

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

In the Matter of )
Board of Trustees, Davis & Elkins College ) Facility ID No. 4298
) NAL/Acct. No. MB200641410067
) File No. BRED-20040107AAJ
Licensee of Station WCDE(FM) ) FRN: 0010044980
Elkins, West Virginia )
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)

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 2011

Released: November 2, 2011

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau ("Bureau") has before it a Petition for Reconsideration ("Petition") filed on May 29, 2009, by the Board of Trustees, Davis & Elkins College ("College"), licensee of non-commercial educational Station WCDE(FM), Elkins, West Virginia ("Station"). The Petition asks for reconsideration of a April 29, 2009, decision to issue a monetary forfeiture ("Forfeiture Order")<sup>1</sup> in the amount of seven thousand dollars (\$7,000) for its willful violation of Section 73.3539 of the Commission's Rules ("Rules")<sup>2</sup> and willful and repeated violation of Section 301 of the Communications Act of 1934, as amended ("Act")<sup>3</sup>, for its failure to timely file a license renewal application for, and unauthorized operation of, the Station. For the reasons discussed below, we deny the Petition.

II. BACKGROUND

2. On September 27, 2006, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of seven thousand dollars (\$7,000) to the College for these violations.<sup>4</sup> As noted in the NAL, the College's license renewal application for the Station should have been filed on June 1, 2003, four months prior to the October 1, 2003, expiration date, but was not.<sup>5</sup> Accordingly, on December 3, 2003, the Bureau notified the College that the Station's license had expired and that: (1) all authority to

<sup>1</sup> Board of Trustees, Davis & Elkins College, Forfeiture Order, 24 FCC Rcd 5197 (MB 2009).

<sup>2</sup> 47 C.F.R. § 73.3539.

<sup>3</sup> 47 U.S.C. § 301.

<sup>4</sup> Board of Trustees, Davis & Elkins College, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 10654 (MB 2006).

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

operate the Station was terminated; and (2) the Station's call letters were deleted from the Commission's data base. The College was advised that any operation of the Station would be unauthorized and must cease immediately.<sup>6</sup>

3. Upon receipt of the letter, on January 7, 2004, the College tendered the captioned license renewal application for the Station and a request for Special Temporary Authorization ("STA") to operate the Station, pending consideration of the renewal application. The Bureau granted the STA request on January 9, 2004.<sup>7</sup> On September 27, 2006, the Bureau issued the NAL advising the College of its apparent liability for a forfeiture of \$7,000 for its failure to timely file the Station's renewal application and for unauthorized operation of the Station.<sup>8</sup> In response, the College filed a Request for Cancellation or Reduction of Proposed Forfeiture ("Request") on October 27, 2006. In support of its Request, the College stated that: (1) its failure to file properly the renewal application was not willful; and (2) it immediately took corrective action upon learning that the Station license had expired. The College claimed that these reasons warranted a cancellation or reduction of the assessed forfeiture. We rejected these arguments in the Forfeiture Order. In response, the College timely filed the subject Petition.

4. In its Petition, the College reiterates its argument that its failure to timely file a renewal application for the Station was not willful. The College also argues that the Bureau's reliance, in part, on the base amount set forth in Section 1.80(b)(4) of the Rules for failure to file a required form should not apply to instances of late filings, and therefore, the forfeiture amount should be either set aside or substantially reduced. Finally, the College argues that public interest considerations warrant either a reduction or elimination of the forfeiture.

### III. DISCUSSION

5. The Commission will consider a Petition for Reconsideration only when petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.<sup>9</sup> The College has failed to meet this burden.

6. The College largely restates its earlier argument that its failure to timely file a renewal application for the Station was not willful, and claims its acts were neither conscious nor deliberate. We have previously considered and rejected the College's arguments regarding the meaning of the term "willful" under the Rules and the Act. We will not grant reconsideration "to debate matters upon which the Commission has already deliberated and spoken."<sup>10</sup>

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<sup>6</sup> *Letter to Davis & Elkins College*, Ref. 1800B3-DW (MB Dec. 3, 2003).

<sup>7</sup> *Letter to Scott D. Goddard, Assistant Dean of Students, Davis & Elkins College*, Ref. 1800B3-MFW (MB Jan. 9, 2004). By the terms of that letter, the authority expired on July 9, 2004. College failed to timely seek an extension of the STA, and it did not file for further authority to continue the Station's operations until April 17, 2006, which the staff granted on April 27, 2006. See *Letter to Stephen Bright, Vice President for Finance and Administration, Davis & Elkins College*, Ref. 1800B3-MFW (MB Apr. 26, 2006).

<sup>8</sup> The Commission granted the above-referenced license renewal application on September 27, 2006.

<sup>9</sup> See 47 C.F.R. § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *In re National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Red 24414, 24415 (2003).

<sup>10</sup> *WWIZ, Inc.*, 37 FCC at 686; see also *William L. Carroll, et al. a General Partnership, d/b/a McMurray Communications, for Construction Permit for a New FM Station on Channel 247A, Lebanon, Ohio*, Order, 8 FCC Red 6279 (1993).

7. The College next argues that a forfeiture based on failure to file a required form is not warranted because it ultimately did file its renewal application, albeit more than four months late. We disagree. Section 73.3539(a)<sup>11</sup> requires that a renewal application be filed “no later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed.” As noted above, the application deadline in this case was June 1, 2003; the College did not file its renewal application until January 7, 2004, more than six months after the filing deadline and three months after the license’s expiration date. Because the College failed to file its application before or on the deadline, its assertion that the proposed forfeiture should not be based on the “failure to file a required form” is without merit.<sup>12</sup>

8. Finally, the College argues that the forfeiture would lead to “a grossly unfair result,”<sup>13</sup> namely, that students who were not enrolled in the College at the time of the violations would ultimately be responsible for paying the fine by way of student association fees. Further, paying the fine would force the College to delay certain planned projects. The College has not shown that these facts (1) relate to events which have occurred or circumstances which have changed since the last opportunity to present them, or (2) were unknown to it until after its last opportunity to present such matters and which could not - through the exercise of ordinary diligence - have been learned prior to such opportunity.<sup>14</sup> We therefore reject this argument pursuant to Section 1.106(c) of the Rules.<sup>15</sup>

#### IV. CONCLUSION

10. Accordingly, for the reasons discussed above, IT IS ORDERED, that the Petition for Reconsideration filed by the Board of Trustees, Davis & Elkins College, on May 29, 2009, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>11</sup> 47 C.F.R. § 73.3539(a).

<sup>12</sup> See *Frank J. Neely*, Forfeiture Order, 24 FCC Rcd 7740, 7742 (MB 2009) (rejecting the assertion that a late-filed form is significantly different from failure to file a required form, and should therefore have a smaller correlating forfeiture amount); *Manuel Huerta*, Forfeiture Order, 23 FCC Rcd 14647, 14648 (MB 2008) (same).

<sup>13</sup> Petition at 6.

<sup>14</sup> See 47 C.F.R. § 1.106(c).

<sup>15</sup> Even if we were to address this argument, the college has failed to show that a waiver of Section 1.80 of our rules is warranted in the public interest. The College argues that payment of the forfeiture would deplete student activity fees and would unfairly burden current students because the loss of those activity fees would cause planned projects to be delayed. This is not a special circumstance justifying waiver of Section 1.80 because the College’s decision to use student activity fees is within its discretion and is not mandated by our decision. The College did not present evidence of inability to pay as set forth in the NAL. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (stating that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972).