

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

In the Matter of)	
)	Application File Nos. BLFT-19980824TA,
)	BLFT-20171221AAJ, and
Absolute Broadcasting, LLC)	BMPFT-20180221AAB
)	
)	Facility ID No. 83187
FM Translator Station DW253AF, Bennington, Vermont)	

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 2023

Released: May 17, 2023

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant the application for review (Application for Review) filed by Absolute Broadcasting, LLC (Absolute) on September 27, 2021. Absolute seeks Commission review of a letter decision on reconsideration¹ issued by the Audio Division, Media Bureau (Bureau), on September 10, 2021.² The *Reconsideration Letter* upheld a May 26, 2020, staff letter decision which: (1) found that the license for FM translator station DW253AF, Bennington, Vermont (Station) had expired as a matter of law under section 312(g) of the Communications Act of 1934, as amended (Act);³ (2) cancelled the Station's license; (3) deleted the Station's call sign; (4) revoked the Station's program test authority (PTA); and (5) dismissed the above-captioned applications for a license to cover the Station's then-permitted facilities at Nashua, New Hampshire (License Application), and a minor modification of the underlying construction permit (Antenna Modification Application), and associated pleadings, as moot.⁴ For the reasons stated below, we grant the Application for Review, reinstate the Station's license, and return the License Application to pending status.⁵

¹ *Absolute Broadcasting*, Letter Decision, Ref. No. 1800B3-ALV, Application File Nos. BLFT-19980824TA, BLFT-20171221AAJ, and BMPFT-20180221AAB (MB Sept. 10, 2021) (*Reconsideration Letter*).

² On October 10, 2021, Saga filed an opposition to the application for review (Opposition). On October 18, 2021, Absolute filed a reply to the Opposition (Reply).

³ See 47 U.S.C. § 312(g) (Section 312(g)) (providing that if a broadcast station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station automatically expires at the end of that period, unless the license is extended or reinstated by the Commission as a matter of equity and fairness); see also 47 CFR § 73.1740(c).

⁴ *Absolute Broadcasting*, Letter Decision, Ref. No. 1800B3-KV, Application File Nos. BLFT-19980824TA, BLFT-20171221AAJ, and BMPFT-20180221AAB (MB May 26, 2020) (*Staff Letter*).

⁵ 47 U.S.C. § 312(g). For the reasons set out in note 72, *infra*, we do not reinstate the Antenna Modification Application, BMPFT-20180221AAB.

II. BACKGROUND

2. In 2016, during the first modification filing window that permitted AM stations to pair with an FM translator,⁶ Absolute received authorization to acquire and relocate the Station from Bennington, Vermont, to Nashua, New Hampshire, to operate as a fill-in FM translator for co-owned AM primary station WGHM(AM), Nashua, New Hampshire (WGHM).⁷ On December 21, 2017, Absolute filed an application for a license to cover the Nashua facilities (the License Application) and began broadcasting under PTA.⁸ On February 12, 2018, Saga Communications of New England, LLC (Saga) filed an interference claim and informal objection to the License Application, alleging listener interference to Saga's FM translator station W260CF, Manchester, New Hampshire.⁹ On February 22, 2018, Absolute took the Station silent in response to Saga's listener interference claim.¹⁰ For the remainder of 2018 and 2019, the Station remained largely silent as the parties disputed whether the Station was causing prohibited interference.¹¹ Absolute did not file a request for silent special temporary authority (STA) until March 25, 2020.¹²

3. On March 8, 2019, Saga filed a "Petition to Declare License Expired" (Expiration Petition), alleging that the Station had been continuously silent for 12 months and therefore its license had automatically expired under Section 312(g).¹³ In support of this allegation, Saga submitted: (1) Absolute's February 22, 2018, "Response to Interference Complaint" stating that it had taken the Station off the air in response to Saga's interference claim; and (2) a declaration from Saga's chief engineer stating that he had "periodically monitored" the Station's frequency during 2018 and had not heard any broadcasts (Stohrer Declaration).¹⁴ Saga further argued that even if the Station had briefly operated during this time, that operation was unauthorized because Absolute had constructed a two-bay antenna

⁶ See *Revitalization of the AM Service*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 30 FCC Rcd 12145 (2015); *Media Bureau Announces Filing Dates and Procedures for AM Station Filing Window for FM Translator Modification and Availability of FM Translator Technical Tools*, Public Notice, 30 FCC Rcd 14690 (MB 2015).

⁷ See Application File Nos. BALFT-20160726ABX (granted August 31, 2016), BPFT-20160727ADA (granted July 25, 2017) (AMR Relocation Application), and BMPFT-20170713AHQ (modifying the construction permit issued by the grant of Application File No. BPFT-20160727ADA) (also granted July 25, 2017). The assignment transaction was consummated on August 18, 2017.

⁸ See Second Response to Interference Complaint and Informal Objections, filed by Absolute on June 12, 2018, at 1-2.

