

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

In the Matter of)	File Nos. BLH-20010924AAM
)	BRH-20030703ACC
A-O Broadcasting Corporation)	BLH-20030703ACD
)	BLSTA-20040413ABX
)	BLSTA-20040415AGE
)	BRH-20050601AYL
License Status of Silent Station)	
DKTMN(FM), Cloudcroft, New Mexico)	Facility I.D. No. 89049

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: January 18, 2008

By the Commission:

I. BACKGROUND

1. The Commission has before it an Application for Review filed by A-O Broadcasting Corporation (“A-O”), which had been authorized to construct an FM broadcast station at Cloudcroft, New Mexico. A-O seeks review of a staff decision¹ which affirmed an earlier decision² that the station’s license and all associated authorizations expired as a matter of law due to the station’s failure to broadcast for one year. The staff also has referred related matters to the Commission and we address them herein.³ For the reasons set forth below, we deny the Application for Review and the related requests.

2. Until a legislative change in December 2004,⁴ Section 312(g) of the Communications Act of 1934, as amended (the “Act”), provided that “if a broadcasting station fails to transmit broadcast signals for any consecutive twelve-month period,” the station’s license expires as a matter of law “notwithstanding any provision, term or condition to the contrary,” and the license is automatically forfeited.⁵ At the time of the staff action under review, the Commission had no discretion to waive

¹ *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 3818 (MB 2003) (“*Reconsideration Decision*”).

² *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 35 (MB 2003) (“*Initial Decision*”).

³ The staff has referred: (1) a September 4, 2003, petition seeking reconsideration of the dismissal of two applications that A-O filed in July 2003 -- one for license renewal, and one for a license to cover facilities at a new site; (2) a July 22, 2005, petition for reconsideration of the dismissal of an additional license renewal application filed in June 2005; and (3) two requests for special temporary authorization (“STA”) that A-O filed in April 2004 to operate at a new site (collectively, the “STA Requests”).

⁴ *See Consolidated Appropriations Act, 2005*, Pub. L. No. 108-447, 118 Stat. 2809, Title IX, § 213 (2004).

⁵ *See 47 U.S.C. § 312(g)* (1996). *See also Aerco Broadcasting Corp. v. FCC*, 51 Fed. Appx. 23 (D.C. Cir. 2002) (per curiam) (effect of Section 312(g) expiration is license forfeiture).

Section 312(g)'s expiration provision.⁶ At issue here is whether the staff properly found that KTMN(FM) had failed to broadcast for twelve consecutive months, and therefore whether the license expired pursuant to Section 312(g). We also consider what impact, if any, subsequent revisions to Section 312(g) -- granting the Commission authority to reinstate expired licenses -- have on the outcome of this case.

3. KTMN(FM) was first licensed on October 5, 2001, at a site known as James Ridge. The Commission's Denver, Colorado Field Office ("Denver Office"), responding to a complaint, inspected the James Ridge facilities on November 14, 2001. The inspection revealed that the station was not operating; A-O informed the inspectors that it had suspended operations on November 7, 2001.⁷ The inspection also revealed numerous violations, leading to a \$25,000 fine.⁸ Of particular concern was A-O's unauthorized installation of the KTMN(FM) transmitting antenna at a low position on an observation tower used by U.S. Forest Service rangers to watch for wildfires, potentially exposing the rangers and other members of the public to hazardous radiofrequency radiation ("RFR").⁹ The Denver Office required KTMN(FM) to remain off air until rectification of this hazard. Thereafter, the U.S. Forest Service revoked A-O's authority to use the James Ridge site. On March 14, 2002, A-O requested special temporary authorization ("STA") to remain silent. The Media Bureau staff granted silence authority through November 7, 2002, but warned that the station's license would automatically expire as a matter of law at 12:01 a.m., November 8, 2002, if the station did not resume broadcasting before then.

4. A-O applied to the Commission on August 22, 2002, for authority to relocate to a new site -- Wofford Peak. The staff granted a conditional construction permit on September 30, 2002. The permit authorized A-O to construct at Wofford Peak and to conduct *equipment* tests. Rather than permitting automatic program tests, however, the permit explicitly conditioned *program* test authority ("PTA") on (1) the filing of a formal PTA request with a license application, and (2) the submission of RFR documentation demonstrating compliance with Commission rules. Both were to be submitted at least ten days prior to commencing broadcasts.¹⁰ Such conditions are not uncommon and allow the Commission to verify that facilities will not expose either workers or the public to RFR in excess of established limits. A-O accepted the permit with these conditions, knowing also that it would need to file

⁶ See *WYCO, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16900, 16902-03 (2003); *OCC Acquisitions, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6147, 6151 (2002), *aff'd per curiam*, *OCC Acquisitions, Inc. v. FCC*, 64 Fed. Appx. 790 (D.C. Cir. 2003); *Silent Station Authorizations*, Order, 11 FCC Rcd 16599, 16600-01 (1996). See also *Expiration of License for Radio Facilities*, Public Notice, 12 FCC Rcd 3769 (MMB Apr. 3, 1997) (announcing license expiration of 24 silent stations and procedures to apply for new facilities to take their place).

⁷ By letter dated November 20, 2001, A-O filed a notification that it had gone off the air for a period less than 30 days due to a computer failure. Stations that are silent for more than ten days, but fewer than 30 days, must notify the Commission but need not obtain silence authority. See 47 C.F.R. § 73.1740(a)(4). A-O's silence notification reached the Commission on January 9, 2002, and apparently was routed to the Enforcement Bureau, which had required the station to cease operating, rather than to the Media Bureau which grants authority to remain silent for periods over 30 days.

⁸ See *A-O Broadcasting*, Notice of Apparent Liability, 17 FCC Rcd 24184 (2002) ("*2002 NAL Order*"), *forfeiture issued*, 31 Comm. Reg. (P&F) 411 (2003), *recon. denied*, 34 Comm. Reg. (P&F) 858 (2005).

⁹ *2002 NAL Order*, 17 FCC Rcd at 24184.

¹⁰ Construction Permit BPH-20020822AAC, Conditions 2 and 3.

the PTA request and license application in time to commence broadcasts prior to the Section 312(g) deadline.

