

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

In re Application of)	
)	
SHELBY BROADCAST ASSOCIATES, LLC)	File No. 0000091616
)	Facility ID No. 141124
Application for Renewal of License for)	
Station W252BE, Tarrant, Alabama)	
Directed to:	Office of the Secretary	
Attention:	Chief, Audio Division, Media Bureau	

**PETITION FOR RECONSIDERATION OF GRANT OF APPLICATION
FOR RENEWAL OF LICENSE**

Marble City Media, LLC (“Marble City”), licensee of Station WFXO(FM), Stewartville, Alabama, by its counsel, hereby respectfully submits its request for reconsideration of the Commission’s March 19, 2020, improvident approval of the above-captioned application of Shelby Broadcast Associates, LLC (“Shelby”) for a renewal of license to operate W252BE. The Commission should not favorably act on the application until it determines whether, in fact, Shelby has a current license which can be renewed, and it resolves the outstanding questions as to the qualifications of Shelby. Challenges to Shelby’s licensed status and qualifications have been raised in numerous pleadings filed by Marble City over the past three years, all of which are a matter of record at the Commission and have not been acted upon.

Marble City filings raising issues as to Shelby’s qualifications have included:

- (1) a February 10, 2017, “Complaint Regarding Co-Channel Interference Caused by Transmissions of FM Translator Station W252BE” (Complaint);
- (2) a March 9, 2017, “Addendum to Complaint Regarding Co-Channel Interference Caused by Transmissions of FM Translator Station W252BE” (Addendum);

- (3) a June 1, 2017, “Reply to Response to Interference Complaint and FCC Letter of Inquiry and Opposition to W252BE Modification Application” (First Reply);
- (4) a June 8, 2017 “Request Relating to Interference Complaint, FCC Letter of Inquiry and Opposition to W252BE Modification Application” (Request);
- (5) a July 6, 2018, “Revival of Complaint and Petition for Cancellation of W252BE License” (Complaint Revival-Petition);
- (6) a July 20, 2018, “Supplement to Revival of Complaint and Petition for Cancellation of W252BE License”(Supplement);
- (7) a July 24, 2018. “Informal Objection,” regarding W252BE’s request for special temporary authority (Objection);
- (8) an August 15, 2018, “Reply to Opposition to Revival of Complaint and Petition for Cancellation of W252BE License” (Second Reply);
- (9) an October 19, 2018, “Comments on Application for License” (Comments); and
- (10) an October 29, 2019, “Response” to October 7, 2019, letter of James D. Bradshaw.

In addition, as Marble City’s pleadings have raised character issues as to Shelby, and there are past actions of the Commission constituting “adverse actions” and therefore the “yes” responses in the “Character Issues” subsection of the “Renewal Certification” section of Shelby’s W252BE renewal application are demonstrably false.

Accordingly, the Commission should reconsider the March 19, 2020, approval of the W252BE renewal application. Indeed, granting a license renewal application without resolving pending matters which could call into question the validity of the underlying license is contrary to customary Commission practice.¹ To do otherwise effectively pre-judges the pending matters.

¹ It is because of its knowledge of this customary practice of resolving underlying issues first that Marble City did not file a petition to deny the license renewal application. Nonetheless, to the extent deemed necessary, Marble City submits that a waiver of any requirement of prior participation in this particular renewal proceeding is warranted in light of its past submissions

Moreover, such a resolution before renewal is necessary as a part of the Commission's process in considering a renewal application. As well known, regardless of a petition to deny or complaint as to a renewal application, the Commission must make public interest findings before granting a renewal application. The pertinent sentences in 47 U.S.C. §309 of the *Communications Act of 1934, as amended*, are:

47 U.S.C. §309(a)... Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 [47 USCS § 308] applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. [underlining added]

47 U.S.C. § 309(k), states that the Commission shall grant a license renewal application if it finds, with respect to that station, during the preceding license term, that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations by the licensee of the Communications Act or the Commission's Rules; and (3) there have been no other violations of the Act or the Commission's rules, which, taken together, would constitute a pattern of abuse.

