

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

In the Matter of)	
)	
CHAPARRAL BROADCASTING, INC.)	Control Nos. 00000RROG-05-031, RROG-
)	06-00007586, and RROG-08-00009906
Request for Waiver of Late Payment Penalty)	

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 2009

Released: October 9, 2009

By the Commission:

1. By this Memorandum Opinion and Order, we deny an application for review (AFR), filed February 13, 2007, by Chaparral Broadcasting, Inc. (Chaparral) seeking review of a ruling by the Chief Financial Officer, Office of Managing Director (OMD) denying reconsideration of a ruling denying Chaparral's request for a waiver and refund of a penalty for late payment of a rulemaking fee.¹ We find that imposition of the late payment penalty conforms to the Commission's rules and that Chaparral has shown no basis to waive the penalty.

I. BACKGROUND

2. Chaparral filed a minor change application for a construction permit to move Station KLZY(FM)² from Channel 223C at Powell, Wyoming to Channel 223C0 at Park City, Montana.³ Chaparral filed its application electronically and simultaneously electronically submitted the requisite application fee for a minor change application.⁴ Chaparral, however, omitted the required fee of \$2,230 for rulemaking to change the community of license or upgrade an existing allotment.⁵ Accordingly, on December 10, 2004, Chaparral was assessed a 25 percent late payment penalty of \$557.50 pursuant to 47 C.F.R. § 1.1116(b).⁶ On December 10, 2004 and January 4, 2005, Chaparral requested waiver of the late

¹ Letter from Mark A. Reger, former Chief Financial Officer to David Tillotson, Esq. (May 23, 2005), *recon. denied*, Letter from Mark A. Stephens, Chief Financial Officer to David Tillotson, Esq. (Jan. 31, 2007) (Reconsideration Order).

² Now KWMY(FM).

³ See Letter from George H. Gwinn, Supervisory Engineer to Mr. David Tillotson (Dec. 10, 2004) (Gwinn Letter) at 1. See also File No. BPH-2004630ABW.

⁴ See Reconsideration Order at 1. See also Petition for Reconsideration, filed June 5, 2005, as supplemented September 25, 2005 (Petition for Reconsideration) at 1.

⁵ See Reconsideration Order at 3 n.12, 4. See also Gwinn Letter at 1.

⁶ See Gwinn Letter at 1. Since Chaparral filed its application for review, the relevant rules have been renumbered. Former 47 C.F.R. § 1.1116 is now 47 C.F.R. § 1.1118 and former 47 C.F.R. § 1.1109 is now 47 C.F.R. § 1.1111. *In The Matter Of 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, Miscellaneous Rules Relating To Common Carriers, Radio Broadcast Services, and Stations In The Maritime Services*, Erratum, DA 08-2125, 23 FCC Rcd 13572 (Off. Man. Dir. 2008). For clarity and convenience this order will refer to the relevant rules by their old numbers.

payment penalty on various grounds.⁷ Chaparral submitted the rulemaking fee and the late payment penalty on January 28, 2005.⁸

3. Only one argument asserted by Chaparral remains at issue. In seeking reconsideration of OMD's refusal to waive the late payment penalty, Chaparral argued that, under the Commission's rules, Chaparral's application should have been dismissed with leave to refile without penalty. Chaparral noted that 47 C.F.R. § 1.1109(c) provides that "Applications and other filings that are not submitted in accordance with these instructions [for submitting fees] will be returned as unprocessable."⁹ Chaparral further stated in seeking reconsideration that:

[Section 1.1109] further provides at subsection (d)(1) that, (i) in the event the Bureau processing the application "discovers" [that the required fee has not been paid] within 30 days after resubmission of an application returned for want of payment of the proper fees, "the application will be dismissed" and (ii) if the Bureau discovers after 30 days following resubmission that the requisite fees have not been paid, "the application will be retained and a [25 percent] late fee will be assessed."¹⁰

Chaparral thus interpreted section 1.1109(d) as authorizing the imposition of a late payment penalty only after an application had been dismissed under subsection (c) for nonpayment of fees, the application had subsequently been resubmitted again without the required fee, and the deficiency in the resubmitted application had been discovered more than 30 days after resubmission. Chaparral noted that its application had never been returned under subsection (c) and concluded that it therefore was not required to pay a penalty.

4. OMD found that Chaparral misread section 1.1109.¹¹ In this regard, OMD found that subsection (d) of the rule applies only where an application has been returned by the staff for additional information or corrections (to the application) and had no applicability to a determination that an applicant had failed to pay a required fee. OMD thus disagreed that a late payment penalty could be assessed only after an application had been dismissed for nonpayment of fees and then resubmitted without required fees.

5. In its AFR, Chaparral reiterates its argument that it was entitled to dismissal and resubmission of its application without penalty. Chaparral again argues that the staff should have dismissed its application under subsection (c) of the rule. Chaparral states:

[OMD] is correct that the staff did not request that Chaparral submit additional or corrected information, **as it was required to do under Section 1.1109(c)**. [OMD] is also correct that Section 1.1109(d), including subsection (ii) which provides the legal basis for assessing late payment penalties with respect to application filing fees, is not applicable to this case precisely because the staff did not return Chaparral's application

⁷ See Letter from David Tillotson to Mr. Andrew Fischel [*sic*], Managing Director (Dec. 10, 2004); Letter from David Tillotson to Mr. Andrew Fischel [*sic*], Managing Director (Jan. 4, 2005).

⁸ See Reconsideration Order at 4.

⁹ Petition for Reconsideration, Supplement at 1-2.

¹⁰ *Id.*, Supplement at 1.

¹¹ Reconsideration Order at 3-4.

pursuant to Section 1.1109(c). But the only possible conclusion to be drawn from these facts is that under its own rule the Commission was barred from assessing a late penalty against Chaparral because the rule only provides for assessing late penalties with respect to applications which have first been returned for want of the correct filing fee pursuant to Section 1.1109(c).¹²

II. DISCUSSION

6. We affirm OMD's rulings. As did OMD, we find that Chaparral misreads the relevant rule provisions¹³ and that the late payment penalty was correctly assessed against Chaparral. In this regard, we discern some confusion on Chaparral's part over the provisions applicable to the imposition of a late payment penalty. Accordingly, to clarify the matter, we first summarize the relevant law.

7. The statutory basis for the Commission's rules regarding untimely payment derives from Section 8 of the Communications Act,¹⁴ which governs the Commission's application filing fee program. Section 8(c)(1)¹⁵ provides:

The Commission shall prescribe by regulation an additional application fee which shall be assessed as a penalty for late payment of application fees required by subsection (a) of the section. Such penalty shall be 25 percent of the amount of the application fee which was not paid in a timely manner.

Section 8(c)(2)¹⁶ provides:

The Commission may dismiss any application or other filing for failure to pay in a timely manner any application fee or penalty.

8. In implementing these provisions, the Commission concluded that it would be desirable to establish a clear demarcation point as to when applications would be dismissed for insufficient fees and when the application would be retained in processing but the applicant assessed a late payment penalty.¹⁷ Because the Commission anticipated that, as part of the routine processing of applications, the initial review of fee payments would typically occur within 30 days of filing, the Commission provided that

¹² AFR at 2. [Emphasis in the original.] Section 1.1109(c) reads: Applications and other filings that are not submitted in accordance with these instructions will be returned as unprocessable.

¹³ On February 19, 2008, OMD, published in the Federal Register a notice deleting, under delegated authority, the substance of 47 C.F.R. § 1.1109, as discussed in this memorandum opinion and order. See 73 Fed. Reg. 9017 (Feb. 19, 2008). As the notice characterizes the amendment as one of several "non-substantive changes to the Commission's rules," it appears that the amendment was made in error, since it is clearly a substantive change beyond the scope of OMD's delegated authority. See 47 C.F.R. § 0.231(b). Accordingly, this memorandum opinion and order applies the rule as it appeared at the time the application was filed. The text of the rule will be corrected by separate action.

¹⁴ 47 U.S.C. § 158.

¹⁵ 47 U.S.C. § 158(c)(1).

¹⁶ 47 U.S.C. § 158(c)(2).

¹⁷ See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 957 ¶ 61 (1987).

where insufficient payment was discovered during this time period, the application would be dismissed.¹⁸ However, to avoid disruption, the Commission provided that if the staff discovered the fee insufficiency after 30 days, the application would be retained in processing and the applicant would be billed, including a 25 percent late payment penalty.¹⁹ The Commission codified this policy as 47 C.F.R. § 1.1114,²⁰ the predecessor of current 47 C.F.R. 1.1116.²¹

9. The Gwinn Letter correctly relied upon section 1.1116(b) when it assessed the 25 percent late payment penalty against Chaparral, having discovered the fee underpayment more than 30 days after Chaparral filed its application.²² The Reconsideration Order correctly upheld this finding.²³ Section 1.1109(d), which OMD correctly found governs applications returned to applicants for additional information or corrections, and upon which Chaparral relies, has no relevance here because Chaparral's application was not returned for additional information or corrections.²⁴ Section 1.1109(c),²⁵ upon which

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* at 994-95.