5. On November 21, 2002, A-O filed a letter acknowledging that it had not yet taken the steps needed to obtain PTA.¹¹ Nevertheless, the letter stated that “KTMN returned to the air for a brief period of *signal tests* on November 7, 2002, and has been conducting tests intermittently since that date.”¹² The staff considered the letter, which was captioned “Notification of Return to Air,” as an argument that A-O’s signal tests qualified as the “transmission of broadcast signals” for purposes of Section 312(g). The staff determined in the *Initial Decision*, however, that A-O’s transmissions did not qualify as “broadcasting,” which the Act defines as “the dissemination of radio communications intended to be received by the public.”¹³ Rather, the staff found that the November 7th transmissions were equipment tests for A-O’s own use in determining the station’s technical performance.¹⁴ The staff thus concluded that the station’s license had expired on November 8, 2002, and deleted call sign KTMN(FM) from the Commission’s database.

6. On reconsideration,¹⁵ A-O for the first time claimed to have transmitted “broadcast signals” on November 5, 2002 (*i.e.*, two days prior to the November 7th “signal tests”). A-O provided the sworn declaration of an employee claiming to have aired six or seven songs and two station identification announcements from the Wofford Peak facilities prior to a power failure.¹⁶ In its *Reconsideration Decision*,¹⁷ the staff found A-O’s submission procedurally defective because A-O had not raised the claimed November 5th transmissions previously nor shown that consideration of that late-filed argument was required in the public interest.¹⁸ The staff also determined that the claimed operations, if considered as either programming or program tests, were unauthorized. The staff observed that A-O held no license or STA for the facilities from which it claimed to “resume” operations, and that it had not requested (and

¹¹ *Letter from Paul H. Brown* (Nov. 21, 2002) (“The KTMN permit does not contemplate automatic program tests at the station’s authorized location. However, KTMN will be requesting program test authority shortly. A-O has made arrangements to measure RF radiation in the vicinity of the new antenna location in order to support its application for program test authority.”).

¹² *Id.* (emphasis added).

¹³ 47 U.S.C. § 153(6).

¹⁴ *Initial Decision*, 18 FCC Rcd at 35.

¹⁵ *See* Petition for Reconsideration (Feb. 3, 2003) (“February Petition”). With consent from the staff, A-O supplemented the February Petition on June 25, 2004 (“2004 Supplement”). Without any prior consent, A-O submitted an additional supplement on March 11, 2005 (“2005 Supplement”). The 2005 Supplement will be considered in part and dismissed in part. *See infra* notes 81-83 and accompanying text.

¹⁶ *See Declaration of Mark Swalley, Employee* (attached to February Petition). The employee, who did not identify his title or position, stated that he was assisting in the completion of the station’s new transmission facilities, that he aired material while working on the station’s computer system, and “understood the purpose of our efforts to be the re-activation of service to the public.” February Petition at 3.

¹⁷ *Reconsideration Decision*, 18 FCC Rcd at 3819.

¹⁸ *See* 47 C.F.R. § 1.106(c).

therefore has not received) PTA, as required by the terms of its permit.¹⁹ Thus, the staff determined that such operations could not have preserved the KTMN(FM) license under Section 312(g). The staff relied in part on a staff-level decision holding that a broadcaster cannot avoid the consequences of Section 312(g) by operating substantially non-conforming facilities without authority.²⁰ A-O then filed its Application for Review on April 11, 2003.

7. Despite the deletion of the KTMN(FM) call sign and all associated authorizations, A-O continued and eventually completed construction at Wofford Peak. On July 3, 2003, A-O filed two applications: one requesting “renewal” of the station’s expired license, and the other seeking a license to cover the newly completed Wofford Peak facilities. The license renewal application contained a request for waiver of Section 73.3539 of the Commission’s Rules (the “Rules”) concerning timeliness of license renewal applications, because the application was filed more than a year before the June 1, 2005, filing deadline for New Mexico radio station renewals.²¹ Both applications indicated that A-O had operated the station after the November 8, 2002, Section 312(g) forfeiture of its license.²² A-O claimed that such operations were authorized pursuant to Section 73.1615 of the Rules, pertaining to modification of facilities.

8. On July 31, 2003, the staff dismissed both applications along with the associated waiver request, without written decision, and updated its database to reflect those actions. On August 6, 2003, the staff sent a letter to A-O explaining the basis for its July 31, 2003 actions. The staff stated that the applications had been inadvertently accepted; KTMN(FM) had neither a valid station license which could be renewed nor a valid construction permit and thus, no facility which could be licensed. The staff also advised that construction and operation after license expiration were unauthorized and advised A-O to cease operating immediately. On April 8, 2004, the Denver Office received complaints that KTMN(FM) was operating from Wofford Peak.²³ On April 13, 2004, the Media Bureau staff faxed a letter to A-O’s counsel emphasizing A-O’s lack of authority to operate and requiring A-O to report whether it ceased operations. A-O did not cease operations, instead requesting STA pending final action

¹⁹ At the time of the issuance of the *Reconsideration Decision* A-O had not requested STA for operations at the new Wofford Peak site, nor had it requested PTA or performed the prerequisite RFR measurements, nor had it filed a license application.

²⁰ See *Reconsideration Decision*, 18 FCC Rcd at 3820, n.7 (citing *Idaho Broadcasting Consortium*, Letter, 16 FCC Rcd 1721, 1723 (MMB 2001) (“*IBC*”)).

²¹ See 47 C.F.R. §§ 73.1020 and 73.3539. The station filed another license renewal application (BRH-20050601AYL) on June 1, 2005, the ordinary due date for licensed New Mexico stations. The staff dismissed that application, without letter, as inadvertently accepted for filing.

²² The application for modified license disclosed that the station was activated in March 2003 for purposes of taking RFR measurements. *But see* 47 C.F.R. § 73.1610(c) (equipment tests may continue only so long as the construction permit remains valid). The license renewal application indicated that the station was on the air and planned to transmit a July 4, 2003, parade. See File No. BRH-20030703ACC, Question III(5).

²³ KTMN(FM) simulcast 100% of the programming of station KUPR(FM), Alamogordo, New Mexico, licensed to Southern New Mexico Radio Foundation. A-O’s President is also President of Southern New Mexico Radio Foundation. On Friday, April 9, 2004, A-O filed a notification that KTMN(FM) would be operating over the weekend to provide “emergency” information about a predicted snowstorm. A-O also maintained that it was entitled to operate because its Application for Review remained pending.

in the instant proceeding. Following an investigation, the Denver Office issued a Notice of Apparent Liability for \$10,000 for unlicensed operations.²⁴ On June 1, 2005, Eagle filed an additional license renewal application. The staff dismissed that application and Eagle filed a petition for reconsideration.

II. DISCUSSION

9. **License Expiration Under Section 312(g).** As discussed above, A-O's arguments on reconsideration were untimely because it had not raised the claimed November 5th transmissions previously, nor did A-O show that consideration of such late-filed argument was required in the public interest. The staff properly dismissed A-O's arguments on those procedural grounds, and we affirm the *Reconsideration Decision* on that basis. Nevertheless, in the interest of developing a complete record, we address the merits of A-O's primary arguments and find them unavailing.²⁵ A-O presents several conflicting theories concerning the lawfulness and sufficiency of its alleged operations. First, A-O argues that its November 5th transmissions broke the station's silence for purposes of Section 312(g), even if those transmissions were unauthorized under the conditions on its permit. Noting the lack of the word "authorized" in Section 312(g), A-O argues that Congress never intended to require stations to resume operations lawfully to prevent Section 312(g) expiration.²⁶ A-O contends that had Congress intended the staff's approach, Congress would have included explicit language to override a policy enunciated in a 1984 Public Notice.²⁷ The Notice explains processing guidelines in situations involving premature or nonconforming construction. It states, for example, that nonconforming facilities will not be allowed on the air if interference would result, and that appropriate action will be determined on a case-by-case basis. A-O argues that pursuant to such a policy, it should not lose its license, noting that its operations caused no interference. A-O also states that the *IBC* case, which formed a basis for the staff's decision,²⁸ is distinguishable because *IBC* involved transmissions from facilities constructed at considerable variance from those permitted, whereas A-O used facilities specified in the Wofford Peak construction permit. A-O further contends that by requiring A-O to resume authorized operations in accordance with the conditions on its construction permit, the staff held A-O to a "letter perfect" standard, whereas the Commission has used a more lenient "substantial compliance" standard in other

²⁴ See *A-O Broadcasting Corp.*, Notice of Apparent Liability (EB Apr. 23, 2004). We have received complaints that A-O operated again in July 2004. These complaints have been forwarded to the Enforcement Bureau.

²⁵ A-O's other arguments warrant only brief mention. A-O's allegations of staff prejudice against A-O and its principal are completely unsupported and without merit. A-O argues disparate treatment because the staff deleted the KTMN(FM) call sign without first sending an inquiry letter, but an inquiry was unnecessary because A-O's November 21, 2002, submission already provided the type of information ordinarily requested. See *supra* note 11.

²⁶ According to A-O, "[r]egardless of whether KTMN's transmissions were authorized . . . the Act does not limit transmissions sufficient to break a 12-month period of silence to those that are in every respect undertaken precisely in accordance with every jot and tittle of a construction permit. The Act only condemns to death those stations that utterly fail to 'transmit' any 'broadcast signals' at all." Application for Review at 7.

²⁷ See 2004 Supplement at 10, n.8 (referencing Public Notice, "Commission Policy Regarding Premature or Nonconforming Construction," Mimeo No. 3853 (Apr. 27, 1984) (available at http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/pn19840427.pdf)).

²⁸ See *supra* note 20.

cases.²⁹ A-O also argues that the staff went beyond its delegated authority because the issue of whether Section 312(g) requires authorized transmissions is novel and requires referral to the full Commission under Section 0.283(a)(1) of the Rules.

10. We disagree with A-O's initial contention that unauthorized transmissions are sufficient to avoid the consequences of Section 312(g). Section 301 of the Act provides that no person shall transmit radio signals except in accordance with authority granted by the Commission.³⁰ It further provides that no license shall be construed to create any right beyond the terms, conditions, and authority of the license. Section 319 of the Act provides that all terms of a construction permit must be fully met before the Commission can license a station.³¹ The sanctions set forth in Section 312 enforce these provisions³² and Section 312(g) establishes the specific sanction for extended failure to broadcast. Indeed, if read to permit unauthorized operation to avoid license expiration, Section 312(g) would encourage violation of Section 301 and defeat its own purpose of ensuring timely construction and operation of authorized facilities that serve the public. A-O's unsupported contention that unauthorized transmissions prevent cancellation under Section 312(g) is inconsistent both with the purpose of Section 312(g) and with other provisions of the Act.³³ Accordingly, we reject that argument.

11. The 1984 Public Notice and Section 312(g) are not in conflict. The former sets forth administrative processing guidelines with regard to premature construction, the latter federal legislation with regard to stations that fail to provide service for extended periods. In any event, the statutory provision would prevail over a Commission processing policy without further action by Congress.³⁴ A-O also has not shown that requiring resumption of legal broadcasts holds A-O to a higher standard than other stations, without adequate notice. A-O's reliance on cases which do not involve Section 312(g) is misplaced.³⁵ The Commission clearly stated that the former Section 312(g) was nondiscretionary.³⁶ We

²⁹ See 2004 Supplement at 12 (citing *Lutheran Church/Missouri Synod*, Initial Decision, 10 FCC Rcd 9880 (ALJ 1995) (subsequent history omitted); *North Florida MMDS Partners*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11593, 11607 (1995); *Crowell-Collier Broadcasting Corp.*, Memorandum Opinion and Order, 44 FCC 2444, 2449 (1961)).

³⁰ 47 U.S.C. § 301.

³¹ 47 U.S.C. § 319(c).

³² See 47 U.S.C. § 312.

³³ Cf. *United States v. Peninsula Communications, Inc.*, 335 F.Supp.2d 1013, 1019 (D. Alaska 2004) (rejecting licensee's argument that Section 312(g) allows a licensee to continue operating a broadcast station after the license is cancelled or revoked in order to "protect" the license from automatic expiration during pendency of a lengthy appeal).

³⁴ See *Fiorentino v. U.S.*, 607 F.2d 963, 967 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980) ("We find nothing in the Supreme Court or D.C. Circuit decisions to suggest that . . . 'agency fostered policies and understandings' could override . . . the limitations of express statutes . . ." (cited in *Doe v. Gates*, 981 F.2d 1316, 1321 (D.C. Cir. 1983))).

³⁵ See *supra* note 29 and *infra* note 49.

³⁶ See, e.g., *Silent Station Authorizations*, 11 FCC Rcd at 16599-00; *OCC Acquisitions, Inc.*, 17 FCC Rcd at 6149-50; *WKZF-FM, Inc.*, Summary Decision, 11 FCC Rcd. 11793, 11796-98 (ALJ 1996) (agency has no discretion to

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find that the staff did not act beyond its delegated authority when it concluded that the KTMN(FM) license had expired, and in any event, the delegated authority issue is moot in light of our affirmation in this order.

12. Alternatively, A-O contends that its alleged November 5th transmissions were authorized broadcast signals pursuant to Section 73.1610 of the Rules, which governs equipment tests.³⁷ This argument has no merit. Equipment tests are “a necessary part of construction.”³⁸ Such tests may entail “adjustments and measurements as may be necessary to assure compliance with the terms of the construction permit”;³⁹ they are not transmissions of broadcast signals as required by Section 312(g).⁴⁰ It is immaterial if A-O performed its tests using music and voice recordings rather than limiting the tests to tones or unmodulated carrier signals. Using music or voice cannot transform equipment tests into broadcast service, even if the test signals are audible by the public.⁴¹ Indeed, Section 73.1610 clearly states that authorization to conduct equipment tests “shall not be construed as constituting a license to operate.”⁴²

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grant silent station’s request to withhold Section 312(g) expiration until after grant of a modification application needed to return station to the air).

³⁷ A-O argues that it broadcast programming during the equipment tests. *See* Application for Review at 7 (citing 47 C.F.R. § 73.1610). *See also* 2004 Supplement at 4 (“[C]ounsel’s November 21 letter erred in characterizing KTMN’s broadcasts as equipment tests. In fact, the station had broadcast programs.”)

³⁸ 47 C.F.R. § 73.1610(d).

³⁹ *Id.* § 73.1610(a). The record supports a finding that if there were transmissions from Wofford Peak on November 5, 2002, they could only have been equipment tests during ongoing construction. A-O concedes that as of November 21, 2002 (weeks after the Section 312(g) deadline) it had taken no RFR measurements, had received no PTA, and had not been in a position to submit a license application. *See supra* note 11. Further, while A-O’s employee indicates that the ultimate purpose of his work was “re-activation of service to the public,” and that he assisted “in completing the transmission facilities” sometime between Fall 2002 and February 2003, the employee as of November 5th was still “working on KTMN’s computer system” (which was responsible for KTMN(FM) going off the air at James Ridge) and experiencing power problems (“A-O . . . went on the air on November 5, 2002, albeit at less than full power” and “shortly after the transmissions began the power failed.”). *See supra* note 16 and *infra* note 41. Broadcast service to the public is not authorized until the permittee (a) has completed construction of the station, (b) has filed an application for a license, and (c) commences with program tests when it files such license application or, if PTA is not automatic, has requested and received PTA. It was not until July 3, 2003, almost eight months after its license expired under Section 312(g), that A-O indicated completion of construction by attempting to file an application for a license to cover the also-expired construction permit for the Wofford Peak facilities.

⁴⁰ *See Carlos J. Lastra, Trustee*, Memorandum Opinion and Order, 16 FCC Rcd 17268 (2001), *aff’d sub nom. per curiam, Aerco Broadcasting Corp. v. FCC*, 51 Fed. Appx. 23 (D.C. Cir. 2002) (automatic expiration pursuant to Section 312(g) not prevented by transmission of a television test pattern).

⁴¹ Moreover, due to a problem A-O reports with its power source which resulted in reduced power test transmissions, it is not clear that the tests were even capable of reaching, or did reach, the general public. *See* 2004 Supplement at 4.

⁴² *See* 47 C.F.R. § 73.1610(d) (emphasis added). A-O’s argument that its November 5th operations were authorized is based on A-O’s holding a permit to *construct* at Wofford Peak. That argument is without merit

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13. Similarly without merit is A-O's claim that the alleged November 5th transmissions from Wofford Peak were authorized broadcasts pursuant to Section 73.1615 of the Rules. Under Section 73.1615(a), FM licensees that cannot maintain licensed operations during facilities modification may for a 30-day period *either* discontinue operations *or* operate from temporary facilities,⁴³ "as necessary to accommodate construction and maintain the size of the presently licensed coverage area."⁴⁴ KTMN(FM) had been nonfunctional for more than 30 days at the licensed James Ridge site, and its equipment had been removed from that site by the time A-O received its September 30, 2002, permit to construct on Wofford Peak. Even if we were to accept *arguendo* that Section 73.1615 is applicable, A-O's could not invoke the rule's "temporary facilities" prong to operate from Wofford Peak; A-O had already used the alternative "discontinued operations" prong by keeping KTMN(FM) off-the-air for an additional 30 days following grant of the Wofford Peak construction permit. Moreover, A-O has not shown that operation with temporary facilities on November 5, 2002, was necessary to maintain existing service to listeners or to accommodate removal of equipment from operating facilities. Further, Section 73.1615 cannot be invoked after-the-fact to permit otherwise unauthorized transmissions; temporary operation may begin only upon notification to the Commission.⁴⁵ A-O provided no such notification before its alleged November 5, 2002, transmissions. Indeed, as noted above, A-O first disclosed these transmissions in its February 5, 2003, petition for reconsideration and made no assertions regarding Section 73.1615 as a basis for its operating authority until April 2003, when it filed the Application for Review.⁴⁶

14. Citing two Enforcement Bureau cases, A-O argues that if its operations were unauthorized, the appropriate sanction is, at most, a monetary forfeiture. A-O contends that it should be treated no more harshly than the licensee in *M.C. Allen Productions*, where the staff assessed a \$4,000 forfeiture for operations at an unauthorized location for over one year.⁴⁷ A-O also contrasts its actions with those of a broadcaster which received a \$6,000 forfeiture for unauthorized operations in *WRHC Broadcasting Corp.*; A-O emphasizes its own use of the site specified in its construction permit whereas the other broadcaster operated intentionally from a site for which it held no permit.⁴⁸ In its 2004

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because the permit on which A-O relies contained a condition that prohibited *operation* of the Wofford Peak facilities prior to satisfying the permit's RFR condition. *See supra*, ¶ 4.

⁴³ 47 C.F.R. § 73.1615.

⁴⁴ *See Reregulation and Oversight of the Rules for Radio and TV Broadcasting*, 76 F.C.C.2d 40 (1980) (subsequent history omitted).

⁴⁵ 47 C.F.R. § 73.1615(c).

⁴⁶ In light of the RFR condition on A-O's permit, the Commission could have precluded in any event A-O's temporary operations at the Wofford Peak site, even if such operations had been otherwise acceptable under Section 73.1615(a). *See* 47 C.F.R. § 73.1615(e) (Commission can disallow Section 73.1615 operations). A limiting condition placed on the Commission permit or license of a specific facility to protect public safety will not be defeated by a rule of general applicability, just as the specific governs the general for purposes of statutory construction. *Cf. Varsity Corp. v. Howe*, 516 U.S. 489, 511 (1996) ("[t]his Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision").

⁴⁷ Forfeiture Order, 16 FCC Rcd 21138 (EB 2001).

⁴⁸ Forfeiture Order, 16 FCC Rcd 10059 (EB 2000).

Supplement, A-O cites additional cases in which the Commission opted for lesser sanctions when stations failed to construct as authorized.⁴⁹ A-O argues that it should be viewed as a responsible broadcaster for not attempting to return to the air from James Ridge given the history of that site.

15. A-O fails to comprehend the critical differences between rule violations and Section 312(g). The Commission has discretion to shape a remedy for rule violations.⁵⁰ As emphasized previously, however, Section 312(g), as in effect during the period at issue here, afforded the Commission no discretion to impose a fine while allowing the station to operate. It was thus not within the Commission's power to fashion an individually-tailored remedy, such as a monetary forfeiture, for KTMN(FM)'s failure to resume authorized operations within 12 months of going silent. The cases A-O cites do not persuade us otherwise. They do not address Section 312(g), focusing only on other rule violations. In fact, several of these cases pre-date Section 312(g) or involve non-broadcast services or permits which are not subject to Section 312(g).

16. **License Applications.** A-O argues that notwithstanding the language of Section 312(g), the Commission can renew the licenses of stations that have been silent for more than 12 months and license new construction by such stations.⁵¹ It argues that we should reinstate its renewal application as well as its license-to-cover application *nunc pro tunc* and process the applications to grant.⁵² A-O relies primarily on two staff actions. In one case, *Morradio*,⁵³ the Commission staff simultaneously issued a \$4,000 forfeiture, accepted a late-filed license renewal application, and granted partial STA for the station, which had operated 10 miles from its licensed site. The license for which renewal was sought

⁴⁹ See *KM Radio of St. Johns*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847 (2004) (\$4,000 forfeiture for construction of new FM station 900 feet from authorized site); *Maria L. Salazar*, Memorandum Opinion and Order, 19 FCC Rcd 5050 (2004) (\$34,000 forfeiture for multiple violations by FM station including \$4,000 for operations outside community of license); *Tekk Comm*, Forfeiture Order, 19 FCC Rcd 392 (EB 2004) (\$3,200 forfeiture for operating wireless equipment from an unauthorized site); *Multimedia Development Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 22649 (four notices of apparent liability totaling \$80,000 rescinded where receiver replaced offending licensee and forfeiture would harm innocent creditors) (WTB 2002); *Morradio*, Forfeiture Order, 14 FCC Rcd 5201 (CIB 1999) (\$4,000 forfeiture for operation at unauthorized site).

⁵⁰ See 47 U.S.C. § 503(b)(3)(A).

⁵¹ To the extent that A-O relies on *Southwestern Broadcasting Corp.*, Order, 11 FCC Rcd 14880 (1996), A-O misinterprets that case. Under the statute in effect at the time of the staff's decision, the Commission could not undo Section 312(g) expiration by acting on a license application or otherwise. In any event, that argument has been superceded by recent statutory revisions. See *infra* ¶ 25.

⁵² A-O also repeats arguments made in a waiver request submitted with the renewal application because it believes the staff did not consider those arguments. The rule for which A-O sought waiver, 47 C.F.R. § 73.3539, states that renewal applications are due four months prior to expiration of the normal license term. The rule is inapplicable to Section 312(g) expirations. Even had KTMN(FM) filed a license renewal application four months prior to Section 312(g) expiration (in its eighth month of silence) that application would have been dismissed once the license was forfeited under Section 312(g). See *Silent Station Authorizations*, 11 FCC Rcd at 16600; *Commission Implements Rules Regarding Silent Broadcast Stations*, Public Notice, 1996 WL 257503 (May 17, 1996).

⁵³ 14 FCC Rcd 5201 (CIB 1999).

had expired by its own terms, however, not by operation of Section 312(g).⁵⁴ The second staff action renewed the license of a previously silent station in Lordsburg, New Mexico, apparently without written decision.⁵⁵ A-O acknowledges that the record contained conflicting information about the date the station resumed operations, and its arguments that the staff renewed the license despite Section 312(g) relies on pleadings that were withdrawn and dismissed. We find both the *Morradio* decision and the Lordsburg action to be irrelevant to our analysis here.

17. A-O's arguments for renewal of its expired license are virtually identical to arguments rejected by the United States Court of Appeals for the D.C. Circuit on two occasions. In *Aerco Broadcasting*,⁵⁶ the court affirmed the Commission's dismissal of a license renewal application that was pending on the 12-month deadline for resumption of broadcasting. The renewal application in that case was held moot because "[t]he subject license was automatically forfeited as a result of [the station's] inactivity over a 12-month period"⁵⁷ Similarly, in *OCC Acquisitions*, the court upheld the Commission's dismissal of applications for license renewal and license modification, as well as a request for STA. The court agreed with the Commission that "when a license expires by operation of law under 47 U.S.C. [Section] 312(g) the Commission lacks discretion to extend the license term," and found that the Commission had adequately explained why "expiration by operation of Section 312(g) is unique."⁵⁸ The court therefore rejected a claim that the Commission should have reinstated a station's deleted call letters for the purpose of considering an application for renewal of license. As in *Aerco Broadcasting* and *OCC Acquisitions*, A-O's license and associated authorizations were forfeited pursuant to Section 312(g).⁵⁹ When a license terminates by operation of law, neither it nor associated applications can be revived through the Commission's license renewal process. The construction permit for Wofford Peak was thus forfeited along with the license, and any subsequent construction was unauthorized. The license renewal and license-to-cover applications were thus appropriately dismissed.⁶⁰

18. **Operating Authority/STA.** As discussed above, A-O completed construction at Wofford Peak and began to operate in July 2003, well after the forfeiture of A-O's authorizations. In

⁵⁴ The *Morradio* decision indicates that the station first went silent on October 21, 1998. As of the date of the decision, released April 2, 1999, a 12-month period had not yet passed. There is no indication that the station did not resume authorized operations within one year, *i.e.*, by October 21, 1999.

⁵⁵ See generally 47 C.F.R. § 0.445(e) (unpublished actions may not be relied upon as precedent).

⁵⁶ 51 Fed. Appx. 23 (*aff'g Carlos J. Lastras*, 16 FCC Rcd 17268 (2001) and *Letter to John A. Borsari, Esq.* (MMB Nov. 14, 2000)).

⁵⁷ *Id.* at 24.

⁵⁸ *OCC Acquisitions, Inc. v. FCC*, 64 Fed. Appx. at 790.

⁵⁹ A-O's argument of renewal discretion is even weaker than those rejected in *OCC Acquisitions* and *Aerco Broadcasting*. In each of these cases, the applicant had filed a timely application for license renewal prior to license expiration pursuant to Section 312(g). In contrast, A-O filed its July 2003, application for license renewal outside of the renewal window for New Mexico stations and after its license expired by operation of Section 312(g). Its June 2005, renewal application also was filed long after the license expired by operation of Section 312(g) and was a nullity.

⁶⁰ To the extent that A-O argues that the act of filing the renewal application affords it ongoing operating authority, we address that matter below. See *infra* ¶¶ 22-24.

response to A-O's disclosure of such operations in its July 3, 2003, applications, the staff contacted A-O on August 6, 2003, stating that "you are hereby advised to cease such operation immediately" As also discussed above, A-O nevertheless activated the station again in April 2004, arguing that it was qualified to broadcast under the emergency provisions of Section 73.1250 of the Rules⁶¹ and pursuant to Section 307(c)(3) of the Act, which provides that a license shall continue in effect pending final decision on a license renewal application. A-O also cited Section 73.3542(a), which allows the Commission to grant temporary authority "in extraordinary circumstances requiring emergency operation to serve the public interest."⁶² On April 13, 2004, following complaints to the Denver Office about those operations, the Media Bureau staff advised A-O that the station was without authority to operate, and that any operation would subject the station to monetary forfeitures. The staff rejected A-O's reliance on Section 73.1250 because that rule does not permit broadcasting but rather point-to-point messages for dispatch and rescue; the rule also does not authorize operations when a station's license has been forfeited. In response, A-O filed a request for STA to operate from Wofford Peak.

19. A-O argues that grant of STA would serve the public interest because Cloudcroft would otherwise lack public safety information that residents need to respond to snow, forest fires, drought, and mud slides. A-O submits statements from Alan Hale (a Cloudcroft resident) stating that KTMN(FM) provides information unavailable on more distant stations, and Gene Green, Cloudcroft's Chief of Police, stating that the station's snowstorm coverage was helpful. A-O also supplements its submission with a statement from Dave Venable, Mayor of Cloudcroft, stating that KTMN(FM) could be an asset to Cloudcroft if it disseminated information concerning fires, water rationing, and evacuations. A-O contends that other stations do not provide adequate service to Cloudcroft and that it could take years under the Commission's auction procedures to authorize another station on KTMN(FM)'s channel. In May 2005, A-O submitted a three-page petition signed by Cloudcroft residents and visitors stating that KTMN(FM) was an asset to Cloudcroft when it was on the air and that they would like the station to resume broadcasting.

20. The Commission's rules specify that authority to operate a station pursuant to STA is limited to permittees or licensees.⁶³ As of November 8, 2002, A-O no longer held a permit or license for KTMN(FM). Moreover, KTMN(FM)'s service record belies A-O's claim that it would be a reliable community resource during any local emergencies. KTMN(FM) was licensed for approximately thirteen months. During that time, it operated for only one month,⁶⁴ was unable to achieve full authorized power, and violated numerous rules -- including lack of an operating emergency alert system and an RFR violation that could have jeopardized the health of the forest rangers whose firefighting efforts A-O now champions. A-O has not shown that Cloudcroft is without any other radio service in the event of an emergency.⁶⁵ There are two other FM stations licensed to Cloudcroft. One of these is noncommercial

⁶¹ 47 C.F.R. § 73.1250(b).

⁶² 47 C.F.R. § 73.3542(a).

⁶³ See 47 C.F.R. § 73.1635. See also 47 U.S.C. §§ 309(b) and (f).

⁶⁴ Specifically, A-O was licensed on October 5, 2001, suspended operations on November 7, 2001, and remained silent for the next 12 months. A-O may also have operated for less than the minimum operating schedule during its one month of operations. A-O states that its "transmitter showed only 33 hours of total operation as of November 7, 2001, when a computer failure took the station dark." 2004 Supplement at 4.

⁶⁵ See generally *Michael Rice*, Memorandum Opinion and Order, 16 FCC Rcd 18394 (2001) (former licensee ordered to cease operations despite loss of service, where the area was served by other stations). A-O argues that

(continued...)

educational station KHII(FM), which is controlled by A-O's principal.⁶⁶ Additionally, engineering data indicate that Cloudcroft receives signals from stations licensed to other communities. While A-O observes that such stations generally direct programming to listeners outside Cloudcroft, it submits no evidence that such stations could not convey vital public safety information to their Cloudcroft listeners if so requested by local authorities in an emergency. Nor has A-O demonstrated the "extraordinary circumstances" required for grant of an emergency authorization under Section 73.3542. A-O supplies a June 4, 2004, letter from the Mayor of Cloudcroft stating that "currently we do not have any means of getting critical warning and essential information disseminated in a timely and life-saving manner to our residents."⁶⁷ Nevertheless, there is no indication or explanation of why the other stations licensed to Cloudcroft, including KHII(FM), would be unable to assist if an emergency arose. At the time of the Mayor's letter, KHII(FM) had been silent for an extended period. It resumed operations, however, on July 1, 2004. Furthermore, the loss of KTMN(FM) does not permanently remove a station from Cloudcroft. As the staff observed, a channel will remain allotted to Cloudcroft, and all interested entities will have the opportunity to apply for the vacant allotment. We find unpersuasive A-O's claim that the Commission should grant STA because it has not yet scheduled a filing window for the now-vacant Cloudcroft allotment.

21. A-O contends that, even without STA, it has authority to operate KTMN(FM) until the Commission or a court takes final action on its license renewal applications.⁶⁸ In support, A-O cites two Commission decisions and one court case.⁶⁹ We reject A-O's contention. First, these cases pre-date Section 312(g). Second, when the Commission has allowed licensees whose renewal applications have been denied to continue operating pending the exhaustion of a judicial appeal, it has done so as a matter of discretion.⁷⁰ A court also has recognized the Commission's ability to prohibit operations during the

(...continued from previous page)

some thinly populated areas near the Lincoln National Forest have radio service that is not reliable, but does not show that existing stations cannot address any such reliability issues. *See* 2004 Supplement at 23. *See also* note 66 *infra*.

⁶⁶ KNMB(FM) (a Class C commercial station) and KHII(FM) are licensed to Cloudcroft. Each of these stations has experienced temporary technical difficulties. KNMB(FM) is currently operating with reduced power from a temporary site pursuant to STA as the result of interference problems. KHII(FM) is currently operating but was silent with authorization due to technical problems during the following periods: April 1, 2003, through May 3, 2003; July 5, 2003 to July 1, 2004; and March 22, 2006 through February 6, 2007. KHII(FM) also notified the Commission of two brief periods of silence in 2004 and 2005. Robert Flotte, President and 100% owner of A-O, is also President, Director, and holds 100% interest in Southern New Mexico Radio Foundation, licensee of KHII(FM), Cloudcroft and KUPR(FM), Alamogordo, New Mexico. On October 22, 2007, the Commission received an application proposing to construct a new noncommercial station at Cloudcroft. *See* File No. BNPED-20071017ACL.

⁶⁷ 2004 Supplement, Exhibit A.

⁶⁸ *See* STA Requests at 2.

⁶⁹ *See Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6061 n.12 (1992); *Faith Center, Inc.*, Memorandum Opinion and Order, 82 FCC2d 1 (1980); *Commission for Open Media v. FCC*, 543 F.2d 861, 867 (D.C. Cir. 1976).

⁷⁰ *See Pinelands, Inc.*, 7 FCC Rcd at 6061 n.12 and cases cited therein.

appeal of an unfavorable license renewal decision.⁷¹ Finally, as discussed above, when a station's license expires pursuant to Section 312(g), all associated authorizations and applications are nullified. A license renewal application for a station whose license has already expired under Section 312(g) is thus a nullity and cannot give rise to any operating authority.

22. A-O was advised on January 3, 2003, that its license had expired automatically on November 8, 2002. As the staff subsequently advised, A-O's administrative appeal of that determination provided no operating authority. Non-hearing actions taken pursuant to delegated authority, unless otherwise ordered by the designated authority, are effective upon release.⁷² The staff's January 3, 2003, letter did not otherwise order. Nor did A-O's Application for Review stay the effectiveness of that decision. Although the Commission has discretion to stay the effectiveness of an order for which review is sought, it has not done so here.⁷³ Similarly, the filing of the September 4, 2003, petition for reconsideration of the dismissal of the license-to-cover and license renewal applications has no impact on the effectiveness of those actions.⁷⁴ The staff properly advised A-O multiple times that the station was without authority to operate.⁷⁵

23. In its 2004 Supplement, A-O argues that support for its operations can also be found in Section 307(c) of the Act, Section 558(c) of the APA, and Section 1.62 of the Commission's rules.⁷⁶ All of these provisions permit station operations while a renewal application is pending, but all presuppose that the application was properly filed. During the relevant time period, Section 307(c) of the Act stated that "the Commission *may by rule prescribe the period* or periods of which licenses shall be granted and renewed . . . Pending any hearing and final decision on such an application . . . the Commission shall continue such license in effect." (Emphasis added.) By subsequent legislation (*see supra* note 4) the term "any hearing" has been changed to "any administrative or judicial hearing," a change that does not affect the outcome of this case. Section 558(c) of the APA states: "When the licensee has made a *timely and sufficient* application for a renewal or a new license *in accordance with agency rules*, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." (Emphasis added.) Section 1.62 of our Rules provides for continued operations "where there is pending before the Commission *at the time of expiration* of license any *proper and timely* application for renewal of license." (Emphasis added.) A license-to-cover or license renewal application filed after Section 312(g) forfeiture of the station's license is neither proper, timely, sufficient, nor filed within the period prescribed by rule.

⁷¹ See *Peninsula Communications, Inc. v. FCC*, 55 Fed. Appx. 1 (D.C. Cir. 2003) (per curiam).

⁷² See 47 C.F.R. § 1.106(b)(1).

⁷³ See 47 C.F.R. § 1.102(b)(3).

⁷⁴ See 47 C.F.R. § 1.106(n).

⁷⁵ We reject A-O's claim that the staff was without authority to order A-O to cease broadcasting without either convening a hearing under 47 C.F.R. § 1.91 or determining that a hearing was waived pursuant to 47 C.F.R. § 1.92. Where the facts demonstrate that a station has failed to transmit broadcast signals for a consecutive 12-month period, Section 312(g) results in automatic cancellation, without requirement of a hearing.

⁷⁶ See 47 U.S.C. § 307(c); 5 U.S.C. § 558(c); 47 C.F.R. § 1.62.

24. Section 307(c) is designed to permit stations to continue operations when the agency is considering renewal of a license that has expired on its own terms.⁷⁷ To the extent that A-O equates Section 312(g)'s use of the word "expire" with license expiration at the end of a station's normal eight-year license term, A-O's understanding is inconsistent with Section 312(g)'s legislative history. Congress designed Section 312(g) to "terminate"⁷⁸ licenses by "automatic cancellation,"⁷⁹ and, as discussed above (at paragraph 2) the result is license forfeiture. Section 307(c) does not operate as an exception to Section 312(g), which was adopted after Section 307(c) and which provided no exemption from its terms based on the pendency or subsequent filing of any application. We find that all of the staff's actions with respect to KTMN(FM) were in accordance with Section 312(g), as then in effect.

25. **Effect of Legislation.** On December 8, 2004, legislation was signed into law which, *inter alia*, revised Section 312(g). The revised law retains all of the existing language of Section 312(g) but adds new language that provides, "the Commission may extend or reinstate [a] 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."⁸⁰ In its 2005 Supplement,⁸¹ A-O argues that the Commission must reinstate its license pursuant to this provision. A-O observes that the Act does not define "equity and fairness," and urges the Commission to adopt four "equitable maxims" for deciding Section 312(g) cases. One maxim urged by A-O -- and the only one of the four allegedly grounded in case law -- is that "equity abhors a forfeiture."⁸² A-O also argues that the Commission should follow non-Section 312(g) cases in which the Commission acted leniently based on concerns for equity and

⁷⁷ See *Miami MDS Co.*, 14 F.3d 658 (D.C. Cir. 1994); *Commission for Open Media v. FCC*, 543 F.2d 861, 867 (D.C. Cir. 1976).

⁷⁸ 141 Cong. Rec. S7881 (daily ed. Jun. 7, 1995) (the statute will "terminate broadcast licenses if a station is silent for more than 12 consecutive months") (emphasis added).

⁷⁹ H. Rep. No. 104-458, at 186 (1996) (the statute provides for "automatic cancellation of a broadcaster's license if the station does not transmit for 12 consecutive months") (emphasis added).

⁸⁰ 47 U.S.C. § 312(g) (1996), amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, Title IX, § 213(3) (2004).

⁸¹ Applications for Review and any supplement thereto must be filed within 30 days of public notice of the action to be reviewed. See 47 C.F.R. § 1.115(d). Although staff did not give prior authorization for A-O's late-filed 2005 Supplement, see *supra* note 15, we will consider it to the extent that it addresses legislation which was enacted after A-O's last opportunity to present such matters. Cf. 47 C.F.R. § 1.115(g)(1) (applicants may seek reconsideration of denial of application for review based on events occurring after last opportunity to present). In all other respects, we are dismissing the 2005 Supplement as late-filed.

⁸² 2005 Supplement at 5. A-O derives this principle from a case considering a California state law that late-filed insurance claims are not forfeited unless the insurer has shown it has been prejudiced. See *UNIM Life Insurance Company v. Ward*, 526 U.S. 358 (1999) ("*UNIM*") (cited in 2005 Supplement at 6). The United States Supreme Court acknowledged therein that "law abhors a forfeiture," but its decision was not based on that principle nor any principle of equity. Rather, the court stated that the state law was "mandatory for insurance contracts, not a principle a court may pliantly employ when the circumstances so warrant." *Id.* at 371. We find the *UNIM* holding concerning state insurance law inapposite to Section 312(g). The other three "maxims" urged by A-O are as follows: (1) equity looks to intent rather than to form; (2) equity looks on that as done which ought to be done; and (3) equity imputes an intention to fulfill an obligation. 2005 Supplement at 5.

fairness.⁸³

26. We reject A-O's reading of the legislation. The new provision does not change the automatic cancellation provision of 312(g) nor mandate any particular Commission action with respect to stations located outside Alaska. It states that the Commission "may extend or reinstate" non-Alaska licenses in certain circumstances. This limited, discretionary provision is phrased as an exception to the general rule that most affected licenses will be forfeited. Broadcast licenses continue to expire and are forfeited automatically at the end of 12 months of silence unless, prior to that time, the Commission has granted STA explicitly authorizing a longer period of silence. After the license has been forfeited, the Commission may reinstate the license upon an appropriate showing. For purposes of deciding whether any applicant's showing is sufficient under Section 312(g), as revised, we decline to adopt A-O's proposed maxims of equity.⁸⁴ Were the Commission to adopt them, the Commission would likely find any loss of license inequitable, nullifying Section 312(g). The Commission and its staff will determine on a case-by-case basis whether any purported equities associated with individual circumstances warrant reinstatement of a license forfeited pursuant to Section 312(g).

27. A-O's license expired on November 8, 2002, before the 2004 legislation was enacted. In any event, we do not find that A-O has met any of the statutory exceptions for reinstatement (*i.e.*, prevailing in an administrative or judicial appeal, changes in applicable law, or promotion of equity and fairness). We find unpersuasive A-O's claim that it should be viewed as more diligent than silent stations that originally caused Congress to enact Section 312(g), and that A-O's principal deserves another chance based on past broadcasting experience. Based on our consideration of the entire record, as discussed above, we find no legal or equitable basis to reinstate the forfeited license of KTMN(FM). In particular, A-O's circumstances are the direct result of its own public safety rule violations at James Ridge and its failure to complete construction in accordance with express permit conditions designed to prevent similar problems at Wofford Peak. Moreover, following forfeiture of the KTMN(FM) license A-O engaged in unauthorized construction and operation in defiance of staff orders.

III. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, that the April 10, 2003, Application for Review filed by A-O Broadcasting IS DENIED; that the September 4, 2003, and July 22, 2005, Petitions for Reconsideration filed by A-O Broadcasting, as supplemented, ARE DENIED; and that the Requests for Special Temporary Authorization filed by A-O on April 13, 2004, and April 15, 2004, ARE DENIED.

29. IT IS FURTHER ORDERED, that A-O Broadcasting Corporation's Wofford Peak tower, which lacks a current Commission construction permit or license, cannot be used for communications purposes. Until the tower is dismantled and removed, the structure will remain subject

⁸³ See 2005 Supplement at 6 (citing *Sam Bushman*, Memorandum Opinion and Order, 17 FCC Rcd 24808 (EB 2002) (finding equity and fairness a basis for rescinding \$7,000 forfeiture for failure to lock fence around transmitter); and *RKO General, Inc.*, Memorandum Opinion and Order, 89 FCC2d 361 (1982) (subsequent history omitted) (finding equity and fairness to station employees one reason to allow unqualified renewal applicant to broadcast during judicial appeal)).

⁸⁴ See *supra* note 82.

to the requirements of the Federal Aviation Administration and to any future action the Commission may take in coordination with the FAA pursuant to 47 U.S.C. Section 303(q).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary