



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

November 9, 2017

DA 17-1098

In Reply Refer to:

1800B3-CEG

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In re: **DKROY(FM), Palacios, Texas**
Facility ID No. 77693
File Nos. BRH-20130328ABT
BALH-20161128ADK

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (Petition) filed by Roy E. Henderson (Henderson) on February 15, 2017, seeking reconsideration of the January 11, 2017, letter decision by the Audio Division, Media Bureau (Bureau) deleting the call sign of Station KROY(FM), Palacios, Texas (Station) and dismissing the above-referenced renewal and assignment applications (Applications) as moot.¹ We also have a reply to the Petition (Reply) filed by Barney Joe Donalson, Jr. (Donalson) on February 21, 2017. For the reasons discussed below, we dismiss the Petition.

Background. As recounted in more detail in the *Letter Decision*, this proceeding arises from Henderson's operation of the Station during the seven years between 2007—when the Station's original antenna tower (Robbins Slough Site) was dismantled—and 2014, when Henderson received automatic program test authority (PTA) at a new permanent site (the Matagorda Site).² During this time, Henderson applied for and received two grants of special temporary authority (STA) to operate the Station at an interim site (the Palacios Site). Each STA authorized operation for six months, with the second one expiring on December 25, 2009.³ After that date, Henderson lacked any sort of Commission authority—STA, PTA, or license—to operate at any site other than the original Robbins Slough Site, until automatic PTA commenced at the Matagorda Site on March 25, 2014.

In the *Letter Decision*, the Bureau found that, because the Station had either been silent or operated at an unauthorized location for at least one consecutive 12-month period, the Station's license

¹ *John C. Trent, Esq.*, Letter, Ref. No. 1800B3-CEG (MB Jan. 11, 2017) (*Letter Decision*). Henderson filed supplements to the Petition on March 13, 2017, and February 16, 2017, in order to submit an exhibit containing audio files on a CD that could not be filed electronically with the Petition. Henderson filed an additional supplement on July 6, 2017 (July 6 Supplement).

² See File No. BLSTA-20071106ADC (granted November 8, 2007); File No. BLH-20140325AAE (granted Mar. 3, 2016); *Broadcast Actions*, Public Notice, Ref. No. 48686 (MB Mar. 8, 2016).

³ The First Engineering STA was granted on Oct. 24, 2008, and expired on April 22, 2009. File No. BSTA-20081021ADB; *Mr. Fred Hannel*, Letter, Ref. No. 1800B3-SNC (MB Oct. 24, 2008). The Second Engineering STA was granted on June 25, 2009, and expired on December 25, 2009. File No. BSTA-20090622AAV (granted June 25, 2009); *Robert J. Buenzle*, Letter, Ref. No. 1800B3-CNM (MB June 25, 2009).

had automatically expired under Section 312(g) of the Communications Act of 1934, as amended.⁴ The Bureau rejected Henderson’s contention that the evidence he submitted of sporadic, unauthorized operation of the Station between 2009 and 2014 was sufficient to avoid expiration under Section 312(g), noting that “[w]ell-established Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in Section 312(g) through the use of unauthorized facilities.”⁵

In the Petition, Henderson claims that the Bureau overlooked the following factors: (1) the Station’s service to Palacios, Texas, since 2000; (2) his 2016 application to assign KROY to New Wavo Communication Group, Inc.⁶; and (3) his efforts to restore broadcast operation (citing *Southwestern Broadcasting*).⁷ Henderson also claims that the Bureau ignored evidence, such as statements from local listeners, that the Station did broadcast during the relevant time period.⁸ Henderson submits with the Petition new evidence purporting to show that the Station broadcast (albeit from an unauthorized site) during the relevant time period.⁹ Henderson also disputes the Bureau’s conclusion that operating without an STA extension constitutes unauthorized operation.¹⁰

In the Petition, Henderson also argues, for the first time, that the *Letter Decision* is inconsistent with the Commission’s practice of accepting late-filed renewal applications while simultaneously taking enforcement action (such as imposing a forfeiture) for any periods of unauthorized operation.¹¹ Finally, Henderson accuses Bureau staff of bias resulting from *ex parte* communications with Donalson and submits, as evidence, a state court civil-action-related deposition which includes taped conversations between Donalson and a Bureau attorney.¹²

In the July 6 Supplement, Henderson reiterates that the Station was never off the air for more than a year and claims that the failure to obtain STA for operation at an alternative site was the fault of “an incompetent and/or unscrupulous engineer” who was paid to submit STA requests but did not do so.¹³ Henderson urges that the Station license be reinstated because “there was no warning of a compliance issue” and he was “never aware that we were operating at an unauthorized location until the letter decision from the Commission staff.”¹⁴

⁴ 47 U.S.C. § 312(g) (Section 312(g)) (“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, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.”).

