

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of)	
)	
COMMON FREQUENCY, INC.)	File No. 0000162427
)	Facility ID #176407
For Renewal of the License)	
For KQCF(FM), Chiloquin, Oregon)	
TO:	The Secretary	
ATTN:	Chief, Audio Division	
	Media Bureau	

PETITION FOR RECONSIDERATION

Common Frequency, Inc. (“CFI”), pursuant to Section 1.106 of the Commission’s rules and by counsel, hereby petitions the Commission for reconsideration of the *Letter Decision* (DA 24-63), dated January 19, 2024, issued by the Chief of the Audio Division, in which he determined that the license for CFI’s noncommercial FM station, KQCF, had expired pursuant to Section 312(g) of the Communications Act, and CFI’s above-identified application for renewal of the license for KQCF was dismissed as moot.¹

The *Letter Decision* should be vacated and the license for KQCF reinstated for two reasons. First, the Commission’s interpretation of Section 312(g) of the Communications Act is unreasonably broad and inappropriate in the context of this case. Second, the Commission’s

¹ The 30-day period for a petition for reconsideration of the *Letter Decision* expired on a day that was not a business day. This pleading is being submitted on the next business following thereafter.

enforcement of the confusingly drafted regulation in Section 73.1690(b)(2) of its rules is unreasonably harsh and irrational.

In the Telecommunications Act of 1996, Congress added Section 312(g) to the Communications Act of 1934. That provision states 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 station expires at the end of that period, . . .”² The statute does not define or qualify what constitutes the transmission of a broadcast signal. In the course of implementing this new law in its regulations, the FCC did not refine, embellish, or otherwise interpret the plain language that Congress had adopted.³

Subsequently, the FCC has added its own gloss to the statute by determining that a station cannot be credited for being on the air during any period when it is broadcasting with unauthorized facilities. Consequently, broadcast signals transmitted from unauthorized facilities for 12 consecutive months are insufficient to avoid the consequences of Section 312(g). The seminal decision for this principle is *Eagle Broadcasting Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd. 588 (2008). Even though the statute does not mention the authorized or unauthorized status of the broadcast signals in question, the Commission reasoned that only a station transmitting pursuant to an authorization granted under Section 301 of the Communications Act could be legitimately characterized as a broadcast signal for purposes of

² 47 U.S.C. § 312(g).

³ See *Implementation of Section 403(l) of the Telecommunications Act of 1996 (Silent Station Authorizations)*, 11 FCC Rcd 16599 (1996).

Section 312(g). The signal that the licensee relied upon in *Eagle* to argue that the station had not been silent for 12 consecutive months was transmitted from a site several miles distant from any site that the Commission had authorized for the station.

The Court of Appeals affirmed the Commission's interpretation of Section 312(g) as pertaining to "unauthorized" transmissions when this same case was before it in *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543 (D.C.Cir. 2009). The Court labeled as "absurd" a hypothetical claim that a station with an authorized antenna site in Arizona could broadcast from a site in New York and thereby escape the consequences of a license expiration under Section 312(g). *Ibid.*, 563 F.3d, at 552.

The nature of the defect in the unauthorized transmissions that were the subject of the *Eagle* decisions was an actual transmission point at some distance from the authorized antenna site. These decisions did not touch on other kinds of irregularities that might be contrary to a station's license and that could be considered to make a transmission "unauthorized." That opened the door for a broadcast licensee to complain about a competitor's use of an antenna system at a variance from the system specified in the station's license. This noncompliant antenna had been installed and in use for more than 12 consecutive months. The petitioner argued that, even though the station was operating at the licensed site, the use of a noncompliant antenna system resulted in unauthorized transmissions. Citing the *Eagle* rulings, the petitioner asserted that therefore the automatic license expiration provision of Section 312(g) had been triggered.

In *Absolute Broadcasting, LLC*, Memorandum Opinion and Order, DA 23-38 (May 17, 2023), the Commission disagreed with this approach. It clarified that only transmissions from unauthorized sites would be subject to the license expiration strictures of Section 312(g).

Transmissions from stations with other kinds of nonconforming unauthorized facilities – even if in operation for more than 12 months – would be policed in other ways, such as with consent decrees and/or forfeitures. The Commission said:

Consistent with this approach, we clarify that not every instance of nonconforming operation that lasts for more a year leads automatically to the loss of the station’s license pursuant to the terms of Section 312(g). We do not believe that Congress, when it set out to address the spectrum warehousing issue of silent stations, or the Court when it rejected the “absurd result” that operation from a distant location could avoid automatic license expiration, also intended to establish without further discussion or analysis, a severe new sanction applicable to *all* consecutive 12-month rule violations. No such intent can be read into Section 312(g) or inferred from the holding in *Eagle*. When confronted with the question of applying Section 312(g) in situations other than those involving silence or an unauthorized location as in *Eagle*, the Commission’s licensing divisions have consistently declined to go to the extreme of cancelling licenses if the infraction lasted longer than a year. Instead, . . . [they have addressed] other rule violations using the existing enforcement framework set out in the Rules. We endorse this approach as a fair and rational application of Section 312(g) as further expounded in the *Eagle* decision. *Ibid.*, at Par. 19. [Emphasis in original.]

The Bureau stated on page 2 of the *Letter Decision*, “The purpose of this provision [Section 312(g)] is to ensure that stations are serving the public as authorized and not warehousing spectrum that could be used by others willing and able to do so.” Most of the Commission’s decisions invoking Section 312(g) concern stations that have actually been silent for a year or longer. To maintain authorizations on spectrum that is not being used in the public interest is the “warehousing” in question. However, it cannot be said that CFI has been warehousing its channel. The record indicates that KQCF has been on the air for most if its

current license term, and certainly has not been silent for any period of 12 consecutive months. Therefore, “warehousing” cannot be the justification for invoking Section 312(g) to find that the station’s license has expired.

