

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

In re Application of
WKLC, INC.
For Modification of License for Station WKLC-FM
St. Albans, West Virginia
NAL/Acct. No. MB2011941410016
FRN: 0002012003
File No. BMLH-20110523AEG
Facility I.D. No. 73175

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 29, 2011

Released: August 1, 2011

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the captioned application of WKLC, Inc. ("WKLC" or the "Licensee") for modification of license (the "Application") for Station WKLC-FM, St. Albans, West Virginia (the "Station"). In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("NAL") issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Rules (the "Rules"), by the Chief, Audio Division, Media Bureau (the "Bureau") by authority delegated under Section 0.283 of the Rules, we find that the Licensee apparently willfully violated Section 73.3598 of the Rules by failing to timely file a License to Cover Application, and willfully and repeatedly violated Section 301 of the Act, by engaging in unauthorized operation of the Station after the construction permit had expired. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of seven thousand dollars (\$7,000); dismiss the Application; and grant Special Temporary Authority ("STA") to permit Licensee to continue the Station's operations.

1 WKLC, Inc. states that it filed the instant Application as a "Modification of License" rather than as a covering license application because it "was unable to check the 'purpose' box on the Form 302-FM for 'cover construction permit.' CDBS apparently no longer recognizes the underlying construction permit (BPH-20040602AAD)." Application, Exhibit 1, n.1.

2 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

3 See 47 C.F.R. § 0.283.

4 See 47 C.F.R. § 73.3598.

5 See 47 U.S.C. § 301.

II. BACKGROUND

2. On June 2, 2004, after its tower site was destroyed, WKLC filed an application (the “2004 Application”) seeking authorization to construct new facilities approximately 2.3 kilometers from its original site.⁶ On July 19, 2004, Commission staff granted the 2004 Application and issued a construction permit (the “Permit”) with an expiration date of July 19, 2007. WKLC failed to file a covering license application by that date, and the Permit expired by operation of law pursuant to Section 73.3598(e) of the Rules.⁷

3. According to WKLC, on April 12, 2006, it “executed a lease at the new site with Sinclair Media III, Inc. [licensee of Station WVAH-TV and tower owner] . . . and commenced operations pursuant to program test authority⁸ promptly thereafter, well-before the expiration of the construction permit”⁹ WKLC, however did not file the Application until May 23, 2011, nearly four years after the Permit’s July 19, 2007, expiration. WKLC “acknowledges its “inadvertent error,” and seeks a waiver of Section 73.3598(e). Licensee argues that waiver is consistent with Commission practice. In particular, WKLC cites *Clear Channel Broadcasting Licenses, Inc.*¹⁰ which it claims “affirmed ‘the staff’s practice of waiving Section 73.3598(e) . . . where the applicant conclusively demonstrates that it completed construction prior to the expiration of the construction period, notwithstanding the tardy filing of the license to cover application.’”¹¹

III. DISCUSSION

4. Pursuant to Section 73.3598(e)¹² of the Rules, a construction permit is automatically forfeited on its expiration date if “construction has not been completed and . . . an application for license has not been filed”¹³ The rule, requiring construction and commencement of operation within three years, is designed to provide permittees sufficient time to construct while conserving staff resources by sharply limiting opportunities to seek extensions.¹⁴

5. It is undisputed that the Permit expired as a matter of law on July 19, 2007. Therefore, absent the grant of a waiver, the Application must be dismissed. An applicant seeking waiver of a Rule

⁶ File No. BPH-20040602AAD. The 2004 Application proposed that the Station be collocated with WVAH-TV, Charleston, West Virginia.

⁷ 47 C.F.R. § 73.3598(e).

⁸ See 47 C.F.R. § 73.1620(a)(1) (providing for “automatic” program test authority).

⁹ Exhibit 1, Modification of License Application.

¹⁰ *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011) (“*Clear Channel*”).

¹¹ *Id.* at 5.

¹² 47 C.F.R. § 73.3598(e).

¹³ *Id.*

¹⁴ See *Clear Channel*, 26 FCC Rcd at 7157, citing *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23089-94 (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 17525, 17533 (1999).

has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁵ Thus, an applicant for waiver “faces a high hurdle even at the starting gate.”¹⁶ Although the Commission must consider carefully all waiver requests, such requests must be supported by a compelling showing in order to be granted.¹⁷ A waiver from the Commission is appropriate if special circumstances¹⁸ warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.¹⁹ Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.²⁰

6. We reject WKLC’s contention that the Commission’s decision in *Clear Channel* compels favorable action on its waiver request. In *Clear Channel*, the Commission affirmed the staff’s waiver of Section 73.3589(e) where an application for license to cover was filed three days after the construction permit’s expiration and the applicant had constructed and commenced operations before the permit’s expiration. In upholding the waiver, the Commission opined that “the staff practice has been to *wave relatively minor filing deadline violations*, so long as the applicant can demonstrate that construction was, in fact, completed in a timely manner.”²¹ The Commission also found that “where [Clear Channel’s] License Application was filed only several days after the pertinent filing deadline . . . a waiver does not undermine Section 73.3598’s purpose.”²² Here, although WKLC purportedly constructed and commenced operations before the July 19, 2007, expiration date, it did not file the Application until nearly four years after the construction permit’s expiration. A passage of years, rather than days as was the case in *Clear Channel*, cannot be characterized as a “relatively minor” filing deadline violation. Moreover, given the extreme tardiness of the Application grant of a waiver would frustrate the purpose of the Rule. WKLC cites no additional cases as support for waiver when, as is presented here, the application for license to cover is filed years after the permit’s expiration. Therefore, after affording

¹⁵ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

¹⁶ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”) (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant’s proposal will not undermine the policy served by the rule). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹⁷ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁸ See, e.g., *Gulf Coast Community College*, 20 FCC Rcd 17157 (MB 2005) (finding special circumstances present for waiver of a Form 301 filing deadline, but issuing a Notice of Apparent Liability for failure to timely file the application).

¹⁹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *WAIT Radio*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (stating that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis).

²⁰ *WAIT Radio*, 418 F.2d at 1157.

²¹ *Clear Channel* 26 FCC Rcd at 7156 (emphasis added). See, e.g., *KXFT(FM)*, Letter, 24 FCC Rcd. 13483 (MB 2009) (waiver granted for application for license to cover filed 15 days after construction permit expired).

²² *Id.* at 7157. The Commission observed that similar waivers “enabled the Bureau to carry out its day-to-day functions, efficiently process applications . . . where good cause exists for limited recurring waivers, and where there is little, if any, threat that the staff’s flexible enforcement of a rule will frustrate its purpose or cause prejudice to third parties.” *Id.* at 7156.

WKLC's waiver request the "hard look" called for under *WAIT Radio*, we find that it has presented no facts and circumstances sufficient to demonstrate that waiver of Section 73.3598(e) would further the public interest. We will therefore deny the waiver request and dismiss the Application.

7. *Proposed Forfeiture.* In this case, the Licensee has failed to timely file a covering license application as required by Section 73.3598(e) of the Rules. Moreover, WKLC continued Station operations with the permitted facilities at the new site for nearly four years after the permit expired on July 19, 2007, before attempting to file the appropriate covering license application, and did not seek an STA to operate with those facilities. Thus, WKLC engaged in unauthorized operation for nearly four years in violation of Section 301 of the Act. Licensees are obligated to comply fully with the Rules, including upon completion of the permitted facilities to timely file an application for license to cover.²³ Here, the Licensee did not do so.

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁴ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.²⁵ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,²⁶ and the Commission has so interpreted the term in the Section 503(b) context.²⁷ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."²⁸

10. 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.²⁹ 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. 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."³⁰

²³ See, e.g. *See, e.g. Hemmingford Media, Inc.*, Forfeiture Order, 14 FCC Red 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)).

²⁴ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

²⁵ 47 U.S.C. § 312(f)(1).

²⁶ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁷ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Red 4387, 4388 (1991).

²⁸ 47 U.S.C. §312(f)(2).

²⁹ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Red 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Red 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

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

11. In this case, the Licensee failed to file a covering application and continued unauthorized operations for nearly four years after the Permit expired on July 19, 2007. Nevertheless, because it holds a license to operate the Station, the latter transgressions are not comparable to "pirate" wireless operations, which typically have been subject to forfeitures of approximately \$10,000. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture for the full \$3,000 amount, for the failure to timely file a License to Cover Application for the Station, but reduce the proposed forfeiture for the unauthorized operation from the \$10,000 base amount to \$4,000.³¹ Accordingly, the proposed forfeiture is in the total amount of \$7,000.

12. Special Temporary Authority. In addition, although there is no such request on file, in order to avoid unnecessary disruption to the residents of St. Albans, West Virginia, and because no applications have been filed which conflict with the facilities specified in the Permit after its expiration, we will *sua sponte* grant an STA to continue WKLC-FM operations with the facilities specified in the 2004 Application. This STA will also afford WKLC the opportunity to apply for a new construction permit for the Station specifying those facilities.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that WKLC, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for the apparent willful violation of Section 73.3598 of the Commission's Rules and willful and repeated violation of Section 301 of the Communications Act of 1934, as amended.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, WKLC, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³² Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank--Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA

³¹ See, e.g., *Southern Broadcasting and Investment Co., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13199 (MB 2010) (\$4,000 forfeiture proposed for nearly six years of unauthorized operation); *Westport Board of Education*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 3215 (MB 2010) (\$4,000 forfeiture proposed for more than three years of unauthorized operation); *WBLW, Inc., Pulaski, Virginia*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 7522 (MB 2007) (\$4,000 forfeiture proposed for nearly three years of unauthorized operation).

³² 47 U.S.C. § 504(a).

Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.³³

19. IT IS FURTHER ORDERED that the application for modification of license application of WKLC, Inc. for WKLC-FM St. Albans, West Virginia (File No. BMLH-20110523AEG) IS DIMISSED .

20. IT IS FURTHER ORDERED that SPECIAL TEMPORARY AUTHORITY IS HEREBY GRANTED to continue WKLC-FM operations with the facilities specified in Application No. BMLH-20110523AEG. This authority will expire: (1) 90 days from the date of this letter; or (2) upon staff action on a new, properly filed application license to cover authorized WKLC-FM facilities, whichever is sooner.

21. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WKLC, Inc., 100 Kanawha Terrace, St. Albans, WV 25177, and to its counsel, Sally A. Buckman, Esq., 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³³ See 47 C.F.R. § 1.1914.