⁹ Specifically, Saga alleged that the Station violated 47 CFR § 74.1203(a)(3) (prohibiting actual interference) with respect to the License Application and 47 CFR § 74.1204(f) (prohibiting predicted interference) with respect to the AMR Relocation Application.

¹⁰ See *Reconsideration Letter* at 2.

¹¹ LOI Response at 3-4. If Saga chooses to make a new interference claim after the Absolute license is reinstated, it must do so following the procedures set out in *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, Report and Order, 34 FCC Rcd 3457, 3458, para. 3 (2019); *FM Translator Interference*, 84 FR 27734 (June 14, 2019); and 47 CFR § 74.1203. The new translator interference rules became effective on August 13, 2019. *Media Bureau Announces August 13, 2019, Effective Date of Amended Rules for FM Translator Interference*, Public Notice, 34 FCC Rcd 7004 (MB 2019). Pursuant to delegated authority, the Bureau will act on any interference complaint in accordance with the procedures established in this rulemaking. See 47 CFR §§ 0.61(h), 0.283.

¹² In the silent STA, Absolute notified the Commission that it had been silent since June 25, 2019, and had only operated "periodically" since filing the License Application. On March 26, 2020, the day after filing the silent STA, Absolute filed a resumption notification, stating that it had returned to the air on March 24, 2020.

¹³ See *Reconsideration Letter* at 2.

¹⁴ Expiration Petition, Exhs. 1 and 2.

instead of the authorized one-bay antenna.¹⁵ As evidence, Saga submitted a photo of the Station's tower, reportedly taken on February 24, 2019, showing a two-bay antenna.¹⁶ Finally, Saga noted that Absolute had failed to file a silent notification or request for silent STA, in apparent violation of section 73.1740(a)(4) of the Rules.¹⁷

4. In response, Absolute argued that the Expiration Petition lacked evidentiary support.¹⁸ In fact, Absolute stated, the Station broadcast for a little over a week, from July 2–11, 2018.¹⁹ In support of this assertion, Absolute submitted sworn statements from an independent contracted engineer, Tom Ray (Ray) of Tom Ray Broadcast Consulting, LLC, and an Absolute employee working with both the primary AM and translator stations, Gary Blue (Blue) (Ray and Blue Declarations).²⁰ Ray stated that he had placed the Station on the air on July 2, 2018, that it was “operating normally” with a two-bay antenna “in accordance with the Construction Permit.”²¹ He also stated that he had been instructed to discontinue operation of the Station on July 11, 2018, and did so immediately.²² Blue stated that he had personal knowledge that the Station was placed on the air from July 2 – 11 and that he had listened to the WGHM rebroadcast signal on the Station.²³ Blue further attested that he had directly communicated with Absolute's counsel on July 11, 2018, who advised him to discontinue operation.²⁴

5. On September 18, 2019, the Bureau issued a letter of inquiry (LOI), directing Absolute to provide evidence regarding its operational status since initially going silent on or about February 22, 2018.²⁵ Specifically, the LOI requested: (1) the location, effective radiated power and antenna height above ground level for all periods of operation from February 22, 2018, to the date of the LOI; (2) copies of all leases, personnel records (including payroll records), engineering records, station logs, invoices, bills, checks written or received, credit card charges, wire transfers or deposits of funds relating to the Station's operation; (3) pictures of the Station's studio facilities and transmission facilities during the relevant timeframe; and (4) exact Station coordinates.²⁶

6. On October 28, 2019, Absolute responded to the LOI (LOI Response), reiterating that the Station had been silent during most of the relevant time period while it addressed the interference allegations but that it had broadcast for a little over a week in July 2018 and again the following summer, from June 17–25, 2019.²⁷ Absolute pointed out that both periods of brief operation were necessary to avoid a Section 312(g) expiration but that the Station was unable to permanently return to the air due to the Commission's pending adjudication of Saga's interference claim.²⁸ Absolute also submitted: (1) the

¹⁵ *Id.* at 2-3.

¹⁶ *Id.*

¹⁷ Expiration Petition at 1-2 (citing 47 CFR § 73.1740(a)(4) (requiring broadcast stations to notify the Commission within 10 days of taking a station silent and to request silent STA if remaining silent more than 30 days)).

¹⁸ “Statement for the Record” filed by Absolute on April 24, 2019 (Absolute Statement) at 2 (emphasis in original).

¹⁹ *Id.* at 1-2.

²⁰ Absolute Statement at 5-6 (exhibits).

²¹ Ray Declaration at 1.

²² *Id.*

²³ Blue Declaration at 1.

²⁴ *Id.*

²⁵ Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to Absolute (MB Sept. 18, 2019) (LOI).

²⁶ *Id.*

²⁷ LOI Response at 3; *see also Reconsideration Letter* at 2.

²⁸ LOI Response at 4.

