



Federal Communications Commission
Washington, D.C. 20554

March 3, 2010

DA 10-364

In Reply Refer to:

1800B3-VMM

NAL/Acct. No. MB-200741410020

FRN: 003771177

Released: March 3, 2010

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Fletcher, Heald and Hildreth, PLC
1300 North 17th St.
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Arlington, VA 22209

Re: Station WSVX(AM) (formerly WKWH)
Shelbyville, Indiana
RSE Broadcasting, LLC
Facility ID No. 2872
File No. BR-20041006ABA

Dear Mr. McCormick:

Before the Audio Division is a March 2, 2007, Response to Notice of Apparent Liability ("Response") filed on behalf of RSE Broadcasting, LLC ("RSE"), former licensee¹ of Station WSVX(AM) (formerly WKWH), Shelbyville, Indiana ("Station"). RSE seeks cancellation of the January 31, 2007, Notice of Apparent Liability for Forfeiture ("NAL")² in the amount of seven thousand dollars (\$7,000), 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.³ For the reasons set forth below, we cancel the monetary forfeiture issued on January 31, 2007, and assess RSE a 25 per cent late-fee penalty for its late filing.

Background. As noted in the NAL, RSE's renewal application for the Station should have been filed by April 1, 2004, four months prior to the August 1, 2004, expiration date, but was not.⁴ The application was not successfully filed until October 6, 2004 ("October Application"). In the October Application, RSE explained that it thought it had timely filed the Station's renewal application on March

¹ On August 7, 2007, the Commission granted an application for assignment of license from RSE Broadcasting, LLC, to Three Towers Broadcasting Company, LLC (File No. BAL-20070611AKH). This assignment was consummated on August 22, 2007. Despite this assignment, RSE 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).

² *RSE Broadcasting, LLC.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 1567 (MB 2007). The Commission granted the captioned application on January 31, 2007.

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

⁴ 47 C.F.R. § 73.3539(a).

24, 2004.⁵ It stated that in August 2004, after it learned that the Commission had no record of receiving the filing fee, it tried to pay the fee, but its payment was rejected by the electronic filing system.⁶ RSE claimed that it then retained counsel, who successfully tendered an online payment for the originally filed renewal application, filed an STA request on September 30, 2007, and submitted the October Application along with another filing fee.⁷ On January 31, 2007, the staff advised RSE 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. In reply, RSE filed the subject Response.

In its Response, RSE argues that we should rescind the forfeiture because (1) the NAL did not sufficiently take into account the mitigating circumstances as described in the October Application;⁸ (2) the Station's renewal was filed in good faith;⁹ (3) any error was inadvertent;¹⁰ (4) no unauthorized operation occurred;¹¹ and (5) the amount assessed was excessive in light of the violations.¹² In light of our disposition below, we need not address these arguments.

Discussion. We have reviewed the record in this case and the Commission's data bases and we find that RSE did in fact tender a license renewal application for the Station on March 24, 2004, but failed

⁵ RSE stated, and Commission records confirm, that this application was assigned File No. BR-20040324ABZ. See File No. BR-20041006ABA, Exhibit 1.

⁶ RSE's fee payment was rejected because it was tendered more than fourteen days after RSE tendered its application for filing. See CDBS User's Guide, http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/cdbs_ug.htm ("Note: Payment must be received by Mellon Bank within 14 (calendar) days of the date that the application is officially received by the Media Bureau's electronic filing system (indicated by the reference number assigned to the electronically filed application). This deadline applies to any payment submission method (electronic or via a paper check). If payment is not received in time, the filed application will be considered to be **not paid** and will therefore not be processed by the MB.") (emphasis in original).

⁷ RSE notes that it requested and was granted a refund of the additional filing fee it submitted. Response at 3, n.2.

⁸ Response at 4.

⁹ *Id.*

¹⁰ *Id.* As further explanation of the circumstances of its filing, RSE states that it simultaneously tendered renewal applications for both the Station and co-owned Station WKWH-FM (now WIFE-FM), and only realized that the Station's application was not properly filed when WKWH-FM's renewal was granted on July 26, 2004. See *Broadcast Actions*, Public Notice, Report No. 45787 (July 29, 2004).

¹¹ *Id.* RSE explains that it assumed it would be contacted by the Commission's staff if anything was wrong with the Station's original application. It further states that it believed in good faith that it could continue operating the Station as normal after the license expired on August 1, 2004, because it thought that the renewal application tendered on March 24, 2004, would be processed after its filing fee problem was resolved, citing to Section 307(c) (3) of the Act, as amended.

¹² In support of this argument, RSE cites to two other cases in which the licensees were fined the same amount for "more egregious violations" than present in the instant case. See Response at 5-6, citing *Christian Action Team, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 2089 (MB 2007) (untimely renewal application and unauthorized operation for seven months) and *Jack W. Ivy, Sr.*, Memorandum Opinion and Order, 22 FCC Rcd 2312 (MB 2007) (untimely renewal application and unauthorized operation for over one year).

to pay the requisite filing fee.¹³ For the reasons set forth below, we will cancel the NAL and impose a 25% penalty as provided in Section 1.1118 of the Rules.

Section 1.1118 of the Rules provides that,¹⁴ if the defective fee is discovered within 30 days of filing, the application is dismissed and can be re-filed 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 1.1118(b) of the Rules, a filer is billed the fee amount due plus a 25 percent penalty. Thus, under current electronic application filing procedures, the March 24, 2004, submission was never “forwarded to Commission staff for substantive review” because it did not contain the requisite filing fee. Because 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,¹⁵ we will do so here.

Conclusion/Action. In view of the foregoing, RSE Broadcasting, LLC’s, Response to our January 31, 2007, NAL in the amount of \$7,000 IS GRANTED, and the Notice of Apparent Liability (NAL/Acct. No. MB-200741410020) 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 1.1118(b) of the Rules, RSE Broadcasting, LLC, will be assessed a penalty charge equal to 25 percent of

¹³ RSE recognized its original application was not properly filed and filed the October Application with a fee and an explanation about its error before being notified by the Commission of any rule violation. *Cf. MFR, Inc.*, Forfeiture Order, 24 FCC Rcd 5688 (MB 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).

¹⁴ *See* 47 C.F.R. §1.1118(a).

¹⁵ *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).

the filing fee, in addition to the filing fee. Therefore, it will be billed a total of \$187.50 under separate cover.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Three Towers Broadcasting Company, LLC