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In Reply Refer to:

1800B3-MFW

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In re: **DWHNY(AM), McComb, Mississippi**
CWH Broadcasting, Inc.
Facility ID No. 7058
File Nos. BR-20040130ADJ
BSTA-20110912AAC
BR-20120201AJD

Request for Reinstatement of License *Nunc pro Tunc*, Grant of Special Temporary Authorization, and Return of Renewal Application to Processing

Dear Ms. Sashkin:

We have before us: (1) a September 20, 2011, Request for Reinstatement of License *Nunc pro Tunc*, Grant of Special Temporary Authorization, and Return of Renewal Application to Processing (the “Reinstatement Request”), filed on behalf of CWH Broadcasting, Inc. (“CWH”), licensee of expired Station DWHNY(AM), McComb, Mississippi (the “Station”); (2) a September 12, 2011, request for special temporary authority to operate the Station at variance from its previously licensed facilities;¹ and (3) an application for renewal of the station’s license, filed on February 1, 2012.² In the Reinstatement Request, CWH seeks reinstatement and processing of a 2004 license renewal application for the Station,³ which was dismissed on January 5, 2011.⁴ For the reasons set forth below, we dismiss the Reinstatement Request, affirm that the Station’s license has expired, and find that the expiration has become final. We also dismiss as moot the STA Request and the 2012 Renewal Application.

Background. DWHNY is a Class B AM station formerly licensed to operate with 5 kW nondirectional daytime and 1 kW directional nighttime facilities. CWH timely filed the Renewal Application on January 30, 2004. Processing of the application was deferred at the request of the Commission’s Enforcement Bureau, which had identified numerous operational violations at the Station.⁵

¹ File No. BSTA-20110912ACC (the “STA Request”).

² File No. BR-20120201AJD (the “2012 Renewal Application”).

³ File No. BR-20040130ADJ (the “2004 Renewal Application”).

⁴ *Letter to CWH Broadcasting, Inc.* Reference 1800B3-DW (MB Jan. 5, 2011).

⁵ See, e.g., *Enforcement Bureau Field Operations List of Actions Taken*, Public Notice, 16 FCC Rcd 8708, 8712 (EB 2001) (Notice of Violation issued to the Station on March 29, 2001, for violations of 47 C.F.R. §§ 17.4(a) (antenna structure registration); 17.51 (time when lights should be exhibited); 73.49 (AM transmission system fencing requirements); 73.1125 (station main studio location); 73.1201 (station identification); 73.1150 (transmission system operation), 73.1560 (operating power and mode tolerances); 73.1745 (unauthorized operation); 73.1820 (station (continued . . .)

In October of 2010, two agents from the New Orleans District Office of the Commission's Enforcement Bureau attempted to reinspect the Station and discovered that the Station was not operational and that its studio facilities appeared to have been abandoned. Upon receiving that information from the New Orleans Office, Media Bureau staff mailed to the station an "Operational Status Inquiry" letter requesting an update on the Station's operating status and cautioning that the "[f]ailure to respond to this letter within the specified time (*i.e.*, 30 days from the date on the letter) will result in the dismissal of the station's pending renewal application . . . and jeopardizing both the station's license and call letters."⁶

The Bureau received no response to the *Operational Status Inquiry Letter*, and on January 5, 2011, the staff wrote to CWH, indicating that the Station's license had expired, deleting the Station's call sign, and dismissing the 2004 Renewal Application.⁷ *Public Notice* of this action was released on January 11, 2011.⁸

CWH did not file a timely petition for reconsideration of the *License Expiration Letter*. Rather, more than eight months later, September 12, 2011, CWH filed the STA Request, seeking authorization to operate the Station temporarily with an emergency "long-wire" antenna until necessary repairs could be made and storm-damaged equipment replaced.⁹ Subsequently, on September 20, 2011, it filed the Reinstatement Request as an "informal request for Commission action" pursuant to Section 1.41 of the Commission's Rules.¹⁰

In the Reinstatement Request, CWH states that the *License Expiration Letter* was issued in error, because the Station's license had not expired pursuant to Section 312(g) of the Act. It acknowledges that WHYN has experienced "multiple hardships beyond its control, resulting in several unavoidable service interruptions;"¹¹ but indicates that it returned the Station to the air on September 24th and 25th, 2010, with

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log); and 73.3526 (contents of public inspection file for commercial stations); *Enforcement Bureau Field Operation List of Actions Taken*, Public Notice, 16 FCC Rcd 21310, 21310 (EB 2001) (\$20,000 *Notice of Apparent Liability* issued to CWH for violation of 47 C.F.R. §§ 17.4(a) (antenna structure registration); 47 C.F.R. §§ 17.51 (time when lights should be exhibited) and 73.49 (AM transmission system fencing requirements); *CWH Broadcasting, Inc.*, Forfeiture Order, 17 FCC Rcd 4548 (EB 2002) (forfeiture amount reduced to \$3,500 based on inability to pay); *CWH Broadcasting, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 14324 (EB 2002) (forfeiture further reduced to \$500 based on proposed Station repairs and "other information, some personal in nature" which had first been presented in response to the *Notice of Apparent Liability*).

