

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.**
Fee Waiver Request: Delinquent Debtor, Financial
Hardship
Disposition: **Dismissed and Denied** (47 U.S.C. §
159(c)(2); 47 C.F.R. §§ 1.1164(e), 1.1166, 1.1910)
Station: N/A
Fees: Fiscal Year (FY) 2012 Regulatory Fees
Date Petition Submitted: Dec. 19, 2013
Date Regulatory Fees Paid: Dec. 20, 2013, and Apr.
1, 2014
Date Regulatory Late Fees Paid: Dec. 20, 2013, and
Apr. 1, 2014
Fee Control No.: RROG-13-00015529

Dear Counsel:

This responds to Licensee's Request for Waiver or Reduction of FY Regulatory Fees (*Request*)¹ on grounds that Licensee "ceased doing business effective November 16, 2011 [or, i]n the alternative, [Licensee] seeks waiver or reduction of fees and penalties due to financial hardship." Because Licensee was delinquent in paying a portion of the FY 2011 regulatory fee,

¹ InComm Solutions, Inc., (FCC Registration No. 0020986089), Request for Waiver or Reduction of FY 2012 Regulatory Fees, GEN Docket No. 86-285 (Dec. 19, 2013) with enclosures (a) Demand Letter from FCC to InComm Solutions, Inc., 208 Harristown Rd., Glen Rock, NJ 07452 (9/20/2013) (*Demand Letter II*), (b) Federal Communications Commission, Remittance Advice, Bill for Collection, Bill Number R12P828883, Applicant FRN# 0020986089, Current Bill Date 9/20/2013, \$9,319.79; (c) 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*), (d) Online Payment Report, InComm Solutions, Inc., Payment Amount \$9,319.79, Payment Date 12/20/2013 (*Payment*), (e) email from paygovadmin@mail.doc.twai.gov to Phil Matarazzo, Payment Date: Dec. 20, 2013 (Dec. 19, 2013) (*Receipt*), (f) IRS Form 1120S, U.S. Income Tax Return for an S Corporation, Tax Year 2010, without schedules or IRS Form 1040 (*Form 1120S, 2010*), (g) IRS Form 1120S, U.S. Income Tax Return for an S Corporation, Tax Year 2011, without schedules or IRS Form 1040 (*Form 1120S, 2011*), (h) 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*), (i) 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*), and ECFS Filing Receipt-Confirmation number 20131219190048 (ECFS Filing Receipt). Demand Letter from FCC to InComm Solutions, Inc., 208 Harristown Rd., Glen Rock, NJ 07452 (Print Date 3/1/2012) (*Demand Letter I*)

and because Licensee failed to establish both good cause and that a waiver is in the public interest, we dismiss and deny.

Background

On March 1, 2012, the Commission sent to Licensee, at the address Licensee provided in its FCC registration,² *Demand Letter I*³ notifying Licensee of (a) the amount of its delinquent debt owed to the United States for an unpaid FY 2011 regulatory fee, (b) an explanation of certain rights (including the opportunity to inspect documents, request an installment payment plan, or seek review of the basis for the debt), and (c) a 15-day period, after which unexercised rights would be deemed waived. *Demand Letter I* 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. *Demand Letter I* provided a telephone number, email address, and mail address for questions. Licensee failed to respond to the *Demand Letter I* 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,⁴ penalty,⁵ and charges of collection.⁶ Upon transfer, the Treasury, on behalf of the Commission, assumed responsibility for collection,⁷ and the Commission ceased collection action.

On August 31, 2012, the Commission published its *Public Notice* reminding licensees and regulatees that the annual regulatory fee for FY 2012⁸ was due September 13, 2012.⁹

On September 20, 2013, the Commission sent to Licensee, at the address Licensee provided in its FCC registration,¹⁰ *Demand Letter II*¹¹ notifying Licensee of (a) the amount of its delinquent debt owed to the United States for an unpaid FY 2012 regulatory fee, (b) an explanation of certain rights (including the opportunity to inspect documents, request an installment payment plan, or seek review of the basis for the debt), and (c) a 15-day period, after which unexercised rights would be deemed waived. Following the form of *Demand Letter I*, *Demand Letter II* 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. *Demand Letter II* provided a telephone number, email address, and mail address for questions. Licensee did not respond to *Demand Letter II* within the 15-day period.

² 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.

³ *Demand Letter I*; see 47 C.F.R. § 1.1911.

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

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

⁶ 31 U.S.C. § 3717.

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

⁸ See Assessment and Collection of Regulatory Fees for Fiscal Year 2012, *Report and Order*, MD Docket No. 12-116, FCC 12-76, 27 FCC Rcd 8390 (2012).

