



Federal Communications Commission
Washington, D.C. 20554

DA 17-456

In Reply Refer to: 1800B3-VMM

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Jan Charles Gray
Mt. Rushmore Broadcasting, Inc.
218 North Wolcott Street
Casper, WY 82602

In re: **KAWK(FM), Custer, SD**
Facility ID No. 43916
File Nos. BRH-20121203BCT, BLH-19970925KD

Dear Mr. Gray:

We have before us the above-referenced application for the renewal of the license for Station KAWK(FM), Custer, SD (Station), filed by Mt. Rushmore Broadcasting, Inc. (MRB) on December 3, 2012 (Renewal Application). On November 10, 2016, the Audio Division, Media Bureau (Bureau) issued a letter of inquiry (LOI)¹ into the Station's operation, to which MRB responded on December 20, 2016 (LOI Response). 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.² Accordingly, we cancel the Station's license, delete the Station's call sign and dismiss the Renewal Application.

Background. Our records show that Commission granted the Station's initial license on December 18, 1997.³ On May 28, 2002, MRB requested Special Temporary Authority (STA) to remain silent, stating that as of April 20, 2002, it was "forced to vacate the transmitting tower."⁴ We granted this request on July 15, 2002.⁵ On January 9, 2003, MRB requested an extension of the STA, indicating that it was "finalizing plans to obtain approval to propose a new site."⁶ We granted that STA on January 10, 2003.⁷

¹ Letter from Peter H. Doyle, Chief, Audio Division to Mt. Rushmore Broad., Inc., Nov. 10, 2016, (Ref. No. 1800B3-VMM).

² 47 U.S.C. § 312(g) (Section 312(g)); *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009); *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603 (2008).

³ File No. BLH-19970925KD (granted December 18, 1997).

⁴ File No. BLSTA-20020528ABQ.

⁵ *H. Taft Snowden, Supervisory Attorney, Audio Division, to Brian M. Madden, Esq.*, Letter Order, July 15, 2002 (Ref. No. 1800B3-ALM).

⁶ File No. BLSTA-20030109AFN.

⁷ *Glenn D. Greisman, Industry Analyst, Audio Division, to Brian M. Madden, Esq.*, Letter Order, Jan. 10, 2003 (Ref. No. 1800B3-GDG).

Our records also show that on March, 6, 2003, MRB requested STA to operate at a site other than the licensed site.⁸ At that time, it stated that it had lost its permanent site and was seeking a new, permanent site. Despite that statement, MRB has not to this date filed an application on FCC Form 301 to specify a new permanent site. As discussed below, neither has it specifically informed the Commission that it had reacquired the right to use its licensed site. From March 19, 2003 to October 21, 2008, the Station operated from that alternate site pursuant to technical STA.⁹

Over the next seven years, starting on October 21, 2008, MRB requested STAs for silent authority,¹⁰ and filed notices of resumption of operation,¹¹ nine times. Significantly for our purposes here, the notice of resumption filed by MRB on September 4, 2009, noted that the station resumed operation on August 16, 2009, “pursuant to the specifications of its license,” without reference to the loss of the licensed transmitter site reported to the Commission in March of 2003.¹²

In its response to the LOI, MRB states that the Station has been operating from the temporary site since March, 2003, and that the authority to use that site had been extended on multiple occasions.¹³ It claims that any resumption notice it filed subsequent to August 2009 used a “previously authorized temporary site,”¹⁴ and that any reference to its “licensed site” in a resumption notice was incorrect, and

⁸ See File No. BSTA-20030306ACD, granted on March 19, 2006.

⁹ See File No. BSTA-20030306ACD, as extended by File Nos. BESTA-20031021AGO, BESTA 20040730BHP, BESTA-20050510ADK, BESTA-20060607AED, and BESTA 20071025ACH (granted April 29, 2008 and expiring on October 29, 2008). Again after April 27, 2012, the Station received permission to broadcast from that same alternate site pursuant to STA. See File Nos. BSTA-20120426ACD, Ex.4, granted April 27, 2012, expired October 27, 2012; BSTA-20160120ACA, Ex. 4, granted January 28, 2016, expired July 27, 2016; BSTA-20160829ACK, Ex.4, granted September 1, 2016, expired February 28, 2017; BESTA 20170223ABP, granted on March 2, 2017, expiring on August 29, 2017.

¹⁰ Dates of silence as documented by silent STA are as follows: October 21, 2008 to August 15, 2009 (298 days, see File No. BLSTA-20081021AAB); September 4, 2009 to August 19, 2010 (349 days, see BLSTA-20080817ACF); September 7, 2010 to June 4, 2011 (271 days, see File No. BLSTA-20101029ACZ); June 7, 2011 to April 26, 2012 (325 days, see File No. BLSTA-20110616AAZ); May 11, 2012 to April 20, 2013 (345 days, see File No. BLSTA-20150521ACX); April 26, 2013-November 3, 2013 (192 days, see File No. BLSTA-20130429AAJ); February 13, 2014-January 24, 2015 (346 days, See File Nos. BLSTA-20140220ABM; BLESTA-20141126ALL); February 1, 2015-January 27, 2016 (361 days, see File Nos. BLSTA-20150303AAZ, BLESTA-20150929ACH); February 3, 2016-August 31, 2016 (211 days, see File No. BLSTA-20160120ACA).

¹¹ See Notices of Resumption filed on September 4, 2009, August 24, 2010, June 6, 2011, April 30, 2012, April 22, 2013, November 4, 2013, January 27, 2015, January 28, 2016, and September 1, 2016.

¹² Subsequent resumption notices indicating that the Station had resumed operation on August 20, 2010, June 5, 2011, April 27, 2012, and January 25, 2015, either were silent about the facilities with which the Station recommenced operation (See Notice of Resumption filed on August 24, 2010, reporting simply that the Station “recommenced broadcasting on Friday, August 20, 2010,” and Notice of Resumption filed on June 6, 2011, stating that the Station had “recommenced broadcasting on Sunday, June 5, 2011.”), stated that the Station resumed operation with STA facilities on a date that fell beyond the expiration date of a previously granted technical STA (see Notice of Resumption filed on April 22, 2013, noting resumption “in accordance with STA” on April 21, 2013), or stated that it resumed operation at the licensed site (See Notice of Resumption filed on January 27, 2015, indicating that the Station had “resumed operation with its licensed facilities” on January 25, 2015.).

¹³ LOI Response at 1.

¹⁴ LOI Response at 1.

was an “oversight.”¹⁵ It states that it had previously relied on the advice of counsel, and it “did not realize that an STA was needed to resume service following a silent period when there had been an STA granted previously for the same facility,” but rather, it assumed that once the site and facilities had been approved on a temporary basis, they could be used again on a temporary basis.¹⁶ It also states that it did not understand the difference between an STA for silent authority and an STA for resumption of service, and believed that all appropriate filings were being made by counsel representing it at the time.¹⁷ Finally, MRB states that it is currently operating with STA from the temporary site, and that this site received a certificate of compliance from the South Dakota Broadcasters Association Alternative Inspection Program on September 1, 2016.¹⁸

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...”¹⁹ Well-established Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in Section 312(g) through the use of unauthorized facilities.²⁰ Thus, a station is subject to Section 312(g)'s license forfeiture provision if: (a) the station fails 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.²¹

In this case, although MRB previously obtained STA to operate from the temporary site, it allowed the STA to expire, and then resumed or continued operation without authorization. MRB's claims that it did not know that the rules required that it have an unexpired authorization to operate from the temporary site,²² or that it was following advice of counsel when it failed to follow Commission rules cannot excuse its failure to seek an STA or its unauthorized operations.²³ It is axiomatic that Licensees

¹⁵ *Id.*

¹⁶ LOI Response at 2.

¹⁷ *Id.*

¹⁸ LOI Response at 3.

¹⁹ See *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16499 (1996); see also 47 CFR § 73.1740(c).

²⁰ See *Eagle Broad. Group*, 563 F.3d at 553 (“Under the statute, unauthorized and unlicensed transmissions are no better than silence”); see also *James McCluskey, Ph.D.*, Letter Order, 27 FCC Rcd 6252, 6254-55 (MB 2012) (“an unauthorized transmission counts for nothing”).

²¹ *Id.*

²² See *Lake County Community Radio*, Forfeiture Order, 31 FCC Rcd 7659, 7660, para. 6 (MB 2016) (violations resulting from inadvertent error are willful violations); *S. California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. den.*, 7 FCC Rcd 3454 (1992) (stating that “inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”); see also *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S. Ct. 1920, 1930, 191 L.Ed.2d 883 (2015) (“In the usual case, ‘I thought it was legal,’ is no defense.”)

²³ MRB's argument that it was following the advice of counsel is without merit. It is well established that “advice of counsel cannot excuse a clear breach of duty by a licensee.” *RKO General v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981).

are expected to operate their stations in accord with the Commission's Rules, which requires a knowledge of those rules.²⁴

Based on our records, and MRB's admissions, we find that the Station was either silent or operating with unauthorized facilities from October 21, 2008 through April 26, 2012. During the brief periods the Station operated during this time, totaling 39 days, MRB lacked any sort of Commission authority to operate the Station.²⁵ Therefore, the Station's license expired as a matter of law on or about October 22, 2009, pursuant to Section 312(g) of the Act.²⁶

