



Federal Communications Commission
Washington, D.C. 20554

September 10, 2021

In Reply Refer To:
1800B3-ALV

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In re: DW253AF, Bennington, Vermont

Absolute Broadcasting, LLC
Facility ID No. 83187
File Nos. BLFT-19980824TA, BLFT-20171221AAJ, and
BMPFT-20180221AAB

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (Petition) filed on June 29, 2020, by Absolute Broadcasting, LLC (Absolute), the former licensee of FM Translator Station W253AF, Bennington, Vermont (W253AF or Station).¹ In the Petition, Absolute seeks reconsideration of the Media Bureau's (Bureau) May 26, 2020, letter decision² finding that the Station's license³ had expired on February 23, 2019, pursuant to section 312(g) of the Communications Act of 1934, as amended (Act)⁴ and dismissing

¹ Also before us are an Opposition to Petition for Reconsideration (Opposition), filed on July 14, 2020, by Saga Communications of New England, LLC (Saga), and a Reply, filed on July 22, 2020, by Absolute.

² See Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau to Absolute, *et. al.*, File Nos. BLFT-19980824TA, BLFT-20171221AAJ, and BMPFT-20180221AAB, Ref. 1800B3-KV (MB May 26, 2020) (*Letter Decision*).

³ File No. BLFT-19980824TA.

⁴ 47 U.S.C. § 312(g).

Absolute's then-pending applications for a license to cover the permitted facilities at Nashua, New Hampshire⁵ and for a minor modification of the construction permit.⁶ For the reasons discussed below, we dismiss the Petition and uphold the cancellation of the W253AF license.

Background. Section 312(g) of the Act provides that if a broadcast station “fails to transmit broadcast signals for any consecutive 12-month period” its license expires automatically at the end of that period.⁷ On September 18, 2019, the Bureau sent Absolute an Operational Status Inquiry letter explaining that the Bureau received information indicating that the Station had been silent (or failed to operate with authorized facilities) for more than one year in violation of section 312(g) of the Act.⁸ In the *OSI Letter* the Bureau requested certain, specific information concerning the Station's operations since February 22, 2018.⁹ On October 28, 2019, Absolute responded that the Station ceased broadcasting “on or about February 22, 2018,”¹⁰ due to an interference complaint, but denied that the Station had been silent for a consecutive 12-month period.¹¹ Absolute claimed that W253AF resumed operations on July 2, 2018, through July 11, 2018 (July 2018 Operations).¹² In support of the purported July 2018 Operations, Absolute provided sworn statements from its consulting engineer, Thomas R. Ray, III and its on-air personality Gary Blue.¹³ Absolute further stated that it did not have “personnel records, invoices, bills, checks etc.”¹⁴

In the *Letter Decision* the Bureau found that Absolute's license for Station W253AF expired on February 23, 2019, pursuant to section 312(g) of the Act because Absolute failed to document the Station's alleged July 2018 Operations as directed in the *OSI Letter*. Specifically, the Bureau stated that Absolute was directed to provide specific types of documentation,¹⁵ but instead proffered only two uncorroborated statements from individuals who worked for the licensee and none of the evidence requested by the Bureau. The Bureau further explained that it has consistently required evidence from

⁵ File No. BLFT-20171221AAJ. On December 21, 2017, Absolute filed an application for a license to cover the permitted facilities (File Nos. BPFT-20160727ADA as modified by BMPFT-20170713AHQ) (Nashua Permit) to operate the Station as W260DB, Nashua, New Hampshire, channel 260.

⁶ File No. BMPFT-20180221AAB. On February 21, 2018, Absolute filed an application for a minor modification of the Station's Nashua Permit.

⁷ 47 U.S.C. § 312(g).

⁸ See Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to Absolute, BLFT-19980824TA, Ref. 1800B3-VM (MB Sep. 18, 2019) (*OSI Letter*). The Bureau issued the *OSI Letter* in response to a petition, filed by Saga, alleging that the W253AF license had expired. See Saga Petition to Declare License Expired, dated March 8, 2019.

