



Federal Communications Commission
Washington, D.C. 20554

August 17, 2015

In Reply Refer to:
1800B3-AJR

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In re: **KXOL(AM), Brigham City, UT**
Facility ID No. 87107

Petition for Reconsideration

File No. BR-20130603AMT

Application for Renewal of License

Dear Counsel:

We have before us a pleading styled as a "Petition for Reconsideration" ("Petition") filed April 22, 2015, by Inca Communications, Inc. ("Inca"), licensee of Station KXOL(AM), Brigham City, Utah (the "Station"). The Petition seeks reconsideration of a staff letter: (1) notifying Inca that, according to Commission records, the Station's license had expired as a matter of law because the Station was off the air for more than 12 consecutive months; and (2) providing 30 days for Inca to submit documented evidence that, in fact, the station returned to the air with authorized facilities between November 20, 2013, and 12:01 a.m., November 21, 2014, or the staff would modify the Commission's databases to reflect that the Station's license had been cancelled and its call letters deleted.¹ We also have before us the referenced application for the renewal of the Station's license ("Renewal Application"), timely filed on June 3, 2013. For the reasons set forth below, we dismiss the Petition, consider the Petition as a response to the *Notification Letter*, find that the Station's license has expired as a matter of law, cancel the Station's license, delete the Station's call sign, and dismiss the Renewal Application as moot.

Background. The Station ceased operations on November 20, 2013, due to technical reasons, and Inca requested a Special Temporary Authority ("STA") to remain silent on November 26, 2013.² The Bureau granted Inca's request on April 11, 2014,³ with the *caveat* that if broadcast operations did not commence within twelve months from the date the Station went silent, *i.e.*, 12:01 a.m., November 21, 2014, the Station's license would expire automatically as a matter of law pursuant to Section 312(g) of the Communications Act of 1934, as amended ("Act").⁴ On October 8, 2014, Inca requested an extension of

¹ See Ernest T. Sanchez, Esq., Letter, Ref. 1800B3-KAW (MB Mar. 23, 2015) ("*Notification Letter*").

² Specifically, Inca explained that the Station had been experiencing signal interference and needed to suspend operations temporarily to investigate the cause of the problem. See File No. BLSTA-20131126AAA, Exhibit 1.

³ See Ernest T. Sanchez, Esq., Letter, Ref. 1800B3-DW (Apr. 11, 2014) ("*STA Letter*").

⁴ 42 U.S.C. § 312(g).

its STA to remain silent due to the unspecified health problems of Nicolas Vicente (“Vicente”), the Station’s President, sole shareholder, and General Manager.⁵ Thereafter, on March 23, 2015, the Bureau sent the *Notification Letter* informing Inca that the Station’s license apparently had expired as a matter of law pursuant to Section 312(g) because the Station had been silent since November 20, 2013. The Station resumed operations on March 26, 2015.⁶

On April 22, 2015, Inca responded to the *Notification Letter* by filing its Petition. In this pleading, Inca appears to believe that the Bureau had already cancelled the Station’s license and seeks reconsideration of that action. Inca contends that the Bureau should exercise its discretion under Section 312(g) of the Act to reinstate the Station’s license because doing so would promote “equity and fairness.” In support of this position, Inca contends that: (1) circumstances beyond its control made it impossible for Inca to maintain service;⁷ (2) Inca acted with diligence to restore service; (3) the Station has provided a valuable and unique broadcast service for eight years; and (4) the facts of this case are distinguishable from other cases where the Commission did not exercise its authority to reinstate licenses for “equity and fairness.” Inca also contends that the Station’s silence was inadvertently extended because of the Bureau’s inaction on the Second STA Request.

Discussion. Procedural Issue: Interlocutory Order. As a threshold matter, Section 1.106(a) generally prohibits petitions for reconsideration of interlocutory orders.⁸ The *Notification Letter* is an interlocutory order because it did not cancel the Station’s license or delete its call letters. Rather, the *Notification Letter* provided an opportunity for Inca to submit evidence regarding the operational status of the Station. Consequently, the *Notification Letter* is not subject to reconsideration at this stage, and we will dismiss the Petition as a petition for reconsideration. However, we will consider the Petition as a response to the *Notification Letter*.

Substantive Issues: Automatic License Expiration. Section 312(g) provides that “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”⁹ Inca acknowledges,¹⁰ and Commission records confirm, that the Station was silent from November 20, 2013, until March 26, 2015.¹¹ Because the Station was silent for more than 12 consecutive months, its license automatically expired on November 21, 2014, without further Commission action.

⁵ See File No. BLESTA-20141008AAX (“Second STA Request”). The Second STA Request was accepted for filing on October 9, 2014, and remains pending.

⁶ See Inca Resumption of Operations Form, April 6, 2015, at 1.

⁷ Inca contends that the circumstances beyond its control were: (1) actual interference to the Station; and (2) the health problems of Vicente.

⁸ See 47 C.F.R. § 1.106(a).

⁹ 47 U.S.C. § 312(g). See also 47 C.F.R. § 73.1740(c).

¹⁰ See Inca Petition for Reconsideration at 3.

¹¹ See *supra* note 6.

