

DOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
OCT 26 2004

TOM PUTMAN
R&ROG

OFFICE OF
MANAGING DIRECTOR

Beth A. Jenkins
Vice President
Music Express Broadcasting Corporation
WATJ
Post Office Box 800
Chardon, OH 44024-0800

Re: WATJ(AM), Chardon, OH
Request for Waiver of FY 2004 Regulatory Fee
Fee Control No. 00000RROG-04-068

Dear Ms. Jenkins:

This is in response to your request dated August 10, 2004, filed on behalf of Music Express Broadcasting Corporation (Music Express), for a waiver and deferral of the \$1,275.00 fiscal year (FY) 2004 regulatory fee for Station WATJ(AM), Chardon, Ohio, based upon financial hardship. Our records reflect that Music Express has not paid the FY 2004 regulatory fee at issue here.

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. The Commission therefore decided to grant waivers or reductions of its regulatory fees in those instances where a "petitioner presents a compelling case of financial hardship." See *Implementation of Section 9 of the Communications Act*, 9 FCC Rcd 5333, 5346 (1994), *recon. granted*, 10 FCC Rcd 12759 (1995). In reviewing a showing of financial hardship, the Commission relies upon a licensee's cash flow, as opposed to the entity's profits, and considers whether the station lacks sufficient funds to pay the regulatory fee and maintain service to the public. Thus, even if a station loses money, any funds paid to principals, deductions for depreciation or similar items are considered funds available to pay the fees.

In your request, you state that "no compensation is now being, or has ever been, paid to officers." You assert that "because of continuing financial hardship, WATJ went dark on May 31, 2004, and its returned license was received by the FCC on June 14, 2004." You also state that the Commission granted WATJ relief from regulatory fees for FYs 1997 and 1999 through 2003. You submit a copy of WATJ's "Profit & Loss: January through July 2004" and a copy of Music Express' 2003 Form 1120S, "U.S. Income Tax Return for an S Corporation." WATJ's "Profit & Loss: January through July 2004" indicates that the station suffered a financial loss during the six-month time period from January 2004 through July 2004 of \$34,186.48, which was only partially offset by depreciation in the amount of \$4,026.12. Similarly, WATJ's 2003 Income Tax Return shows a loss of \$45,458.00, which is only partially offset by depreciation of \$11,015.00.

Beth A. Jenkins, Vice President

2.

Given that WATJ suffered a financial loss in 2003, as well as from January 2004 through July 2004, we grant your request for a waiver of the \$1,275.00 regulatory fee for FY 2004.¹

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

Sincerely,



Mark A. Reger
Chief Financial Officer

¹ WATJ's status as a dark station would also warrant a fee waiver. *See generally 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 10891, para. 15 (1995) (determining that the Commission will "grant petitions for waivers of the regulatory fees on grounds of financial hardship from licensees of broadcast stations which are dark (not operating)").

'00000RROG-04-068

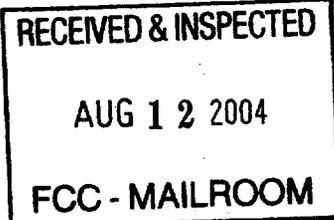
DOCKET FILE COPY ORIGINAL

MUSIC EXPRESS
BROADCASTING CORPORATION

RECEIVED FCC
WATJ

2004 AUG 12 2 32
PO Box 800
Chardon, OH 44024-0800

FINANCIAL OPERATIONS
CENTER



Phone: (440) 286-8781

Fax: (440) 286-9247

Office of the Managing Director
Federal Communications Commission
Attn.: Regulatory Fee Waiver/Reduction Request
445 12th Street, S. W., Room 1-A625
Washington, D.C. 20554

August 10, 2004

Re: Petition to Defer Payment and Request for Waiver of Regulatory Fee
AM Radio Station WATJ, 1560, Chardon, OH

Dear Sir or Madam,

I write to seek relief from payment of regulatory fees because of financial hardship. Additionally, I formally petition to defer payment of the \$1,275.00 FY 2004 regulatory fee pending your decision on the request for waiver. According to FCC rules, Requests for waivers or reductions 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.

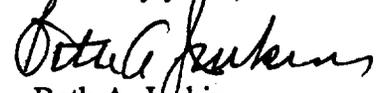
I am therefore enclosing copies of our most recent profit and loss statement and balance sheet, page one of our 2003 Form 1120S, and Mr. Mark Reger's letter dated December 10, 2003, granting relief from FY 2003 regulatory fee.

Please be advised that no compensation is now being, or has ever been, paid to officers. The FCC granted WATJ relief from regulatory fees for FY 1997, 1999, 2000, 2001, 2002 and 2003.

You are further advised that because of continuing financial hardship, WATJ went dark on May 31, 2004, and its returned license was received by the FCC on June 14, 2004. In consideration of all the above, please therefore grant us relief from Regulatory Fees for FY 2004.

Kindly contact me if you would like any additional information documenting the financial hardship. Thank you for your consideration.

Sincerely yours,


Beth A. Jenkins
Vice President

/baj

Enclosures

cc: Tom Putnam, Office of the Chief Financial Officer

AUG 13 2004

DOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

TOM PUTMAN
R&ROG

DEC 14 2004

OFFICE OF
MANAGING DIRECTOR

Stuart A. Shorenstein
Wolf, Block, Schorr and Solis-Cohen LLP
250 Park Avenue
New York, New York 10177

Re: NTT America, Inc. FY 2004
Regulatory Fee
Fee Control No. 00000RROG-05-001
Bill No. 0420000262

Dear Mr. Shorenstein:

This is in response to your request filed on behalf of NTT America, Inc. (NTTA) for waiver of the late payment penalty associated with its fiscal year (FY) 2004 regulatory fees. Our records reflect that NTTA's check for \$276,043.52 for its FY 2004 regulatory fees was received by the Commission at the Mellon Bank on September 20, 2004 but that we have not yet received NTTA's late payment penalty of \$69,010.83.

By way of explanation, you state in your request that NTTA's late payment was due to a computer error resulting from NTTA's changing its software system early in the week of August 15, 2004. You assert that the new software system contained a defect which prevented the proper execution of an appropriate check at the correct time and that the check could not be issued until the defect was corrected. You state further that once the defect was corrected, the check was issued and picked up by FedEx at 3:48 p.m. on August 19, 2004. It was delivered to the Commission's Depository in Pittsburgh at 9:37 A.M. on August 20, 2004, which was past the FY 2004 payment deadline of 11:59 p.m. on August 19, 2004. You argue that the delay was de minimis and did not cause any harm or prejudice to the FCC in the form of loss of interest. You urge the Commission to exercise its discretion to waive the penalty, citing cases in which the Commission has done so. Further, you assert that the size of the penalty is out of proportion to the minor delay and that NTTA made every effort to pay the fee on time.

The Communications Act of 1934, as amended, requires the Commission to assess a late payment 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.

The Commission takes great care to inform its licensees of the due dates, amounts of the fees, and payment methods on its web site, www.fcc.gov. For the FY 2004 regulatory fees, the Commission timely released and posted several Public Notices and news releases on its web site that both informed licensees of the August 19, 2004 deadline and the availability of the Fee Filer online system for submission of annual regulatory fees and related filing data. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, Report and Order, FCC 04-146 (released June 24, 2004) ¶ 64 (stating Fee Filer is an “easy and convenient way to make fee payments on a timely basis”); Public Notice, *FY 2004 Regulatory Fees Due No Later Than August 19, 2004*, (July 2, 2004); Public Notice, *Payment Methods and Procedures For Fiscal Year 2004 Regulatory Fees*, DA 04-2215 (July 21, 2004) (stating easiest and quickest way to pay regulatory fees is through FCC’s online payment system, known as Fee Filer, and listing both the web address and a phone number to call for technical assistance); Public Notice, *Fee Filer Available August 1 for 2004 Regulatory Fees*, DA 04-2262 (July 23, 2004); FCC News, *Official FY 2004 Regulatory Fee Payment Window Opens Tomorrow – Fees Due No Later than August 19* (Aug. 9, 2004) (reminding of deadline and stating that Commission would begin aggressive effort to collect fees, including 25 percent penalty, beginning August 20, 2004); Public Notice, *Deadline for Filing FY 2004 Regulatory Fees*, DA 04-2549 (Aug. 18, 2004).

The cases you cite do not support NTTA’s position. *Northeast Radio, Inc.*, July 14, 2003, involved a waiver of the underlying fee based on documentation establishing financial hardship. *Kidd Communications*, June 2, 2003, involved a waiver of the underlying fee based on evidence of bankruptcy establishing financial hardship. And *Harlan Municipal Utilities*, November 19, 2002, involved extension of the regulatory fee filing window as a “result of the clearly unforeseeable events of September 11, 2001 (including the ensuing interruption of mail and carrier service) that even the best of planning could not have avoided.” None of these cases are comparable to NTTA’s situation. While we acknowledge that NTTA’s circumstances are unfortunate and the amount of the penalty is significant, we do not find that NTTA’s situation justifies a waiver of the penalty. NTTA had notice as early as July 2, 2004 of the August 19, 2004 payment deadline (see Public Notice, *FY 2004 Regulatory Fees Due No Later Than August 19, 2004*, (July 2, 2004)) and thus had ample time to remit a check before the window closed.¹

We find that NTTA did not meet its obligation to file its regulatory fee to be received by the Commission no later than August 19, 2004, the final date of the regulatory fee filing window for FY 2004. We therefore deny your request for waiver of the penalty for late payment of the fiscal year 2004 regulatory fee.

¹ Insofar as NTTA claims that it could not avail itself of the Commission’s well-advertised on-line Fee Filer system because of its own credit limit, NTTA may wish to seek expansion of its credit limit in order to take advantage of Fee File in future years.

Stuart A. Shorestein

3.

Your late payment penalty in the amount of \$69,010.83 for FY 2004 is now due. The fee must be received, together with a copy of Bill No. 0420000262, within 30 days from the date of this letter. If you have any questions concerning this matter please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark A. Reger', with a large, stylized initial 'M'.

Mark A. Reger
Chief Financial Officer

0000 RPO6-05-001

WolfBlock

50 Park Avenue, New York, New York 10177
tel: (212) 986-1116 ■ Fax: (212) 986-0604 ■ www.WolfBlock.com

Stuart A. Shorenstein
Direct Dial: (212) 883-4923/(202) 628-8895
Direct Fax: (212) 672-1123/(202) 789-4242
E-mail: sshorenstein@wolfblock.com

September 22, 2004

Express Mail

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Petition for Waiver of Late Filing Penalty

Dear Ms. Dortch:

Submitted herewith, on behalf of NTT America, Inc., are an original and four copies of its Petition for Waiver of Late Filing Penalty

Kindly direct any inquiries regarding this submission to the undersigned at the New York office of this firm. Please acknowledge receipt of this filing by date stamping and returning to the undersigned the extra copy of this transmittal letter in the self addressed envelope provided herewith.

Sincerely,



Stuart A. Shorenstein
For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

SAS
Enclosures

cc: Andrew S. Fishel, Managing Director
Revenue and Receivables Operations Group
William Mosca, Esq.
Dawn Fasano, Esq.
David Bronston, Esq.

DSN:232942.1/NTT001-220995

Cherry Hill, NJ ■ Harrisburg, PA ■ New York, NY ■ Norristown, PA ■ Philadelphia, PA ■ Roseland, NJ ■ Wilmington, DE
WolfBlock Government Relations: Harrisburg, PA and Washington, DC
Wolf, Block, Schorr and Solis-Cohen LLP, a Pennsylvania Limited Liability Partnership

OCT 06 2004



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC/MELLON

SEP 27 2004

In the Matter of the)
)
Petition of NTT America, Inc. for a) MD Docket No. _____
Waiver of the Late Charge Penalty Assessed)
in Conjunction with NTT America's 2004)
Regulatory Filing Fee)

FCC/MELLON SEP 27 2004

To: Managing Director

PETITION FOR WAIVER OF LATE FILING PENALTY

NTT America, Inc. ("NTTA"), by its attorneys, respectfully requests this Commission pursuant to 47 CFR §§ 1.3 and 1.1166 to grant it a waiver of additional charges imposed upon it as a penalty for NTTA's de minimis late payment of its 2004 regulatory fee. In support of this Petition, NTTA states as follows:

1. NTTA is an American company incorporated in the State of Delaware and licensed to conduct business in that state and throughout the United States. NTTA is in the business of providing to client companies domestic and international telecommunications services, network architecture, computer hardware and software, and associated management and maintenance services.

2. NTTA holds an appropriate federal 214 license to conduct the telecommunications services aspects of its business. NTTA has held this license continuously since 1997.

3. Each year, pursuant to Congressional mandate, the Federal Communications Commission ("FCC" or "Commission") assesses regulatory fees to recover costs associated with the Commission's enforcement, policy and rulemaking, user information and international activities. These fees are then proportionally allocated among the various license holders, including NTTA. The 2004 fiscal year aggregate regulatory fee assessment totaled \$272,958,000.¹

4. The FCC has allocated to NTTA a proportionate share of the annual regulatory fee assessment since 1997. From 1997 through 2003, NTTA paid this regulatory fee in full and on a timely basis.

5. The FCC also apportioned to NTTA a proportionate share of the fiscal year 2004 regulatory fee assessment. Again, and as was the case in prior years, NTTA paid the FCC's fiscal year 2004 regulatory fee in full, but missed the filing deadline by only a few hours.

6. All licensees were required to have the annual regulatory fee payment in the hands of the FCC by August 19, 2004, at 11:59 p.m.² Consistent with its practice in prior years, NTTA also planned to have the requisite fee payment in the hands of the FCC by the prescribed deadline, and made appropriate arrangements to make payment to the FCC's Revenue and Receivables Operations in Pittsburgh, Pennsylvania.³

¹ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Docket No. 04-73 (June 24, 2004)

² See Public Notices, Federal Communications Commission, July and August 2004 generally.

³ These facts and other facts described in this Petition are established in the Affidavit In Support of Petition For Waiver of Late Filing Fee, which is attached as NTTA Exhibit 1.

7. Unfortunately, a computer error caused NTTA narrowly to miss the filing deadline. For several years, NTTA computers have run using SAP software. Each year, the FCC regulatory assessment fee was programmed for payment, and the NTTA computer system ensured that a proper check, for the appropriate amount, was issued and available for timely filing with the FCC. However, early in the week of August 16, 2004, NTTA changed software systems from the existing SAP to a new system known as PeopleSoft. Unbeknownst to NTTA, the new software system contained a defect which prevented the proper execution of an appropriate check at the correct time. More specifically, the new software system did not contain a proper "posting to payment" function, and the check could not be issued until the software was corrected. This defect caused the authorization for the FCC regulatory fee to be delayed, and despite working late into the night on August 18 to correct the software defect, NTTA could not issue a proper check until after 3:00 p.m. in the afternoon of August 19, 2004.

8. As soon as the check to cover the FCC's 2004 regulatory fee assessment was issued, NTTA contacted FedEx and arranged for delivery to the FCC's Depository in Pittsburgh. FedEx picked up the check at 3:48 p.m. on August 19, 2004, and completed delivery at 9:37 a.m. on August 20, 2004. The check therefore arrived nine hours and thirty eight minutes late.⁴

9. On September 7, 2004, NTTA received in a letter postmarked August 30, 2004, what appeared to be an invoice from the Commission. Entitled BILL FOR COLLECTION, the

⁴ The FedEx Track Shipments Detailed Results demonstrating the pick-up, transit and delivery information are attached as NTTA Exhibit 2.

one page document displayed a "Total Amount Due" of \$69,010.83, with a line stating "Assess penalty for late regulatory fee payment not received by 8/19/04."⁵

10. Under authority conferred by the Communications Act, the FCC has promulgated rules and regulations to assess and collect regulatory fees, to prescribe payment deadlines for collecting these fees, and to assess and collect penalties associated with late payment. The Communications Act also authorizes the FCC to waive its rules and regulations where appropriate, including any penalties associated with late payment of regulatory fees.⁶ Additionally, the FCC retains inherent power to waive or modify any of its rules or regulations, including imposition of fees or penalties for good cause shown.⁷

