



Federal Communications Commission
Washington, D.C. 20554

June 9, 2020

In Reply Refer to:
1800B3-HOD

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In re: Synergy Broadcast North Dakota, LLC
KLTQ(FM), Beulah, North Dakota
Facility ID No. 166059
File No. BLH-20190815ABJ

Petition to Deny

Dear Counsel:

We have before us an application for a license to cover (License Application) filed by Synergy Broadcast North Dakota, LLC (Synergy), licensee of KLTQ(FM), Beulah, North Dakota (Station). Also before us are (1) a Petition to Deny filed by Digital Syndicate Network, LLC (DSN), which asserts that the Station's license expired by operation of law pursuant to section 312(g) of the Communications Act of

1934, as amended (Act),¹ (2) an Opposition to Petition to Deny (Opposition) filed by Synergy,² (3) a request that we reinstate the Station's license (Reinstatement Request) submitted by Synergy as part of an amendment to the License Application,³ and (4) a Supplement to Petition to Deny (Reply) filed by DSN.⁴ As detailed below, we find the Station's license expired pursuant to section 312(g) of the Act, decline to exercise our discretion to reinstate the Station's license, delete the Station's call sign, and dismiss the Application.

Background. On August 15, 2018, Synergy took the Station off the air due to "financial concerns."⁵ Synergy sought special temporary authority (STA) for the Station to remain silent.

¹ The pleading also is captioned as a Reply to Opposition to a Petition for Reconsideration. Consolidated Reply to Opposition to Petition for Reconsideration and Petition to Deny License Application BLH-20190815ABJ of Digital Syndicate Network, LLC, File Nos. BALH-20190513AAU, BRH-20121130BHR, BLH-20190815ABJ (filed Aug. 19, 2019) (Petition to Deny/PFR Reply). The Petition for Reconsideration to which the pleading replies was filed by DSN, and challenges our grant of an application to assign the Station's license, File No. BALH-20190513AAU, and our renewal of the Station's license. *See* Petition for Reconsideration of Digital Syndicate Network, LLC, File Nos. BALH-20190513AAU, BRH-20121130BHR (filed July 30, 2019). Because herein we find the Station's license expired by operation of law and terminate Synergy's authority to operate the Station, we dismiss as moot the Petition for Reconsideration. We also dismiss as moot the Opposition to Petition for Reconsideration filed by Synergy. Opposition to Digital Syndicate Network, LLC, Petition for Reconsideration, of Synergy Broad. North Dakota, LLC, File Nos. BALH-20190513AAU, BRH-20121130AHR (filed Aug. 13, 2019) (PFR Opposition). Finally, we dismiss as moot those portions of the Petition to Deny/PFR Reply that respond solely to the PFR Opposition. *See* Petition to Deny/PFR Reply at 2 (addressing arguments made in PFR Opposition).

² The pleading also responds to issues raised in the context of the Petition for Reconsideration (as opposed to the Petition to Deny). Opposition to Petition to Deny and Response to Reply to Petition for Reconsideration of Synergy Broad. North Dakota, LLC, File Nos. BALH-20190513AAU, BRH-20121130BHR, BLH-20190815ABJ (filed Sept. 4, 2019) (Opposition/Response to PFR Reply). As such, it is unauthorized. *See* 47 CFR § 1.106(g) and (h) (providing only for oppositions to petitions for reconsiderations and replies to oppositions). Accordingly, we dismiss those portions of the pleading that respond to issues raised in the context of the Petition for Reconsideration. Opposition/Response to PFR Reply at 2 (discussing evidence submitted by DSN to support allegations made in the Petition for Reconsideration). In addition, as noted *supra* note 1, we dismiss the portions of the pleading to which it responds as moot. Thus, were we not dismissing these portions of the Opposition/Response to PFR Reply as unauthorized, we would dismiss them as moot.

³ *See* File No. BLH-20190815ABJ, Attach. 1 (as amended September 5, 2019) (Reinstatement Request). Synergy actually frames its request as a request for waiver of section 312(g). However, the Commission does not have the authority to waive the provisions of section 312(g). Rather, it has the authority to extend or reinstate an otherwise expired license to promote equity and fairness. *See Buffalo Baptist Church*, Memorandum Opinion and Order, 31 FCC Rcd 2393.2394, n.6 (2016). Accordingly, we treat Synergy's request as a request that the Commission exercise its discretion to reinstate the Station's license.

