

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

In the Matter of)	
)	
Roy E. Henderson)	
)	
Cancellation of License for KROY(FM), Palacios, Texas)	BLH-20140325AAE Facility ID No. 77693
)	
Application for Renewal of License)	File No. BRH-20130328ABT
Application for Assignment of License)	File No. BALH-20161128ADK

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 2018

Released: March 26, 2018

By the Commission:

1. By this Memorandum Opinion and Order, we deny the December 11, 2017, Application for Review (AFR) filed by Roy E. Henderson (Henderson), the former licensee of DKROY(FM), Palacios, Texas (the Station). Henderson seeks review of a November 9, 2017, letter decision by the Audio Division, Media Bureau (Bureau).¹ In the *Letter Decision*, the Bureau upheld on reconsideration: its finding that the Station’s license automatically expired under Section 312(g) of the Communications Act of 1934, as amended (the Act);² its decision declining to reinstate the license; deletion of the call sign for Station KROY(FM); and the dismissal of the above-referenced renewal and assignment applications as moot. For the following reasons, we affirm the Bureau’s actions.

2. *Background.* From December 26, 2009, to March 25, 2014, Station KROY(FM) either was silent or operated sporadically with unauthorized facilities.³ Accordingly, on January 11, 2017, the

¹ *Bennett G. Fisher, Esq.*, Letter, 32 FCC Rcd 9371 (MB 2017) (*Letter Decision*).

² 47 U.S.C. § 312(g).

³ *See John C. Trent, Esq.*, Letter, Ref No. 1800B3-CEG (MB Jan. 11, 2017) (*January 2017 Decision*). As fully detailed in the *January 2017 Decision*, the Station’s original antenna tower (Robbins Slough Site) was dismantled in 2007, and the Station remained silent from October 24, 2007, to October 23, 2008, pursuant to two special temporary authorizations (STAs). *See* File Nos. BLSTA-20071106ADC (November 8, 2007, grant of request for silent STA; expired on May 6, 2008); BLESTA-20080505AEK (grant of request to extend silent STA). The Bureau subsequently issued two STAs to the Station to operate at an interim site (Palacios Site). The first STA was granted in October 2008 and expired in April 2009. The second STA was granted on June 25, 2009, and expired on December 25, 2009, after which the Station lacked Commission authority to operate at the Palacios Site or any site other than the original (dismantled) site (Robbins Slough Site). After the second STA expired, Henderson continued to operate the Station on an unauthorized basis at the Palacios Site until March 2, 2012. *See January 2017 Decision* at 2. In an October 16, 2014, Declaration from Ryan Henderson, the General Manager of KROY(FM), Mr. Henderson admitted that after that date, the Station went silent for nearly a year, from March 2, 2012, until February 28, 2013. *See* Declaration of Ryan Henderson, attached as Exhibit to October 17, 2014, Response to Notice of Inquiry Issued August 24, 2014 (declaring that “the Station was taken silent form March 2, 2012 until February 28, 2013.”). Following this extended silent period, the Station operated on an unauthorized basis for two brief periods, *i.e.*, from March 1-9, 2013, at the Palacios Site and from December 23, 2013 until January 2, 2014, at an undisclosed site, and was silent for the majority of the one-year period between March 2013 to March 2014. *See* Declaration of Ryan Henderson at paras. B-C (“The Station was returned to the air on March 1, 2013 and was operating and on the air until March 9, 2013, at which time a request was filed for silent authority. The station remained silent from

(continued....)

Bureau found that the Station's license had automatically expired under Section 312(g).⁴ Section 312(g) of the Act provides for automatic expiration of a broadcast station's license as a matter of law upon failure to transmit a broadcast signal for 12 consecutive months.⁵ The Act, however, allows the Commission to reinstate a terminated license if, in the Commission's judgment, such action would promote "equity and fairness."⁶

3. In the *Letter Decision*, the Bureau declined to reinstate the license pursuant to the "equity and fairness" provision of Section 312(g) and affirmed the basic and well-established principle that unauthorized operation is not considered a broadcast signal for the purpose of Section 312(g).⁷ The Bureau also rejected: (1) Henderson's argument that the Bureau's cancellation of the Station's license was inconsistent with the Commission's practice of accepting late-filed renewal applications and (2) Henderson's assertion that the Bureau staff violated the general principles of agency bias and the Commission's *ex parte* rules. In the AFR, Henderson does not dispute that the automatic expiration provision of Section 312(g) was triggered by the circumstances of this case.⁸ Instead, Henderson raises, often verbatim, the same arguments the Bureau rejected in the *Letter Decision*. Specifically, Henderson asserts that the Bureau: (1) misapplied Section 312(g) of the Act by not reinstating the license for reasons of equity and fairness; (2) ignored Section 307 of the Act;⁹ (3) violated Henderson's Fifth Amendment rights to equal protection; and (4) violated the Commission's *ex parte* rules and was biased against him.¹⁰ On March 20, 2018, Henderson filed a supplement to the Application for Review.¹¹

4. *Discussion.* Upon review of the AFR and the entire record, we conclude Henderson has failed to demonstrate the Bureau erred. We, therefore, deny the AFR and affirm the Bureau's *Letter Decision*.

(Continued from previous page) _____

March 9, 2013 until December 22, 2013. On December 23, 2013 the station was returned to the air and remained on the air until January 2, 2014." The Station requested program test authority (PTA) and filed a license application for a new permanent authorized site (Matagorda Site) on March 25, 2014. Accordingly, for over four years (*i.e.*, December 26, 2009 (the date on which the second STA expired) through March 25, 2014 (the date on which Henderson requested PTA and filed the license application)), the Station was either silent *or* engaged in unauthorized operations. See *January 2017 Decision* at 2; see also *Letter Decision*, 32 FCC Rcd at 9371. More detailed facts of this matter are set forth in the Bureau's letter decisions.

⁴ 47 U.S.C. § 312(g); see also *January 2017 Decision*. The Bureau found that the Station's license expired as a matter of law on or about December 26, 2010. *Id.* at 3.

⁵ 47 U.S.C. § 312(g). See also *Kingdom of God, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 3654 (2017), appeal pending in D.C. Circuit (*Kingdom of God*); *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008), *aff'd sub nom. Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009) (unauthorized, unlicensed broadcasts cannot constitute transmission of broadcast signals to avoid termination under Section 312(g)) (*Eagle*).

⁶ See 47 U.S.C. § 312(g). The Commission conducts a case-by-case factual analysis to determine whether reinstatement would promote equity and fairness. It has exercised this statutory discretion only when the failure to timely resume broadcasts was for a compelling reason beyond the licensee's control. See, e.g., *V.I. Stereo Comm'n Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstating license where station's silence was attributable to destruction of towers in hurricane) (*V.I. Stereo*).

⁷ See *Letter Decision* (citing *Kingdom of God*; *Eagle*, *supra* note 5).

⁸ AFR at 2-4. See also *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009) (upholding the FCC's determination that the station's license had expired pursuant to Section 312(g) where the station, for 12 consecutive months, was silent for an extended period of time and briefly transmitted broadcast signals from an unauthorized and unlicensed facility).

⁹ 47 U.S.C. § 307(a).

¹⁰ AFR at 2.

¹¹ See Supplement to Application for Review, dated March 20, 2018. See *infra* note 16.

5. First, we reject Henderson's allegation that the Bureau misapplied Section 312(g) of the Act by refusing to exercise its discretion to reinstate the Station's expired license to "promote equity and fairness."¹² The Commission exercises such discretion under Section 312(g) very strictly and generally only where the failure to transmit broadcast signals for 12 consecutive months is due to compelling circumstances beyond the licensee's control.¹³ Conversely, the Commission has consistently declined to exercise its Section 312(g) discretion when, as here, station silence is the result of a licensee's own inaction and/or exercise of business judgment.¹⁴ Moreover, the U.S. Court of Appeals for the D.C. Circuit has held that in assessing a licensee's rights under Section 312(g), "unauthorized and unlicensed transmissions are no better than silence."¹⁵

6. It is uncontroverted that between December 2009 and March 2014 the Station was either silent or operated intermittently from an unauthorized and unlicensed site.¹⁶ In the AFR, Henderson again attempts to minimize this transgression by arguing that it "had no knowledge that it ever operated from an unauthorized location," and by placing blame on its engineer for not making the necessary filings with the Commission.¹⁷ As the Bureau previously explained, however, it is axiomatic that a licensee is directly responsible for compliance with the Commission's rules and cannot evade responsibility by attributing

¹² See 47 U.S.C. § 312(g).

¹³ See, e.g., *V.I. Stereo*, 21 FCC Rcd at 14262, para. 8.

¹⁴ 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) (*A-O Broadcasting*); *Buffalo Baptist Church*, Memorandum Opinion and Order, 31 FCC Rcd 2394, para. 2 (2016) (not reinstating license where licensee's belief that unexpired term of construction permit extended its silent period) (*Buffalo Baptist Church*).

¹⁵ *Eagle*, 563 F.3d at 553; see also *James McCluskey, Ph.D.*, Letter Order, 27 FCC Rcd 6252, 6254-55 (MB 2012).

¹⁶ See *supra* note 3. Henderson's supplement included a "Clarification of Declarations of Ryan Henderson," dated March 20, 2018, in which some of the specified dates regarding when the Station was silent differ from those specified in Mr. Henderson's October 16, 2014, Declaration. See Clarification of Declarations of Ryan Henderson, attached as Exhibit to Supplement to Application for Review, dated March 20, 2018 ("In a prior declaration ... I stated inaccurately that we were off the air from March 2, 2012 until February 28, 2013. Upon my recollection, and upon careful review of my records, we were actually off from March 2, 2012 until August that year, and broadcasting from a trailer I set up there until March 9, 2013."). Further, in the March 20, 2018, declaration, Mr. Henderson also states that the Station was off the air from "January 2, 2014 until February 25, 2014 On February 25, 2014 KROY(FM) was returned to the air pursuant to BPH-20120713ADI and BLH-20140325AAE." Commission rules require that the application for review and any supplement thereto be filed within 30 days of public notice of such action. See 47 CFR § 1.115(d). Henderson filed the supplement more than four months after public notice of the challenged *Letter Decision*, and therefore it is untimely. In addition, we note that the supplement raises facts upon which the Bureau had been afforded no opportunity to consider, in violation of 47 CFR § 1.115(c). Accordingly, we dismiss Henderson's supplement. Even were we to consider it, we note that the February 25, 2014, date is inconsistent with the March 25, 2014, date the Station requested PTA and filed its license application. And, in any event, these factual discrepancies do not undermine our conclusion that for over four years (*i.e.*, December 26, 2009 (the date on which the second STA expired) through March 25, 2014 (the date on which Henderson requested PTA and filed the license application)), the Station was either silent or engaged in unauthorized operations. See *January 2017 Decision* at 2; see also *Letter Decision*, 32 FCC Rcd at 9371.

¹⁷ AFR at 3. As further support for reinstatement, the AFR tries to trivialize the violation by characterizing it as a "paperwork error." See AFR at 3, para. 4 ("Here the Commission has pulled a station license for what???...a paperwork error?!"); *id.* at 5, para. 8 ("Here we have unintentional paperwork errors and the Commission...made the wrong choice in denying Henderson his license renewal"); *id.* at 6, para. 9 (arguing unequal treatment because in other similar cases, licensees were able to maintain their license "despite errors in paperwork"). The Station's failure to file a third STA request to operate from the Palacios Site, while continuing to operate (sporadically and unauthorized) from the Palacios Site, is not a mere "paperwork error." Unauthorized operations can have serious consequences to life and safety, thus necessitating Commission review and scrutiny of any temporary or permanent change in technical facilities or operations.

the misconduct to a Station agent or employee.¹⁸ Henderson alone is responsible for his lack of diligence to maintain authorized operations and the corresponding statutory consequences. Thus, the station's failure to transmit authorized broadcast signals for 12 consecutive months was clearly not due to compelling circumstances beyond the licensee's control.¹⁹

