Lykes v. United States*, 343 U.S. 118, 127 (1952) (administrative interpretation never reversed or changed entitled to substantial weight).

[97] *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915).

no "cogent reason" to disturb a consistent and well-founded interpretation that been confirmed by the Commission, upheld by the courts, and unquestioned by Congress for nearly three decades.

The Commission, though, questions in the *R&O* the utility of Congressional inaction as interpretive tool, referencing several cases to the effect that Congressional silence does not always denote acquiescence.[98] The Commission's doubts about the inferences to be drawn from Congressional silence are, apparently, new-found, as less than two years ago it based its decision to abandon Title II regulation of Internet services, in part, on precisely such Congressional inaction, finding: "that the Commission's original interpretation better reflects Congressional intent is further evidenced by the fact that, although Congress has amended the Communications Act and section 332 on multiple occasions since the

[98] *R&O*, 35 FCC Rcd at 4984-4985 ¶ 18 & n.62 (JA 198-199). The Commission also cites to the familiar principle that agencies may revisit prior interpretive decisions, citing, among other cases, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The *Fox* case also, however, stands for the proposition that an agency change in policy will be subject to heightened scrutiny if the "new policy rests upon factual findings that contradict those which underlay [the] prior policy; or when [the] prior policy has engendered serious reliance interests that must be taken into account." *Id.* at 515-16; *see also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 719 (D.C. Cir. 2016). In this case, both predicates for heightened review are present as the Commission has contradicted its prior findings regarding the import of the *1993 Conference Report* and it has done so to the detriment of parties who have relied upon more than two decades of FCC adherence to the prior interpretation.

Commission defined the [relevant] term, it has never changed the Commission's interpretation."[99]

In any event, the cases the FCC relies upon either undermine its own argument or deal with facts that are distinguishable from the case at bar. For example, the Commission cites the Supreme Court opinion in *Power Reactor Dev. Co.*, in which the Court cautioned that "[i]t may often be shaky business to attribute significance to the inaction of Congress."[100] However, *dicta* aside, the actual holding in *Power Reactor Dev. Co.* gave "particular weight" to Congressional silence because the agency construction at issue "has time and again been brought to the attention" of the relevant committee of Congress such that the Court "read this history as *de facto* acquiescence in and ratification of the Commission's [construction]."[101]

Similarly, in *Jones v. Liberty Glass*, cited in the *R&O*, the Court's *caveat* that the doctrine of legislative acquiescence is merely "an auxiliary tool" was offered in the context of congressional silence in response to "rather recent contrary decisions by lower federal courts" that departed from an agency construction adopted "nearly a quarter of a century ago . . . that has been continued

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[99] *Restoring Internet Freedom*, 33 FCC Rcd 311, 356 (2018).

[100] *Power Reactor Dev. Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO,* 367 U.S. 396, 408-410 (1961).

[101] *Power Reactor Dev. Co,* 367 U.S. at 409.

through various reenactments and changes in the revenue laws . . . [and which] has been consistently recognized and followed by the [agency]."[102] The Court explained further that "[w]e do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."[103]

Finally, although the *R&O* quotes this Court's admonition in *Chisholm v. FCC* that "attributing legal significance to Congressional inaction is a dangerous business,"[104] the *Chisholm* court continued, "[o]n the other hand, the [Supreme] Court recently stated that:

> A court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has reenacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.[105]

In short, the value of Congressional inaction is of course a contextual question focused on the purported provocation. While courts cannot expect

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[102] *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533 (1947).

[103] *Id.* at 534; *see also United States v. Price*, 361 U.S. 304, 310-11 (1960) (no inference of acquiescence because it was unclear whether the failure to act in response to a single 9th circuit decision indicated approval of court's approach or simply that action was unnecessary because the court was clearly wrong); *cf. Zuber v. Allen*, 396 U.S. 168, 205 (1969) (Black, J., dissenting) (the case was not about legislative silence, but about a lower court decision that was clearly erroneous).

[104] *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir. 1976).

[105] *Id.* 538 F.2d at 361 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

Congress to respond to every lower court opinion construing a statute, one would expect Congress to act in the face of, for instance, a Supreme Court decision with a contrary interpretation, a series of lower court opinions misconstruing a statute, or a flawed interpretation of long-standing by the agency responsible for administering a statute. The FCC would have this Court believe that it has been misreading Section 9 for almost thirty years and, as a result, not imposing regulatory fees upon non-U.S. licensed space stations when it should have been — and Congress has said not a word. Such a position tests the bounds of credulity.

### B. By Reenacting the Prior Fee Schedule, RAY BAUM'S Act Explicitly Preserved the Commission's Original Interpretation of Its Authority under Section 9

Congress has not been *entirely* silent when it comes to Section 9. As discussed above, just two years ago Congress made general amendments to Section 9 in RAY BAUM'S Act specifically addressing the application and structure of the statute. Far from reversing the Commission's long-standing interpretation of the term "space station," Congress was content to make a minor textual change to eliminate surplusage in the subsection dealing with rate adjustments while retaining, at least for the immediate future, the Section 9 fee schedule in effect at the time, including the "space station" category.[106]

[106] *See* RAY BAUM's Act, Pub. L. 115-141, div. P, title I, § 102(d)(2) ("A regulatory fee established under section 9 of the Communications Act of 1934 [47 U.S.C. 159], as such section is in effect on the day before the effective date

The FCC had long understood the term "space station," in the context of regulatory fees, to have a particular meaning. Specifically, it had found the term to include a jurisdictional limit that allows the FCC to assess regulatory fees only upon those satellites it has licensed directly pursuant to Title III. When RAY BAUM'S Act was enacted, that was the state of the law — the term "space station" had a well-established technical legal sense, at least insofar as Section 9 was concerned. In carrying over the Section 9 fee schedule, RAY BAUM'S Act, in effect, re-enacted the statute incorporating the established meaning of the term "space station." Thus, the traditional rule that re-enactment of a statute presumptively adopts prior authoritative constructions properly applies in this case.[107]

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described in section 103 of this title [Oct. 1, 2018], shall remain in effect under section 9 of the Communications Act of 1934, as amended by subsection (b) of this section, until such time as the Commission [Federal Communications Commission] adjusts or amends such fee under subsection (c) or (d) of such section 9, as amended.").

[107] *Shapiro v. United States*, 335 U.S. 1, 16 (1948) *("Shapiro")* ("there is a presumption that Congress, in reenacting the immunity provision ... was aware of the settled judicial construction of the statutory immunity [and] in adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it part of the enactment.'") (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)); *Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992) (when Congress makes substantive changes to a statute without amending a "longstanding and well-known construction," it has presumptively adopted that construction).

Indeed, the re-enactment canon is broader than suggested in *Shapiro* and applies as well to interpretations of lower courts and administrative agencies, and to language in related statutes.[108] As Justice Kennedy explained: "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."[109] As such, administrative and judicial interpretations of provisions subject to the "re-enactment" rule are not mere glosses on the *former* statute, they effectively constitute elements of the *newly enacted* statute. The question, simply put, is whether the weight of authority is significant enough or so

[108] *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned") (internal quotation omitted); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Alexander v. Sandoval*, 478 U.S. 833, 846 (1986) ("When Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (internal quotation omitted).

[109] *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also, e.g.*, *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) (interpreting the word *deposit* to accord with "the longstanding [agency] interpretation" of the word in a predecessor statute); *NLRB*, 416 U.S. at 274-75 (Congressional failure to revise or repeal an agency interpretation evidences the correctness of that interpretation).

well settled that the issue may be regarded as having been conclusively decided prior to the subsequent legislation.[110]

In this case, there is no doubt but that the Commission had, without exception, held over twenty-five years that satellites licensed by other administrations are not "space stations" for purposes of Section 9. When Congress passed RAY BAUM'S Act, it is presumed to have known "about existing law pertinent to the legislation it enacts,"[111] and in preserving the term, unchanged, in the new statute, it effectively incorporated the Commission's long-standing interpretation in the legislation.

The appropriate recourse now for those who would alter that interpretation is to Congress.[112] It is not open to the agency, as the Commission did here, to declare, based on no change in the ambient facts or law, a statute passed by

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[110] *See, e.g.*, *NLRB*, 416 U.S. at 289 (adopting the Labor Board's "consistent construction . . . for more than two decades" of the term *employee* as used in the Taft-Hartley Act); *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 (1934) (construction reiterated over thirty years without Congressional action presumptively incorporated).

[111] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *see also EEOC v. Aramark Corp.*, 208 F.3d 266, 271 (D.C. Cir. 2000).

[112] *See NLRB*, 416 U.S. at 289 (an agency construction implicitly incorporated into subsequent legislation not subject to reconsideration, even by the same agency); *Manhattan Properties*, 291 U.S. at 336 (Amendments to the Bankruptcy Act without changing well established statutory construction "persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. . . . If the rule is to be changed Congress should so declare.").

Congress to have an entirely new, un-foreshadowed, un-adopted, and un-discussed meaning.

## CONCLUSION

For the foregoing reasons, the Petition for Review should be granted and the portion of the *R&O* extending regulatory fees to non-U.S. licensed space stations should be vacated or, in the alternative, reversed and remanded.

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March 4, 2021

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Brief of Petitioners contains 12,786 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: March 4, 2021 By: */s/ W. Kenneth Ferree*

## CERTIFICATE OF SERVICE

I, W. Kenneth Ferree, hereby certify that on March 4, 2021, I electronically filed the foregoing Opening Brief of Petitioners with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that on March 4, 2021, service of the foregoing will be made electronically via the CM/ECF system upon the participants in the case who are registered CM/ECF users including the individuals shown below. Participants who are not registered CM/ECF users will receive service via U.S. mail unless another attorney for the same party is receiving service through the CM/ECF system.

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