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In re: DW243AP, Mooresville, AL
Facility ID No. 157069
File Nos. BSTA-20180702AAH,
BLSTA-20180710AAR

**Shelby Broadcast Associates, LLC
Petition for Reconsideration**

Dear Counsel:

We have before us the Petition for Reconsideration (Petition) of Shelby Broadcast Associates, LLC (SBA), former licensee of Station DW243AP, Mooresville, Alabama (Station), seeking reconsideration of the Media Bureau (Bureau) letter decision¹ cancelling the Station's license, terminating the authority of the Station to operate, deleting that Station's call sign, and dismissing SBA's pending applications, including requests for Special Temporary Authority (STA).² For the reasons set forth below, we deny the Petition.

Background. As noted in the *Letter Order*, on July 10, 2017, SBA filed an STA for the Station to remain silent, citing the inability to access its tower site.³ The Station received its Silent Authority STA on August 3, 2017, requiring that the Station resume its authorized broadcast operations before 12:01 a.m. on July 2, 2018, twelve months from the date it went silent, in order to prevent the expiration of its license as a matter of law.⁴ SBA requested an extension of the STA on January 29, 2018 and was reminded again of the statutory deadline of July 2, 2018 by the Bureau.⁵

During June 2018, an SBA representative agreed upon a temporary location for the Station with PFI Group of Rogersville, Alabama (PFI). SBA then filed an STA request on June 11, 2018 to operate

¹ *Shelby Broadcasting Associates, LLC*, Letter Order, Ref. 1800B3-VM (MB Nov. 29, 2018) (*Letter Order*).

² File Nos. BSTA-20180702AAH (July 2, 2018 STA Request) and BLSTA-20180710AAR (July 10, 2018 STA Request).

³ File No. BLSTA-20170710ABP, granted on Aug. 3, 2017.

⁴ *Letter from Lisa Scanlan, Deputy Chief, Audio Division, Media Bureau to Mr. Lee S. Reynolds*, Ref. 1800B3-KC (Aug. 3, 2017) (citing 47 U.S.C. 312(g) (“[i]f 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 . . . , except that the Commission may extend or reinstate such station license . . . to promote equity and fairness”)).

⁵ File No. BLESTA-20180129AIO, granted on Feb. 16, 2018; *Letter from Lisa Scanlan, Deputy Chief, Audio Division, Media Bureau to Mr. Lee S. Reynolds*, Ref. 1800B3-DW (Feb. 16, 2018) (citing 47 U.S.C. 312(g)).

the Station at a temporary site with coordinates specified as 34-38-19 North Latitude, 86-52-41 West Longitude (Mooresville Road Site). The Bureau granted that STA on June 14, 2018.⁶

On June 29, 2018, SBA filed a notice of resumption of operation. Three days after that resumption notice was filed (at which point SBA's July 2, 2018 resumption deadline had passed), SBA filed a new STA request for a site roughly one-tenth of a mile (416 feet) away from the Mooresville Road Site.⁷ In the July 2, 2018 STA Request, SBA claimed that PFI had "mandated a slight site modification of the STA facility to another location on [its] property."⁸ Given the proximity of these separate filings, the Bureau sent a Letter of Inquiry (*LOI*) to SBA, requiring SBA to provide evidence of the Station's operational status from June 28 to July 3, 2018.⁹ SBA's response indicated that the authorized STA site—the Mooresville Road Site—was not the site used from June 28 to July 3, 2018.¹⁰ The response also stated that after SBA filed its resumption notice, it realized the facility was actually built at a location 138 feet beyond the three-second "tolerance zone of [Section] 73.1690(b)(2) by [138 feet]" as measured from the authorized Mooresville Road Site.¹¹

In the *Letter Order*, the Bureau held that the Station's license had expired pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act) because the Station had not broadcast from an authorized site for a 12-month period.¹² The *Letter Order* noted that for a station's broadcasting to qualify, it must be in accordance with authorized STAs, and thus SBA's broadcasting had to be at the authorized Mooresville Road Site.¹³ The *Letter Order* further rejected SBA's request that we exercise our discretion "to promote equity and fairness" under Section 312(g) despite SBA's location violation because such discretion has only been used in limited cases where the station could not provide service due to "compelling reasons beyond the licensee's control," and not because of a station's business judgments and arrangements, as was the case here.¹⁴ The Bureau rejected SBA's argument that Section 73.1690(b)(2) of the FCC's rules (Rules) allowed it a three-second "tolerance" in the location of its site, noting that the rule is a means to correct coordinates where subsequent measurements find a small discrepancy, and in any case the facility constructed by SBA was outside the three-second tolerance.¹⁵ Further, the Bureau explained that SBA's position was not supported by "equity and fairness" because SBA knowingly violated Section 301 of the Act by operating a station at a new site without Commission

⁶ File No. BSTA-20180611ABA (June 2018 STA Request).