Station's location, effective radiated power, antenna height, and description of the antenna configuration;²⁹ (2) screenshots of the Station's transmitter log during June 17–25, 2019; (3) five undated pictures of the Station's studio facilities and transmission facilities; and (4) the Station's coordinates.³⁰ Absolute explained that it could not provide the other documentation requested by the Bureau because “[t]here are no personnel records, invoices, bill, checks, etc. because this is an FM Translator and not a primary station.”³¹ In addition, it claimed, because the Station had not operated for long, there was “little accounting data available.”³²

7. On May 26, 2020, the Bureau issued the *Staff Letter*, finding that Absolute had failed to demonstrate that it had operated during the relevant timeframe and therefore the Station's license had automatically expired under Section 312(g).³³ The Bureau relied heavily on the fact that Absolute had failed to provide the documents requested in the LOI and “accorded little weight” to the Ray and Blue Declarations as “uncorroborated statements” from persons who were not disinterested witnesses.³⁴

8. On June 29, 2020, Absolute petitioned for reconsideration of the *Staff Letter* (Petition for Reconsideration), reiterating that the Station had operated from July 2–11, 2018, and submitting sworn statements from five listeners who claimed to have heard the broadcast during that time (Listener Statements). With the Petition for Reconsideration, Absolute submitted a sworn statement by a third-party engineer (Ruck Statement), who analyzed the Station's electrical usage and concluded that an “apparent increase in consumption during the months of June and July” was “consistent with the Translator being operational during this time period.”³⁵ Absolute repeated its argument that it was unable to provide all of the information requested in the LOI.³⁶

9. In the *Reconsideration Letter*, the Bureau dismissed the Petition for Reconsideration for relying on evidence that could have been presented earlier (namely, the Listener Statements and the Ruck Statement).³⁷ The Bureau added that even if it had considered the merits of the Petition, the additional evidence would fail to establish that the Station had operated for a week in July 2018.³⁸ Specifically, the Bureau found that the Ruck Statement was “specious evidence” of operation³⁹ and that the Listener Statements were “insufficient to establish the Station's purported 2018 operations” because they were “uncorroborated by *any* of the information requested in the [LOI].”⁴⁰

²⁹ *Id.* at 2.

³⁰ *Id.* at 3-4.

³¹ *Id.* at 4.

³² *Id.* at 4.

³³ *Staff Letter* at 4-5.

³⁴ *Id.* at 4.

³⁵ Petition for Reconsideration at 5-6.

³⁶ *Id.* at 3-4 (“[The Station] is *passive*. It only rebroadcasts the signal of WGHM. As a translator, it does not have employees, payroll records, etc. Furthermore, it does not sell advertising, and, thus, there does not exist any translator billing. It should be noted that there are two (2) operative leases relative to the translator. The transmitter building is owned by the City of Nashua and the lease is with WSMN(AM). The tower is shared with WSMN . . . Thus, there are no separate leases for the translator. In addition, all maintenance and service for the translator is done by WGHM personnel.”) (emphasis in original).

³⁷ *Reconsideration Letter* at 4 (citing the well-established principle that a party may not “sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence.”).

³⁸ *Id.* at 4-5.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 5.

10. In its Application for Review, Absolute urges the Commission to reconsider the evidence already on record, contending that since it is “unable to supply the other information requested” by the LOI, it should be permitted to establish station operation through other means—especially where the consequence is the “draconian action of cancellation of a license.”⁴¹

11. In the Opposition, Saga argues that the Application for Review is procedurally inadmissible because it relies on facts presented in the Petition for Reconsideration upon which the Bureau “had no previous opportunity to pass”—namely, the Ruck Statement and Listener Statements.⁴² On the merits, Saga contends that the Bureau correctly rejected the Ruck Statement as “speculative” and asserts that without a “photographic memory” no listener could remember listening to a broadcast from nearly two years earlier.⁴³ Finally, Saga argues that even if the Station’s license did not automatically expire under Section 312(g), the Commission should revoke it under section 74.1263(e) of the Rules, which permits the Commission to cancel a translator’s license for failure to operate for 30 or more consecutive days.⁴⁴

III. DISCUSSION

12. We grant the Application for Review and reinstate the Station’s license. An application for review of a final action taken on delegated authority will be granted when, *inter alia*, such action: conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.⁴⁵ In this case, we find that the Bureau relied on an insufficient factual basis when it cancelled the Station’s license pursuant to Section 312(g).

13. Section 312(g) provides that if a broadcast 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 to promote equity and fairness.⁴⁶ The Commission has held that unauthorized operation is “no better than silence” for section 312(g) purposes; therefore, consecutive periods of both silence and unauthorized operation are considered in the aggregate when calculating a consecutive 12-month period under the Act.⁴⁷

14. Upon careful examination of the record, we find that considered as a whole, the evidence in this case does not reasonably support a finding that the Station was silent for 12 consecutive months.⁴⁸ As detailed below, the record here contains some evidence that the Station operated during the relevant timeframe, lacks evidence that the station was *continuously* silent throughout the relevant timeframe, and

⁴¹ Application for Review at 3-4.

