

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

In the Matter of )
)
Pillar of Fire )
)
Cancellation of License for FM Translator Station ) BLFT-20060905AAL
DK255BL, Craig, Colorado ) Facility ID No. 139406

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 2017

Released: November 3, 2017

By the Commission:

1. FM translator station K255BL (now DK255BL), Craig, Colorado (Station), licensed to Pillar of Fire (POF), was off the air for a consecutive 12-month period ending on November 30, 2016. Under Section 312(g) of the Communications Act of 1934, as amended (Act), this meant that the Station’s license expired automatically as of December 1, 2016, unless the Commission took action to extend or reinstate the Station’s license.1 On March 13, 2017, POF filed a “Petition for Waiver” (Waiver Request) requesting that the Bureau do so.2 On July 12, 2017, the Audio Division, Media Bureau (Bureau) determined that the Station’s license had expired and deleted the Station’s call sign, finding that POF had not shown a valid basis for the Commission to reinstate the Station’s license.3 POF filed an Application for Review on July 25, 2017. We hereby affirm the Bureau’s decision.

2. In its Application for Review, POF argues that the Bureau should have granted its Waiver Request because POF, the licensee of “heritage” AM Station KPOF, Denver, Colorado, misunderstood the statutory limitation on the length of time a station may remain silent, and intended to use the translator to improve its service through the FCC’s AM Revitalization initiative.4 Specifically, POF argues that: 1) the Bureau should have found that POF’s reasons for extended silence warranted the exercise of discretion, rather than rejecting its request in a short decision;5 and 2) fairness and the public interest

1 47 U.S.C. § 312(g) (the license of any station that fails to transmit broadcast signals for any consecutive 12-month period expires automatically at the end of that period, unless extended or reinstated). As the Commission has noted, the agency does not have the authority to waive any provision of Section 312(g), but rather has the authority to extend or reinstate an otherwise 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.” Id.; see Buffalo Baptist Church, Memorandum Opinion and Order, 31 FCC Rcd 2393, 2394 n.6 (2016) (Buffalo).

2 Petition for Waiver of Pillar of Fire (filed Mar. 13, 2017).

3 Matthew H. McCormick, Esq., Letter Order, Ref. No. 1800B3-VM (MB July 12, 2017) (Letter Decision).

4 See Revitalization of the AM Radio Service, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145 (2015) (AM Revitalization Order).

5 Application for Review at 6-7. POF also argues that the Letter Decision was too brief and did not give sufficient explanation for the Bureau’s actions. Id. at 7-11. We disagree. The Letter Decision fully explained the Bureau’s actions and properly cited relevant holdings in support. See, e.g., Pamplin Broadcasting, Inc., Memorandum Opinion and Order, 23 FCC Rcd 649, 653 (2008) (staff’s analysis need not be a certain length if concise explanation is sufficient); Ernest T. Sanchez, Letter Order, 32 FCC Rcd 2132, 2134 (MB 2017) (agency’s reason for waiver denial will stand unless the agency’s reasons are “so insubstantial as to render that denial an abuse of discretion”). Moreover, the Letter Decision is consistent with the Commission’s recent Buffalo decision, which resolved

(continued....)

require reinstatement of the license to allow KPOF to participate in AM Revitalization.<sup>6</sup> In the *Letter Decision*, the Bureau rejected these arguments,<sup>7</sup> explaining that the Commission exercises its discretion under Section 312(g) to extend or reinstate a station's expired license "to promote equity and fairness" very strictly and generally only where the failure to transmit broadcast signals for 12 consecutive months is due to circumstances beyond the licensee's control.<sup>8</sup> The Bureau also noted that POF had received clear written warning regarding the impending Section 312(g) expiration date when the Bureau had previously granted the assignment of license application authorizing POF to acquire the Station's license from the former licensee, Professional Antenna, Tower and Translator Service (PATTs).<sup>9</sup>

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arguments largely identical to those raised by POF. *See Buffalo*, 31 FCC Rcd at 2393-94, para. 2; *see also Letter Decision* at 2-3 and n.15.

<sup>6</sup> Application for Review at 11-12.

