



Federal Communications Commission
Washington, D.C. 20554

June 9, 2021

In Reply Refer to:
1800B3-AR

Clinton Educational Association
c/o Dennis J. Kelly
P.O. Box 41177
Washington, DC 20018
(via email to dkellyfcclaw1@comcast.net)

In re: Clinton Education Association
KXJX-LP, Clinton, Iowa
Facility ID No. 133435
NAL/Acct. No. MB-202141410020
FRN: 0007439110
File No. 0000130177

Dear Licensee:

We have before us a petition for reconsideration (Petition)¹ filed by Clinton Educational Association, (CEA), licensee of low power FM (LPFM) station KXJX-LP, Clinton, Iowa (Station), requesting cancellation of a Notice of Apparent Liability for Forfeiture (NAL)² in the amount of one thousand five hundred dollars (\$1,500) for its violation of section 73.3539 of the Commission's rules (Rules).³ The violation addressed in the NAL involves CEA's failure to file a timely license renewal application for the Station. By this action, we deny CEA's request for cancellation of the NAL.

Background. As noted in the NAL, CEA's license renewal application for the Station was due on October 1, 2020, four months prior to the February 1, 2021 license expiration date. CEA did not file a

¹ Petition for Reconsideration of Clinton Educational Association, Pleading No. 0000143028 (filed Apr. 5, 2021). Licensee submitted a written response styled as a response to the NAL, or in the alternative, a petition for declaratory ruling, or petition for reconsideration. Because this proceeding does not require removal of uncertainty or termination of controversy, a declaratory ruling is unwarranted. *See, e.g., Petitions to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters*, Order, 66 FCC 2d 1021, 1024 n. 13 (1977) (denying request for declaratory ruling "in stark contravention of a clear, comprehensive rule."). Further, petitions for reconsideration do not lie against interlocutory actions, such as the NAL. *See* 47 CFR § 1.106(a)(1). *See also South Seas Broad., Inc.*, Forfeiture Order, 27 FCC Rcd 4151, 4152 n.7 (MB 2012) ("Because the NAL merely proposed rather than imposed a forfeiture, the Media Bureau's (Bureau) action was interlocutory in nature."), *recon. denied*, Memorandum Opinion and Order, 27 FCC Rcd 15049 (MB 2012). Accordingly, we will treat the pleading as a "written statement seeking reduction or cancellation of the proposed forfeiture" specifically authorized in the NAL. *See* NAL at para. 10. Additionally, the Commission's records indicate that CEA paid the \$1,500 proposed forfeiture on March 23, 2021. Thus, we will also treat the Petition as a request for a refund of the paid NAL.

² *Clinton Educational Association*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 21-263 (MB Mar. 5, 2020).

³ 47 CFR § 73.3539.

license renewal application until December 28, 2020,⁴ and provided no explanation for the untimely filing. On March 5, 2021, the Audio Division, Media Bureau (Bureau) issued the *NAL* in the amount of \$1,500 to CEA. CEA submitted a payment of \$1,500 on March 23, 2021, and the Bureau granted the Application on March 26, 2021. CEA subsequently filed its Petition requesting cancellation of the forfeiture on April 5, 2021.

In the Petition, Licensee acknowledges that the renewal application is granted and does not dispute that it violated section 73.3539 of the Rules, but maintains that the proposed forfeiture should be cancelled.⁵ Specifically, Licensee argues that section 504(c) of the Communications Act of 1934, as amended (Act), bars the Commission from making the payment of a civil forfeiture a condition precedent to the grant of an application.⁶

Licensee also contends that the Rules and *Forfeiture Policy Statement* do not include a forfeiture provision for late-filed renewal applications and moreover, that it was not put on notice of the potential forfeiture,⁷ in violation of the Administrative Procedure Act.⁸ Finally, the Licensee argues that the Commission has treated similarly situated parties differently⁹ because it granted late-filed renewal applications for other low power stations in Iowa and Missouri without imposition of a monetary forfeiture¹⁰ and declined to impose a forfeiture for late-filed ownership reports in a renewal application.¹¹

Discussion. The forfeiture amount proposed in this case was assessed in accordance with section 503(b) of the Act,¹² section 1.80 of the Rules,¹³ and the Commission's Forfeiture Policy Statement.¹⁴ In assessing forfeitures, section 503(b)(2)(E) of the Act requires that we take into account the nature,

⁴ Application No. 0000100307 (filed Dec. 28, 2020).