Accordingly, the Commission should consider the matters raised herein and other matters as to Shelby and W252BE, whether in response to this Petition or on its own motion.

ARGUMENT

(a) Renewal of license is inappropriate as Shelby Lacks a License to operate W252BE

As stated in past Marble City filings, the primary issue at hand is that Shelby has no license to operate station W252BE. Accordingly the approval of its renewal application should

and the serious nature of the matters raised therein, which demonstrate that grant of the underlying W252BE license would be contrary to the public interest.

be vacated. Indeed, Shelby's operation of W252BE in an unauthorized manner for multiple years has negated its status as the station's licensee.

As detailed previously by Marble City, on October 16, 2018, in its last filing for an authorization, Shelby filed an application, BLFT-20181016ABE, for license to cover a construction permit file number BPFT-20170511AAL granted June 21, 2017, sixteen (16) months before that date. In its October 19, 2018, Comments on that application, Marble City noted that W252BE had not operated in accordance with its license or any other authorization from the Commission since at least November 16, 2016, when its last Commission authorization to operate at variance from its licensed parameters had expired.² Shelby itself acknowledged that its operation after November 8, 2015 had not even been in accordance with that 2015 STA.³ Thus, W252BE operated without authorization for a period of 35 months prior to filing the license application.

Marble City noted in its pleadings that given the extensive period of time of unauthorized operations and the circumstances, Shelby's license had expired. As is apparent from the facts, the unauthorized operations were deliberate and knowing actions by Shelby.

More particularly, Marble City concluded in its October 19, 2018, *Comments*:

"As is well established, unauthorized operation is considered by the Commission to be the equivalent of no operation at all. *Eagle Broad. Group*, 563 F.3d 543, 553 (D.C. Cir. 2009) ("Under the statute, unauthorized and unlicensed transmissions are no better than silence") *A-O Broad. Corp.*, 23 FCC Red 603 (2008); *see also James McCluskey, Ph.D.*, Letter Order, 27 FCC Red 6252, 6254-55 (MB 2012) ("an unauthorized transmission counts for nothing"); *A-0 Broadcasting Corporation*, 23 FCC Red 603 (2008); *Tango Radio, LLC*, 30 FCC Red 10564,

² See October 19, 2018, Marble City Comments on Shelby Application for License.

³ See, *Shelby Opposition*, filed August 3, 2018, in response to Marble City's *Revival of Complaint and Petition for Cancellation of W252BE License*, filed July 6, 2016.

10567-68 (2015) (temporarily constructed facilities do not form the basis for filing a license application). Section 312(g) of the Communications Act of 1934, as amended, specifies that the license of a station that is silent or engages in operation other than as authorized for a period of 12 consecutive months automatically expires at the end of that period.”⁴

A brief review of the months leading to the Shelby October 16, 2018, license application filing is helpful to an understanding the conclusion that W252BE is an expired authorization.

Apart from prior filings, in a pleading filed July 6, 2018, Marble City demonstrated that W252BE had been operating at the unauthorized antenna height of approximately 750 feet, with an improperly oriented directional antenna, and transmitter output power almost double that authorized.⁵

Shelby did not contest the foregoing conclusive showing that Shelby was and had been illegally operating W252BE; however, Shelby responded with a request for a technical STA for W252BE, File No. BSTA-20180718AAD on July 18, 2018. That request was dismissed the very next day due to failure to indicate a reason why the STA was needed, but Shelby turned around and filed another STA request (the “STA Request”). While this STA Request provided the previously missing reason for seeking an STA, that explanation itself, and the other information in the STA Request and additional Shelby filings, raised further troubling questions and

⁴ In its Comments as to the license application, Marble City referenced, as relevant to the current circumstances, the *Letter Order as to WZNN(FM), Maplesville, AL (reference 1800B3-VM)* dated November 15, 2017, which provided in part, “*Well established Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in Section 312(g) through the use of unauthorized facilities.*” The Commission cancelled the WZNN(FM) license, deleted the call sign, and as a further measure required Valleydale Broadcasting, LLC (“Valleydale”), and its various principals to submit a copy of the *Letter Order* with every facilities application filed for a period of five years.⁴ The named principals include those associated with Shelby. Due to its direct relevance as express notice to Shelby that prolonged unauthorized operations result in license cancellation, the Revival pleading included a copy of the Commission’s *Letter Order* concerning Valleydale and through shared principals, Shelby. See *Revival of Complaint and Petition for Cancellation of W252BE License*.