²¹ The section was redesignated by *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 59 Fed. Reg. 30984, 30998 (Jun. 16, 1994) and *Reorganization Establishing the International Bureau*, 60 Fed. Reg. 5322, 5326 (Jan. 27, 1995). The applicable portion of current section 1.1116 reads:

(a) Filings subject to fees and accompanied by defective fee submissions will be dismissed under §1.1109 (d) [*sic*, see note 27, *infra*] of this subpart where the defect is discovered by the Commission's staff within 30 calendar days from the receipt of the application or filing by the Commission.

....

(b) Applications or filings accompanied by insufficient fees or no fees, or where such applications or filings are made by persons or organizations that are delinquent in fees owed to the Commission, that are inadvertently forwarded to Commission staff for substantive review will be billed for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing by the Commission. Applications or filings that are accompanied by insufficient fees or no fees will have a penalty charge equaling 25 percent of the amount due added to each bill. Any Commission action taken prior to timely payment of these charges is contingent and subject to rescission.

²² See Gwinn Letter at 1. Chaparral does not dispute that the underpayment was discovered more than 30 days after the application was filed.

²³ Reconsideration Order at 4.

²⁴ See Reconsideration Order at 4. Subsection 1.1109(d) states in full (emphasis added):

(d) **Applications returned to applicants for additional information or corrections** will not require an additional fee when resubmitted, unless the additional information results in an increase of the original fee amount. Those applications not requiring an additional fee should be resubmitted directly to the Bureau/Office requesting the additional information. The original fee will be forfeited if the additional information or corrections are not resubmitted to the appropriate Bureau/Office by the prescribed deadline. A forfeited application fee will not be refunded. If an additional fee is required, the original fee will be returned and the application must be resubmitted with a new remittance in the amount of the required fee to the Commission's lockbox bank. Applicants should attach a copy of the Commission's request for additional or corrected information to their resubmission.

Chaparral also relies, does not provide a basis for dismissing Chaparral's application without imposing a late fee. As described above, the purpose of section 1.1116 was to distinguish between fee underpayments discovered within 30 days and underpayments discovered more than 30 days after filing. Chaparral's reading of section 1.1109(c), would nullify this distinction. Accordingly, we read section 1.1109(c) not to require applications to be returned where section 1.1116 provides for continued processing of the application and the imposition of a late fee. We therefore conclude that imposition of the penalty was consistent with the Commission's rules and that Chaparral has provided no grounds for waiver.

III. ORDERING CLAUSE

10. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed February 13, 2007, by Chaparral Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(1) If the Bureau/Office staff discovers within 30 days after the resubmission that the required fee was not submitted, the application will be dismissed.

(2) If after 30 days the Bureau/Office staff discovers the required fee has not been paid, the application will be retained and a 25 percent late fee will be assessed on the deficient amount even if the Commission has completed its action on the application. Any Commission actions taken prior to timely payment of these charges are contingent and subject to recession.

See also Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5369 ¶ 103 (1994) (amending former section 1.1107(d), the predecessor of 1.1109(d), to provide, *inter alia*, for the assessment of a late payment penalty for resubmitted applications not accompanied by sufficient fees).

²⁵ We recognize that section 1.1116(a) incorrectly cross-references section 1.1109(d), rather than 1.1109(c) when it provides that filings accompanied by defective fee submissions will be dismissed under section 1.1109(d), where the defect is discovered within 30 days. The error occurred in renumbering the section. Earlier versions of the rule (*see, e.g.*, 47 C.F.R. § 1.1114 (1993)), correctly cross-reference the predecessor of section 1.1109(c), thereby reinforcing the point that that dismissal under section 1.1109(c) is appropriate only where the underpayment is discovered within 30 days. To avoid any confusion in the future, we direct OMD to make an editorial correction to this cross-reference pursuant to its delegated authority. *See* 47 C.F.R. § 0.231(b).