⁴ The pleading also serves as a supplement to the Petition for Reconsideration. Consolidated Supplement to Petition for Reconsideration and Supplement to Petition to Deny License Application of Digital Syndicate Network, LLC, File Nos. BALH-20190513AAU, BRH-20121130BHR, BLH-20190815ABJ (filed Sept. 9, 2019) (Reply/PFR Supplement). As such, it was late filed. *See* 47 CFR § 1.106(f) (providing that a "petition for reconsideration and any supplement thereto" must be filed "within 30 days from the date of public notice of the final Commission action" involved). Accordingly, we dismiss those portions of the pleading that supplement the Petition for Reconsideration. In any event, we note that, even if we treated these portions of the pleading as an additional pleading related to the Petition for Reconsideration, we would dismiss them as unauthorized and/or moot. *See supra* note 2.

⁵ *See* File No. BLSTA-20181030AAM, Exh. 1 (STA Request).

We granted STA to remain silent in a letter dated November 16, 2018,⁶ but noted that “[n]otwithstanding the grant of this Special Temporary Authority, the broadcast license for Station KLTQ(FM) will automatically expire as a matter of law if broadcast operations do not resume by 12:01 a.m., August 16, 2019.”⁷ Synergy later sought an extension of the STA,⁸ which we granted on June 6, 2019.⁹ We again reminded Synergy that the Station needed to resume operations on or before 12:01 a.m. on August 16, 2019, or its license would automatically expire.¹⁰

On August 15, 2019, Synergy filed the License Application along with a Resumption of Operations notice (Notice). Both indicated that the Station had resumed operations on August 15, 2019. A few days later, DSN filed the Petition to Deny. DSN alleges that the Station did not resume operations on August 15, 2019, and thus that the Station’s license expired by operation of law. DSN also alleges that Synergy misrepresented the Station’s operating status in the License Application and the Notice.

On September 4, 2019, Synergy filed the Opposition. Synergy acknowledges that the Station did not return to the air on August 15, 2019.¹¹ Synergy asserts that, while the License Application and Notice incorrectly indicated the Station had resumed operations on that date, it was unaware—at the time they were filed—that the Station had not done so.¹² Synergy states that its counsel filed the License Application and Notice after Synergy’s consulting engineer informed counsel that the Station would resume operations late in the evening on August 15, 2019.¹³ Synergy states that, when it discovered the Station had not resumed operation until the next day, it began to prepare an amendment to the License Application, and the Waiver Request.¹⁴

On September 5, 2019, Synergy amended the License Application to acknowledge the Station did not resume operations on August 15, 2019, and to request reinstatement of the

⁶ Letter from Lisa Scanlan, Deputy Chief, Audio Division, Media Bureau, to Richard J. Hayes, Jr., Esq (MB Nov. 16, 2018) (*STA Letter*).

⁷ *Id.* at 1.

⁸ See File No. BLESTA-20190508AAV.

⁹ Letter from Lisa Scanlan, Deputy Chief, Audio Division, Media Bureau, to Richard J. Hayes, Jr., Esq (MB June 6, 2019) (*STA Extension Letter*).

¹⁰ *Id.* at 1.

¹¹ Opposition/Response to PFR Reply at 3.

¹² *Id.* at 3 (noting the consulting engineer contacted counsel late in the evening on August 15, 2019, “when it appeared that the station would be able to resume service”). We note that it was inappropriate for Synergy to represent to the Commission that certain events had occurred on August 15, 2019, when, at the time the representation was made, Synergy only expected the events to happen. Synergy should have waited to file the License Application and Notice until it had confirmed the Station had resumed broadcasts.

¹³ *Id.* at 3. Synergy submits a declaration, made under penalty of perjury by its consulting engineer, to support this allegation. *Id.*, Decl. of William W. Glass at para. 5 (Glass Decl.). We note that, in addition to acting as Synergy’s consulting engineer, William W. Glass (Glass) is authorized to acquire the Station’s license from Synergy. *See Broadcast Actions*, Public Notice, Report No. 49524 (MB July 9, 2019). Glass and Synergy have yet to consummate the transaction.