⁵ *Revival of Complaint and Petition for Cancellation of W252BE License*.

definitively established by Shelby's own statements that W252BE has been operating in an unauthorized manner since November 8, 2015.⁶

Further, as demonstrated by Marble City in a supplemental filing as to the STA Request, through a showing of its consulting engineer, the STA Request was unacceptable as violating Section 74.1204(a)(3) due to prohibited signal contour overlap with WFXO. Shelby's October 16, 2018, application, BLFT-20181016BE, for license to cover a construction permit followed the two STA attempts but did not cure the infirmities of the translator's status and its deliberate and knowing actions in operating the station illegally without authorization.

Finally, as Marble City noted in its response to October 7, 2019, letter of Jim Bradshaw as to the Translator Interference Order, the primary issue is no longer interference to WFXO's past facilities, which have been modified since the initial complaint was filed, but rather is that Shelby does not have a license to operate W252BE. Shelby's current operation of W252BE, as were its operations for over four (4) years back to November 8, 2015, are in blatant disregard of the Commission's rules. As previously requested by Marble City, under all the circumstances, the Commission should rescind the March 19, 2020, grant of the renewal application and order that W252B immediately cease operation.

⁶ See, Shelby Opposition, in which Shelby admitted that its operation of W252BE had never been in accordance even with its 2015 STA.

(b) Shelby Improperly Answered Renewal Application Character Questions

Shelby's improper responses in its renewal application are to the following questions in the RENEWAL CERTIFICATION portion of the renewal application form under the subheading CHARACTER ISSUES:

Licensee certifies that neither the licensee nor any party to the application has or has had any interest in, or connection with, any broadcast application in any proceeding where character issues were left unresolved, or were resolved adversely against the applicant or any party to the application;

Licensee certifies that neither the licensee nor any party to the application has or has had any interest in, or connection with, any pending broadcast application in which character issues have been raised.

(underlining added)

Though knowing of the allegations in the content of past Marble City pleadings referenced above are unresolved, Shelby answered both questions in the certifications as "yes", which are false answers.⁷ A correct responses should have been "no." As made clear by Marble City's Objection and various other pleadings, Shelby not only operated without authorization but provided false information about W252BE's operations to the Commission on a number of occasions.

In addition, the "yes" responses in the renewal application fail to disclose that Shelby's FM translator station W243AP, Mooresville, AL was revoked pursuant to Section 312(g) of the Act in a November 29, 2018, FCC letter ruling ("Letter Order") which reflected character issues adversely resolved as to Shelby. The Letter Order detailed that Shelby had violated Section 301 of the Communications Act and made false statements to the FCC. Shelby had failed to operate

⁷ See CHARACTER ISSUES subheading section of the W252BE renewal application.

the facility with authorized facilities for a consecutive 12-month period and thus the license expired under Section 312(g) of the Act.

As with W252BE, Shelby was operating the Mooresville station W243AP with unauthorized facilities. A portion of the conclusion of that letter reads:

“We find that exercise of discretion to reinstate an expired license is especially unwarranted when SBA violated Section 301 of the Act by operating the Station from an alternate facility without FCC approval, falsely claimed on July 2, 2018, that the site modification was due to the property owner’s “mandate,” and only notified the Commission of the Station’s unauthorized operation after the Bureau demanded specific information in the LOI. The “unclean hands” doctrine — which “closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief — can be applied in appropriate circumstances in administrative proceedings, and SBA’s conduct in this proceeding mitigates against any “equity and fairness” finding in its favor.”(footnotes with case citations are not shown)

Shelby’s petition for reconsideration of the foregoing letter was denied by action of the FCC in a July 19, 2019, letter.⁸ The FCC’s November 29, 2018, Letter Order dictated a “no” response by Shelby in the CHARACTER ISSUES section as to proceedings with character issues resolved adversely against the applicant or any party to the application.

In yet another adverse resolution which dictated a “no” response, in the CHARACTER ISSUES subsection, the FCC’s November, 17, 2017, letter revoking the license for WZNN(FM) Maplesville, AL, which was another Section 312(g) of the Act ruling, included adverse conclusions as to the qualifications of Shelby’s principals as a basis for the revocation. While that letter was attached by Shelby to the renewal application, the CHARACTER ISSUES question was improperly answered as “yes” when a “no” response was required.⁹ As noted in

⁸ It does not appear that Shelby filed an Application for Review so the adverse action became final.

⁹ It is noted Shelby responded “no” as to adverse findings as to “any felony; mass media related antitrust or unfair competition; fraudulent statements to another governmental unit; or discrimination” but no details in a statement or exhibit was provided.

footnote 3 above, in that letter, the Commission cancelled the WZNN(FM) license, deleted the call sign, and as a further measure required Valleydale Broadcasting, LLC (“Valleydale”), and its various principals to submit a copy of the *Letter Order* with every facilities application filed for a period of five years. The named principals include those associated with Shelby.

It is well established that the Commission’s consideration of the qualifications of an applicant is dependent upon correct responses from an applicant, not only by an applicant refraining from misrepresenting information but also by not omitting “material information” that is necessary to prevent any material factual statement that is made from being incorrect.¹⁰ Shelby’s responses prevented the Commission from properly considering its qualifications and reaching a well reasoned decision as required by Communications Act provisions referenced above and warrants withdrawal of the grant of the renewal application.

Further, as evident from Marble City’s pleadings, and the Commission’s Mooresville and Maplesville actions above, Shelby has consistently ignored the Commission’s rules and policies.

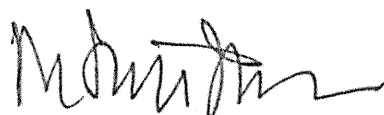
¹⁰ Policy Regarding Character Qualifications in Broadcast Licensing, Gen. Docket No. 81-500, Report, Order and Policy Statement, 102 F.C.C.2d 1179, 1211, para. 61(1986) (1986 Character Policy Statement) (“The integrity of the Commission’s processes cannot be maintained without honest dealing with the Commission by licensees”); Policy Regarding Character Qualifications in Broadcast Licensing, Gen. Docket No. 81-500, Notice of Inquiry, 87 F.C.C.2d 836, 846, para. 23 (1981) (“The Commission’s scheme of regulations rests upon the assumption that applicants will supply it with accurate information”).

CONCLUSION

The Commission should withdraw and reconsider the grant of the W252BE renewal application and not favorably act on the application until it determines whether (a), in fact, Shelby has a current license which can be renewed, and (b) it resolves the outstanding questions as to the qualifications of Shelby. Finally, under 47 U.S.C. § 309(d)(2) “If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience, and necessity],” it must formally designate the application for a hearing pursuant to 47 U.S.C. § 309(e)).

Respectfully submitted,

MARBLE CITY MEDIA, LLC



By: _____

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April 16, 2020

CERTIFICATE OF SERVICE

I, Sherry Schunemann, a legal assistant in the offices of Smithwick & Belendiuk, PC, hereby certify that a true and correct copy of the foregoing “Comments and Petition for Reconsideration” as to the W252BE Application for license renewal” was emailed today and/or sent on this 16th day of April, 2020, via First-Class United States mail, postage pre-paid, or as otherwise specified, to the following:

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Licensing and Management System

Pleadings
Application Submitted

Approved by OMB (Office of Management and Budget)
3060-0423
November 2005

Download Reference Copy (../api/download/pleading/draftcopy/25076f91717ac40d017184cf21b4137c)

Your application has been submitted for processing.

- Use the assigned **Pleadings/Appeals Number: 0000112328** when referencing this application in the future.

Application Summary

File Number: 0000112328
Pleading Type: Petition for Reconsideration
Status: SUB
Date Submitted: 2020-04-16

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