

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1132

KINGDOM OF GOD, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

NICHOLAS A. DEGANI
ACTING GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

PAMELA L. SMITH
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The appellant is Kingdom of God, Inc. The appellee is the Federal Communications Commission.

2. Rulings under review.

In the Matter of Kingdom of God, Inc. Former Licensee of Deleted Class A Television Station DWKOG-LP, Indianapolis, IN, Memorandum Opinion and Order, 31 FCC Rcd 7522 (2016) (JA 170), *recon. denied*, 32 FCC Rcd 1599 (Jan. 31, 2017) (JA 189), *recon. denied*, 32 FCC Rcd 3654 (April 20, 2017) (JA 201).

3. Related cases.

The order on review has not previously been before this Court. Counsel is not aware of any related cases that are pending before this Court or any other court.

TABLE OF CONTENTS

Table of Authorities.....	iii
Glossary.....	v
Introduction.....	1
Questions Presented.....	2
Jurisdiction.....	3
Statutes and Regulations.....	3
Counterstatement.....	3
I. Statutory and Regulatory Background.....	3
A. Broadcast Licensing.....	3
B. Section 312(g) of the Communications Act.....	4
II. Factual Background.....	5
A. The Field Investigation.....	5
B. The License Cancellation Letter.....	6
C. The Bureau Reconsideration Denial.....	8
D. The Commission Order.....	11
E. The Commission Reconsideration Denials.....	13
Summary of Argument.....	15
Argument.....	16
I. Standard of Review.....	16
II. The Commission Reasonably Determined That Kingdom’s Broadcast License Expired as a Matter of Law Under Section 312(g).....	16

III. The Commission Reasonably Declined To Reinstate
Kingdom’s Expired Broadcast License.20

Conclusion.....26

TABLE OF AUTHORITIES

CASES

<i>BDPCS, Inc. v. FCC</i> , 351 F.3d 1177 (D.C. Cir. 2003).....	21
<i>Cellco P’ship v. FCC</i> , 357 F.3d 88 (D.C. Cir. 2004).....	16
<i>Comcast Corp. v. FCC</i> , 526 F.3d 763 (D.C. Cir. 2008).....	23
<i>Conference Group, LLC v. FCC</i> , 720 F.3d 957 (D.C. Cir. 2013).....	20
<i>Contemporary Media, Inc. v. FCC</i> , 214 F.3d 187 (D.C. Cir. 2000).....	19
* <i>Eagle Broadcasting Group, Ltd. v. FCC</i> , 563 F.3d 543 (D.C. Cir. 2009).....	2, 7, 12, 13, 16, 17, 18, 19
<i>FCC v. WOKO, Inc.</i> , 329 U.S. 223 (1946).....	19
<i>McDonnell v. United States</i> , 136 S. Ct. 2355 (2016).....	13, 18
<i>Paralyzed Veterans of Am. v. D.C. Arena, L.P.</i> , 117 F.3d 579 (D.C. Cir. 1997)	20
<i>Perez v. Mortgage Bankers Ass’n</i> , 135 S. Ct. 1199 (2015)	20

STATUTES

5 U.S.C. § 706(2)(A).....	16
18 U.S.C. § 201(a)(3).....	18
47 U.S.C. § 153(7).....	3
47 U.S.C. § 301	3, 19
* 47 U.S.C. § 312(g).....	1, 2, 4, 5, 15, 16, 19, 26
47 U.S.C. § 402(b)(5).....	3
47 U.S.C. § 402(c).....	3

REGULATIONS

47 C.F.R. § 1.115(c).....	11, 21
47 C.F.R. § 73.1635	4

47 C.F.R. § 73.1635(a)(4)	5
47 C.F.R. § 73.1740	4
47 C.F.R. § 73.1740(a)(4)	4
47 C.F.R. § 73.1740(a)(5)	4
47 C.F.R. § 73.1740(c)	5, 19
47 C.F.R. § 73.1745(a)	4
47 C.F.R. § 73.1750	5

ADMINISTRATIVE DECISIONS

* <i>A-O Broadcasting Corp.</i> , 23 FCC Rcd 603 (2008).....	7, 12, 17
<i>Continental Media Group, LLC</i> , 32 FCC Rcd 4187 (2016)	24
<i>Emmis Communications Corp.</i> , 19 FCC Rcd 16003 (2004)	24
<i>Emmis Radio License, LLC</i> , 29 FCC Rcd 2571 (2014)	24
<i>John L. White</i> , 24 FCC Rcd 12541 (2009).....	23
<i>V.I. Stereo Communications Corp.</i> , 21 FCC Rcd 14259 (2006)	20
<i>WRHC Broadcasting Corp.</i> , 15 FCC Rcd 5551 (EB 2000).....	24
<i>WRHC Broadcasting Corp.</i> , 16 FCC Rcd 10059 (EB 2000)	24