¹⁴ *Id.*, Glass Decl. at para. 5.

Station's license. Therein, Synergy asserts that the Station was unable to resume service until August 16, 2019, due to circumstances beyond its control.¹⁵ It cites tower crew shortages and weather delays.¹⁶

In the Reply, DSN asserts that Synergy continues to mislead the Commission. DSN challenges Synergy's assertion that the Station resumed operations on August 16, 2019.¹⁷ DSN alleges that the Station did not resume broadcasts until late on August 18, 2019.¹⁸ DSN also disputes Synergy's assertion that the Station did not resume operations due to circumstances beyond its control. Specifically, DSN disputes Synergy's statements regarding removal of the Station's licensed tower, unavailability of tower crews, and weather conditions at the site specified in the Station's construction permit.¹⁹

Discussion. Section 312(g) of the Act provides that the license of a station that fails to transmit broadcast signals for any consecutive 12-month period expires automatically at the end of that period.²⁰ The Commission, however, has the discretion to extend or reinstate a license following automatic forfeiture "to promote equity and fairness."²¹ The Commission resolves questions of "equity and fairness" by conducting a case-by-case analysis of the relevant facts.²² To date, the Commission has exercised its discretion to reinstate an expired license "only in rare circumstances where a station was silent as the result of natural disasters or other compelling reasons beyond the licensee's control."²³ The Commission has refused to exercise its discretion where the failure to resume station operations was due to the licensee's own actions, finances, and/or business judgments.²⁴

Synergy does not dispute that the Station failed to resume operations by 12:01 a.m. on August 16, 2019, and thus its license expired by operation of law. Instead, Synergy asserts that we should reinstate the Station's license because it "took all steps needed to return the station to the air" but was unable to actually resume service due to circumstances beyond its control.²⁵ To support this claim, Synergy cites

¹⁵ Reinstatement Request at paras. 1, 2, 6.

¹⁶ *Id.* at paras. 4, 5. *See also* Glass Decl. at paras. 4, 5.

¹⁷ Reply/PFR Supplement at 3.

¹⁸ *Id.*

¹⁹ *Id.* at 2-3.

²⁰ 47 U.S.C. § 312(g).

²¹ *Id.*

²² *See, e.g., Roy E. Henderson*, Memorandum Opinion and Order, 33 FCC Rcd 3385, 3386, n.6 (2018) (*Henderson*); *WJBW, LLC*, Memorandum Opinion and Order, 32 FCC Rcd 2301, 2301, n. 6 (2017).

²³ *Christian Broad. of East Point, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 13975, 13976, para. 4 (2015).

²⁴ *Wilks License Co.*, Letter Order, 29 FCC Rcd 4903, 4905-06 (MB 2014).

²⁵ Reinstatement Request at para. 3.

“the unavailability of tower crews”²⁶ and an “unusual amount of rain which made the tower site inaccessible for installation of the equipment.”²⁷

We are unconvinced that the Station’s failure to resume operations before 12:01 a.m. on August 16, 2019, is attributable to circumstances beyond its control rather than Synergy’s poor planning. Synergy took the station off the air for financial—not technical—reasons.²⁸ Synergy was aware of the need for the Station to resume operations by midnight on August 15, 2019.²⁹ However, despite being aware of the need to find a new tower on which to mount the Station’s antenna,³⁰ Synergy did not begin its search for a new tower until at least mid-May 2019,³¹ and did not attempt to line up a tower crew until August 12, 2019.³² This allowed a mere three days for Synergy to hire a tower crew, and have the crew arrive on site and perform the necessary work. Even with such a tight timeline, Synergy did not indicate it had a contingency plan such as to seek STA to operate with temporary facilities to save the Station’s license.³³

²⁶ *Id.* at paras. 1-2. *See also* Glass Decl. at paras. 4-5. Synergy attributes its difficulty in finding an available tower crew to the TV channel repack and 5G deployment, and attaches news reports to the Opposition/Response to PFR Reply to support its claim. Opposition/Response to PFR Reply, Exh. 1.

²⁷ Reinstatement Request at paras. 2, 4. *See also* Glass Decl. at para. 5. To support its claims regarding the rainfall amounts, Synergy includes data from the National Oceanic and Atmospheric Administration regarding precipitation recorded at weather stations in Bismarck and Lincoln, North Dakota. Opposition/Response to PFR Reply, Exh. 3.

²⁸ STA Request, Exh. 1.

²⁹ *STA Letter* at 1; *STA Extension Letter* at 1.

³⁰ We assume for the purposes of our analysis that, as Synergy alleges, the Station could not resume operations from the tower specified in its license. Reinstatement Request at para. 1; Glass Decl. at para. 3. However, we acknowledge that DSN disputes Synergy’s claim. Reply/PFR Supplement at 2.

³¹ *See* Reinstatement Request at para. 1 (stating that the process of determining how to return the Station to the air commenced on or after May 13, 2019).

³² Reinstatement Request at para. 1 (noting that tower crew companies were contacted only after a lease for space on a new tower was signed); Opposition/Response to PFR Reply, Exh. 2 (indicating lease for new tower was signed on August 12, 2019). For the purposes of our analysis here, we assume that—as Synergy asserts—the type of tower crew it needed is the same type of tower crew needed to work on the TV channel repack and 5G deployments. We acknowledge, though, that DSN disputes this assertion. Reply/PFR Supplement at 2-3.

³³ It is not uncommon for licensees to seek STA to resume operations using temporary facilities (or at a variance from their licenses) in order to avoid expiration of station licenses by operation of law. *See, e.g., Southern TV Corp.*, Memorandum Opinion and Order, 31 FCC Rcd 519, 521, n.18 (2016) (noting licensee had filed STA requests citing “the need to make the Station operational, albeit with reduced facilities, to avoid license expiration under Section 312(g),” and Media Bureau had granted these requests); *Saga Communications of New England, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 4491, 4493 para. 4 (MB 2010) (noting licensee filed an STA request to “preserve its license” from expiration by operation of law); *Fort Meyers Broad. Co.*, Letter Order, 19 FCC Rcd 19556, (MB 2004) (discussing filing—and grant—of STA to operate low power television station from a temporary site “so that the station can return to the air . . . to avoid losing the station’s license by operation of 47 USC § 312(g)”; *Pacific Broad. of Missouri, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 2291, 2294, n.21 (2003) (noting Media Bureau granted licensee of FM radio station STA to “in order to avoid automatic expiration of the KTKY(FM) license pursuant to Section 312(g)”).

We reject Synergy's attempts to elevate ordinary construction tasks and risks into circumstances beyond its control.³⁴ Synergy made a business decision to take the Station off the air, and chose not to take steps to return the Station to the air until after it had entered into an agreement to sell the Station. Then, it decided not to secure the services of a tower crew until it signed a lease for a new tower site.³⁵ Synergy's choices resulted in an extremely tight timeline that did not allow for even minor difficulties hiring a tower crew, let alone minor weather-related delays.³⁶ The situation Synergy finds itself in is one of its own making.

We further reject Synergy's assertion that the Station's community of license and coverage area "are currently underserved by local radio stations."³⁷ An AM station and two FM translators are licensed to Beulah.³⁸ In addition, Beulah receives service from at least four other AM stations.³⁹ In any event, the Commission has considered and rejected the argument that reinstatement is justified where the station at issue provided a community's sole local service.⁴⁰

Finally, we note that DSN has made a *prima facie* case that Synergy made false statements to the Commission in the waiver request and the Opposition.⁴¹ Specifically, although Synergy indicated that the Station resumed operations on August 16, 2019, DSN alleges that the Station did not resume operations until 10 p.m. on August 18, 2019. DSN submits photographic evidence and a declaration made by its consulting engineer to support its claim.⁴² DSN also asserts Synergy made additional false statements

³⁴ *Kingdom of God, Inc.*, Letter Order, 29 FCC Rcd 11589, 11591 (MB 2014) (finding "the removal of the Station's tower and antenna are not persuasive arguments in support of reinstatement" and noting licensee "failed to present any evidence demonstrating why it was unable, due to circumstances beyond its control, to transmit a broadcast a signal at some point between the time it went silent . . . and expiration of its license"). See also *A-O Broadcasting*, 23 FCC Rcd at 617 (2008) (reinstatement not warranted where, among other things, station's continued silence was a result of licensee's failure to complete construction at an alternate site); *ETC Communications, Inc.*, Letter, 25 FCC Rcd 10686, 10689 (MB 2010) (reinstatement not warranted where licensee chose not to operate financially struggling station while offering it for sale).

³⁵ Synergy allowed only three days to hire the crew, have the crew arrive on site and complete construction. See *supra* note 32. We find this was unreasonable, especially given that news reports dating back to at least December 2018 had warned of potential tower crew shortages. Opposition/Response to PFR Reply, Exh. 1.

³⁶ We assume for the purposes of our analysis that, as Synergy alleges, rainfall had made the "dirt road to the tower location ... impassable." Glass Decl. at para. 5. See also Reinstatement Request at paras. 2, 4. However, we acknowledge that DSN disputes Synergy's claim. Reply/PFR Supplement at 3.

³⁷ Reinstatement Request at para. 5; Glass Decl. at para. 6.

³⁸ The stations are KDKT(AM), K293CS, and K300BP.

³⁹ The stations are KFYZ(AM), KXMR(AM), and KBMR(AM), Bismarck, North Dakota, and KCJB(AM), Minot, North Dakota.

⁴⁰ *Henderson*, 33 FCC Rcd at 3388, n.22 (rejecting argument that reinstatement under section 312(g) is justified where, as a result of license expiration pursuant to that section, a community is "without its own local commercial station"); *Christian Broad. of East Point, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 13975, 13976-77 (2015) (explaining that while "bringing an additional radio service" to a community" is an important policy goal, it does not justify reinstatement of a station license that expired by operation of law).

⁴¹ DSN also asserts that Synergy made additional misrepresentations in the waiver request. Specifically, DSN asserts that the Station's licensed tower had not been removed, there was no shortage of tower crews, and the weather conditions did not inhibit access to the site specified in the construction permit.

⁴² Reply/PFR Supplement, Declaration of James R. Offerdahl (Offerdahl Decl.).

related to the removal of the Station's licensed tower, a shortage of tower crews, and weather conditions inhibiting access to the transmitter site specified in the Station's permit.⁴³ Synergy has not had an opportunity to respond to these allegations, which DSN made in the Reply. Given this and the fact that we find the Station's license expired by operation of law, we will not at this time investigate DSN's allegations. We will, however, require that Synergy and its principals attach a copy of this decision to any FCC broadcast application that any of them files in the next five years so that these character-related allegations can be assessed in connection with any such application.⁴⁴

Ordering Clauses. For the reasons set forth above, we find that the license of KLTQ(FM), Beulah, North Dakota (Facility ID No. 166059), EXPIRED by operation of 47 U.S.C. § 312(g) at 12:01 a.m. on August 16, 2019. Accordingly, the Commission's public and internal databases will be modified to reflect that expiration, and the Station's call sign IS HEREBY DELETED. All authority to operate the Station IS TERMINATED and any operation of the facility must cease immediately.⁴⁵

IT IS FURTHER ORDERED that the Consolidated Reply to Opposition to Petition for Reconsideration and Petition to Deny License Application BLH-20190815ABJ filed by Digital Syndicate Network, LLC, on August 19, 2019, IS GRANTED IN PART and otherwise DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Synergy Broadcast North Dakota, LLC (and each of its principals, as well as any entity in which any of them holds an interest that is attributable under the standard set forth in 47 CFR § 73.3555 or subject to the ownership and control disclosure standard set forth in 47 CFR § 1.2112) SHALL SUBMIT a copy of this Letter Order with every broadcast application—FCC Form 301, 302 (any version), 303-S, 308, 309, 310, 314, 315, 316, 318, 319, 340, 345, 346, 347, 349 or 350—that any of them file with the Commission for a period of five years from the release date of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that the application for license to cover (File No. BLH-20190815ABJ) filed by Synergy Broadcast North Dakota, LLC, on August 15, 2019, IS DISMISSED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

⁴³ *Id.* at 2-3; Offerdahl Decl.

⁴⁴ See *E-String Wireless, Ltd.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 133, 139, para. 18 (MB 2016).

⁴⁵ 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.