11. The instant matter is one where the FCC should exercise its sound discretion and waive in its entirety the penalty assessed against NTTA. It is clear that NTTA has a long history of paying its regulatory fees on time, and fully intended and attempted to do so for the FCC's fiscal year 2004 regulatory assessment. As a demonstration of its good faith and diligence, NTTA had a procedure in place to ensure that it would file its regulatory assessment in the correct amount and in a timely manner. NTTA was prevented from filing its fee before expiration of the deadline because of an error in its new software that delayed the issuance of the check. Furthermore, once it discovered the error, corrected it and had the check properly issued, NTTA took immediate measures to ensure the check's prompt delivery to the FCC's Pittsburgh Depository. As a result, NTTA's check was indeed delivered to the proper FCC office early in

⁵ The BILL FOR COLLECTION is attached as NTTA Exhibit 3.

⁶ The relevant Communications Act and FCC rules are found at 47 U.S.C. sec.159 et seq., especially pars. (c) and (d), and at 47 CFR § 1.3 and § 1.1164 et seq.

⁷ 47 CFR § 1.3.

the morning following the midnight deadline. The check is for the full amount of the regulatory assessment. The delay in filing was, in fact, de minimis and has not caused any harm or prejudice to the FCC in the form of loss of interest or any other type of harm.

12. Furthermore, NTTA has corrected the software error and ensured that future payments to the FCC to cover regulatory or other assessments will be made in a timely and appropriate manner.

13. NTTA's late delivery was, in light of all the circumstances, an excusable mistake that resulted from computer software error, and not from any lack of diligence, proper attention, good faith or cooperation on NTTA's part. In fact, NTTA's problem is quite analogous to the banking error situation that the Communications Act and FCC Rules recognize as an excuse to late payment.⁸

14. This Commission has in the past exercised its sound discretion and excused companies from penalties assessed for late payment of regulatory fees for demonstrated good cause. See, e.g., *Harlan Municipal Utilities*, November 19, 2002 (granted request for waiver of penalty relating to late payment of FY 2001 regulatory fees); *Northeast Radio, Inc.*, July 14, 2003; *Kidd Communications*, June 2, 2003.

15. Here, the very size of the penalty (\$69,010.83) is vastly out of proportion to the very minor payment delay, especially since the delay was unintentional, NTTA made every effort to pay the fee once the mistake was discovered and rectified, and in fact made full payment promptly thereafter. NTTA has demonstrated further its good faith by promptly paying the

⁸ See references contained in footnote 7, *supra*.

penalty, which has been received by the FCC's Revenue and Receivables Operation in Pittsburgh.⁹

WHEREFORE, NTT America, Inc., respectfully requests the Federal Communications Commission, in the exercise of its sound discretion, to waive in its entirety the penalty assessed against NTT America, Inc., for late payment of the fiscal year 2004 regulatory assessment.

Respectfully submitted,

NTT AMERICA, INC.

By: 
Stuart A. Shoreinstein

Wolf, Block, Schorr & Solis-Cohen LLP
250 Park Avenue
New York, NY 10177
Tel: 212-883-4923
Fax: 212-672-1123

Dated: September 22, 2004

⁹ NTTA made this payment, under protest and with all rights reserved, by overnight mail on September 21, 2004. The FCC received the payment on September 22, 2004.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of the)
Petition of NTT America, Inc. for a) MD Docket No. _____
Waiver of the Late Charge Penalty Assessed)
in Conjunction with NTT America's 2004)
Regulatory Filing Fee)

To: Managing Director

**AFFIDAVIT IN SUPPORT OF PETITION FOR WAIVER
OF LATE FILING PENALTY**

Your Affiants, Makoto Nishimura and Dawn M. Fasano, first being duly sworn on oath, depose and state as follows:

1. Our names are Makoto Nishimura and Dawn M. Fasano. We hold the offices of NTT America, Inc. ("NTTA") Controller of Finance and Accounting, and Chief Counsel, respectively. We are adult persons of sound mind and body. We have personal knowledge of the matters attested to in this Affidavit.