The Commission’s and the Court’s expansion of the definition of silence to include broadcast transmissions from unauthorized sites implies an unspoken concern about a broadcast ecosystem that could become unwieldy due to random interference caused by rogue stations harming rule-compliant stations operating from their licensed sites. KQCF does not fit that model. The record shows that its operational site was within three geographic seconds of the authorized site and was in no danger of causing harmful interference to any other station from that position. Consequently, even though not transmitting precisely from its authorized site, KQCF cannot realistically be characterized as a target for enforcement under the expanded “unauthorized transmissions” approach to Section 312(g). The Commission plainly does not anticipate that transmissions originating within three seconds of the station’s authorized site are likely to cause interference. Section 73.1690(c)(11) of the rules permits a station inadvertently constructed within three seconds of the authorized site to merely file a corrective license application rather than to go silent.

CFI was relying on trees rather than man-made structures to mount the antenna for KQCF, and consequently had to make use of the supports where they grew rather than where they could be built. Relying on its understanding of the language of Section 73.1690(b)(2) of the Commission’s rules, CFI believed in good faith that its antenna site was close enough to the licensed site to be rule-compliant.

The Bureau says that CFI misunderstood the rule. If so, it must be forgiven, along with many other broadcasters, for being confused by the rule's language. In part, Section 73.1690(b) states that a construction permit application must be filed for:

(2) Any change in station geographic coordinates, including coordinate corrections of more than 3 seconds latitude and/or 3 seconds longitude.

A plausible reading of the rule leaves one with the reasonable impression that no application is necessary if the actual site is within three seconds of the authorized site – as was the situation in this case. Upon reflection and closer reading of the rules, CFI concedes that it should have filed a construction permit application. Nonetheless, this rule violation did not merit the draconian sanction of license cancellation. No spectrum was warehoused and no harmful interference was caused to other stations.

As the *Letter Decision* explains, and as Section 73.1690(c)(11) of the Commission's rules provides, the three-second tolerance zone is for situations where the licensee of a constructed station has discovered that it needs to make a small correction to the coordinates in its authorization which were mistakenly calculated originally. In that case, the licensee may simply file a corrective license application without the need for a construction permit application.

As a practical matter, the regulatory posture and public interest impact of CFI's situation and that of a station merely needing to correct its coordinates are similar. Both are operating from an unauthorized site. Neither is warehousing spectrum nor causing harmful interference. Yet, one is allowed to file a simple corrective license application and avoid any enforcement action, while pursuant to the *Letter Decision*, CFI's station goes extinct. This result is perverse, arbitrary, and irrational. If it is "absurd" to claim that transmissions in New York can qualify an

Arizona station to be operational or not silent, it would be equally absurd if actual local transmissions from a site within three seconds of a station's authorized site would cause the station to be legally characterized as silent for purposes of Section 312(g).

The cancellation of the license for KQCF will have a detrimental public interest impact on the service area. The attached map shows the 60 dbu service contour for the station and for other noncommercial stations in the region. As the map demonstrates, KQCF provides a second NCE service throughout its entire 60 dbu coverage area. The Commission places a high value on providing at least two noncommercial aural services under the fair distribution of service criteria for evaluating mutually exclusive applications for new stations.⁴ The loss of KQCF would eliminate this second noncommercial service for the station's service area. In response to similar arguments raised in other cases involving the cancellation of a license, the Commission has remarked that replacement service can be provided by subsequent applicants for new stations, or by minor modifications to existing stations. Neither of those scenarios is likely in this case. Applications for new stations cannot be filed until there is a noncommercial FM filing window. The Commission recently conducted such a filing window in November 2021. The prior filing window was held fourteen years earlier in 2007. It could well be another decade before there is another filing window. The attached map showing the service areas of existing noncommercial stations in the region indicates that there is no other nearby station that could plausibly modify its facilities to provide a second noncommercial service. The second service that KQCF can provide would be lost for the foreseeable future.

⁴ See 47 CFR § 73.7002.

As CFI indicated in its January 3, 2024, response to the Commission's *Letter of Inquiry*, KQCF provides significant broadcast services to the Native American population in the community – a segment of the community otherwise only poorly served, if at all. Cancellation of the license for KQCF would unnecessarily negatively impact the civic and cultural life of this minority community.

The principal issue to be adjudicated in this proceeding apparently presents a case of first impression. CFI has not identified any published Commission decision sanctioning in any way a broadcast applicant/permittee/licensee for erroneously constructing its station within three seconds of the authorized site, much less cancelling its authorization. If determined to be a violation, constructing and operating a station's antenna site within three seconds of the authorized site should not lead to license expiration under Section 312(g). Rather, the Commission should exercise its discretion to employ a lesser and more reasonable sanction as it explained that it could and would do in *Absolute Broadcasting*.

The foregoing considered, CFI respectfully urges the Media Bureau to reconsider the *Letter Decision*, to reinstate the license for KQCF, and to reinstate and grant the station's license renewal application.

Respectfully submitted,

COMMON FREQUENCY, INC.

By: /Donald E. Martin/
Donald E. Martin

DONALD E. MARTIN, P.C.
P.O. Box 8433
Falls Church, Virginia 22041
(703) 642-2344

Its Attorney

February 20, 2024

