



Federal Communications Commission
Washington, D.C. 20554

March 9, 2021

DA 21-288
In Reply Refer to:
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In re: Delmarva Educational Association
W224DK, Durham, NC
Facility ID No. 146901
File No. 0000078596

**Application for Renewal of License
Informal Objection**

Dear Applicant, Counsel and Objector:

We have before us the referenced application for renewal of license (Application) filed by Delmarva Educational Association (Delmarva) for FM translator station W224DK, Durham, North Carolina (Translator). Also before us is an Informal Objection (Objection) to the Application filed by Triangle Access Broadcasting, Inc. (Triangle).¹ For the reasons set forth below, we dismiss in part and otherwise deny the Objection, and assess Delmarva a 25 percent penalty for failing to pay the Application's filing fee.

Background. The Translator is licensed to rebroadcast WPFT(AM), Raleigh, North Carolina, which is licensed to First State Communications (First State). Delmarva timely filed the Application on July 25, 2019.

In the Objection, Triangle alleges that Delmarva has avoided paying required application and regulatory fees by improperly claiming noncommercial educational (NCE) and nonprofit exemptions.² Specifically, Triangle argues that Delmarva is not entitled to claim the NCE exemption for application and regulatory fees because WPTF(AM) is a commercial station, and thus, the Translator "is itself"

¹ Triangle filed the Objection on September 26, 2019 (Pleading No. 000008222). Delmarva filed an Opposition to Triangle's Objection on October 21, 2019 (Opposition) (Pleading No. 0000086943). Triangle filed a Reply to the Opposition on October 25, 2019 (Reply) (Pleading No. 0000087338).

² See Objection at 1-2.

commercial.³ Triangle also argues that Delmarva does not qualify for the nonprofit regulatory fee exemption.⁴ Triangle recognizes that Delmarva is a nonprofit entity, but argues that it is “disqualifi[ed]” from the nonprofit regulatory fee exemption because First State supplies commercial programming to the Translator which, it argues, gives First State an attributable ownership interest in Delmarva.⁵ The Objection alleges that Delmarva has failed to pay its required application fees for the Translator “since it was initially conceived in 2003,” and states that it was unable to locate records evidencing that Delmarva has ever paid any regulatory fees.⁶ Accordingly, Triangle urges us to dismiss the Application for failure to pay required fees and cancel the Translator’s license unless the delinquency is resolved.

In its Opposition, Delmarva counters that its failure to pay the Application’s filing fee was inadvertent. Delmarva states that it has remitted payment and that Triangle’s argument related to its deficient application fee is now moot. Delmarva also counters that, pursuant to section 1.1162(c) of the Commission’s rules (Rules), it is exempt from paying regulatory fees because it is a qualified nonprofit, tax-exempt entity under section 501 of the Internal Revenue Code.⁷ Delmarva argues that the Commission’s nonprofit exemption applies to nonprofit licensees “regardless of whether their stations operate” commercially.⁸ Delmarva urges the Commission to deny the Objection and grant the Application.

In its Reply, Triangle acknowledges that Delmarva has remitted payment for the Application’s filing fee, but Triangle continues to question Delmarva’s failure pay the Translator’s “application fee at licensing.”⁹ Further, Triangle maintains that Delmarva is not qualified for the nonprofit regulatory fee exemption. Triangle argues that the nonprofit regulatory fee exemption is not intended to “exempt all nonprofits . . . irrespective of programming.”¹⁰ Triangle maintains that Delmarva’s operation of a commercial translator deviates from the “scope of its charitable purpose.”¹¹ Triangle also alleges that Eastern Airwaves, LLC (Eastern), a commercial entity that Triangle alleges co-owns First State, has exercised control over the Translator, and has an attributable ownership interest in the Translator by virtue of an application for consent to assign the original construction permit for the Translator to Eastern,¹² and a subsequent application to modify the permit to rebroadcast WPTF(AM),¹³ that makes it “improper for Delmarva to avoid regulatory fees based solely on Delmarva’s nonprofit status.”¹⁴

³ Objection at 1-2 (citing 47 CFR §§ 1.1104, 1.1153, 1.1116(b), (c), 1.1162(e)).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Opposition at 1 (citing 26 U.S.C § 501(c)(3)).

⁸ *Id.*

⁹ Reply at 1. *See also* File No. BLFT-20170104AAX.