7. Second, we also reject Henderson's argument that the Bureau "completely ignored its Congressional mandate" under Section 307 of the Act²⁰ to consider the public interest when it found that the Station's license automatically expired under Section 312(g) and declined to reinstate it, thus "depriving Palacios of its only commercial station."²¹ The public interest would not be served by reinstating a license of a former licensee that has continuously failed to provide its community with reliable, consistent, authorized service. Rather, when a station fails to provide promised service to its community for a period of 12 consecutive months, Section 312(g) reflects a determination that ordinarily the public interest is served by terminating the license so that an authorization may ultimately become available to others that will, in fact, provide continuous service to the community.²²

8. Third, we reject Henderson's attempt to again conflate the bases for granting a late filed license renewal application²³ with those for reinstating a license under Section 312(g) of the Act and his

¹⁸ See *Letter Decision*, 32 FCC Rcd at 9374; see also e.g., *Entercom License LLC*, Hearing Designation Order, 31 FCC Rcd 12196, 12226-27, para. 75 (2016). Moreover, Henderson's claim of ignorance is, in any event, belied by his earlier efforts to file and extend his Palacios Site STA. We likewise reject Henderson's suggestion that the Station's noncompliance was "reasonable" because the Station "Management was also in regular contact with the FCC enforcement staff, who never indicated they were operating from an unauthorized location." See AFR at 3, para. 2. It is not the responsibility of FCC staff to remind regulatees of our rules, their responsibilities, and potential rule violations. See, e.g., *Pillar of Fire*, Memorandum Opinion and Order, FCC 17-144, para. 3 (rel. Nov. 3, 2017) ("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").

¹⁹ Finally, we reject Henderson's reliance on *Southwestern Broadcasting Corp.* In the AFR, Henderson again attempts to rely on *Southwestern*, a case involving an outdated ad hoc processing policy, to support the reinstatement of its license. See *Southwestern Broadcasting Corp.*, 11 FCC Rcd 14880 (1996) (*Southwestern*). The Commission previously rejected arguments largely identical to Henderson's reliance on *Southwestern*, explaining that *Southwestern* "involved an ad hoc processing policy only used during a one-year transition period between Section 312(g)'s enactment in 1996 and the date upon which silent station licenses would first expire for non-operation in 1997. That processing policy expired long ago and has no bearing on [a licensee's] failure to transmit broadcast signals over the Station with authorized facilities for 12 consecutive months." *Christian Broadcasting of East Point*, Memorandum Opinion and Order, 30 FCC Rcd 13975, 13976, para. 3 (2015) (*Christian Broadcasting*). After *Southwestern* was decided, Congress amended Section 312(g) by adding language giving the Commission discretion to "extend or reinstate" a license in order to, *inter alia*, "promote efficiency and fairness." See 47 U.S.C. § 312(g) (2004) (amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004)). As explained above, we do not find that the facts of this case present circumstances in which it is fair or equitable to reinstate the Station's license.

²⁰ 47 U.S.C. §307(a) ("The Commission, if public convenience, interest, or necessity will be served thereby shall grant to any applicant therefor a station license...").

²¹ AFR at 6.

²² See, e.g., *Christian Broadcasting*, 30 FCC Rcd at 13975, para. 3 (explaining that Section 312(g) of the Act reflects the will of Congress to automatically terminate licenses that fail to provide service for 12 consecutive months so the authorization may become available to others that will provide such service). For these reasons, we likewise reject Henderson's argument that an "appropriate showing" for reinstatement under Section 312(g) has been made where, "as a result of Staff action, [] Palacios is without its own local commercial station." See AFR at 4, para. 4.

²³ See 47 U.S.C. § 309(k). The Commission has frequently allowed broadcast station licenses to be renewed even when the license renewal application was filed after the license term expired. See, e.g., *Atlantic City Board of Education*, Memorandum Opinion and Order, 31 FCC Rcd 9380 (2016) (*Atlantic City Board of Education*), *aff'd*, *Press Communications v. FCC*, 875 F.3d 1117, 1124 (D.C. Cir. 2017) (finding that the short spacing defect was

(continued....)

argument that the Bureau violated his Fifth Amendment equal protection rights by treating the two situations differently. In the context of Section 312(g), Congress has made it clear that a license expires at the end of 12 months of silence.²⁴ In contrast, the renewal provisions of the statute²⁵ contain no such language regarding automatic expiration, *i.e.*, nothing in the statutory text compels the conclusion that a license is automatically forfeited when the licensee does not file a timely renewal application. Moreover, as the Bureau explained, there are critical differences between the two situations in terms of intentionality of the acts involved, potential for interference to other stations, and disruption to our allocations framework.²⁶ Moreover, the Commission has previously rejected a similar argument, finding that “the decision to renew a license under Section 309(k) has no relevance to the issue of whether to reinstate a license that automatically cancels under Section 312(g) based on considerations of equity and fairness.”²⁷

9. Finally, we reject Henderson’s argument that alleged bias on the part of Media Bureau staff requires “immediate reversal” of the *Letter Decision*.²⁸ It is well settled that in making a claim of bias, a litigant must overcome a presumption of honesty and integrity which accompanies administrative adjudicators.²⁹ Here, the record does not show bias on the part of Bureau staff in rendering the November 9, 2017 *Letter Decision*.³⁰ In addition, we have taken a fresh look at the facts of this case and, based on our independent judgment, find that the Bureau reached the correct decision, fully consistent with

(Continued from previous page) _____
independently sufficient to support the FCC’s order and thus declining to address the license renewal argument), *petition for cert filed sub nom., Press Communications v. FCC* (February 22, 2018).

²⁴ See 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.”).

²⁵ See 47 U.S.C. §§ 307(c), 309(k).

²⁶ See *Letter Decision*, 32 FCC Rcd at 9373. Although a late filed renewal application is a violation of the Commission’s rules, there are generally no threats to public safety or violations of the public’s interest in continuity of service assuming the station continues to operate at its previously licensed parameters. In contrast, when a station engages in unauthorized operations or is silent for over 12 consecutive months, there are potential serious consequences, including interference to other stations, potential threats to life and safety due to the lack of FAA clearance, and the deprivation of continuous and reliable service to the public.

²⁷ See *Kingdom of God*, 32 FCC Rcd at 3654, para. 2, n.9. Henderson’s attempt to again analogize the Commission’s decision to accept a late-filed renewal application in *Atlantic City Board of Education* to the instant situation is misplaced. In *Atlantic City Board of Education*, a station did not file its renewal application until four years after its license expired. The license was ultimately renewed while the station was reprimanded and fined for the late filing. In that case, the late filed renewal application did not result in the interruption or lack of service to a station’s community of license. In contrast, here, the Station failed to provide its community with reliable, consistent, licensed service for over four years.

²⁸ AFR at 6-7.

²⁹ See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Riggins v. Goodman*, 572 F.3d 1101 (10th Cir. 2009).

³⁰ In response to the *January 2017 Decision*, Henderson filed a Petition for Reconsideration, which included as an exhibit a recording of a conversation between a third party and a Bureau staff attorney. See AFR at 6-7. Henderson claims that the recorded statements made by the Bureau staff attorney show evidence of bias. *Id.* at 6. After the Petition for Reconsideration was filed, and out of an abundance of caution, the Bureau staff attorney recused himself and did not participate further in this proceeding. The Bureau concluded that the recorded “remarks did not reveal personal animus or prejudgment of the KROY proceeding” but nonetheless, the *Letter Decision* was decided without the Bureau staff attorney’s involvement. See *Letter Decision*, 32 FCC Rcd at 9374. Henderson has provided no evidence to demonstrate that the Bureau as a whole was not capable of judging this matter fairly on the basis of its own circumstances in rendering the *Letter Decision*.

pertinent precedent.³¹ As the Bureau explained, Henderson’s failure to operate with authorized facilities for over four years resulted in expiration of the Station’s license as a matter of law under Section 312(g) of the Communications Act. Based on our consideration of the entire record, we find no legal or equitable basis to reinstate the Station’s forfeited license, and we affirm the holding in the *Letter Decision*.

10. 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(g) of the Commission’s rules, 47 CFR § 1.115(g), the Application for Review filed by Roy E. Henderson on December 11, 2017, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ We also find that the Bureau correctly followed Commission case law interpreting the “equity and fairness” language of Section 312(g). *See, e.g., Kingdom of God, supra* note 5; *A-O Broadcasting; Buffalo Baptist Church, supra* note 13.