



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to: 1800B3-VMM

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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In re: DKMYQ(FM), North English, IA
Facility ID No. 170998
File Nos. BLH-20120123ABO,
BRH- 20121001ANF, BALH-20171011ACH
Petition for Reconsideration
Motion for Stay

Dear Counsel:

This letter concerns the Petition for Reconsideration and Motion for Stay (Petition)¹ filed on January 19, 2018, on behalf of Justin A. McLuckie (Licensee), licensee of former station DKMYQ(FM), North English, Iowa (Station). The Petition requests reconsideration and stay of our action on December 15, 2017, cancelling the Station's license as expired² pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act).³ This letter also addresses the Statement in Support of the Petition for Reconsideration and Motion for Stay (KM Pleading) filed on March 8, 2018, by KMYQ Media, LLC (KM), the proposed assignee of the Station.⁴ For the reasons set forth below, the Petition is denied, and the KM Pleading is dismissed.

¹ Justin A. McLuckie, *Petition for Reconsideration of Cancellation of Broadcast License and Denial of License Renewal and License Assignment Application, and Motion for Stay* (Jan. 19, 2018).

² See *Letter from Peter H. Doyle, Chief, Audio Division, to Mr. Justin A. McLuckie*, Ref. No. 1800B3-VM, Dec. 15, 2017) (*Cancellation Letter*). At the same time, the Station's license renewal application (File No. BRH-20121001ANF) and application for consent to assignment of license (File No. BALH-20171011ACH), were dismissed as moot.

³ 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.").

⁴ KMYQ Media, LLC, *Statement in Support of Motion for Stay and Petition for Reconsideration of Cancellation of Broadcast License and Denial of License Renewal and License Assignment Application* (Mar. 8, 2018). Section 405

Background. On October 19, 2017, the staff sent Licensee a letter requesting evidence documenting the operational status of the Station, because the staff's review of the Station's operating history indicated that the Station may have been off the air for more than 12 months.⁵ On November 20, 2017, Licensee responded, stating that the Station was operating from its licensed site as of September 27, 2017.⁶ After being informed that this did not respond in full to our letter, Licensee submitted a further showing by email on December 8, 2017.⁷ This response was deemed insufficient because it also did not provide the required documentation of when and where the Station operated during the timeframe delineated by our letter.⁸ In short, Licensee failed to provide the documentation requested by the *OSI* to show when and where the Station operated (if at all) during the period of September 20, 2013 to September 27, 2017.⁹ On January 19, 2018, we issued the *Cancellation Letter*.

of the Act, and the FCC's rules (Rules) require any petition for reconsideration to be filed within thirty days of the date upon which the Commission gives public notice of the decision. In this case, public notice of the action in the *Cancellation Letter* was released on December 20, 2017, and any petition for reconsideration of that action was due on Monday, January 22, 2018. *See* 47 U.S.C. § 405(a); 47 CFR § 1.106(f); 47 CFR § 1.4(b)(2), (j). Despite being styled as a "Statement," in reality, the KM Pleading is an untimely petition for reconsideration of the *Cancellation Letter*. It is also untimely and unauthorized as a responsive pleading pursuant to 47 CFR § 1.45. Accordingly, the KM Pleading is dismissed.

⁵ *See Letter from Peter Doyle, Chief, Audio Division, Media Bureau, to Mr. Justin A. McLuckie*, Ref. No. 1800B3-VM (Oct. 19, 2017) (*OSI*). This review showed that the Station was licensed on January 25, 2012, and that it had filed a request for Special Temporary Authority (STA) to remain silent on October 1, 2012, stating that it went silent on April 1, 2012, and that it had given up its transmitter site. *OSI* at 1. Our review also showed that on March 22, 2012, Licensee filed a request for technical STA to operate from a temporary site, which we granted on March 27, 2013, and which expired on September 23, 2013. *Id.* (*See* File No. BSTA-20130322AIE (2013 STA)). On March 30, 2013, the Station resumed operation using the 2013 STA (*See* Notice of Resumption of Operations, Apr. 1, 2013), and on September 20, 2013, it went silent again, purportedly to seek a new permanent site. *OSI* at 2. (*See* File No. BLSTA-20130923AGI, extended by File No. BLESTA-20140604ACE). On September 9, 2014, Licensee claimed that the Station had resumed operation at its licensed site on September 5, 2014. *Id.* (*See* Notice of Resumption of Operations, Sep. 9, 2014). On September 27, 2016, Licensee filed another request for STA to remain silent due to financial difficulties. *Id.* (*See* File No. BLSTA-20160927ADV). This STA expired on April 19, 2017. On September 14, 2017, Licensee filed an extension of the silent STA, stating that it intended to assign the license to a new entity. *Id.* (*See* File No. BLESTA-20170914AAM). On September 29, 2017, we received a Notice of Resumption of Operations, stating that the Station had "returned to air on September 27, 2017, using its full power." *OSI* at 3. *See Email from Rick Watts to Dale Bickel, Staff Engineer, Audio Division, Media Bureau, FCC* (Sept. 29, 2017, 1:38 pm EDT). On October 11, 2017, Licensee filed an application for assignment of license of the Station to KMYQ Media, LLC. *Id.*

⁶ Email from Greg Skall, Esq., Counsel to Justin McLuckie, to Victoria M. McCauley, Esq., Audio Div. MB, FCC (Nov. 20, 2017, 16:59 EST) (*OSI* Response) at 1.

⁷ Email from Greg Skall, Esq., Counsel to Justin McLuckie, to Victoria M. McCauley, Esq., Audio Div. MB, FCC (Dec. 8, 2017, 15:11 EST) (*OSI* Response Supplement).

⁸ The information required by the letter was as follows: "This evidence must indicate the location, effective radiated power and antenna height above ground level for **all periods of operation** from September 20, 2013, to the present. Also include copies of all leases, personnel 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. You **must also include pictures** of the Station's studio facilities and transmission facilities during this timeframe, and provide exact *Station* coordinates." *OSI* at 3 (*emphasis in original*).

⁹ *Id.* In fact, Licensee failed to show that the Station ever operated at its licensed site prior to September 27, 2017. Licensee's *OSI* Response and *OSI* Response Supplement (reprinted as Exhibit 1 to the Petition) provided copies of September 2017 construction invoices, including invoices for a 120-foot tower and a three-bay antenna. That raised questions about whether the Station actually was constructed in accordance with its construction permit in 2012, as claimed in the original license application for the Station. *See* FCC File No. BLH-20120123ABO. For 2012,

The Petition argues that the staff erred when it cancelled the Station's license.¹⁰ The Petition argues that the staff: (1) ignored evidence of Station operation;¹¹ (2) failed to allow sufficient time for Licensee to submit supplemental evidence;¹² (3) violated Section 309(e) by dismissing the renewal and assignment applications without a hearing;¹³ (4) failed to consider the public interest mandate of Section 307 of the Act;¹⁴ and (5) failed to exercise its discretion pursuant to Section 312(g).¹⁵ The Petition also states that substantial sums have been spent to bring the Station to operation, which was done based on "representations from Commission staff that the operation was permissible."¹⁶ It also argues that the community is losing its only station and that it has a new buyer who is ready to operate the station.¹⁷

Decision. We deny the Petition and confirm the finding that the Station's license expired for failure to transmit an authorized signal for 12 consecutive months. 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.¹⁸ Licensee has failed to meet this burden. Licensee argues that it was denied due process because its license was cancelled without giving it adequate time to respond to the *OSI*. We disagree. Licensee was granted an initial 30 days to respond to the *OSI*, and a 30-day extension after the first response was deemed inadequate. No further extension of time to respond was requested. After the second unresponsive submission, the staff was under no obligation to await further submissions, despite Licensee's erroneous claim that additional information would be forthcoming. The *Cancellation Letter* made note of the documentation provided by Licensee (including two affidavits, pictures of the STA site, and documentation involving the original transmitter). It then quoted the *OSI* and cancelled the license based on failure to show "actual operation of the Station during the timeframe requested."¹⁹ We note that Licensee has submitted no additional documentation in the Petition or elsewhere that the Station was operating with authorized facilities between September 20, 2013 and September 27, 2017.²⁰

Licensee only submitted: (1) a quotation of pricing for a transmitter and related equipment; and (2) an invoice issued to "Mytown Media Inc." of Wichita, Kansas for that transmitter and related equipment. *See* Petition at Exh. 1. In contrast to the showing for 2017, the showing for 2012 included no reference to a tower, antenna, or installation costs. In 2014, Licensee proposed to sell the Station to My Town Media, Inc. of Wichita, Kansas. *See* FCC File No. BALH-20140624AAK. The cancellation of the Station's license mooted any need to formally investigate whether the Station was constructed in 2012 and whether the payment for the equipment to My Town Media, Inc., rather than the Licensee, is evidence of an unauthorized transfer of control.

¹⁰ Petition at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 6. This assertion is unsupported and need not be addressed further.

¹⁷ *Id.*

¹⁸ *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).

¹⁹ *Cancellation Letter* at 1.

²⁰ *See* note 8 *supra*.