2. We have reviewed all of the assertions in the Petition for Waiver of Late Filing Penalty, and those assertions are true to the best of our knowledge and belief. We offer more specific factual information here concerning the computer software error that led to the late payment of the FCC's fiscal year 2004 regulatory assessment fee.

3. NTTA, has paid all of its prior FCC fiscal year regulatory assessments in a timely manner, and was planning to pay the fiscal year 2004 assessment in a timely manner as well.

4. On August 16, 2004, NTTA received notification that the precise amount of its FCC regulatory assessment for fiscal year 2004 was \$276,043.52. This amount was significantly higher than the assessment for fiscal year 2003, which was only \$43,574.40. Given the size of the 2004 assessment, and the fact that it was many multiples of the previous fiscal year assessment, NTTA immediately sought to confirm the charge.

5. Importantly, NTTA had switched its computer software from SAP to PeopleSoft early in the week of August 16, 2004. The fiscal year 2004 FCC regulatory assessment was the first fee that NTTA was to pay to the FCC using the new software. As a security measure, NTTA does not permit the issuance of manually cut checks. Checks can only be processed and printed by computer.

6. On August 17, 2004, after confirming that the fiscal year 2004 FCC regulatory assessment was indeed correct, NTTA attempted to pay by credit card. However, NTTA has a credit limit of \$250,000, and was unable to pay the fee. NTTA determined that it would have to issue a check to cover the assessment.

7. On August 18, 2004, NTTA attempted to process a check through the computer system for the full amount of the FCC's fiscal year 2004 assessment. At that time, NTTA discovered that the check-issuing mechanism in the new software was not functioning properly. More specifically, the software did not contain a proper "posting to payment" option. A file flag went unchecked during the software conversion, which caused the computer to reject attempts to cut checks outside of the normal reimbursement cycle. Therefore, the FCC fee check could not

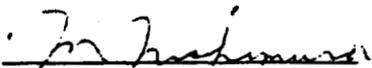
be issued until the defect was found and corrected. NTTA personnel worked late into the night on August 18 trouble-shooting the system but could not resolve the issue.

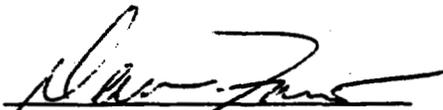
8. NTTA was unable to have the software corrected until August 19, 2004, and could not issue a check until after 3:00 p.m. that day. At that time, NTTA issued a check for the full amount of the FCC's fiscal year 2004 regulatory assessment, and promptly delivered it to FedEx for shipment to the FCC's Depository in Pittsburgh. The FedEx tracking report attached to NTTA's Petition for Waiver of Late Filing Penalty is a true and correct copy of the report as issued by FedEx and received by NTTA.

9. But for the software error described above, NTTA would have been able to issue the appropriate check and to have met the deadline.

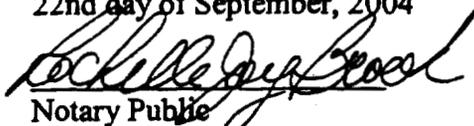
10. NTTA has resolved the software error, and there should be no recurrence of this error or late payment of regulatory fees in the future. As a sign of its good faith, NTTA has in the meantime paid (under protest and with reservation) the penalty that the FCC issued in this matter.

Further your Affiants sayeth not.


Makoto Nishimura
NTTA Controller, Finance and Accounting


Dawn M. Fasano
NTTA Chief Counsel

Sworn to before me this
22nd day of September, 2004

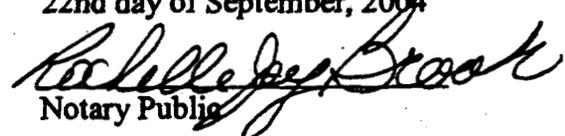

Notary Public

ROCHELLE JOY BROOK
Notary Public, State of New York
No. 30 01BR4755294
Qualified in Nassau County
Commission Expires

5/3/06

DSN:232952.1/NTT001-220995

Sworn to before me this
22nd day of September, 2004


Notary Public

ROCHELLE JOY BROOK
Notary Public, State of New York
No. 30 01BR4755294
Qualified in Nassau County
Commission Expires

12/3/06