⁷ July 2, 2018 STA Request.

⁸ *Id.*

⁹ Letter of Inquiry from Albert Shuldiner, Chief, Audio Division, Media Bureau, to Mr. Lee S. Reynolds (Aug. 2, 2018).

¹⁰ Letter of Inquiry Response, from Shelby Broadcast Associates LLC, to Albert Shuldiner, Chief, Audio Division, Media Bureau, at 11 (Sep. 7, 2018).

¹¹ *Id.*

¹² *Letter Order* at 2, (citing 47 U.S.C. § 312).

¹³ *Id.* at 3 (citing 47 U.S.C. § 301).

¹⁴ *Id.* at 3 (citing *V.I. Stereo Commc'ns Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted where station's silence resulted from hurricane destruction); *Community Bible Church*, Letter Order, 23 FCC Rcd 15012, 15014 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air, but remained off air to promote air safety after discovering and reporting that FCC and FAA records contained incorrect tower information); *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from licensee's compliance with a court order)).

¹⁵ *Letter Order* at 3; see also 47 CFR § 73.1690(b)(2) (construction permit required for changes in a full-service FM station's coordinates beyond three seconds latitude or longitude).

approval.¹⁶ The Bureau further noted that SBA did not acknowledge it operated the Station from an unauthorized site until after the Bureau had already noticed the discrepancy and issued the *LOI*.¹⁷ Accordingly, the Bureau declined to exercise its discretion under Section 312(g) to reinstate the Station’s license.

In the Petition, SBA argues that the Bureau misapplied Section 312(g) and misinterprets Section 73.1690(b)(2) of the Rules. It explains that the agreement between PFI and SBA was reached because there were existing lighting poles on the Mooresville Road Site, which SBA could use in constructing its temporary station.¹⁸ However, PFI subsequently reneged on the agreement, as another business arrangement required immediately taking down the lighting poles.¹⁹ SBA emphasizes that it could not construct its temporary station at the FCC-authorized Mooresville Road Site, but instead, SBA had to construct a free-standing tower at a different location on PFI’s property.²⁰ SBA further states that “[t]he tower was completed on June 29, 2018, and, shortly prior to 2 p.m. on that date, Station W243AP resumed broadcast operations.”²¹ But in constructing the temporary tower, two SBA representatives miscommunicated and the tower was placed 138 feet beyond the 3-second latitude/longitude measurement error allowed under Section 73.1690(b)(2) of the Rules.²² Yet even though SBA principal Lee Reynolds was aware of the discrepancy between the Station’s location and the FCC-approved coordinates “[i]mmediately after the Station resumed operations,”²³ he did not file an updated STA request with the correct coordinates until July 2, 2018—after the Station’s resumption deadline had passed.²⁴

SBA further argues that even though it constructed its facility 138 feet outside the bounds of Section 73.1690(b)(2), the Bureau should exercise its equitable authority under Section 312(g) of the Act—allowing SBA to count its unauthorized June 28 to July 3, 2018 transmission and retain its license.²⁵ SBA bases its argument first on the idea that “[e]very station filing a License Application to correct coordinates is acknowledging that it has operated with facilities which are at variance with those in its license.”²⁶ SBA argues that because it did not transmit with unauthorized facilities—merely from an unauthorized location—this is not sufficiently “outrageous” conduct that would justify rejecting relief on the basis of equity and fairness.²⁷ SBA also asserts that Lee Reynolds did not hide unauthorized operations, because the only unauthorized aspect of the transmission was the Station’s location, which he applied to change three days later.²⁸ Next, SBA cites the opinions of the communications engineers it had talked with, claiming their understanding of the three-second limit to Section 73.1690(b)(2) to not require

¹⁶ *Letter Order* at 3 (citing *Daniel A. Edelman, Esq.*, Memorandum Opinion and Order, 19 FCC Rcd 12741, 12742-3, para. 5 (2004); *FCC v. WOKO, Inc.*, 329 U.S. 323, 329 (1946) (counterbalancing considerations of public interest in the service involved might justify award despite misbehavior).

¹⁷ *Letter Order* at 3.

