

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

In the Matter of)	
)	
Daytona Beach Broadcasting Association)	
)	
Application for a Construction Permit for)	File No. BNPL-20131115ACE
Station DWDRD-LP, Daytona Beach, Florida)	Facility ID No. 197582

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 2018

Released: March 13, 2018

By the Commission:

1. We have before us the Application for Review (AFR) filed by Daytona Beach Broadcasting Association (DBBA), seeking Commission review of a Media Bureau (Bureau) decision¹ that denied reinstatement of DBBA's expired construction permit (Permit) for a station DWDRD-LP, Daytona Beach, Florida (Station). That denial was based on DBBA's failure to file a covering license application certifying that the Station was constructed in accordance with the underlying Permit, as required by Commission rules (Rules). We dismiss the AFR insofar as it raises new arguments that were not previously presented to the Bureau and otherwise deny the AFR.

2. As discussed in the *Staff Decision*, DBBA filed the captioned application for the Permit in 2013,² and was awarded the Permit on March 6, 2014. The Permit had an initial expiration date of September 6, 2015, which was subsequently extended to March 6, 2017, the maximum period of time to complete construction.³ DBBA did not and has never filed a covering license application certifying that the Station was constructed as authorized in the underlying construction permit.⁴ Instead, DBBA filed a Program Test Notice (Notice) with the Bureau on March 6, 2017, indicating that the Station was commencing program tests pursuant to Section 73.1620(a)(5) of the Rules⁵ and that DBBA would apply for a license to cover within 10 days of the Notice.⁶ On March 7, 2017, the Bureau staff cancelled the

¹ *Daytona Beach Broadcasting Association*, Letter Order, Ref. 1800B3-ATS (MB Oct. 26, 2017) (*Staff Decision*).

² File No. BNPL-20131115ACE (Application) (filed on November 15, 2013, and amended on March 5, 2014).

³ 47 CFR § 73.3598(a) (providing that LPFM construction permits shall expire after 18 months, but may be extended for one additional 18-month period).

⁴ See FCC Form 319, Section III, Question 2; <https://transition.fcc.gov/Forms/Form319/319Fill.pdf>.

⁵ 47 CFR § 73.1620(a)(5) ("Except for permits subject to successive license terms, the permittee of an LPFM station may begin program tests upon notification to the FCC in Washington, DC, *provided that within 10 days thereafter, an application for license is filed*. Program tests may be conducted by a licensee subject to mandatory license terms only during the term specified on such licensee's authorization.") (emphasis added).

⁶ The Notice is dated March 2, 2017, but was not received by the Commission until March 6, 2017, as noted by the FCC Mailroom stamp. DBBA did not file a covering license application as it represented it would do in its Notice. See also note 5 *supra* (quoting the Rule cited by DBBA in its Notice).

Permit in the Commission's broadcasting database, CDBS, pursuant to Section 73.3598(e) of the Rules,⁷ and deleted the Station's call sign.

3. On April 3, 2017, DBBA filed a Petition for Reconsideration (First Petition) seeking reinstatement of the Permit based on the filing of the Notice and argued—without support or explanation—that the cancellation of the Permit and deletion of the Station's call sign prevented it from conducting testing and filing a covering license application.⁸ Accordingly, DBBA requested 10 days in which to file a covering license application.⁹

4. On April 11, 2017, the Bureau granted the First Petition by Public Notice, reinstated the Permit, and advised DBBA that a covering license application must be filed within 10 days, *i.e.* by April 21, 2017.¹⁰ In addition to the Public Notice, the staff notified DBBA by email at the address provided in the Application¹¹ that the Bureau was reinstating the Permit and allowing DBBA 10 days in which to file a covering license application.¹²

5. DBBA did not file a covering license application by April 21, 2017, nor has it ever filed a covering license application certifying that the station was constructed as authorized in the underlying construction permit. On April 26, 2017, the Bureau staff again cancelled the Permit in CDBS and deleted the Station's call sign. DBBA filed a second Petition for Reconsideration (Second Petition) in which it argued that the Bureau erred by not providing “written notice that it had until April 21, 2017, to file an application for a license to cover,” and that this failure to provide DBBA with written notice by mail violated Sections 1.47(a) and 0.445(a) of the Rules.¹³

6. In the *Staff Decision*, the Bureau held that it had erred in reinstating the Permit because DBBA had failed to file a covering license application within 30 days of the expiration of the Permit.¹⁴ The Bureau also held that the filing of the Notice pursuant to Section 73.1620(a)(5) did not extend the Permit, and rejected DBBA's argument that this action afforded it ten extra days in which to file a covering license application.¹⁵ Finally, the Bureau found that DBBA had received adequate notice of the

⁷ 47 CFR § 73.3598(e) (“Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”).

⁸ First Petition at 2.

⁹ *Id.*

¹⁰ *Broadcast Applications*, Report No. 28964 (MB Apr. 14, 2017) (Reinstatement PN) (“Petition for Reconsideration filed 04/03/2017 by DAYTONA BEACH BROADCASTING ASSOCIATION granted 4/11/2017 and permit reinstated. Applicant must file covering license on or by 4/21/2017 or permit will be deemed expired pursuant to 47 CFR 73.3598; WKLC, Inc., Memorandum Opinion and Order, 28 FCC Rcd 2061, 2064, para. 9 (MB 2013).”).

¹¹ Both in its Application as originally filed and in its amended Application, DBBA provided that email address in response to every question in the Application that asked for an email address. See Application at Section I, Questions 1 and 2, Section III, Question 3, and Section VI, Preparer's Certification (providing e-mail address APPLAUDING7@YAHOO.COM); <https://transition.fcc.gov/Forms/Form318/318.pdf>.

¹² Email from Alexander T. Sanjenis, Esq., Audio Division, Media Bureau, FCC, to Sylvia Johnson (APPLAUDING7@YAHOO.COM) (Apr. 11, 2017, 14:34 EDT) (Johnson Email).

¹³ Second Petition at 1-3 (citing 47 CFR §§ 1.47(a), 0.445(a); *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1602-03, para. 22 (2011)).

¹⁴ *Staff Decision* at 2-3 (citing *WKLC, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 2061, 2064, para. 9 (MB 2013) (*WKLC*)).

¹⁵ *Staff Decision* at 3 (citing *Urban One Broadcasting Network, LLC*, Memorandum Opinion and Order, 31 FCC 4186, 4188-89, para. 6 (2016) (“[n]either special temporary authority nor program test authority typically associated (continued....)”).

reinstatement of the Permit based on: 1) the Bureau notifying DBBA via the Johnson Email; and 2) the issuance of the Reinstatement PN.¹⁶ Thus, the Bureau denied the Second Petition.

7. In the AFR, DBBA argues, for the first time, that it was legally barred from filing a covering license application after the Bureau deleted the Station's call sign¹⁷ and that Section 73.1620(c) of the Rules provides that no further extension of the construction permit is required following the filing for program test authority.¹⁸ Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Rules bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass."¹⁹ We thus dismiss the AFR to the extent it relies on arguments which were not previously presented to the Bureau.²⁰

8. The remainder of the AFR repeats two arguments that the Bureau rejected in the *Staff Decision*: first, that Section 73.1620(a) of the Rules precluded the Bureau from cancelling the Permit for 10 days after the filing of the Notice;²¹ and second, that Section 0.445 of the Rules requires that the Bureau provide it written notification by mail that the Permit had been reinstated on April 11.²²

9. Initially, we affirm the Bureau's determination that the Permit automatically expired on March 6, 2017, because DBBA had not filed a covering license application by that date. We note further that DBBA did not file a covering license application by the Bureau's reinstated deadline of April 21, 2017,²³ nor has it ever filed a covering license application as required by the Rules. Accordingly, the Permit is expired.

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with a 'license to cover' application would modify the terms of [a construction permit] or extend its expiration date.")).

¹⁶ *Staff Decision* at 3-4.

¹⁷ AFR at 3, 4 (citing *Implementation of Section 403(l) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 16599, 16601, para. 6 (1996) (*Implementation Order*)).

¹⁸ AFR at 3-5 (citing 47 CFR § 73.1620(c)).

¹⁹ See 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission's order dismissing arguments under Section 1.115(c) because that Rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

²⁰ As a separate and independent basis for our decision, we find that if we were to consider these arguments, we would also reject them on the merits. DBBA's reliance on the *Implementation Order* is misplaced, because this order applies only to stations that have already been licensed and whose license automatically expired after failing to broadcast for 12 months pursuant to Section 312(g) of the Act. Here, DBBA never held a license, and thus Section 312(g) is inapplicable. Moreover, the deletion of a call sign pursuant to the expiration of a permit or license does not preclude the filing of an application in CDBS, and the Bureau, under certain circumstances, has in fact accepted applications filed by permittees and licensees after the expiration of their authorization and deletion of the station's call sign. See, e.g., *Lancaster Broadcasters, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 7147 (MB 2015) (renewal application for Station DWKYY(AM), Lancaster, Kentucky, filed following expiration of station's license and deletion of its call sign). Thus, DBBA's assertion that it was unable to file a covering license application in CDBS is simply incorrect. DBBA's argument that Section 73.1620(c) effectively extended the Permit is also incorrect. This Rule allows a permittee to continue testing under program test authority following the expiration of a construction permit "during FCC consideration of the application for license." 47 CFR § 73.1620(a)(5) (emphasis added). However, a licensee must still file a timely covering license application, which DBBA failed to do. See *CCBL Broadcasting Licenses, Inc.*, Letter Order, 23 FCC Rcd 4526 (MB 2008). Moreover, DBBA failed to show that it completed station construction before the Permit's expiration date.