The *Cancellation Letter* properly found that Licensee did not show that the Station operated with authorized facilities between September 20, 2013, and September 27, 2017. The OSI Response Supplement showed that Licensee (or another party) had purchased a transmitter in 2012,²¹ had secured a location from which to operate in 2012 and 2013, and included pictures of the 2013 STA site.²² This documentation was insufficient to establish that the Station operated with authorized facilities during the period of time specified in the *OSI*. We note that Licensee did not submit personnel records, utility bills or other invoices, station logs, issues/programs lists, or engineering records, all of which were specifically required by the *OSI*, and which would have shown actual operation. To date, none of this documentation has been submitted. Accordingly, the staff correctly held that Licensee submitted no documentation of authorized station operation for the four years prior to September 27, 2017.

Licensee fails to show that Section 309 of the Act applies to this matter.²³ The *Cancellation Letter* was not a determination of the merits of any application within the scope of Section 309. Rather, the *Cancellation Letter* reached a determination pursuant to Section 312(g) of the Act that the Station's license had expired due to the Station's failure to operate with authorized facilities for at least four years. Based on that determination under Section 312(g), Licensee's applications for license renewal and consent to assignment of license were dismissed as moot.²⁴

We decline to reinstate the license pursuant to the "equity and fairness" provision of Section 312(g).²⁵ The Commission has declined to reinstate licenses pursuant to this provision where, as here, the failure to transmit a broadcast signal was due to the licensee's own actions, finances, and/or business judgments.²⁶ We find that exercise of such discretion is particularly unwarranted here, where for almost four years, the Station was either silent or engaging in periods of unauthorized operation, while failing to

²¹ See note 9 *supra*.

²² OSI Response Supplement at 4-5 (Affidavit of Darin Chittick, dated Dec. 8, 2017 (stating that the Station placed equipment at his mother's property (license site) from January 2012 through April 2012, and resumed operation there, starting on September 27, 2017); Affidavit of Dale Faas, dated Dec. 7, 2017 (stating that the Station was allowed to place its equipment on his grain elevator and operated there (STA site) starting in March 2013).

²³ See Petition at 3. Licensee also fails to show that Section 307(a) of the Act, involving applications for station licenses, applies here. *Id.* at 4-5; see also Motion for Stay at 3. The *Cancellation Letter* did not make a determination of the merits of any such application.

²⁴ *Cancellation Letter* at 2. Even if there had been a determination on the merits of an application, Licensee has not shown an error supporting reconsideration. Licensee's public interest arguments focus on the Station's initiation of authorized service as of September 27, 2017. However, Licensee fails to cite any Commission precedent to support those arguments. In reality, Commission precedent supports the action taken here. See note 26 *infra*.

²⁵ See note 3 *supra*.

²⁶ See, e.g., *Kingdom of God, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 7522, 7527, para. 11 (2016), *aff'd per curiam sub nom. Kingdom of God, Inc. v. FCC*, No. 17-1132 (D.C. Cir. Apr. 10, 2018); *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617, para. 27 (2008) (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, 11591 (MB 2014) (reinstatement denied because silence was not the result of compelling reasons beyond the licensee's control, but, rather, "a direct result of [its] own business decisions"); *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).

provide accurate information in its FCC filings and sufficient information in response to FCC inquiries.²⁷ Subsequent events, such as the Station's resumption of authorized operation, and locating a qualified potential buyer, are irrelevant to this determination.²⁸

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.²⁹ 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 September 21, 2014.

Accordingly, the Petition for Reconsideration and Motion for Stay filed by Justin A. McLuckie on January 19, 2018, for Station DKMYQ(FM), North English, Iowa, ARE DENIED, and the Statement in Support of Motion for Stay and Petition for Reconsideration filed by KMYQ Media, LLC on March 8, 2018, IS DISMISSED.

Sincerely,



Albert Shuldiner
Chief, Audio Division
Media Bureau

²⁷ See note 5 *supra*. We note that this case is readily distinguishable from *John L. White, Licensee of KOLJ(AM), Quanah, Texas*, Notice of Apparent Liability and Order, 24 FCC Rcd 12541 (2009) (*KOLJ*), in which the Commission exercised its discretion under Section 312(g) of the Act. In *KOLJ*, the Commission's decision was based on the facts that the station operated from its licensed site and had not made misrepresentations to the Commission. *KOLJ* at 12543. Here, the STA site was at a different location from the license site, and Licensee misrepresented its operation on the notice of resumption filed on September 9, 2014.

²⁸ 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), *aff'd sub nom. Roy E. Henderson*, Memorandum Opinion and Order, FCC 18-36 at 3 (Mar. 26, 2018) (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).

²⁹ *Cancellation Letter* at 1.