Although the Commission retains discretion under Section 312(g) to extend or reinstate such license "to promote equity and fairness,"²⁷ our discretion under that provision of Section 312(g) is severely limited.²⁸ The Commission has exercised its authority to reinstate an expired license to "promote equity and fairness" only where the station failed to provide service for 12 consecutive months due to compelling reasons beyond the licensee's control.²⁹ Conversely, the Commission has declined to reinstate licenses where, as here, the failure to transmit a broadcast signal was due to the licensee's own actions, finances, and/or business judgments.³⁰ We find that exercise of such discretion is especially unwarranted when for more than six years the Station was either silent or engaging in brief periods of unauthorized operation. Furthermore, MRB has failed adequately to explain its false claim in September of 2009 that

²⁴ *Lake County Cmty. Radio*, Forfeiture Order, 31 FCC Rcd at 7660; *S. California Broad. Co.*, 6 FCC Rcd 4387 at 4387.

²⁵ See *Eagle Broad. Group*, 563 F.3d at 553; see also *Kingdom of God, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 7522, 7527 (2016) (license cancellation under Section 312(g) resulting from unauthorized operation was appropriate).

²⁶ We note that Section 312(g) would equally apply to any subsequent 12-month period of silence and/or unauthorized operation.

²⁷ 47 U.S.C. § 312(g).

²⁸ See *A-O Broad.*, 23 FCC Rcd at 617, para. 27 ("This limited, discretionary provision is phrased as an exception to the general rule that most affected licenses will be forfeited").

²⁹ See, e.g., *V.I. Stereo Commc'ns Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted where station's silence resulted from hurricane destruction); *Community Bible Church*, Letter, 23 FCC Rcd 15012, 15014 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air, but remained off air to promote air safety after discovering and reporting that FCC and FAA records contained incorrect tower information); *Mark Chapman, Court-Appointed Agent*, Letter, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from licensee's compliance with a court order).

³⁰ See, e.g., *A-O Broad.*, 23 FCC Rcd at 617, para. 27 (reinstatement not warranted when site loss was a result of the licensee's rule violations and continued silence was a result of licensee's failure to complete construction at an alternate site); *ETC Communications, Inc.*, Letter, 25 FCC Rcd 10686 (MB 2010) (reinstatement not warranted where the licensee chose not to operate financially struggling station while offering it for sale); *Kirby Young*, Letter, 23 FCC Rcd 35 (MB 2008) (reinstatement not warranted where the licensee was not financially able to restore operations after transmitter failed). See also *Kingdom of God*, Letter, 29 FCC Rcd 11589 (MB 2014) (Bureau rejects KOG's request for reinstatement of its permit for LPTV Station WKGK-LP, Kokomo, Indiana, expired pursuant to Section 312(g), under the "equity and fairness" language, finding that "the ultimate reason for the station's silence was due to KOG's business decision not to promptly find a permanent and suitable transmitter site," and concluding that KOG's silence was not the result of compelling reasons beyond the licensee's control, but, rather, "due to the licensee's own actions, finances and/or business judgments.").

the Station returned to the air “pursuant to the specifications of its license,” or its subsequent claims that the Station returned to the air with expired STA facilities.³¹ The “unclean hands” doctrine – which “closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief”³² – can be applied in appropriate circumstances in administrative proceedings,³³ and MRB’s conduct in this proceeding mitigates against any public interest finding in favor of reinstating the Station’s license.³⁴

Conclusion/Actions. For the reasons set forth above, we find that the license of KAWK(FM), Custer, South Dakota (Facility ID No. 43916), EXPIRED by operation of 47 U.S.C. § 312(g) on or about October 22, 2009. Accordingly, the Commission’s public and internal databases will be modified to reflect that expiration, and we HEREBY DELETE the Station’s call sign, KAWK(FM). All authority to operate this facility IS TERMINATED and any operation of the facility must cease immediately.

IT IS FURTHER ORDERED that the renewal application filed on December 3, 2012 (File No. BRH-20121203BCT) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³¹ See *Eagle Broad. Group*, 563 F.3d at 554 (discretion not warranted because “it does not require legal counsel or any level of sophistication to avoid making false statements on simple matters of fact”); cf., *John L. White*, Notice of Apparent Liability for Forfeiture and Order, 24 FCC Rcd 12541, 12543 (MB 2009) (312(g) discretion appropriate when, among other factors, licensee did not misrepresent regarding its operation).

³² *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945).

³³ See, e.g., *Daniel A. Edelman, Esq.*, 19 FCC Rcd 12741, 12742-3, para. 5 (2004); see also *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961) (*WKAT*).

³⁴ See, e.g., *FCC v. WOKO, Inc.*, 329 U.S. 323, 329 (1946), cited in *WKAT*, 296 F.2d at 383 (counterbalancing considerations of public interest in the service involved might justify award despite misbehavior).