<sup>7</sup> The *Letter Decision*, issued on July 12, 2017, also rescinded the grant of POF's license application for the Station's modification of facilities (FCC File No. BLFT-20170619ADZ), which had been inadvertently granted on June 28, 2017. *See Letter Decision* at 1, n.2 (stating that POF's "application was inadvertently granted on June 28, 2017 and is hereby rescinded sua sponte"). POF argues that the Bureau violated Section 312(c) of the Act by rescinding the license grant and cancelling the construction permit without first issuing an order to show cause. Application for Review at 10-11. However, no Section 312(c) violation occurred here because the Bureau rescinded the license grant within 30 days after the inadvertent grant, and the construction permit expired by operation of law due to the expiration of the Station's underlying license under Section 312(g). *See* 47 CFR § 1.113(a) (Bureau may, on its own motion, set aside any action taken by it within 30 days from the date of public notice); *Spirit Productions, Inc.*, Letter Order, 28 FCC Rcd 8875, 8877 (MB 2013) (construction permit is part of the underlying license and expires by operation of law when the underlying license expires). In addition, we disagree that POF deserves relief for expeditiously completing construction after recognizing its license had expired. *See* Application for Review at 11. Because any construction POF undertook after acknowledging the expiration of the Station's license in the Waiver Request was taken at POF's own risk, we see no strong public interest consideration or reasons of "equity and fairness" requiring reinstatement of POF's expired license.

<sup>8</sup> *Letter Decision* at 2, n.15, *citing V.I. Stereo Commc'ns Corp.*, Memorandum and Order, 21 FCC Rcd 14259, 14262, para. 8 (2006) (reinstating license where silence was due to destruction of towers in hurricanes); *Cnty. Bible Church*, Letter Order, 23 FCC Rcd 15012, 15014 (MB 2008) (FCC recognizes significance of airspace safety in extending expiration deadline where FCC and Federal Aviation Administration records contained incorrect tower information, for which licensee was not responsible); *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578, 6580 (MB 2007) (reinstating license where silence was due to licensee's compliance with court order); *compare Buffalo*, 31 FCC Rcd at 2393-94, para. 2 (licensee's belief that unexpired term of construction permit extended its silent period did not provide grounds for Section 312(g) reinstatement). We disagree that POF's circumstances are similar "in significant respects" to those of *Cnty. Bible Church*. *See* Application for Review at 9-10. In *Cnty. Bible Church*, which is summarized above, the FCC reinstated a license pursuant to Section 312(g) because "it would be unduly harsh to penalize [the licensee] for conscientiously initiating actions which directly promoted the integrity of the [antenna structure registration] system and advanced air safety goals." 23 FCC Rcd at 15014. In this case, POF failed to show any such regulatory compliance issue that would have impeded the resumption of Station operation on or before November 30, 2016. We also reject POF's argument that the Bureau "required [it] to meet a standard which has no statutory basis" because "the statutory provision which allows the Commission to extend or reinstate the license of a silent station does not require that any reasons for such action be matters beyond the licensee's control." *See* Application for Review at 2, 7-8. To the contrary, the Bureau correctly followed Commission case law interpreting the "equity and fairness" language of Section 312(g).

<sup>9</sup> *Letter Decision* at 2. PATTs and POF consummated the assignment of the Station's license on August 30, 2016. The assignment authorization, issued by the Bureau to PATTs and POF on May 10, 2016, alerted POF to the fact that the Station license would expire on December 1, 2016, if the Station had not returned to the air. Specifically, the assignment authorization stated, "Commission records reflect that [the Station] has been off the air since November 30, 2015. Therefore, the license for this station will expire as a matter of law if the station does not resume broadcast operations by December 1, 2016, 12:01 AM. *See* Pub. Law No. 104-104, 110 Stat. 56, Sec. 403(l), codified at 47 U.S.C. Section 312(g)." *See* FCC File No. BALFT-20160315ABU.

3. In the Application for Review, POF raises for the first time the argument that the Bureau's alleged errors and omissions caused POF to believe it had additional time to remain silent beyond the one-year mark set by Section 312(g). In the Waiver Request, POF acknowledged that its own misunderstanding caused it to allow the Station's license to expire.<sup>10</sup> In the Application for Review, POF now argues that its belief that it had additional time was "reasonable" and a circumstance over which POF "had no effective control."<sup>11</sup> POF argues that although the assignment of license grant issued by the Bureau to PATTS and POF on May 10, 2016, clearly stated that the license would expire on December 1, 2016, the construction permit granted to PATTS on August 16, 2016, for a three-year term, was silent regarding the license expiration.<sup>12</sup> Section 5(c)(5) of the Act and Section 1.115(c) of the Commission's Rules (Rules) bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass."<sup>13</sup> Accordingly, we will dismiss this new argument.<sup>14</sup> As a separate and independent ground for our decision, we reject this argument on the merits. First, it is well settled that a construction permit is considered to be part of the underlying license.<sup>15</sup> Accordingly, once the Station failed to resume broadcast operations by December 1, 2016, the license and the accompanying construction permit expired by operation of law under Section 312(g). Thus, for purposes of Section 312(g), the expiration date of the construction permit is immaterial. Section 312(g) explicitly states that the license expiration occurs "notwithstanding any provision, term, or condition of the license to the contrary."<sup>16</sup> There is no obligation on the Bureau's part to issue repeated reminders of a license's impending expiration when licensees and permittees are expected to know our rules.<sup>17</sup> Furthermore, the Commission has consistently ruled that misinterpretation of the law does not excuse its violation.<sup>18</sup>

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<sup>10</sup> Waiver Request, Appx. A (Declaration of Jack Pelon) at 2, para. 10 (citing his "mistaken belief" and "misunderstanding" of the deadline).

<sup>11</sup> Application for Review at 6-7.

<sup>12</sup> *Id.* at 4, 6-7.

<sup>13</sup> 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c). *See Access*, Memorandum Opinion and Order, 29 FCC Rcd 9735 (2014) (application for review raising new issue for first time dismissed).

<sup>14</sup> POF's Application for Review also presents a new argument that the reason the Station was off the air was the loss of consent to carry its primary station, which POF argues is a matter beyond the control of the Station's licensee. *See* Application for Review at 8-9. This argument was never previously presented to the Bureau by POF, and therefore this portion of the Application for Review will also be dismissed. *See* note 13 *supra*. As a separate and independent ground for our decision, we note that POF has failed to show any circumstance beyond its control, in the three months it was the licensee of the Station (*i.e.*, from August 30 to November 30, 2016), that would have prevented POF from finding another primary station to rebroadcast.

<sup>15</sup> *See Implementation of Section 403(l) of the Telecommunications Act of 1996 (Silent Station Authorizations)*, Order, 16599, 16601, para. 6 (1996) (*Implementation Order*) ("With the expiration of a station's license, all associated authorizations related to that station necessarily would become null and void because there can be no such continued authority absent a valid station license."); *see also* note 7 *supra*.

<sup>16</sup> 47 U.S.C. § 312(g).

<sup>17</sup> *See Lake County Cmty. Radio*, Forfeiture Order, 31 FCC Rcd 7659, 7660, para. 6 (MB 2016) (violations resulting from inadvertent error are willful violations); *S. California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, para. 3 (1991), *recon. den.*, 7 FCC Rcd 3454 (1992) (stating that "inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance"); *see also Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920, 1930 (2015) ("In the usual case, 'I thought it was legal,' is no defense.").

<sup>18</sup> *See Word of God Fellowship, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 13279, 13280 (2014) (rejecting licensee's argument that its "good faith" misunderstanding of Commission action should provide grounds for Section 312(g) discretion).

4. We further reject POF's argument that its misunderstanding about the status of the Station's license "was, in fact, a circumstance over which it had no effective control."<sup>19</sup> When POF became the licensee of the Station on August 30, 2016, it became responsible for knowing whether the Station's silence was authorized under the Rules, when the silent authority would expire, and whether continued silence beyond November 30, 2016 would jeopardize the Station's license.<sup>20</sup> POF's decision to not carefully review the Station's licensing status, and instead rely on a mistaken assumption about the import of the construction permit, is a matter that was within its control.<sup>21</sup> We thus reject POF's implicit premise that it is not responsible as a broadcast licensee for understanding the requirements of the Act, the Commission's rules, and the terms of its authorizations. In any event, in this case POF was, or should have been, well aware of the status of the Station's license. After receiving Bureau approval of the proposed sale, PATTS and POF mutually agreed to close on the sale of the Station on August 30, 2016. Prior to closing on that transaction, POF had the opportunity to review all relevant Commission records for the Station, including: (1) the assignment application grant dated May 10, 2016, warning that the Station's license would automatically expire on December 1, 2016, if the station did not resume operation prior to that date; (2) the construction permit issued to PATTS on August 16, 2016, for the proposed relocation of the Station; and (3) the extension of silent authority requested by PATTS on July 27, 2016, and issued to PATTS on August 29, 2016, authorizing the Station to remain silent until November 30, 2016, while repeating the warning that, if the Station did not resume operation prior to December 1, 2016, the Station's license would expire.<sup>22</sup>

5. Upon review of the Application for Review and the entire record, we conclude that POF has not demonstrated that the Bureau erred, and we affirm the Bureau's decision. The Commission has consistently declined to exercise its Section 312(g) discretion when, as here, station silence is the result of

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<sup>19</sup> See Application for Review at 8.

<sup>20</sup> See 47 CFR § 74.1263(c) and (e).

<sup>21</sup> We reject POF's attempt to distinguish the Commission's decision in *Buffalo*. POF claims that the licensee in *Buffalo* had received an order to show cause why its license should not be cancelled, whereas POF "recognized the issue on its own and brought the matter to the Commission's attention." Application for Review at 9. (In reality, the licensee in *Buffalo* had received a letter with the heading "Notification of License Expiration." See FCC File No. BLL-20100304AAI.) However, POF fails to cite to any authority, in case law or otherwise, suggesting that the outcome of the case should differ depending on whether the Section 312(g) issue is raised first by the agency or by the licensee. To the contrary, this distinction is irrelevant because Section 312(g) is self-executing, in that license expiration occurs solely due to the passage of time. See *Implementation Order*, 11 FCC Rcd 16599-600, para. 3. In addition, by the time POF filed the Waiver Request, the Station had been silent without Commission approval for months, which would have been a violation of 47 CFR § 74.1263 if not for the Station's license expiration as of December 1, 2016. Accordingly, this is not a factor that favors POF under Section 312(g)'s "equity and fairness" standard. POF further argues that *Buffalo* is distinguishable because the licensee in that case received two warnings about license expiration, first in the grant of its assignment application and then again, after the grant of a construction permit to modify its station, when it applied for and received an extension of silent authority. Application for Review at 9. However, as shown above, the same sequence of warnings occurred here—warnings that POF was aware of or should have been aware of before it acquired the Station or before the Station's silent authority and license expired as a matter of law. In any event, prior to license cancellation, POF had been fully informed about the impending Section 312(g) expiration date when the Bureau granted the assignment of license application. See note 9 *supra*.

<sup>22</sup> See Letter from Lisa Scanlan, Assistant Chief, Audio Division, Media Bureau, to Alan B. Greager, PATTS (Aug. 29, 2016) (FCC File No. BLESTA-20160727ABQ) ("PATTS's request is granted. Accordingly, Special Temporary Authority is granted to permit Station K255BL to remain silent until November 30, 2016. **Notwithstanding the grant of this Special Temporary Authority, the broadcast license for Station K255BL will automatically expire as a matter of law if broadcast operations do not resume by 12:01 a.m., December 1, 2016.**") (emphasis in original).

a licensee's own inaction and/or exercise of business judgment.<sup>23</sup> Furthermore, the Commission has held that its *AM Revitalization Order* did not change the interpretation of Section 312(g) as it applies to AM stations.<sup>24</sup>

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,<sup>25</sup> and Section 1.115(c) of the Commission's Rules,<sup>26</sup> the Application for Review IS DISMISSED to the extent indicated above, and otherwise IS DENIED pursuant to Section 1.115(g) of the Commission's Rules.<sup>27</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>23</sup> The Commission has declined to reinstate broadcast licenses that have expired by operation of law where, *inter alia*, failure to resume operations was due to the licensee's own actions, finances, and/or business judgments. *See, e.g., A-O Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617, para. 27 (2008) (not reinstating license where site loss was due to licensee's rule violations and continued silence was due to failure to complete construction at an alternate site); *New Visalia*, Memorandum Opinion and Order, 29 FCC Rcd 9744 (2014) (not reinstating license due to the alleged health problems of the licensee's principal).

<sup>24</sup> *See WJBW, LLC*, Memorandum Opinion and Order, 32 FCC Rcd 2301, 2304, para. 8 (2017) (AM Revitalization does not provide reason to exercise discretion under Section 312(g)). We, thus, reject POF's argument that cancellation of its license under Section 312(g) was "contrary to Commission policies and its stated goals [ ] adopted [in] the AM Revitalization program." *See* Application for Review at 12-14.

<sup>25</sup> 47 U.S.C. § 155(c)(5).

<sup>26</sup> 47 CFR § 1.115(c).

<sup>27</sup> 47 CFR § 1.115(g).