



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:
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Absolute Broadcasting, LLC
c/o Christopher D. Imlay, Esq.
Booth, Freret & Imlay, LLC
14356 Cape May Road
Silver Spring, MD 20904-6011

Saga Communications of New England, LLC
c/o Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, DC 20016

In re: W253AF, Bennington, Vermont
Absolute Broadcasting, LLC
Facility ID No. 83187
File Nos. BLFT-19980824TA, BLFT-20171221AAJ, and
BMPFT-20180221AAB

**Notification of License Expiration/
Deletion of Call Letters/Dismissal of Applications/
Revocation of Program Test Authority**

Dear Counsel:

This letter concerns our investigation of W253AF's (W253AF or Translator)¹ broadcast operations. For the reasons discussed below, we find that the Translator's license has expired pursuant to

¹ W253AF, Bennington, Vermont, channel 253, is licensed (File No. BLFT-19980824TA) to Absolute Broadcasting, LLC (Absolute or Licensee). On December 21, 2017, Absolute filed an application for a license to cover (File No. BLFT-20171221AAJ) (Nashua License Application) the permitted facilities (File Nos. BPFT-20160727ADA as modified by BMPFT-20170713AHQ) (Nashua Permit) to operate the Translator as W260DB, Nashua, New Hampshire, channel 260 (W260DB). The Nashua License Application is currently pending. On February 21, 2018, Absolute filed a minor modification application (File No. BMPFT-20180221AAB) (Minor Modification Application) to modify the Nashua Permit. The Minor Modification Application is currently pending.

section 312(g) of the Communications Act of 1934, as amended (Act).²

Background. On September 18, 2019, the Media Bureau (Bureau) sent an Operational Status Inquiry letter (*OSI Letter*)³ to Absolute informing the Licensee that the Bureau had received information indicating that the Translator had been silent (or failed to operate with authorized facilities) for more than one year in violation of section 312(g) of the Act.

The Bureau requested information concerning the Translator's operations since February 22, 2018.⁴ Specifically, the Bureau directed Absolute to submit the following: information indicating the Translator's location, effective radiated power, and antenna height above ground level for all periods of operation from February 22, 2018, to the present; copies of all leases, personnel records (including payroll records appropriately redacted to protect the privacy of individual employees), engineering records, and station logs for the same period of time; 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; pictures of the Translator's studio facilities and transmission facilities during this timeframe; and exact Station coordinates.⁵

On October 28, 2019, Absolute responded to the *OSI Letter*.⁶ In its response, Absolute confirmed that the Translator ceased broadcasting "on or about February 22, 2018,"⁷ due to Saga's

² 47 U.S.C. § 312(g).

³ See *Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to Absolute Broadcasting, LLC* (dated Sep. 18, 2019) (*OSI Letter*). The Bureau sent Absolute the *OSI Letter* after Saga Communications of New England, LLC (Saga) filed a petition urging the Bureau to find that the Translator's license had expired. See "Petition to Declare License Expired" (Petition) filed on March 8, 2019, by Saga. In the Petition, Saga asserted that Absolute had admitted to taking the Translator off the air on February 22, 2018. Saga also contended that even if the Translator had resumed operations as W260DB such operations were unauthorized because an unauthorized antenna was installed at the Translator's registered antenna site. Specifically, Saga claimed that the Nashua Permit authorized a "one-bay NIC Model BLD-1/P," but a two-bay antenna was mounted on Translator's registered antenna structure for its Nashua facilities. Petition at 2, Exhibits 2 and 2A. Thereafter, the parties filed a series of filings: an "Opposition to Petition to Declare License Expired" (Petition Opposition) filed on April 2, 2019, by Absolute; a "Reply to Opposition to Petition to Declare License Expired" (Petition Reply) filed on April 11, 2019, by Saga; a "Statement for the Record" (Absolute Statement) filed on April 24, 2019, by Absolute; a "Counterstatement for the Record" (Saga Counterstatement) filed on May 3, 2019, by Saga; a "Renewed Petition to Declare License Expired" (Renewed Petition) filed on August 14, 2019, by Saga; a "Renewed Petition to Declare License Expired with Corrected Certificate of Service" (Corrected Renewed Petition) filed on August 15, 2019, by Saga; an "Opposition to Renewed Petition to Declare License Expired" (Renewed Petition Opposition) filed on August 29, 2019, by Absolute; and a "Reply to Opposition to Renewed Petition Declare License Expired" (Renewed Petition Reply) filed on September 11, 2019, by Saga.

⁴ *OSI Letter* at 1.

⁵ *Id.*

⁶ See "Response of Absolute Broadcasting, LLC to Operational Status Inquiry Letter dated September 18, 2019 (1800B3-VM)" (dated Oct. 28, 2019) (OSI Response). Absolute's response was due within 30 days of the *OSI Letter*; Commission staff, however, extended the deadline until October 28, 2019. See *Email from Victoria McCauley, Attorney Advisor, Audio Division, Media Bureau to Christopher D. Imlay, Esq.* (dated Oct. 16, 2019). Additionally, on November 18, 2019, Saga filed a "Further Statement for the Record Concerning W253AF Response to FCC Letter" commenting on Absolute's OSI Response. Saga cites no grounds for the acceptance of this filing in the Bureau's OSI investigation of the Translator. Therefore, we will not consider it further.

⁷ OSI Response at 3. Absolute reported that in December 2017 it completed construction of the Translator's Nashua facilities, as specified in the Nashua Permit, and that the Translator commenced operations as W260DB under the Nashua License Application pursuant to program test authority. Absolute stated the Translator's antenna "as finally installed . . . is a two-bay array of Nicom Model BLD-1/P antennas spaced 0.75 wavelengths apart. The Translator has not been operated with other than a two-bay antenna." *Id.* at 2, n.4. Absolute noted that on February 21, 2018,

interference complaint.⁸ However, Absolute denied that the Translator had been silent for a consecutive 12-month period.⁹

Absolute claimed that the Translator resumed operations on July 2, 2018, through July 11, 2018, (July 2018 Operations), and then again on June 17, 2019, through June 25, 2019, (June 2019 Operations).¹⁰ In support of the purported July 2018 Operations, Absolute provided only sworn statements from its consulting engineer, Thomas R. Ray, III (Ray), and its on-air personality Gary Blue.¹¹ In support of the alleged June 2019 Operations, Absolute attached a second sworn statement from Ray; the Translator's transmitter log for the period of June 17, 2019, through June 25, 2019; and screenshots of the Translator's transmitter screen on specified days between June 17, 2019, through June 25, 2019.¹² Absolute also submitted five undated photographs of the Translator's facilities and equipment.¹³ Absolute stated that it did not have "personnel records, invoices, bills, checks etc."¹⁴

Discussion. Section 312(g) of the Act provides that "[i]f 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, except that the Commission may extend or reinstate the such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness."¹⁵ Well-established

it amended the Nashua License Application "to clarify the antenna characteristics of the permitted, constructed facility at Nashua." *Id.* at 3.

⁸ In its interference complaint, Saga alleged that the Translator's operations as W260DB caused interference to W260CF, Manchester, New Hampshire, licensed to Saga. *See* "Interference Complaint" (Complaint) and "Informal Objection" (Objection), both filed on February 12, 2018, by Saga. Thereafter, the parties filed a series of filings: a "Response to Interference Complaint" (Complaint Response) filed on February 22, 2018, by Absolute; a "Response to Interference Complaint and Informal Objection" (Absolute First Consolidated Response) filed on March 2, 2018, by Absolute; a "Consolidated Reply to Responses to Interference Complaint and Informal Objection" (Saga First Consolidated Reply) filed on March 13, 2018, by Saga; an "Informal Objection" (Modified Permit Objection) to Absolute's Minor Modification Application filed on March 29, 2018, by Saga; a "Second Response to Interference Complaint and Informal Objections" (Absolute Second Consolidated Response), filed on June 12, 2018, by Absolute; and a "Reply to Second Response to Interference Complaint and Informal Objections" (Saga Second Consolidated Reply) filed on June 27, 2018, by Saga.

⁹ OSI Response at 4.

¹⁰ *Id.* at 4. On March 25, 2020, Absolute filed a "Notification of Suspension of Operations" stating that the Translator ceased operations on June 25, 2019, and on March 26, 2020, Absolute filed a "Resumption of Operations" notice stating that the Translator had resumed operations on March 24, 2020.

¹¹ *See* OSI Response, Exhibits, "Statement of Thomas R. Ray, III" (dated Apr. 23, 2019) (First Ray Statement) and "Statement of Gary Blue" (dated Apr. 23, 2019) (Blue Statement). Absolute originally filed these statements in April 2019. *See* Absolute Statement for the Record, Exhibits (filed Apr. 24, 2019).

¹² *See* OSI Response attaching the Renewed Petition Opposition, "Statement of Thomas R. Ray, III" (dated Aug. 27, 2019) (Second Ray Statement); Exhibit A, "Transmitter Log for FM Translator" (June 2019 Transmitter Log); and Exhibit B, "Transmitter Screenshots for FM Translator."

¹³ *See Email from Christopher D. Imlay, Esq. to Albert Shuldiner, Chief, Audio Division, Media Bureau, et al.* (dated Oct. 28, 2019).

¹⁴ OSI Response at 3.

¹⁵ 47 U.S.C. § 312(g). The Commission conducts a case-by-case factual analysis to determine whether reinstatement would "promote equity and fairness." *Id.* The Commission has exercised this statutory discretion only when the failure to timely resume broadcasts was for a compelling reason beyond the licensee's control. *See, e.g., V.I. Stereo Comm'n Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (destruction of towers in hurricane and damage to rebuilt tower in subsequent hurricane); *Harry Martin, Esq.*, Letter Order, 23 FCC

Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in section 312(g) through the use of unauthorized facilities.¹⁶ Thus, a station is subject to section 312(g)'s license expiration 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.¹⁷

Based on the record evidence, we find that the Translator's license has expired pursuant 312(g) of the Act. We further find that the facts of this case do not support reinstatement of the license to promote fairness and equity.¹⁸

It is undisputed that the Translator ceased operations on February 22, 2018.¹⁹ As discussed above, in the *OSI Letter*, the Bureau directed Absolute to provide specific types of documentation for all periods of the Translator's operations since February 22, 2018, including "leases, personnel records . . . , engineering records, and station logs," as well as "invoices, bills, checks, . . . credit card charges, wire transfers or deposits of funds relating to the Station's operations."²⁰

Absolute has not provided such evidence documenting the Translator's purported July 2018 Operations. For the Translator's alleged July 2018 Operations, Absolute proffered only two statements from individuals who worked for Absolute and none of the evidence requested by the Bureau in the *OSI Letter*.²¹ The Bureau has long held that uncorroborated statements from persons, such as employees and consultants, who are not disinterested witnesses are to be accorded little weight.²² Moreover, relevant caselaw reveals that the Bureau has consistently required evidence from employees and other interested witnesses to be corroborated by the specific types of evidence identified in the *OSI Letter*.²³ Because

Rcd 15012 (MB 2008) (licensee completed all steps to resume broadcasts but remained silent to promote air safety due to Federal Aviation Administration error for which licensee was not responsible); and *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (silence to comply with court order).

¹⁶ See *Eagle Broad. Group, Ltd.*, 563 F.3d 543, 553 (D.C. Cir. 2009) ("Under the statute, unauthorized and unlicensed transmissions are no better than silence"); see also *James McCluskey*, Letter Order, 27 FCC Rcd 6252, 6254-55 (MB 2012) ("an unauthorized transmission counts for nothing").

¹⁷ *Id.*

¹⁸ See *supra* note 15.

¹⁹ See OSI Response at 4.

²⁰ *OSI Letter* at 1.

²¹ See *supra* note 11. In contrast, for the Translator's purported June 2019 Operations, Absolute submitted the Translator's transmission logs dated June 17-25, 2019, as requested by the Bureau, along with screenshots the Translator's transmitter screen for specified days in June 2019, and a second sworn statement from its consulting engineer. See *supra* note 12. The Translator's June 2019 Operations, however, occurred several months after its license had expired.

²² See e.g. *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16310, 16319 (MB 2010) (petitioner's engineering consultant's hearsay statement, uncorroborated by independent documentation, should be given little weight because he was not a disinterested witness); and *Second Samoan Congregation Church*, Letter, 23 FCC Rcd 16630, 16636 (MB 2008) (applicant's counsel's statements should be given little weight because he is not a disinterested witness).

²³ See e.g., *WBNZ(FM), Frankfort, Michigan*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 5223, 5227 (MB 2018) (citing as proof of operations declarations from station's employees corroborated by a contemporaneous agreement for station's electrical power supply along with advertising orders and payments); see also *WHYC(FM)*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 3895, 3897, and n.18 (MB 2016) (citing as proof of operations declaration from station's general manager corroborated by station's transmitter logs).

Absolute has failed to document the Translator's alleged July 2018 Operations as directed in the *OSI Letter*, we find the Translator's license expired as a matter of law on February 23, 2019, at the end of 12 consecutive months of silence. Given our finding that the Translator's license expired on February 23, 2019, we do not need to consider the Translator's purported June 2019 Operations, which occurred several months after its license expired.²⁴ Similarly, the pending Nashua License Application²⁵ and Minor Modification Application,²⁶ as well as Saga's pending petitions,²⁷ interference complaint,²⁸ and informal objections,²⁹ are rendered moot by our finding that the Translator's license has expired; therefore, we will dismiss these applications and pleadings.

Conclusion. ACCORDINGLY, pursuant to section 312(g) of the Communications Act of 1934, as amended,³⁰ the Commission's public and internal databases have been modified to indicate that the broadcast license for the Translator³¹ EXPIRED as a matter of law, at 12:01 a.m. on February 23, 2019, and we HEREBY DELETE the Translator's call sign W253AF.

In addition, pursuant to sections 0.61, 0.111, and 0.283 of the Commission's rules,³² IT IS ORDERED that the application of Absolute Broadcasting, LLC, for a license to cover (File No. BLFT-20171221AAJ) and the application to modify the construction permit (File No. BMPFT-20180221AAB) ARE DISMISSED; all program test authority IS REVOKED; and the Translator MUST CEASE BROADCAST OPERATIONS IMMEDIATELY.³³

IT IS FURTHER ORDERED that Saga Communications of New England, LLC's "Renewed Petition to Declare License Expired" filed on August 14, 2019; "Petition to Declare License Expired" filed on March 8, 2019; "Informal Objection" filed on March 29, 2018; "Interference Complaint" filed on February 12, 2018; "Informal Objection" filed on February 12, 2018; and "Informal Objection" filed on March 29, 2018, ARE DISMISSED.

Finally, we note that it is imperative to the safety of air navigation that any prescribed painting and illumination of the Translator's tower be maintained until the tower is dismantled. Accordingly, the owner of the tower where the Translator's transmitting antenna is located is required, pursuant to Section

²⁴ See *supra* note 21.

²⁵ See *supra* note 1.

²⁶ See *supra* note 1.

²⁷ See *supra* note 3.

²⁸ See *supra* note 8.

²⁹ See *supra* note 8.

³⁰ 47 U.S.C. § 312(g).

³¹ File No. BLFT-19980824ATA.

³² 47 CFR §§ 0.61, 0.111, and 0.283.

³³ See *supra* note 10.

303(q) of the Act, to maintain the tower in the manner prescribed by the Commission's rules and the terms of the cancelled license.³⁴

Sincerely,

Albert Shuldiner
Chief
Audio Division
Media Bureau

³⁴ See 47 U.S.C. § 303(q). See also 47 CFR §§ 17.1 *et seq.* and 73.1213; *Streamlining the Commission's Antenna Structure Clearance Procedure*, Report and Order, 11 FCC Rcd 4272 (WTB 1995).