



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

January 11, 2017

***In Reply Refer to:
1800B3-CEG***

John C. Trent, Esq.
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In re: **KROY(FM), Palacios, Texas**
Facility ID No. 77693
File Nos. BRH-20130328ABT
BALH-20161128ADK

Application for License Renewal
Application to Assign License

Dear Counsel:

We have before us the above-referenced applications for: (1) the renewal of the license for Station KROY(FM), Palacios, Texas (Station),¹ filed by Roy E. Henderson (Henderson) on March 28, 2013 (Renewal Application); and (2) the assignment of the Station's license from Henderson to New Wavo II, Inc., filed on November 28, 2016 (Assignment Application). On August 28, 2014, the Audio Division, Media Bureau (Bureau) issued a letter of inquiry (LOI) into the Station's operation, to which Henderson responded on October 17, 2014 (LOI Response).² Upon review of the record before us, we find that the Station's license expired as a matter of law under Section 312(g) of the Communications Act of 1934, as amended.³ Accordingly, we delete the Station's call sign and dismiss the Renewal Application, Assignment Application, and associated pleadings as moot.

Background. On November 6, 2007, Henderson notified the Commission that the Station's original antenna tower (Robbins Slough Site) had been dismantled, and requested silent special temporary authority (STA) starting October 24, 2007.⁴ On October 24, 2008, Henderson filed a request for an engineering STA to operate the Station at a temporary site (Palacios Site).⁵ On February 20, 2009, Henderson filed a modification application to relocate the Station's transmission facilities to a new

¹ File Nos. BLH-19970205KG (granted October 29, 1997) (1997 License) and BRH-20050331AHN (granted July 25, 2005); *see also Broadcast Actions*, Public Notice, Report No. 46036 (MB July 28, 2005).

² On April 10, 2015, the Bureau issued a letter identifying certain deficiencies in the LOI, to which Henderson responded by supplementing the LOI Response on May 21, 2015 (First LOI Supplement). On August 18, 2015, Henderson again supplemented the LOI Response (Second LOI Supplement).

³ 47 U.S.C. § 312(g) (Section 312(g)).

⁴ File No. BLSTA-20071106ADC (granted November 8, 2007).

⁵ File No. BSTA-20081021ADB; *Mr. Fred Hannel*, Letter, Ref. No. 1800B3-SNC (MB Oct. 24, 2008) (First STA Letter) (First Engineering STA).

permanent site (Antenna Structure Registration Number (ASRN) 1048855) (Matagorda Site).⁶ However, Henderson did not file a license to cover the First Modification Application before the underlying construction permit expired, on July 15, 2012. On April 22, 2009, the First Engineering STA expired.⁷ On June 25, 2009, the Bureau granted a second engineering STA for the Palacios Site, which expired on December 25, 2009.⁸ After the Second Engineering STA expired, Henderson admittedly continued to operate the Station at the Palacios Site until March 2, 2012,⁹ at which point the Station again went silent for nearly a year (until February 28, 2013).¹⁰ Meanwhile, on July 13, 2012, Henderson filed a second modification application for a construction permit at the Matagorda Site.¹¹ In the LOI Response, Henderson states that the Station resumed operation for two brief periods before the License Application for the Matagorda Site was filed: (1) March 1, 2013, to March 9, 2013, at the Palacios Site; and (2) December 23, 2013, to January 2, 2014, at an undisclosed site.¹² During these two periods of operation, Henderson did not have an engineering STA, program test authority (PTA), or a license to operate at either the Palacios or Matagorda Sites.¹³ On March 25, 2014, Henderson filed a license application for the Matagorda Site,¹⁴ which the Bureau granted on March 3, 2016.¹⁵

Discussion. Section 312(g) of the Act 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...”¹⁶ Well-established Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in Section 312(g) through the use of unauthorized facilities.¹⁷ Thus, a station is subject to Section 312(g)'s license forfeiture provision if: (a) the station fails

⁶ File No. BPH-20090220ADA (granted July 15, 2009) (First Modification Application); *Broadcast Actions*, Public Notice, Report No. 47031 (MB July 21, 2009).

⁷ First STA Letter at 2.

⁸ File No. BSTA-20090622AAV (granted June 25, 2009); *Robert J. Buenzle*, Letter, Ref. No. 1800B3-CNM (MB June 25, 2009) (Second Engineering STA).

⁹ LOI Response, Exh.1 at 1 (Henderson Declaration).

¹⁰ *Id.*; File No. BLSTA-20120515ABY (granted August 6, 2012).

¹¹ BPH-20120713ADI (granted August 31, 2012) (Second Modification Application); *Broadcast Actions*, Public Notice, Ref. No. 47817 (MB Sept. 6, 2012). We note that, according to the ASRN database, the tower specified in the Second Modification Application (ASRN 1048855) was dismantled in 2013 and a new tower (ASRN 1061114) constructed at the same location. Although the Commission should have been notified of this change, the discrepancy does not affect the application of Section 312(g) herein.

