



Federal Communications Commission
Washington, D.C. 20554

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DA 07-3504

In Reply Refer to:

1800B3-TSN

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Mr. Leon F. Pettersen
P.O. Box 1061
Live Oak, FL 32064-1061

In re: **Leon F. Pettersen**
WLVO(FM), Live Oak, Florida
Facility ID No. 37060
File No. BRH-20030929AAS
File No. BRH-20040928ARL

**Application for Renewal of FM
Radio Station License**

Dear Applicant:

We have before us the captioned application of Leon F. Pettersen (the "Licensee"), for renewal of his license for Station WLVO(FM), Live Oak, Florida (the "Station"). We find that the Licensee did not timely and properly file the renewal application, but also find that our recourse for the improper filing is dictated by Section 1.1116(b) of the Commission's Rules (the "Rules").¹ Accordingly, we grant, in part, Licensee's Petition for Reconsideration of the staff's cancellation of his license and deletion of the Station's call sign, and grant the captioned WLVO(FM) renewal application and reinstate the call sign for the Station.

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."² An application for renewal of WLVO(FM)'s license should have been filed by October 1, 2003, four months prior to the Station's February 1, 2004, license expiration date,³ but was not. Accordingly, on August 31, 2004, the staff wrote to the Licensee indicating that the Station's license had expired and that: (1) all authority to operate the Station was

¹ 47 C.F.R. § 1.1116(b).

² 47 C.F.R. § 73.3539(a).

³ See 47 C.F.R. §§ 73.1020, 73.3539(a). The license renewal application is filed on FCC Form 303-S. In 2003, the filing fee was \$145.00. 47 C.F.R. § 1.1104(3)(f) (2003).

terminated; and (2) the Station's call letters were deleted from the Commission's database. The Licensee was advised that any operation of the Station was then unauthorized and must cease immediately.⁴

Upon receipt of the August 31, 2004, Staff Letter, Licensee filed a September 8, 2004, request for Special Temporary Authorization ("STA") for WLVO(FM) to continue operating,⁵ and on September 9, 2004, a Petition for Reconsideration of the Staff Letter (the "Petition"). On September 28, 2004, the Licensee properly filed the license renewal application for the Station, accompanied by the appropriate filing fee ("2004 Renewal Application"). The staff granted the STA Request by letter dated September 30, 2004.⁶ By the terms of that letter, the authority expired 180 days later, on March 29, 2005. The Licensee timely filed a request for extension of STA on March 16, 2005, which remains pending. In Exhibit 1 to the 2004 Renewal Application, and also in the Petition, the Licensee indicated that he "in fact filed a timely application for renewal of his license" on September 29, 2003 (the "2003 Submission").⁷ The Licensee opted to submit the filing fee associated with the 2003 Submission by check, but did not do so until 22 days after purportedly filing his renewal application, and the check was not received and negotiated by the Commission's bank until 30 days after filing. Pursuant to the Rules and the Bureau's procedures, discussed below, the 2003 Submission was not processed due to the tardy application filing fee payment. Because the Licensee did not timely submit the appropriate application filing fee, the 2003 Submission was never properly filed. Absent a properly filed application, the staff was unable to process the 2003 Submission. Conversely, the Licensee's 2004 Renewal Application was properly if tardily filed, because the Licensee also timely submitted the required application filing fee.

Discussion. In this case, the record indicates that the Licensee failed to timely and properly file a license renewal application for the Station, as required by Section 73.3539(a) of the Rules. At the time such applications are filed, the Bureau's electronic filing system routinely provides notice that the Licensee must pay the filing fee for the application within 14 calendar days of its submission and warns that, if payment is not timely made, the application will not be processed.⁸ Because the Licensee failed to comply with this directive, his 2003 Submission was never considered as having been properly filed. The Licensee filed a renewal application on September 28, 2004, nearly one year after the license renewal filing deadline, and almost eight months after the WLVO(FM) license had expired, and timely submitted the appropriate license renewal application filing fee.

In the Petition, Licensee argues that he timely filed his renewal application, and that therefore the cancellation of his license and deletion of his call sign were improper. First, he contends that Section 558(c) of the Administrative Procedure Act prohibits cancellation of a license while a "timely and

⁴ Letter to Leon F. Pettersen, Ref. No. 1800B3-DW (MB Aug. 31, 2004) (the "Staff Letter").

⁵ File No. BLSTA-20040908AMJ (the "STA Request").

⁶ Letter to John J. McVeigh, Esq., Ref. No. 1800B3 (MB Sept. 30, 2004).

⁷ Exhibit 1 to 2004 Renewal Application.

⁸ See also CDBS User's Guide, http://svartifoss2.fcc.gov/prod/cdbforms/prod/cdbforms_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).

sufficient application for a renewal or a new license” is pending.⁹ However, while the Licensee may have timely submitted his license renewal application on September 29, 2003, that submission was not sufficient because the required application filing fee was not timely submitted.¹⁰ Although the Licensee raises questions about the 14-day payment provision set forth in the CDBS User’s Guide, arguing that it is not contained in a rule and was never published in the *Federal Register*, he appears to argue that the Rules contain *no* provision dictating a deadline for payment of application filing fees for CDBS-filed applications. We disagree. As an initial matter, except in certain specified circumstances, the Commission’s rules and decisions generally governing application filing fees mandate that the filing fee accompany an application in order for the application to be deemed sufficient for processing.¹¹

Moreover, in this instance it is immaterial whether the 14-day payment provision set forth in the CDBS User’s Guide was required to be published in the Federal Register because the Licensee had actual notice of that time frame. As courts and this Commission have held, application of a requirement such as this to a person is not prohibited if the person has “actual and timely notice” of that requirement regardless of whether it appeared in the Federal Register.¹² Here, Licensee undeniably had actual notice that the filing fee must be received within 14 calendar days of the date of submission of the renewal application, not only because this information was set forth in the CDBS User’s Guide, but because the CDBS electronic filing system displays this information upon completion of an application submission.¹³

⁹ See 5 U.S.C. § 558(c).

¹⁰ The Licensee also argues that cancellation of the WLVO(FM) license contravened Section 307(c)(2) of the Act (47 U.S.C. § 307(c)(2)), which prohibits the Commission from requiring renewal applicants to file any information which previously has been furnished or which is not directly material to the considerations that affect grant or denial of such applications. Petition at 2. It is not readily apparent why the Licensee believes this statute precludes cancellation of his license. As noted in the text, the issue is not the information submitted or even the timing of the Licensee’s 2003 Submission. Rather, the issue is whether the 2003 Submission was required to be processed, due to the Licensee’s failure to timely submit the required application filing fee.

¹¹ See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 52 Fed. Reg. 5285, 5286 at para. 10 (Feb. 20, 1987) (“[A]ll fees will be due in full upon submission of an application or filing to the Commission. Partial payments or installment payments will not be permitted. Therefore, no submission will be deemed sufficient for processing by the appropriate bureau or office unless the full fee is attached.”); 47 C.F.R. § 1.1109(c) at note. See also 47 C.F.R. § 1.1110(b) (“[a]pplicants are required to submit one payment instrument . . . with each application or filing.”); but see *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1989*, Memorandum Opinion and Order, 5 FCC Rcd 3558, 3570-3571 (1990) (“[W]e have made an exception to the rule that fees must accompany the submission to provide for limited instances in which a billing process will be used”).

¹² 5 U.S.C. § 552(a)(1); *U.S. v. Hall*, 742 F.2d 1153, 1155 (9th Cir. 1984); *American Telephone and Telegraph Company*, Memorandum Opinion and Order, 86 FCC2d 956 at 961 n.14 (1981) (finding that company could not raise failure to publish rate of return decision as bar to effectiveness of rates when Motion filed by company with the Commission clearly showed that the company possessed a copy of the rate of return decision and thus had actual notice of that decision).

¹³ In addition to the CDBS User’s Guide, *supra* note 8, those submitting applications electronically in CDBS see a screen after completing their submissions that states: (1) whether a fee is required; (2) the amount of the fee, if applicable; and (3) that “[p]ayment 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 above). 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 Licensee further argues that the Bureau's actions negate its cancellation of his license. He contends that the 2003 Submission was "officially received" and "filed" with the Bureau, and further that the Bureau neglected to inform him of the defect (*i.e.*, non-payment) in his fee within 30 days of tendering the 2003 Submission.¹⁴ The Licensee points to Section 1.1116(b) of the Rules,¹⁵ which provides that a filing accompanied by no fees, and that is inadvertently forwarded to Commission staff for substantive review, will result in the filer's being billed for the amount due plus a 25 percent penalty if the discrepancy is not discovered until 30 calendar days from receipt of the filing. Because the Bureau never informed him of the lack of timely fee filing within 30 days of the 2003 Submission, the Licensee argues, it could not refuse to process the 2003 Submission, but could only assess the 25 percent penalty.¹⁶ Section 1.1116(b)'s provenance antedates electronic application filing, when fee processing and substantive review were performed by separate Commission staff. Thus, as discussed above, under current electronic application filing procedures the 2003 Submission was never "forwarded to Commission staff for substantive review."¹⁷ However, we agree with Licensee to the extent that Section 1.1116(b), both as written and as originally conceived, provides that the Commission's recourse, once 30 days have elapsed from the date an application is submitted with no fee, is to retroactively bill the applicant and impose the 25 percent penalty.¹⁸ As the Commission has already received Licensee's late-submitted fee for the 2003 Submission, along with a subsequent fee submitted with his September 2004 application, we will not bill Licensee but rather direct him to apply for a partial refund of that portion of the September 2004 application fee that exceeds the 25 percent penalty charge.

the [Media Bureau]." (emphasis in original) The screen also has links to the electronic Form 159, Remittance Advice, and to a printable Form 159 for those not wishing to pay electronically. We also note that the Commission gave notice to licensees that it would be moving toward an electronic filing system for broadcast applications. *1998 Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056 (1998), and that electronic filing would include Form 303-S. *New FCC Form 303-S Available For Use*, Public Notice, 18 FCC Rcd 5088 (MB 2003). Licensee therefore cannot plausibly argue that he was not exposed to the various instructions accompanying the electronically filed form.

¹⁴ Petition at 3-5.

¹⁵ 47 C.F.R. § 1.1116(b).

¹⁶ Petition at 5.

¹⁷ *See supra* note 8.

¹⁸ *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.").

Conclusion. In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.¹⁹ That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.²⁰ Apart from the filing irregularities discussed above, we have no record of operational violations by Licensee. Further, we find that Station WLVO(FM) served the public interest, convenience, and necessity during the subject license term. Accordingly, the Petition for Reconsideration filed by Licensee on September 9, 2004 IS GRANTED to the extent noted above and is otherwise DENIED, and the call sign WLVO(FM) IS REINSTATED. IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of Leon F. Pettersen for Station WLVO(FM), Live Oak, Florida (File No. BRH-20030929AAS) IS DEEMED FILED AND IS GRANTED. The license renewal application filed September 28, 2004, File No. BRH-20040928ARL, IS DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: John J. McVeigh, Esq., Counsel for Leon F. Pettersen

¹⁹ 47 U.S.C. § 309(k).

²⁰ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).