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Act or Communications Act	Communications Act of 1934, as amended, 47 U.S.C. 151 <i>et seq.</i>
Bureau	Media Bureau, Federal Communications Commission
<i>Bureau Reconsideration Denial</i>	November 6, 2015 Letter from Barbara K. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (JA 144)
Commission or FCC	Federal Communications Commission (appellee)
<i>Commission Order</i>	<i>Kingdom of God, Inc.</i> , Memorandum Opinion and Order, 31 FCC Rcd 7522 (2016) (JA 170), <i>recon. denied</i> , 32 FCC Rcd 1599 (Jan. 31, 2017) (JA 189), <i>recon. denied</i> , 32 FCC Rcd 3654 (April 20, 2017) (JA 201)
<i>Commission Reconsideration Order</i>	<i>Kingdom of God, Inc.</i> , Order on Reconsideration, 32 FCC Rcd 1599 (Jan. 31, 2017) (JA 189)
Kingdom or KOG	Kingdom of God, Inc. (appellant)
<i>License Cancellation Letter</i>	August 10, 2015 Letter from Barbara K. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (JA 113)
STA	special temporary authorization

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1132

KINGDOM OF GOD, INC.,
APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION
APPELLEE.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

INTRODUCTION

This case involves a challenge by Kingdom of God, Inc., the former licensee of Indianapolis television station WKOG-LP, to a Federal Communications Commission decision that Kingdom's broadcast license expired as a matter of law pursuant to Section 312(g) of the Communications Act, 47 U.S.C. § 312(g), because the station failed to transmit an authorized broadcast signal for 12 consecutive months.

Kingdom does not dispute that WKOG broadcast from an unauthorized location and at variance from its authorized technical parameters for more than six years, and it proffers no compelling excuse for its failure to do so. Under these

circumstances, the FCC's determination that Kingdom's license expired as a matter of law, and that considerations of equity and fairness did not require reinstatement, was entirely reasonable and should be affirmed.

QUESTIONS PRESENTED

Section 312(g) of the Communications Act provides that a broadcast license "expires" if a "broadcasting station fails to transmit broadcast signals for any consecutive 12-month period." 47 U.S.C. § 312(g). The statute gives the FCC the power, however, to "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." *Ibid.*

Longstanding FCC precedent, affirmed by this Court in *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009), holds that "in assessing a licensee's rights under § 312(g) . . . an unauthorized transmission counts for nothing." The questions presented are:

1. Did the FCC properly determine that Kingdom's broadcast license had expired as a matter of law because Kingdom had failed to transmit an authorized broadcast signal for more than six years.

2. Did the FCC reasonably determine that considerations of equity and fairness did not require it to exercise its discretion to reinstate Kingdom's license

where Kingdom had offered no compelling excuse for its unauthorized transmissions.

JURISDICTION

The order that is the subject of this appeal was released on June 27, 2016; the Commission denied reconsideration on January 31, 2017, and again on April 20, 2017. The notice of appeal was timely filed on May 19, 2017, which was within the 30-day period set forth in 47 U.S.C. § 402(c). The Court has jurisdiction under 47 U.S.C. § 402(b)(5).

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the appendix to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. Broadcast Licensing

Section 301 of the Communications Act provides that “[n]o person shall” transmit television broadcast signals “except under and in accordance with this chapter and with a license” “granted under the provisions of this Act.” 47 U.S.C. § 301. The Communications Act defines “broadcasting” as the “dissemination of radio communications intended to be received by the public.” 47 U.S.C. § 153(7). A station that is not “broadcasting” is commonly referred to as “silent.”

Under the Commission's rules, broadcast stations are required to operate pursuant to minimum operating schedules. 47 C.F.R. § 73.1740. For example, Class A television stations (a category of low-power television stations) are required to operate "[n]ot less than 18 hours in each day of the week." 47 C.F.R. § 73.1740(a)(5). However, if "causes beyond the control of a licensee make it impossible to adhere to the operating schedule," then a broadcast station may go silent "for a period of not more than 30 days without further authority from the FCC." 47 C.F.R. § 73.1740(a)(4). A licensee must request and be granted a special temporary authorization ("STA") for a broadcast station to go or remain silent for more than 30 days. *See* 47 C.F.R. § 73.1635. The FCC's rules also prohibit a broadcast station from operating "at times, or with modes or power, other than those specified and made a part of the license" without agency approval. *See* 47 C.F.R. § 73.1745(a).

B. Section 312(g) of the Communications Act

Section 312(g) of the Communications Act prohibits a broadcast station from going silent for a year. Under the provision, "[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, notwithstanding any provision, term, or condition of the license to the contrary." 47 U.S.C. § 312(g). The Commission's rules implementing Section

312(g) make clear that “[t]he license of a broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires as a matter of law at the end of that period, notwithstanding any STA or provision, term, or condition of the license to the contrary.” 47 C.F.R. § 73.1635(a)(4). *See also* 47 C.F.R. §§ 73.1740(c); 73.1750 (mirroring statutory language).

Section 312(g) grants the FCC the discretion to “extend or reinstate” a broadcast license that has expired under this provision, but only under specified circumstances: “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.” 47 U.S.C. § 312(g).

II. FACTUAL BACKGROUND

A. The Field Investigation.

Kingdom was formerly licensed to operate analog Class A television station WKOG-LP from a site in downtown Indianapolis, Indiana. *See* Investigation Field Report of Agent John Kuzma (“Field Report”) at 1 (JA 84).

In January 2015, the FCC’s Enforcement Bureau commenced an investigation into station WKOG’s operations. Field Report at 1 (JA 84). The investigation revealed that since 2009 Kingdom had not been transmitting from its authorized location and when broadcasting had been doing so at variance from its license. *Id.* at 2 (JA 85). Sister Sue Jenkins, President and sole principal of

Kingdom, informed the investigator that “[t]he WKOG transmitter [was] located at St. Francis Hospital, 1600 Albany St, Beech Grove, Indiana” and “was moved to the hospital approximately 6 to 8 years” prior to 2015, and was the station’s only transmitter. *Ibid.* (JA 85). The station’s engineer separately confirmed that “the [station’s] equipment was moved to St. Francis Hospital six years ago.” *Id.* at 3 (JA 86). He also told the FCC investigator that “due to space constraints” only two of the antenna’s four panels had been mounted at the hospital site. As a result, although the station’s transmitter was rated at “1000 watts,” its actual output with only two panels was “around 300 watts.” *Ibid.*

On July 7, 2015, Kingdom filed an application for a construction permit to relocate its facilities to the location at which it had been broadcasting (JA 101), along with an application for a special temporary authorization to operate from that site (JA 94). Prior to that time, Kingdom had filed a number of other special temporary authorization applications, which sought only permission to go or remain silent. (JA 35, 39, 45, 72).

B. The License Cancellation Letter.

On the basis of the Field Report, the FCC’s Media Bureau (“Bureau”) issued a letter on August 10, 2015 notifying Kingdom of its finding that WKOG “has failed to transmit a broadcast signal for twelve consecutive months” and that, accordingly, “the Station’s license has automatically expired” under Section

312(g). August 10, 2015 Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (“*License Cancellation Letter*”) at 4 (JA 116). As the letter explained, “well established Commission precedent” holds “that unauthorized transmission of a broadcast signal does not constitute broadcasting for purposes of Section 312(g) of the Act.” *Id.* at 3 (JA 115) (citing *A-O Broadcasting Corp.*, 23 FCC Rcd 603 (2008); *Eagle Broadcasting*, 563 F.3d at 545). The Bureau emphasized that “Section 312(g) is meant to encourage the legal transmission of broadcast signals, not unauthorized or illegal operations in violation of Commission Rules and the Act.” *Ibid.* (citations omitted).

The Bureau found, on the basis of the testimony of the station’s principal owner and its engineer, that “WKOG has been transmitting an unauthorized signal, both at variance from its licensed technical parameters and from a non-licensed site, for at least six years.” *Id.* at 3-4 (JA 115-16). Accordingly, the Bureau canceled the Station’s license, deleted its call sign, canceled its digital construction permit, and dismissed all of its pending applications. *Id.* at 4 (JA 116).

On September 10, 2015, the FCC received by mail Kingdom’s petition for reconsideration. Petition for Reconsideration at 1 (JA 117).¹ Kingdom did not address the Bureau’s finding that it had broadcast from an unauthorized location

¹ Kingdom’s document as filed is two pages long: the first page is not numbered (JA 117), and the last page is numbered “Page 3” (JA 118).

and at unauthorized parameters. Instead, it simply asserted that the Station “[has] never failed to broadcast a television signal at once (or more times) within every 12-month period,” and asked the FCC to “return to us our license and grant us a 6-month ‘STA Request’ so that, we can immediately resume the construction in building our WKOG-TV station to go the air [sic] and broadcast digitally.” *Id.* at 2 (JA 118).

C. The Bureau Reconsideration Denial

On November 6, 2015, the Bureau dismissed Kingdom’s petition for reconsideration on procedural grounds and alternatively denied “it on independent substantive grounds.” November 6, 2015 Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (“*Bureau Reconsideration Denial*”) at 1 (JA 144); *see also id.* at 4 (JA 147). The Bureau dismissed the petition on procedural grounds because it was filed late. *See id.* at 2 (JA 145).

In the alternative, the Bureau denied Kingdom’s reconsideration request on the merits in light of “well established Commission precedent that unauthorized transmission of a broadcast signal does not constitute broadcasting for purposes of Section 312(g) of the Act.” *Id.* at 3 (JA 146). The Bureau explained that “[w]hile [Kingdom’s] statement that it has broadcast at least once every twelve months since it commenced operations in 1995 may be true, what [Kingdom] fails to address in its Petition . . . is that since at least 2009 any operations have been from

an unauthorized location with parameters at variance from those in its license.”

