



Federal Communications Commission
Washington, D.C. 20554

February 23, 2018

In Reply Refer to: 1800B3-VMM

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Jan Charles Gray
Mt. Rushmore Broadcasting, Inc.
218 North Wolcott Street
Casper, WY 82602

In re: **DKAWK(FM), Custer, SD**
Facility ID No. 43916

File No. BRH-20121203BCT
File No. BLH-19970925KD

Petition for Reconsideration

Dear Mr. Gray:

This letter concerns the Petition for Reconsideration (Petition) filed on June 12, 2017, on behalf of Mt. Rushmore Broadcasting, Inc. (Licensee), licensee of former station DKAWK(FM), Custer, South Dakota (Station), requesting reconsideration of our action on May 12, 2017, cancelling the Station's license as expired¹ pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act).² For the reasons set forth below, the Petition is denied.

Background. On November 10, 2016, the staff sent Licensee a letter requesting clarification of the operational status of the Station, because the staff's review of the Station's renewal application indicated that the Station may have been off the air for more than 12 months during the license term.³ On December 20, 2016, Licensee responded, stating that the Station resumed operation on August 16, 2009 using a "previously authorized temporary site,"⁴ and that its reference to its "licensed site" in the

¹ See *Mt. Rushmore Broad., Inc.*, Letter Order, 32 FCC Rcd 3924 (MB 2017) (Cancellation Letter). At the same time, the Station's license renewal application (File No. BRH-20121203BCT) was dismissed as moot, and we are treating this as a petition for reconsideration of that action, as well.

² 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, except that the Commission may extend or reinstate the 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.").

³ See *Letter from Peter Doyle, Chief, Audio Division, Media Bureau, to Mr. Jan Charles Gray*, Ref. No. 1800B3-VM (Nov. 10, 2016) (OSI). This review showed that Licensee had reported losing its transmitter site in 2002, and had received Special Temporary Authority (STA) to remain silent or operate from temporary facilities beginning in 2002. OSI at 1. On September 4, 2009, after a period of silence starting on October 21, 2008, Licensee claimed the Station had resumed operation at the licensed site on August 16, 2009. Our review also showed that the previous STA to operate from the temporary site expired on October 29, 2008. See File No. BESTA-20071025ACH (2008 STA). Thus, there appeared to be no authorized site from which the Station could be operating on August 16, 2009. OSI at 2.

⁴ *Mt. Rushmore Broad. Inc.*, Response to Operational Status Inquiry (Dec. 20, 2016) (OSI Response) at 1.

resumption notice filed on September 4, 2009, was incorrect, and was an “oversight.”⁵ Licensee stated that it had previously relied on the advice of counsel, and it “did not realize that an STA was needed to resume service following a silent period when there had been an STA granted previously for the same facility,” but rather, it assumed that once the site and facilities had been approved on a temporary basis, they could be used again on a temporary basis.⁶ Licensee also stated that it did not understand the difference between an STA for silent authority and an STA for resumption of service, and believed that all appropriate filings were being made by counsel representing it at the time.⁷ Finally, Licensee stated that the Station is now operating with an STA for the temporary site, and that this site received a certificate of compliance from the South Dakota Broadcasters Association Alternative Broadcast Inspection Program (ABIP) on September 1, 2016.⁸

The staff found that the Station’s license expired on or about October 22, 2009, pursuant to Section 312(g). Based on the OSI Response, the Cancellation Letter stated that the Licensee allowed the 2008 STA to expire and then resumed or continued operation for brief periods each year at the temporary site without authorization.⁹ Therefore our records and Licensee’s admissions established that the Station was either silent or operating with unauthorized facilities from October 21, 2008 through April 26, 2012.¹⁰ During the brief periods the Station operated during this time, totaling 39 days, Licensee lacked any sort of Commission authority to operate the Station other than from the licensed site that was last used in 2002.¹¹ The staff discredited Licensee’s claim that it did not know that Commission rules required that it have an unexpired authorization to operate from the temporary site,¹² or that it was following advice of counsel when it failed to follow Commission rules.¹³

The staff also declined to exercise the discretion afforded in Section 312(g) to extend or reinstate such license “to promote equity and fairness.”¹⁴ The Cancellation Letter found that Commission

⁵ *Id.*

⁶ OSI Response at 2. The OSI Response did not attempt to reconcile this belief with the Licensee’s record of extending the Station’s STAs to operate with temporary facilities from 2003-07 (*see, e.g.*, File Nos. BLSTA-20030109AFN, 20031021AGO, 20040730BHP, 20050510ADK, 20060607AED, and BESTA-20071025ACH).

