

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

In the Matter of)	
)	
Kingdom of God, Inc.)	Facility ID No. 34894
Former Licensee of Deleted Class A Television)	
Station DWKOG-LP, Indianapolis, IN)	

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 2016

Released: June 27, 2016

By the Commission:

I. INTRODUCTION

1. By this *Memorandum Opinion and Order*, we dismiss an Application for Review filed by Kingdom of God, Inc. (KOG), the former licensee of deleted Class A television station DWKOG-LP, Indianapolis, Indiana (Station), challenging a staff decision that denied a Petition for Reconsideration (Petition) of the Video Division's cancellation of the Station's license and digital construction permit, deletion of its call-sign, and dismissal of all pending applications.¹ Because KOG raises its substantive arguments for the first time in its AFR, we dismiss the AFR, pursuant to Section 1.115(c) of the Commission's Rules (Rules).²

II. BACKGROUND

2. On August 10, 2015, the Video Division (Division) issued a letter decision finding that the Station's license had automatically expired pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act) due to KOG's failure to transmit an authorized broadcast signal over the Station for 12 consecutive months, since at least 2009.³ Under that statutory provision, if a broadcast station "fails to transmit broadcast signals for any consecutive 12-month period," its license expires automatically at the end of that period.⁴ The Division's action followed an Enforcement Bureau field investigation in January and February 2015 that consisted of site visits; an in-person interview with the President and sole principal of KOG, Sister Sue Jenkins;⁵ and telephone interviews with Mr. Steve Whitesell, an independent contractor in the Indianapolis area who has serviced equipment at KOG's licensed site,⁶ and Mr. Mike Sercer, who volunteers as the Station's engineer.⁷ Based on the record, including the Enforcement Bureau's field investigation, the Division determined that the Station had been broadcasting from an unauthorized location and otherwise operating at variance from its licensed

¹ Application for Review (filed Mar. 8, 2016) (AFR).

² 47 C.F.R. § 1.115(c).

³ Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (Aug. 10, 2015) (*August 2015 Decision*).

⁴ 47 U.S.C. § 312(g).

⁵ See KOG's current FCC Form 323 Broadcast Ownership Report, File No. BOA-20130508ABM.

⁶ Mr. Whitesell was the former Chief Engineer for WHMB-TV, Indianapolis, Indiana.

⁷ Field Report for WKOG, Kingdom Of God, Inc., Indianapolis, Indiana, prepared by Agent John Kuzma, EBATS Case #: EB-FIELDNER-15-00018105 (Feb. 18, 2015), available at: http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/corrr_list.pl?Facility_id=34894 (Field Report).

parameters for at least six years. Citing pertinent judicial and Commission precedent, the Division concluded that the Station's unauthorized operation did not constitute transmission of a broadcast signal for purposes of Section 312(g).⁸ Accordingly, in accordance with that statutory provision, the Division cancelled the Station's license and digital construction permit, deleted its call-sign, and dismissed all pending applications.

3. In its Petition, KOG sought reconsideration of the *August 2015 Decision* and requested reinstatement of the Station's license based solely on its contention that, contrary to the Division's conclusion, the Station had not failed to transmit a broadcast signal for twelve consecutive months.⁹ In a letter decision dated November 6, 2015, the Division dismissed in part and otherwise denied the Petition.¹⁰ As an initial matter, the Division dismissed the Petition, finding that KOG had failed to timely file it with the Commission.¹¹ Alternatively, the Division denied the Petition on the merits and affirmed its decision below by concluding that, even if the Station had transmitted a broadcast signal at least once every twelve months since it had commenced operations in 1995, as KOG claimed in its Petition, since at least 2009, the Station had been operating from an "unauthorized location and operating with parameters at variance from its license."¹² As it had in its August 2015 Decision, the Division concluded that such unauthorized operation did not constitute transmission of a broadcast signal for purposes of preventing the automatic license cancellation provision of Section 312(g), relying upon and citing the same precedent noted in its August 2015 Decision.¹³

4. KOG filed a timely AFR on March 8, 2016.¹⁴ Therein, KOG argues, for the first time, that its operation of the Station during the period in question was not unauthorized: according to KOG, not only had it notified the Division that it was operating from a "temporary site," but the Division had approved such operation.¹⁵ Thus, KOG now contends that the Division "incorrectly" determined that KOG had failed to seek Commission approval to transmit a signal from that location until July 8, 2015,

⁸ *August 2015 Decision* at 3, n. 17.