Ibid. (JA 146). “In order for [Kingdom] to have prevented automatic expiration of the Station’s license under Section 312(g),” the Bureau stated, “it needed to transmit an *authorized* broadcast signal,” but Kingdom had failed to “provide any evidence that since 2009 it ever transmitted an authorized broadcast signal.” *Ibid.* (JA 146).

On March 8, 2016, Kingdom filed an application for Commission review of the Bureau’s decision. Application for Review at 1 (JA 154).² Kingdom argued that Commission review was warranted for the following reasons.

First, while conceding that the “isolated fact” that “the Station was ‘operating, since at least 2009’ from a location different than as licensed” “is true,” Kingdom argued that the Bureau had “incorrectly” found that Kingdom did not seek Commission approval to operate at the “temporary site” at St. Francis Hospital “until July 7, 2015.” *Id.* at 4 (JA 157). Kingdom asserted that it had “specifically referenced Station transmissions from the Temporary Site” in a May 2009 request for silent authority and the “Bureau approved the May 2009 STA, by

² On February 8, 2016, the Bureau re-sent the *Bureau Reconsideration Denial* (which originally was sent to Kingdom’s out-of-date mailing address) and advised Kingdom that it could seek Commission review of the Bureau’s action until March 9, 2016. February 8, 2016 Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. at 1 (JA 148).

letter, on June 3, 2009.” *Ibid.* (JA 157). In view of the Bureau’s grant of authority for WKOG to be silent between May 15 and November 15, 2009, as well as additional requests for silent authority filed between 2010 and 2015, Kingdom contended that “the Bureau arrived at a false conclusion that [Kingdom] violated Section 312(g) of the Communications Act by operating from an unapproved site for over a year – when, in fact, the Commission approved Station operations mentioned in the May 2009 STA.” *Id.* at 5 (JA 158).

Second, Kingdom asserted that “[e]ven if the Bureau was correct in its factual assertions” that WKOG was not authorized to broadcast from the St. Francis Hospital site, the Bureau “should have exercised discretion ‘to promote fairness and equity’ as instructed by Section 312(g)” and “should have imposed an alternative sanction short of Station death.” *Id.* at 6 (JA 159).³

³ Kingdom also contended that the Bureau had erred “by incorrectly stating that [Kingdom] failed to comply with filing deadlines and filing requirements.” *Id.* at 3 (JA 156). To support its claim, Kingdom provided a copy of a mailing label which showed that the package “was addressed to ‘Marlene H. Dortch . . . Office of the Secretary,” and a tracking report which showed that the package was both dispatched from Indianapolis, Indiana and available for pick-up at the Washington, D.C. post office on September 9, 2016, even though the package was not delivered to the FCC until September 10, 2016. *See id.* at 8-10, Exh. 2 & Exh. 3 (JA 161-63, 167 & 169).

D. The Commission Order.

On June 27, 2016, the Commission dismissed the application for review pursuant to Section 1.115(c) of its rules, 47 C.F.R. § 1.115(c), which provides that the Commission will not grant an application for review that “relies on questions of fact or law upon which the designated authority”—here, the Bureau—“has been afforded no opportunity to pass.” *Kingdom of God, Inc.*, 31 FCC Rcd 7522, 7524 (¶ 5) (2016) (“*Commission Order*”) (JA 172). “Because [Kingdom] presents its substantive arguments . . . for the first time in its [Application for Review], having failed to provide the Bureau the opportunity to consider any of them,” the Commission dismissed the pleading. *Ibid.* (JA 172).

As “an independent and alternative basis,” the Commission concluded that Kingdom had not shown that the Bureau “erred in its decision to deny the Petition, nor, in so acting,” that it treated Kingdom “differently from other purported similarly situated parties.” *Ibid.* (JA 172). The Commission also found that “the record does not support [Kingdom’s] new contentions that the [Bureau] approved operation of the Station from a ‘temporary site,’ or that reinstatement of the

Station license is warranted under the ‘equity and fairness’ provision of Section 312(g).” *Ibid.* (JA 172).⁴

The Commission emphasized Kingdom’s concession “that, since at least 2009,” WKOG “has been operating from a location and with facilities that are different from those for which it was authorized.” *Id.* at 7525 (¶ 6) (JA 173). The Commission explained that it has “consistently held that the unauthorized transmission of a broadcast signal does not exempt a licensee from the automatic expiration provision of Section 312(g) of the Act.” *Id.* at 7526 (¶ 8) (JA 174) (citing *A-O Broadcasting*, 23 FCC Rcd at 608, and *Eagle Broadcasting*, 563 F.3d at 545). The Commission noted that while Kingdom had filed—and the agency had approved—STA requests in May and November 2009 to go and remain silent that referenced in passing broadcasting from a “‘temporary’ site,” the approvals “related solely to the requests before it – for the Station to go and remain silent.” *Id.* at 7525-26 (¶ 7) (JA 173-74). “The STA requests did not seek – and the staff’s actions did not approve – [Kingdom’s] prior unauthorized operation or give