²¹ AFR at 3-5.

²² *Id.* at 5-6.

²³ Because DBBA failed to file a covering license application by April 21, 2017, we need not—and thus do not—decide the question whether the Bureau erred in reinstating the Permit and affording DBBA the opportunity to file

(continued....)

10. The explanations DBBA presents in the AFR for failing to file by either of these two deadlines—which it presented previously to the Bureau—are unavailing, and we affirm the *Staff Decision*'s rejection of the arguments. First, we reject DBBA's argument that Section 73.1620 prevented the Bureau from cancelling the Permit. Section 73.1620(a) permits program tests to be conducted only upon completion of construction of the station in accordance with the terms of the construction permit, the technical provisions of the application, the Rules, and the applicable engineering standards.²⁴ Here, DBBA has not demonstrated that it completed construction of the Station in accordance with the terms of the construction permit or that it has satisfied any of the other requirements set forth in 73.1620(a), nor has DBBA certified that the Station was constructed as authorized in the underlying construction permit.²⁵ The Bureau correctly held that "nothing in . . . Section 73.1620(a)(5) provides that the filing of a program test authority notice extends the expiration date of a construction permit or is equivalent to filing a covering license application. Section 73.1620(a)(5) merely permits an LPFM permittee to conduct program testing for 10 days without a covering license, and does not extend the automatic expiration provisions of Section 73.3598(e)."²⁶ As noted above, DBBA never filed a covering license application as required by the Rules.

11. Second, DBBA's written notification argument provides no basis for granting the AFR. The Bureau correctly held that DBBA was given ample notice of the reinstatement of the Permit by the Johnson Email and by Public Notice.²⁷ Despite DBBA's continued assertion,²⁸ Section 0.445 provides that "opinions and orders" may be "delivered by electronic means," such as the Johnson Email.²⁹ Indeed, while DBBA complains about the mode of service used by the Bureau, it never claims that it did not receive the Bureau's email reinstating the Permit and establishing a new deadline of April 21, 2017. We thus reject DBBA's notice argument and deny the AFR.

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by the extended deadline of April 21, 2017. We reject DBBA's suggestion that the Bureau's action was somehow invalid "because such action had occurred more [than] 30 days after the Bureau had cancelled DBBA's permit on March 7, 2017." AFR at 4. As DBBA acknowledges elsewhere in its AFR, the Bureau's action was simply a prompt grant of DBBA's First Petition. AFR at 2. DBBA's further argument that the Bureau failed to give DBBA proper notice of that action is addressed below.

²⁴ 47 CFR § 73.1620(a).

²⁵ See FCC Form 319, Section III, Question 2; <https://transition.fcc.gov/Forms/Form319/319Fill.pdf>.

²⁶ *Staff Decision at 3*; note 14 *supra*.

²⁷ *Staff Decision at 3-4*.

²⁸ AFR at 6 (citing pre-2011 version of Section 0.445(a), which did not provide for electronic delivery of orders to parties, instead of current rule, which does so provide). See also *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594 (2011) (revising Section 0.445(a)).

²⁹ 47 CFR § 0.445. DBBA does not address or acknowledge the Johnson Email in the AFR. See *supra*, note 11. DBBA has identified the email address APPLAUDING7@YAHOO.COM in its contact information in five separate submissions to the Commission: its original Application; its March 5, 2014 amendment to the Application; the First Petition; the Second Petition; and the subject AFR. *Id.*; see https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101754348&formid=917&fac_num=197582, https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101756567&formid=917&fac_num=197582, and https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101772684&formid=917&fac_num=197582 (providing the same email address in Section I, Questions 1 and 2 of the cover page for the First Petition, Second Petition, and AFR). Accordingly, delivery by electronic means to the same email address that DBBA has regularly identified to the Commission as the e-mail at which it could be contacted in this proceeding provided DBBA with reasonable notice. Delivery by electronic means was particularly appropriate here, given that the applicant requested 10 days to file a covering license application.

12. Accordingly, IT IS ORDERED that the Application for Review filed on November 27, 2017, by Daytona Beach Broadcasting Association, Inc.: (1) IS DISMISSED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the FCC's Rules, to the extent that it relies on questions of fact or law not previously presented to the Media Bureau; and (2) otherwise IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the FCC's Rules.³⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c), (g).