⁷ *Id.*

⁸ OSI Response at 3.

⁹ Cancellation Letter, 32 FCC Rcd at 3926-27.

¹⁰ *Id.* at 3927. This period started with a cessation of broadcast operations as of October 21, 2008 (*see* File No. BLSTA-20081021AAB). It concluded with the grant of File No. BSTA-20120426ACD (STA authorizing operation from temporary site), and a notice of resumption of operations on April 26, 2012.

¹¹ Cancellation Letter, 32 FCC Rcd at 3926-27. *See Eagle Broad. Group, Ltd. v. FCC* 563 F.3d 543, 553 (D.C. Cir. 2009); *see also Kingdom of God, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 7522, 7527 (2016) (license cancellation under Section 312(g) resulting from unauthorized operation was appropriate).

¹² Cancellation Letter, 32 FCC Rcd at 3926-27. *See Lake County Cmty. Radio*, Forfeiture Order, 31 FCC Rcd 7659, 7660, para. 6 (MB 2016) (violations resulting from inadvertent error are willful violations); *Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. den.*, 7 FCC Rcd 3454 (1992) (stating that “inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”); *see also Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920, 1930 (2015) (“In the usual case, “I thought it was legal,” is no defense.”).

¹³ Cancellation Letter, 32 FCC Rcd at 3926. Licensee’s argument that it was following the advice of counsel is without merit. It is well established that “advice of counsel cannot excuse a clear breach of duty by a licensee.” *RKO General v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981).

¹⁴ Cancellation Letter, 32 FCC Rcd at 3927-28; 47 U.S.C. § 312(g).

decisions interpreting that provision of Section 312(g) have limited such exercises of discretion¹⁵ to situations involving compelling reasons beyond the licensee's control.¹⁶ Conversely, the Commission has declined to reinstate licenses where, as here, the failure to transmit a broadcast signal was due to the licensee's own actions, finances, and/or business judgments.¹⁷ The staff also found that exercise of such discretion was particularly unwarranted here, where for more than three years the Station was either silent or engaging in brief periods of unauthorized operation. Furthermore, the staff found that Licensee had failed adequately to explain its false claim in September of 2009 that the Station returned to the air "pursuant to the specifications of its license," or its subsequent claims regarding the series of years in which the Station returned to the air for brief periods of operation without authorized facilities.¹⁸ Thus, the staff found that Licensee's conduct mitigated against any public interest finding in favor of reinstating the Station's license.¹⁹

Licensee argues on reconsideration that its OSI Response was not given proper consideration, and that Licensee did not have enough time to respond to the OSI.²⁰ Licensee again argues that its counsel was responsible for the filings it failed to make and errors in the filings it made.²¹ Licensee claims that the Station was never off the air for more than a year at a time.²² Licensee mentions an unrelated consent decree with the Enforcement Bureau (EB) that resolved other violations of Commission rules. Licensee also alleges that a statute of limitations should apply to any determination involving the Station's

¹⁵ *Id.* at 3927. See *A-O Broad.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617, para. 26 (2008) ("This limited, discretionary provision is phrased as an exception to the general rule that most affected licenses will be forfeited.").

¹⁶ Cancellation Letter, 32 FCC Rcd at 3927. See, e.g., *V.I. Stereo Commc'ns Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted where station's silence resulted from hurricane destruction); *Community Bible Church*, Letter Order, 23 FCC Rcd 15012, 15014 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air, but remained off air to promote air safety after discovering and reporting that FCC and FAA records contained incorrect tower information); *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from licensee's compliance with a court order).

¹⁷ Cancellation Letter, 32 FCC Rcd at 3927. See, e.g., *A-O Broad.*, 23 FCC Rcd at 617, para. 27 (reinstatement not warranted when site loss was a result of the licensee's rule violations and continued silence was a result of licensee's failure to complete construction at an alternate site); *ETC Commc'ns, Inc.*, Letter Order, 25 FCC Rcd 10686 (MB 2010) (reinstatement not warranted where the licensee chose not to operate financially struggling station while offering it for sale); *Kirby Young*, Letter Order, 23 FCC Rcd 35 (MB 2008) (reinstatement not warranted where the licensee was not financially able to restore operations after transmitter failed); *Kingdom of God*, Letter Order, 29 FCC Rcd 11589 (MB 2014) (reinstatement denied because silence was not the result of compelling reasons beyond the licensee's control, but, rather, "due to the licensee's own actions, finances and/or business judgments"); *Silver Fish Broad., Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 15054, 15055, para. 3 (2014) (no equitable relief under Section 312(g) is warranted when a station's extended silence is the result of a licensee's own voluntary business decision).

¹⁸ Cancellation Letter, 32 FCC Rcd at 3927-28. See *Eagle Broad. Group*, 563 F.3d at 554 (discretion not warranted because "it does not require legal counsel or any level of sophistication to avoid making false statements on simple matters of fact").

¹⁹ Cancellation Letter, 32 FCC Rcd at 3928.

²⁰ Petition at 1, 4. Based on our review of the record, we find that Licensee has received a full opportunity to present any exculpatory information, but has failed to present evidence relevant to our determination other than its admissions regarding the Station's unauthorized operations.

²¹ Petition at 1-2. There is an indecipherable reference to a "geography error" regarding the site. We do not address this issue.

²² Petition at 2.

unauthorized operation.²³ Finally, Licensee claims that the Station's authorized operation from September 2016 to May 12, 2017, and the Station's positive ABIP inspection should negate the Station's history of extended silence and unauthorized operations, and warrant reinstatement of the License pursuant to Section 312(g).²⁴ Licensee requests a short-term renewal of the Station's license as an alternative resolution.²⁵

Decision. We deny the Petition. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.²⁶ The Licensee has failed to meet this burden.

The staff properly held that the Station's license expired as a matter of law pursuant to Section 312(g) for remaining silent or operating through the use of unauthorized facilities for more than twelve months.²⁷ Licensee does not dispute that its OSI Response admitted that the Station resumed operation on August 16, 2009, using the facility specified in the expired 2008 STA, and not its licensed facilities, as it had originally stated to the Commission in its notice of resumption.²⁸ Accordingly, the staff properly found that the Station's license automatically expired as a matter of law pursuant to Section 312(g) at 12:01 a.m. on October 22, 2009. Subsequent events, such as the Station's resumption of authorized operation and positive ABIP inspection, are irrelevant to this determination.²⁹ To the extent Licensee is arguing that such subsequent events are a basis for reinstating the Station's license "to promote equity and fairness" under Section 312(g), corrective action to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate prior violations.³⁰

We reject Licensee's argument that the Cancellation Letter conflicts with a statute of limitations. Licensee does not indicate what the source of this statute of limitations would be, or its duration. Furthermore, our ability to resolve this case in a timely manner was impeded by the Licensee's own misrepresentation of the Station's operating status when it claimed to be using the Station's licensed facilities for the resumed operation in August 2009. The Commission relies on an applicant's truthful

²³ Petition at 2. The EB Consent Decree is irrelevant to this matter and we do not address it.

²⁴ Petition at 3-4.

²⁵ Petition at 5. A short-term renewal is not an option under the terms of Section 312(g).

²⁶ See 47 CFR § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 3 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); and *National Ass'n of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415, para. 4 (2003).

²⁷ Cancellation Letter, 32 FCC Rcd at 3927.

²⁸ Licensee again attempts to place blame on its counsel, and we again find no merit in this argument. See note 13, *supra*.

²⁹ Section 312(g) provides for automatic license expiration for failure to operate as authorized for twelve months. Compare 47 U.S.C § 312(g) with 47 U.S.C. § 312(c); see also *Spirit Prod., Inc.*, Letter Order, 28 FCC Rcd 8875, 8877 (MB 2013) (license expiration pursuant to Section 312(g) takes effect automatically by operation of law); *Bennett G. Fisher, Esq.*, Letter Order, 32 FCC Rcd 9371 (MB 2017) (app. for review pending) (authorized resumption in 2014 does not support relief under Section 312(g) for station that was silent or operating with unauthorized facilities from 2007-2014); *Jerry Russell d/b/a The Russell Company*, Memorandum Opinion and Order, 27 FCC Rcd 8323, 8325 n.18 (MB 2012) (resumption in accordance with license on August 1, 2009 does not support relief under Section 312(g) for station that had ceased operations in May of 2007).

³⁰ See *Viacom Inc.*, Forfeiture Order, 30 FCC Rcd 797, 806, para. 23 (2015).

representations in filings,³¹ and the Licensee's failure to submit accurate information resulted in this delayed action.

Accordingly, the Petition for Reconsideration filed by Mt. Rushmore Broadcasting, Inc. for Station DKAWK(FM), Custer, South Dakota, IS DENIED.

Sincerely,



Albert Shuldiner
Chief, Audio Division
Media Bureau

³¹ See 47 CFR § 1.17; *John Jason Bennett*, Letter Order, 20 FCC Rcd 17193, 17196 (MB 2005) (a false certification, even absent an intent to deceive, may be considered an actionable violation of Section 1.17).