⁴ The Commission did not “reach a conclusion” regarding the Bureau’s dismissal of the petition for reconsideration on timeliness grounds because, as the Commission explained, “[w]hether or not the [Bureau]’s dismissal of the Petition was appropriate does not impact our ultimate conclusion that the [Bureau]’s cancellation of the Station’s license pursuant to Section 312(g) of the Act was proper.” *Id.* at 7524 n.20 (JA 172).

[Kingdom] authority to operate the station in the future at variance from its license.” *Id.* at 7526 (¶ 7) (JA 174).

The Commission also rejected Kingdom’s contention that its license should be reinstated on grounds of equity and fairness. The Commission found the argument precluded because Kingdom did not make it before the Bureau, which accordingly had no opportunity to consider it. *Id.* at 7527 (¶ 11) (JA 175). “As an alternative and independent reason,” the Commission rejected the argument, noting that it had reinstated an expired license under Section 312(g) “only where the station failed to provide service . . . due to compelling reasons beyond the licensee’s control,” and not, “where, as here, the failure to transmit a broadcast signal was due to the licensee’s own actions, finances, and/or business judgment.” *Ibid.* (JA 175).

E. The Commission Reconsideration Denials.

On July 27, 2016, Kingdom petitioned the Commission to reconsider the dismissal of its application for review. Kingdom contended that the Supreme Court’s decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), “overrule[d]” this Court’s decision in *Eagle Broadcasting* affirming the FCC’s interpretation of Section 312(g), and that, as a result, the Commission’s order “must be vacated, and the WKOG-LP license must be reinstated.” Petition for Reconsideration at 6 (JA 185).

On January 31, 2017, the Commission denied reconsideration. *Kingdom of God, Inc.*, 32 FCC Rcd 1599 (2017) (“*Commission Reconsideration Order*”) (JA 189). The Commission found the *McDonnell* decision, which addressed the interpretation of “criminal federal corruption laws,” had “no bearing on the interpretation of Section 312(g) of the [Communications] Act” and was therefore irrelevant. *Id.* at 1600-01 (¶¶ 7-8) (JA 190). The Commission also found that Kingdom did “not raise any new facts or arguments that warrant our reconsideration” and so “again reject[ed] [Kingdom]’s equity and fairness arguments.” *Id.* at 1601 (¶ 9) (JA 191).

Kingdom filed yet another petition for reconsideration on March 2, 2017, reiterating its reliance on *McDonnell* and repeating its allegations of disparate treatment. *Petition for Reconsideration* at 3-6 (JA 197-200). Kingdom also argued that the Commission’s appeal process is fundamentally unfair because staff that worked on this case at the Bureau level was involved in writing the Commission’s order on reconsideration. *Id.* at 2-3. On April 20, 2017, the Commission dismissed the petition “as repetitious to the extent it contends that the Supreme Court decision in *McDonnell v. United States* or considerations of equity and fairness mandate reinstatement of the Station’s license.” *Kingdom of God, Inc.*, 32 FCC Rcd 3654 (¶ 2) (JA 201). The Commission also denied the petition “to the extent it contends that the Commission’s appeal process is fundamentally unfair,”

making clear that “[t]he Commissioners, not the staff, are the final decision makers on all action taken by the full Commission.” *Id.* at 3655 (¶ 3) (JA 202). Noting that “the Commission has now determined on three separate occasions that [Kingdom]’s arguments provide no basis to overturn the staff’s underlying decision,” the Commission directed its staff “to dismiss summarily, citing this Order on Reconsideration, any subsequent pleadings filed by [Kingdom] with respect to reinstatement of [WKOG].” *Ibid.* & n.14 (JA 202). This appeal followed.

SUMMARY OF ARGUMENT

Section 312(g) of the Communications Act requires broadcasters to use their licenses to provide service to the public, and as part of that obligation specifies that licenses automatically expire upon a failure to transmit authorized broadcast signals for 12 consecutive months. It is undisputed that Kingdom’s television station, without any compelling excuse, failed to transmit authorized broadcast signals from its licensed site for at least six years and that the signals it did transmit (from an unauthorized location) were at variance with the terms of its license. Accordingly, the Commission reasonably found that Kingdom’s license automatically expired pursuant to Section 312(g) and that reinstatement of that license would not promote equity and fairness but would instead undermine the licensing goals of the Communications Act.

