

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

DEC 17 2014

OFFICE OF
MANAGING DIRECTOR

Jeffrey A. Mitchell, Esquire
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, VA 22102

Licensee/Applicant: **InComm Solutions, Inc.**
Petition For Reconsideration: Delinquent Debtor
Disposition: **Dismissed and Denied** (31 U.S.C. §
3711(g), 31 C.F.R. § 285.12, 47 U.S.C. § 159(c)(2);
47 C.F.R. §§ 1.7, 1.106, 1.1164(e), 1.1166, 1.1910)
Station: N/A
Fees: Fiscal Year (FY) 2011 Regulatory Fees
Date Petition Submitted: Mar. 26, 2014
Date Regulatory Fees Paid: Apr. 1, 2014
Date Regulatory Late Fees Paid: Apr. 1, 2014
Fee Control No.: RROG-13-00015696

Dear Counsel:

This responds to Licensee's "request [for] reconsideration and a further explanation" (*Petition*)¹ concerning Licensee's delinquent debt that we transferred to the United States Treasury (Treasury) for collection action. Specifically, Licensee seeks reconsideration of the Commission's response to the Treasury. As we discuss in detail below, we dismiss because Licensee was a delinquent debtor at the time of submission, the submission does not comply with our rules, and to the extent we construe Licensee's request as seeking a waiver and refund of the fee and accrued charges, because it fails to meet our standard, we deny.

¹ Facsimile transmission from Jeff Mitchell, Lukas, Nace, Gutierrez & Sachs, LLP, 8300 Greensboro Dr., Suite 1200, McLean, VA 22102 to Theresa Meeks, Office of the Managing Director, FCC (Mar. 26, 2014) (*Fax*) with Letter from Jeffrey A. Mitchell, Lukas, Nace, Gutierrez & Sachs, LLP, 8300 Greensboro Dr., Suite 1200, McLean, VA 22102 to Theresa Meeks, Office of the Managing Director, FCC (Mar. 26, 2014) (*Petition*) and Letter from Jeffrey A. Mitchell, Lukas, Nace, Gutierrez & Sachs, LLP, 8300 Greensboro Dr., Suite 1200, McLean, VA 22102 to ConServe, P.O. Box 1528, Fairport, NY 14450 (Dec. 4, 2013) (*Debtor Dispute*) with enclosures: (a) Demand Letter from FCC to InComm Solutions, Inc., 208 Harristown Rd., Glen Rock, NJ 07452 (Print Date 3/1/2012) (*Demand Letter*), (b) Bill of Sale, from InComm Solutions, Inc., Seller to Chorus Call, Inc., and InComm Conferencing, Inc., Buyer, 2 pages with Schedule 1 to Bill of Sale, Tangible Property (Nov 16, 2011) (*Bill of Sale*), (c) IRS Form 1120S, U.S. Income Tax Return for an S Corporation, Tax Year 2010, without schedules or IRS Form 1040 (*Form 1120S*), (d) Letter from Mark Stephens, CFO, FCC to Aaron P. Shainis, Esq., Shainis & Peltzman, Chtd, 18500 M St., N.W., Ste 240, Washington, DC 20036 (Dec 6, 2010) (*Pocatello Waiver Request*). Licensee's submission by facsimile transmission to a staff member fails to comply with Commission's rules (47 C.F.R. §§ 1.7, 1.106(i)).

Background

On March 26, 2014, Licensee submitted its *Petition* by facsimile transmission to a Commission staff member.² In the *Petition*, Licensee asserted that our staff member's response to a Treasury query required an explanatory decision. It does not, and Licensee used an improper process. The following summary of the relevant history provides context to both our staff member's response to Treasury and our disposition.

On March 1, 2012, the Commission sent to Licensee, at the address Licensee provided in its registration,³ a *Demand Letter*⁴ notifying Licensee of (a) the amount of its delinquent debt owed to the United States for an unpaid regulatory fee, (b) an explanation of certain rights (including the opportunity to inspect documents, request an installment payment plan, or seeks review of the basis for the debt), and (c) the 15-day period after which unexercised rights would be deemed waived. The *Demand Letter* also notified Licensee of the consequences of continued delinquency, including, that the Commission withholds action on any application filed by delinquent debtors and that the Commission transfers delinquent debt to Treasury for collection action. The *Demand Letter* provided a telephone number, email address, and mail address for questions. Licensee failed to respond to the *Demand Letter* within the 15-day period, thus, as required by 31 U.S.C. § 3711(g), 31 C.F.R. § 285.12(c), and 47 C.F.R. § 1.1917, we transferred to Treasury the debt, which included the unpaid regulatory fee,⁵ penalty,⁶ and charges of collection.⁷ Upon transfer, the Treasury, on behalf of the Commission, assumed responsibility for collection,⁸ and the Commission ceased collection action.