¹⁰ Reply at 2 (stating that section 1.1162(e) of the Rules clarifies that broadcast operations must be in accordance with section 73.503 of the Rules which requires that stations be used for the advancement of educational programming in order to qualify for the NCE regulatory fee exemption.).

¹¹ *Id.*

¹² File No. BAPFT-20150901ACK (Assignment Application).

¹³ File No. BMPFT-20150901ACL (Permit Modification Application).

¹⁴ Reply at 3.

Discussion. Under section 309(k) of the Communications Act of 1934, as amended (Act), the Commission shall grant the renewal application 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.¹⁵ If, however, the licensee fails to meet that standard, the Commission may deny the application—after notice and opportunity for a hearing under Section 309(e) of the Act—or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”¹⁶

Informal objections to license renewal applications, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with section 309(k) of the Act.¹⁷ Informal objections must also contain adequate and specific factual allegations sufficient to warrant the relief requested.¹⁸ For the reasons set for below, we find that Triangle has not met this burden.

Filing Fees. Under section 8 of the Act, and section 1.1104 of the Rules, the Commission is required to assess and collect application fees to recover the costs of processing applications for media services.¹⁹ Delmarva has acknowledged that it submitted the Application without the requisite filing fees, claims that such omission was inadvertent, and has in fact paid the required filing fee.²⁰ We therefore dismiss the Objection as moot to the extent it opposes grant of the Application on that basis.

Section 1.1118 of the Rules sets forth the procedures for processing applications submitted without required fees.²¹ Specifically, if the defective fee is discovered within 30 days of filing, the application is dismissed and can be re-filed with a new filing date.²² 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, the filer is billed the fee amount due plus a 25 percent penalty.²³

¹⁵ 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*, Order, 11 FCC Rcd 6363 (1996).

¹⁶ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁷ 47 U.S.C. § 309(d)-(e). *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 R.R.2d 862, 864, para. 6 (1986) (*Area Christian*) (stating informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁸ *See Area Christian*, 60 R.R.2d at 864, para. 6; *WFBM, Inc.*, Memorandum Opinion and Order, 47 FCC 2d 1267, 1268, para. 3 (1974).

¹⁹ 47 U.S.C. 158; 47 CFR § 1.1104.

²⁰ Opposition at 1.

²¹ 47 CFR § 1.1118.

²² 47 CFR § 1.1118(a).

²³ 47 CFR § 1.1118(b) (“Applications or filings accompanied by insufficient fees or no fees, ... that are inadvertently forwarded to Commission staff for substantive review will be billed for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing by the Commission. Applications or filings that are accompanied by insufficient fees or no fees will have a penalty charge

Here, the Application was inadvertently forwarded to Commission staff for substantive review without the requisite filing fee. As 30 days have elapsed from the date the Application was submitted with no fee, we could bill Delmarva retroactively and impose the 25 percent penalty.²⁴ Because Delmarva paid its renewal filing fee on October 17, 2019,²⁵ we will only require it to pay the 25 percent penalty for its deficient filing.

Nonprofit Regulatory Fee Exemption. Under section 9 of the Act, and section 1.1153 of the Rules, the Commission is required to assess and collect regulatory fees to recover the costs of certain regulatory activities.²⁶ Section 159(e)(1)(A) of the Act and section 1.1162(c) of the Rules provide a general regulatory fee exemption for nonprofit entities.²⁷ The nonprofit exemption is available only to those licensees who have established their nonprofit status under section 501 of the Internal Revenue Code or to those licensees with certification as a nonprofit entity by state or other governmental authority.²⁸ Thus, this exemption is predicated solely on the entity's status as a qualified nonprofit entity.²⁹ We have confirmed that Delmarva is recognized as a nonprofit organization under section 501 of the Internal Revenue Code, and was recognized as such at the time it filed the Application.³⁰ Because

equaling 25 percent of the amount due added to each bill. Any Commission action taken prior to timely payment of these charges is contingent and subject to rescission.”).

²⁴ See 47 CFR § 1.1118(b); *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 percent penalty).

²⁵ See 47 CFR § 1.1104(4)(c) (requiring FM translators to pay a \$70.00 fee for license renewal applications); Opposition at 2, Exhibit A.

²⁶ 47 U.S.C. § 159(a); 47 CFR §§ 1.1151-1.1167.

²⁷ 47 U.S.C. § 159; 47 CFR § 1.1162(c).