⁵ Since CEA paid the \$1,500 proposed forfeiture on March 23, 2021, we are treating the Petition as a request for a refund, not cancellation, of the paid *NAL* forfeiture, *supra* note 1.

⁶ Petition at 2 (citing *AM Broadcast Station KTNC and C.R. Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 19114, para. 2, n.5 (2000) (*KTNC*) (citing *Associated Broadcasters, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3324 (1997); *Pikes Peak Broadcasting Company*, Memorandum Opinion and Order, 14 FCC Rcd 19011 (1999), *Tri-Valley Broadcasters*, Memorandum Opinion and Order, 14 FCC Rcd 19307 (1999)).

⁷ Petition at 3-4 (citing *Forfeiture Policy Statement*, 12 FCC Rcd at 17113-15; 47 CFR § 1.80(b)).

⁸ Petition at 3-6 (citing 5 U.S.C. 553(c)-(d); *First American Bank of Virginia v. Dole*, 763 F.2d 644, n.6 (4th Cir. 1984)).

⁹ Petition at 4 (citing *City of Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Melody Music, Inc. v. FCC*, 345 F.2d 720 (D.C. Cir. 1965)).

¹⁰ Petition at 3-4 and Exh. B.

¹¹ Petition at 6 (citing *Colorado West Broadcasting, Inc.*, Letter, 14 FCC Rcd 18354 (MMB 1999) (*Colorado West*)).

¹² 47 U.S.C. § 503(b).

¹³ 47 CFR § 1.80.

¹⁴ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recon. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

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.¹⁵

We affirm our finding that the Licensee willfully violated section 73.3539 of the Rules, and we reject Licensee's arguments to cancel or reduce the forfeiture. Licensee misinterprets section 504(c) of the Act, which forbids the Commission from using a Notice of Apparent Liability to the prejudice of the party against whom it was issued "in any *other* proceeding before the Commission[.]"¹⁶ An *NAL* issued as part of an ongoing renewal proceeding is not a separate proceeding. Moreover, section 504(c) is not applicable to this case because the Bureau did not rely on the *NAL* to CEA's detriment in any other proceeding, and the renewal application has been granted. Further, since Licensee paid the forfeiture, Licensee's reliance on *KTNC* and the cases cited in that decision is misplaced because they support a denial of Licensee's request for refund of its voluntarily paid forfeiture.¹⁷

We also reject Licensee's argument that there are no provisions for, or notice of, forfeitures for late-filed renewal applications. Section 503(b)(1)(B) of the Act authorizes the Commission to impose a forfeiture against any entity that "willfully or repeatedly fail[s] to comply with any of the provisions of [the Act] or of any rule . . ."¹⁸ In cases in which the Commission has not established a base forfeiture amount for an apparent violation, it has looked to the base forfeitures established or issued in analogous cases for guidance,¹⁹ and the Commission retains the discretion to issue forfeitures on a case-by-case basis pursuant to section 503,²⁰ irrespective of whether it has established a corresponding base forfeiture amount.²¹ Moreover, the *Forfeiture Policy Statement* clarified that "any omission of a specific rule violation . . . should not signal that the Commission considers any unlisted violation as nonexistent or unimportant. The Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules."²² Because the Act and the *Forfeiture Policy Statement* plainly allow the issuance of the forfeiture proposed in the *NAL*, the Commission was not required to engage in a notice and comment rulemaking proceeding as Licensee argues. Moreover, the Commission has long-held that the failure to file a timely renewal application is grounds for the issuance for a monetary forfeiture.²³ As a further reminder to licensees, the Bureau released a Public Notice on March 15, 2019, clearly warning all radio broadcast licensees of their obligations during the upcoming renewal cycle, including where to

¹⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁶ See 47 U.S.C. § 504(c) (emphasis added).