⁴² Opposition at 4-5.

⁴³ *Id.* at 6-7.

⁴⁴ See 47 CFR § 74.1263(e).

⁴⁵ 47 CFR 1.115(b)(2).

⁴⁶ 47 U.S.C. § 312(g).

⁴⁷ See *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008) (*Eagle*), *aff’d by Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009) (*Eagle v. FCC*).

⁴⁸ The *Staff Letter* only analyzed the Station’s operation from February 2018 to February 2019, explaining that “[g]iven our finding that the [Station’s] license expired on February 23, 2019, we do not need to consider the [Station’s] purported June 2019 Operations, which occurred several months after its license expired.” *Staff Letter* at 5. Therefore, in the pleadings relating to the *Reconsideration Letter* and Application for Review, the parties do not brief this issue, and it is not directly before the Commission on review. Nonetheless, because we reinstate the Station’s license herein, we note that the evidence that the Station briefly operated in 2019 is even stronger than for 2018 because it includes screenshots of the Station’s transmitter log from June 17–25, 2019.

includes a plausible explanation of why the Station was unable to provide additional evidence as requested by the Bureau. In these circumstances, we cannot reasonably conclude that the Station's license automatically expired under Section 312(g).⁴⁹ Therefore, we reverse the Bureau's holding and reinstate the Station's license.

15. *Review of the evidence.* Saga bases its Section 312(g) argument on two sources: the Stohrer Declaration and Absolute's own statement in its February 22, 2018, "Response to Interference Complaint," that it had taken the Station silent in response to Saga's interference complaint.⁵⁰ Neither provides evidence of continuous silence throughout the relevant timeframe. The Stohrer Declaration—even if accepted at face value—merely establishes that the Station was silent for much of 2018 and 2019.⁵¹ That fact is not contested, and even Saga does not claim that the Stohrer Declaration establishes that the Station was continuously silent for 12 months.⁵² As far as Absolute's own statements, Absolute has conceded throughout this proceeding that it was silent for most of 2018 and 2019 in response to Saga's interference claim; however, it has also consistently qualified this admission with the assertion that it briefly operated in July 2018.⁵³ Upon review of the record we find that neither of these above-mentioned sources provides sufficient evidence supporting a Section 312(g) determination that the Station was silent for 12 consecutive months.

16. Based on our review of the total record, the evidence submitted by Absolute prior to its Petition for Reconsideration supports its claim that it briefly operated in July 2018.⁵⁴ First is its own assertion, made repeatedly under penalty of perjury, that it operated during this time.⁵⁵ Second are the Ray and Blue Declarations—sworn statements by persons with firsthand knowledge of the facts attested

⁴⁹ This situation is distinguished from cases where the Commission designated a renewal application for a hearing because of extended periods of silence throughout the eight-year license term. *See generally*, 47 U.S.C. 309(k); *see also, e.g., Radioactive, LLC*, Hearing Designation Order, 32 FCC Rcd 6392 (2017); *Birach Broadcasting*, Hearing Designation Order, 33 FCC Rcd 852 (2018). This is not a renewal application and therefore does not involve a Section 309(k) public interest analysis. 47 U.S.C. § 309(k). Furthermore, in this case, the Station was required under the Rules to cease broadcasting as a secondary service responding to an interference claim. *See* 47 CFR § 74.1203(a).

⁵⁰ Expiration Petition at 1-2.

⁵¹ *See* Expiration Petition, Exh. 2 (stating that during the period February 22, 2018 through February 25, 2019, Saga's Chief Engineer, Peter Stohrer "periodically monitored" the FM frequency 99.9 MHz in the area around Absolute's antenna structure and "never heard any transmissions from the apparatus on the tower").

⁵² *See Glenn Cherry*, Memorandum Opinion and Order, 34 FCC Rcd 4198, 4199, para. 5 (2019) (*Cherry*) ("[Objector's] evidence does not refute or conflict with [the evidence of brief operation] and provided at best a 'snap shot' of discrete instances of station non-operation on separate dates.").

⁵³ *See, e.g., "Opposition to Renewed Petition to Declare License Expired"* filed by Absolute on August 29, 2019, at 2; LOI Response at 3; Petition for Reconsideration at 1-3; Application for Review at 2.

⁵⁴ We do not rely on evidence Absolute submitted for the first time in its Petition for Reconsideration, including the Listener Statements and the Ruck Statement. The Bureau appropriately dismissed the submission of this evidence on procedural grounds because it should have been submitted in response to the LOI. *See Reconsideration Letter* at 4 (citing the well-established principle that a party may not "sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence"). *See also International Aerospace Solutions, Inc.*, Memorandum Opinion and Order, 2023 WL 2012155, para. 10 (Feb. 13, 2023) (affirming Bureau's procedural dismissal of Petition for Reconsideration that relied on arguments that should have been submitted in response to Bureau's LOI).