⁶ *Letter to CWH Broadcasting, Inc.*, Reference 1800B3-DW (MB Oct. 29, 2010) (the "*Operational Status Inquiry Letter*"). A copy of the letter was sent by Certified Mail – Return Receipt Requested – to the Licensee's address of record with the Commission (a Post Office Box in McComb, Mississippi) and the address listed in the *Broadcasting and Cable Yearbook*. Letter sent to the licensee's address of record was returned by the Post Office with an indication "Box Closed."

⁷ *Letter to CWH Broadcasting, Inc.*, Reference 1800B3-DW (MB Jan. 5, 2011) (the "*License Expiration Letter*").

⁸ *See Broadcast Actions*, Public Notice, Report No. 47400 (Jan. 11, 2011).

⁹ STA Request at Exhibit 16. CWH requests authority to operate at 25% power, with 1250 watts daytime and 250 watts nondirectional nighttime facilities.

¹⁰ 47 C.F.R. § 1.41. CWH observes that informal requests for Commission action are not subject to the 30-day deadline for petitions for reconsideration (*see* 47 U.S.C. § 405 and 47 C.F.R. § 1.106), citing *Nevada Cogeneration Associations*, Order, 24 FCC Rcd 5501 (WTB 2009). Reinstatement Request at 1 n.1.

¹¹ Reinstatement Request at 2. CWH indicates that the Station had been "forced off the air in January 2010 due to a loss of radio frequency excitation in the transmitter," and that prior to going silent on January 18, 2010, the Station was on the air at full power daytime and 250 watts nighttime from November 19, 2008. *Id.* at 3 and n. 3. CWH did not have authority from the Commission to operate the Station with reduced power at night or for the Station to go silent.

full 5 kW daytime¹² and less-than-authorized 250-watt nighttime operation.¹³ It argues that therefore it was off the air just over nine months during the period specified in the *License Expiration Letter*. It indicates that its principal received neither the *Operational Status Inquiry Letter* nor the *License Expiration Letter* and did not learn of the license cancellation until June of 2011; shortly thereafter, CWH states, it submitted a letter, dated July 13, 2011, documenting Station operations and seeking authorization to resume broadcasting, followed the next day by a letter to a Division staff engineer seeking STA to resume station operations.¹⁴ CWH states that later, “recognizing the gravity of the situation,” it submitted the STA Request. CWH concludes that, assuming *arguendo* that Section 312(g) of the Act applies in this case, the Commission has the discretion to reinstate a license where doing so would “promote equity and fairness,” and it should exercise that discretion here, where the licensee “was subjected to the ultimate penalty despite lack of notice and obvious efforts to return the Station to the air.”¹⁵

Discussion. A petition for reconsideration must be filed within thirty days of the date upon which the Bureau gives public notice of the decision at issue.¹⁶ The Commission cannot waive or extend this thirty day period, except in “extraordinary” circumstances.¹⁷ Here, as noted, the Bureau provided public notice of the *License Expiration Letter* on January 11, 2011. Any petition for reconsideration of the *License Expiration Letter* was due on February 10, 2011. CWH, however, did not file the Reinstatement Request until September 12, 2011, and it does not attempt to demonstrate any “extraordinary circumstances” that would warrant revisiting the now-final *License Expiration Letter*.

We also reject CWH’s attempt to circumvent statutory requirements by styling its filing as an “informal request for Commission action.” Accepting such pleadings as a means to reopen long-final Commission actions would undercut the goals of administrative efficiency and finality that underlie the statutory limits on seeking reconsideration as well as fundamental fairness to the litigants involved. Proceedings that have become final generally will not be reopened unless there has been fraud on the agency’s processes or the result is manifestly unconscionable,¹⁸ or to correct an inadvertent, ministerial error,¹⁹ states of affairs not raised, much less established, here.

CWH is correct that, in *Nevada Cogeneration*, the Wireless Telecommunications Bureau’s Mobility Division (the “Mobility Division”) treated a “Request for Enforcement Action” (the “Request”) as an informal request for Commission action under Section 1.41 of the Rules that was not time-barred by

¹² *Id.* at 3.

¹³ CWH indicates that it “mistakenly believed” that a prior STA it received from the staff to operate with a nighttime power level of 250 watts utilizing a nondirectional pattern continued in effect without the need for further actions. CWH indicates that it therefore believed that resumption of nighttime operations with 250 watts nondirectional was in accordance with Commission authorization, when in fact it was not. *Id.* at n.3. See BSTA-20000828BCN, indicating that the station’s facilities were destroyed by fire and theft, granted on October 27, 2000, and extended by letters dated August 9, 2001 (File No. 20010518ABV), September 18, 2002 (File No. 20020701ACA), August 12, 2003 (File No. 20030414ACO), and July 2, 2004 (File No. 20040401AUI). The STA expired by its terms on January 2, 2005, and CWH sought no further extensions.

¹⁴ Reinstatement Request at 2-3.

¹⁵ *Id.* at 4.

¹⁶ 47 U.S.C. § 405(a) (2006).

¹⁷ *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976). Extraordinary circumstances include instances where a licensee’s late-filing is substantially due to the Commission’s failure to afford a party timely notice of the action for which reconsideration is sought.

¹⁸ See, e.g., *Radio Para La Raza*, Memorandum Opinion and Order, 40 FCC 2d 1102, 1104 (1973).

¹⁹ See, e.g., *County of San Mateo, California*, Memorandum Opinion and Order, 16 FCC Rcd 16501, 16503 (2001).

statute or rule. *Nevada Cogeneration*, however, involved an application for assignment of a wireless license from Nevada Cogeneration to Mr. Thomas K. Kurian in which the assignor's section was electronically and fraudulently signed by Mr. Kurian on behalf of a David A. Ramos, who had left the company five years previously.²⁰ On June 19, 2008, approximately eight months after the assignment application had been granted, Nevada Cogeneration sent the Request to the Commission's Enforcement Bureau, alleging that the assignment application was unauthorized. In light of the Request and information submitted in response to an Enforcement Bureau inquiry letter, the Mobility Division rejected Mr. Kurian's argument that Nevada Cogeneration's filing was an untimely petition for reconsideration of the grant of the assignment application, treated the Request as an informal request for Commission action under section 1.41 of the Rules, and set aside its assignment grant. The factors in *Nevada Cogeneration* warranting such actions are not present here, where no fraud or deception has been perpetrated on any Commission processes. In any event, the Media Bureau is not bound by Wireless Telecommunications Bureau determinations.²¹ As CWH presents no "extraordinary" circumstances excusing its tardiness,²² we will dismiss the Reinstatement Request.

Additionally, even were we to consider the merits of the Reinstatement Request, we would deny it. 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"²³ The record in this case indicates that the Station remained continuously off the air at least from January 18, 2010,²⁴ until the present.²⁵ Although CWH indicates that the Station resumed operation on September 24th and 25th, 2010, it did not resume operation at that time with authorized nighttime facilities. Well-established 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.²⁶ Consequently, the Station's license has expired as a matter of law.

²⁰ In *Nevada Cogeneration Decision*, the Mobility Division notes that Mr. Kurian admitted to preparing the application to assign the license to himself using Nevada Cogeneration's Universal Licensing System Password and signed it as David A. Ramos. *Nevada Cogeneration*, 24 FCC Rcd at 5501.

²¹ See, e.g., *Colquitt Community Radio, Inc.*, Letter, 26 FCC Rcd 10243 (MB 2011) (Media Bureau not bound by a Wireless Telecommunications Bureau decision where Bureau case law on the relevant legal standard was well-developed).

²² See *Gardner*, 530 F.2d at 1091.

²³ 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).

²⁴ See Reinstatement Request at 3 n.3.

²⁵ In the 2012 Renewal Application, CWH certifies that the station is not on currently on the air but also that it has not been silent for any consecutive 12-month period. See 2012 Renewal Application, Section III, Items 5, 6. It also answers "no" to the certification that, during the preceding license term, the station has not been silent (or operating for less than its prescribed minimum operating hours) for any period of more than 30 days, attaching an Exhibit indicating that "a more detailed account of the instances during the license term in which the Station did not maintain a minimum operating schedule is being compiled and will be submitted by amendment." *Id.* at Section III, Item 4 and Exhibit 13. No such amendment was tendered.

²⁶ See *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8244-47 (MB 2009) (finding that "construction with unauthorized facilities does not override the 'automatic forfeiture' provision in our Rules") (citing *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009) (affirming Commission's determination that station's broadcast license had expired pursuant to Section 312(g) of the Act, due to its failure to broadcast at its authorized facilities for one year) and *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 603 (2008) (affirming staff decision that station's license had expired as a matter of law due to the station's failure to broadcast at its authorized facilities for one year)).

Finally, notwithstanding the fact that the Station was silent for more than 12 consecutive months, the Commission retains discretion under Section 312(g) of the Act to extend or reinstate such license “to promote equity and fairness.”²⁷ However, the exercise of that discretion is not warranted here, where the Station was either silent or operating with noncompliant facilities for more than three years²⁸ and where the licensee has a documented history of noncompliance with the Rules.

Conclusion/Actions. For the reasons set forth above, we find that the Station’s license has expired as a matter of law and that the expiration has become final. Accordingly, IT IS ORDERED, that the September 20, 2011, Request for Reinstatement of License *Nunc pro Tunc*, Grant of Special Temporary Authority, and Return of Renewal Application to Processing, IS DISMISSED.

IT IS FURTHER ORDERED that the September 12, 2011, request for special temporary authority (File No. BSTA-20110912ACC) and the February 1, 2012, application (File No. BR-20120201AJD) for renewal of license for expired Station DWHNY(AM), McComb, Mississippi, ARE DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Charles Holt

²⁷ 47 U.S.C. § 312(g).

²⁸ See *Letter to Erwin G. Krasnow, Esq. (KRAM(AM), West Klamath, Oregon)*, 25 FCC Rcd 1842, 1844 (MB 2010) (exercise of discretion under Section 312(g) not warranted “where for nearly four years the Station was either silent or engaging in unauthorized operation.”)