

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

NOV 20 2014

OFFICE OF
MANAGING DIRECTOR

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, PC
5028 Wisconsin Ave., NW, Suite 301
Washington, DC 20016

Applicant/Licensee: **Millard S. Younts,
Receiver**
Waiver and Petition for Deferral: Financial
Hardship
Disposition: **Dismissed and Denied** (47
C.F.R. §§ 1.7, 1.1157(c)(1), 1.1164, 1.1166,
and 1.1910)
Fee: Fiscal Year (FY) 2013 Regulatory Fee
Date Filed: Sep. 27, 2013
Fee Control No.: RROG-13-00015719
Amount Due: **See Fee Filer**

Dear Mr. Smithwick:

This responds to the Petition for Waiver of FY 2013 Annual Regulatory Fee¹ (*Petition*) submitted on the grounds that Petitioner is a court appointed receiver who lacks funds. As we explain in detail below, we dismiss and, in the alternative, deny because Petitioner is a delinquent debtor and Petitioner failed to establish financial hardship to warrant waiver. Full payment of the delinquent Fiscal Year (FY) 2012 and FY 2013 regulatory fees, plus the accrued but unpaid penalties, interest, penalties and charges of collection are due.

¹ Millard S. Younts, Receiver, Annual Regulatory Fees-FY 2013, WEFC-TV [former WDRL-TV], Danville, VA (Facility ID No. 15507) Bill No. R13T015552, *Petition for Waiver of FY 2013 Annual Regulatory Fee* (Sep. 27, 2013) (*Petition*) with Attachment 1, Amended Judgment Order, dated Jun. 18, 2010 Attachment 1) and Attachment 2, Declaration of Millard S. Younts, dated Sep. 27, 2013 (Attachment 2).

Background

On September 27, 2013, after the FY 2013 fee was due,² Petitioner filed the instant *Petition*. In relevant part, the *Petition* presented as fact that on September 8, 2009, the United States District Court, Southern District of West Virginia entered a \$1,111,059.14 judgment, plus post-judgment interest, attorney fees, and costs, against Melvin Eleazer, *et al.*, including MNE Broadcasting, LLC, defendants in a civil action filed by Charter Communications VI, LLC, d/b/a Charter Communications, *et al.*³ A defendant was the prior license holder. On June 18, 2010, the court appointed Petitioner receiver to take control of the defendants' assets "to preserve, manage, sell, and otherwise liquidate the assets, including the FCC licenses used to operate WDRL-TV, to permit execution of the default judgment entered by the court."⁴ Now, Petitioner asserts the Commission should waive the "FY 2013 regulatory fee and penalty for station WEFC-TV" because of the appointment order as a receiver, and because the station "was silent from July 15, 2010, until June 1, 2011 ... [t]he Station has been on the air and off the air during the period of receivership [and it] is currently silent ... receiver has entered into an agreement to assign the license[, which] is pending"⁵ Furthermore, Petitioner asserts waiver is appropriate because he lacks funds, and, as he points out, on prior occasions the Commission has waived payment of the regulatory fees where the licensee is in receivership and where the station was dark.⁶

Petitioner included the Amended Judgment Order and a declaration by Petitioner.⁷ Missing from the submission is evidence showing a complete accounting of all assets, asset valuation, expenses, complete details of all past and future sales, the disposition of sale proceeds, and the balance remaining after closing of each sale. Moreover, Petitioner failed to include adequate financial documentation to support his assertion that he lacks funds to pay the regulatory fee or to determine whether Petitioner met his burden to establish financial hardship sufficient to waive payment of the regulatory fee and accrued charges. In this instance, necessary documentation should have encompassed a range of materials including for example, a fair market appraisal of all of defendants' assets, including the station license and all associated property and equipment, a complete accounting of "the assets of MNE Broadcasting, LLC" from the date of appointment to the present,⁸ financial documentation of both the Petitioner and MNE Broadcasting, LLC at all relevant periods, copies of court required financial accountings, the disposition of any assets sold, transferred, or disposed of after the date of judgment, the proposed disposition of assets after the sale, and any offer by the purchaser to pay fees and the delinquent debts.

