

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

In re Application of	)	
	)	
<b>Creek Broadcasting Corporation</b>	)	Facility I.D. No. 14478
	)	NAL/Acct. No. MB-200741410383
For Renewal of License for	)	FRN: 0013709902
Station KTMP(AM)	)	File Nos. BR-20050930BEB
Heber City, Utah	)	BR-20060120AAA

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: October 18, 2007**

**Released: October 19, 2007**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. The Commission has before it: (1) the captioned applications of Creek Broadcasting Corporation (the "Licensee"), for renewal of its license for Station KTMP(AM), Heber City, Utah (the "Station"); (2) a Petition to Deny the renewal application ("Petition"), filed on April 3, 2006, by Gene Guthrie ("Guthrie"); and (3) a Petition to Deny the renewal application ("Petition"), filed on March 15, 2006, by Kayleen Johnson ("Johnson"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),<sup>1</sup> by the Chief, Audio Division Media Bureau, by authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that the Licensee apparently willfully violated Sections 73.3539 and 73.3526 of the Rules,<sup>3</sup> by failing to timely file a license renewal application for the Station and failing to retain all the required documentation in Station KTMP(AM)'s public inspection file. Based upon our review of the facts and circumstances before us, we deny Johnson's Petition, grant in part and deny in part Guthrie's Petition, and conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of two thousand five hundred dollars (\$2,500). Furthermore, we grant the original KTMP(AM) renewal application (File No. BR 20050920BEB), dismiss as moot the duplicate renewal application (File No. BR-20060120AAA), and reinstate the Station's call sign.

**II. BACKGROUND**

2. 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."<sup>4</sup> An application for renewal of the Station's license should have been filed by June 1, 2005, four months prior to the Station's October 1, 2005, license

<sup>1</sup> 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> See 47 C.F.R. § 0.283.

<sup>3</sup> See 47 C.F.R. §§ 73.3539 and 73.3526.

<sup>4</sup> 47 C.F.R. § 73.3539(a).

expiration date.<sup>5</sup> No such application was received by the Commission staff for processing before the Station's license expired. Thereafter, on December 27, 2005, the staff wrote to the Licensee indicating that the Station's license had expired and that (1) all authority to operate the Station was terminated; and (2) the Station's call letters were deleted from the Commission's data base. The Licensee was advised that any further operation of the Station was unauthorized and must cease immediately.<sup>6</sup> Subsequently, on January 20, 2006, the Licensee filed a license renewal application (the "2006 Application"). On April 17, 2006, the Licensee filed a request for special temporary authorization ("STA") to operate the Station after the license had expired.<sup>7</sup>

3. In its STA request, the Licensee stated that it attempted to file a renewal application online through the Media Bureau's Electronic Filing and Application Retrieval database, CDBS on September 30, 2005 (the "2005 Application").<sup>8</sup> The Licensee states that when it reached Form 159, Remittance Advice, CDBS reflected that \$375.00 was due. Despite the Licensee's misgivings about this amount, it opted to pay the amount shown and assumed its application was successfully filed. The Licensee further stated that after receiving the December 27, 2005, staff letter, it learned that the \$375.00 fee paid in September 2005, was the Station's regulatory fees for the year and that it had never paid the license renewal fee, thus the 2005 Application was never successfully filed.<sup>9</sup> To correct this deficiency, the Licensee not only filed the 2006 Application along with the proper fee, but also paid the required fee for the 2005 Application, in January 2006. In effect, the Licensee filed two renewal applications and paid two application filing fees.<sup>10</sup> The staff granted the Licensee an STA on April 26, 2006, to continue operations pending action on the 2006 Application.<sup>11</sup>

### III. DISCUSSION

4. *Late Filed Renewal Application.* We have reviewed the record in this case and the Commission's databases, and we find that the Licensee did, in fact, tender a license renewal application for KTMP(AM) on September 30, 2005, before the Station's license expired. However, at that time, it neglected to pay the requisite filing fee. Thus, under current electronic application filing procedures, the 2005 Application was not successfully filed. As noted above, the Licensee ultimately paid the filing fee not only for the 2005 Application, but also for the subsequently filed 2006 Application. We therefore decline to impose the 25 percent late payment penalty prescribed by Section 1.1116(b) of the Rules.<sup>12</sup> Nevertheless, because the 2005 Application was not successfully filed on or before June 1, 2005,

<sup>5</sup> See 47 C.F.R. §§ 73.1020, 73.3539(a).

<sup>6</sup> Letter to Creek Broadcasting Corporation, Ref. 1800B3 (MB Dec. 27, 2005).

<sup>7</sup> File No. BLSTA-20060417AHO.

<sup>8</sup> As discussed below, the 2005 Application should have been filed before June 1, 2005, pursuant to Section 73.3539 of the Rules. Instead, the Licensee attempted to file the 2005 Application on September 30, 2005, one day before the Station's license expired on October 1, 2005.

<sup>9</sup> Commission records reflect that the Licensee paid \$375.00 in satisfaction of its regulatory fees, along with a \$93.75 late fee, on October 13, 2005.

<sup>10</sup> Commission records also reflect that the required fee for the 2005 Application was paid on January 18, 2006, and on January 20, 2006, the Licensee filed and paid for the 2006 Application.

<sup>11</sup> See Letter to Ms. Sandy Mahoney, Ref 1800B3 (Apr. 26, 2006). The licensee has since filed for an extension of this STA (File No. BLSTA-20061023AHV) which remains pending.

<sup>12</sup> See 47 C.F.R. § 1.1116(b); *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). *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% penalty).

as required by Section 73.3539(a) of the Rules, we propose a forfeiture below. We also dismiss the 2006 Application as moot and reinstate the Station's call letters.

5. *Petitions to Deny.* On March 15, 2006, Johnson filed a Petition to Deny the Station's renewal application, and on April 3, 2006, Guthrie filed a Petition to Deny the Station's renewal application.<sup>13</sup> Under Section 309(d) of the Act, a party has standing to file a petition to deny if grant of an application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.<sup>14</sup> The Commission also accords party-in-interest status to a petitioner who demonstrates either that he/she resides in the service area of the station that is the subject of the petition or that he/she listens to or views the station regularly and that such listening or viewing is not the result of transient contacts with the station.<sup>15</sup> To do so, the petitioner must provide an affidavit or declaration that establishes such standing.<sup>16</sup> Neither Johnson or Guthrie provide an affidavit or declaration alleging a specific injury that would be caused by grant of the KTMP(AM) renewal application or attempt to establish listener/residence status as a basis for standing. Therefore, we find that both Johnson and Guthrie lack standing to file petitions to deny in this proceeding. Nevertheless, we will consider Johnson and Guthrie's Petitions as informal objections under Section 73.3587 of the Rules.<sup>17</sup>

6. Both Johnson and Guthrie allege that the Station's tower is not secured properly. Johnson also alleges that the Licensee has "sent out false affidavits the entire 2005 year" and that "KTMP has ran (sic) contests on air and then refused to give away the prizes offered. . . ." <sup>18</sup> Guthrie alleges that when he viewed the public inspection file on August 24, 2005, it was deficient and that he was denied access to the Station's public inspection file on February 8, 2006.<sup>19</sup> In response, the Licensee states that the Station's transmitter is secured with a fence, barbed wire, and signage. However, it concedes that there was an isolated breach of the fence, subsequently repaired, which was reported to the local police. The Licensee provides a copy of the report prepared by the Heber City Police Department regarding the incident. The Licensee also states that it has always delivered prizes to its contest winners. The Licensee further states that the Station's public file is up to date and complete at the present time. The Licensee states that every required item was prepared and placed in the public inspection file and that any previous deficiencies are solely attributable to Guthrie taking the public file when he left the employ of the Licensee. The Licensee states that Guthrie was denied access to the public inspection file because there was a restraining order preventing Guthrie from entering the Station's facilities. The Licensee provides a copy of the restraining order with its response.

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<sup>13</sup> Johnson and Guthrie filed Petitions against the 2006 Application. Because the 2005 and 2006 Applications are identical and the Petitions raise allegations pertaining to both, we will consider the Petitions in the context of the 2005 Application as well.

<sup>14</sup> See, e.g., *Telesis Corp.*, Memorandum Opinion and Order, 68 FCC2d 696 (1978).

<sup>15</sup> See *Tabback Broadcasting Company*, Memorandum Opinion and Order, 15 FCC Rcd 11899, 11900 n. 3 (2000), and *Chet-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041 (1999).

<sup>16</sup> See *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980); see also *Infinity Broadcasting Corp. of California*, Memorandum Opinion and Order, 10 FCC Rcd 9504 (1995); *Tabback Broadcasting Company, supra*, and *Niles Broadcasting Company*, Memorandum Opinion and Order, 7 FCC Rcd 5959 (1992).

<sup>17</sup> 47 C.F.R. § 73.3587.

<sup>18</sup> Johnson does not state to whom these affidavits were sent, in what context, or what makes them "false." From the information provided it is unclear what exactly what Johnson is alleging.

<sup>19</sup> Guthrie claims the following items were missing from the Station's public inspection file: 1. "no Public issues for years;" (2) "No Applications pending including 'A License renewal Application;'" (3) "No copies of FCC Letters pertaining to FCC Investigations;" (4) No Citizen agreements that effect employment and programming;" and (4) No Ownership reports."

7. Johnson has not provided specific facts sufficient to show a violation of the Commission's Rules by the Licensee. We find the Licensee's explanation of the trespassing incident, coupled with the report prepared by the Heber City Police, indicates that the Station's tower is properly secured and that the breach of its security was an isolated incident. Johnson's claim regarding the false affidavits is not supported with copies of the affidavits, nor specific information regarding why Johnson considered them to be false. Johnson's claim regarding unfulfilled contest prize promises by the Licensee is equally unsupported. Johnson does not provide proof of such an occurrence and did not provide specific information from a KTMP listener who did not receive a contest prize as promised. The Johnson Petition contains neither adequate nor specific factual allegations sufficient to warrant further inquiry regarding renewal of KTMP(AM)'s license. Thus it will be denied.<sup>20</sup>

8. Section 73.3526 of the Rules<sup>21</sup> requires broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period.<sup>22</sup> We credit Guthrie's complaint regarding the Station's deficient public inspection file, but deny his claim regarding the denial of access to the Station's public inspection file. The licensee had a valid restraining order against Guthrie at the time he requested the Station's public inspection file in 2006; thus, he was lawfully denied access to the file. With respect to the missing items from the Station's public inspection file, the Licensee has not adequately rebutted Guthrie's allegations. The Licensee only states that the required items were prepared and placed in the file, but were subsequently removed from the file by Guthrie upon his less-than-amicable departure from the Station when his employment was terminated. Where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.<sup>23</sup> For this reason we will propose a forfeiture for failure to maintain a public inspection file below. Guthrie's Petition will be granted to the extent it addresses the deficient public inspection file and denied with respect to all other matters.

9. *Proposed Forfeiture.* In this case, the Licensee has failed to timely file a license renewal application for the Station, as required by Section 73.3539(a) of the Rules. The Licensee does not explain its failure to file the license renewal application before June 1, 2005, however we find that it did file the 2005 Application before the license expired on October 1, 2005, and that the December 27, 2005, staff letter deleting the Station's call letters and terminating the Station's authority to operate was in error. The Licensee also states despite every required item being prepared and placed in the public inspection file and that there was a period of time where it was deficient due to the acts of a former employee, in violation of Section 73.3526 of the Rules.