¹⁸ Petition at 2.

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ Petition at 4.

²² *Letter Order* at 2.

²³ Petition at 4.

²⁴ *Letter Order* at 1-2.

²⁵ Petition at 6.

²⁶ *Id.*

²⁷ *Id.* at 7.

²⁸ *Id.* at 8.

that a location discrepancy be unintentional. In addition, because the error put the tower 138 feet outside the range permitted by Section 73.1690(b)(2), SBA argues the discrepancy to be *de minimis* and worthy of equity, in light of the facts of this case.²⁹

Discussion. The Bureau will consider a petition for reconsideration only when the petitioner shows either a material error in the original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.³⁰ Here, SBA has neither demonstrated that the *Letter Order* erred in holding that the Station's license expired under Section 312(g) of the Act, nor provided additional facts as to why the Commission should reinstate the station to promote equity and fairness.

At issue is whether SBA's operation of the Station at coordinates not authorized by the June 2018 STA were in fact authorized by virtue of Section 73.1690(b)(2). We find that the *Letter Order* correctly interpreted Section 73.1690(b)(2) as providing a streamlined process for correcting small discrepancies in coordinates (up to three seconds) in the event later measurements indicate an error on a station's authorization.³¹ By contrast, a change in a broadcast tower's authorized height or location is governed by Section 73.1690(b)(1), which requires submission and approval of a minor change application, "except for replacement of an existing tower with a new tower of identical height and geographic coordinates."³² SBA fails to cite any case law supporting its interpretation of Section 73.1690(b)(2), and further fails to explain how its interpretation of that rule can be squared with the language of Section 73.1690(b)(1). Moreover, the *Letter Order* correctly pointed out that even SBA's interpretation of the Rule does not support SBA's position because SBA constructed the temporary tower at a location that differed by more than three seconds from the coordinates of the Mooresville Road Site.³³

Rather than build the Station at the FCC-authorized Mooresville Road Site, SBA *deliberately* built the tower at different coordinates—because PFI did not allow it to construct at the Mooresville Road Site—without applying for an updated STA until after the Section 312(g) deadline had passed.³⁴ As extensive precedent indicates, operating an alternate facility without Commission approval does not qualify as resuming a station's broadcast.³⁵

SBA also attempts to distinguish its case from case law by emphasizing that its actions were not "outrageous," as in previous cases. However, our discretion under 312(g) is severely limited and SBA has failed to cite any comparable case where the Commission applied that discretion to reinstate a license.³⁶ Here, the tower was so far from its approved coordinates that it was beyond even the three-

²⁹ *Id.*

³⁰ 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

³¹ 47 CFR § 73.1690(b)(2); *Letter Order* at 3.

³² 47 CFR § 73.1690(b)(1).

³³ *Letter Order* at 3.

³⁴ *Id.* at 1-2.

³⁵ See *Eagle Broad. Group, LTD*, 563 F.3d 543, 553 (D.C. Cir. 2009) ("Under the statute, unauthorized and unlicensed transmissions are no better than silence"); *Roy E Henderson*, Memorandum Opinion and Order, 33 FCC Rcd 7365 (2018).

³⁶ See *A-O Broad. Corp.*, 23 FCC Rcd 603, 617, para. 26 (2008) ("This limited, discretionary provision is phrased as an exception to the general rule that most affected licenses will be forfeited."). Well-established precedent shows that "the Commission has refused to exercise discretion under Section 312(g) where the failure to resume station operations was due to the licensee's own actions, finances, and/or business judgments." *Wilks License Co.*, Letter Order, 29 FCC Rcd 4903, 4905-06 (MB 2014). See also *A-O*, *supra*, 23 FCC Rcd at 617, para. 27 ("In particular,

second latitude/longitude tolerance allowed in cases of measurement error under the Rule that SBA has attempted to invoke. Although SBA contends this distance to be *de minimis*, there is no case law supporting that claim. SBA's unlicensed broadcasting violated Section 301 of the Act, and its failure to resume authorized Station broadcasting within twelve months of July 1, 2017 meant that its license expired under Section 312(g) of the Act. To contend that the Station's "death penalty" is unjustified and inequitable is to dismiss the significance of extended station silence under Section 312(g) and SBA's many shortcomings in completing its resumption process in accordance with the Rules.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Shelby Broadcast Associates, LLC on January 30, 2019 IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

A-O's circumstances are the direct result of its own public safety rule violations . . . and its failure to complete construction in accordance with the express permit conditions designed to prevent similar problems").