

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

In the Matter of
NTT America, Inc.

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Fee Control No. 0409238340480001

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2006

Released: July 13, 2006

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by NTT America, Inc. (NTTA). NTTA seeks review of a decision of the Office of Managing Director (OMD or Managing Director) denying NTTA's request for a waiver of the 25 percent penalty charged to it for late payment of its Fiscal Year (FY) 2004 regulatory fee. For the reasons below, we deny the Application for Review.

II. BACKGROUND

2. On September 22, 2004, NTTA requested a waiver of the \$69,010.83 penalty for late payment of its \$276,043.32 FY 2004 regulatory fee, which was due August 19, 2004. NTTA stated that the untimely payment was the result of a computer error caused when NTTA changed its software system "early in the week of August 16, 2004." NTTA asserted that the new software system contained a defect preventing the proper execution of an appropriate check at the correct time and that the check could not be issued until the defect was corrected. NTTA stated that once the defect was corrected, the check was issued and then picked up by FedEx at 3:38 p.m. on August 19, 2004. FedEx delivered the check 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. NTTA argued that the delay was *de minimis* and did not cause any harm or prejudice to the FCC in the form of loss of interest. NTTA claimed that the size of the penalty was out of proportion to the minor delay and that NTTA made every effort to pay the fee on time.

3. On December 14, 2004, OMD denied NTTA's request for waiver of the late payment penalty.¹ OMD stated that 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

¹ See Letter from Mark A. Reger, Chief Financial Officer (CFO), OMD, FCC to Stuart A. Shoreinstein, Esq. (dated Dec. 14, 2004) (*December 14 Letter Decision*). The *December 14 Letter Decision* erroneously indicated that NTTA did not pay the late payment penalty, but the Commission's records confirm that payment was made at the time of the waiver request.

timely manner. OMD pointed out that 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. OMD noted that the Commission informs its licensees of the due dates, amounts of the fees, and payment methods on its website and that the Commission specifically and repeatedly informed licensees of the August 19, 2004 deadline for the FY 2004 regulatory fees. Moreover, OMD stated, the Commission advised licensees of the availability of the online Fee Filer payment system.² Thus, OMD found that NTTA had notice as early as the *July 2, 2004 Public Notice* of the August 19, 2004 payment deadline and had “ample time to remit a check before the filing window closed on August 19, 2004.” Finally, OMD determined that the fee waiver cases NTTA cited were not comparable to NTTA’s situation and did not support its waiver request.³

4. In its Application for Review, NTTA largely repeats the arguments raised in its initial waiver request. NTTA asserts that the *December 14 Letter Decision* “fail[ed] properly to weigh the merits of this case, especially the very minor payment delay, the grossly large penalty, the computer software error . . . , NTTA’s diligence and good faith in attempting to meet the payment deadline. . . , and NTTA’s prior history of on-time payment of its regulatory fee.” NTTA also claims that its “problem is quite analogous to the banking error situation that the Communications Act and FCC Rules recognize as an excuse to late payment.”

III. DISCUSSION

5. 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 payment penalty of 25 percent on any regulatory fee not paid in a timely manner.⁴ The Commission’s rules provide that a timely payment is one received at the Commission’s lockbox bank by the due date.⁵ We find that NTTA’s reliance on the software difficulties it encountered in attempting to issue a check to cover the FY 2004 regulatory fee fails to establish the extraordinary circumstances that would justify a waiver of the late payment penalty. The untimely payment of NTTA’s regulatory fee was the direct result of NTTA’s decision to change its software system “early in the week of August 16, 2004” (*i.e.*, three days before the regulatory fee was due) and therefore the direct result of its failure to allot sufficient time to detect and

² OMD cited *Assessment and Collection of Regulatory Fees for Fiscal Year 2004, Report and Order*, 19 FCC Rcd 11662, 11680 (2004) (*FY 2004 Fee Order*) (stating Fee Filer is “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) (*July 2, 2004 Public Notice*); Public Notice, *Payment Methods and Procedures for Fiscal Year 2004 Regulatory Fees*, 19 FCC Rcd 20428, 20430 (July 21, 2004) (stating easiest and quickest way to pay regulatory fees is through Fee Filer); *Fee Filer Available August 1 for 2004 Regulatory Fees*, 19 FCC Rcd 13841 (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 filing deadline and stating that Commission would begin an aggressive effort to collect fees, including 25 percent penalty, beginning August 20, 2004); Public Notice, *Deadline for Filing FY 2004 Regulatory Fees*, 19 FCC Rcd 15635 (Aug. 18, 2004) (reminding of deadline).

