

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

In the Matter of)	
)	
WJBW, LLC)	
)	
Applications for Modification and Special)	File Nos. BSTA-20160201ANX
Temporary Authority for FM Translator Station)	BPFT-20160129ACA
DW283AM, ¹ Arcadia, Florida)	Facility ID No. 138804

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 2017

Released: March 21, 2017

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review (AFR) filed by WJBW, LLC (WJBW),² licensee of former FM translator station W283AM, Arcadia, Florida (Translator) and the current licensee of WJBW(AM), Jupiter, Florida, an AM station that WJBW planned to rebroadcast over the Translator. WJBW seeks review of a decision³ in which the Media Bureau (Bureau) declined to reconsider the Bureau's determination that the Translator's license had terminated for non-operation as a matter of law, and dismissing WJBW's applications seeking special temporary authority (STA) to temporarily relocate the Translator and authority to modify the Translator authorization to allow it to permanently operate at another location.⁴ For the reasons stated below, we deny the AFR.

II. BACKGROUND

2. Section 312(g) of the Communications Act of 1934, as amended (Act), provides for automatic expiration of a broadcast station's license as a matter of law upon failure to transmit a broadcast signal for 12 consecutive months.⁵ The Act allows the Commission to reinstate a silent station's terminated license if, in the Commission's judgment, such action would promote "equity and fairness."⁶

¹ The "D" preceding the station's call sign reflects its deletion from the Commission's database.

² WJBW, Application for Review (filed Dec. 5, 2016).

³ Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Dan J. Alpert, Esq., Letter Order (MB Nov. 1, 2016) (*Reconsideration Decision*).

⁴ Letter from Dale Bickel, Senior Engineer, Audio Division, Media Bureau, to WJBW, LLC, Letter Order (Feb. 11, 2016) (*Letter Decision*).

⁵ 47 U.S.C. § 312(g); 47 CFR § 74.15(f). *See also Kingdom of God, Inc.*, Memorandum Opinion and Order, FCC 17-17 (Jan. 31, 2017); *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008), *aff'd sub nom. Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009) (unauthorized, unlicensed broadcasts cannot constitute transmission of broadcast signals to avoid termination under Section 312(g)) (*Eagle*).

⁶ *See* 47 U.S.C. § 312(g). The Commission conducts a case-by-case factual analysis to determine whether reinstatement would promote equity and fairness. It has exercised this statutory discretion only when the failure to

(continued...)

3. On October 23, 2015, the Commission released its First Report and Order in the AM Revitalization proceeding.⁷ Therein, the Commission, *inter alia*, directed the Media Bureau to open an exclusive filing window limited to the licensees and permittees of certain classes of AM stations, including Class D stations such as WJBW(AM), to file applications for authority to relocate an existing FM translator station up to 250 miles to bring it within the AM station's service area for carriage of the AM station's programming.⁸ In November 2015, one month after the Commission's release of the *AM Revitalization Order*, WJBW acquired two stations through *pro forma* assignments from Azure Media, LLC, a commonly-owned affiliate.⁹ These stations were: (1) WJBW(AM), Jupiter, Florida, an operating Class D AM station; and (2) the Translator, which had been off the air since February 1, 2015 due to the reported loss of its authorized transmitter site in Arcadia. The Bureau's assignment authorization, issued on November 23, 2015, warned that the Translator's license would expire as a matter of law unless WJBW restored operations before 12:01 a.m., February 2, 2016.¹⁰ On January 29, 2016, *i.e.*, four days prior to the deadline to resume operations, WJBW filed an application for a construction permit to move the Translator 109 miles from Arcadia to Jupiter (CP Application). At 10:01 p.m. on February 1, 2016, *i.e.*, two hours before the resumption deadline, WJBW filed a request for STA to operate the Translator from a temporary location in the Arcadia area that was not the location authorized for the Translator. On February 3, 2016, WJBW notified the Bureau that it had, on February 1, 2016, resumed Translator operations from the temporary site proposed in the STA Request.

4. The Bureau determined that the Translator's license had expired as a matter of law pursuant to Section 312(g) and, therefore, on February 11, 2016, deleted the Translator's call letters, and dismissed the CP Application, as well as the STA Request.¹¹ The Bureau acknowledged WJBW's claim of having returned the Translator to the air shortly before the twelve-month deadline, but found that those alleged operations were unauthorized and, thus, could not break the station's consecutive months of silence for purposes of Section 312(g).¹² In particular, the Bureau stated that WJBW: (1) had no authority to operate at the temporary Arcadia site from which it allegedly resumed operations; (2) sought

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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 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); *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (silence to comply with court order).

⁷ *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145 (2015) (*AM Revitalization Order*).

⁸ *Id.* at 12150-51, para. 7. In 2009, the Commission changed its rules to allow the use of FM translators to rebroadcast the signals of AM stations within the AM stations' service areas. *See Amendment of Service and Eligibility Rules for the FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009).

⁹ *See* FCC File No. BAL-20151021AIA at Exh. 5 ("This is a corporate reorganization, transferring the stations from Azure Media, LLC to WJBW LLC, which is an identically owned corporation [sic]. There is no written agreement.").

¹⁰ *See* Consent to Assignment from Azure Media, LLC to WJBW, File No. BALFT-20151021AIB (granted Nov. 23, 2015) at 1. The transaction was consummated on November 24, 2015. *See* Consummation Notice (filed Jan. 22, 2016). The Bureau's letter approving the Translator's silence previously had similarly warned that the Translator's license was subject to forfeiture after one year of silence pursuant to Section 312(g). Letter from Lisa Scanlan, Audio Division, Media Bureau to Dan J. Alpert, Esq. at 1 (Apr. 24, 2015) ("Notwithstanding the grant of this Special Temporary Authority, the broadcast license for Station W283AM will automatically expire as a matter of law if broadcast operations do not resume by 12:01 a.m., February 2, 2016," citing Section 312(g)).

¹¹ *Letter Decision* at 2-3.

¹² *Id.* at 2, citing *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603 (2008) (failure to complete construction at alternate site) (*A-O*).

such authority by submitting the STA Request after close of business on the last possible day, precluding any staff consideration prior to expiration of the Translator license; (3) did not demonstrate, as claimed, that it had resumed operations with an “emergency antenna” that needed no prior authorization;¹³ and (4) had presented no “equity and fairness” basis for reinstatement.¹⁴

5. In the November 1, 2016 *Reconsideration Decision*, the Bureau addressed several issues. With respect to WJBW’s claim to have used an “emergency antenna,” the Bureau stated that the Commission’s rules (Rules) define an emergency antenna as one used after an authorized antenna is damaged and cannot be used, whereas WJBW had not claimed any antenna damage nor shown how loss of the licensed site one year previously could be considered an “emergency.”¹⁵ The Bureau also rejected WJBW’s argument that its intended use of the Translator in connection with the *AM Revitalization Order* qualified as an “equity and fairness” basis for reinstatement. The Bureau stated that, to the contrary, nothing in the *AM Revitalization Order* expresses any Commission intent to expand the grounds for reinstatement of licenses expired due to non-operation pursuant to Section 312(g) of the Act.¹⁶ WJBW now seeks Commission review of the Bureau’s actions.

III. DISCUSSION

6. The Commission will consider an Application for Review, *inter alia*, to address questions of law or policy not previously resolved by the Commission.¹⁷ WJBW argues that this case presents two such questions: (1) whether a silent station facing Section 312(g) license expiration should be permitted to invoke the emergency antenna provisions of Section 73.1680 to restore operations on a temporary basis to avoid such expiration; and (2) whether allowing a translator license to expire as a matter of law is in the public interest where that translator would be used in conjunction with an AM station to further the goals of the *AM Revitalization Order*.

7. Upon consideration of the AFR and the entire record, we affirm the *Reconsideration Decision*. The allegedly “new” questions that WJBW presents are not unresolved questions of law or policy but rather attempts to have the Commission reinterpret or change rules and policies already clear upon their face. WJBW’s reliance on Section 73.1680 is misplaced. That rule does not by its terms apply to FM translator service authorizations and no other rule makes Section 73.1680 applicable to such authorizations.¹⁸ Even if that rule were applicable here, as noted above, Section 73.1680 is specifically limited to situations in which the authorized antenna is “damaged and cannot be used,” which was not the

¹³ See 47 CFR § 73.1680 (“an emergency antenna is one that is erected for temporary use after the authorized main and auxiliary antennas are damaged and cannot be used. . . . [A]n informal letter request to continue operation with the emergency antenna must be made within 24 hours . . . to include a description of the damage to the authorized antenna. . .”).

¹⁴ *Letter Decision* at 1-3. The *Letter Decision* also stated that the Bureau could not have authorized the Translator to operate from the site proposed in the STA Request and from which WJBW allegedly resumed operations because, contrary to STA processing guidelines, that location was outside the service area of the licensed facilities. *Id.* at 2. On reconsideration, the Bureau did not reach the merits of WJBW’s responsive argument that the intended STA site was within the licensed service area but that the STA Request listed incorrect site coordinates due to a typographical error. See *Reconsideration Decision* at 2. The Bureau stated that even had WJBW specified correct coordinates for the intended site, the result would have been the same because the claimed pre-expiration operations from that site were unauthorized and could not have prevented license termination. *Id.* at 2-3.

¹⁵ *Id.* at 2; see 47 CFR § 73.1680(a).

¹⁶ See *Reconsideration Decision* at 3.

¹⁷ 47 CFR § 1.115(b)(2)(ii).

¹⁸ See 47 CFR § 73.1680, which references only AM stations (73.1680(b)(1)) and FM, TV and Class A TV stations (73.1680(b)(2)). In contrast, for example, Section 74.780 makes Section 73.1680 applicable to TV translators. 47 CFR § 74.780.

case here.¹⁹ We further note that Section 74.21, the rule authorizing “emergency” operations by FM translators, is similarly limited to cases in which licensed facilities have been “disrupted or destroyed by . . . disasters.”²⁰ Neither rule permits otherwise unauthorized operations to remedy a licensee-created problem—failure to operate in accordance with the terms of its authorization—that it self-servingly describes as an “emergency.”

8. The *AM Revitalization Order* is similarly clear on its face. It allows certain AM stations to file modification applications to relocate FM translators that will rebroadcast the AM stations’ signals.²¹ Nothing therein contemplates an AM station’s unilateral relocation and operation of a translator prior to Commission grant of the translator modification application. The *AM Revitalization Order* does not mention Section 312(g), much less purport to alter the Commission’s longstanding interpretation of this provision of the Act.²² In the instant case, WJBW began to operate a translator without authority, at a time when the Bureau had granted neither its CP Application nor its STA Request. Indeed, the eleventh-hour timing of WJBW’s filings made it impossible for the Bureau to review those filings and approve WJBW’s operation with the facilities proposed prior to expiration of the Translator’s license.

9. In adopting rules to implement Section 312(g), the Commission stressed that licensees at risk of automatic expiration should allow sufficient time for Commission review and post-authorization construction when filing an application for facilities intended to return a silent station to the air.²³ Similarly, the Bureau warned that it is the responsibility of the licensee, not of the agency, to timely and properly resume operations.²⁴ Although the agency will do its best to assist, its limited staff resources prevent action on applications filed without sufficient lead time, especially if the application contains deficiencies or the applicant fails to alert the staff of the need for expedited consideration.²⁵ WJBW

¹⁹ See *supra*, note 13.

²⁰ See 47 CFR § 74.21 (“In an emergency where normal communication facilities have been disrupted or destroyed by storms, floods or other disasters, the stations licensed under this part may be operated for the purpose of transmitting essential communications intended to alleviate distress, dispatch aid, assist in rescue operations, maintain order, or otherwise promote the safety of life and property.”). WJBW has never claimed that there was an actual emergency that disrupted or destroyed the Translator in any way or that the Translator aired safety-related programming during its brief operations; it has only stated that “it lost its transmitter site.” See, e.g., AFR at 1.

²¹ *AM Revitalization Order*, 30 FCC Rcd at 12150-51, para. 7.

²² We, thus, reject WJBW’s argument that Section 312(g) termination of the Translator’s license is inconsistent with an “analogous” provision in the *AM Revitalization Order* which gives permittees of certain new, unconstructed FM translators an opportunity to seek additional construction time by waiver. AFR at 9; see *AM Revitalization Order*, 30 FCC Rcd at 12152 n.36. Broadcast construction deadlines differ substantively from deadlines for returning silent stations to the air. See 47 U.S.C. § 312(g); 47 CFR § 73.3598. Exceptions to the three-year period to construct new stations are no longer relevant once the station has been licensed, and cannot prevent a licensed station’s Section 312(g) termination upon a one-year period of silence. See *Silver Fish Broad., Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 15054, 15055, para.3 (2014), *appeal dismissed sub nom. Silver Fish Broad., Inc. v. FCC*, No. 15-1004, 2015 WL 3372262 (D.C. Cir. Apr. 30, 2015) (per curiam) (rejecting former licensee’s “attempt to conflate the bases for tolling of the deadline for construction of an unbuilt station and those for reinstating a lapsed license under Section 312(g)” due to the “fundamental difference” of the two situations). Similarly, we reject WJBW’s “equity and fairness” argument that the Translator’s license should be reinstated because its co-owned AM station would otherwise be unable to avail itself of translator-related opportunities announced in the *AM Revitalization Order*. AFR at 7-9. WJBW lost the opportunity to rebroadcast on the Translator due to its own inaction.

²³ See *Implementation of Section 403(l) of the Telecom. Act of 1996 (Silent Station Authorizations)*, Order, 11 FCC Rcd 16599, 16601, para. 6 (1996) (applicants “to modify the facilities of a silent station should make sure that sufficient time exists, before the automatic expiration of the license, to return the station to the air”).

²⁴ See *Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcasting Stations*, Public Notice, 11 FCC Rcd 14356, 14356 (MB/IB 1996).

²⁵ *Id.*

neither provided sufficient lead time nor alerted the staff when it filed the CP Application four days prior to expiration and the STA request two hours prior to termination, after close of business. Additionally, the STA Request misidentified the proposed site.²⁶ These actions were wholly within WJBW's control and further support the Bureau's determination.²⁷ Finally, we note that the Commission has consistently declined to exercise its Section 312(g) discretion when, as here, station silence is the result of a licensee's own inaction and exercise of business judgment.²⁸

10. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by WJBW, LLC on December 5, 2016, IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules.²⁹

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ See *supra*, note 14.

²⁷ See, e.g., *OCC Acquisitions, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6147 (2014) (STA not granted prior to expiration due to deficiencies in STA request).

²⁸ E.g., *New Visalia Broad., Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9744 (2014) (health problems of principal); *A-O*, 23 FCC Rcd at 617, para. 27 (failure to complete construction at alternate site) (*A-O*); *Eagle*, 23 FCC Rcd at 589-90, paras. 3-6 (operation from unauthorized site after loss of licensed site due to interference and land use issues).

²⁹ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(g).