⁵ See, e.g., *James McCluskey, Ph.D.*, Letter Decision, 27 FCC Rcd 6252, 6254-55 (MB 2012) (“[U]nauthorized and unlicensed transmissions are no better than silence” and, in assessing a licensee’s rights under Section 312(g), “an unauthorized transmission counts for nothing”) (internal citations omitted).

⁶ File No. BALH-20161128ADK.

⁷ Petition at 1, 4 (citing *Southwestern Broadcasting Corp.*, Order, 11 FCC Rcd 14880, 14881 (1996) (*Southwestern*)).

⁸ Petition at 1.

⁹ Petition, Exh. 1.

¹⁰ Petition at 2-3 (arguing that the Bureau erroneously concluded that “even if Henderson was on the air (which he was). . . since the STA extension was not submitted (even though a site had been previously approved), [that] means that there is no authority to operate.”) (emphasis in original omitted).

¹¹ Petition at 5-6.

¹² Petition at 6-8, Exhs. 6,7 (citing *Henderson v. Donalson*, Cause No. 2016-66840 (Dist. Ct., Harris County, TX)).

¹³ July 6 Supplement at 1-3.

¹⁴ July 6 Supplement at 5.

In his Reply, Donalson states that he is not a party to the Applications, that his “communications with FCC staff were immaterial and irrelevant to [the Applications],¹⁵ and that the deposition exhibit submitted by Henderson is inadmissible because it was “illegally taken in violation of Texas’ anti-SLAPP laws suspending discovery.”¹⁶ Otherwise, Donalson states that he “takes no position concerning the renewal of DKROY and/or the FCC decision deleting the license.”¹⁷

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁸ A petition for reconsideration that simply reiterates arguments previously considered and rejected will be denied.¹⁹ It is axiomatic that a party may not “sit back and hope that a decision will be in its favor and, when it isn’t, to parry with an offer of more evidence.”²⁰ Because all of Henderson’s facts and arguments presented in the Petition—service to the community, effect of proposed assignment, remedial steps, listener statements, comparison to renewal proceedings, effect of unauthorized broadcast, and fault assignable to a Station employee—are based on facts and case law existing at his last opportunity to present them, none provides a basis for reconsideration. Accordingly, we dismiss the Petition and affirm the basic principle that unauthorized operation is not considered a “broadcast signal” for the purpose of Section 312(g).²¹

Even if they were procedurally acceptable, we would find no merit to those arguments presented for the first time in the Petition and July 6 Supplement. First, Henderson’s reliance on *Southwestern* is misplaced. *Southwestern* involved an ad hoc processing policy only used during the one-year transition period between the enactment of Section 312(g) in 1996 and the deadline upon which silent station licenses would first expire for non-operation in 1997. Therefore, that processing policy expired long ago and has no bearing on Henderson's failure to transmit broadcast signals over the Station with authorized facilities for 12 consecutive months between 2009 and 2014.²²

Second, we reject Henderson’s argument that we should extend our longstanding policy regarding the treatment of late-filed renewal applications (which we have more recently addressed through a rigorous outreach program) to stations that choose to operate at unauthorized sites during their license term. The two situations are not comparable in terms of intentionality of the acts involved, potential for interference to other stations, and disruption to our allocations framework.

Third, regarding Henderson’s contention that his failure to obtain STAs and consequent unauthorized operation was attributable to the actions of an “incompetent and/or unscrupulous engineer,”

¹⁵ Reply at 5.

¹⁶ Reply at 4-5.

¹⁷ Reply at 5.

¹⁸ See 47 CFR § 1.106(c), (d); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) (*WWIZ*).

