

October 18, 2001

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Re: FCC *Amicus* Brief in *TCG New York, Inc., et al. v. City of White Plains*

Dear Ken:

Thank you for your letter expressing LSGAC's concerns about footnote 7 in the Commission's amicus brief in the *White Plains* case. The Commission was involved in the *City of White Plains* case as an amicus to express the agency's position that costs imposed on new entrants, but not incumbents are not "competitively neutral and nondiscriminatory" under Section 253(c) of the Communications Act, 47 U.S.C. §253(c). Because the validity of gross revenues based-fees was an issue discussed extensively in the main party briefs, we felt a need to acknowledge the issue and did so in footnote 7. As we have discussed, however, the footnote was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery. Indeed, we recognized that this is an issue that continues to develop in the courts and before the Commission, and we deliberately limited our discussion of the issue in the amicus brief.

We share your concern that others are misrepresenting the language of the brief. It is regrettable that some people are misusing it in the way described in your letter. This is not the first time that has happened with a brief filed by the Commission. In our experience, we believe that the best approach to dealing with this problem is to allow the brief to remain filed with the court as written. The brief says what it says, and the Commission filed the brief with some care to avoid taking a firm position on revenue-based fees. If and when parties review the brief, they will see that is the case. Indeed, if the Commission were now to withdraw the brief or the portion including footnote 7, we believe that action could similarly be misconstrued. Therefore, we are not inclined to take any action with respect to your request.

Thanks again for keeping us informed of developments related to this issue, and please let us know if there are further developments.

Very truly yours,

Jane E. Mago
General Counsel