ARGUMENT

I. STANDARD OF REVIEW.

The *Commission Order* must be affirmed unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Under this “‘highly deferential’ standard of review, the court presumes the validity of agency action . . . and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco P’ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

II. THE COMMISSION REASONABLY DETERMINED THAT KINGDOM’S BROADCAST LICENSE EXPIRED AS A MATTER OF LAW UNDER SECTION 312(G).

Section 312(g) of the Communications Act provides that “[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, notwithstanding any provision, term, or condition of the license to the contrary.” 47 U.S.C. § 312(g).

It has been settled by the Commission and by this Court that only transmission of broadcast signals from an authorized location in accordance with a station’s license matters for purposes of Section 312(g). Thus, in *Eagle Broadcasting*, a radio station licensed to operate from a site in Parker, Arizona ceased operations at that site and commenced operations—without authorization—from a different location. 563 F.3d at 548. The FCC determined that because the

station had failed to broadcast from the site authorized in its license for more than a year, its license had expired as a matter of law under Section 312(g).

In a unanimous opinion, this Court affirmed. As the Court explained, “it strains credulity to suggest that the reference to ‘broadcast signals’ in § 312(g) includes *unauthorized* and *unlicensed* transmissions.” 563 F.3d at 552. And it would be “absurd,” the Court stated, to read the statute to “allow a station to avoid expiration by broadcasting from any site, even one that is thousands of miles removed from the authorized location.” *Ibid.* “Under the statute,” the Court emphasized, “unauthorized and unlicensed transmissions are no better than silence.” *Id.* at 553. “Thus, in assessing a licensee’s rights under 312(g), the FCC reasonably concluded that an unauthorized transmission counts for nothing.” *Ibid.* *See also A-O Broadcasting*, 23 FCC Rcd at 608 (rejecting the “contention that unauthorized transmissions prevent cancellation under Section 312(g)” as “inconsistent both with the purpose of Section 312(g) and with other provisions of the Act”).

Eagle Broadcasting is on all fours with this case and controls its result. Kingdom does not dispute that WKOG failed to transmit a broadcast signal from its licensed site for 12 consecutive months. *See, e.g.*, Initial Brief of Appellant (“Br.”) at 14 (not contesting that “WKOG had not broadcast from an authorized transmitter site since 2009”); Application for Review at 4 (conceding, as “true

enough,” that “the Station was ‘operating, since at least 2009’ from a location different than as licensed.”) (JA 157). As a result, the Commission determined that Kingdom’s license for WKOG had automatically expired under Section 312(g). *Commission Order*, 31 FCC Rcd at 7524 (¶ 5) (JA 172). Under *Eagle Broadcasting*, that determination is plainly reasonable, and there is no basis for the Court to disturb the Commission’s action.

On appeal, as before the Commission, Kingdom argues that the Supreme Court’s decision in *McDonnell v. United States* “requires this Court to overturn its holding” in *Eagle Broadcasting*. Br. at 15. But *McDonnell* is wholly inapposite, as the Commission recognized. *Commission Reconsideration Order*, 32 FCC Rcd at 1601 (¶ 8) (JA 191). In *McDonnell*, the Supreme Court overturned the federal criminal bribery conviction of former Virginia Governor Robert McDonnell. The decision turned on the proper interpretation of the term “official act” as used in the federal bribery statute, 18 U.S.C. § 201(a)(3). *See* 136 S. Ct. at 2367. It had nothing to do with the application or interpretation of the Communications Act or of Section 312(g).

Kingdom nonetheless contends that *McDonnell* “requires the FCC and the courts to narrowly and cautiously interpret and apply statutes which allow for draconian penalties such as license revocation or forfeiture.” Br. at 15. But that broad proposition cannot be derived from *McDonnell*, which was grounded on a

close reading of the specific criminal provision before the Court. Kingdom argues that Section 312(g) is analogous to the statute in *McDonnell* because it “is essentially penal in nature,” Br. at 15, but that is incorrect. The revocation of a broadcast license is not a penal measure. *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 199 (D.C. Cir. 2000); *see FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946) (denial of license not a penal measure).

In any event, even a narrow and cautious reading of Section 312(g) would not help Kingdom, because, as this Court recognized in *Eagle Broadcasting*, an interpretation of the statute to permit the term “broadcast signals” in Section 312(g) to include “unauthorized and unlicensed transmissions” would “strain credulity.” 563 F.3d at 552. The entire purpose of the Communications Act is to ensure that broadcasting takes place in accordance with the terms and conditions of licenses granted by the Commission. 47 U.S.C. § 301.

Kingdom also complains that the FCC never gave broadcasters “explicit notice” of its interpretation of 47 C.F.R. § 73.1740(c). Br. at 17. But that regulation simply mirrors the terms of Section 312(g) that a broadcast license “expires as a matter of law” if the station “fails to transmit signals for any consecutive 12-month period.” *See* Br. at 16-18. And the Commission’s precedent applying Section 312(g), including this Court’s affirmance in *Eagle Broadcasting*, provided “clear notice” of the Commission’s reading of that provision.