⁹ *OSI Letter* at 1. The Bureau directed Absolute to submit, *inter alia*, copies of all leases, personnel records, engineering records, and station logs for all periods of operation from February 22, 2018, to the present; copies of all invoices, bills, checks written or received, credit card charges, and wire transfers or deposits of funds relating to the Station's operation; and pictures of the Station's studio facilities and transmission facilities.

¹⁰ See Response of Absolute to Operational Status Inquiry Letter, 1800B3-VM (Oct. 28, 2019) (OSI Response).

¹¹ OSI Response at 4.

¹² *Id.* at 4.

¹³ See OSI Response, Exhibits, Statement of Thomas R. Ray, III (dated Apr. 23, 2019) and Statement of Gary Blue (dated Apr. 23, 2019).

¹⁴ *Id.* at 3.

¹⁵ See *OSI Letter* at 1.

employees and other interested witnesses to be corroborated by the specific types of evidence identified in the *OSI Letter*.¹⁶ Based on the record evidence, the Bureau found that the Station's license expired on February 23, 2019, at the end of 12 consecutive months of silence, and that the facts of the case did not support reinstatement of the license to promote fairness and equity.¹⁷

On June 29, 2020, Absolute petitioned for reconsideration of the *Letter Decision*, arguing that the Bureau's finding that the Station was silent for a consecutive 365 days was erroneous, and accordingly, cancellation pursuant to section 312(g) was inappropriate. Absolute reasserts that the Station was operational between July 2, 2018, and July 11, 2018. To support this contention, Absolute submits (1) declarations from five individuals, stating that each recalls listening to the Station between July 2, 2018, and July 11, 2018;¹⁸ and (2) an Engineering Statement, prepared by Jeremy Ruck, analyzing the electrical bills and "apparent increase in consumption during the months of June and July"¹⁹ to conclude that the increase was a result of the operation of the translator. Absolute asserts that "it is in the public interest to not cancel the license"²⁰ and urges the Commission to reinstate the W253AF license and the associated applications.²¹

In its Opposition, Saga argues that the Commission cannot consider Absolute's new evidence, which Absolute could have submitted in response to the *OSI Letter*, but provides for the first time in the Petition. Saga asserts that the new evidence is not only "unacceptable as a matter of law,"²² but also suspicious and ephemeral.²³ Specifically, Saga states that the "virtually identical Declarations from five individuals" have "no probative value because they are impossible to verify."²⁴ Saga further asserts that Absolute's Engineering Statement, analyzing the electrical bills, cannot be credited because the bill was submitted without any historical context or any evidence about the size of the various transmitters in the building or the cooling capacity of the air conditioner.²⁵ Finally, Saga argues that "even if the Translator went back on the air during those periods, it did so with an unauthorized antenna, which the Commission equates to being off the air."²⁶

In its Reply, Absolute reasserts that it is not in the public interest for the Commission to cancel a

¹⁶ See *Letter Decision* at 3.

¹⁷ *Id.* at 4.

¹⁸ See Absolute Petition at Attachments R -V.

¹⁹ *Id.* at Attachment W.

²⁰ *Id.* at 1.

²¹ See BLFT-20171221AAJ and BMPFT-20180221AAB.

²² Saga Opposition at 3.

²³ *Id.*

²⁴ *Id.* Saga also asserts that it is "preposterous to believe that nearly **two years later** each declarant specifically remembered listening to the Translator during the convenient period July 2 through July 11, 2018." *Id.* at 2-3.

²⁵ *Id.* at 4. Saga states that "there is no way of knowing whether the electrical usage in July 2018 was the same, or more or less than the usage in equivalent months, such as July 2017 or July 2019." *Id.*; see also Technical Statement of Justin Asher, attached to Saga Opposition (concluding that based on the documented average monthly temperatures in relation to electrical usage, there simply is no conclusive evidence to prove the Translator was operational for the ten days between July 2-11, 2018, and that it is more likely that changes in average temperature during the summer months of 2018 were the cause for the electrical use fluctuations).