¹⁹ 47 CFR § 1.106(a)(3) (stating that petitions for reconsideration may be dismissed or denied where they “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *WWIZ*, 37 FCC at 686 (holding that reconsideration “will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.”).

²⁰ *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

²¹ See, e.g., *Kingdom of God, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 7522, 7526 (2016); *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009).

²² See, e.g., *Christian Broadcasting of East Point, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 13975, 13976 (2015).

we observe that it is axiomatic that a licensee is directly responsible for compliance with the Commission's Rules and cannot evade responsibility by attributing the misconduct to a Station agent or employee.²³

Fourth, we find that the communication between Donalson and Bureau staff did not violate general principles of agency bias or the Commission's *ex parte* rules specifically. The *ex parte* rules ensure that the Commission's decisions are fair, impartial, and based on a public record free of influence from non-record communications between decision-makers and outside persons.²⁴ To this end, the rules prohibit *ex parte* presentations—e.g., oral presentations made without advance notice to the parties and without opportunity for them to be present—made to or from decision-making personnel in restricted proceedings.²⁵ This prohibition applies to “[a]ny communication directed to the merits or outcome of a proceeding.”²⁶ Whether admissible in a Texas state court civil proceeding or not, most of the taped conversation submitted by Henderson as Exhibit 7 to the Petition relates to the 2013 Low Power FM (LPFM) nationwide filing window and is not directed to the merits or outcome of any pending KROY application or proceeding. To the extent that the parties briefly discuss KROY, they do not discuss the merits of the Applications. To the contrary, the Bureau attorney explicitly stated to Donalson that they could only discuss the *status* of cases with pending complaints, such as KROY. For these reasons, the submitted communications do not violate the Commission's *ex parte* rules.

Finally, regarding Henderson's allegation of bias, such a claim must overcome the “presumption of honesty and integrity” that attaches to the decisions of public officials when acting in an adjudicative capacity.²⁷ Upon close review of the record, we conclude that the Bureau staff attorney's remarks did not reveal personal animus or prejudice of the KROY proceeding, but rather constitute an attempt to identify Donalson's goals and provide an outline of his procedural options, such as filing petitions against pending KROY applications or “try[ing] to get a congressman interested” in petitioning the Commission for relief. Therefore, we find that Henderson has failed to show that the Bureau's actions in the *Letter Decision* are the result of impermissible bias.

In this respect, we note that the statutory operation of Section 312(g) is extremely circumscribed and does not permit much scope for agency discretion. If the statutory standard is met, as here, the license expiration occurs by operation of law, without further agency action. Although the Commission may exercise its discretion to reinstate an automatically expired license to “promote equity and fairness,” this authority is exercised sparingly and only in the rare circumstance where a station's extended silence is caused by compelling reasons that are beyond the licensee's control.²⁸ Here, nothing in the Petition

²³ See, e.g., *Entercom License LLC*, Hearing Designation Order, 31 FCC Rcd 12196, 12226-27 (2016); *Discussion Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7439 (2004); *WMJX, Inc.*, Decision, 85 FCC 2d 251, 266-67 (1981); *Four Corners Broadcasting, Inc.*, Forfeiture Order, 29 FCC Rcd 15127, 15129 (EB 2014).

²⁴ *Ex Parte Communications*, Report and Order, 2 FCC Rcd 3011, 3012 (1987).

²⁵ 47 CFR §§ 1.1202(b)(2), 1.1208.

²⁶ 47 CFR § 1.1202(a).

²⁷ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); see also *Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (holding that “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger . . .”) (emphasis in original).

²⁸ See, e.g., *V.I. Stereo Comm'n Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstating license where station's silence was attributable to destruction of towers in hurricane and substantial damage to rebuilt towers in additional hurricanes); *Harry Martin, Esq.*, Letter Order, 23 FCC Rcd 15012 (MB 2008) (reinstating license where licensee took all steps needed to return to air from replacement site prior to 12 months of silence but nevertheless remained off air to promote air safety after diligently reporting that FCC and FAA records

establishes that the Station's silence and/or unauthorized operation were beyond Henderson's control. Therefore, we confirm the *Letter Decision* in this respect as well.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed by Henderson on February 15, 2017, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

contained incorrect tower information for which it was not responsible); *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (reinstating license where extended silence resulted from the licensee's compliance with a court order).