¹² Henderson Declaration at 1-2; File No. BLSTA-20130327ABP (granted June 11, 2013).

¹³ PTA pursuant to the current authorization commenced March 15, 2014. 47 CFR § 73.1620(a)(1) (allowing program tests to begin 10 days before an application for license is filed).

¹⁴ File No. BLH-20140325AAE (granted Mar. 3, 2016) (License Application); *Broadcast Actions*, Public Notice, Ref. No. 48686 (MB Mar. 8, 2016).

¹⁵ *John C. Trent, Esq.*, Letter, Ref. No. 1800B2-RB (MB Mar. 3, 2016).

¹⁶ *See Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16499 (1996); *see also* 47 C.F.R. § 73.1740(c).

¹⁷ *See, e.g., James McCluskey, Ph.D.*, Letter Decision, 27 FCC Rcd 6252, 6254-55 (MB 2012) (“[U]nauthorized and unlicensed transmissions are no better than silence” and, in assessing a licensee’s rights under Section 312(g), “an unauthorized transmission counts for nothing”) (internal citations omitted).

to operate for twelve consecutive months or longer; (b) the station operates with unauthorized facilities for such a period; or (c) a combination of the prior two situations occurs for such a period.¹⁸

In this case, the Station was either silent or operating with unauthorized facilities from December 26, 2009 (the day after the Second Engineering STA for the Palacios Site expired), to March 15, 2014 (when automatic program test authority commenced at the Matagorda Site). During the two brief periods of operation Henderson reports during this time (i.e., March 1 to 9, 2013, and December 23, 2013, to January 2, 2014), the Station lacked any sort of Commission authority to operate—STA, PTA, or license to cover—at either site.¹⁹ Therefore, the Station's license expired as a matter of law on or about December 26, 2010, pursuant to Section 312(g) of the Act.²⁰ Although the Commission retains discretion under Section 312(g) to extend or reinstate such license “to promote equity and fairness,”²¹ we find that exercise of such discretion is not warranted here, where for more than three years the Station was either silent or engaging in unauthorized operation.

This decision is limited solely to the operation of Section 312(g) and is without prejudice to any further enforcement action that the Commission may take regarding KROY or any other Henderson station.

Conclusion/Actions. For the reasons set forth above, we find that the license of KROY(FM), Palacios, Texas (Facility ID No. 77693), HAS EXPIRED by operation of 47 U.S.C. § 312(g) on or about December 26, 2010. Accordingly, the Commission's public and internal databases will be modified to reflect that expiration, and we HEREBY DELETE the Station's call sign, KROY(FM). All authority to operate this facility IS TERMINATED and any operation of the facility must cease immediately. Notwithstanding this order, it is imperative to the safety of air navigation that any prescribed painting and illumination of the Station's tower be maintained until the tower is dismantled. Therefore, the owner of the tower where KROY's transmitting antenna is located must maintain the tower in the manner prescribed by the Commission's rules and the terms of the expired license.²²

¹⁸ *Id.*

¹⁹ Although, for Section 319(k) purposes, we do not distinguish between silent periods and unauthorized operation, we note that the record in this case lacks conclusive evidentiary support—such as utility bills or station logs—that the Station in fact operated during the claimed periods.

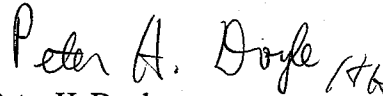
²⁰ We note that Section 312(g) would equally apply to any subsequent 12-month period of silence and/or unauthorized operation between December 26, 2009, and March 15, 2014. Although Henderson ultimately received authorization to operate KROY at the Matagorda Site, that License Application did not relate to—and the staff's action did not approve—KROY's prior unauthorized operation. *See, e.g., Kingdom of God, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 7522, 7525-26 (2016); *Christian Broadcasting of East Point, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 13975, 13976 (2015). Therefore, the licensing action did not affect the prior expiration of the KROY license by operation of law under Section 312(g), which expressly operates “notwithstanding any provision, term, or condition of the license to the contrary.”

²¹ 47 U.S.C. § 312(g).

²² *See* 47 U.S.C. § 303(q) and 47 CFR § 17.6.

IT IS FURTHER ORDERED that the renewal application filed on March 28, 2013 (File No. BRH-20130328ABT), the assignment application filed on November 28, 2016 (File No. BALH-20161128ADK), and all associated pleadings ARE DISMISSED as moot.

Sincerely,

A handwritten signature in cursive script that reads "Peter H. Doyle" followed by a small mark that appears to be "H/D".

Peter H. Doyle
Chief, Audio Division
Media Bureau