



Federal Communications Commission
Washington, D.C. 20554

June 18, 2013

DA 13-1391
Released: June 18, 2013

Spirit Productions, Inc.
c/o Aaron P. Shainis
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1850 M Street NW
Suite 240
Washington, DC 20036

Re: WALO-LP Channel 53
West Palm Beach, FL
File Nos. BLTTL-20090223ACF;
BDISDTL-20100104AAQ
Facility ID No. 61930

Dear Counsel:

This is with respect to the *Petition for Reconsideration* (“*Petition*”) filed by Spirit Productions, Inc. (“*Spirit*”) seeking reconsideration of the Video Division’s February 20, 2013, letter decision cancelling the analog license and digital construction permit for station WALO-LP, West Palm Beach, FL (the “*Station*”), and deleting the call sign. For the reasons provided below, the *Petition* filed by Spirit Productions, Inc. is denied.

Background. The Station was licensed for low power operation on channel 53. Following the filing of a displacement application on December 17, 2009, the Station was assigned a digital construction permit for in-core channel 44. Commission records show that the Station went silent on channel 53 on September 30, 2011. In accordance with the Commission’s *Second Report and Order*, all low-power television broadcast stations operating on out-of-core channels (channels 52 through 69) were required to cease their out-of-core operations by December 31, 2011.¹ In adopting this deadline, the Commission cautioned out-of-core licensees to be mindful of the automatic cancellation provision in Section 312(g) when constructing their authorized in-core facilities.² Section 312(g) reads, in part:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term or condition of the license to the contrary....

¹ See *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power, Television Translator and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, *Second Report and Order*, 26 FCC Rcd 10732, 10743-10749 (2011) (“*Second Report and Order*”).

² *Id.* at 26 FCC Rcd 10749.

Despite the requirements of the *Second Report and Order*, as evidenced through Spirit's own admission and Commission records, the Station illegally resumed service on its out-of-core channel on September 24, 2012. The Station subsequently went silent on October 17, 2012. The Commission has no record of any legal operation on the Station's in-core channel (channel 44).

Spirit filed a timely *Petition* on March 22, 2013, requesting that the cancellation of its license for WALO-LP license be rescinded and the digital construction permit be reinstated. In its *Petition* Spirit argues that it was "unaware of the necessity to cease broadcasting on channel 53 by December 31, 2011," and that while the Station's operation from September 24 to October 17 was not legal "it nevertheless was broadcasting and was not violative of Section 312(g)." Spirit maintains that under the circumstances and in light of Commission precedent the appropriate sanction for illegal operation is forfeiture, not license cancellation. In addition, Spirit's *Petition* states that its digital construction permit does not expire until September 1, 2015, and that reversing the license cancellation would be in the public interest.

Discussion. We have carefully considered Spirit's *Petition* and conclude that no basis exists for granting reconsideration of our previous decision. Section 312(g) provides that the license of a broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires automatically at the end of that period. In *A-O Broadcasting*, the Commission upheld a staff decision which concluded that crediting an unauthorized transmission as sufficient to prevent cancellation under Section 312(g) would be inconsistent with the purpose of the Act.³ Section 312(g) is meant to encourage the legal transmission of broadcast signals, not unauthorized or illegal operations. As supported by the Commission's holding in *A-O Broadcasting*, if the statute were read as Spirit suggests, Section 312(g) would encourage violation of the Act, specifically Sections 301 and 319, and discourage timely construction and legal operation of authorized facilities.⁴

Spirit also contends that it was "unaware of the necessity to cease broadcasting on Channel 53 by December 31, 2011." Lack of knowledge or ignorance of a Commission Order or action is not an excuse for failing to abide by it. Publication in the Federal Register, as is required under Section 553(d) of Administrative Procedures Act, provides legal notice to all parties potentially impacted and allows them to prepare for implementation of the rules.⁵ The *Second Report and Order* was published in the Federal Register on July 27, 2011, and the rules went into effect on August 26, 2011.⁶ Accordingly, the fact that Spirit did not know they must cease operation on their out-of-core channel by December 31, 2011, holds no merit. The *Second Report and Order* was clear in requiring out-of-core stations to cease operation by December 31, 2011, and prohibiting out-of-core stations from continuing operations even if their in-core digital facilities were not yet constructed.⁷

³ See *A-O Broadcasting*, 23 FCC Rcd 603, 608 (2008).

