

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

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|--------------------------|---|---------------------------|
| In the Matter of |) | |
| |) | |
| Vearl Pennington |) | |
| DW05CB, |) | Facility ID No. 69843 |
| Burlington, Ohio |) | File No. BLTVL-19941019JA |
| |) | |
| DW06BC, |) | Facility ID No. 69842 |
| Mount Sterling, Kentucky |) | File No. BLTVL-19900102IF |
| |) | |
| DW10BM, |) | Facility ID No. 69839 |
| Morehead, Kentucky |) | File No. BLTVL-19900102IG |

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2019

Released: September 19, 2019

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration a July 20, 2018, Application for Review (AFR) filed by Vearl Pennington (Pennington), former licensee of deleted low power television (LPTV) stations: DW05CB, Burlington, Ohio (DW05CB); DW06BC, Mount Sterling, Kentucky (DW06BC); and DW10BM, Morehead, Kentucky (DW10BM) (collectively the Stations).¹ The AFR seeks review of a June 21, 2018, decision by the Video Division (Division) of the Media Bureau (Bureau) that dismissed and denied Pennington's 2017 petition for reconsideration of the 2004 cancellation and deletion of the Stations' licenses.² For the foregoing reasons, we affirm the *2018 Letter Decision* and dismiss in part and otherwise deny the AFR.

II. BACKGROUND

A. 1998 License Renewals and 2004 License Cancellations

2. Pennington is the former licensee of the Stations. He was granted license renewals for the Stations with the following expiration dates: June 1, 1998, for DW05CB; and August 1, 1998, for DW06BC and DW10BM. Pennington was therefore required to file license renewal applications in the Commission's Consolidated Database System (CDBS) by February 1, 1998, for W05CB, and April 1, 1998, for W06BC and W10BM.

3. In 2004, the Division discovered that Pennington had failed to file for renewal of the Stations' licenses prior to their expiration.³ On April 27, 2004, the Division wrote Pennington to confirm

¹ Application for Review of Vearl Pennington, File No. BLTVL-19900102IG (filed Jul. 20, 2018) (AFR). The letter "D" placed in front of the call signs indicate that the call signs have been deleted.

² See Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Vearl Pennington (June 21, 2018) (*2018 Letter Decision*).

³ Due to this failure, the licenses expired, and the Stations were no longer authorized to operate. See 47 CFR § 73.3539 (requiring broadcast licensees to submit renewal applications four months prior to expiration). Review of CDBS demonstrates that Pennington also failed to seek special temporary authority to continue to operate the Stations after the licenses had expired.

whether he had filed renewal applications for the Stations in 1998.⁴ Pennington was directed to respond to the Division within thirty days to confirm “if [he] and when [he] filed the requisite renewal application (FCC Form 303-S)” for the Stations. The Renewal Inquiry Letters stated that failure to respond with the requested information would result in cancellation of the station licenses.

4. Pennington failed to submit any written response to the Renewal Inquiry Letters or prove that he had previously filed renewal applications in 1998. While it appears that Pennington tried to submit late-filed renewal applications prior to the expiration of the thirty-day period, as discussed in greater detail below, he failed to pay the required filing fees and, therefore, the applications were not accepted for filing and could not be reviewed by staff.⁵ Accordingly, on October 18, 2004, the Division notified Pennington that the Stations’ licenses had been canceled and updated CDBS accordingly.⁶ Both the Renewal Inquiry Letters and the Cancellation Letters were sent via U.S. Postal Service mail to the Stations’ addresses of record in CDBS at the time.⁷ Pennington did not timely seek reconsideration of the cancellation of the Stations’ licenses, and the cancellations became final.⁸ However, Pennington continued to operate the Stations without a license in violation of the Communications Act of 1934, as amended (the Act).⁹