⁹ Reminder That FY 2012 Regulatory Fees Are Due No Later Than September 13, 2012, Eastern Time, *Public Notice*, DA 12-1423 (Aug. 31, 2012) (2012 Fee PN).

¹⁰ See 47 C.F.R. § 1.8001, *et seq.*

¹¹ *Demand Letter*; see 47 C.F.R. § 1.1911.

On December 4, 2013, related to the collection of delinquent FY 2011 regulatory fees that we had transferred to Treasury, Licensee sent a *Debtor Dispute* to the Treasury's collection activity,¹² ConServe to assert, in part, that Licensee sold its business effective November 16, 2011, it did not receive the *Demand Letter I*, 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,¹³ 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."¹⁴

On December 19, 2013, Licensee initiated electronic payment of the delinquent FY 2012 regulatory fee that would have a payment date of December 20, 2013.¹⁵ Also on December 19, 2013, Licensee submitted this Request.

On April 1, 2014, Licensee paid the balance owed on the FY 2011 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,¹⁶ 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."¹⁷ 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."¹⁸

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.¹⁹ The Commission has narrowly interpreted its

¹² 31 C.F.R. § 285.12(c)(2).

¹³ *Debtor Dispute* at 2.

¹⁴ *Id.* at 3.

¹⁵ *Payment, Receipt*.

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

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

¹⁸ 47 C.F.R. § 1.1164.

¹⁹ 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

waiver authority to require a showing of compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs.²⁰ In an appropriate situation, we may grant fee relief based on a "sufficient showing of financial hardship."²¹ 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."²² 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 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.²³

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(e), and 1.1910(b)(2) & (3), we will dismiss²⁴ a request for relief and impose the statutory penalty.²⁵

Discussion

As we will discuss below, because Licensee was a delinquent debtor when it filed its *Request*, we dismiss, and because Licensee failed to establish both good cause and that a waiver is in the public interest, we deny.

On December 19, 2013, when Licensee filed its *Request*, Licensee was delinquent in paying a portion of the FY 2011 regulatory fees²⁶ and the FY 2012 regulatory fees. On

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).

²⁰ *Id.*

²¹ 10 FCC Rcd at 12761-62, ¶ 13.

²² *Id.*

²³ *Id.*

²⁴ 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.").

²⁵ 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.").

²⁶ See 47 C.F.R. § 1.1940(f). A partial payment is applied first to penalties and charges of collection, second to accrued interest, and finally to the principal amount. Thus, after the partial payment, some part of the regulatory fee remains delinquent.

December 20, 2013, the Commission credited Licensee's account with the amount paid for the FY 2012 regulatory fee; however, the FY 2011 regulatory fee remained delinquent until April 1, 2014. Even so, Licensee's payment on April 1, 2014, did not resolve the procedural defect that required the Commission to withhold action on and dismiss the *Request*. In this case, Licensee's proper course was to submit the *Request* after the delinquent debt was paid. Plainly, Licensee was notified of the consequences of its delinquency status; both *Demand Letter I* and *Demand Letter II* 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. §§ 1.1164(e) and 1.1910,²⁷ we dismiss. This ends the matter; however, as a courtesy, we look to the merits of the *Request*, and for the reasons discussed next, we deny.

Licensee asserts we should waive the fee and charges first, because it ceased doing business effective November 16, 2011, and second, because of financial hardship.²⁸ Licensee adds that it did not receive *Demand Letter II* in a timely manner because it had "no paid staff in place to regularly monitor notices to [Licensee]. As a result, [Licensee] was not aware of the debt until it belatedly received a copy of the [*Demand Letter II*]." ²⁹ Then, it was "too late to exercise its rights to seek agency ... review of the debt."³⁰ Licensee asserts that the public interest is served in granting the waiver because the debt relates to FY 2012 regulatory fees, which are "intended to recoup the FCC's costs for regulatory activities ... during the period beginning October 1, 2011, and ending September 30, 2012."³¹ Licensee asserts it ceased business as of November 16, 2011, thus it did not benefit from the Commission's activities during the period of the fee, and the public interest is served in waiving the fee.³² Finally, Licensee asserts it has shown good cause because it had no revenue for ten months prior to the due date of the fee, it experienced financial hardship, as evidenced by tax returns, and it did not receive notice of the debt in a timely manner.³³ We discuss these points in turn below.

47 C.F.R. § 1.1166 requires the applicant to demonstrate both good cause and that the waiver would promote the public interest. Licensee failed to satisfy both prongs of the standard.

First, Licensee failed to provide both necessary financial documentation and the explanation to present and support a request for waiver. Instead, Licensee asserts that it sold its assets and operations to a new company, and that Licensee ceased doing business effective November 16, 2011.³⁴ Furthermore, after the sale, Licensee had no paid staff in place to monitor regularly notices to the company, thus Licensee was unaware of the debt until it received *Demand Letter II*.³⁵ This is not relevant to the task of demonstrating that a waiver should be

²⁷ 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."); 47 C.F.R. § 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.")

