

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

JAN 8 2014

OFFICE OF
MANAGING DIRECTOR

David Beck, Controller
Xchange Telecom Corp.
1428 36th Street, Suite 215
Brooklyn, NY 11218

Licensee/Applicant: **Xchange Telecom Corp.**
Station: N/A
Waiver Request: Late Payment Penalty; 47 U.S.C. §
159(c)(1); 47 C.F.R. § 1.1164
Disposition: Denied
Fee: Fiscal Year (FY) 2012 Regulatory Fee Late
Fee
Date Request Filed: Nov. 7, 2012
Date Regulatory Fee Paid: Oct. 4, 2012
Date Regulatory Late Fee Paid: Oct. 4, 2012
Fee Control No.: RROG-11-00014862

Dear Mr. Beck:

This responds to Licensee's *Request*¹ for waiver of the penalties for late payment of Fiscal Year (FY) 2012 regulatory fees. For the reasons stated herein, we deny the *Request*.

Under 47 U.S.C. § 159 and the Commission's implementing rules, we are required to "assess and collect regulatory fees" to recover the costs of the Commission's regulatory activities,² 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."³ Specifically, our rule provides that "[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."⁴

¹ Letter from David Beck, Controller, Xchange Telecom Corp., 1428 36th Street, Suite 215, Brooklyn, NY 11218 to Marlene Dortch, FCC, Attn: Office of Managing Director, Regulatory Fee Waiver/Reduction Request, 445 12th St., SW, Room TW-B204, Washington, DC 20554 (Nov. 7, 2012) (*Request*).

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

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

⁴ 47 C.F.R. § 1.1164

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. § 1.1164, and additional charges of interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. For FY 2012, payment was due no later than September 13, 2012.⁵ We did not receive Licensee's payment by that deadline, thus we assessed the mandatory penalty, and when the debt remained delinquent, we assessed the additional charges. Indeed, Licensee's payment was not received and credited until October 4, 2012. Even so, Licensee requests "an abatement for the late fees and penalties [because Licensee] has a change in personnel handling the FCC fee filing ... the [credit card payment] charge never came through ... [thus Licensee] believe[s] there was a processing error."⁶

When we evaluate such matters, we look to whether the *Request* petitioning for a waiver of the statutory penalty and accrued interest, penalty, and charges of collection establishes the existence of bank error or presents legal grounds or clear mitigating circumstances to waive collection of the penalty. Licensee's *Request* does not.

The Commission has repeatedly held that "[l]icensees are expected to know and comply with the Commission's rules and regulations and will not be excused for violations thereof, absent clear mitigating circumstances."⁷

Every licensee is obliged to make the fee payment by the deadline. In such cases, neither the statute nor the Commission's regulations contemplates a waiver of or reduction in the late payment penalty based on the amount of time after the deadline within which the regulatee satisfies its payment obligations; indeed, the penalty for late payment applies even to situations where the deadline is missed by a short period of time.⁸ Further, although the Commission has waived late fees on a showing of good cause, neither the statute nor the Commission's regulations contemplates a waiver of or reduction in the late payment penalty based on the amount of time after the deadline within which the regulatee made payment. The penalty required by 47 U.S.C. § 159(c)(1) is not limited to situations where the failure to pay was knowing or willful. If it is to be waived, it is "only in the most extraordinary circumstances,"⁹ which are not described in Licensee's situation. Moreover, the Commission's rules implementing 47 U.S.C. § 159, are not too strict.¹⁰ Thus, under the law, we deny the *Request*, and we not able to refund the penalty paid.

⁵ See FY 2012 Regulatory Fees Due No Later Than September 13, 2012, *Public Notice*, DA 12-1295 (Aug. 13, 2012).

⁶ *Request*. Licensee did not present any evidence of a bank error or a system processing error.

⁷ See *Sitka Broadcasting Co., Inc.*, 70 FCC 2d 2375, 2378 (1979), citing *Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970) and *Emporium Broadcasting Co.*, 23 FCC 2d 868 (1970); see also *NextGen Telephone (OMD)*, Apr. 22, 2010); *Istel, Inc. (OMD)*, Apr. 22, 2010).

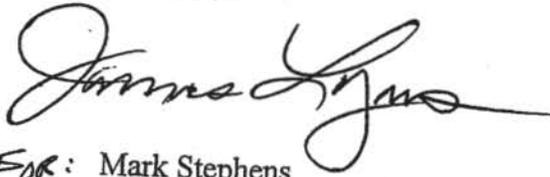
⁸ See *XO Communications, LLC (OMD)*, Nov. 10, 2010).

⁹ *McLeodUSA Telecommunications Services, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589, ¶¶ 7-8 (2004) (denying the request for waiver of 25 percent penalty); *NTT America, Inc., Memorandum Opinion and Order*, 21 FCC Rcd 8088, 8089-90, ¶ 5 (2006) (software difficulties encountered in attempting to issue check for payment did not establish extraordinary circumstances).

¹⁰ *Id.*, 6589, ¶ 7.

If Licensee has any questions concerning this matter, please call the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "James Lyne". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

FOR: Mark Stephens
Chief Financial Officer