



Federal Communications Commission
Washington, D.C. 20554

February 15, 2008

DA 08-384

In Reply Refer to:

1800B3-KAW

Released: February 15, 2008

James L. Oyster, Esq.
108 Oyster Lane
Castleton, VA 22716

Re: KELP(AM), El Paso, TX
McClatchey Broadcasting
Facility ID # 40831
File No. BR-20050328AGB
BR-20060719AAC

Dear Mr. Oyster:

The staff has under consideration the referenced applications of McClatchey Broadcasting (the "Licensee") for renewal of license for Station KELP(AM), EL Paso, Texas. For the reasons set forth below, we deem filed the renewal application filed on March 28, 2005 (the "Renewal Application"), dismiss as moot the renewal application filed on July 19, 2006, and assess the Licensee a 25 percent late-fee penalty charge. Furthermore, we grant, contingent on the timely payment of the requisite filing fee and penalty, the Renewal Application, and we reinstate the Station's call sign.

Background. Section 73.3539(a) of the Commission's Rules (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."¹ An application for renewal of KELP(AM)'s license should have been filed by April 1, 2005. No such application was successfully filed, and the Station's license expired on August 1, 2005. Accordingly, on July 12, 2006, the staff wrote to McClatchey Broadcasting 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.² Upon receipt of the letter, on July 21, 2006, the Licensee filed a request for special temporary authorization ("STA") to continue operations pending consideration of the untimely KELP(AM) renewal application.³ Subsequently, on July 19, 2006, the Licensee properly filed a license renewal application for KELP(AM). The staff granted the STA Request on August 2, 2006, and it was to expire on February 2, 2007.⁴ The Licensee timely filed a request for extension of the STA on January 26, 2007; that request remains pending.⁵

¹ 47 C.F.R. § 73.3539(a).

² *Letter to McClatchey Broadcasting*, Ref. 1800B3-JDB (Chief, Audio Division, Media Bureau, Jul. 12, 2006).

³ *See* File No. BLSTA-20060721AEG (the "STA Request").

⁴ *Letter to Mr. James L. Oyster, Esquire*, Ref. 1800B3-MFW (Chief, Audio Division, Media Bureau, Aug. 2, 2006).

⁵ *See* File No. BELSTA-20070126AFV.

In the STA Request, the Licensee explains that it attempted to timely file the license renewal application for KELP(AM), but did not submit the requisite filing fee with the application. Therefore, the application was never accepted for filing or processing.⁶ The Licensee states that it then filed a second license renewal application – with the appropriate filing fee – and the STA Request.

Discussion. We have reviewed the record in this case and the Commission’s data bases, and we find that the Licensee did in fact tender a license renewal application for KELP(AM) on March 28, 2005, but failed to pay the requisite filing fee. Section 1.1116(b) of the Rules⁷ sets forth the procedures for processing applications submitted without required fees. Specifically, a filer is billed the fee amount due plus a 25 percent penalty if the application is inadvertently forwarded to Commission staff for substantive review and the discrepancy is not discovered until after 30 calendar days from receipt of the filing. Section 1.1116(b) antedates electronic application filing, when fee processing and substantive review were performed by separate Commission staff. Thus, under current electronic application filing procedures, the January 2005 submission was never “forwarded to Commission staff for substantive review.” 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,⁸ we will do so here.

Conclusion/Actions. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.⁹ 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.¹⁰ Apart from the filing irregularities discussed above, we have no record of operational

⁶ CDBS assigned this submission the number “20050328AGB.” The filing fee for license renewal applications for commercial FM stations is \$150.00. *See* 47 C.F.R. § 1.1104.

⁷ 47 C.F.R. § 1.1116(b).

⁸ *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.”). *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).

⁹ 47 U.S.C. § 309(k).

¹⁰ 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*

violations by Licensee. Further, we find that Station KELP(AM) served the public interest, convenience, and necessity during the subject license term.

As discussed above, the \$150.00 fee required for a license renewal application was not submitted with the March 28, 2005, application. Accordingly, pursuant to Section 1.1116(b) of the Rules, McClatchey Broadcasting will be assessed a penalty charge equal to 25 percent of the filing fee. Therefore, McClatchey Broadcasting will be billed a total of \$187.50 under separate cover.

Accordingly, pursuant to Section 309(k) of the Communications Act of 1934, as amended, IT IS ORDERED, that the license renewal application of McClatchey Broadcasting for Station KELP(AM), El Paso, Texas filed on March 28, 2005, (File No. BR-20050328AGB) IS DEEMED FILED. IT IS FURTHER ORDERED, that the license renewal application filed on July 19, 2006 (File No. BR-20070719AAC) IS DISMISSED AS MOOT. IT IS FURTHER ORDERED, that the call sign KELP(AM) IS REINSTATED. IT IS FURTHER ORDERED, that the March 28, 2005, license renewal application IS GRANTED contingent on timely payment of the application fee and assessed penalty charge and IS SUBJECT to rescission for failure to make a timely payment.¹¹

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: McClatchey Broadcasting

204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), Order, 11 FCC Rcd 6363 (1996).

¹¹ See 47 C.F.R. § 1.1116(b) (“Any Commission action taken prior to timely payment of these charges is contingent and subject to rescission.”)