On December 4, 2013, Licensee sent its *Debtor Dispute* to the Treasury's collection activity,⁹ ConServe to assert, in part, that Licensee sold its business effective November 16, 2011, it did not receive the *Demand Letter*, and it had no revenue from which to pay the delinquent debt. Licensee, relying in part on the Commission's authority from 47 U.S.C. § 159(d) to waive or reduce a regulatory fee,¹⁰ stated that "[f]or reasons of financial hardship," it requested Treasury to reverse and refund "the initial fee ... plus the 25% statutory penalty." In the alternative, Licensee asked that the Treasury reverse "any interest, additional fees, and penalties beyond the principal and statutory penalty."¹¹ Later, the Treasury consulted with the Commission on the *Debtor Dispute*. Commission staff informed Treasury that we disagreed, and we recommended continued collection action. On March 26, 2014, Licensee submitted its *Fax* to the Commission staff with the *Petition*.

² *Fax* and *Petition*.

³ See 47 C.F.R. § 1.8001, et seq. Section 1.8002(b)(2) requires registrants to keep current the entity's name, contact name and title, address, and taxpayer identification number.

⁴ *Demand Letter*; see 47 C.F.R. § 1.1911.

⁵ 47 U.S.C. § 159(a), 47 C.F.R. § 1.1151.

⁶ 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157, 1.1164.

⁷ 31 U.S.C. § 3717.

⁸ 31 U.S.C. § 3711(g)(1)(B), 31 C.F.R. § 285.12(c).

⁹ 31 C.F.R. § 285.12(c)(2).

¹⁰ *Debtor Dispute* at 2.

¹¹ *Id.* at 3.

Our records show that Licensee was delinquent in paying regulatory fees for FY 2011 and FY 2012. It was not until December 23, 2013, and April 1, 2014, respectively, that Licensee made first, a partial,¹² and later, a final payment of the delinquent FY 2011 regulatory fee, and on December 20, 2013, Licensee paid the delinquent FY 2012 regulatory fee.

Standards

First, as the regulatory fee, under 47 U.S.C. § 159 and the Commission's rules, we are required to "assess and collect regulatory fees" to recover the costs of the Commission's regulatory activities,¹³ and when the required payment is received late or it is incomplete, to assess a penalty equal to "25 percent of the amount of the fee which was not paid in a timely manner."¹⁴ Specifically, "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... which was not paid in a timely manner."¹⁵

Each year, the Commission establishes the final day on which payment must be received before it is considered late, *i.e.*, a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, as well as interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940.

In establishing a regulatory fee program, the Commission recognized that in certain instances, payment of a regulatory fee may impose an undue financial hardship upon a licensee, and it may be waived, reduced or deferred, but only upon a showing of good cause and a finding that the public interest will be served thereby.¹⁶ The Commission has narrowly interpreted its waiver authority to require a showing of compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs.¹⁷ In an appropriate situation, we may grant fee relief based on a "sufficient showing of financial hardship."¹⁸ In such matters, "[m]ere allegations or documentation of financial loss, standing alone," do not suffice and "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."¹⁹ Thus, in order to establish a basis for waiver predicated on financial need, the regulatee must provide financial documents including, *e.g.*, a licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an

¹² A partial payment is applied first to penalties and charges of collection, second to accrued interest, and finally to the principal amount. 47 C.F.R. § 1.1940(f). A partial payment does not fully pay the delinquent regulatory fee, rather after the partial payment, some part of the regulatory fee remained delinquent.

¹³ 47 U.S.C. §159(a)(1); 47 C.F.R. § 1.1151.

¹⁴ 47 U.S.C. §159(c)(1); 47 C.F.R. §§ 1.1157(c)(1); 1.1164.

¹⁵ 47 C.F.R. § 1.1164.

¹⁶ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). *See also* Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 1994, *Report and Order*, 9 FCC Rcd 5333, 5344, ¶ 29 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995).

¹⁷ *Id.*

¹⁸ 10 FCC Rcd at 12761-62, ¶ 13.

¹⁹ *Id.*

explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.²⁰

In such matters, when an applicant for relief is delinquent in paying the regulatory fee, under 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164, 1.1166, and 1.1910(a)(2) & (3), we will dismiss²¹ a request for relief and impose the statutory penalty.²²

Next, as to Licensee's *Petition*, title 47 C.F.R. § 1.106(i) requires "Petitions for reconsideration ... shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554, by mail, by commercial courier, by hand, or by electronic submission through the Commission's Electronic Comment Filing System or other electronic filing system (such as ULS). Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed."²³ The Commission maintains different offices for different purposes, and persons filing documents with the Commission must take care to ensure that they file their documents at the correct location specified in the Commission's Rules.²⁴ As such, a document is *filed* with the Commission upon its receipt at the location designated by the Commission,²⁵ and applications and other filings not submitted in accordance with the correct addresses or locations will be returned to the filer without processing.²⁶

Furthermore, a petition for reconsideration must "state with particularity the respects in which petitioner believes the action taken by ... the designated authority should be changed,"²⁷ and the petition must identify a material error, omission or reason warranting reconsideration.²⁸

²⁰ *Id.*

²¹ 47 U.S.C. § 159(c)(2) ("The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section."); 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment."); 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.")

²² 47 U.S.C. § 159; 47 C.F.R. § 1.1166; Waivers, Reductions and Deferments of Regulatory Fees, *Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) ("The Commission will dismiss any petition for waiver of a regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. * * * The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.")

²³ 47 C.F.R. § 1.106(i). *See also* 47 C.F.R. § 1.1159(b) ("Petitions for reconsideration ... submitted with no accompanying payment should be filed with the Secretary")

²⁴ 47 C.F.R. § 0.401.

²⁵ 47 C.F.R. § 1.7

²⁶ *Id.*

²⁷ 47 C.F.R. § 1.106(d)(1).

²⁸ 47 C.F.R. § 1.106(d)(2).

We will now discuss these standards in relation to the submission, turning first to the *Petition* and then the context of the *Debtor Dispute*, which in essence is an improper request for waiver.

Discussion

As we will discuss below, any of these reasons is a ground to dismiss the *Petition*.

First, we have no record showing the matter was submitted to the Secretary to conform to our requirement of "receipt at the location designated by the Commission." Accordingly, under 47 C.F.R. § 1.7, *Petition* is not "filed with the Commission,"²⁹ thus we deny or dismiss.³⁰

Next, Licensee failed to "state with particularity the respects in which petitioner believes the action taken by ... the designated authority should be changed,"³¹ and the petition must identify a material error, omission or reason warranting reconsideration.³² In that regard, Licensee seeks reconsideration of an intra-governmental communication involving a matter that by law is under the Treasury's authority. Licensee provides no authority for reconsideration of that communication, and no explanation of how it should be changed. Thus, under 47 C.F.R. 1.106(p), we dismiss.

Moreover, Licensee was a delinquent debtor, and its later payment did not resolve the procedural defect without a resubmission. Specifically, our *Demand Letter* provided notice that under 47 C.F.R. § 1.1910, we withhold action on and dismiss any application pending or filed by a delinquent debtor. Accordingly, under 47 C.F.R. §§ 1.106(p), 1.1164(e), 1.1167(b), and 1.1910,³³ we dismiss.

Finally, turning to the merits of the *Debtor Dispute*, whether under 47 C.F.R. § 1.1166, Licensee established grounds for waiver of the fee based on financial hardship; we find that in paying the fee, Licensee has made moot the *Debtor Dispute*. On that ground, we may return the filing without action. Nonetheless, having it before us, we looked to the merits, and deny relief. Licensee asserts the fee and charges should be waived because first, it did not receive the Demand Letter in a timely manner, and second, it is experiencing financial hardship. Our rule at 47 C.F.R. § 1.1166 requires the applicant to demonstrate both good cause and that the waiver would promote the public interest. Nothing asserted or presented addresses the second prong, that the waiver would promote the public interest. On that ground, failure to demonstrate the public interest prong, we deny. In addition, we turn to the other points.

²⁹ 47 C.F.R. § 1.7.

³⁰ 47 C.F.R. § 1.106(p)(7).

³¹ 47 C.F.R. § 1.106(d)(1).

³² 47 C.F.R. § 1.106(d)(2).

³³ 47 C.F.R. § 1.1164 (e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment. The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."); § 1.1164 (f)(5) ("An application or filing by a regulatee that is delinquent in its debt to the Commission is also subject to dismissal under 47 CFR 1.1910.")

First, we note that Licensee failed to provide both necessary financial documentation and the explanation to present and support a request for waiver. Instead, Licensee simply asserts that it sold its assets and operations to a new company, and that Licensee “cease[d] to exist as a going concern effective November 16, 2011.” Furthermore, after the sale, Licensee “had no paid staff in place to regularly monitor notices to the company. As a result, [Licensee] did not receive and was not aware of the FCC Demand Letter ... [Licensee] did not become aware of the debt until July 30, 2013, when it received a collection notice from the Department of Treasury.”³⁴ We disagree with Licensee that these assertions are relevant to the issue whether Licensee established good cause and that a waiver of the fee serves the public interest.

First, Licensee bears the responsibility for any delay in receiving the *Demand Letter*. Even now, Licensee has not altered the address information in the Commission FRN database, and it remains unchanged from what the Commission used in the *Demand Letter*. Licensee is obliged to make corrections to the Commission’s database.³⁵ Second, Licensee provided us with a copy of its irrevocable appointment of the buyer as Licensee’s “true and lawful attorney ... full power and authority in the name of and on behalf of [Licensee] to ... receive ... all rights, demands, ... claims ... liabilities, or obligations of every kind and description whatsoever arising out of, incident to, or in connection with the Acquired Assets ...”³⁶ Third, the buyer maintains the same street address as reported by Licensee in the Commission’s records, thus, consistent with the power of attorney and the absence of any change to the Commission’s record; we presume the *Demand Letter* was received as addressed. Thus, it is not material whether Licensee monitors its mail, regular or not, by unpaid or volunteer staff or whether Licensee submitted a change of address notification with the United States Postal Service. Licensee failed to respond to the *Demand Letter*, and it is deemed to have waived the listed rights.

Finally, Licensee failed to establish financial hardship or that the public interest is served by waiving the fee. Looking to its submission, Licensee advises that it sold its assets, but it failed to show the amount received and disposition of the proceeds. Licensee asserts it has no business operations effective November 16, 2011, but it failed to provide evidence that the corporation dissolved and distributed the corporate assets in accordance with the governing law. Licensee asserts that it has no revenue, but it failed to demonstrate that that it has no assets or funds available to pay the fee. Licensee provided the first page of the five-page *Form 1120S* from 2010, but failed to include the required schedules and referenced statements. Moreover, Licensee failed to provide any financial information pertaining to calendar years 2011 through 2014, necessary to show financial hardship when the fee was due and now.

³⁴ *Debtor Dispute* at 2.

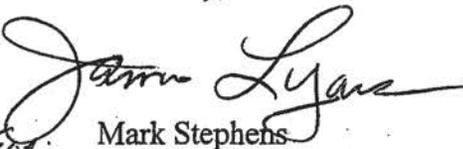
³⁵ 47 C.F.R. § 1.8002(b)(2).

³⁶ *Bill of Sale* at 2.

Licensee failed to meet the burden of establishing both financial hardship and extraordinary and compelling circumstances that outweigh the public interest in recouping the Commission's regulatory costs.³⁷ Where, as here, the Licensee did not carry its burden of meeting the standard, the Commission will not speculate to fill gaps in information that Licensee should have provided.³⁸ Thus, we deny the form of the request expressed in the *Debtor Dispute*.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,


FOR: Mark Stephens
Chief Financial Officer

³⁷ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5344, ¶ 29 (1994), *recon. denied*, 10 FCC Rcd 12759 (1995); Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003) ("Fee relief may be granted based on asserted financial hardship, but only upon a documented showing that payment of the fee will adversely impact the licensee's ability to serve the public. . . . [I]n the absence of a documented showing of insufficient funds to pay the regulatory fees, [applicant] has not made a compelling showing that overrides the public interest in the Commission's recouping the costs of its regulatory activities.").

³⁸ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971) ("burden is on the applicant seeking waiver of ... rules to plead specific facts and circumstances which would make the general rule inapplicable"); *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997) ("petitioner . . . has the 'burden of clarifying its position' before the agency."); *see also* 47 C.F.R. § 1.16 (An applicant is responsible for the continuing accuracy and completeness of information furnished.). 47 C.F.R. § 1.65 ("Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ... whenever the information furnished ... is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of the application so as to furnish such additional or corrected information as may be appropriate.).