Commission Reconsideration Order, 32 FCC Rcd 1601 (¶ 8) (JA 191). Kingdom suggests that the Commission’s interpretation of the statute (and its mirroring regulation) must be embodied in an order following notice and comment rulemaking, Br. at 17-18, but that is not true. It is settled that binding agency interpretations of existing law can be contained in adjudicatory orders. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015); *Conference Group, LLC v. FCC*, 720 F.3d 957, 965-66 (D.C. Cir. 2013).⁵

III. THE COMMISSION REASONABLY DECLINED TO REINSTATE KINGDOM’S EXPIRED BROADCAST LICENSE.

The Commission also did not abuse its discretion in refusing to reinstate Kingdom’s expired license. First, as the Commission explained, it considers the discretion granted under Section 312(g) to be “severely limited.” *Id.* at 7527 (¶ 11) (JA 175). As such, the “Commission has exercised its authority to reinstate an expired license to ‘promote equity and fairness’ only where the station failed to provide service for 12 consecutive months due to compelling reasons beyond the licensee’s control.” *Ibid.* (JA 175) (citing, *inter alia*, *V.I. Stereo Communications Corp.*, 21 FCC Rcd 14259 (2006) (hurricane damage)). In Kingdom’s case

⁵ We note that the Supreme Court in *Perez* overturned the notice and comment requirement announced in *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), upon which Kingdom relies (Br. at 18), as inconsistent with the Administrative Procedure Act.

however, the Commission found that “the failure to transmit a broadcast signal was due to the licensee’s own actions, finances, and/or business judgments.” *Ibid.* (JA 175). Kingdom was not compelled by outside forces to shift its operations without authorization. It chose to do so on its own.

Kingdom nonetheless contends that the Commission should have reinstated its license for considerations of equity and fairness. At the outset, that argument is foreclosed because it was not raised before the Bureau and only for the first time to the Commission in its Application for Review. The argument is thus barred by 47 C.F.R. § 1.115(c) of the Commission’s rules, which provides that an application for review will not be granted on any issue on which the subordinate bureau “has been afforded no opportunity to pass.” *See, e.g., BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003).

In any event, Kingdom proffers no excuse for its decision to broadcast from an unauthorized location for more than six years, much less any compelling considerations of equity and fairness. It asserts that it “was keeping the FCC informed” by stating in a May 2009 STA application (which was granted by FCC staff) “that it had been operating from a ‘temporary tower site.’” Br. at 19. But as the Commission explained, that STA request asked for permission for WKOG to go silent, and “the staff cannot be held to render a decision on a request not before it.” *Commission Order*, 31 FCC Rcd at 7525-26 (¶ 7) (JA 173-74).

The substance of that “Request for Silent STA” (JA 35) reads in its entirety “SILENT STA. WKOG-LP CHANNEL 31, HAS BEEN BROADCASTING ON A TEMPORARY TOWER SITE AND HAD TO GO OFF. WE NOW WORKING TOWARDS A MORE PERNMENT [sic] SITE FOR WKOG-LP. THIS IS A REQUEST FOR A SIX MONTH SILENT STA.” (JA 36).

Even if Commission staff noted the reference to a “temporary tower site” on that form—which merely requested authorization to go off the air temporarily—and understood that to mean that the station had been operating out of compliance with its license—and there is no evidence of that—“[t]he STA request[] did not seek – and the staff’s action did not approve – [Kingdom’s] prior unauthorized operation or give [Kingdom] authority to operate the Station in the future at variance from its license.” *Commission Order*, 31 FCC Rcd at 7526 (¶ 7) (JA 174).⁶ Indeed, in July 2015—after the Commission first noted the station’s unauthorized broadcasting—Kingdom filed a request to modify its licensed facility. That detailed application (reproduced at JA 101-112) bears no resemblance to the passing reference to a temporary facility in Kingdom’s STA application. It was perfectly reasonable for the Commission to disregard the

⁶ Kingdom also asserts that it made a similar reference to temporary facilities in a May 2010 STA application. Br. at 19. But it concedes that the Commission “never acted on” that application at all. *Ibid.*

impact of an isolated and unexplained statement regarding temporary facilities in an application obtaining unrelated relief in determining that there were no compelling equities in Kingdom's favor to support reinstatement of its expired license.

Kingdom also argues that the Commission should have applied its decision in *John L. White*, 24 FCC Rcd 12541 (2009), in determining whether to impose a sanction "short of the Section 312(g) death penalty." Br. at 19-20. But as the Commission explained, the decision in *John L. White* was by FCC staff and thus not binding on the Commission. *Commission Order*, 31 FCC Rcd at 7526 (¶ 9) (JA 174) (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008)). In any event, the decision "concluded that imposition of a monetary forfeiture in lieu of license cancellation was warranted because the licensee," unlike Kingdom "(1) remained at its authorized site . . . and (2) had sought and received Commission approval of an STA to operate with its modified facilities." *Ibid.* In this case, "[Kingdom], by its own admission, neither remained at its authorized site when conducting its unauthorized operation nor sought or received Commission approval to so operate its modified facilities prior to its belated filing of the modification application and related STA request in July 2015." *Id.* at 7526-27 (¶ 9) (JA 174-75).

