

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:
}
} **Implementation of the Debt Collection**
} **Improvement Act of 1996 and Adoption**
} **Of Rules Governing Applications or**
} **Requests for Benefits by Delinquent**
} **Debtors**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MD Docket No. 02-339

TO: Marlene H. Dortch, Secretary
For Transmission to:
The Commission

PETITION FOR RECONSIDERATION OR CLARIFICATION

1. Fletcher, Heald & Hildreth, P.L.C. ("FHH"), pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429 (2003), hereby submits this "PETITION FOR RECONSIDERATION OR CLARIFICATION" of the *Report and Order* ("R & O"), released on April 13, 2004 in the above-referenced proceeding.¹

2. As set forth below, "conditional" grants of benefits and authorizations raise serious concerns for regulatees when coupled with the inability to make inquiries to the Commission's staff about payment status. Because of these concerns, FHH asks the Commission to either reconsider the process by which a grant can be rescinded due to debt non-payment or to reinstate

¹*In the Matter of Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, Report and Order, 19 FCC Rcd 6540 (2004) ("R & O"). Public notice of the R & O was published in the Federal Register on May 17, 2004. 69 Fed. Reg. 27843 (May 17, 2004). Therefore, pursuant to Section 1.4(b)(1) of the Commission's rules, this Petition for Reconsideration is timely filed.*

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an informal debt inquiry policy which will permit regulatees to determine whether, according to the Commission's records, they are subject to such rescission.

STANDING

3. FHH represents clients who are subject to the payment of regulatory and other fees to the Commission and who also seek grants from the Commission which, under the rules revised in the *R & O*, would be subject to rescission for failure to pay those fees. In the ordinary course of their representation of those clients, FHH attorneys frequently are called upon to provide formal opinions concerning the finality of the Commission's actions. Since, as discussed below, the debt collection rules under consideration here may severely undermine FHH attorneys' ability to reliably provide such opinions, particularly in light of a recent informal change in another Commission policy, FHH, its attorneys, and its clients are directly affected by the changes adopted by the Commission.²

BACKGROUND

4. In the *R & O*, the Commission has sought to expand its ability to collect debts owed to the United States Government. To accomplish that salutary goal, the Commission added "payment of delinquent fees" to the conditions on a grant of benefit or authorization.³ The Commission also added a new section entitled "Effect of insufficient fee payments, delinquent

² While we are citing only the effects of the debt collection rules on FHH attorneys and clients for standing purposes, as a practical matter we would anticipate that attorneys and regulatees throughout our field share similar concerns about the finality of the Commission's actions.

³ Previously grants were conditioned only upon "payment of applicable fees" (*see* 47 CFR §1.1112(a)) and "payment of current regulatory fees" (*see* 47 CFR §1.1161(a)).

debts, or debarment” which states that, “Any Commission action taken prior to the payment of delinquent non-tax debt owed to the Commission is contingent and subject to rescission.”⁴

5. In a development separate from, but clearly relevant to, the operation of the debt collection process, the Commission’s staff has recently reversed a longstanding policy regarding fee inquiries. Pursuant to this policy, members of the public, including attorneys representing regulated entities, could determine through informal inquiries to the Commission’s staff whether a particular entity had, according to the Commission’s records, paid all fees. The reversal of the policy has not been formally announced, but it has been communicated in an email, dated March 2004 from Claudette Pride, Chief, Revenue and Receivables Operations Group, in which she advises that:

During an interim period, the Office of the Managing Director performed due diligence research activities for Media license applications. In dialogue with offices within the FCC, it became clear that the FCC is not responsible for performing this research, and the research should be properly performed against the applicant’s records than from the FCC records. In addition, the FCC is under strict budgetary reductions, and as a result of our determinations, the FCC will no longer perform this research.⁵

In FHH’s view, this change in policy, when coupled with the Commission’s enhanced debt collection efforts, gives rise to intolerable uncertainty which will have an adverse impact on a wide range of private transactions.

⁴ 47 CFR §1.1910.

⁵ As indicated in the text, this policy change came to our attention in early March 2004, long after the close of the comment period in this proceeding. Had this change in policy been announced, formally or otherwise, prior to the deadline for comments, interested parties would have had an opportunity to raise this concern for the Commission’s consideration prior to the issuance of the *R & O*. Since the change in policy did not occur until shortly before the *R & O* was issued, the instant petition for reconsideration or clarification provides the most timely means of raising this matter for the Commission’s consideration.

DISCUSSION

6. FHH does not dispute the importance of timely collection of debts owed to the United States Government. Developing more effective ways to achieve this goal is an important focus of the Commission and will benefit the public. However, we also believe that predictability and finality are imperative when advising clients, especially with respect to transactional matters where finality of the underlying grant is typically, and understandably, a condition to closing. The addition of delinquent debt payment to the list of conditions on a grant, when coupled with the Commission's refusal to provide informal debt status updates, seriously detracts from the predictability and finality needed in these types of matters and we ask the Commission to reconsider this condition.

7. The ability to consider a grant "final" is an important step in private transactions. "Finality" is conventionally defined for most contractual purposes as the point beyond which an agency action is not subject to further administrative or judicial reconsideration or review. When engaging in transactional matters, including assignments, transfers and financing, purchasing entities normally require a warranty that all necessary Commission authorizations have been obtained and that these authorizations are final. These requirements are typically fulfilled through the provision of opinion letters by counsel. In order to ensure finality, and therefore the accuracy of these opinion letters, counsel will both calculate the date on which a grant is "final" and perform a "due diligence" review of Commission files and records.

8. In calculating the date on which a grant is "final," one first calculates the date before which an interested party may seek review through a petition for reconsideration,⁶ an application

⁶ See 47 CFR §1.106.

for review⁷ or a judicial review.⁸ Next, one considers the time within which action might be taken on the Agency's own motion, either by the subordinate authority that took the original action⁹ or by the full Commission.¹⁰ Once the last possible date for any such reconsideration or review has past, the grant is normally deemed "final."

9. In addition to this chronological calculation of "finality," counsel normally undertakes a "due diligence" review of Commission files and records. One element of this review has historically been an inquiry to the Fee Section to confirm that, according to the Commission's records, all fees have been paid.¹¹ However, if parties are no longer able to obtain such confirmation from the Commission, their ability to warrant that their grants from the Commission are final is seriously compromised, if not eliminated all together.

10. In the *R & O*, the Commission acknowledges that it expects applicants will "diligently check" the status of their fee payments to confirm that they are not delinquent.¹² But such "diligent checks" cannot be undertaken if the Commission refuses to disclose to would-be

⁷ See 47 CFR §1.115.

⁸ See 47 USC §402.

⁹ See 47 CFR §1.113.

¹⁰ See 47 CFR §1.117.

¹¹ Although counsel does not expect to rely exclusively on the Commission's records, this inquiry will determine whether any question about payment exists which might then be resolved promptly and effectively.

¹² *R & O*, ¶ 9 (*stating*, "We expect that most applicants will diligently check to determine whether they are delinquent in any debts owed to the Commission and resolve any such delinquencies in a timely manner.").

checkers whether or not any delinquency appears in the Commission's records.¹³ The reinstatement of an informal inquiry policy would allow counsel to properly advise clients in transactional matters. This would also allow counsel to take action to resolve debt issues before consummation, thereby avoiding the confusion which could result from a post-consummation rescission of a grant based on the Commission's determination--correct or otherwise--that some debt remains unpaid.

11. We appreciate the constraints on Commission staff and do not wish to shift the due diligence burden to the Commission. However, the ability to confirm that the regulatee's records and the Commission's records are in agreement is imperative. To that end, we propose the reinstatement of an informal inquiry policy or the creation of an online debt information database that could be searched by regulatees and their counsel. The Commission has significant experience in affording online access to its databases and, while fee-related data may be subject to particularized considerations, the template for access has already been established. By using this template as a starting point, the Commission could build upon its previous success in increasing the amount of helpful information that is available online.

CONCLUSION

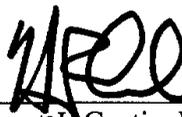
12. The debt-collection amendments that condition grants based on payment of delinquent debts, combined with the new Commission policy of refusing to disclose debt status upon inquiry, create unreasonable unpredictability for regulatees. The changes discussed herein

¹³ Although each regulatee presumably has its own records concerning fee payments, those records may not always be complete or reliable. More importantly, even if a regulatee's records establish conclusively that all fees have been paid, that conclusion would be immaterial if the Commission's records, for whatever reason, did not agree with that conclusion and subsequently are used to disrupt a deal that was anticipated to be closed.

would balance both the Commission's goal of collecting debts owed to the United States Government and regulatees' goal of regaining the predictability and finality needed to operate effectively.

Respectfully Submitted,

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