²⁸ 47 CFR § 1.1162(c) (No regulatory fee shall be required for “[a]pplicants and permittees who qualify as nonprofit entities. For purposes of this exemption, a nonprofit entity is defined as: “an organization duly qualified as a nonprofit, tax exempt entity under section 501 of the Internal Revenue Code, 26 U.S.C. 501; or an entity with current certification as a nonprofit corporation or other nonprofit entity by state or other governmental authority.”).

²⁹ 47 CFR § 1.1162(c)(1) (“Any permittee, licensee or other entity subject to a regulatory fee and claiming an exemption from a regulatory fee *based upon its status as a nonprofit entity*, as described above, shall file with the Secretary of the Commission (Attn: Managing Director) written documentation establishing the basis for its exemption”) (emphasis added); *Documentation of Nonprofit Exemption from Regulatory Fees*, Public Notice, 13 FCC Rcd 744 (1998) (providing that “Nonprofit entities are exempt from paying FCC annual regulatory fees if they claim nonprofit status under Section 501(c)(3) of the Internal Revenue Code (IRS), 26 U.S.C. §501 or are certified, or otherwise authorized, as a nonprofit entity by a state or other governmental authority.”). See, e.g., *Assessment & Collection of Regulatory Fees for Fiscal Year 2005*, Report and Order, 20 FCC Rcd 12259, 12266 (2005) (“A University owns a commercial facility whose profits are used to support the University and/or its programs. If the facility is licensed to the University directly, or to an exempt subsidiary of the University, it is exempt from regulatory fees. If, however, the license is held by a for-profit subsidiary, regulatory fees are owed, even though the University is an exempt entity. A state pension fund is the majority owner of a for-profit commercial broadcasting firm. The facilities licensed to the for-profit broadcasting firm would be subject to regulatory fees, even though it is owned by an exempt agency.”).

³⁰ See IRS, Charities and Non-Profits, <https://www.irs.gov/charities-non-profits/tax-exempt-organization-search> (last visited July 30, 2020) (displaying tax exempt status for “Delmarva Education Association”). Given this determination, we will not address any challenges to its nonprofit status at this time, as the Commission generally defers to the Internal Revenue Service on such matters.

nonprofit entities are exempt from regulatory fees,³¹ we conclude that Delmarva's reliance on the nonprofit regulatory fee exemption under section 1.1162(c) of the Rules is appropriate.³² We reject Triangle argument that an entity requesting an exemption under section 1.1162(c) must also meet the criteria of section 1.1162(e). Triangle provides no authority for this argument, and as discussed, Delmarva has demonstrated that it meets the requirements of section 1.1162(c), which is all that is required to obtain exemption from regulatory fees.

Finally, Triangle does not explain how, under the criteria of Note 2 to section 73.3555 of the Rules, First State or Eastern would have an attributable interest in the Translator.³³ Additionally, the Assignment Application was never consummated and the Permit Modification Application was dismissed in 2016. We thus reject the argument that First State or Eastern have an attributable interest in the Translator which would require payment of regulatory fees.

Renewal of License. We have reviewed the Application in accordance with section 309(k) of the Act,³⁴ and we find that the Translator served the public interest, convenience, and necessity during the subject license term. We will therefore grant the Application by separate action upon payment of the 25 percent penalty charge so long as there are no other issues that would preclude grant of the Application.

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED**, that the Informal Objection filed by Triangle Access Broadcasting, Inc. on September 26, 2019, **IS DISMISSED IN PART AND OTHERWISE DENIED.**

IT IS FURTHER ORDERED that, pursuant to section 1.1118(b) of the Commission's rules, Delmarva Educational Association will be assessed a penalty charge equal to 25 percent of the filing fee for its application to renew the license of W224DK, Durham, North Carolina (File No. 0000078596). Accordingly, it will be billed a total of \$17.50 under separate cover.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

³¹ 47 CFR § 1.1162(c).

³² 47 CFR § 1.1162(c). Delmarva does not claim (nor is it qualified to claim) the NCE regulatory fee exemption. See 47 CFR § 1.1162(e) (No regulatory fee shall be required for “[a]pplicants, permittees or licensees of noncommercial educational broadcast stations in the FM or TV services, as well as AM applicants, permittees or licensees operating in accordance with § 73.305 of this chapter.”).

³³ See 47 CFR § 73.3555, Note 2.

³⁴ 47 U.S.C. § 309(k)(1).

Keith Coboen
Delmarva Educational

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