



Federal Communications Commission
Washington, D.C. 20554

November 2, 2007

DA 07-4510

In Reply Refer to:

1800B3-SS

Released: November 2, 2007

Mr. Roger L. Hoppe, II
Limon Broadcasting, LLC
P.O. Box 80495
Rochester, MI 48308

In re: KIIQ(FM), Limon, CO
Limon Broadcasting, LLC
Facility ID No. 85056
File No. BRH-20051003BCL

Petition for Reconsideration

Informal Objection

Dear Mr. Hoppe:

This letter refers to: (1) the captioned application of Limon Broadcasting, LLC (the "Licensee") for renewal of its license (the "Renewal Application") for Station KIIQ(FM), Limon, Colorado (the "Station"); (2) a July 8, 2005, Petition for Reconsideration and October 3, 2005, supplement (collectively, the "Petition") filed by the Licensee requesting reinstatement of its license and deleted call sign;¹ (3) the Informal Objection to the application and supplement (collectively, the "Objection") filed April 4, 2007, and August 6, 2007, respectively, by White Park; and (4) a "Consolidated Reply" filed on April 16, 2007, by the Licensee in response to White Park's April 4, 2007, pleadings.² We find that the Licensee willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (the "Act"),³ by engaging in the unauthorized operation of the Station after its authorization had expired. Based upon our review of the facts and circumstances before us, we admonish the Licensee for its violation of the Section 301 of the Act, grant the Licensee's Petition, grant White Park's Objection in part, reinstate the license and call sign for the Station, and grant the captioned Renewal Application.

Background. Section 73.3539(a) of the Commission's Rules (the "Rules") requires that applications for renewal of license for broadcast stations must be filed "not later than the first day of the

¹ On April 4, 2007, White Park Broadcasting, Inc. ("White Park"), licensee of KZDR(FM), Cheyenne, Wyoming, filed a "Petition for Leave to File Opposition" and an Opposition to the Petition.

² White Park filed a "Reply" on April 27, 2007.

³ See 47 U.S.C. § 301.

fourth full calendar month prior to the expiration date of the license sought to be renewed.”⁴ An application for renewal of KIIQ(FM)’s license should have been filed by December 1, 2004. No such application was filed, and the Station’s license expired on April 1, 2005. Accordingly, on June 24, 2005, the staff advised the Licensee that: (1) the Station’s license had expired; (2) all authority to operate the Station was terminated; and (3) the Station’s call letters were deleted from the Commission’s data base. The Licensee was advised that any further operation of the Station was unauthorized and must cease immediately.⁵ Upon receipt of the letter, on July 8, 2005, the Licensee timely filed the Petition. Subsequently, on August 26, 2005, the Licensee filed a request for special temporary authorization (“STA”) to continue Station operation,⁶ and on October 3, 2005, the Licensee tendered the Renewal Application. The staff granted the STA for a six-month term on November 21, 2005.⁷ The Licensee timely sought an extension of the STA on May 19, 2006, and that request remains pending.⁸

Discussion. Petition for Reconsideration/Informal Objection. The Commission will consider a petition for reconsideration when a petitioner shows either a material error in the Commission’s original order or raises additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.⁹ In its Petition, the Licensee explains that it did not file a timely renewal application because the Station’s original covering license application was granted December 8, 2004, seven days after the December 1, 2004, deadline for filing renewal applications for AM and FM broadcast stations in Colorado.¹⁰ The Licensee states that it therefore believed that its license was already “valid for the next term,”¹¹ and it did not need to file a license renewal application for the Station. The Licensee argues that by granting the Station’s license application on December 8, 2004, the Bureau mistakenly deviated from its established practice of withholding action on pending covering license applications during the period between the renewal filing deadline and the date of license expiration.¹²

In its Opposition to the Petition, White Park argues that the Petition should be denied because it has not relied on changed facts or circumstances or “identified and substantiated” any errors or omissions in the *Cancellation Letter*.¹³ In its concurrently filed Objection to the Renewal Application, White Park argues for similar reasons that the Renewal Application should be dismissed, or in the alternative, that it

⁴ 47 C.F.R. § 73.3539(a).

⁵ Letter to Limon Broadcasting, LLC, from Peter H. Doyle, Chief, Audio Division, Media Bureau, Ref. 1800B3, (rel. Jun. 24, 2005) (“*Cancellation Letter*”).

⁶ See File No. BLSTA-20050826ACA (the “STA Request”).