B. 2017 Late-Filed Petition for Reconsideration

5. On July 2, 2017, more than 12 years after the Division affirmatively cancelled the licenses and 19 years after the licenses expired, Pennington filed a self-styled “Petition to Reinstate Licenses.”¹⁰ Pennington argued that, after receiving the Renewal Inquiry Letters in 2004, he called Division staff to resolve issues that he had accessing CDBS.¹¹ After purportedly resolving those issues, Pennington contended that on May 21 and 22, 2004, he had filed the license renewal applications for each of the Stations (collectively the 2004 Renewal Applications) and paid a combined total of \$1,155, which he asserted represented the application filing fees.¹² Pennington further noted that he, at some unidentified time, attempted to resubmit the 2004 Renewal Applications to ensure that they had been

⁴ See Letter from Hossein Hashemzadeh, Associate Chief, Video Division, Media Bureau, to Vearl Pennington (Apr. 27, 2004) (DW06BC, Mount Sterling, Kentucky and DW10BM, Morehead, Kentucky); Letter from Hossein Hashemzadeh, Associate Chief, Video Division, Media Bureau, to Vearl Pennington (Apr. 27, 2004) (DW05CB, Burlington, Ohio) (collectively, Renewal Inquiry Letters).

⁵ See *infra* paras. 5, 7; see also 2018 Letter Decision at 3.

⁶ Letter from Hossein Hashemzadeh, Associate Chief, Video Division Media Bureau, to Vearl Pennington (Oct. 18, 2004) (DW06BC, Mount Sterling, Kentucky and DW10BM, Morehead, Kentucky); Letter from Hossein Hashemzadeh, Associate Chief, Video Division Media Bureau, to Vearl Pennington (Oct. 18, 2004) (DW05CB, Burlington, Ohio) (collectively, Cancellation Letters).

⁷ 47 CFR § 1.5 (“Each licensee shall furnish the Commission with an address to be used . . . in serving documents or directing correspondence to that licensee. Unless any licensee advises the Commission to the contrary, the address contained in the licensee’s most recent application will be used by the Commission for this purpose.”).

⁸ 47 U.S.C. § 405(a); 47 CFR § 1.106(a)(1).

⁹ We note that, as part of a separate proceeding that is now final, the Commission has imposed a forfeiture of \$144,344, jointly and severally, against Pennington and Michael Williamson (Williamson) for the unauthorized operation of DW10BM for over 18 years. See *Vearl Pennington, Morehead, Kentucky and Michael Williamson, Morehead Kentucky*, Forfeiture Order, 34 FCC Rcd 770 (2019) (*Forfeiture Order*). As concluded in the *Forfeiture Order*, “even if we agreed that Pennington had properly filed the Station’s license renewal application in 2004 . . . the Station would still be subject to forfeiture penalty for operating without an authorization.” *Id.* at 774, para. 12.

¹⁰ See Petition to Reinstate Licenses of Vearl Pennington, File No. BLTVL-19900102IG (filed July 2, 2017) (Petition).

¹¹ Petition at 2.

¹² *Id.* at 2, Exhs. B, C, D, and E.

filed, but that CDBS “alerted [him] that the renewal applications have already been filed.”¹³ Accordingly, Pennington argued that the Stations’ licenses should have been reinstated because he responded to the Renewal Inquiry Letters in 2004 via a phone conversation with Division staff and filed renewal applications for the Stations that, to date, “have neither been granted nor denied.”¹⁴ Moreover, Pennington argued that he did not receive formal notice that the Division cancelled the Stations’ licenses because the Division mailed the Cancellation Letters to an old address of record.¹⁵

C. 2018 Letter Decision

6. In the *2018 Letter Decision*, the Division treated the “Petition to Reinstate Licenses” as a petition for reconsideration under section 1.106 of the Commission’s rules and dismissed the Petition on procedural grounds, finding that it was filed nearly 13 years late.¹⁶ The Division concluded that Pennington should have sought reconsideration no later than November 17, 2004—30 days after the Division affirmatively canceled the Stations’ licenses in the Cancellation Letters.¹⁷

7. The Division also denied Pennington’s substantive arguments. The Division found that Pennington never filed renewal applications for the 1998 renewal cycle and that he failed to demonstrate that he properly filed the 2004 Renewal Applications within the 30-day period specified in the Renewal Inquiry Letters.¹⁸ The Division determined that the 2004 Renewal Applications were not accepted for filing because Pennington failed to pay the application fees, which is a condition precedent for filing renewal applications; consequently, the Division could not review the applications.¹⁹ Importantly, the Division found that the \$1,155 that Pennington paid in 2004 was for the Stations’ annual regulatory fees, not payment of the application filing fees for the 2004 Renewal Applications as asserted by Pennington. The Division also found that Pennington’s conversations with staff did not constitute a response to the Renewal Inquiry Letters.²⁰ Finally, the Division rejected Pennington’s claim that he did not receive the Cancellation Letters because they were sent to the Stations’ official address of record at the time of issuance.²¹

D. 2018 Application for Review

8. Pennington now seeks review of the *2018 Letter Decision*. First, he argues that the Division’s finding with regard to the Stations’ mailing addresses was not supported “by substantial evidence in the record.”²² Pennington alleges that he spoke with a Division staff member in 2004, after

¹³ *Id.* at 3, Exh. H. Based on the evidence provided, this attempt to re-file appears to have occurred just over thirteen years later, on June 26, 2017.

¹⁴ Petition at 3.

¹⁵ *Id.* at 2.

¹⁶ *2018 Letter Decision* at 1 n.2, 2-3.

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.*

²⁰ *Id.* at 4. Although Pennington does not challenge the Division’s finding that the Stations’ license renewal applications were never accepted for filing, in the affidavit attached to the AFR, he continues to insist that the application filing fees were paid. Specifically, Pennington argues that in August 2004 he tendered \$1,155 to the Commission in order to pay “renewal fees for the 3 stations through the year 2022.” AFR at Affidavit of Vearl Pennington. This argument is identical to the argument raised by Pennington and rejected by the Commission in the forfeiture proceeding. *Forfeiture Order*, 34 FCC Rcd at 775, para. 13. We reaffirm our conclusion from the forfeiture proceeding concerning Pennington’s failure to properly file the Stations’ license renewal applications and decline to comment on this argument any further.

²¹ *Id.*

²² AFR at 3.

receiving the Renewal Inquiry Letters, and requested informally that the Stations' addresses of record be updated; therefore, the Commission should have had the correct mailing addresses.²³ Pennington states that this is evidenced by the fact that the Commission used the "correct" mailing address to mail him a May 2007 invoice for regulatory fees for Station DW06BC.²⁴ Second, Pennington argues that the Division's actions violated his right to equal protection under the Fifth Amendment to the U.S. Constitution by treating him differently from other licensees.²⁵ Finally, Pennington argues that the Division's failure to reinstate and renew the Stations' licenses is inconsistent with the Commission's public interest mandate under section 307(a) the Act.²⁶

III. DISCUSSION

9. After a complete analysis of the record, we conclude that Pennington has failed to show that the Division's 2018 *Letter Decision* was in error.²⁷ Specifically, we uphold the Division's finding that the underlying petition for reconsideration upon which the AFR is based was procedurally deficient under section 405(a) of the Act, and therefore deny the AFR.

10. Section 405(a) of the Act requires a party to file a petition for reconsideration within 30 days after the Commission, or its staff acting under delegated authority, issues "an order, decision, report, or action."²⁸ The Commission does not have the authority to waive or excuse the statutory 30-day filing period for petitions for reconsideration except where extraordinary circumstances indicate that justice would be served.²⁹ For example, as held in *Gardner*, such circumstances include where the late-filing is due to the Commission's failure to adhere to its notice provisions such that the party did not receive any notice of the action for which reconsideration is sought.³⁰ A petitioner seeking to rely on *Gardner* has the burden to show: (1) when and how it received notice in fact; (2) that the time remaining was inadequate to allow it reasonably to timely file; and (3) that it acted promptly on receiving actual notice.³¹ Though

²³ *Id.*

²⁴ *Id.* Pennington also highlights the fact that this invoice was sent after the license for the Station was canceled.

²⁵ *Id.* Citing the Commission's decision in *Atlantic City Board of Education*—in which expired station licenses were reinstated where the cancellation notices had not yet become final orders—Pennington asserts that the Division failed to treat him the same as other similarly situated licensees who had their licenses canceled for failing to file timely license renewal applications. *Id.* at 4 (citing *Atlantic City Board of Education*, Memorandum Opinion and Order, 31 FCC Rcd 9380 (2016)).

²⁶ AFR at 4; *see also* 47 U.S.C. § 307(a) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."). According to Pennington, the Division's action failed to consider that, for the past 28 years, the Stations have been providing the only over-the-air commercial broadcast television service to Morehead, Kentucky. AFR at 4. However, as we found in the enforcement context, DW10BM had been operating without a license in violation of section 301 of the Act for more than 18 years. *Forfeiture Order*, 34 FCC Rcd at 778-9, para. 20. Such illegal operation unequivocally contravenes the public interest and we reject Pennington's claim to the contrary.

²⁷ *See* 47 CFR § 1.115(b)(2).

²⁸ 47 U.S.C. § 405(a); 47 CFR § 1.106(a)(1).

²⁹ *See Reuters, Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) (the Commission does not have statutory authority to act on a petition for reconsideration filed after the 30-day filing period); *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) (*Gardner*) (the Commission may only act on late-filed petitions for reconsideration when "extraordinary circumstances indicate that justice would thus be served").

³⁰ *Gardner*, 530 F.2d at 1091.

³¹ *Id.* at 1092, n.24.

the AFR fails to specifically dispute the Division's finding that the Petition should be dismissed as late-filed, an examination of the facts indicates no extraordinary circumstances warranting a different result.³²

11. As an initial matter, we reject Pennington's continued insistence that the Renewal Inquiry Letters and the Cancellation Letters were sent to the wrong address. Commission rules provide that licensees are required to furnish the Commission with an address to be used by the Commission in serving documents or directing correspondence to that licensee.³³ Based on the address of record information in CDDBS at the time, the addresses to which the Division mailed the Renewal Inquiry Letters and the Cancellation Letters were correct.³⁴ To the extent those addresses were no longer valid, Pennington was required to notify the Commission of the new address via a written submission to the Commission or through an electronic form that was available in CDDBS. Such formal procedures are necessary to protect the integrity of the Commission's records and to prevent unauthorized changes to station information. Pennington does not assert that he ever formally notified the Commission that the Stations' addresses of record had changed, and his claimed informal staff request that the addresses be updated did not relieve him of the obligation to follow established procedure by filing a written request—either a paper filing or via CDDBS—to update the addresses.³⁵

12. Even if the Renewal Inquiry and Cancellation Letters for DW06BC and DW10BM were sent to the “wrong” address, as Pennington suggests, it is undisputed that the Renewal Inquiry Letters and the Cancellation Letters for at least DW05CB were sent to what Pennington argues is the “correct” address for all the Stations.³⁶ Further, his argument that he did not receive the letters is undermined by his argument that it was his receipt of the Renewal Inquiry Letters that caused him in 2004 to engage Division staff by phone on the issue of failing to file license renewal applications.³⁷ Therefore, he cannot plausibly claim that he lacked notice that the Stations' licenses had expired or were ultimately cancelled. Furthermore, the fact that the Commission mailed Pennington a May 15, 2007, invoice for regulatory fees to the “correct” address for DW06BC is irrelevant to whether or not the Renewal Inquiry Letters and the Cancellation Letters were sent to the Stations' addresses of record at the time they were issued, three years earlier in 2004.³⁸ Accordingly, Pennington had 30 days (until November 17, 2004) to file a petition for reconsideration once the Division issued the Cancellation Letters.³⁹ Instead, Pennington filed the Petition on July 2, 2017, more than 12 years late.

13. The AFR fails to dispute the Division's conclusion that the Petition was not timely-filed, and Pennington presents no argument or evidence that extraordinary circumstances exist to overcome the statutory bar on our ability to consider the Petition. Unlike *Gardner*, in this case, the Commission

³² See 47 CFR § 1.115(b)(1).

³³ See *id.* § 1.5.

³⁴ The address of record and location the letters for DW05CB were sent was 135 Lee Cemetery Road, Morehead, Kentucky, 40351. The addresses of record and location the letters for DW06BC and DW10BM were sent was P.O. Box 968, Mt. Sterling, Kentucky, 40353. According to Pennington, the “correct” addresses for all the Stations was 135 Lee Cemetery Road, Morehead, Kentucky, 40351.

³⁵ This case provides strong support for strict adherence to the formal notice requirements. Given the extreme passage of time, the Commission has no way to verify the content of any conversations between Pennington and staff or even that such conversations took place.

³⁶ See *supra* note 34.

³⁷ Petition at 2.

³⁸ We note that the mailing of the past due invoice to DW06BC does not mean that a station was still licensed. We also note that Pennington does not state that this bill was paid.

³⁹ 47 CFR § 1.4(b)(5) (providing that the computation of time for a non-public letter begins on the date appearing on the document).

adhered to its notice provisions, rather than deviating from them.⁴⁰ Indeed, the only thing extraordinary in this case is the extent to which the licensee neglected his duty to abide by the Commission's rules and to ensure that the Stations were operating pursuant to the terms of a validly issued license.⁴¹ Pennington appears to have taken no steps in the twelve-year period between submitting the 2004 Renewal Applications and filing the Petition in 2017 to ascertain whether the Stations were operating with a valid authorization. Unauthorized operation, by its very nature, fails to serve the public interest, convenience, or necessity and is in direct conflict with the Act.⁴² Accordingly, having found that no "extraordinary circumstances" exist to warrant consideration of Pennington's grossly late-filed Petition, we affirm the Bureau decision to dismiss the Petition and deny the AFR.⁴³

14. In addition to dismissing the Petition as late-filed, the *2018 Letter Decision* addressed and rejected Pennington's substantive arguments. Upon review, we find the Division's decision to be well supported and we affirm their rejection of Pennington's arguments; however, in light of our decision to affirm dismissal of the Petition, we decline to discuss these issues here. We also decline to address new legal arguments raised in the AFR, notably Pennington's Fifth Amendment and section 307(a) claims. We dismiss these allegations as procedurally defective as they were not previously presented to the Bureau⁴⁴

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and sections 1.115(c), (g) of the Commission's rules, 47 CFR § 1.115(c), (g), the Application for Review filed by Vearl Pennington, **IS DISMISSED** to the extent that it relies on questions of fact or law not previously presented to the Media Bureau and is otherwise **DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ Furthermore, even if the initial notices were insufficient—they were not—Pennington still fails to explain why he waited almost a year to seek reconsideration of the license cancellations after supposedly learning in August 2016 that DW10BM was operating without a license. See *Forfeiture Order*, 34 FCC Rcd at 772, para. 5; *Gardner*, 530 F.2d at 1091-92 n.24 (requiring parties to promptly seek reconsideration upon receiving actual notice of Commission action).

⁴¹ The station licenses conspicuously note the relevant expiration date (e.g., "This license expires 3:00 a.m. local time, June 01, 1998."). See, e.g., FCC Form 365, Low Power Television/Television Translator Broadcast Station License, DW05CB (Jan. 17, 1995), http://licensing.fcc.gov/prod/cdbs/pubacc/Auth_Files/203353.pdf.

⁴² See, e.g., 47 U.S.C. § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.").

⁴³ See *NCE Reserved Allotment Group 14 Florida Community Radio, Application to Construct a New Noncommercial Educational FM Station at Otter Creek, Florida, et al.*, Memorandum Opinion and Order, 33 FCC Rcd 849, 850-51, para. 4 (2018) (denying application for review where underlying petition for reconsideration was late-filed and the petitioner failed to satisfy *Gardner* test).

⁴⁴ See *id.* § 155(c)(5); 47 CFR § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.").