⁵⁵ *See, e.g., "Opposition to Renewed Petition to Declare License Expired"* filed by Absolute on August 29, 2019, at 2; LOI Response at 3; Petition for Reconsideration at 1-3; Application for Review at 2.

to.⁵⁶ Third is the technical information submitted by Absolute in response to specific items requested in the LOI: namely, the location, effective radiated power and antenna height of the facilities (as well as a description of the antenna configuration), photos of the Station's studio facilities and transmission facilities that match the Station photos submitted by Saga, and the Station's coordinates.⁵⁷ The fact that the Station's facilities were constructed and thus physically capable of broadcasting during the claimed period in July 2018 is relevant and circumstantiates Absolute's claim of operation.⁵⁸ The above three sources form an evidentiary basis for Absolute's claim that the Station operated for a little over a week in July 2018. Taken as a whole, the record contains some evidence of operation and lacks evidence of *continuous* silence. Therefore, there was not a sufficient evidentiary basis to support the Bureau's conclusion that the Station's license had automatically expired after 12 months of continuous silence.⁵⁹

17. In the *Staff Letter* and *Reconsideration Decision*, the Bureau relied heavily on Absolute's failure to produce the standardized list of requested documents (i.e., the "leases, personnel records (including payroll records), engineering records, station logs, invoices, bills, checks written or received, credit card charges, wire transfers or deposits of funds" relating to the Station's operation), without considering the service- and licensee-specific factors affecting Absolute's ability to produce those documents. In this case—where an FM translator is installed on the same tower and shares utilities, personnel, and other expenses with the primary station—we find plausible Absolute's assertion that it did not have separate versions of these requested documents relating specifically to the Station's operation. We also agree with Absolute that a translator is in a different position than a full power station with respect to the separate documentation it is required or likely to retain for business or regulatory purposes.⁶⁰ Many of the documents requested in the LOI would be more relevant to determining whether a full service station was constructed at its authorized site than whether, as here, a cross-service translator, co-located with its primary station, briefly operated during a specific time window.⁶¹ Presumably, Absolute could have produced checks, charges, transfers, or other financial transactions relating to the purchase and installation of the Station's antenna system. However, the fact that the Station's antenna system was purchased, installed, and commenced operation is not at issue here. All parties agree that the Station was constructed—in fact, its operation forms the basis of the interference complaint by Saga. Lastly, there was no testimony available from individuals who had personal knowledge of the Station's operation but were not engaged by Absolute to operate the Station. Rather, the individuals who had personal knowledge of the Station's operation were the ones who were engaged by Absolute to operate it. In these circumstances, we find that Absolute's decision to submit the sworn statements of a consulting

⁵⁶ See *Fort Myers Broad. Co.*, 19 FCC Rcd 19556, 29560 (MB 2004) ("With respect to the assertion that the station operated briefly during June 1999, that claim is not supported by the declaration of a person with personal knowledge regarding the operations of the station.").

⁵⁷ LOI Response at 3-4.

⁵⁸ In contrast, many Section 312(g) cases involve stations that could not have physically broadcast from their licensed sites due to failure to construct at that site, termination of a lease, etc. See *infra*, note 68.

⁵⁹ See, e.g., *Cherry*, 34 FCC Rcd at 4199, para. 5 (weighing evidence of frequent silence against evidence of occasional operation and finding insufficient evidence of continuous silence).

⁶⁰ See generally, 47 CFR § 74.1281.

⁶¹ To be clear, we do not require the Bureau to individually tailor in advance the information requested in each LOI, but only to take service- and licensee-specific factors into account when it assesses the sufficiency of the licensee's response as part of its Section 312(g) determination. We further clarify that we expect the Bureau to distinguish between a licensee's inability to provide responsive information versus an unwillingness or failure to do so when the requested material is or should be available. This holding in no way undermines the well-established principle that failing to timely respond to a Bureau LOI is a violation of a Commission order and therefore may be subject to appropriate sanctions. See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589 (2002); *Donald W. Kaminski, Jr.*, Forfeiture Order, 18 FCC Rcd 26065 (EB 2003).

engineer and an Absolute employee with personal knowledge of the Translator's operation was reasonable given the lack of other responsive information.

