

ACCEPTED/FILED

DEC 17 2013

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | File No.: DA 13-2316 |
| |) | Facility I.D. 39561 |
| WDKA Acquisition Corporation |) | NAL/Acct. No. 20134120049 |
| Licensee of Station WDKA(TV) |) | FRN: 5013164 |
| Paducah, Kentucky |) | |

To: Office of the Secretary

APPLICATION FOR REVIEW

WDKA Acquisition Corporation, (“WDKA Acquisition”) licensee of Station WDKA, Paducah Kentucky, by its attorney, respectfully files this Application for Review of the *Forfeiture Order*, DA 13-2316, released December 4, 2013, by the Chief, Video Division (“Video Division”).

The Video Division had previously issued a *Notice of Apparent Liability For Forfeiture* (“NAL”) DA 13-1941, released September 23, 2013. The NAL ordered WDKA Acquisition to pay a forfeiture of \$1,500 for alleged violation of Section 73.3539(a) of the Commission’s Rules for failing to timely file Form 303-S, application for license renewal. WDKA Acquisition timely filed a response to the NAL, seeking cancelation or rescission of the NAL.

Questions for Review

1. Did the Audio Division err when it treated similarly situated parties differently?
2. Did the Audio Division err when it concluded that WDKA Acquisition failure to file a timely renewal application was willful?

Factors that Warrant Commission Consideration

Pursuant to Section 1.115 of the Commission's rules the following factors, as discussed herein, warrant Commission consideration.

1. The action involves a question of law or policy which has not been previously resolved by the Commission.
2. The action involves an application of a precedent or policy which should be overturned or revised.

Background

The *NAL* states that WDKA Acquisition was required to file its Form 303-S to renew the license of WDKA on or before April 1, 2013, but did not file the license renewal application until May 6, 2013. The *NAL* also states that "over the course of its current license term the Licensee has demonstrated a history of compliance with the Rules, including the preparation and maintenance of quarterly issues and programs lists and timely filing of quarterly Children's Television Programming Reports." The *Forfeiture Order* does not take into account WDKA Acquisition's prior compliance with the rules.

Argument

The Video Division erred when it failed to explain its different treatment of similarly situated parties.

The *NAL*, released September 23, 2013, orders WDKA Acquisition to pay a forfeiture of \$1,500. As WDKA Acquisition pointed out in its response, on September 25, 2013, the Video Division released two letter orders admonishing television stations

for submitting late filed renewal applications.¹ In both cases television licensees submitted late filed renewal applications. In both cases, the Video Division admonished the licensees for late filing, but did not issue a forfeiture.

In the *Forfeiture Order* at ¶7, the Video Division distinguished these two cases by stating that “the license renewal applications at issue were filed nine and ten days late. In contrast, the Licensee filed its license renewal application one month and five days after the filing deadline. We find that the Licensee’s untimely filing has a greater detrimental impact on the public interest by delaying both the public’s review of the Licensee’s efforts during the previous license term and the fulfillment of the Commission’s obligations under Section 309(k) of the Act.” WDKA Acquisition believes that a distinction of just a few days is insufficient to support of forfeiture of \$1,500.

The Court of Appeal has long recognized that an agency acts irrationally when it treats similarly situated parties differently. The Commission may not refuse to explain apparent inconsistencies in decisions issued "at virtually the same time." See *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730, 732-33 & n.4 (D.C. Cir. 1965). In *Melody Music* the FCC refused to renew the license of a radio station operator who had secretly given assistance to contestants in answering questions on a number of television quiz shows the licensee had produced. At the same time, however, the Commission, making no mention of the network's role in the deception, had granted several license renewals to NBC, which aired and for a time owned the tainted quiz shows. The radio station operator appealed the FCC's denial of its request for license renewal and the Court concluded that the Commission's "refusal at least to explain its

¹ *PTP Holdings, Inc.*, WTNB-CA, Cleveland, TN, DA 13-1977, released September 25, 2013; *Channel Eleven, Inc.*, WETV-LP, Murfreesboro, TN, DA 13-1976, released September 25, 2013.

different treatment of appellant and NBC was error." *Id.* at 732. Because the Commission did not "explain the relevance of those differences [between NBC and the radio station] to the purposes of the Federal Communications Act," the Court in *Melody Music* remanded the matter for the Commission to explain its decision to treat the two renewal applicants differently, given that both "were connected with the deceptive practices and their renewal applications were considered by the Commission at virtually the same time." *Id.* at 733, 732. In *Melody Music*, the Court concluded the FCC's decision to treat the two licensees differently was arbitrary and capricious because it did not give an adequate explanation for doing so. *See also, Tel. & Data Sys. v. FCC*, 305 U.S. App. D.C. 216, 19 F.3d 655, 657 (D.C. Cir. 1994), (FCC's explanation for not applying prior prevailing standard was "intolerably mute" rather than "tolerably terse" and therefore matter was remanded for more fully articulated rationale) (quoting *Action for Children's Television v. FCC*, 261 U.S. App. D.C. 253, 821 F.2d 741, 746 (D.C. Cir. 1987)). Likewise, in this case the Video Bureau fails to explain why similarly situated licensees were treated differently.

The Video Division erred when it concluded that the conduct was willful

The failure to timely file a renewal application was not willful. The facts set out in the *NAL* and the *Forfeiture Order* do not provide sufficient evidence of a "willful or repeated" violation of the Rule. As the Video Division correctly points out, WDKA Acquisition has a history of complying with the FCC's filing requirements. Section 503(b) of the Communications Act of 1934, as amended, authorizes the Commission to assess forfeitures only against those who have "**willfully or repeatedly** failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the

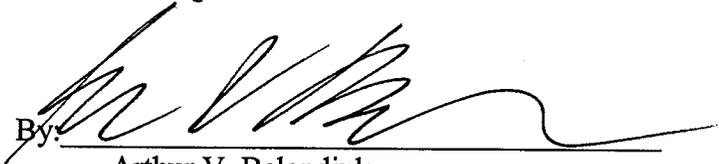
Commission...” WDKA Acquisition’s failure to file a timely renewal application was neither willful nor repeated.

There is no evidence that the failure to file the application was “conscious or deliberate.” In contrast, it was wholly inadvertent. To accept the Video Division’s interpretation of the law would render every apparent violation of the rules a “willful” one—clearly, something Congress was not prepared to do when it adopted Section 503 of the Act. “Willful” means “the conscious and deliberate commission or omission of [a prohibited] act, irrespective of any intent to violate the Act or Commission rules.” (See Section 312(f) of the Communications Act, as amended.) In *Vernon Broadcasting, Inc. (WYGO, Corbin, KY)*, 60 RR 2d 1275, 1277 (1986), the Commission canceled a forfeiture for violation of Section 73.49(a)(8) of the Rules (inadequate fencing around the tower) because “there was no indication that the licensee was aware of the broken fence before the FOB [Field Operations Bureau] inspection or that it had failed to monitor the condition of the antenna site [material in brackets inserted].” When it became apparent that a renewal application had not been filed, the station’s management took immediate action and prepared and filed a renewal application. Thus, WDKA Acquisition promptly rectified the problem and has taken steps to prevent a recurrence.

In light of the foregoing, the *Forfeiture Order* should be canceled or rescinded and this proceeding terminated.

Respectfully submitted,

WDKA ACQUISITION CORPORATION

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