



Federal Communications Commission
Washington, D.C. 20554

October 18, 2007

DA 07-4326

In Reply Refer to:

1800B3-MFW

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John F. Garziglia, Esq.
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1401 I Street, N.W., Seventh Floor
Washington, DC 20005

Re: KITX(FM), Hugo, OK
K95.5, Inc.
Facility ID # 26159
File No. BRH-20050201AXU
BRH-20060714ABM

Dear Mr. Garziglia:

The staff has under consideration the referenced applications of K95.5, Inc. (the "Licensee") for renewal of license for Station KITX(FM), Hugo, Oklahoma. For the reasons set forth below, we deem filed the renewal application tendered on February 1, 2005 (the "Renewal Application"), dismiss as moot the renewal application filed on July 14, 2006, and assess the Licensee a 25 percent penalty for submitting the Renewal Application with an insufficient fee. We grant, contingent on the timely payment of the requisite application fee and penalty, the Renewal Application.

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."¹ An application for renewal of KITX(FM)'s license should have been filed by February 1, 2005. No such application was successfully filed, and the Station's license expired on June 1, 2005. Accordingly, on July 7, 2006, 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.² Upon receipt of the letter, on July 13, 2006, the Licensee filed a request for special temporary authorization ("STA") to continue operations pending consideration of the untimely KITX(FM) renewal application.³ On July 14, 2006, the Licensee filed a second license renewal application for KITX(FM). The staff granted the STA Request on July 19, 2006.⁴ A request for extension of the STA, filed on January 16, 2007, remains pending.⁵

¹ 47 C.F.R. § 73.3539(a).

² *Letter to K95.5, Inc.* Ref. 1800B3-JDB (Chief, Audio Division, Media Bureau, July 7, 2006).

³ *See* File No. BLSTA-20060713ACA (the "STA Request").

⁴ *Letter to Mr. William Payne*, Ref. 1800B3 (Chief, Audio Division, Media Bureau, July 19, 2006).

⁵ *See* File No. BELSTA-20070116AAH.

In the STA Request, the Licensee explains that it attempted to timely file the license renewal application for KITX(FM), but did not correctly associate the proper filing fee with the application. Therefore, the application was therefore 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.⁷

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 KITX(FM) on February 1, 2005, but failed to pay the proper filing fee amount. Section 1.1116(b) of the Rules⁸ 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,⁹ 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.¹⁰ 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

⁶ CDBS assigned this submission the number "20050201AXU." The filing fee for license renewal applications for commercial FM stations when the Renewal Application was filed was \$150.00. *See* 47 C.F.R. § 1.1104 (2005).

⁷ The November 2005 license renewal application contains a request for waiver of 47 C.F.R. § 73.3539 to permit the processing of the application. In light of our actions below, we need not rule on the waiver request.

⁸ 47 C.F.R. § 1.1116(b).

⁹ *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).

¹⁰ 47 U.S.C. § 309(k).

application.¹¹ Apart from the filing irregularities discussed above, we have no record of operational violations by Licensee. Further, we find that Station KITX(FM) 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 January 28, 2005, application. Accordingly, pursuant to Section 1.1116(b) of the Rules, the Licensee will be assessed a penalty charge equal to 25 percent of the filing fee. Therefore, the Licensee 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, the license renewal application of K95.5, Inc. for Station KITX(FM), Hugo, Oklahoma, filed on February 1, 2005 (File No. BRH-20050201AXU) IS DEEMED FILED. IT IS FURTHER ORDERED that the license renewal application filed on July 14, 2006 (File No. BRH-20060714ABM) IS DISMISSED AS MOOT. IT IS FURTHER ORDERED that the February 1, 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.¹²

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: K95.5, Inc.
Associate Managing Director – Financial Operations

¹¹ 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).

¹² *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.”)