Reinstatement of Expired License. Under Section 312(g) of the Act, we may extend or reinstate an expired license to “promote equity and fairness.”¹² The Commission has exercised this authority only in rare circumstances, each of which involved silence for compelling reasons beyond the licensee’s control.¹³ On the other hand, the Commission has refused to exercise discretion under Section 312(g) where the failure to resume station operations was due to the licensee’s own actions, finances, and/or business judgments.¹⁴ In this case, we find that the facts in this case do not support an exercise of discretion under Section 312(g).

Inca was granted authority to remain silent based on its claim that it was experiencing an increasing amount of signal interference and needed time to investigate. It has not provided the results of that investigation or shown why the problem could not be corrected within a year. Further, in spite of allegations that it acted with diligence, it has also not demonstrated what steps have been taken, such as requesting an STA to operate at variance with its authorized facilities, which would have enabled the Station to resume operations at an earlier date. Likewise, although we are sympathetic to the health problems suffered by Mr. Vicente, we have never held that the illness of a licensee’s principal is a factor requiring our exercise of discretion to further “equity and fairness.”¹⁵ Moreover, there is nothing in the record of this case that would cause us to do so for the first time. Accordingly, we conclude that the exercise of our discretion under Section 312(g) is not warranted on the facts presented here.

To the extent that Inca argues that its provision of a broadcast service for 8 years justifies reinstatement of its license under Section 312(g), it has provided no authority for this proposition, and we are aware of none. On the contrary, Section 312(g) states that if a station is silent for 12 consecutive months, the license expires as a matter of law “notwithstanding any provision, term, or condition of the license to the contrary.” To the extent that Inca argues that the Station’s silence was inadvertently extended because of the Bureau’s inaction on the Second STA Request, we disagree. It is well established that “staff inability to act on any application within a specified time cannot prevent license expiration nor give rise to any equitable claim that a license should be extended,” and ultimately it is the responsibility of the licensee to bring the station back on the air.¹⁶ Moreover, even if the staff had acted on the Second STA Request, it would not have extended the STA beyond November 20, 2014. Third, to the extent that Inca relies upon the Station’s resumption of service on March 26, 2015, as a basis for reinstating the Station’s license, this reliance is inapposite because the Station’s operation was

¹² 47 U.S.C. § 312(g) (“the Commission may extend or reinstate such 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”).

¹³ See, e.g., *V.I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstating license where station’s silence was attributable to destruction of towers in hurricane and substantial damage to rebuilt towers in additional hurricanes).

¹⁴ See, e.g., *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617 (2008) (not reinstating license where site loss was due to licensee’s own rule violations and continued silence was due to failure to complete construction at alternate site).

¹⁵ See *New Visalia Broadcasting, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9744 (2014) (not reinstating expired license due to alleged health problems of the licensee’s principals).

¹⁶ See *OCC Acquisitions*, Memorandum Opinion and Order, 17 FCC Rcd 6147, 6150 (2002) (not reinstating expired license and rejecting argument that staff inaction on two STA requests to remain silent was responsible for the station’s failure to resume broadcast operations).

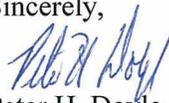
unauthorized as its license had expired as a matter of law on November 21, 2014.¹⁷ Finally, Inca claims that the facts of this case are distinguishable from *Eagle Broadcasting Group, Ltd. v. FCC*,¹⁸ as well as several other cases,¹⁹ where the Commission did not exercise its authority to extend or reinstate licenses for “equity and fairness,” because Inca has been diligent in its efforts. However, other than state that it timely filed requests for STAs to remain silent, Inca has made only conclusory statements regarding how it exercised “diligence,” which is not a sufficient factual basis to distinguish these cases or, as observed above, to justify exercise of our discretion under Section 312(g).

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed on April 22, 2015, by Inca Communications, Inc., IS DISMISSED.

IT IS FURTHER ORDERED that the Commission’s public and internal databases will be modified to indicate that the broadcast license (BL-19990208DD) for Station KXOL(AM), Brigham City, Utah, IS CANCELLED, and its call sign KXOL(AM) IS DELETED.

IT IS FURTHER ORDERED that the application (File No. BR-20130603AMT) filed by Inca Communications, Inc., for renewal of license for Station KXOL(AM), Brigham City, Utah, IS DISMISSED AS MOOT.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ See *Richard R. Zaragoza, Esq., and Gary S. Smithwick, Esq.*, Letter, 29 FCC Rcd 4903 (MB 2014) (finding that unauthorized construction and operation of a station approximately 8 months after its license expired did not warrant an exercise of discretion to reinstate the station’s license).

¹⁸ 563 F.3d 543 (D.C. Cir. 2009) (finding that the Commission did not abuse its discretion by not reinstating expired license where the licensee had not operated from its authorized site for more than 12 months but had operated from an unauthorized site).

¹⁹ See, e.g., *ETC Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 10686 (2010) (not reinstating license where licensee chose not to operate financially struggling station while offering it for sale); *Zacarias Serrato*, Letter, 20 FCC Rcd 17232 (MB 2005) (not reinstating license where licensee made business decision not to obtain an alternate site promptly).