²⁸ *Request* at 1-2.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.* at 4.

³² *Id.*

³³ *Id.* at 4-5.

³⁴ *Id.* at 1, 3, and 4.

³⁵ *Id.* at 3.

granted. Plainly, Licensee has not shown how an alleged delay in receiving the *Demand Letter* should alter the relevant facts that Licensee failed to pay both annual regulatory fees when each was due, administrative sanctions are imposed on delinquent debtors, and Licensee was a delinquent debtor when it filed this *Request*.

Licensee bears the responsibility for any delay in receipt of the two *Demand Letters*. The Commission mailed each notification to Licensee's address reported in the Commission FRN database, which Licensee is obliged to keep current.³⁶ The information used in the address of both *Demand Letters* remains unchanged from what is in the FRN database. Even so, Licensee asserts it did not receive the *Demand Letters* and that it does not maintain paid staff to monitor notices.³⁷ Despite that disclaimer, public information reveals that the buyer of Licensee's assets maintains its business office at the same addresses reported and used by Licensee. Furthermore, the buyer is Licensee's agent. As shown in Licensee's *Bill of Sale*, Licensee executed an 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"³⁸ Consistent with the power of attorney and Licensee's unchanged address and contact information in the Commission's records, we presume Licensee or Licensee's agent received *Demand Letter II* (and *Demand Letter I*). Thus, it is not material whether Licensee monitors its mail, regularly or not, by unpaid or volunteer staff or even whether Licensee submitted a change of address notification with the United States Postal Service. There is a presumption that Licensee received the mail.³⁹ Licensee failed to respond to the *Demand Letter II*, thus Licensee waived the listed rights, and on that ground, we would deny the request. Even so, we looked to the merits of the *Request*, and find Licensee failed to establish financial hardship or that the public interest is served by waiving the fee.

Licensee asserts that it ceased business activity on November 16, 2011, thus it has no revenue, but this approach does not establish financial hardship. Licensee failed to include relevant financial information about the sale or other matters relevant to establish financial hardship. Licensee's supporting financial documentation consists of the first page of the multi-page *Form 1120S* from tax years 2010 and 2011. On one hand, the documents are incomplete; they do not include either the Schedules or the referenced statements reporting deductions for matters such as compensation to officers, taxes and licenses, and other deductions. On the other hand, rather than tending to show financial hardship, the tax form reports Licensee's more than 100% increase in "total assets" from tax year 2010 to tax year 2011. We conclude from this profound increase in assets that Licensee has sufficient funds to pay the fee and accrued charges. Thus, Licensee's assertion that it did not generate revenue fails to establish that it lacks the funds to pay the fee, and it does not demonstrate compelling and extraordinary circumstances.

Finally, Licensee asserts that the public interest is served in waiving the fee because Licensee would not have benefitted from the Commission's regulatory activities.⁴⁰ This benefits

³⁶ 47 C.F.R. § 1.8002(b)(2).

³⁷ *Request* at 3.

³⁸ *Bill of Sale* at 2.

³⁹ *Maggio v. Wisconsin Ave. Psychiatric Ctr., Inc.* 987 F.Supp. 2d 38 (D.D.C. 2013)

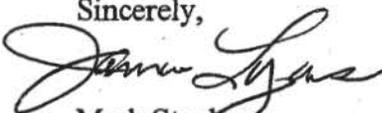
⁴⁰ *Request* at 4-5.

test has been rejected. Section 9 fees recover a number of costs, and the benefits are not limited strictly to the benefits derived from the Commission regulation of a specific service, or lack thereof. There is no statutory requirement to tie each fee to the specific costs associated with each service or the share to a particular regulatee.⁴¹ Indeed, "Section 9(a) does not require that [the Commission] base [its] fees solely on benefits to regulatees or that the fees recover from an entity only its particular cost of regulation."⁴² Rather, the standard is whether the entity seeking a waiver presented extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions. Licensee failed in that showing. Instead, Licensee presented a picture that shows Licensee's assets doubled between 2010 and 2011 and that it sold the business to another entity that continues with the underlying service.

Overall, 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.⁴³ 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.⁴⁴ Thus, we deny the *Request*.

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

Sincerely,


F&R: Mark Stephens
Chief Financial Officer

⁴¹ Assessment and Collection of Regulatory Fees for Fiscal Year 2004, *Report and Order*, 19 FCC Rcd 11662, 11666-667, ¶ 11 (2004).

⁴² Assessment and Collection of Regulatory Fees for Fiscal Year 1998, *Report and Order*, 12 FCC Rcd 17161, 17171-72 (1997).

⁴³ 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.").

⁴⁴ *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.).