²⁶ Saga Opposition at 4.

license if it can be demonstrated that the premise for cancellation is incorrect²⁷ and that “had this evidence been in existence at the time Absolute submitted its response, the Commission would not have taken the draconian action it did.”²⁸ Absolute argues that the listener declarations should be credited since they were made under penalty of perjury.²⁹ To support its electrical usage analysis, Absolute submits a new Engineering Statement from Jeremy Ruck, stating that the electrical invoice is “germane to the question at hand, as it spans the period of time covering facility construction and equipment testing, through the submission of the application of license to cover, on to the interference complaint, temporary cessation of operation and resumption of operation.”³⁰

Discussion. We dismiss the Petition as procedurally defective. 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 additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.³¹ As set forth below, Absolute has not met this test.

In its Petition, to support its claim that the Station was operational between July 2, 2018, and July 11, 2018, Absolute presents new evidence: (1) declarations from five individuals, stating that each recalls listening to the Station during the July 2018 time period; and (2) an Engineering Statement analyzing the translator's electrical bills. All of this new evidence could have been presented earlier, but was not. Absolute does not provide any reason for its failure to submit such evidence in response to the initial *OSI Letter*. As the Commission has explained: “We cannot allow a party to ‘sit back’ and hope that a decision will be in its favor, and when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”³² Accordingly, we dismiss the Petition.³³

Moreover, we note that even if we were to consider the Petition on its merits, we would deny it. The Engineering Statement, analyzing the electrical bills, is specious evidence, at best, to establish that the Station was operational for a week in July 2018.³⁴ Further, although we would consider the listener

²⁷ Absolute Reply at 2.

²⁸ *Id.* at 3.

²⁹ *Id.* (arguing that “how Absolute obtained the Declarations, where the Declarants listened, on what receiver, what was on the air and at what day and time are irrelevant.”).

³⁰ *Id.* at 4. Absolute also disputes Saga's claim that if the Station went back on the air, it did so with an unauthorized antenna. *See id.* at 4-6.

³¹ *See* 47 CFR § 1.106(c), (d); *see also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (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).

³² *See Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8153, 8154, para. 7 (1999), *quoting Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

³³ *See* 47 CFR § 1.106(c). This rule is fundamental to the Commission's processes because it encourages applicants and others to provide complete information at an early stage, thereby minimizing the need for reconsideration proceedings, and enables the Commission's processes to operate efficiently because facts are not presented in a piecemeal fashion.

³⁴ Mr. Ruck does not conclude, but rather speculates, that the increase in electrical bills demonstrates that the Station was operational in July. *See* Petition at Attachment W, Engineering Statement (“The apparent increase in consumption during the months of June and July is consistent with the Translator being operational during this time period ... the attached electrical service invoice ... appears to demonstrate that not only was the translator operational in the summer of 2018, but also into the autumn months ...”).

declarations if they were timely submitted, the declarations alone, uncorroborated by *any* of the information requested in the Bureau's *OSI Letter*, is insufficient to establish the Station's purported July 2018 operations. We, therefore, affirm that the translator Station's license expired on February 23, 2019, at the end of 12 consecutive months of silence,³⁵ and that the facts of this case do not support reinstatement of the license to promote fairness and equity.³⁶

Conclusion. ACCORDINGLY, for the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Absolute Broadcasting, LLC on June 29, 2020 IS DISMISSED.

Sincerely,

Albert Shuldiner
Chief
Audio Division
Media Bureau

³⁵ See 47 U.S.C. 312(g). We note that even if we were to find that the Station operated in July 2018, there is an unresolved dispute regarding whether the Station was operating with authorized facilities. See, e.g., *Saga Petition to Declare License Expired*, dated March 8, 2019 (alleging that Absolute installed an unauthorized antenna for the Station, resulting in unauthorized operations). Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in Section 312(g) of the Act through the use of non-conforming facilities. See, e.g., *Great Lakes Community Broadcasting*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8247, para. 20 (MB 2009) (finding that "construction with unauthorized facilities does not override the 'automatic forfeiture' provision in our Rules").

³⁶ Although the Commission may exercise its discretion to reinstate an automatically expired license to "promote equity and fairness," this authority is exercised sparingly and only in very limited circumstances where a station's extended silence is caused by compelling reasons that are beyond the licensee's control. See, e.g., *V.I. Stereo Commc'n Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstating license where station's silence was attributable to destruction of towers in hurricane and substantial damage to rebuilt towers in additional hurricanes). The rare circumstances under which the Commission has provided relief under the "equity and fairness" provision of 312(g) are not present here.