18. *Unauthorized operation.* We reject Saga's claim that the Station's July 2018 operation was unauthorized because it used the wrong antenna configuration and, as such, could not avert automatic expiration. The Commission has not directly addressed the question of whether *any* noncompliance with a technical or other regulatory requirement means a station has "fail[ed] to transmit broadcast signals" for Section 312(g) purposes. Section 312(g) itself does not state that unauthorized operation is sufficient to avoid expiration under Section 312(g),⁶² and the Commission did not discuss the issue when it implemented Section 312(g) in 1996.⁶³ In the 2008 *Eagle* decision, the Commission held that transmissions from an *unauthorized location* could not be used to avoid automatic license expiration, explaining, "Section 312(g), which establishes the specific sanction for extended failure to broadcast, cannot be read to create an exception to Section 301 licensing requirements."⁶⁴ The D.C. Circuit (Court) upheld the Commission's analysis and rejected the appellant's argument that a station could avoid automatic license expiration by transmitting "*any* signals from *any* location."⁶⁵ Such an approach, the Court explained, would produce the "absurd result" of a licensee being able to avoid expiration at a licensed site in Arizona by broadcasting in New York.⁶⁶ In short, the Court concluded, "unauthorized and unlicensed transmissions are no better than silence."⁶⁷

19. In the vast majority of cases since *Eagle*, the Commission has concluded that licenses have expired pursuant to 312(g) due to "unauthorized operation" when the operation occurred at an unauthorized location⁶⁸ or, in the context of the DTV transition, on an unauthorized frequency.⁶⁹ For

⁶² In its entirety, Section 312(g) states, "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 an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness."

⁶³ See *Implementation Order*, 11 FCC Rcd at 16599-600, paras. 2-3.

⁶⁴ *Eagle*, 23 FCC Rcd at 592, para. 9. Prior to 2008, the Commission issued a forfeiture for nearly five years of operation at an unauthorized location. *Morgan County Industries, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 13712 (MB 2006).

⁶⁵ *Eagle v. FCC*, 563 F.3d at 543.

⁶⁶ *Id.* at 552.

⁶⁷ *Id.* at 553.

⁶⁸ See, e.g., *Chinese Voice of Golden City v. FCC*, 2021 WL 6102191 (D.C. Cir. 2021) (affirming that transmissions from an unauthorized location do not constitute "broadcast signals" for purposes of § 312(g)); *Kingdom of God, Inc. v. FCC*, 719 Fed.Appx. 19, 20 (D.C. Cir. 2018) (Mem.) ("Kingdom's transmissions from its unauthorized location in Beech Grove do not constitute 'broadcast signals' for purposes of § 312(g)"); *Roy E. Henderson*, Memorandum Opinion and Order, 33 FCC Rcd 3385, 3385, n.3 (2018) (upholding a Section 312(g) finding where the licensee had lost its licensed site and had not obtained authorization to operate at other temporary sites); *Great Lakes Community Broad., Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8257 (2009) (cancelling a station's license that was constructed at an unauthorized location); *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 608, 611 (2008) (holding that equipment testing at an unlicensed location was insufficient to avoid automatic expiration). See also *Hispanic Target Media Inc.*, Letter Decision, Application File Nos. BPH-20180917AAI and BPH-20180910AAD (MB 2021) (finding that two stations' licenses had expired after 12 months' operation at unauthorized locations); *DW243AP, Mooresville, AL*, Letter Decision, 34 FCC Rcd 6202, 6203-4 (MB 2019) (cancelling station's license after operating an unauthorized site at a greater distance than the three-second "tolerance zone" of 47 CFR § 73.1690(b)(2)); *Mr. Jan Charles Gray*, Letter Decision, 32 FCC Rcd 3924, 3927 (MB 2017) (cancelling a station's license after several years of combined silence and operation at an unauthorized location); *James McCluskey, Ph.D.*, Public Notice, 27 FCC Rcd 6252, 6255 (MB 2012) (finding that a station's

(continued....)

other nonconforming operations not involving an unauthorized location or frequency, even if the violation lasted longer than a year, the Bureau has typically entered into a consent decree or imposed a forfeiture under Section 503(b)(1) of the Act.⁷⁰ Consistent with this approach, we clarify that not every instance of non-conforming operation that lasts for more than a year leads automatically to the loss of the station's license pursuant to the terms of Section 312(g). We do not believe that Congress, when it set out to address the spectrum warehousing issue of silent stations, or the Court, when it rejected the “absurd result” that operation from a distant location could avoid automatic license expiration, also intended to establish, without further discussion or analysis, a severe new sanction applicable to *all* consecutive 12-month rule violations. No such intent can be read into Section 312(g) or inferred from the holding in *Eagle*. The Court in *Eagle* established that operation from an unauthorized location triggers Section 312(g) but did not discuss which other rule violations might also rise to the level of being “no better than silence” under Section 312(g). When confronted with the question of applying Section 312(g) in situations other than those involving silence or an unauthorized location as in *Eagle*, the Commission's licensing divisions have consistently declined to go to the extreme of cancelling licenses if the infraction lasted longer than a year. Instead, beyond cases of silence, they have applied Section 312(g) to unauthorized location—or the spectrum “real estate” equivalent, unauthorized frequencies—while addressing other rule violations using the existing enforcement framework set out in the Rules. We endorse this approach as a fair and rational application of Section 312(g) as further expounded in the *Eagle* decision.

20. In this case, the record indicates that the Station's antenna configuration in July 2018 was apparently at variance from the technical parameters authorized in the construction permit (File No. BPFT-20160727ADA) granted July 25, 2017 (Construction Permit).⁷¹ Specifically, the Construction

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license expired after several years' operation at an unauthorized site); *John C. Trent*, Letter Decision, 27 FCC Rcd 2925, 2926 (MB 2012) (finding that a Station's license had automatically expired after 12 years of operation at an unauthorized site); *Idaho Broad. Consortium*, Letter Decision, 16 FCC Rcd 1721, 1722-23 (MB 2001) (applying Section 312(g) where a station was either silent or operated at unauthorized coordinates, antenna height, and antenna configuration).

⁶⁹ See *Word of God Fellowship, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 13280, 13281-82 (2014) (affirming cancellation of television station broadcasting with temporary facilities on its new channel without an STA). See also *Spirit Productions, Inc.*, 28 FCC Rcd 8875, 8877 (MB 2013) (applying section 312(g) to a television station broadcasting on an unauthorized channel after express notification in a previous order that operation on an out-of-core channel could lead to automatic expiration).

⁷⁰ See, e.g., *Zwerling Broad. System, Ltd.*, Forfeiture Order, DA 22-1318 (MB Dec. 15, 2022) (*Zwerling*) (imposing a forfeiture on an AM station for years of “non-conforming operations,” including exceeding its authorized nighttime power limit); *Low Power Television Stations KRLB-LD, Richland, WA, et al.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 22-1058 (MB Oct. 4, 2022) (imposing a forfeiture on low power TV stations for years of “unauthorized operation” after failing to file applications for licenses to cover after the expiration of the underlying construction permits); *Roy E. Henderson*, Forfeiture Order, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 5223 (MB 2018) (imposing a forfeiture on an FM licensee for “unauthorized operation with non-conforming facilities” for more than a year, specifically, an unauthorized power reduction, while finding that the station had not expired under Section 312(g)). In 2012, however, the Bureau cancelled a station's license under Section 312(g) when it resumed operation with a lower nighttime power than authorized. *Davina Sashkin, Esq.*, Letter Decision, 27 FCC Rcd 2920, 2924-25 (MB 2012) (*McComb*). Staff decisions are not, of course, binding on the Commission. See *Comcast v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

⁷¹ The Construction Permit authorized the facilities specified in the AMR Relocation Application. Because the Bureau found that the Station's license had automatically expired on other grounds, it did not reach the issue of unauthorized operation.

Permit authorized a two-bay antenna system, composed of two stacked Nicom BLD-1/P antennas.⁷² In the License Application, Absolute stated that it had installed one Nicom BLD-1/P antenna, achieving the same signal coverage by correspondingly increasing the transmitter power output (TPO).⁷³ Under Section 74.1251(b)(2) of the Rules, this variance was unauthorized because Absolute had not previously obtained Commission approval to modify its antenna system (by filing an FCC Form 349).⁷⁴ On August 20, 2018, Absolute amended the then-pending License Application to reflect that a “second bay identical to the first was added to the array” and the transmitter power input accordingly reduced to 0.2 kW to produce the authorized ERP of 0.25 kW.⁷⁵ It does not state precisely when the second bay was added. Therefore, the Station’s July 2018 operation was conducted using an antenna that either (1) did not conform to the Construction Permit (authorizing two bays) or (2) did not conform to the facilities described in the License Application (originally specifying one bay).⁷⁶

21. For the reasons discussed in paragraph 19, *supra*, we conclude that the apparent variance of the Station’s installed antenna system from its authorized technical parameters is not subject to automatic license expiration under Section 312(g).⁷⁷ Instead, we direct the Bureau to consider appropriate enforcement action for Absolute’s failure to file an application to modify the Construction Permit to reflect a single bay antenna system prior to filing the License Application,⁷⁸ taking into account the very short time (nine days) that the Station operated with apparently non-conforming equipment, the fact that the Station at all times operated at its authorized location and on its authorized frequency, the loss of the use of Station for nearly three years due to erroneous cancellation, and Absolute’s full and voluntary disclosure regarding the antenna installation in the License Application.

22. *Discontinuation of operation.* Although a translator station is not required to adhere to any regular schedule of operation, section 74.1263(c) of the Rules requires an FM translator licensee to notify the Commission of its intent to discontinue operations for 30 or more consecutive days.⁷⁹ Notification must be made within 10 days of the date on which the station first discontinues operation, and Commission approval is required for such discontinued operation to continue beyond 30 days. The foregoing facts reveal that Absolute apparently violated section 74.1263(c) when it failed to file a silent

⁷² We reject Saga’s contention that the Construction Permit authorized a one-bay antenna system. *See* Expiration Petition at 2-3. In the AMR Relocation Application, Absolute specified a Nicom “BLD-1/P” antenna model in the Tech Box, explaining in the Technical Exhibit that it would install a “two bay 0.75 wavelength spaced Nicom BLD-1/P” antenna. Bureau engineering staff reviewed and authorized this two-bay antenna system. We do not reinstate the Antenna Modification Application, which replaces the AMR Relocation Application’s “BLD-1/P” with “BLD-2/P” in light of our determination that the AMR Relocation Application accurately reflected the proposed antenna and because there is no Nicom antenna model number “BLD-2/P.”

⁷³ License Application, Exh. 12 (“[B]ecause the area [within 207 meters of the tower] is unpopulated [two bays would have reduced downward radiation], it was decided to go with a single bay antenna to bring costs down slightly”).

⁷⁴ *See* 47 CFR § 74.1251(b)(2). Operation under PTA constitutes “broadcast signals” for Section 312(g) purposes. *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 604-5, para. 4 (2008).

⁷⁵ License Application (as amended), Exhs. 1, 10 (also lowering the corresponding TPO).

⁷⁶ We note that Ray states that “by [July 2018, the Station] had been constructed using a two-bay antenna as specified in the construction permit.” Ray Declaration at 1.

⁷⁷ We emphasize that this holding has no effect on our well-established rules and policies in any other area that might use similar terminology, for example, whether a station has completed construction before its construction permit expires under 47 CFR § 73.3598(e).

⁷⁸ 47 CFR § 74.1251(b)(2) (requiring a modification application for any change in the transmitting antenna system).

⁷⁹ 47 CFR § 74.1263(c).

notification or request for silent STA after going silent in February 2018.⁸⁰ We direct the Bureau to consider appropriate enforcement action for Absolute's failure to file a silent notification or request for silent STA, taking into account that Absolute repeatedly notified the Commission that it had gone silent in its February 22, 2018, "Response to Interference Complaint" and subsequent pleadings.⁸¹ We note that if Absolute had complied with these requirements, which serve the purpose of ensuring that the Commission is at all times kept aware of a station's operational status, there would have been a contemporaneous record of the Station's operational history for the period in question, thereby avoiding the need to adjudicate the issue. We also reject Saga's argument that Absolute permanently discontinued operation under section 74.1263(e) of the Rules.⁸² The record shows that Absolute temporarily ceased operation pending resolution of Saga's interference complaint, as it is required to do as a secondary service.⁸³ A finding of permanent discontinuation of operation or to cancel the Station's license under section 74.1263(e) would be inappropriate in these circumstances.

23. *Conclusion.* The license for FM translator station DW253AF, Bennington, Vermont was cancelled almost three years ago, on May 26, 2020.⁸⁴ For the foregoing reasons, we find that the Bureau erred in cancelling the Station's license pursuant to Section 312(g). Section 312(g) provides that the Commission may reinstate an expired license if the station "prevails in an administrative . . . appeal."⁸⁵ In light of our decision to grant Absolute's Application for Review, we reinstate the license for FM translator station DW253AF, Nashua, New Hampshire.

IV. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,⁸⁶ and Section 1.115(g) of the Commission's Rules,⁸⁷ the Application for Review filed by Absolute Broadcasting, LLC, on September 27, 2021, IS GRANTED.

25. IT IS FURTHER ORDERED, pursuant to Section 312(g) of the Communications Act of 1934, as amended,⁸⁸ the license for FM translator station DW253AF, Nashua, New Hampshire, (Application File No. BLFT-19980824TA), IS REINSTATED.

⁸⁰ Under Bureau precedent, Absolute's failure to file a resumption notice is not determinative in a Section 312(g) analysis. *Elohim Group Corporation*, Memorandum Opinion and Order, 2022 WL 1540570, para. 6 (MB 2022) ("[Objector] provides no authority, and we are not aware of any, to support his claim that section 312(g) is triggered by a licensee's administrative failure to timely file a resumption notice."). We endorse the Bureau's view regarding the effect of a failure to file a resumption notice in a Section 312(g) determination.

⁸¹ See, e.g., "Opposition to Renewed Petition to Declare License Expired" filed by Absolute on August 29, 2019, at 2; LOI Response at 3; Petition for Reconsideration at 1-3; Application for Review at 2.

⁸² See 47 CFR § 74.1263(e).

⁸³ See, e.g., Response to Interference Complaint at 1; *Reconsideration Letter* at 2. See generally, 47 CFR § 74.1203(a) (prohibiting a translator from operating if it causes actual interference to another broadcast station).

⁸⁴ See *Staff Letter*.

⁸⁵ 47 U.S.C. § 312(g).

⁸⁶ 47 U.S.C. § 155(c)(5).

⁸⁷ 47 CFR § 1.115(g).

⁸⁸ 47 U.S.C. § 312(g).

26. IT IS FURTHER ORDERED that the application for a license to cover construction permit File No. BPFT-20160727ADA, as modified by construction permit File No. BMPFT-20170713AHQ, filed by Absolute Broadcasting, LLC, on December 21, 2017, and amended on August 20, 2018 (License Application File No. BLFT-20171221AAJ), IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary