

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

In the Matter of	)	
	)	
Silver Fish Broadcasting, Inc.	)	File Nos. BLH-20110323ABV, BMPH-
License Status of Silent Station	)	20110316AAK
DWTTT(FM), Stratford, NH	)	
	)	Facility ID No. 166038

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 10, 2014****Released: December 11, 2014**

By the Commission:

1. The Commission has before it the Application for Review (“AFR”) filed by Silver Fish Broadcasting, Inc. (“Silver Fish”) on December 18, 2013. Silver Fish seeks review of a November 18, 2013, Media Bureau (“Bureau”) decision.<sup>1</sup> The *Staff Decision* denied Silver Fish’s Request to reinstate its expired license, holding that Silver Fish was subject to automatic license expiration based on the statutory one-year period of silence provision of Section 312(g) of the Communications Act, as amended (“Act”),<sup>2</sup> and that the tolling provisions of Section 73.3598(b)(2) (the “Tolling Rule”) of our rules are inapplicable.<sup>3</sup> In the AFR, Silver Fish again argues that the Bureau should reinstate its license and that pursuant to the Tolling Rule and/or the “equity and fairness” provision for reinstatement of an otherwise expired license in Section 312(g).<sup>4</sup>

2. Upon review of the AFR and the entire record, we conclude that Silver Fish has failed to demonstrate that the Bureau erred. We thus uphold the Bureau’s decision for the reasons stated in the *Staff Decision*. As indicated there, the Tolling Rule, which tolls the expiration of a broadcast *construction permit* under certain limited circumstances, does not apply to this case because Silver Fish had completed construction before its construction permit expired, representing that construction had been completed in its license application, which was granted.<sup>5</sup> The filing of a Petition for Reconsideration of that license grant did not create a construction tolling situation.<sup>6</sup>

<sup>1</sup> *Silver Fish Broadcasting, Inc.*, Letter, 28 FCC Rcd 15816 (MB 2013) (“*Staff Decision*”). The *Staff Decision* also dismissed as moot a pending Petition for Reconsideration filed by White Mountains Broadcasting, LLC (“White Mountains”), against Silver Fish’s modification application (File No. BMPH-20110316AAK). This dismissal is not challenged.

<sup>2</sup> 47 U.S.C. § 312(g) (“If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in any administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.”).

<sup>3</sup> 47 C.F.R. § 73.3598(b)(2).

<sup>4</sup> AFR at 3.

<sup>5</sup> See response to Silver Fish’s FCC Form 302-FM, Section III, Item 7 (File No. BLH-20110323ABV), granted April 6, 2011; AFR at 1.

<sup>6</sup> *Staff Decision*, 28 FCC Rcd at 15817-18.

3. Furthermore, we reject Silver Fish's attempt to conflate the bases for tolling the deadline for construction of an unbuilt stations and those for reinstating a lapsed license under Section 312(g).<sup>7</sup> Although both situations may involve circumstances beyond the permittee's or licensee's control,<sup>8</sup> there is a fundamental difference between an unbuilt station with an outstanding construction permit and a constructed and licensed station that the licensee voluntarily removed from the air.<sup>9</sup> Construction of a broadcast station pursuant to a construction permit involves a major investment in transmission facilities and (if required) a main studio.<sup>10</sup> Through the Tolling Rule, the Commission has recognized that a challenge to the validity of the construction permit is a type of encumbrance that justifies tolling of the expiration date, and the obligation of the permittee to construct by that date.<sup>11</sup> In contrast, the filing of a petition for reconsideration of the grant of Silver Fish's license did not impede Silver Fish from continuing to operate the station, which had already been constructed, from the date the station went silent, April 7, 2011 (the day before the Petition was mailed to the Commission for filing by White Mountains), until the loss of its licensed site on December 9, 2011 due to a foreclosure action.<sup>12</sup> Moreover, notwithstanding the Bureau's repeated warnings to it that the station's license would expire if it did not resume operations by April 7, 2012,<sup>13</sup> Silver Fish made no attempt to resume operations with temporary facilities after the foreclosure. We specifically reject as meritless Silver Fish's contention that the pendency of the petition for reconsideration of the grant of its license application relieved it of its obligation to undertake diligent efforts to promptly resume broadcast operations. No equitable relief under Section 312(g) is warranted when a licensee's extended silence is the result of its own voluntary business decision.<sup>14</sup>

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<sup>7</sup> See AFR at 2-4; see also *Letter from A. Wray Fitch III to Secretary, FCC* (May 7, 2012) at 2 ("This request to extend the right to remain silent is on all fours with the rationale to toll a construction permit. The same equities apply.").

<sup>8</sup> See 47 C.F.R. § 73.3598(b) ("The period of construction for an original construction permit shall toll when construction is prevented by the following causes not under the control of the permittee . . ."), and *Staff Decision*, 28 FCC Rcd at 15818 (the Commission has reinstated lapsed licenses under Section 312(g) "in only a few cases, each of which involved silence for compelling reasons beyond the licensee's control").

<sup>9</sup> See *Staff Decision*, 28 FCC Rcd at n.14 and related text.

<sup>10</sup> See *Rainbow Broadcasting Co.*, Decision, 13 FCC Rcd 21000, 21021-22 (1998) (extensive litigation "effectively deprived Rainbow of an unencumbered 24 months in which it reasonably could have been expected to construct the station").

<sup>11</sup> See 47 U.S.C. § 319(b); 1998 Biennial Regulatory Review – *Streamlining of Mass Media Applications, Rules and Processes, Report and Order*, 13 FCC Rcd 23056, 23090 (1998), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999) (citing *Rainbow Broadcasting*).

<sup>12</sup> See *Staff Decision*, 28 FCC Rcd at 15818.

<sup>13</sup> *Id.* at 15817.

<sup>14</sup> Compare, e.g., *Zacarias Serrato*, Letter, 20 FCC Rcd 17232 (MB 2005) (former licensee not entitled to equitable relief pursuant to Section 312(g) when silence was due to business decision not to seek an alternate site) with, e.g., *V. I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259, 14262 (2006) (equitable reinstatement warranted where station's extended silence was due to destruction of towers in a hurricane and substantial damage to rebuilt facilities by a subsequent hurricane). We also reject Silver Fish's argument that it had a "right to remain silent" because of the economic risk of operating a station whose license was under challenge. See n.6, *supra*; see also AFR at 2-3. This argument flies in the face of the basic tenet of a licensee's public interest obligation, which is to provide service to the public. See *LKCM Radio Group*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 1045, 1048-50 (MB 2014).

4. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,<sup>15</sup> and Section 1.115(g) of the Commission's Rules,<sup>16</sup> the Application for Review filed by Silver Fish Fellowship, Inc. on December 18, 2013, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>15</sup> 47 U.S.C. § 155(c)(5).

<sup>16</sup> 47 C.F.R. § 1.115(g).