

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

In the Matter of )
)
Glenn Cherry ) Facility ID No. 201673
Permittee of FM Translator ) File No. BNPFT-20171201ACH
Station W264DP )
Daytona Beach, Florida )

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 2019

Released: May 29, 2019

By the Commission:

1. In this Memorandum Opinion and Order, we deny the December 7, 2018, Application for Review (AFR) filed by Southern Stone Communications (SSC). SSC seeks review of the Media Bureau's (Bureau) November 7, 2018, Reconsideration Decision. There, the Bureau denied reconsideration of a Staff Decision in which the Bureau found that SSC had failed to raise a substantial and material question of fact that would justify further inquiry into whether Cherry's referenced application for a new FM Translator station in Daytona Beach, Florida (Application), should be dismissed. SSC asserted that the license of the translator's proposed primary station, WPUL(AM), South Daytona, Florida (Station), expired pursuant to section 312(g) of the Communications Act of 1934, as amended, due to the Station's silence for more than 12 consecutive months. For the reasons set forth below, we uphold the Bureau and deny review.

2. SSC has claimed throughout this proceeding that the Station went silent (with Commission authority) on August 22, 2016, and needed to resume authorized operations by August 21, 2017, to preserve its license under section 312(g), and it did not do so. In the AFR, SSC maintains that the Bureau erred in finding the evidence SSC submitted in the proceeding was insufficient for the Bureau to issue a Letter of Inquiry (LOI) to Cherry asking the Station to demonstrate it was not off the air for 12 consecutive months. SSC acknowledges that it did not provide "irrefutable" evidence that the Station was off the air for 12 consecutive months, but claims it raised a substantial and material question of fact -

1 On December 20, 2018, Glenn Cherry (Cherry) filed an Opposition to the AFR (Opposition). There is no record of SSC filing a Reply to the Opposition in this proceeding.

2 SSC is licensee of several full-power and FM translator stations in the Daytona Beach, Florida, radio market.

3 Southern Stone Communications, LLC, and Glenn Cherry, Letter Order, Ref. 1800B3-SS (MB Nov. 7, 2018) (Reconsideration Decision).

4 Southern Stone Communications, LLC, and Glenn Cherry, Letter Order, Ref. 1800B3-SS (MB Apr. 13, 2018) (Staff Decision).

5 47 U.S.C. § 312(g).

6 See, e.g., SSC's December 22, 2017, Petition to Deny at 2-3.

7 AFR at 1, citing 47 CFR § 1.115(b)(2)(iv).

the standard in this case – whether the Station was off the air. Thus, SSC asserts the Bureau should have issued an LOI to Cherry, as the Bureau had done in other recent cases.<sup>8</sup>

3. In his Opposition, Cherry argues that the AFR should be dismissed procedurally because it “did not provide a concise and plain list of the legal questions presented for review,” in violation of section 1.115(b) of the FCC’s rules (Rules),<sup>9</sup> and that the AFR fails on its merits for the reasons stated in the *Reconsideration Decision*.<sup>10</sup>

4. Initially, we reject Cherry’s argument that the AFR is procedurally defective under section 1.115(b) of the Rules. In the AFR, SSC very clearly sets forth the question it presents for review, and it also specifies the allegedly erroneous finding of fact made by the Bureau. The AFR therefore complies with sections 1.115(b)(1) and (2) of the Rules.

5. Nonetheless, based on the record before us, we find that SSC fails to provide adequate factual or legal support to find that there has been an erroneous finding as to a material question of fact.<sup>11</sup> The Bureau considered the proffered evidence and adequately explained that the record contained insufficient evidence that the Station had been off the air continuously for more than 12 consecutive months to warrant further investigation. Although Commission records indicate that the Station has been off the air frequently since 2014,<sup>12</sup> they do not indicate that the Station has been silent for more than 12 consecutive months. The Bureau reasonably concluded that these records and Cherry’s evidence, which included sworn declarations based on personal knowledge attesting that the station was operating on August 12 and 15, 2017, were sufficient to refute the allegation of continuous silence exceeding one year, even considering the declarations (all except one of which were unsworn) and photographic/video evidence submitted by SSC in this proceeding. SSC’s evidence does not refute or conflict with Cherry’s evidence of operation on August 12 and 15, 2017, and provided at best a “snap shot” of discrete instances of station non-operation on separate dates.<sup>13</sup> As a result, we agree with the Bureau that it was not