⁴ *Id.*

⁵ "The publication of rules and regulations in the Federal Register gives legal notice of their contents to those subject to, or affected by, them, regardless of actual knowledge of what is in the regulations or of the hardship resulting from innocent ignorance." *Higashi v. United States*, 225 F.3d 1343 (Fed. Cir. 2000); See also *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996) (publishing in the Federal Register provides notice and an opportunity for impacted entities to adjust behavior prior to implementation).

⁶ *Digital Low Power Television, Television Translator, and Television Booster Stations and To Amend Rules for Digital Class A Television Stations*, 76 FR 44821 (2011).

⁷ See *Second Report and Order*, supra note 1.

As noted by Spirit in its *Petition*, the expiration date of its digital construction permit is September 1, 2015, however, for purposes of Section 312(g) the expiration date of the construction permit is immaterial. Section 312(g) explicitly states that the license expiration occurs “notwithstanding any provision, term, or condition of the license to the contrary.” In addition, the Commission has a long established policy of the “single, unified station license” as part of the digital conversion process.⁸ Spirit’s digital construction permit for channel 44 is considered to be part of Spirit’s underlying license. Once transmission on channel 53 was no longer permissible under Commission rules, Spirit was required to transmit a broadcast signal on channel 44 in order to prevent the automatic expiration of its license under Section 312(g). When Spirit failed to do so, its license for channel 53 and the accompanying digital construction permit for channel 44 expired by operation of law.

With respect to Spirit’s argument that forfeiture is a more appropriate sanction than license cancellation, we note that forfeiture is not an option under Section 312(g). Unlike a revocation proceeding under Section 312(a), Section 312(g) takes effect by operation of law and the Commission’s discretion is severely limited.⁹ The only discretion the Commission has under Section 312(g) is to reinstate a license “to promote equity and fairness.” In the past, the Commission has exercised its discretion in cases involving natural disaster or other compelling circumstances outside of the licensee’s control which forced cessation of the station’s operations. For example, in *V.I. Stereo Communications Corp.*,¹⁰ the Commission on reconsideration concluded that the station’s extended silence was understandable and that reinstatement was warranted, given the fact that the station’s tower had been completely destroyed by a hurricane and after it was rebuilt, again sustained substantial damage from three more hurricanes. Other than simply stating that reinstatement would be “in the public interest,” Spirit fails to demonstrate why the Commission should exercise its limited discretion under Section 312(g).

Based upon the foregoing, we conclude that the described resumption of station operations was insufficient to exempt Spirit from automatic expiration of the Station’s license pursuant to Section 312(g), and that the Station clearly had been silent for more than a consecutive 12-month period prior to the Division’s February 20, 2013 letter decision. Having concluded that Spirit has failed to present any facts or arguments that warrant reconsideration and reinstatement of the authorization for its expired license at West Palm Beach, Florida, the *Petition for Reconsideration* by Spirit Productions, Inc. IS HEREBY DENIED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

⁸ See *Remedial Steps For Failure to Comply With Digital Television Construction Schedule, Report and Order*, 18 FCC Rcd 7174, 7183-4 and n. 25 (2003).

⁹ *In the Matter of A-O Broad. Corp.*, 23 FCC Rcd 603, 618 (2008) citing *OCC Acquisitions, Inc. v. FCC*, 64 Fed. Appx. at 790, aff’d *In re OCC Acquisitions, Inc. Radio Station WSTA-FM*, 17 FCC Rcd 6147 (2002).

¹⁰ *V.I. Stereo Communications Corp.*, 21 FCC Rcd. 14259 (2006).