³ NTTA cited Letter from Mark A. Reger, CFO, OMD, FCC to Maurice Cohen, President of Northeast Radio (dated July 14, 2003) (*Northeast Radio*), Letter from Mark A. Reger, CFO, OMD, FCC to Chris Kidd of Kidd Communications (dated June 2, 2003) (*Kidd Communications*), and Letter from Mark A. Reger, CFO, OMD, FCC to Larry G. Link, CFO of Harlan Municipal Utilities (dated Nov. 19, 2002) (*Harlan Municipal*).

⁴ 47 U.S.C. §159(c)(1).

⁵ 47 C.F.R. §1.1164.

correct potential software problems. In essence, the problems that led to the untimely payment of NTTA's regulatory fee were entirely within NTTA's control and the consequence of its own business decisions. Furthermore, as OMD pointed out, the Commission has repeatedly advised licensees that they may submit regulatory fee payments electronically, thereby allowing them to account for individual circumstances. *See* 47 C.F.R. §1.1158; *Aerco Broadcasting Corp.*, 16 FCC Rcd 15042 (2001).⁶ We also reject the contention that the size of the penalty was disproportionate to the lateness. Congress mandated that an additional charge of 25 percent would be assessed as a penalty for all late payments of fees required by Section 9. *See* 47 U.S.C. §159(C)(1). And the Commission recently upheld OMD's refusal to waive the 25 percent penalty in analogous circumstances. *See McLeod/USA Telecommunications Services, Inc.*, 19 FCC Rcd 6587 (2004) (fee was received one day late and no extraordinary circumstances existed to justify lateness). Moreover, the penalty amount imposed in *McLeod/USA* was larger than that at issue in this case. *Id.* at 6590.

6. Further, we disagree with NTTA's assertion that a waiver of the late payment penalty would be consistent with section 1.1164(b) of the Commission's rules, 47 C.F.R. §1.1164(b), which provides that if "a fee payment fails due to error by the payor's bank, as evidenced by an affidavit of an officer of the bank, the date of the original submission will be considered the date of filing." Bank errors that cause untimely payment of regulatory fees involve circumstances entirely outside the regulatee's ability to control. In contrast, the untimely payment of NTTA's regulatory fee was the direct result of NTTA's decision to change its software system shortly before the regulatory fee was due, which was a matter completely within its own control.

7. Finally, we agree with OMD that the facts in the instant case are in no way comparable to those in *Northeast Radio*, *Kidd Communications*, and *Harlan Municipal*, which are relied on by NTTA. *Northeast Radio* and *Kidd Communications* both involved waivers based on documented showings of financial hardship. The Commission will waive fees where a "petitioner presents a compelling case of financial hardship"⁷ and makes a showing "that it lacks sufficient funds to pay the regulatory fees and to maintain its service to the public."⁸ Unlike the regulatees in *Northeast Radio* and *Kidd Communications*, NTTA has made no claim, let alone submitted evidence, of hardship or shown that payment of the regulatory fee and the associated late payment penalty would affect its ability to serve the public. In *Harlan Municipal*, the Managing Director found that the untimely receipt of the regulatory fee was the direct result of the "clearly unforeseeable" events of September 11, 2001 (including the ensuing interruption of mail and air courier service), "that even the best of planning could not have avoided." In contrast to the situation in *Harlan Municipal*, NTTA's untimely regulatory fee payment was a consequence of NTTA's decision to change software systems three days before the payment due date. These circumstances are hardly comparable to the extraordinary events of September 11,

⁶ NTTA asserted to OMD that its own credit limit precluded use of Fee Filer, but even if so, NTTA could have sought expansion of its limit in anticipation of making its fee payment or made plans earlier to use an alternative form of payment in view of its credit limitation. As OMD noted, the Commission widely disseminated public notice of the August 19 due date as early as July 2, which afforded all licensees sufficient time to make timely payment.

⁷ *See Implementation of Section 9 of the Communications Act*, 9 FCC Rcd 5333, 5346 (1994), *recon. granted*, 10 FCC Rcd 12759 (1995) (*Implementation of Section 9 on Reconsideration*).

⁸ *Implementation of Section 9 on Reconsideration*, 10 FCC Rcd at 12762; *see also id.* at 12761-62 ("we will grant a waiver only when the impact of the regulatory fee will affect a regulatee's ability to serve the public").

2001. We therefore reject NTTA's contention that *Northeast Radio*, *Kidd Communications*, and *Harlan Municipal* provide support for a waiver of the late payment penalty.

8. We find that NTTA failed to meet its obligation to file its FY 2004 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, and that no extraordinary circumstances existed that would warrant waiver of the penalty for late payment of the FY 2004 regulatory fee.

IV. ORDERING CLAUSE

9. ACCORDINGLY, IT IS ORDERED that the Application for Review filed on January 5, 2005 by NTT America, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary