

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

In re	)	
	)	
<b>CHINESE VOICE OF GOLDEN CITY</b>	)	File No. BLL-20171120AAB
<b>DKQLS-LP, Las Vegas, Nevada</b>	)	File No. BMLL-20190809AAL
	)	Facility ID # 194198
Expiration of License Pursuant	)	
To 47 U.S.C. §312(g)	)	

TO: Honorable Marlene H. Dortch  
Secretary of the Commission

ATTN: The Commission

**OPPOSITION TO  
APPLICATION FOR REVIEW**

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February 28, 2020

**SILVER STATE BROADCASTING, LLC**

## **SUMMARY**

Chinese Voice of Golden City (CVGC) filed an FCC Form 319 application with the FCC on November 20, 2017, File No. BLL-20171120AAB, seeking an initial covering license for KQLS-LP, Las Vegas, Nevada. CVGC certified that it had constructed KQLS-LP "as authorized in the underlying construction permit", File No. BNPL-20131115AGM, which would have otherwise expired that day.

As it turned out, CVGC later admitted to the FCC in another FCC Form 319 application filed on August 9, 2019, File No. BMLL-20190809AAL had not constructed KQLS-LP at the geographic coordinates specified in its construction permit. When the FCC's Media Bureau, Audio Division, learned about this, it issued a letter on November 19, 2019 that KQLS-LP had operated with unauthorized facilities for over twelve consecutive months and therefore the KQLS-LP license had expired on December 13, 2018 pursuant to 47 U.S.C. §312(g).

CVGC filed a Petition for Reconsideration on December 5, 2019, which Silver State Broadcasting, LLC learned about and filed opposition pleadings on January 2, 2020. Silver State has filed an application to relocate its FM Translator Station K284CW, Winchester, Nevada, to 103.1 MHz, which KQLS-LP had occupied. On January 15, 2020, the Media Bureau released a

**Memorandum Opinion and Order**, DA 20-75, denying the Petition for Reconsideration. CVCG then filed its Application for Review. CVGC raised arguments relative to the controlling appellate precedent interpreting 47 U.S.C. §312(g), **Eagle Broadcasting Group, Ltd. v. FCC**, 563 F. 3d 543 (D. C. Cir. 2009) that it had not presented in its Petition for Reconsideration.

The CVCG Application for Review is procedurally defective because it violates 47 C.F.R. §1.115(c), which states that “no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass”. The CVGC Application for Review otherwise fails to present any colorable argument why the Media Bureau’s January 15, 2020 order dealing with the arguments that CVGC did assert in its Petition for Reconsideration constituted reversible error.

In fact, the Media Bureau and its Audio Division could have relied upon 47 U.S.C. §312(a)(2) as an alternative ground for terminating KQLS-LP’s operating authority, because if the Bureau had known in November, 2017 that CVGC had “constructed” its station at the wrong geographic coordinates, it would never have granted its application for initial covering license.

Therefore, the CVGC Application for Review must be dismissed or denied.

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TO: Honorable Marlene H. Dortch  
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**OPPOSITION TO  
APPLICATION FOR REVIEW**

Silver State Broadcasting, LLC (SSB), licensee of FM Translator Station K284CW, Winchester, Nevada, pursuant to Section 1.115(d) of the Commission's rules, hereby respectfully submits this Opposition to the February 14, 2020 "Application for Review"<sup>1</sup> (AFR) filed by Chinese Voice of Golden City ("CVGC"), the former licensee of deleted Low Power FM Station KQLS-LP, 103.1 MHz, Las Vegas, Nevada. In support whereof, the following is shown:

**Preliminary Statement**

1. SSB's interest in the above-captioned matter stems from its filing of a December 17, 2019 LMS Form 2100 application to move K284CW from its current frequency assignment of 104.7 MHz to

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<sup>1</sup>Pleading File No. 0000106071.

103.1 MHz to resolve an interference dispute with the licensee of FM Broadcast Station KJUL, 104.7 MHz, Moapa Valley, Nevada, File No. 0000093597. This application was filed after the November 19, 2019 letter notification to CVGC by the Media Bureau's Audio Division that the KQLS-LP license had expired on December 13, 2018. SSB's December 17 application is mutually-exclusive with CVGC's appeal of the Audio Division's deletion of the KQLS-LP facilities. Therefore, SSB has standing to oppose CVGC's "Application for Review".

2. As this Opposition is filed within 15 days of the filing of CVGC's AFR, it is timely filed.

**CVGC's AFR is Procedurally Defective**

3. Section 1.49(c) of the FCC's Rules requires a pleading exceeding 10 pages to include a **"summary of the filing, suitably paragraphed, which should be a succinct, but accurate and clear condensation of the substance of the filing"**. CVGC's pleading lacks such a "summary".

4. More significantly, Section 1.115(c) of the FCC's Rules provides that **"No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."** Much of CVGC's "Application for Review" consists of legal arguments why the Commission *en banc* should reinterpret the decade-old appellate precedent of ***Eagle Broadcasting Group, Ltd. v. FCC***, 563 F. 3d 543

(D. C. Cir. 2009) or otherwise make an exception to it in favor of CVGC. **Eagle** was cited in the Audio Division's November 19, 2019 letter determination that the KQLS-LP license had expired. At footnote 6 of said letter, the Audio Division wrote that **Eagle** stood for the proposition that "[u]nder the statute, unauthorized and unlicensed transmissions are no better than silence". CVGC's December 5, 2019 "Petition for Reconsideration" of the Audio Division's November 19, 2019 letter determination did not make any arguments relative to the **Eagle** case.

5. Pursuant to Section 1.115(c), CVGC is now estopped from raising arguments in its AFR relative to the applicability of **Eagle** to the expiration of the KQLS-LP license. **Kingdom of God, Inc. (WKOG-LP)**, 31 FCC Rcd 7522, 7524 (2016), recon. den., 32 FCC Rcd 1599 (2017), *aff'd*, **Kingdom of God, Inc. v. FCC**, 719 Appx. 19 (Mem) (D. C. Cir. 2018). CVGC's AFR extensively argues at pp. 11-20 why the FCC should now ignore **Eagle** and reinstate the KQLS-LP license.

6. CVGC's AFR extensively discusses **Chevron USA Inc. v. Natural Resources Defense Council, Inc.**, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) in its AFR, referring to it as "probably . . . the most frequently cited case in administrative law" (AFR at p. 16). Unfortunately for CVGC, it failed to cite or discuss it in its December 5, 2019 "Petition for Reconsideration". The FCC is obligated to follow its own rule that no application

for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. The AFR must be dismissed or denied as procedurally defective, or, in the alternative, all of CVGC's arguments relative to the *Eagle* and *Chevron* decisions must be stricken.

**47 U.S.C. §312(a)(2) Requires That the AFR Be Denied**

7. Section 312(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §312(a)(2), states as follows:

The Commission may revoke any station license or construction permit— \* \* \*

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

8. CVGC's original construction permit for KQLS-LP was granted on November 20, 2014. CVGC's FCC Form 319 application for the initial covering license for KQLS-LP, File No. BLL-20171120AAB, was filed on November 20, 2017, the third anniversary of the grant of said construction permit and its expiration date. In Section III, Question 2 of its November 20, 2017 Form 319 application, CVGC affirmatively certified that "**the facility was constructed as authorized in the underlying construction permit**" [emphasis supplied]. The Audio Division granted this application on December 12, 2017.



9. On August 9, 2019, over twenty months after the KQLS-LP initial covering license application was filed, CVGC filed an FCC Form 319 "application for modification of transmission parameters of licensed facility", File No. BMLL-20190809AAL. Therein, CVGC admitted in a statement in Exhibit 5:

THE LICENSEE HAS RECENTLY DETERMINED THAT THE COORDINATES INCLUDED IN ITS LICENSE APPLICATION WERE IN ERROR BY 256 FEET. THE CORRECT COORDINATES ARE: 36-11-21.6 N, 115-08-36.1 W. NO OTHER CORRECTIONS ARE BEING MADE TO THE ENGINEERING DATA PROVIDED IN THE LICENSEE'S TECHNICAL INFORMATION.

10. The ruling case law at the Audio Division as of December 12, 2017 on 47 C.F.R. §73.3598 was that a construction permit expired as a matter of law when the station was not constructed as permitted by the deadline. **Centro Cristiano Vida Abundante (KSIY(FM), San Simeon, CA)**, 32 FCC Rcd 10072, DA 17-1137, 2017 WL 5712822 (Audio Div., November 22, 2017). This ruling was released by the FCC two days after CVGC filed its Form 319 initial covering license application.

11. CVGC admitted to the FCC on August 9, 2019 that KQLS-LP had not been constructed in accordance with its construction permit. Had CVGC admitted this to the FCC as a part of its November 20, 2017 Form 319 initial covering application, said application would had to have been dismissed or denied.

12. Section 312(a)(2) of the Communications Act mandates that the Commission revoke a license granted by it when it turns

out that the agency learned about facts and circumstances which, had it known them at the time the application for initial covering license was pending, would have led it to dismiss or deny said application.

13. This being the case, CVGC has no legal leg to stand on. The almost ten pages of arguments about how the FCC misread Eagle and how Chevron might be overturned at the Supreme Court are irrelevant. Whether intentional or not, CVGC did not tell the FCC the truth on November 20, 2017 when it filed its original covering license application. CVGC admitted this to the FCC on August 9, 2019. CVGC should never have been granted an initial covering license, and the FCC I 47 U.S.C. §312(a)(2) has all the statutory authority it needs to terminate CVGC's authority to operate a low power FM station on 103.1 MHz in Las Vegas, Nevada.

**Responses to CVGC's "Questions Presented for Review"**

14. *Did CVGC or any of its principals engage in misrepresentations or lack of candor in dealing with the Bureau?* It is not necessary to decide this question to affirm the Bureau's determination that the KQLS-LP license expired pursuant to 47 U.S.C. §312(g). The undisputed facts are that when KQLS-LP was constructed in 2017, it was not constructed in accordance with its construction permit. CVGC admitted to the FCC in an FCC Form 319 application filed on August 9, 2019 that the station had not been constructed at the geographic coordinates specified in its 2014

construction permit. Thus, KQLS-LP had engaged in unauthorized transmissions for more than 365 consecutive days. The Audio Division was well within the law to declare the KQLS-LP license expired pursuant to Section 312(g). It could have justified the revocation of KQLS-LP's license under 47 U.S.C. §312(a)(2), *supra*.

15. The Audio Division was also well within its rights to reserve a determination of CVGC's basic qualifications to be an FCC licensee for a future proceeding. CVGC had a motive in November, 2017 to withhold from the Audio Division the reality that it had not constructed its facility in accordance with its construction permit. CVGC knew or should have known that if it had been truthful in its Form 319 covering license application that the station had not been constructed in accordance with its underlying construction permit, the Audio Division would have ruled that the KQLS-LP construction permit had expired. See e.g. ***Centro Cristiano Vida Abundante***, *supra*.

16. There is precedent for what the Audio Division did with respect to CVGC's basic qualifications. In ***Western Cities Broadcasting, Inc.***, 5 FCC Rcd 6177, 6180, ¶22 (Bureau, 1990), the Commission designated a basic qualifications issue against the license renewal application of KQKS(FM), Longmont, Colorado, where the controlling principal of KQKS(FM), Richard Phalen, had been found to be the undisclosed real-party-in-interest in his daughter's application for a new FM station at Montecito,

California. This issue was added because of a recommendation of the Administrative Law Judge in the Montecito hearing. **Shawn Phalen**, 4 FCC Rcd 5714, nn. 10, 38 (Miller, ALJ, 1989). What the Audio Division did with respect to CVGC is nothing new or novel, but rather is a measured response which protects the rights of both CVGC and the public. There was no reversible error here.

17. *Did the MO&O Incorrectly Interpret Section 312(g) of the Act?* The FCC's interpretation of the appellate decision in **Eagle**, *supra*, was not contested by CVGC at the Petition for Reconsideration stage of this proceeding. The plain text of the Eagle decision dooms CVGC (563 F.3d at 552-53):

There is no doubt that § 312(g) does not, by its plain terms, state that unauthorized transmissions are sufficient to avoid expiration pursuant to § 312(g). In other words, the statutory text "fails to transmit broadcast signals" surely does not *plainly* indicate that *unauthorized* and *unlicensed* broadcast transmissions are sufficient to avoid the strictures of § 312(g). The most that can be said is that § 312(g), standing alone, is silent with respect to whether transmissions must be authorized in order to avoid license expiration.

Actually, when § 312(g) is read in context, *i.e.*, as a part of the entire Act, Eagle's "plain meaning" argument falls apart. *See, e.g., Sierra Club v. EPA*, [551 F.3d 1019](#), 1027 (D.C.Cir.2008) (stating that the meaning of certain words and phrases must be examined in context as part of the *Chevron* Step One inquiry). Section 301 of the Act positively requires a purported broadcaster to secure a license from the FCC to transmit broadcast signals by radio. 47 U.S.C. § 301. Unlicensed radio transmissions are not recognized under the Act. And nothing in § 312 says otherwise. It is therefore an understatement to say that it strains credulity to suggest that the reference to "broadcast signals" in § 312(g) includes *unauthorized* and *unlicensed* transmissions.

Moreover, Eagle conceded at oral argument that its reading of § 312(g) would allow a station to avoid expiration by broadcasting from any site, even one that is thousands of miles removed from the authorized location. Recording of Oral Argument at 8:08. In other words, according to Eagle, the company could have avoided license expiration by broadcasting from a site

in New York. Section 312(g) cannot be read to plainly dictate this absurd result.

Section 312(g) refers only to broadcasters who have a "station license" to transmit radio signals. As the parties acknowledged at oral argument, Eagle's license was specifically limited to one permissible site of operation — Black Peak. When Eagle failed to transmit from this place of license for more than a year, its license expired by operation of law. Under the statute, unauthorized and unlicensed transmissions are no better than silence. If anything, the plain meaning of § 312(g) says just the opposite of what Eagle contends.

18. The Audio Division's determination that the KQLS-LP license had expired was also consistent with an agency precedent decided prior to the appellate decision in Eagle. In **A-O Broadcasting Corporation (KTMN)**, 22 FCC Rcd 603, 608 ¶10 (2008), the Commission wrote:

We disagree with A-O's initial contention that unauthorized transmissions are sufficient to avoid the consequences of Section 312(g). Section 301 of the Act provides that no person shall transmit radio signals except in accordance with authority granted by the Commission. It further provides that no license shall be construed to create any right beyond the terms, conditions, and authority of the license. Section 319 of the Act provides that all terms of a construction permit must be fully met before the Commission can license a station. The sanctions set forth in Section 312 enforce these provisions and Section 312(g) establishes the specific sanction for extended failure to broadcast. Indeed, if read to permit unauthorized operation to avoid license expiration, Section 312(g) would encourage violation of Section 301 and defeat its own purpose of ensuring timely construction and operation of authorized facilities that serve the public. A-O's unsupported contention that unauthorized transmissions prevent cancellation under Section 312(g) is inconsistent both with the purpose of Section 312(g) and with other provisions of the Act. [footnotes omitted]

19. There is no ambiguity in the FCC's interpretation of Section 312(g). As **A-O Broadcasting** demonstrates, the FCC was already interpreting Section 312(g) in the manner which the appellate court approved in **Eagle**. The Audio Division was correct in its determination that the KQLS-LP license had expired.

20. Are Sections 73.875 and Section 73.1690 of the Commission's Rules in conflict? The simple answer to this is that the FCC specifically made Section 73.1690 inapplicable to low power FM stations.

21. Section 73.801 states the broadcast regulations outside of Part 73, Subpart G which are applicable to low power FM stations. Noticeably absent is Section 73.1690, which states the limited instances where primary broadcast stations can seek authority to make changes to their facilities on a license application rather than a construction permit application.

22. We would also point out that the instructions to FCC Form 319, on page one, clearly state as follows:

**The form may not be used:**

**To change location of the tower structure. Any such relocation requires the prior filing and approval of FCC Form 318. See 47 C.F.R. Section 73.875(b).** [emphasis supplied]

23. Section 73.875(b) of the FCC's Rules states as follows:

(b) The following changes may be made only after the grant of a construction permit application on FCC Form 318.

(1) Any construction of a new tower structure for broadcast purposes, except for replacement of an existing tower with a new tower of identical height and geographic coordinates.

**(2) Any change in station geographic coordinates, including coordinate corrections and any move of the antenna to another tower structure located at the same coordinates.** [emphasis supplied]

(3) Any change in antenna height more than 2 meters above or 4 meters below the authorized value.

(4) Any change in channel.

24. Therefore, it is clear that when the Commission adopted Section 73.801 of its Rules, it meant to exclude Section 73.1690 from the primary broadcast stations regulations which also apply to low power FM stations. There is no conflict between Sections 73.875 and 73.1690. The former section applies to low power FM stations; the latter section does not.

25. *Does the MO&O treat CVGC in a manner different from other licensees in an arbitrary and capricious manner?* Clearly, the FCC has not treated CVGC differently than **Centro Cristiano Vida Abundante, Kingdom of God, Inc.** and **A-O Broadcasting**, whose cases are discussed *supra*. The same rationale which was applied to these erstwhile broadcasters was applied to CVGC. Further, we would also cite the unreported August 24, 2018 letter ruling in **Women's Civic Improvement Club of Sacramento, Inc.**, where the Audio Division ruled that the construction permit for KWCS-LP, Sacramento, California had expired where the "constructor" of KWCS-LP admitted that the station had not been constructed in accordance with its construction permit by the construction deadline (see Exhibit A).

26. *Is a sanction other than license cancellation the appropriate result?* Section 312(g) of the Communications Act mandates license expiration under the facts and circumstances present in the KQLS-LP case.

27. We would also point out that, were the FCC to substitute a civil monetary forfeiture in lieu of license expiration in this case, it would have let CVGC make a mockery of Section 73.3598(e) of the FCC's rules, which states:

Any construction permit for which construction has **not** been completed and for which an application for license has **not** been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.

28. It is uncontroverted that KQLS-LP had not been constructed in accordance with its underlying construction permit by its construction deadline of November 20, 2017. Its certification that the station had been constructed in accordance with its construction permit turned out to be false through an August 9, 2019 CVGC representation in another FCC Form 319 application.

29. Therefore, both 47 U.S.C. §312(g) and 47 U.S.C. §312(a)(2) mandate that the expiration of the KQLS-LP license be affirmed. Furthermore, on this record Section 73.3598(e) of the Rules requires a finding that CVGC's construction permit expired on November 20, 2017, and it never had a valid authority to operate KQLS-LP thereafter.

30. *Is reinstatement of the license appropriate to promote equity and fairness?* The better question to ask would be whether reinstatement of KQLS-LP on this record throw into chaos the FCC's jurisprudence in enforcing construction deadlines and the



construction and operation of broadcast stations in accordance with their permits and licenses. If anything, it would be inequitable and unfair to Eagle Broadcasting Group, Inc. and the former licensees/permittees of KSIY(FM), WKOG-LP, KTMN(FM) and KWCS-LP to reinstate the KQLS-LP construction permit and license.

31. CVGC's protestations and pleas for "equitable" relief put one in mind of the proverbial case where the child murdered his parents and then sought the mercy of the court on the grounds that he was an orphan. Whether intentional or unintentional, CVGC made a material misrepresentation of fact which led the Audio Division to grant its initial covering license. If the Audio Division had known that CVGC had not constructed KQLS-LP in accordance with its construction permit, its license would never have been granted. CVGC then proceeded to engage in unauthorized transmissions for over a year after its initial license had been granted by the Audio Division. Its operating authority was properly revoked by the Audio Division when it ruled that the KQLS-LP license had expired pursuant to 47 U.S.C. §312(g).

32. The reinstatement of the KQLS-LP license would not promote equity and fairness, but rather would make it impossible for the Commission to equitably and fairly enforce Section 312(g) of the Communications Act and Section 73.3598(e) of its Rules.

## **Conclusion**

33. The CVCG Application for Review is procedurally defective and otherwise fails to present any colorable argument why the Media Bureau's January 15, 2020 order in this matter should be reversed.

34. CVGC raised new legal arguments in its AFR which were not asserted in its Petition for Reconsideration. Not only is this tactic not allowed by 47 C.F.R. §1.115(c), the appellate court with jurisdiction over the FCC wrote the following almost eighty years ago:

Under these circumstances to allow the appellant to allege as an error or law a situation that it took no timely steps to correct by presenting its evidence in full would change its position from that of an interested party under the statute to that of a mere vigilante. As we said in the Red River case, 'The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume in this case a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation. [footnote omitted]

***Colorado Radio Corp. v. FCC***, 118 F.2d 24, 27 (D. C. Cir. 1941), citing ***Red River Broadcasting Co. v FCC***, 98 F. 2d 282, 286-88 (D. C. Cir., 1938).

35. When it filed its FCC Form 319 initial covering license application, CVGC withheld from the Audio Division the fact that KQLS-LP had not been constructed at the geographic coordinates

specified in its underlying construction permit. Then, CVGC withheld from the Audio Division the sophisticated legal argument concerning the efficacy of the appellate precedent in **Eagle** and the Audio Division's application of it in the KQLS-LP matter, only presenting it for the first time in its AFR. The Audio Division's determination that the KQLS-LP license expired as a matter of law on December 13, 2018 was legally correct and must be affirmed.

**WHEREFORE**, it is urged that the Application for Review filed by Chinese Voice of Golden City **BE DISMISSED OR DENIED**.

Respectfully submitted,

**SILVER STATE BROADCASTING, LLC**

A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

By \_\_\_\_\_  
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DATED AND FILED: February 28, 2020

## EXHIBIT A



**Federal Communications Commission  
Washington, D.C. 20554**

August 24, 2018

In Reply Refer To:  
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**In re: Women's Civic Improvement Club of  
Sacramento, Inc.**

Station KWCS-LP, Sacramento, CA  
Facility ID No. 192390  
File No. BLL-20171219ADO

**Petition for Reconsideration**

Dear Mr. Gwyn and Counsel:

We have before us the Petition for Reconsideration (Petition) filed by Women's Civic Improvement Club of Sacramento, Inc. (WCICS), requesting reconsideration of the dismissal<sup>1</sup> of its license to cover application (License Application) for Station KWCS-LP, Sacramento, California (Station).<sup>2</sup> For the reasons set forth, we deny the Petition.

**Background.** The Media Bureau (Bureau) issued WCICS a construction permit (Permit) for the Station on December 8, 2014, with an expiration date of December 8, 2017.<sup>3</sup> No license to cover application was filed by December 8, 2017, and on December 12, 2017, the Bureau cancelled the Permit in the Commission's electronic database, CDBS, and deleted the Station's call sign.

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<sup>1</sup> *Broadcast Actions*, Public Notice, Report No. 49220 (MB Apr. 23, 2018) (*Dismissal PN*).

<sup>2</sup> WCICS filed the Petition on May 22, 2018. Punjabi America Media, LLC (PAM), filed an Opposition on June 1, 2018. New Inspiration Broadcasting Company, Inc. (NIBC), filed a pleading styled "Comments in Support of Punjabi American, LLC's Opposition to Petition for Reconsideration" on June 6, 2018. PAM is the assignee of the license of FM Translator Station K227AH, River Pines, California. See File No. BALFT-20160729ALB. PAM filed an application to modify K227AH, which is mutually exclusive with an application filed by NIBC to modify FM Translator Station K245AR, Little Fish Lake Val, California. See File Nos. BPFT-20160729ALZ, BPFT-20160729ANB. PAM filed an amendment to its modification application which proposes to resolve this mutually exclusivity by specifying operation on the same channel as KWCS-LP.

<sup>3</sup> See File No. BNPL-20131104AUY (Permit Application). WCICS filed an application to modify the Permit by specifying operation on a different channel. See File No. BMPL-20160711ABR. The Bureau granted this application on July 18, 2016.

WCICS filed the License Application on December 19, 2017, certifying that the facility had been constructed in accordance with the terms of the Permit.<sup>4</sup> That the same day, the Bureau reinstated the Permit and the Station's call sign.<sup>5</sup> PAM filed an Informal Objection to the License Application on December 20, 2017 (Objection), and a Supplement to the Objection on January 18, 2018 (Objection Supplement).<sup>6</sup> On April 18, 2018, the Bureau dismissed the License Application pursuant to Section 73.3598 of the FCC's rules (Rules) because it was filed after the Permit had expired.<sup>7</sup>

In the Petition, WCICS argues that the Station was timely constructed on December 7, 2017, in accordance with the Permit.<sup>8</sup> It explains that it is "not a seasoned broadcast entity" and was not sure how to inform the Commission that the Station had commenced operations.<sup>9</sup> WCICS notes that the Commission has a policy to accept covering license applications filed after the expiration of the underlying construction permit,<sup>10</sup> and argues that it has met the requirements of this policy because the Station was built on time and WCICS has proven that it was in fact timely constructed.<sup>11</sup>

The Petition is accompanied by a Declaration of Charles Gwyn. Gwyn states that he constructed and operated the Station until the License Application was dismissed.<sup>12</sup> Gwyn further states that the Station was constructed and commenced broadcasting on December 7, 2017, at the WCICS headquarters at 3555 3<sup>rd</sup> Ave, Sacramento, California, and provides a picture of what he claims is that tower.<sup>13</sup> Gwyn also notes—for the first time—that although the Permit authorized an antenna height of 31 meters,<sup>14</sup> the antenna was built at 16.8 meters, but argues that the Station still complies with the minimum requirements of Section 73.811(b) of the Rules.<sup>15</sup> Finally, Gwyn states that "[w]hen the [License Application] was canceled, the station stopped transmitting."<sup>16</sup>

**Discussion.** 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.<sup>17</sup> WCICS has failed to meet this burden.

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<sup>4</sup> License Application at Section III, Question 2.

<sup>5</sup> *Broadcast Applications*, Public Notice, Report No. 29138 (MB Dec. 22, 2017).

<sup>6</sup> The Bureau did not address either the Objection or the Objection Supplement in the *Dismissal PN*.

<sup>7</sup> See *Dismissal PN* ("Dismissed 4/18/2018 per 47 CFR Section 73.3598. The original permit BNPL-20131104AUY, as modified by BMPL-20160711ABR, expired on 12/08/2017. No letter sent."); 47 CFR § 73.3598.

<sup>8</sup> Petition at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2 (citing *WKLC, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 2061 (MB 2013) (*WKLC*)).

<sup>11</sup> Petition at 2-3.

<sup>12</sup> Petition at Gwyn Declaration. Although we note that PAM has raised procedural objections to the Petition (Opposition at 3), we need not address those in light of our disposition here.

<sup>13</sup> *Id.*

<sup>14</sup> Permit Application at Section VI, Question 6.

<sup>15</sup> Petition at Gwyn Declaration (citing 47 CFR § 73.811(b)).

<sup>16</sup> Petition at Gwyn Declaration.

<sup>17</sup> 47 CFR § 1.106(c); *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*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).



Under our precedent, “we will only waive the automatic expiration provision of Section 73.3598(e) and accept a late-filed covering license application where: (1) the permittee demonstrates conclusively that construction in accordance with the construction permit was complete and the station was ‘ready for operation’ by the permit expiration date; and (2) the covering license application is filed within 30 days of the expiration date.”<sup>18</sup> WCICS failed to meet this standard because it did not conclusively demonstrate when it filed the License Application that the Station was timely constructed in accordance with the Permit; in fact, the License Application contained no documentation at all showing that the Station had been timely constructed in accordance with the Permit. The Petition likewise fails to meet this standard. The lone undated photograph WCICS provided, of an unidentified communications tower in an unidentified location, fails to demonstrate that the Station was built in accordance with the Permit by December 7, 2017.<sup>19</sup> Accordingly, we deny the Petition.<sup>20</sup>

Moreover, assuming the Station was constructed, the Petition concedes that it was not constructed in accordance with the Permit.<sup>21</sup> WCICS states in the Petition that the Station’s antenna was constructed at a height of 16.8 meters above ground level when it was authorized at a height of 31 meters, a difference of 14.2 meters below the authorized height.<sup>22</sup> Section 73.875(b)(3) of the Rules provides that an LPFM station may not modify its antenna height by more than 2 meters above or 4 meters below its authorized value without prior approval by the Commission.<sup>23</sup> WCICS’s modification occurred without the required approval from the Commission. We have deemed a construction permit expired where the permittee constructed the facility at a variance from the underlying permit.<sup>24</sup> WCICS’s failure to construct the facility in accordance with the Permit would serve as separate and independent basis to dismiss the License Application, even if WCICS had made a showing that the Station’s construction was complete before the Permit expired.<sup>25</sup>

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<sup>18</sup> *WKLC*, 28 FCC Rcd at 2064, para. 9. The Bureau adopted this processing policy following the decision in *Clear Channel Broadcasting Licenses, Inc.*, where the Commission affirmed the Bureau’s policy of waiving Section 73.3598 and accepting a covering license application filed within a few days of the expiration of the underlying construction permit. *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153, 7157, para. 10 (2011). We note that Section 73.3598 applies to the Station by virtue of 47 CFR § 73.801.

<sup>19</sup> For example, WCICS could have provided station logs, equipment receipts, invoices from contractors, payment records, or other documentation proving the Station was timely constructed.

<sup>20</sup> In light of our finding that the Bureau properly dismissed the License Application, we need not address the numerous issues PAM raised in the Objection, Objection Supplement, and Opposition.

<sup>21</sup> We note that PAM presented a detailed showing in the Objection Supplement to support a claim that the Station was not constructed in the location authorized by the Permit as of January 11, 2018. *See* Objection Supplement at 2-5. WCICS never attempted to rebut that claim and asserted in the Petition that the Station operated until the License Application was dismissed. Petition at Gwyn Declaration. However, we need not address it in light of our disposition here.

<sup>22</sup> Petition at Gwyn Declaration; *see* FCC File No. BMPL-20160711ABR.

<sup>23</sup> 47 CFR § 73.875(b)(3).

<sup>24</sup> *See, e.g. Centro Cristiana Vida Abundante*, Letter Order, 32 FCC Rcd 10072 (MB 2017) (finding that construction permit has expired where permittee modified facility without authority and thus did not timely build facility as authorized).

<sup>25</sup> We reject WCICS’s argument that the License Application should be accepted because the facility it constructed, even with the reduced antenna height, nonetheless provides the minimum coverage required under Section 73.811(b). We have held that “[e]xcept to the extent specifically provided in our Rules, we do not allow permittees to self-approve modifications to their construction permits.” *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8244 n.24 (MB 2009) (“Commission review and prior approval of engineering changes are necessary prior to construction. The Commission operates a national database of authorizations that allows all parties to know where and when broadcast spectrum is available. In an era of intense

**Conclusion.** Accordingly, for the reasons discussed above, IT IS ORDERED that the Petition for Reconsideration filed on May 22, 2018 by Women's Civic Improvement Club of Sacramento, Inc., IS DENIED.

Sincerely,



Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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demand for broadcast spectrum, parties . . . cause substantial harm when they hoard spectrum by holding authorizations . . . but operate minimal facilities that would not have been approved under our Rules had they been presented to us (or, worse, fail to operate any facilities)."). Indeed, here, WCICS's inaction has precluded the Bureau from processing several applications filed by PAM and NIBC. *See supra* n.2.



## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing "Opposition to Application for Review" has been served by both e-mail and first-class United States mail, postage prepaid, on this 28<sup>th</sup> day of February, 2020 upon the following:

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Dennis J. Kelly