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<sup>8</sup> AFR at 2, citing *Francisco San Millan and John F. Garzigila, Esq.*, Letter Order, Ref. 1800B3 (MB Feb. 13, 2018). In the *Reconsideration Decision* (at page 3), the Bureau found this case inapposite because it involved a “completely different factual context,” *i.e.*, whether a station had been timely constructed according to its permit authorization, and a qualitatively greater disparity between the objector’s documented allegations and the permittee’s peremptory and inconsistent opposition statements. SSC also cites, for the first time, *Mr. Jan Charles Gray*, Letter Order, 32 FCC Rcd 3924 (MB 2017), in which the staff issued an LOI based on Commission records that indicated the subject station was either silent or operating with unauthorized facilities for four years. *Id.* at 3927; *Letter from Peter H. Doyle, Chief, Audio Division to Mt. Rushmore Broad., Inc.*, Nov. 10, 2016, (Ref. No. 1800B3-VMM). We find this case inapposite because our records do not indicate that the Station was off the air for 12 consecutive months.

<sup>9</sup> Opposition at 2. Section 1.115(b) of the Rules requires that an application for review “shall concisely and plainly state the questions presented for review” and that the party seeking review must specify with particularity the grounds on which Commission consideration is warranted. 47 CFR § 1.115(b)(1), (2).

<sup>10</sup> Opposition at 5-6.

<sup>11</sup> See *KGAN Licensee, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 7664, 7665, para. 3 (2015) (citing *Red Hot Radio*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6744, para. 16 (2015), and *RCN Telecom Services of PA., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15615, 15616, para. 5 (2001) (finding that applications for review must present something that raises an erroneous action as to a material question of fact).

<sup>12</sup> The Commission’s records indicate that the Station was silent from February 18, 2014, until February 10, 2015, see BLESTA-20141124BIG and Notification of Resumption of Operation filed February 10, 2015; from August 22, 2016, until August 15, 2017, see BLESTA-20170411ARR and Notification of Resumption of Operation filed August 15, 2017 (the primary period on which SSC focuses in its pleadings); and from September 11, 2017, until January 18, 2018, see BSTA-20170926AAO and Notification of Resumption of Operation filed January 18, 2018.

(continued....)

necessary to issue an LOI regarding whether the Station was off the air for 12 consecutive months.<sup>14</sup> Thus, we find SSC has not shown a material error in the *Staff Decision* or *Reconsideration Decision*.

6. 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 of the Commission's rules,<sup>16</sup> the Application for Review of Southern Stone Communications, LLC **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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We note that the Station was granted an extension until March 13, 2019, to operate with temporary facilities pending completion of construction at a new permanent site. See *Letter to Glenn Cherry* (MB Sep. 18, 2018). On September 7, 2018, Cherry filed an application for a minor change to facility for a new permanent site, see BP-20180907ADW, which the staff granted on November 6, 2018. See *Broadcast Actions*, Public Notice, Report No. 49360 (MB Nov. 9, 2018). On March 15, 2019, Cherry filed an extension to operate with temporary facilities pending completion of construction at its authorized site, see BESTA-20190315AAR, which the staff accepted for filing on March 18, 2019.

<sup>13</sup> See *Reconsideration Decision* at 3-4; see also *Staff Decision* at 4 and n.27, referencing SSC Petition to Deny, Exhibits A and B, which contained declarations and photographic/video evidence intended to establish that the Station was not operational on August 18, 2017, at 11:30 a.m.; August 23, 2017, at 10:55 a.m.; August 24, 2017, at 2:45 p.m.; and August 28, 2017, at 3:18, p.m.

<sup>14</sup> As noted above, *supra* note [8], the cases cited by SSC in which the Bureau issued LOIs are not comparable. We note that the Station's periods of silence will be reportable in its next license renewal application and may be considered in connection with any action taken on that application. See, e.g., *Radioactive, LLC*, Hearing Designation Order, 32 FCC Rcd 6392 (2017). SSC's claim that "Cherry represented to the FCC that WUPL was on the air" when it was not is wholly unsupported. See AFR at 2 (claiming that Cherry represented that WUPL was on the air on specific dates). SSC does not cite the source of Cherry's alleged representation or otherwise elaborate on this claim in the AFR. In the Petition to Deny, however, SSC claims that, by notifying the Commission of resumption of service on August 15, 2017, and then later seeking silent status on September 11, 2017, Cherry "represented to the Commission that WPUL(AM) was on the air from August 15 to September 10, 2017." Petition to Deny at 2. The fact that Cherry requested an STA to permit silent status several weeks after notifying the Commission that the Station had resumed service does not constitute a representation that the station was continuously broadcasting in the intervening period. Moreover, there is no requirement that a licensee notify the Commission that a station is silent for less than 10 days. 47 CFR § 73.1635.

<sup>15</sup> 47 U.S.C. § 155(c)(5),

<sup>16</sup> 47 CFR §§ 1.115.