

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

In the matter of
McLeodUSA Telecommunications Services, Inc.
Application for Review
Fee Control No. 00000RROG-03-081

Memorandum Opinion and Order

Adopted: March 25, 2004

Released: April 5, 2004

By the Commission: Commissioner Copps concurring, and issuing a statement.

1. The Commission has before it an Application for Review filed April 23, 2003 on behalf of McLeodUSA Telecommunications Services ("McLeodUSA"). McLeodUSA seeks review of a decision by the Managing Director denying its request for waiver of the 25% penalty charged to it for the late payment of its Fiscal Year 2002 ("FY 2002") regulatory fees. For the reasons set forth below, we deny McLeodUSA's request.

I. BACKGROUND

2. On December 18, 2002, McLeodUSA requested a waiver of the penalty fee charged to it for the late payment of its FY 2002 regulatory fees, which were due September 25, 2002. McLeodUSA stated that it made a good faith effort to comply with this deadline, and that it confirmed that a check for \$368,259.10 to cover McLeodUSA's 2002 regulatory fees was sent via First Class mail from its headquarters in Cedar Rapids, Iowa, to the appropriate Mellon Bank address on September 20, 2002, or five days prior to the September 25, 2002 regulatory fee deadline. McLeodUSA stated that it was not clear when Mellon actually received the payment, but its records show that Mellon Bank cashed the check on September 26, 2002. McLeodUSA further stated that the Commission previously waived a late payment penalty for regulatory fees that were mailed five days before the regulatory fee deadline, and McLeodUSA requested that the Commission do so here as well. Specifically, McLeodUSA cited a letter in which the Commission waived a penalty for West Beach Broadcasting Corporation in 2001 because of the continued disruption of the mail after the terrorist attacks of September 11, 2001. McLeodUSA agrees that the Commission did not routinely grant waiver requests for any regulatory fees untimely received during the 2001 filing period, and in fact denied another waiver request for regulatory fees mailed one day before the new deadline. McLeodUSA distinguishes that case, however, noting that mailing the payment from Minnesota one day prior to the deadline did not demonstrate that the company

1 Letter from David R. Conn, Deputy General Counsel of McLeodUSA Telecommunications Services, Inc., to Andrew S. Fishel, Managing Director of the Federal Communications Commission, dated December 18, 2002.

2 See Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to James Tilton, West Beach Broadcasting, dated May 30, 2002 (West Beach letter).

mailed the payment in sufficient time for it to reach the Mellon Bank in Pennsylvania.³ Lastly, McLeodUSA argued that the Commission's FY 2002 regulatory fee system was "likely unconstitutional" because it violated Article I, Section 7, Clause 1, which requires that "all Bills for raising Revenues shall originate in the House of Representatives."⁴

3. On March 24, 2003, the Office of Managing Director (OMD) denied McLeodUSA's request for waiver of the late charge penalty.⁵ OMD stated that 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. OMD also cited the Commission's rules, 47 CFR Section 1.1164, which provide 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. A timely fee payment ... is one received at the Commission's lockbox bank by the due date specified by the Commission or by the Managing Director." OMD stated that with respect to FY 2001 regulatory fees, it granted waivers to this rule in some instances in which it found that the untimely receipt of the fee was the result of the clearly unforeseeable events of September 11, 2001, including the ensuing interruption of mail and air courier service. OMD found that, by contrast, no such extraordinary circumstances existed to justify waiver of the rule with respect to the FY 2002 fee requirement.

4. OMD also found that McLeodUSA's constitutional challenge was without merit. OMD noted that Section 9 of the Communications Act, as amended, provides that the Commission shall assess and collect regulatory fees to recover the costs of specific regulatory activities of the Commission. Citing *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) and *Sperry Corp. v. United States*, 925 F.2d 399 (Fed. Cir. 1991), OMD found that a statute that provides for monetary assessments to fund a particular government program, as does Section 9, "is not a 'Bill for raising Revenue' within the meaning of the Origination Clause.

5. In its Application for Review, McLeodUSA argues that OMD did not adequately explain its decision to deny McLeodUSA's waiver request and reiterates its previous arguments. It also states that while the events of September 11, 2001 were "clearly unforeseeable," the widespread disruption in the mail service that was occurring at the time the 2001 regulatory fees were due clearly was not unforeseeable, as evidenced by the Commission's decision to move the regulatory fee filing deadline forward by five days. Moreover, McLeodUSA argues that if the Commission believed that five days was a sufficient amount of time for a regulatory fee payment to be received by the Mellon Bank from Washington State in the case of West Beach during a time when major mail disruptions were well-known, then five days was clearly a sufficient amount of time for McLeodUSA's regulatory fee payment to be received by the Mellon Bank from Iowa, a state 1,900 miles closer during a time when no widespread disruptions of mail service were occurring. McLeodUSA also submits that even under normal circumstances mail delays occur, and a company should not be penalized 25% for an interruption that it cannot control. It states that granting a waiver to McLeodUSA would be appropriate because McLeodUSA made as much of a good faith effort to timely submit payment of its regulatory fees as West Beach did.

6. McLeodUSA also asserts that the OMD decision did not adequately address the constitutional challenge it raised and does not demonstrate how the regulatory fee system falls under the *Munoz-Flores* exception to the Origination Clause requirement. More specifically, McLeodUSA states that Section 9 of

³ See Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission to Michael O. Ostbye, Rural Services of Central Minnesota, dated May 1, 2002 (Ostbye Letter).

⁴ U.S. Const. Art. I, Sect. 7, cl. 1.

⁵ Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to David R. Conn, Deputy General Counsel of McLeodUSA Telecommunications Services, Inc., dated March 24, 2003.

the Act does not create a particular program that the regulatory fees are used to support, but instead raises revenues to support the government and the Commission generally. Finally, McLeodUSA cites another proceeding in which similar constitutional issues were raised, where OMD found that “there was some ambiguity concerning the Commission’s policies for implementation of the provisions of Section 9 of the Act ... requiring assessment of a 25 percent penalty for late payment.”⁶ McLeodUSA states that based on these ambiguities, OMD waived the late charge.

II. DISCUSSION

7. We conclude that the Managing Director’s decision is correct. As OMD stated, Section 9(c)(1) of 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.⁷ The Commission’s rules, also cited by OMD, provide that “a timely fee payment ... is one received at the Commission’s lockbox bank by the due date specified by the Commission or by the Managing Director.”⁸ In the rulemaking that implemented Section 9(c)(1), the Commission rejected arguments that it consider a regulatory fee payment to be timely submitted if the payment is postmarked by the date it is due.⁹ 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.¹⁰ The Commission has specifically rejected arguments that its rules implementing Section 9(c)(1) are too strict. *See Aerco Broadcasting Corporation*, 16 FCC Rcd. 15,042 (2001) (upholding OMD’s denial of waiver of late charge penalty where payment was mailed two days before the deadline and where preparations for a hurricane could have delayed delivery of the payment). Insofar as McLeodUSA believes that the Commission should adopt a more lenient definition of what constitutes a timely fee payment, McLeodUSA’s proposal is more appropriately raised in a petition for rulemaking. In addition, as we stated in *Aerco*, 16 FCC Rcd at 15043, “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....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.”

8. As OMD stated, with respect to FY 2001 regulatory fees, it did not impose the 25% penalty in some instances in which it found that the untimely receipt of the fee was the result of the clearly unforeseeable events of September 11, 2001, including the ensuing interruption of mail and air courier service. As McLeodUSA states, however, OMD did not grant waivers in all cases in which a waiver was sought for late payment of FY 2001 regulatory fees, but only where the untimely receipt of the fee was a direct result of the interruption of mail and air courier service in the aftermath of the events of September 11, 2001.¹¹ Thus, only in the most extraordinary circumstances has the Commission waived its late charge penalty for FY 2001 regulatory fees. Like OMD, we find that no comparable extraordinary circumstances existed to justify waiver of the 25% penalty with respect to McLeodUSA’s FY 2002 fee

⁶ *Id.* at n.17, citing Letter from Mark A. Reger, Chief Financial Officer of the Federal Communications Commission, to Dennis J. Kelley, Esq., dated June 24, 2002 (Kelley letter).