10. 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.<sup>24</sup> Section 312(f)(1) of the Act defines willful as "the conscious and

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<sup>20</sup> See *Area Christian Television, Inc.*, Decision, 60 R.R. 2d 862 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>21</sup> 47 C.F.R. § 73.3526.

<sup>22</sup> Cf. *Kathleen N. Benfield*, Letter, 13 FCC Rcd 4102 (1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, 8 FCC Rcd 6400 (1993)).

<sup>23</sup> See *Padre Serra Communications, Inc.*, Letter Decision, 14 FCC Rcd 9709, 9714 (MMB 1999) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)).

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

deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>25</sup> 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,<sup>26</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>27</sup>

11. 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 and \$10,000 for failure to properly maintain a public inspection file.<sup>28</sup> 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."<sup>29</sup>

12. In this case, the Licensee failed to timely file the KTMP(AM) renewal application and to properly maintain the Station's public inspection file. Taking into consideration these facts, including that the 2005 Application was filed before the expiration of the Station's license and that the required public inspection file documents were prepared and subsequently removed, and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we reduce the proposed forfeiture from the \$3,000 base amount to \$1,500 for the late filed renewal application and from the \$10,000 base amount to \$1,000 for the public file violations.<sup>30</sup> For the reasons stated above, we decline to impose a penalty for late submission of a fee. Thus, we propose a forfeiture in the total amount of \$2500.

13. *License Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.<sup>31</sup> 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.<sup>32</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>33</sup>

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<sup>25</sup> 47 U.S.C. § 312(f)(1).

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

<sup>27</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>28</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

<sup>29</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

<sup>30</sup> See *Milwaukee Board of School Directors*, Memorandum Order and Opinion, 22 FCC Rcd 1143 (MB 2007); *The Trustees of Davidson College*, Forfeiture Order, 20 FCC Rcd 17190 (MB 2005).

<sup>31</sup> 47 U.S.C. § 309(k).

<sup>32</sup> 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).

<sup>33</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

14. We find that the Licensee's apparent violation of Sections 73.3539 and 73.3526 of the Rules does not constitute a "serious violation" warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.<sup>34</sup> Further, we find that Station KTMP(AM) served the public interest, convenience, and necessity during its subject license terms. We will, therefore, grant the license renewal application below.

#### IV. ORDERING CLAUSES

15. 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 Creek Broadcasting Corporation is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of two thousand five hundred dollars (\$2,500) for its apparent willful violation of Sections 73.3539 and 73.3526 of the Commission's Rules.

16. 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*, Creek Broadcasting Corporation SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. 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 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

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

19. 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.

20. 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, D.C. 20554.<sup>35</sup>

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<sup>34</sup> For example, we do not find here that the Licensee's operation of the Stations "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *See Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the stations] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. *See also Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

<sup>35</sup> *See* 47 C.F.R. § 1.1914.

21. IT IS FURTHER ORDERED, that the Petition to Deny filed by Kayleen Johnson IS DENIED and the Petition to Deny filed by Gene Guthrie is GRANTED IN PART AND DENIED IN PART.

22. IT IS FURTHER ORDERED, that the call sign KTMP(AM) IS REINSTATED.

23. IT IS FURTHER ORDERED, that pursuant to Section 309(k) of the Communications Act of 1934, as amended, that the license renewal application of Creek Broadcasting Corporation for Station KTMP(AM), Heber City, Utah (File No. BR-20050930BEB) IS GRANTED and the duplicate license renewal application (File No. BR-20060120AAA) is DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Sandy Mahoney, Creek Broadcasting Corporation, 260 North Main, Heber, Utah 84032; and by First Class Mail to Gene Guthrie, 3909 South 7200 West, Magna, Utah 84044 and Kayleen Johnson, 915 East Main Canyon Road, Wallsburg, Utah 84082.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau