



Federal Communications Commission
Washington, D.C. 20554

November 18, 2009

DA 09-2438

In Reply Refer to:

1800B3-VMM

Released: November 18, 2009

David Tillotson, Esq.
4606 Charleston Terrace, N.W.
Washington, DC 20007

Re: KDLS(AM), Perry, Iowa
Perry Broadcasting Company
Facility ID # 52314
File No. BR-20050301AAQ
NAL/Acct. No. MB-20051810099

Dear Mr. Tillotson:

Before the Audio Division is a September 20, 2005, letter¹ filed on behalf of Perry Broadcasting Company ("Perry"), former licensee of Station KDLS(AM), Perry, Iowa ("Station").² The Response seeks cancellation of the September 21, 2005, Notice of Apparent Liability for Forfeiture ("NAL")³ in the amount of seven thousand dollars (\$7,000), to Perry for willfully violating Section 73.3539 of the Commission's Rules ("Rules") and for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended ("Act") for its failure to timely file a license renewal application and for unauthorized operation of the Station after its license had expired.⁴ For the reasons set forth below, we cancel the monetary forfeiture issued on September 21, 2005, and assess Perry a 25 percent late-fee penalty for its late filing.

Background. Section 73.3539(a) of the Rules requires that applications for renewal of license for broadcast stations must be filed "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed."⁵ Perry's renewal application for the station for the current license term should have been filed by October 1, 2004, four months prior to the February 1, 2005, expiration date, but was not. The application was not successfully filed until March 1, 2005. In the

¹ Letter to Peter H. Doyle, Chief, Audio Division, from David Tillotson, Esq. (Sept. 30, 2005) (the "Response").

² Perry assigned the Station to Coon Valley Communications, Inc., in 2006 (see File No. BAL-20051213ABB) (granted Jan. 31, 2006). The assignment was consummated on February 15, 2006. Despite this assignment, Perry remains liable for forfeiture for any violations occurring when the Station was under its stewardship. See, e.g., *Vista Point Communications, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 14 FCC Rcd 140, 140 n.2 (MMB 1999) (finding licensee liable for forfeiture for violations of the Commission's rules that took place when station was under its stewardship).

³ Letter to David Tillotson, Esq. from Peter H. Doyle, Chief, Audio Division, Media Bureau, ref. 1800B3 (MB Sept. 21, 2005).

⁴ 47 C.F.R. § 73.3539; 47 U.S.C. § 301.

⁵ 47 C.F.R. § 73.3539(a).

renewal application, Perry explained that it thought it had timely filed the KLDS(AM) renewal application and only realized that there was a problem when the renewal application for co-owned station KLDS-FM, Perry, Iowa, had been granted. It noted that there was a miscommunication regarding the filing fee for the application, and therefore the application had never registered as “Filed” in the Commission’s electronic filing system. On September 21, 2005, the staff advised Perry of its apparent liability for a forfeiture of \$7,000 for failure to file a timely renewal application for the Station and for unauthorized operation of the Station after its license expired.

On September 30, 2005, Perry filed the Response, requesting that we rescind the forfeiture, stating that the Station’s renewal application was filed in good faith and that no unauthorized operation occurred. Perry argues that any violation was minor, and that it has a history of overall compliance with the Rules. Perry states that at the time it filed the March 1, 2005, application and request for Special Temporary Authorization (“STA”), it attached an exhibit explaining the circumstances of the late filing. Perry explains that it originally tendered the Station’s renewal application on September 30, 2004. It believed at the time that it had paid the required filing fee, as it had done successfully for KDLS-FM. Perry also explains that it refiled the Station application as soon as it noticed that the KDLS-FM application had been granted, but the Station’s application was not. Perry argues that the Station’s application for renewal should have been returned as unprocessable pursuant to then Section 1.1109 of the Rules due to its failure to submit the required fee, and that it should have been given an opportunity to refile a corrected application as that section provides. Perry claims that, because the application was not returned as required by the Rules, it is not liable for a forfeiture.⁶

Discussion. We have reviewed the record in this case and the Commission’s data bases, and we find that Perry did in fact tender a license renewal application for the Station on September 30, 2004, but failed to pay the requisite filing fee. It submitted the filing fee on February 28, 2005, and on March 1, 2005, it re-filed its application with an explanation of the circumstances regarding its error.⁷ For the reasons set forth below, we will cancel the NAL and impose a 25% penalty as provided in Section 1.1116 of the Rules.