⁷ 47 U.S.C. Section 159(c)(1).

⁸ 47 CFR Section 1.1164.

⁹ *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, 5353 (1994).

¹⁰ *Id.* at 5353, n.23.

¹¹ *See* Ostbye Letter, where OMD denied petitioner’s request for a waiver of a late charge penalty where the regulatory fee was mailed one day before the due date, thus not ensuring sufficient time for a timely receipt.

requirement. Moreover, the OMD's decision in *West Beach* does not stand for the blanket proposition that all fees mailed five days in advance of the filing deadline will be accepted without penalty, even if received one day late. The decision makes clear that, but for the extraordinary events of September 11, 2001, a waiver would not be granted.

9. Here, the Commission's Payment Detail Report verifies that Mellon Bank, the Commission's lockbox bank, received McLeodUSA's FY 2002 regulatory fees on September 26, 2002, a day after the deadline. Thus, McLeodUSA's fee payment was not timely submitted, and no extraordinary circumstances existed which would justify a waiver of the late charge penalty. Accordingly, the 25 percent late charge penalty is due.

10. We also disagree with McLeodUSA that Section 9 runs afoul of the Origination Clause of the Constitution, which requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Section 9 is part of the Omnibus Budget Reconciliation Act of 1993, which was introduced in the House on May 25, 1993 (H.R. 2264). Section 9 itself was added in conference but also had its genesis in a "virtually identical" provision in a predecessor bill, H.R. 1674, that the House, though not the Senate, passed in the previous 102d Congress. *See* House Conf. Rep. No. 213, 103rd Cong., 1st Sess. 1188 ("...the fee provisions contained in this section are virtually identical to those contained in H.R. 1674, which passed the House in 1991. To the extent applicable, the appropriate provisions of the House Report (H.R.Rep 102-207) are incorporated herein by reference.") Further, the House was the first chamber to pass H.R. 2264 as reported out of Conference, including the Section 9 regulatory fee provisions. In any event, section 9 is not a "bill for raising revenue" because it establishes fees to support a specific government program and does not raise revenue to support government generally. *See United States v. Munoz-Flores*, 495 U.S. 385, 397-98 (1990); *see also* "Policies of the Chair," Congressional Record, vol. 137, Jan. 3, 1991, p. 66 (defining "non-revenue receipts" not subject to the Origination Clause). Finally, the statement in the Kelley letter that MacLeod cites referred not to the constitutionality of Section 9 but to ambiguity concerning implementation of the provisions of Section 9 in connection with the collection of FY 1998 regulatory fees, which is not a matter in issue here.

11. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by McLeodUSA on April 23, 2003 IS DENIED.

12. IT IS FURTHER ORDERED that McLeodUSA IS DIRECTED to submit payment in the amount of \$92,064.78 and FORM FCC 159 within 30 days from the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

Re: McLeodUSA Telecommunications Services, Inc., Application for Review

The Commission today addresses a situation in which a company mailed the regulatory fees it owed to the Commission five days prior to the deadline. The check was processed one day after the deadline, and for this one day, McLeodUSA was penalized over \$90,000 – a 25 percent penalty. I concur in the decision because the statute and our rules require such a penalty. I am disappointed, however, that the Commission does not seek comment on approaches that could address such situations in the future. For example, the FCC bases the deadline for its schools and libraries universal service program on the postmark date of the filing. The IRS uses a similar method for payment of taxes. Using the postmark date or some other alternative might better take into account those who are located further away or who face unforeseen delays in mail delivery that are beyond their control.