⁷ See *Cancellation Letter*.

⁸ See File No. BESTA-20060519ACM.

⁹ 47 C.F.R. § 1.106, and *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁰ Supplement to Petition at 1.

¹¹ Petition at 1.

¹² Supplement to Petition at 2.

¹³ Opposition at 2.

should be designated for evidentiary hearing, because it was filed after the Station's license expired.¹⁴ White Park states that even if an unpublished "policy" as described by the Licensee exists, the fact that the grant of KIIQ(FM)'s license to cover came shortly after the renewal application deadline does not relieve the Licensee of its duty to heed Commission actions, "to pay attention to the terms of station authorizations and license terms and to comply with them, or otherwise address the Commission in timely fashion with respect to those terms."¹⁵ Furthermore, in its "Supplement" to its Objection, White Park claims that 50 per cent of the membership assets and voting interest of the Licensee belongs to an entity – EB Hayden, LLC – that was dissolved on August 4, 2000, and this matter was not properly reported to the Commission pursuant to Section 73.1015 of the Rules.¹⁶

As noted above, Section 73.3539(a) of the Rules requires that an application for renewal of license for a broadcast station must be filed four months prior to the expiration date of the station's license. In fact, the staff does follow a processing policy of withholding action on an otherwise grantable initial covering license application when the license application becomes ready for grant during the period between the deadline for filing a license renewal application and the expiration date for AM and FM station licenses in the particular state or jurisdiction. This policy ensures that new broadcast licensees in situations similar to that of KIIQ(FM) will receive a full initial license term. It also eliminates the need to file a license renewal application based on only a brief period of station operations. The staff deviated from this policy here. Moreover, the Commission has accepted and processed license renewal applications filed after a station's license has expired and found that a forfeiture for late-filing and unauthorized operation, rather than a license cancellation, is the appropriate sanction in such cases.¹⁷ Thus, reconsideration of the *Cancellation Letter* is warranted. Accordingly, we reject White Park's request that we dismiss or designate for hearing the Renewal Application.

Nevertheless, the authorization issued to the Licensee on December 8, 2004, specified an expiration date of April 1, 2005. Thus, the Licensee was on actual notice that it was required to file a license renewal application. Moreover, the Licensee's reliance on an unpublished staff processing policy does not fully excuse the violation of Section 301 of the Act. The Station operated after its license expired and without authorization for more than four months.¹⁸ The Licensee was obligated to fully comply with the terms of its Station's license and maintain in effect the Station's authorization.¹⁹ It did not do so.

¹⁴ Objection at 6-7.

¹⁵ *Id.* at 4, Opposition at 5-6.

¹⁶ Supplement to Objection at 2.

¹⁷ See *Discussion Radio Incorporated*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7438 (2004).

¹⁸ See, e.g., *UTV of San Francisco, Inc. (KBHK-TV)*, Letter, 10 FCC Rcd 10986, 10987 and note 1 (MMB 1995); *Le Sea Broadcasting Corp. (WHKE-TV)*, Letter, 10 FCC Rcd 4977, 4978 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, Letter, 10 FCC Rcd 4959, 4960 (MMB 1995); *Gannett Massachusetts Broadcasting, Inc. (WLVI-TV)*, Letter, 9 FCC Rcd 1555 (MMB 1994); *Ramar Communications, Inc. (KJTV-TV)*, Letter, 9 FCC Rcd 1831 (MMB 1994).

¹⁹ See, e.g., *Hemmingford Media, Inc.*, Forfeiture Order, 14 FCC Rcd 2940, 2941-2 (CIB 1999) (responsibility for complying with terms of station license "rests solely and exclusively with the licensee") (citing *Empire Broadcasting Corp.*, Memorandum Opinion and Order, 25 FCC 2d 68 (1970)).

Sanction. Section 503(b) of the Act²⁰ and Section 1.80(a) of the Rules,²¹ each state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Act, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Rules.²² A continuing violation is “repeated” if it lasts more than one day.²³

The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.²⁴ The guidelines also specify a base forfeiture amount of \$10,000 for station construction and/or operation without an instrument of authorization for the service.²⁵ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁶

In this case, the Licensee failed to file a license renewal application for the Station even though it was on notice that its license expired on April 1, 2005. Moreover, it continued operating the Station for more than four months after the license had expired before seeking STA to so operate, and for more than six months before filing the Renewal Application, in violation of Section 301 of the Act. However, because the staff deviated from an established, albeit unpublished, processing policy of withholding action on a license application during the pertinent four-month application processing renewal window, we will, on our own motion, waive Section 73.3539 of the Rules to accept the Licensee’s otherwise late-filed Renewal Application and forego proposing a forfeiture for the Licensee’s untimely filing of the Renewal Application.²⁷ We recognize that the Licensee could not have timely filed the Renewal Application because the Station’s initial covering license was granted *after* the renewal filing date for Colorado stations had passed. We will also exercise our discretion and decline to propose a forfeiture for

²⁰ 47 U.S.C. § 503(b).