¹⁷ *KTNC*, 15 FCC Rcd at 19115, para. 3 (citing *Assoc. Broad.*, Memorandum Opinion and Order, 12 FCC Rcd 3324 (1997) ("money that is paid voluntarily under a misapprehension of the legal rights and obligations of the person paying, but in the absence of fraud, duress, or mistake of fact, is not recoverable.") (citing *Putnam Tool Company v. United States*, 147 F.Supp. 746, 748 (1957), cert. denied, 355 U.S. 825 (1957))).

¹⁸ 47 U.S.C. § 503(b)(1)(B); 47 CFR § 1.80(a)(2). See also *NAL* at 2, paras. 4-6.

¹⁹ See, e.g., *Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3304, para. 19 (2000).

²⁰ *Forfeiture Policy Statement*, 12 FCC Rcd at 17098-99, para. 22.

²¹ See, e.g., *Cumulus Radio LLC et al.*, Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 7289, 7294-95, para. 14 (2019) (noting that the *Forfeiture Policy Statement* and section 1.80 of the Rules do not specify a base forfeiture for failing to comply with a Commission order, and proposing a \$25,000 penalty for failure to comply with terms of a consent decree).

²² *Forfeiture Policy Statement*, 12 FCC Rcd at 17099, para. 22.

²³ *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7438, para. 15 (2004) (*Discussion Radio*).

find application filing deadlines and notification that failure to timely file a renewal application can result in forfeitures.²⁴ Additionally, the Bureau e-mailed Licensee on September 2, 2020, reminding it that its renewal application was due by October 1, 2020.²⁵ On October 2, 2020, the Bureau sent Licensee a second e-mail confirming that Licensee failed to timely file its renewal application, and notifying Licensee that no adverse action would be taken if the renewal application was filed by November 1, 2020.²⁶

Licensee references applications of other stations that were late-filed and subsequently granted, and an application where the Bureau declined to impose a forfeiture for late-filed ownership reports in a renewal application. These examples are inapposite. Since 2011, it has been the Bureau's processing policy to afford licensees a 30-day grace period in which to file renewal applications following the filing deadline, without imposing a monetary forfeiture.²⁷ The Iowa and Missouri stations listed in Exhibit B of the Petition were all filed within 30 days of the filing deadline.²⁸ Licensee did not file its renewal application until December 28, 2020, roughly three months past the October 1, 2020 filing deadline and outside the 30-day grace period. Licensee's reliance on *Colorado West* is also misplaced because that decision involves a late-filed ownership report, not a renewal application, and predates *Discussion Radio*, where the Commission established the Bureau's authority to impose monetary forfeitures for untimely filing of license renewal applications.

We have examined CEA's Petition pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. We conclude that CEA willfully violated section 73.3539 of the Rules and that no mitigating circumstances warrant cancellation or reduction of the proposed forfeiture amount. Accordingly, CEA's payment of \$1,500 will not be refunded.

Conclusion. For the reasons stated above, Clinton Educational Association's request for cancellation of the Notice of Apparent Liability (NAL/Acct. No. MB-202141410020) for violation of section 73.3539 of the Commission's Rules and request for a refund **IS DENIED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

²⁴ See *Media Bureau Reminds Broadcast Licensees Of Upcoming Radio Station License Renewal Cycle*, Public Notice, 34 FCC Rcd 1344 (MB 2019) ("The base forfeiture amount for a late-filed AM or FM station (including NCE station) license renewal application is \$3,000.").

²⁵ E-mail from Bureau via RadioRen@fcc.gov, to CEA (Sept. 2, 2020) (on file with author).

²⁶ E-mail from Bureau via RadioRen@fcc.gov, to CEA (Oct. 2, 2020) (on file with author).

²⁷ See *Atlantic City Board of Education*, Memorandum Opinion and Order, 31 FCC Rcd 9380, 9384, n.30 (2016).

²⁸ Petition, Exh. B.