

Before the  
Federal Communications Commission  
Washington, D.C. 20554

*file-245*

In the Matter of )  
 )  
Aerco Broadcasting Corp. )  
Application for Review )  
 )  
 )  
 )

Fee Control No. 00000CDMC-99-026

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 2001

Released: July 30, 2001

By the Commission:

1. The Commission has before it an Application for Review filed on behalf of Aerco Broadcasting Corp. (Aerco). For the reasons set forth below, we deny Aerco's request.

2. Aerco seeks review of a decision entered by the Managing Director denying its request for waiver of the late charge penalty for late payment of the Fiscal Year (FY) 1998 regulatory fees. Aerco was assessed a late charge penalty for failure to make payment of its FY 1998 regulatory fee in a timely manner in accordance with the Commission's rules. In its subsequent waiver request, Aerco argued that the Commission's rules requiring a penalty of 25 percent of the amount of the fee not paid in a "timely manner" were too strict. The waiver request noted that Aerco's payment was mailed on September 16, 1998, in time for delivery by the deadline of September 18, 1998, and the effects of a hurricane which struck Puerto Rico, where Aerco is located, a few days after the check was mailed, could have delayed delivery of the payment due to preparation for the hurricane. In denying Aerco's request, the Managing Director determined that Aerco had failed to indicate or substantiate that it had met its obligation to make payment in accordance with the Commission's rules and that Aerco had provided no persuasive basis for questioning the validity of the late charge penalty.

3. We conclude that the Managing Director's decision is correct. The late fee was charged in accordance with Section 9(c)(1) of the Act. <sup>1</sup> Section 9(c)(1) states:

The Commission shall prescribe by regulation an additional charge which shall be assessed as a penalty for late payment of fees required by subsection (a) of this section. Such penalty shall be 25 percent of the amount of the fee which was not paid in a timely manner.

4. Nothing in the statute or its legislative history supports Aerco's claim that the Commission's rules implementing Section 9(c)(1) are inconsistent with Congress' intent because the rules do not account for circumstances such as whether payment is one day or one year late, payment is late or not made at all, the station is located outside the continental United States, or mail delivery of payment may have been delayed due to hurricane. To the contrary, as stated in the Managing Director's

<sup>1</sup> 47 U.S.C. § 159(c)(1).

decision, the rules fully comport with Section 9(c)(1), which requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner. Moreover, the rules and statute do account for more serious violations. In addition to setting the late charge penalty amount, the statute itself provides additional penalties for fees that are not paid at all. Section 9(c)(3) authorizes the Commission to revoke an existing license or other authorization for nonpayment of a regulatory fee.<sup>2</sup>

5. In the rulemaking that implemented Section 9(c)(1), the Commission also rejected arguments, similar to Aerco's, that it consider a regulatory fee payment to be timely submitted if the payment is postmarked by the date it is due.<sup>3</sup> Instead, the Commission determined that a regulatory fee is untimely paid when it is not received at the lockbox bank by the payment date, citing the need to process payments efficiently.<sup>4</sup> To the extent Aerco believes the Commission should adopt more lenient rules for stations outside the continental United States, Aerco's proposal is more appropriately raised in a petition for rulemaking.

6. In addition, Section 1.1158 of the Commission's rules permits payment of regulatory fees in forms that would not be affected by extrinsic factors, such as the uncertainties associated with the timing of mail delivery or the possibility of approaching weather conditions that might slow delivery.<sup>5</sup> The rules allow electronic transfer of funds, thus providing greater certainty of timely delivery. This permits licensees to account for individual circumstances in choosing how to meet their obligations to make payment in a timely manner.

7. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Aerco Broadcasting Corp. on December 21, 2000 IS DENIED.

8. IT IS FURTHER ORDERED that Aerco IS DIRECTED to submit payment in the amount of \$1,352.75 and Form FCC 159 within 30 days from the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>2</sup> 47 U.S.C. § 159(c)(3).

<sup>3</sup> *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, MD Docket No. 94-19, Report and Order, 9 FCC Rcd 5333, 5353 (1994).

<sup>4</sup> *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, MD Docket No. 94-19, Report and Order, 9 FCC Rcd 5333, 5353 n.23 (1994).

<sup>5</sup> 47 C.F.R. § 1.1158.

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

RECEIVED  
DEC 21 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ASSOC. MNG. DIR.  
FINANCIAL OPERATIONS  
(APR-10)

In re Matter of )  
AERCO BROADCASTING CORP )  
San Juan, Puerto Rico )

) Fee Control No: 00000CDMC-99-026

For Waiver of Late Charge  
To: The Commission

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APPLICATION FOR REVIEW

Aerco Broadcasting Corp, applies to the Commission to reverse the decision of the Managing Director issued November 21, 2000 wherein he denied Aerco's request for a waiver of late payment penalties. In support thereof the following is shown.

1. On December 3, 1998 the FCC's Managing Director issued two delinquency letters assessing a 25% penalty (\$1,352.75) for purported late payment of the 1998 annual regulatory fee (\$5,411.00). Aerco requested that the penalty be waived and that has been denied by the Managing Director.

2. The decision of the Managing Director should be reversed since the penalty is inapplicable in the first instance and if not inapplicable then it should be waived for the reasons set forth herein.

3. The concept of penalizing licensee has its genesis in the Communications Act, wherein Section 9(c)(1) states:

The Commission shall prescribe by regulation an additional charge which shall be assessed as a penalty for late payment of fees required by subsection (a) of this section. Such penalty shall be 25 percent of the amount of the fee which was not paid in a timely manner. 47 U.S.C. Sec. 159(c)(1).

While the amount of the penalty is specified, the definition of "timely manner" is not dictated by statute. In implementing the act the FCC, on its own, defined "timely manner" as follows:

We propose to incorporate section 9(c)(1) into our rules. Thus, we will charge a 25 percent penalty to any regulatee that fails to pay its regulatory fee (or installment) in a timely manner. We intend to consider a payment to be late, or "not paid in a timely manner," if the full regulatory fee amount or the entire installment payment is not received at the lockbox bank by the due date specified by the Commission. A payment would also be considered late if the payment (check, bank draft or other means) is not collectible. Implementation of Section 9 of the Communications Act; Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 75 RR 2d 424, 9 FCC Rcd 6957 (1994)

The penalty should not be assessed for three reasons.

4. First, the rules implementing the act are too stringent to comport with the purpose for which Congress authorized the assessment of so large a penalty. Second, the payment was mailed in time for receipt by the deadline so that some grace period should be allowed for any licensee. Third, this station is located in Puerto Rico, which has heavily damaged by hurricanes and the station took reasonable efforts to pay by the deadline. The payment was mailed in time for delivery by September 18, 1998.

5. The purpose of a penalty is to punish a licensee for not paying the regulatory fee or for willful, negligent non-payment. In the case of licensee's Congress surely did not intend that so large a penalty be assessed for lateness due to mail delivery. Congress did not intend that licensees should be penalized for late mail service; nor should they be placed in the same category as to licensee who do not pay at all. The rules as currently written make no distinctions, whether the payment is received 1 day or 1 year late. This surely is not what congress meant when they authorized rules to implement "timely manner". Some flexibility, and reasonableness must be applied to stations located outside the continental United States. While the use of a receipt date is

not per se unreasonable, given the magnitude of the fine the Commission should implement the "timely manner" of the act with more flexibility.

6. In the case of the 1998 regulatory fees the deadline was September 18, 1998. As shown in the record, below, payment this check was mailed on September 16, 1998 in time for timely receipt by the 18th. Apparently, one check was processed by the Bank on September 23, 1998 and another check was not processed until September 28, 1998, despite the fact that they were both sent together. There is no information provided by the Commission or the Melon Bank as to when the payment was received. For the purpose of determining whether this station sent its fee in timely, the controlling date should be when the check was deposited in the US mails, not when it is processed by the Melon Bank in Pittsburgh.

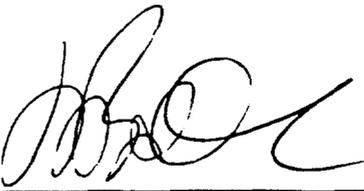
7. Finally, broadcast stations in Puerto Rico have been devastated by weather during the month of September and some leeway should be allowed since mail service between the island and the mainland is sporadic. While Hurricane Georges struck the island a few days after the check was mailed it is possible that the post office in Puerto Rico was affected by the impending storm and bad weather which normally proceeds a hurricane with such great force as Georges, which eventually decimated the island of Puerto Rico and the surrounding Caribbean.

8. The Managing Director addressed non of these arguments when he issued his ruling refusing to rescind the penalty, and in view of the foregoing, it is requesting that the Commission abate the penalty by finding that the payment was timely made.

9. Furthermore, the station has been financially affected by the hurricane and the penalty will not be in the public interest since there was no willful attempt to avoid timely payment of the regulatory fee.

10. Alternatively, it is requested that for the reasons submitted that the Commission waive the penalty under the circumstances present here.

Respectfully submitted,  
AERCO BROADCASTING CORP

By:   
\_\_\_\_\_  
John A. Borsari  
ITS Attorney

BORSARI & ASSOC., PLC  
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(703) 524-4329 (fax)

December 21, 2000

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

NOV 21 2000

OFFICE OF  
MANAGING DIRECTOR

John A. Borsari, Esquire  
Borsari & Assoc., P.L.L.C.  
1401 Wilson Boulevard, Suite 1007  
Post Office Box 29  
Arlington, VA 22210

RE: Request for Waiver of Late Charge  
Penalty for FY 1998 Regulatory Fees  
Aerco Broadcasting Corp.  
Fee Control No. 00000CDMC-99-026

Dear Mr. Borsari:

This is in response to the objection to, or request for waiver of, the late charge penalty for late payment of the Fiscal Year (FY) 1998 regulatory fees, filed on behalf of Aerco Broadcasting Corp. (Aerco).

You assert that the late charge penalty should not be assessed for three reasons: (1) the Commission's rules requiring a penalty of 25 percent of the amount of the fee not paid in a "timely manner" are too strict; (2) Aerco's payment was mailed on September 16, 1998, in time for delivery by the deadline of September 18, 1999; and (3) hurricane damage in Puerto Rico, where Aerco is located, could have delayed delivery of the payment and has affected Aerco financially.

We have fully considered all of your contentions. The Communications Act of 1934, as amended, requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner. It is the obligation of the licensees responsible for regulatory fee payments to ensure that the Commission receives the fee payment no later than the final date on which regulatory fees are due for the year. Your request does not indicate or substantiate that Aerco Broadcasting Corp. met this obligation. Nor does it provide any persuasive basis for questioning the validity of the late charge penalty in these circumstances. Therefore, the penalty was properly imposed and your request is denied.

Payment of the late charge penalty in the amount of \$1,352.75 was assessed and due on September 19, 1998. The late charge penalty must be filed together with a Form FCC 159 (copy enclosed) within 30 days from the date of this letter. You are cautioned that the failure to submit payment as required may result in further sanctions and the initiating of a proceeding to recover the penalty and accrued interest pursuant to the provisions of the Debt Collection Improvement Act of 1996.

John A. Borsari, Esq.

Page 2.

If you have any questions concerning this letter, please call the Credit & Debt Management Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Reger", with a small mark to the left of the first letter.

Mark A. Reger  
Chief Financial Officer