²¹ 47 C.F.R. § 1.80(a).

²² See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-4388 (1991).

²³ *Id.* at 4388.

²⁴ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

²⁵ A broadcast station requires an authorization from the Commission to operate. See 47 U.S.C. § 301.

²⁶ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

²⁷ See 47 C.F.R. § 1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[W]aiver is appropriate . . . if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). See also *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999) (matters not specifically listed may be considered upon request for waiver).

the Licensee's unauthorized operation based on the staff's deviation from established processing policies.²⁸ Considering the record as a whole, we believe that an admonishment, rather than a forfeiture, is appropriate for the violation of Section 301 of the Act in this case.²⁹

Concerning White Park's claim against the Licensee's corporate status, the Commission generally will not deny an application involving a commercial broadcast facility based on a licensee's or permittee's alleged non-compliance with state corporate law "when no challenge has been made in the state courts, and the determination is one that is more appropriately a matter of state resolution."³⁰ White Park has failed to demonstrate that any such challenge has been made in the instant case.

License Renewal Application. In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act. That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.³¹ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted."³²

We find that the Licensee's violation of Section 301 of the Act does not constitute a serious violation warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.³³ Further, we find that Station KIIQ(FM)

²⁸ See 47 C.F.R. § 1.80(b)(4) ("The Commission and its staff may use these guidelines in particular cases[, and] retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute." (emphasis added)).

²⁹ See, e.g., *Dan Alpert, Esq.*, Letter, 20 FCC Rcd 17147, 17150 (2005) (Bureau concludes that an admonishment is sufficient to redress the instant statutory and rule violations).

³⁰ See *Abundant Life, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 4972, 4973 (2001), *appeal dismissed sub. nom. Unity Broadcasters v. FCC*, Case No. 01-1148 (D.C. Cir. 2002); *Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543, 18546 (1999), *recon. dismissed*, 15 FCC Rcd 10520 (2000); and *North American Broadcasting Co., Inc.*, Memorandum Opinion and Order, 15 FCC 2d 979, 983 (Rev. Bd. 1969).

³¹ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

³² 47 U.S.C. §§ 309(k)(2), 309(k)(3).

³³ For example, we do not find here that the Licensee's Station operation "was conducted in an exceedingly careless, inept and negligent manner and that the Licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

served the public interest, convenience, and necessity during its subject license term. We will therefore grant the Renewal Application below.

Conclusion/Actions. For the reasons set forth above, and pursuant to Section 503 (b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), and Sections 0.283 and 1.80 of the Commission's Rules, 47 U.S.C. Sections 0.283 and 1.80, Limon Broadcasting, LLC, is hereby **ADMONISHED** for its apparent violation of Section 301 of the Communications Act of 1934, as amended.

Additionally, **IT IS ORDERED**, that the July 8, 2005, Petition for Reconsideration filed by Limon Broadcasting, LLC, **IS GRANTED**.

IT IS FURTHER ORDERED that the April 4, 2004, Informal Objection filed by White Park Broadcasting, Inc., **IS GRANTED** to the extent indicated and **IS DENIED** in all other respects.

IT IS FURTHER ORDERED that the previously forfeited license for KIIQ(FM) **IS REINSTATED**.

IT IS FURTHER ORDERED that the call sign DKIIQ(FM), which indicated the Station's deletion, **IS CHANGED** to KIIQ(FM).

Finally, **IT IS FURTHER ORDERED**, that the application (File No. BRH-20051003BCL) of Limon Broadcasting, LLC, for renewal of license for station KIIQ(FM), Limon, Colorado, **IS GRANTED**.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Frank R. Jazzo, Esq. (Counsel for Limon Broadcasting, LLC)
White Park Broadcasting, Inc.
Barry Friedman, Esq. (Counsel for White Park Broadcasting, Inc.)