Perry argues that the Station’s application for renewal should have been returned as unprocessable pursuant to Section 1.1109 of the Rules.⁸ We agree that under former Section 1.1109 of the Rules, which was in effect at the time that Perry filed the original application,⁹ as well as Section

⁶ Perry also states that it would be willing to pay the late payment penalty for its “late filed” renewal application to settle this case.

⁷ Licensee recognized its original application was not properly filed and re-filed its renewal application with a fee and an explanation about its error prior to any Commission action against its license. *Cf. MFR, Inc.*, Forfeiture Order, DA 09-1091, 2009 WL 1392548 (MB May 19, 2009) (licensee required to pay forfeiture when it files application without fee and later re-files, but only provides an explanation of its initial filing error in response to an NAL).

⁸ Perry also argues that, pursuant to Section 307(c) of the Act, submission of the application, albeit without the required fee, precludes the Commission from holding that continued operation of the station was unauthorized. Although we are rescinding the forfeiture in this case, we note that Section 307(c) does not allow a licensee who files a defective application for renewal to continue to operate after its license expires.

⁹ That section has been amended and the provisions Perry quotes were renumbered as Section 1.1111 in 2008. *See Amendment of Parts 0, 1, 2, 61, 64, 73, and 80 of the Commission’s Rules, Concerning Commission Organization, Practice and Procedure, Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Tariffs,*

1.1116(a), if the defective fee is discovered within 30 days of filing, the application is dismissed and can be refiled with a new filing date. If the defect is discovered after 30 days have passed without being “forwarded to Commission staff for substantive review,” pursuant to Section 1.1116(b), a filer is billed the fee amount due plus a 25 percent penalty. Thus, under current electronic application filing procedures, the September 30, 2004, submission was never “forwarded to Commission staff for substantive review” because it did not contain the requisite filing fee. To the extent that the Rules provide that the Commission’s recourse, once 30 days have elapsed from the date an application is submitted with no fee, is to bill the applicant retroactively and impose the 25 percent penalty,¹⁰ we will do so here. In light of this disposition, we need not address Perry’s remaining arguments.

Conclusion/Action. In view of the foregoing, Perry Broadcasting Company’s September 30, 2005, response to our September 21, 2005, NAL in the amount of \$7,000 IS GRANTED, and the Notice of Apparent Liability (NAL/Acct. No. MB-20051810099) for violation of Section 73.3539 of the Commission’s Rules and Section 301 of the Communications Act of 1934, as amended, is HEREBY CANCELLED. Pursuant to Section 1.1116(b) of the Rules, Perry Broadcasting Company will be assessed a penalty charge equal to 25 percent of the filing fee, in addition to the filing fee. Therefore, Perry Broadcasting Company will be billed a total of \$187.50 under separate cover.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Perry Broadcasting Company

Miscellaneous Rules Relating to Common Carriers, Radio Broadcast Services, and Stations in Maritime Services, Order, 23 FCC Rcd 680 (2008), *erratum* issued, DA 08-2125 (OMD Sep. 19, 2008), 74 Fed. Reg. 344401 (Jan. 21, 2009).

¹⁰ See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, Report and Order, 2 FCC Rcd 947, 957, Supplemental Order, 2 FCC Rcd 1882 (1987), *recon. granted in part*, 3 FCC Rcd 5987 (1988), *aff’d sub nom. Brown v. FCC*, 888 F.2d 898 (D.C. Cir. 1989) (“On further review, we believe that a clearer demarcation point is necessary to avoid industry confusion and uncertainty as to the consequences of an insufficient fee payment. Generally, when applications are received, tracking information is put into a data base. Although some bureaus and offices may enter data fast than others [sic], the process generally takes approximately 30 days. During this same 30 day period we will expect bureau and office staff to take a second review of the fee and enter identifying codes into the fee system. Thus, this timeframe allows the Commission to complete its initial review of fees and return unprocessable applications before authorizations are granted. Therefore, fee underpayments identified by Commission staff in 30 calendar days or less from the time of receipt of the application at the Commission or Treasury lockbox bank will result in dismissal of the application and its return to the applicant. . . . Underpayments identified after this time will result in a bill to the applicant that includes a penalty charge of 25 percent of the amount due.”). See also *Leon F. Petterson*, Letter, 22 FCC Rcd 14021 (MB 2007) (after 30 days, recourse when application is submitted without appropriate filing fee is to bill the applicant retroactively for a 25 percent penalty).