Kingdom also suggests that the Commission's refusal to reinstate its license is inconsistent with the Enforcement Bureau's decision to impose a forfeiture in *WRHC Broadcasting Corp.*, 15 FCC Rcd 5551 (EB 2000) (Notice of Apparent Liability); 16 FCC Rcd 10059 (EB 2000) (Forfeiture Order). Br. at 19. That staff decision (also not binding on the Commission) is also distinguishable because it does not apply or interpret Section 312(g), and in any event predated the decisions of the Commission and this Court making clear that unauthorized broadcasts do not toll Section 312(g). Kingdom's reference (Br. at 18) to *Continental Media Group, LLC*, 32 FCC Rcd 4187 (2016), is even farther afield.⁷ In sum, Kingdom has not come close to showing that the Commission's decision not to reinstate Kingdom's license is inconsistent with its prior precedent.

Kingdom's last two contentions can be disposed of summarily. First, Kingdom contends that the Commission's tardiness in providing public notice of the Bureau's Initial Cancellation Letter meant that Kingdom's "petition for reconsideration was due as a matter of law on Wednesday, October 21, 2015." Br.

⁷ *Continental Media* simply affirmed an FCC staff decision that dismissed, on procedural grounds, a petition for reconsideration of the staff's denial of an unopposed transfer of control and broadcast license renewal application. The decision has nothing to do with Section 312(g) or its implementation. The same is true for *Emmis Communications Corp.*, 19 FCC Rcd 16003 (2004) and *Emmis Radio License, LLC*, 29 FCC Rcd 2571 (2014) (*see* Br. at 20), which involved allegations of inappropriate programming, not failure to broadcast.

at 21. But the timeliness (or lack of thereof) of Kingdom's petition for Bureau reconsideration is not an issue in this appeal because the Commission did "not reach a conclusion regarding the timeliness of the Petition," but instead relied on its merits determination "that the [Bureau's] cancellation of the Station's license pursuant to Section 312(g) of the Act was proper." *Commission Order*, 31 FCC Rcd at 7524 n.20 (JA 172). Because the Commission did not rely on the untimeliness of Kingdom's petition for Bureau reconsideration in its decision, the issue can hardly have "taint[ed]" that decision (Br. at 21) or provide a basis for vacatur (Br. at 22).

Second, Kingdom complains that the Commission failed to act on seven requests for special temporary authorization to go silent. Br. at 22. But Kingdom fails to explain how rulings on those requests could have any impact on its claims in this case, since none of the applications could have cured its failure to broadcast from an authorized location or tolled the requirements of Section 312(g). Indeed, even the letters granting the May and November 2009 STA applications reminded Kingdom that, regardless of the grant, "[a]s a matter of law, the license for the above station will automatically expire if broadcast operations do not commence within 12 months from the date that the station ceased broadcasting." STA Approval (JA 37 & 41).

* * * * *

As the Commission reasonably determined, in choosing not to broadcast from its licensed location for more than six years, Kingdom ran afoul of Section 312(g) of the Communications Act and its license expired as a matter of law. And because Kingdom has pointed to no considerations of equity and fairness, compelling or otherwise, for its failure to comply with the statute, the Commission acted well within its discretion to refuse to reinstate Kingdom's license.

CONCLUSION

The *Commission Order* should be affirmed.

Respectfully submitted,

Nicholas A. Degani
Acting General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/ Pamela L. Smith

Pamela L. Smith
Counsel

Federal Communications
Commission
Washington, D.C. 20554
(202) 418-1740

October 12, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KINGDOM OF GOD, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE.

No. 17-1132

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Appellee in the captioned case contains 5,714 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

/s/ Pamela L. Smith
Pamela L. Smith
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)

STATUTORY ADDENDUM

Communications Act Provisions:

47 U.S.C. § 153(7)

47 U.S.C. § 301

47 U.S.C. § 312(g)

FCC Rules:

47 C.F.R. § 1.115(c)

47 U.S.C.

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

(7) Broadcasting

The term “broadcasting” means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

§ 312. Administrative sanctions

(g) Limitation on silent station authorizations

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. Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

47 C.F.R.

§ 1.115. Application for review of action taken pursuant to delegated authority.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

CERTIFICATE OF FILING AND SERVICE

I, Pamela L. Smith, hereby certify that on October 12, 2017, I filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system.

/s/ Pamela L. Smith

Pamela L. Smith
Counsel
Federal Communications
Commission
Washington, D. C. 20554
(202) 418-1710