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In Reply Refer To:

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In re: KXFT(FM), Manson, Iowa
Facility ID No. 162477

File No. BLH-20080324AHT

Request for Waiver

Dear Counsel:

We have before us the captioned application (“Application”) of Three Eagles of Lincoln, Inc. (“TEL”) for a license to cover the modified construction permit¹ (“Permit”) for Station KXFT(FM), Manson, Iowa (“Station”). Also before us is an unopposed pleading filed by TEL on March 28, 2008, styled as a “Petition for Reconsideration and Request for Reinstatement *Nunc Pro Tunc*” (“Petition”). The Petition seeks reinstatement *nunc pro tunc* of the Permit, which expired as a matter of law on March 9, 2008, pursuant to Section 73.3598(e) of the Commission’s Rules (“Rules”).² For the reasons set forth below, we dismiss the Petition as procedurally defective, but treat and grant it as a request for waiver of Section 73.3598 of the Rules, reinstate the Permit *nunc pro tunc*, dismiss a request for extension of special temporary authority (“STA”) as moot, admonish TEL for its late-filed Application, and grant the Application.

Background. Section 73.3598(a) of the Rules,³ promulgated pursuant to Section 319(b) of the Communications Act of 1934, as amended (“Act”),⁴ states that construction permits for new stations “shall specify a period of three years from the date of issuance of the original construction permit within

¹ File No. BMPH-20060804AEO. Clear Channel Broadcasting Licenses, Inc., the initial permittee, assigned the original construction permit (File No. BNPH-20050103AEH) to TEL’s parent company, Three Eagles Communications, Inc., which transferred control to its subsidiary, TEL. See File Nos. BAL-20070416ABN, and BAL-20070809AAG, consummated on July 12, 2007, and August 20, 2007, respectively.

² 47 C.F.R. § 73.3598(e).

³ 47 C.F.R. § 73.3598(a).

⁴ 47 U.S.C. § 319(b).

which construction shall be completed and application for license filed.”⁵ In addition, Section 73.3598(e) of the Rules provides that “[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”⁶

TEL’s Permit, granted on March 9, 2005, was to expire on March 9, 2008.⁷ By its own admission, TEL inadvertently failed to timely file a covering license application prior to the Permit’s expiration. Accordingly, on March 9, 2008, the Permit automatically expired under Section 73.3598(e) of the Rules.⁸

On March 24, 2008, TEL filed the Application,⁹ and on March 28, 2008, filed the instant Petition. In its Petition, TEL states that it completed construction of the facilities for the Station on November 23, 2007, and began operating under automatic program test authority pursuant to Section 73.1620(a)(1) of the Rules.¹⁰ TEL requests that the Commission reconsider its “dismissal” of the Permit¹¹ and reinstate the Permit *nunc pro tunc* pursuant to waiver of Sections 73.3598(a) and (e) of the Rules.¹² TEL argues that the Commission has granted license applications filed after the permit expiration date in several instances, when permittees such as TEL have demonstrated timely construction in accordance with the permit’s terms.¹³ It also argues that a waiver is warranted in this instance because forfeiture of the KXFT(FM) construction permit will deprive the community of Manson, Iowa, of its sole local aural transmission service.

Discussion. Procedural Issue. As an initial matter, we conclude that TEL incorrectly styled its pleading as a Petition for Reconsideration. Section 1.106(a)(1) of the Rules is clear that, with one noted exception, the Commission or delegated authority will only entertain petitions requesting reconsideration

⁵ See 47 C.F.R. § 73.3598(a), revised in *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23089-94 (1998) (“*Streamlining Order*”), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999).

⁶ 47 C.F.R. § 73.3598(e).

⁷ See File No. BNPH-20050103AEH. The Commission granted a minor modification of the construction permit on August 29, 2006, noting in the modified permit that the grant would have no effect on the March 9th expiration date. See File No. BMPH-20060804AEO.

⁸ 47 C.F.R. § 73.3598(e).

⁹ File No. BLH-20080324AHT. TEL concurrently filed an STA request to operate the Station in accordance with the terms and conditions of its expired construction permit. See File No. BLSTA-20080324AHP. The Bureau granted the request on May 7, 2008, with an expiration date of November 7, 2008. TEL filed for an extension of the STA on November 6, 2008, which remains pending. See File No. BELSTA-20081106ADE. In light of our actions herein, we will dismiss the STA extension request.

¹⁰ 47 C.F.R. § 73.1620(a)(1). TEL did not provide the program test notification required by Section 73.1620(a)(1).

¹¹ Petition at 1.

¹² *Id.*

¹³ Petition at 2 (citing *Clear Channel Broadcast Licenses, Inc.*, Letter, 21 FCC Rcd 8677, 8680-81 (MB 2006) (“*Clear Channel*”) (waiving Section 73.3598(e) of the Rules and accepting WKRH(FM)’s license application based, in part, on the fact that the facility was fully constructed by the permit’s expiration date), *recon. denied*, Letter, 23 FCC Rcd 4526 (MB 2008).

of a final action.¹⁴ Here, TEL asks us to reconsider our “dismissal” of the Permit.¹⁵ However, the Commission did not “dismiss” the Permit or take any other affirmative action in this case; the Permit simply expired automatically as a matter of law pursuant to Section 73.3598(e) of the Rules.¹⁶ Accordingly, we will dismiss the Petition and instead treat it as a request for waiver of Section 73.3598(e) of the Rules.

Request for Waiver. TEL requests reinstatement *nunc pro tunc* of the Permit pursuant to waiver of Sections 73.3598(a) and (e) of the Rules. As discussed above, the Permit expired as a matter of law on March 9, 2008, pursuant to Section 73.3598(e) of the Rules. A waiver of that Rule would allow us to reinstate the Permit and consider the Application. The Commission has authority to issue waivers for good cause when enforcing a rule fails to serve the public interest.¹⁷ Long-standing precedent establishes that unintended consequences of a Rule are a significant factor favoring a Rule waiver.¹⁸ Furthermore, automatic forfeiture of the authorization of an operating station is a severe penalty which the Commission has been reluctant to impose absent an egregious violation of its Rules.¹⁹

As noted by TEL, the Commission has, in several instances, granted license applications filed after the permit expiration date, provided that the permittee has conclusively demonstrated timely construction in accordance with the terms of the permit.²⁰ Here, TEL states that it was operating the Station pursuant to program test authority as of November 23, 2007, “well in advance” of the Permit’s March 9, 2008, expiration date, and that its failure to timely file the Application was inadvertent.²¹ In support of this assertion, TEL submits an affidavit from Robert E. Cook, Technical Director of TEL, who states that the facilities for KXFT were completed in accordance with the terms of the modified construction permit prior to November 23, 2007.²² It also provides copies of KXFT’s Transmitter Maintenance Log, dated November 15, 2007, to December 17, 2008, Program Logs dated November 23rd, 24th and 30th, and KXFT’s electric bills, dated November 12, 2007, and January 28, 2008. KXFT’s transmitter maintenance log demonstrates that in mid-November of 2008, station employee Ronald Schacht conducted final rounds of technical testing in preparation for the November 23rd on-air date. On that date, the entry states that Mr. Schacht checked the system at 5:52a.m., and the station went “on air” at 6:07a.m. The electrical billing records reflect a significant – nearly 60 times – increase in payments for

¹⁴ 47 C.F.R. § 1.106(a)(1).

¹⁵ Petition at 1.

¹⁶ 47 C.F.R. § 73.3598(e).

¹⁷ 47 C.F.R. §§ 0.201, 0.283 and § 1.3. *See also WAIT Radio v. FCC*, 418 F.2d 1153, 1156-57 (DC Cir. 1969) (“*WAIT*”) (Commission may waive any provision of its rules if it determines that good cause has been shown and that grant of the waiver does not undermine the policies set forth by the rule).

¹⁸ *Id.* at 1156-57.

¹⁹ *See WRKH(FM), Mobile, Alabama*, Letter, 23 FCC Rcd 4526, 4529-30, n. 37 (MB 2008) (*citing WAIT*, 418 F.2d at 1156-57).

²⁰ *See, e.g., Clear Channel*, 21 FCC Rcd at 8680-81. As noted in *Clear Channel*, the Media Bureau has granted license applications filed after the permit expiration date in several instances. *See id.* at 8679 n.17 (noting grants of late-filed applications, including: WJUN(AM), Mexico, Pennsylvania (Construction Permit No. BP-19990727AC; License Application File No. BL-20050125ALN); WJEH(AM), Gallipolis, Ohio (Construction Permit No. BP-20010525ABL; License Application File No. BL-20041012AKQ)).

²¹ Petition at 3.

²² Petition at Exhibit A.

January, 2008, as compared to the bill that covered November, 2007. We find that this evidence sufficiently demonstrates that the Station was operating as of November 23, 2007.

Taking into account all the circumstances in this case, we find that TEL's failure to file the Application prior to the expiration of the Permit, on the facts presented here, does not warrant dismissal of the Application. Instead, we conclude that waiver of Section 73.3598(e) of the Rules is warranted and that an admonishment is sufficient to redress TEL's failure to timely file the Application and the program test notification required by 73.1620(a)(1). Finally, we urge TEL to use care to ensure future compliance.

Conclusion. We have evaluated the Application and it appears that Station KXFT(FM) has been constructed in accordance with the terms and conditions of the Permit and that grant of the Application is consistent with the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED that the March 28, 2008, Petition for Reconsideration IS DISMISSED and, when treated as a Request for Waiver IS GRANTED to the extent stated above.

IT IS FURTHER ORDERED that Three Eagles of Lincoln, Inc. IS ADMONISHED for its late-filed license application in violation of Section 73.3598(a) of the Commission's Rules and for its failure to file the program test notification as required by 73.1620(a)(1) of the Commission's Rules.

Finally, IT IS ORDERED that Section 73.3598(e) of the Commission's Rules IS WAIVED to the extent indicated, the request for extension of special temporary authorization (File No. BELSTA-20081106ADE) is DISMISSED as moot, the construction permit for Station KXFT(FM), Manson, Iowa (File No. BMPH- 20060804AEO) IS REINSTATED, *nunc pro tunc*, and the KXFT(FM) license application (File No. BLH-20080324AHT) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Three Eagles of Lincoln, Inc.