² See Payment Methods and Procedures For Fiscal Year 2013 Regulatory Fees, Public Notice (DA 13-1796)(Sep. 4, 2013)("Regulatory fee payments must be RECEIVED by the Commission no later than 11:59 PM, Eastern Daylight Time, on September 20, 2013.")

³ *Id.*, Attachment 1, p. 1.

⁴ *Id.*, p. 2.

⁵ *Petition*, pp. 1-2.

⁶ *Id.*, at 3.

⁷ Attachments 1 and 2.

⁸ Attachment 1.

*Dismissal of Unfiled Petition
By a Delinquent Debtor*

Petitioner filed his *Petition* on September 27, 2013. At the time of filing, *Petition* was delinquent in paying the regulatory fees for both FY 2012, which was due no later than September 13, 2012,⁹ and FY 2013. When the fees became delinquent, the debtor was subject to sanctions for nonpayment.¹⁰ Petitioner acknowledges that it failed to pay the FY 2013 fee when due.¹¹ Because Petitioner did not in a timely and proper manner either pay the fee or submit a complete petition to defer payment,¹² the regulatory fee is delinquent and additional charges accrued, *e.g.*, the statutory penalty under 47 U.S.C. § 159(c) and interest, penalties and charges of collection under 31 U.S.C. § 3717. The debts remain delinquent. Under 47 U.S.C. § 159(c) and 47 C.F.R. §§ 1.1164(c)¹³ & (e)¹⁴ and 1.1166, we assessed the late payment penalties and charges.¹⁵ Thus, we dismiss the *Petition*. The delinquent fees and accrued charges are due immediately, and because we dismiss, that ends the matter; however, as a courtesy, we next discuss the content of the *Petition*, and the alternative ground for dismissal and denial.

No Evidence of Financial Hardship

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 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 extraordinary and compelling circumstances that outweigh the public interest in recouping the Commission's regulatory costs.¹⁷ Fee relief may be granted based on a "sufficient

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

¹⁰ Assessment and Collection of Regulatory Fees for Fiscal Year 2012, *Report and Order*, 27 FCC Rcd 8390, 8400, ¶¶ 31-32 (2012).

¹¹ *Petition* at 2.

¹² Petitioner also acknowledges, "Petitions for waiver must be accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship." *Petition* at 2.

¹³ 47 C.F.R. § 1.1164(c) ("If a regulatory fee is not paid in a timely manner, the regulatee will be notified of its deficiency. This notice will automatically assess a 25 percent penalty, subject the delinquent payor's pending applications to dismissal, and may require a delinquent payor to show cause why its existing instruments of authorization should not be subject to rescission.").

¹⁴ 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.").

¹⁵ See 31 U.S.C. § 3717.

¹⁶ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166. See also 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 (1994), *recon. denied*, 10 FCC Rcd 12759 (1995).

¹⁷ 9 FCC Rcd at 5344 ¶ 29; In The Matter of Phoenix Broadcasting, Inc. Stations KSWD and KPFD 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

showing of financial hardship.”¹⁸ “Mere 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, 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.²⁰

Here, Petitioner failed to include any financial documentation, rather Petitioner’s evidence shows only that he was appointed receiver “to take immediate control of the assets ... to preserve, manage, sell, and otherwise liquidate the assets ... to permit execution of the default judgment.”²¹ That limited evidence does not establish financial hardship, and without the required relevant financial documentation,²² Petitioner failed to meet our standard set forth at 47 C.F.R. § 1.1166, and on this additional ground, we dismiss. Moreover, the failure to provide the required documentation leaves the Commission unable to find that Petitioner did or will experience financial hardship.

Petitioner failed to provide evidence of his financial capability as a receiver to pay the fee, which is a necessary component in a claim of financial hardship, or, in the alternative, to explain the legal authority excusing Petitioner from complying with the court order that requiring him to “preserve” and to “manage” the assets, which duties would include paying the FCC regulatory fee. Petitioner failed in its duty to clarify its position with the Commission²³ and to maintain the accuracy and completeness of its application.²⁴ We will not speculate what information may fill in the gaps, thus without documentation of financial hardship, we dismiss.²⁵

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.”)

¹⁸ Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 13 (1995) (FY 1994 MO&O).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Attachment 1.

²² 47 C.F.R. § 1.1166(c).

²³ *Bartholdi Cable Co. Inc. v FCC*, 114 F3d 274, 280 (DC Cir. 1997)(The Commission “‘need not sift pleadings and documents’ to identify arguments that are not ‘stated with clarity’ by a petitioner. It is the petitioner that has the burden of clarifying its petition before the agency.”)

²⁴ 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.”)

²⁵ 47 C.F.R. § 1.1166(c).

Merely asserting that that receivership status exists does not relieve an applicant from establishing proper grounds to seek a waiver. Although receivership status is a factor,²⁶ status alone does not comply with and meet our standard. Indeed, a significant question may exist as to whether a petitioner's situation represents the 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.²⁷ The primacy of the standard remains, the applicant must present "extraordinary and compelling circumstances showing that a waiver ... would override the public interest" in collecting the fee.²⁸ Thus, even where an applicant asserts receivership as the basis for relief, we analyze the facts of each case to determine whether the applicant has satisfied both prongs of the Commission's standard, financial hardship and extraordinary²⁹ and compelling circumstances³⁰ showing waiver is justified.³¹ Here, Petitioner failed to establish that the receivership was based on financial hardship grounds and he failed to furnish any financial documentation. Moreover, from Petitioner's disclosed facts, we conclude that a reduction in the fee would result in a commensurate financial benefit to the defendants in the underlying lawsuit. Accordingly, we deny the *Request*.

Petitioner is delinquent in paying both the FY 2012 and FY 2013 regulatory fees, 25% penalties for both years, and other accrued charges. As such, we continue to assess interest and penalties from the dates of delinquency, and under the law,³² we will apply debt collection procedures.³³ Petitioner should confirm a payoff amount by going to the Commission's Fee Filer website.

Because Licensee is delinquent in a debt owed the United States, this provides notification that under 31 U.S.C. § 3711(g), without further notice, and usually within 180 days or less of delinquency, we will transfer the delinquent debt to Treasury, which will initiate collection action through private collection activities and assess additional charges. In addition, we may refer the debt to the Department of Justice, which may result in litigation and additional costs.

Moreover, under 31 U.S.C. § 3716, 31 C.F.R. § 285.5, and 47 C.F.R. § 1.1912, some or all of the debt may be collected by non-centralized or centralized administrative offset. Also, under 31 U.S.C. § 3711(e), this debt and Petitioner's payment history will be reported to credit reporting information bureaus. Because we have furnished notice here,

²⁶ See *FY 1994 MO&O*, 10 FCC Rcd at 12762, ¶ 14 ("[W]here a bankruptcy trustee, receiver, or debtor in possession is negotiating a possible transfer of a license, the regulatory fee could act as an impediment to the negotiations and the transfer of the station to a new licensee.").

²⁷ Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Notice of Proposed Rulemaking*, 18 FCC Rcd 6085, 6090, ¶ 11 (2003).

²⁸ *FY 1994 MO&O*, 10 FCC Rcd at 12761, ¶ 12.

²⁹ Black's Law Dictionary (9th ed. 2009)(extraordinary-"a highly unusual set of facts that are not commonly associated with a particular thing or event").

³⁰ *Id.* (compelling-"something so great that irreparable harm or injustice would result if not met").

³¹ In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 15985, 15989-90, ¶¶ 11, 13, 14 (2003).

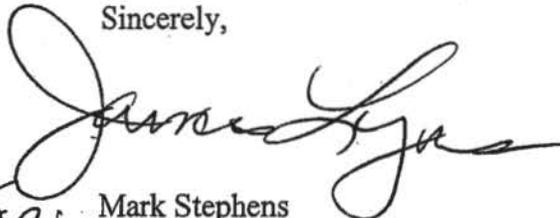
³² See 47 C.F.R. § 1.1901, *et seq.*

³³ See 31 C.F.R. § 3717.

Petitioner may not receive another notification of this process. Finally, Petitioner will be red lighted³⁴ until he pays the debt or makes other satisfactory arrangements.³⁵

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

³⁴ See 47 C.F.R. § 1.1910(b)(2) ("Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or request for authorization by any entity found to be delinquent in its debt to the Commission"); 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.").

³⁵ See 47 C.F.R. § 1.1914 ("If a debtor is financially unable to pay a debt in one lump sum, the Commission, in its sole discretion, may accept payment in regular installments.").