⁹ Petition for Reconsideration, at 3 (dated Sept. 1, 2015) (Petition) ("Ever[] since we signed on the air (1995) we have never failed to broadcast a television signal at once (or more times) within every 12-month period....There is one FCC rule that we knew and practice well was to follow the rule of having our WKOG-LP signal broadcast within [] every yearly period").

¹⁰ Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (Nov. 6, 2015) (*November 2015 Decision*)

¹¹ *November 2015 Decision* at 2-3. The date-stamp on the Petition indicates that the document was not received by the FCC mailroom and thereby filed until September 10, 2015. KOG had thirty-days from August 10, 2015, the date appearing on the Division's letter decision, to file a petition or reconsideration. As such, KOG had until September 9, 2015, to file its Petition. See 47 C.F.R. § 1.106(f).

¹² *November 2015 Decision* at 3.

¹³ *Id.*; see *August 2015 Decision* at 3-4, n. 17.

¹⁴ After placing the *November 2015 Decision* in the mail, it subsequently came to the attention of Division staff that the letter was inadvertently mailed to KOG's previous P.O. Box address of record. On February 8, 2016, the Division mailed a copy of the decision to KOG's updated P.O. Box number. It also provided KOG with a new thirty-day period, until March 9, 2016, within which to file an appeal. Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau to Kingdom of God, Inc. (Feb. 8, 2015) (*February 2016 Letter*).

¹⁵ AFR at 3-6, paras. 12-21.

when it applied to modify its authorization for the Station to specify, *inter alia*, a new site.¹⁶ In support of its argument, KOG points to a series of STA requests that it filed between 2009 and 2015 that made reference to its past operation of the Station from a “temporary tower site.”¹⁷ KOG also first contends that, in declaring the Station license expired, the Division treated KOG differently from other similarly situated licensees by failing to exercise its discretion under the “equity and fairness” provision of Section 312(g) and reinstating the Station license.¹⁸ In support of that contention, KOG cites to the case of *John L. White*.¹⁹ Procedurally, KOG contends that the Petition was in fact filed in a timely manner and that the Division’s dismissal of it was improper.²⁰ Ultimately, KOG argues that the license for WKOG-LP and its dismissed applications should be reinstated.

III. DISCUSSION

5. Section 1.115(c) of the Rules provides, “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.”²¹ Because KOG presents its substantive arguments discussed above for the first time in its AFR, having failed to provide the Bureau the opportunity to consider any of them, we dismiss the pleading. As an independent and alternative basis for our action here, consistent with the standard set forth in Section 1.115(b)(2) of the Rules,²² we conclude that KOG has not demonstrated that the Division erred in its decision to deny the Petition, nor, in so acting, did the Division treat KOG differently from other purported similarly situated parties. Moreover, the record does not support KOG’s new contentions that the Division 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).

¹⁶ AFR at 4, para. 13. The AFR references LMS File No. 0000003010, a KOG July 8, 2015 modification application to relocate the Station and make other technical changes. In the *November 2015 Decision*, the Division discussed this application, noting that “the new site appears to be close to or at the non-licensed site from which the Station operated sporadically for at least the past six years.” The Division also noted that KOG had concurrently filed a request for STA to commence operation from the site proposed in that application. November 2015 Decision at 1-2; File No. BSTA-20150708ACA (Request for STA).

¹⁷ *Id.* at 4, para. 15. KOG argues that, by its STA requests, the Division was both alerted to and upon grant of two of those requests – in June and November 2009 – approved its operation from an alternate location. *Id.* at 4-5 paras. 15-19. KOG also contends that the Division’s failure to act on its subsequent STA requests to go or remain silent (referred to in the AFR as KOG’s “post-2009 STA requests”), instead continuing to operate the Station from its unauthorized facilities in reliance on the 2009 STA grants, deprived it of the “opportunity...to alter temporary facilities before a 312(g) death sentence could have become a possibility.” AFR at 5, para. 19.

¹⁸ *Id.* at 6-7, paras. 22-27.

¹⁹ AFR at 6, para. 23 (citing *John L. White*, Notice of Apparent Liability for Forfeiture and Order, 24 FCC Rcd 12541 (Aud. Div. 2009) (*John L. White*)).

²⁰ *Id.* at 7-10, paras. 28-38. The AFR includes documentation, as Exhibit 2, containing tracking information from the United States Postal Service showing that the Commission’s mail processing facility received the document on September 9, 2015, not September 10, 2015, as was indicated by the FCC Mailroom time-stamp placed on the Petition. Because our decision affirms the Division’s action denying the Petition on its merits, we need not reach a conclusion regarding the timeliness of the Petition. Whether or not the Division’s dismissal of the Petition was appropriate does not impact our ultimate conclusion that the Division’s cancellation of the Station’s license pursuant to Section 312(g) of the Act was proper.

²¹ 47 C.F.R. § 1.115(c).

²² 47 C.F.R. § 1.115(b)(2) (stating that the Commission may grant an application for review if the petitioner can demonstrate, among other factors, that (1) “[t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy;” (2) “[t]he action involves application of a precedent or policy which should be overturned or revised;” or (3) “[a]n erroneous finding as to an important or material question of fact.”).

6. KOG concedes that, since at least 2009, the Station has been operating from a location and with facilities that are different from those for which it was authorized.²³ Contrary to its contention that the Division approved such operation, an examination of KOG's STA requests reveals that each request solely sought authority for the Station to go or remain silent.²⁴ Furthermore, KOG fails to address the Division's finding that, in addition to KOG's operation from an unauthorized location, KOG was broadcasting at technical parameters otherwise at variance from those specified in its license.²⁵

7. Section 73.1745(a) of the Rules requires licensees to operate pursuant to the terms contained in their authorizations.²⁶ In order for a station to operate at variance from such terms, the licensee must file and have granted either an application to modify its station authorization or a request for STA, the latter pursuant to Section 73.1635 of the rules.²⁷ KOG failed to obtain a modification to its authorization and, between May 28, 2009 and March 19, 2015, filed eight STA requests to either go or remain silent.²⁸ Although KOG's May and November 2009 STA requests noting that the Station had been operating from a "temporary" site were granted, contrary to KOG's contention that the Division approved the Station operation at its "temporary tower site,"²⁹ the staff's grants related solely to the

²³ See Field Report at 2.

²⁴ In its May 2009 request, KOG represented, "WKOG-LP Channel 31, has been broadcasting on a temporary tower site and had to go off. We are working towards a more permanent [sic] site for WKOG-LP. This is a request for a six month silent STA." See File No. BLSTA-20090528AEC. The November 2009 request was for a six month extension of the previously granted STA, representing "we are working with a national bandwidth company who plans to help place our LPTV station on the air to be digital. Please grant a six-month extension of STA request." No mention is made of operation from the temporary facility. See File No. BLESTA-20091116ACE. In its June 3 and November 23, 2009 letters granting the requests, the Division stated that it was granting "silent authority," with no reference to operation at any temporary facility. Each letter also reminded KOG of the need to commence operations within 12 months from the date it ceased broadcasting or its license for the Station will "automatically expire," citing Section 312(g) of the Act. See letters from Hossein Hashemzadeh, Associate Chief, Video Division to Kingdom of God, Inc. (Jun. 3 and Nov. 23, 2009). With the exception of the November 2009 request, which was filed as a "Request to Extend STA," each STA request to which KOG refers in its AFR was filed on the form entitled "Notification of Suspension of Operations/Request for Silent STA" and KOG stated as the purpose of the filing, in response to Section I, Question 3, "Request for Silent STA."

²⁵ See *November 2015 Decision* at 3; Field Report at 3 and Exhibit 3 (noting that the antenna being used at the Station's unauthorized site has a maximum output of 300 watts. The Station is licensed to operate at 55 kilowatts).

²⁶ 47 C.F.R. § 73.1745(a).

²⁷ 47 C.F.R. § 73.1635. Such temporary operations are only authorized for "a limited period." 47 C.F.R. § 73.1635(a). In order to receive an extension of the initial STA period, a licensee must "demonstrate that any further extensions requested are necessary and that all steps to resume normal operation are being undertaken in an expeditious and timely fashion." 47 C.F.R. § 73.1635(a)(4). The Station's alleged limited operation since 2009 – albeit unauthorized and if true – would appear to be a poorly veiled attempt by KOG to merely evade license expiration under Section 312(g), not to resume normal operations to provide service to its community of license in an expeditious manner. See Petition at 3 ("[t]here is one FCC rule that we knew and practice well was to follow the rule of having our WKOG-LP signal broadcast within an every yearly period.").

²⁸ According to Commission records, since the May 2009 STA request was filed, the Station has been silent for all but approximately three months. For those periods it was operating, the Station was doing so from a location and at technical parameters that were never authorized. In fact, since December 25, 2005, the Station has been silent for all but approximately four months.

²⁹ AFR at 5.

requests before it – for the Station to go and remain silent.³⁰ The STA requests did not seek – and the staff’s action did not approve – KOG’s prior unauthorized operation or give KOG authority to operate the Station in the future at variance from its license. Because the staff cannot be held to render a decision on a request not before it, the fact that KOG’s “post-2009 STA requests” remain pending did not deprive KOG of the opportunity to engage in authorized operations prior to expiration of the license.³¹ Rather, it was KOG’s own action and inaction that resulted in the automatic expiration of its Station license pursuant to Section 312(g) of the Act. KOG alone is responsible for its lack of diligence to maintain authorized operations and the corresponding statutory consequences.

8. Indeed, KOG’s inclusion of statements in its requests for STA that the Station had been operating from a “temporary tower site”³² only bolsters the Division’s conclusion that the Station was in fact engaged in unauthorized operation since at least 2009. Interpreting KOG’s *ex post facto* statements as prospective requests for STA would not only conflict with the specific silent authority sought by KOG in each STA request, but would facilitate unauthorized or illegal operations prior to receiving Commission approval.³³ As the Division correctly noted in both its August and November 2015 Decisions, the Commission 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.³⁴ We conclude that the staff was correct when it determined that the Station failed to transmit a broadcast signal for a consecutive 12-month period and that, therefore, application of the automatic expiration provision of Section 312(g) was appropriate.

9. As to KOG’s new claim that it was treated differently by the Division from similarity situated parties, specifically the licensee in the case of *John L. White*, we disagree. Aside from the fact that *John L. White* was an Audio Division decision and accordingly not binding on the Commission,³⁵ we find that there are significant factual differences between that case and the one before us. In *John L. White*, the Audio Division concluded that imposition of a monetary forfeiture in lieu of license cancellation was warranted because the licensee, *inter alia*: (1) remained at its authorized site (although from a tower that it had rebuilt after its authorized structure had collapsed in a storm, mounting its antenna at a height other than that at which it was authorized); and (2) had sought and received Commission approval of an STA to operate with its modified facilities.³⁶ Here, neither of these considerations are present. KOG, 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

³⁰ Because KOG’s STA requests were for silent authority, with no mention of the licensee’s intention to sporadically operate from “temporary facilities,” the Division had no reason to analyze those facilities for compliance with the Commission’s technical requirements, including those to ensure that it would not cause harmful interference with other stations. Indeed, because KOG provided no technical information concerning such operations in its STA requests, there was no way for the Division to conduct such a review.

³¹ Such authorized operations could have included those consistent with the Station’s licensed parameters or operations at variance from those parameters that had been approved by the Commission pursuant to a granted modification application or STA.

³² See *e.g.*, File Nos. BLSTA-20090528AEC; BLSTA-20100513ACH; and BLSTA-20130723ACP.

³³ See 47 U.S.C. § 301 (providing that no person shall transmit radio signals except in accordance with authority granted by the Commission); *Eagle Broadcasting Group, Ltd.*, 563 F.3d 543, 552-553 (D.C. Cir. 2009).

³⁴ See, *e.g.*, *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 608, para. 10 (2008) (“*A-O Broadcasting*”); *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d at 545 (affirming Commission’s determination that station’s broadcast license had expired pursuant to Section 312(g) of the Act, due to its failure to broadcast at its authorized facility for one year).

³⁵ See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

³⁶ *John L. White*, 24 FCC Rcd at 12543.

modified facilities prior to its belated filing of the modification application and related STA request in July 2015.

10. The facts at issue in the case before us are more akin to those in the three other cases cited in the AFR, in which the Commission, Audio Division, on delegated authority, and the Court of Appeals, affirming the Commission, each determined that license cancellation under Section 312(g) resulting from unauthorized operation was appropriate.³⁷ In each of those cases, the licensee's unauthorized operation was at a different location from that at which it was licensed, the very misconduct in which KOG engaged here.

11. Finally, in response to KOG's new contention in its AFR that the "equity and fairness" language in Section 312(g)³⁸ mandates reinstatement of the Station license, again, because KOG did not make the argument in the Petition, and, because the Bureau accordingly had no opportunity to consider it, we also will dismiss that portion of the AFR pursuant to Section 1.115(c) of the Rules. As an alternative and independent reason for our action here, we note that our discretion under that provision of Section 312(g) is severely limited.³⁹ 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.⁴⁰ The Commission has declined to reinstate licenses where, as here, the failure to transmit a broadcast signal was due to the licensee's own actions, finances, and/or business judgments.⁴¹

³⁷ AFR at 7, paras. 25-26, nn. 14-16, citing *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 608, 611g (2008); *Eagle Broadcasting Group Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009); and *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239 (Aud. Div. 2009).

³⁸ Under Section 312(g), the Commission can reinstate an expired 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." 47 U.S.C. § 312(g).

³⁹ See *A-O Broadcasting*, 23 FCC Rcd at 617, para. 27 ("This limited, discretionary provision is phrased as an exception to the general rule that most affected licenses will be forfeited").

⁴⁰ See, e.g., *V.I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted where station's silence resulted from hurricane destruction); *Community Bible Church*, Letter, 23 FCC Rcd 15012, 15014 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air, but remained off air to promote air safety after discovering and reporting that FCC and FAA records contained incorrect tower information); *Mark Chapman, Court-Appointed Agent*, Letter, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from licensee's compliance with a court order).

⁴¹ See, e.g., *A-O Broadcasting*, 23 FCC Rcd at 617, para. 27 (reinstatement not warranted when site loss was a result of the licensee's rule violations and continued silence was a result of licensee's failure to complete construction at an alternate site); *ETC Communications, Inc.*, Letter, 25 FCC Rcd 10686 (MB 2010) (reinstatement not warranted where the licensee chose not to operate financially struggling station while offering it for sale); *Kirby Young*, Letter, 23 FCC Rcd 35 (MB 2008) (reinstatement not warranted where the licensee was not financially able to restore operations after transmitter failed). See also, *Kingdom of God*, Letter, 29 FCC Rcd 11589 (MB 2014) (Bureau rejects KOG's request for reinstatement of its permit for LPTV Station WKGK-LP, Kokomo, Indiana, expired pursuant to Section 312(g), under the "equity and fairness" language, finding that "the ultimate reason for the station's silence was due to KOG's business decision not to promptly find a permanent and suitable transmitter site," and concluding that KOG's silence was not the result of compelling reasons beyond the licensee's control, but, rather, "due to the licensee's own actions, finances and/or business judgments.").

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(c) of the Commission's rules, 47 C.F.R. § 1.115(c),(g), the Application for Review filed by Kingdom of God, Inc., IS DISMISSED.⁴²

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴² By *Order to Show Cause*, DA 12-383, rel. March 12, 2012, the Video Division directed KOG to show cause why its authorizations for the Station and for Station WKGK-LP, Kokomo, Indiana, should not be modified to specify each station as a low power television station. In light of our action herein, and the Bureau's termination of the WKGK-LP and related digital construction permit, also pursuant to Section 312(g) of the Act for failure to provide service for 12 consecutive months (*see supra* note 41, we direct the Division to terminate that proceeding. *See Kingdom of God, Inc.*, Letter, 29 FCC Rcd 11589 (MB 2014)).