

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

In the Matter of)	
)	File Nos. BPH-20020215ABM
Eagle Broadcasting Group, Ltd.)	BSTA-20040429ABF
)	BRH-20040318ACK
)	BRH-20050601BTP
License Status of Silent Station)	
DKVEZ(FM), Parker, Arizona)	Facility I.D. No. 35119

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: January 18, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it four petitions for reconsideration, filed March 18, 2004, June 2, 2004, June 7, 2004, and July 22, 2005, by Eagle Broadcasting Group (“Eagle”), former licensee of former broadcast station KVEZ(FM), Parker, Arizona.¹ The first (“March Petition”) seeks reconsideration of a February 17, 2004, decision (“Staff Decision”) determining that the station’s license and all associated authorizations expired as a matter of law as of December 21, 2003, due to the station’s failure to broadcast for one year.² In response to a May 3, 2004, staff letter³ that dismissed an April 29, 2004, request for special temporary authorization (the “2004 STA Request”), Eagle filed its June 2, 2004, petition for reconsideration (“June STA Petition”). The third (“June Renewal Petition”) seeks reconsideration of the staff’s dismissal of Eagle’s March 18, 2004, application for license renewal.⁴ The fourth seeks reconsideration of an additional license renewal application filed on June 1, 2005. The staff has also referred a related STA request filed January 25, 2005 (the “2005 STA Request”). For the reasons set forth below, we deny all four petitions, dismiss the 2005 STA Request as moot, and affirm the staff determinations.

¹ The staff has referred these matters to the Commission pursuant to 47 C.F.R. § 1.106(a)(1).

² Letter to Eagle Broadcasting Group, Ltd. (Feb. 17, 2004). The Staff Decision also dismissed as moot an application to modify the license.

³ See Letter to Eagle Broadcasting Group, Ltd. (May 3, 2004) (“Dismissal Letter”).

⁴ The staff dismissed the license renewal application and STA request in the same Dismissal Letter. See *id.* Eagle seeks reconsideration in two separate documents, both of which were timely filed based on the dates of public notice of the decision’s STA and renewal components. See 47 C.F.R. § 1.4(b)(4) and (5). The Dismissal Letter itself served as public notice of the STA action, while a separate document entitled “Public Notice” was issued with respect to the license renewal action. See *Public Notice*, Report No. 45731 (May 7, 2004). The June STA Petition and June Renewal Petition are referred to herein, collectively, as the “June Petitions.”

II. BACKGROUND

2. Until a legislative change in December 2004,⁵ Section 312(g) of the Communications Act of 1934, as amended (the “Act”) provided that “if a broadcasting station fails to transmit broadcast signals for any consecutive twelve-month period,” the station’s license expires as a matter of law “notwithstanding any provision, term, or condition of the license to the contrary,” and the license is automatically forfeited.⁶ The Act defines “broadcasting” as the “dissemination of radio communications intended to be received by the public.”⁷ At the time of the staff actions under review, the Commission had no discretion to waive Section 312(g)’s expiration provision.⁸ At issue here is whether the staff properly found that KVEZ(FM) failed to broadcast for twelve consecutive months, and therefore whether the license expired pursuant to Section 312(g). We also consider below what impact, if any, subsequent revisions to Section 312(g) -- granting the Commission authority to reinstate expired licenses -- have on the outcome of this case.

3. Eagle was licensed to operate KVEZ(FM) from a site known as Black Peak, but experienced problems at that site due to interference caused to another site user. The station ceased broadcasting on June 23, 2001. On February 15, 2002, KVEZ(FM) filed a modification application, proposing to relocate its transmitter to a site in the Buckskin Mountains.⁹ The staff expedited consideration of the Buckskin Application and on April 24, 2002, notified Eagle of a deficiency. Eagle had responded “not applicable” to a question asking for a Commission tower registration number, which an applicant obtains after receiving a determination from the Federal Aviation Administration (“FAA”) that its proposed tower will not be a hazard to air navigation. The engineering staff determined that Eagle’s “not applicable” response was incorrect,¹⁰ and that public safety factors required both FAA approval and Commission registration of the tower proposed in the Buckskin Application.¹¹

⁵ See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, Title IX, § 213 (2004).

⁶ 47 U.S.C. § 312(g) (1996) amended by *id.* See *Aerco Broadcasting Corp. v. FCC*, 51 Fed. Appx. 23 (D.C. Cir. 2002) (*per curiam*) (the effect of Section 312(g) is license forfeiture). The Commission codified Section 312(g) in several of its rules. *E.g.*, 47 C.F.R. § 73.1740(c). See *Silent Station Authorizations*, Order, 11 FCC Rcd 16599 (1996).

⁷ 47 U.S.C. § 153(6).

⁸ See *WYCO, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16900, 16902-03 (2003); *OCC Acquisitions, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6147, 6151 (2002), *aff’d per curiam*, *OCC Acquisitions, Inc. v. FCC*, 64 Fed. Appx. 790 (D.C. Cir. 2003); *Silent Station Authorizations*, 11 FCC Rcd at 16600-01. See also *Expiration of License for Radio Facilities*, Public Notice, 12 FCC Rcd 3769 (MMB Apr. 3, 1997) (announcing license expiration of 24 silent stations and procedures to apply for new facilities to take their place).

⁹ File No. BPH-20020215ABM (“Buckskin Application”).

¹⁰ Eagle had not shown, for example, that its proposed tower met a specific exception to the requirement of notification/registration. See 47 C.F.R. § 17.14.

¹¹ Applicants proposing to construct an antenna structure that is more than 200 feet (60.96 meters) in height above ground level, or that may interfere with the approach or departure space of a nearby airport runway, must notify the FAA of proposed construction. See 14 C.F.R. § 77.13. See also 47 C.F.R. § 17.7. The FAA issues a written acknowledgement of each notice, which contains a determination of whether the antenna structure constitutes a potential hazard, and may require painting and lighting. See 14 C.F.R. § 77.19. All towers that require FAA

(continued...)

4. Eagle did not supply the required air safety information needed to complete the Buckskin Application. Instead, it sought and received STA to resume operations from a temporary location in Parker, Arizona. On December 20, 2002, however, the day after the STA expired, the station went silent again. In a letter notifying the Commission of the station's silence, Eagle stated that it was "in the process of moving to our new transmitter site as previously approved by the FCC" and for which the FAA had "finally give[n] its OK."¹² The basis for these assertions is not apparent. If Eagle was referencing the Buckskin site, the Commission had given no such approval. Eagle's submission failed to provide a written confirmation from the FAA, a Commission tower registration number, or any indication that the Buckskin Application had been amended with the information needed for Commission action. The staff sent a letter to Eagle on January 23, 2003, reiterating the need to correct the application's FAA-related deficiency in order to receive permission to move to the Buckskin site.

5. An Eagle consultant submitted an e-mail response to the deficiency letter ten months later on November 26, 2003. According to the consultant, the FAA had reported that its authorization was not required because the tower was not within the glide slope of the Parker airport, was not of significant height, and required no lighting or painting. On December 9, 2003, the staff requested that the consultant submit a copy of the FAA's letter, and reminded the consultant of the need to return to the air by December 20, 2003, to avoid license expiration under Section 312(g). The staff also had contacted the station by telephone to warn it of the impending expiration. On December 10, 2003, Eagle's consultant indicated that he would send a copy of written confirmation from the FAA later that week. No written corroboration was ever submitted, however. The consultant also indicated that a letter from the station was on its way to the Commission reporting that the station had returned to the air on November 22, 2003, and that the station's license therefore should not expire. The notification, received on December 3, 2003, advised of "resumption of regular broadcasting . . . at the *previously approved site* North of the city of license, Parker, Arizona."¹³ In early January 2004, however, the staff received a complaint alleging that KVEZ(FM) was not operating from any site approved by the Commission.

6. On January 28, 2004, the staff contacted the station by fax and e-mail asking for clarification of the "previously approved" site from which Eagle was operating. Eagle's President, Maurice Coburn, advised a staff member by telephone that the station was operating at the site proposed in its Buckskin Application. On February 3, 2004, KVEZ(FM)'s consultant phoned the same staff member and provided the same information. The staff determined that Eagle was operating with unlicensed facilities for which Eagle held no STA or other authority. Accordingly, as noted above, the staff issued the Staff Decision on February 17, 2004, finding that operations at Buckskin did not constitute lawful resumption of broadcast operations for purposes of Section 312(g).¹⁴ The staff also concluded that KVEZ(FM)'s license had expired as a matter of law as of December 21, 2003, dismissed

(...continued from previous page)

notification must be registered with the Commission. See 47 C.F.R. § 17.4. The Commission has a statutory responsibility to "require the painting and/or illumination of radio towers" in cases where there is a "reasonable possibility" that an antenna structure may cause a hazard to air navigation. 47 U.S.C. § 303(q).

¹² Letter to Edward P. DeLaHunt from Maurice W. Coburn (Dec. 31, 2002) (March Petition, Attachment A).

¹³ Letter to Edward P. DeLaHunt from Maurice W. Coburn (Dec. 3, 2003) (emphasis added) (March Petition, Attachment D).

¹⁴ Staff Decision at 2 (citing 47 U.S.C. § 301; *Paul Brown, Esq. (KTMN)*, Letter, 18 FCC Rcd 3818 (MB 2003); and *Idaho Broadcasting Consortium*, Letter, 16 FCC Rcd 1721, 1723 (MMB 2001)).

the Buckskin Application as moot, and updated the Commission's database to delete the station's call sign.

7. Eagle then filed the March Petition and an application to "renew" KVEZ(FM)'s expired license. The March Petition states that on February 23, 2004, immediately upon its receipt of the Staff Decision, Eagle removed KVEZ(FM) from the air. The license renewal application indicated that the station was silent in March 2004, but had not been silent for any consecutive 12-month period. The renewal application contained a request for waiver of Section 73.3539 of the Commission's Rules (the "Rules") concerning timeliness of license renewal applications, because the application was filed more than a year before the June 1, 2005, filing deadline for Arizona radio station renewals.¹⁵ On April 29, 2004, Eagle requested STA to operate from the Buckskin site ("2004 STA Request"). On May 3, 2004, the staff dismissed the renewal application, the associated waiver request, and the 2004 STA Request. The staff stated that there is no license after a Section 312(g) expiration and, thus, Eagle held no authorization which could be renewed or upon which its STA request could be based. As discussed previously, Eagle sought reconsideration of these actions in the June Petitions. In its 2005 STA Request, Eagle sought authority to operate from the Buckskin site for a brief period prior to February 23, 2005, to avoid the station remaining silent for the 12-month period running from February 23, 2004 to February 23, 2005.¹⁶ According to Eagle, this is necessary to preserve its arguments in the instant proceeding. In a letter dated January 31, 2005, the staff informed Eagle that it would refer the 2005 STA Request to the Commission for consideration in the present proceeding, but also explained that the operations Eagle contemplated in that STA request were unnecessary as a result of the recent legislative change to Section 312(g).¹⁷

III. DISCUSSION

8. **License Expiration Under Section 312(g).** In its March Petition and June Petitions, Eagle argues that transmissions from the Buckskin site broke the station's silence for purposes of Section 312(g), although those transmissions were unauthorized. Noting the lack of the word "authorized" in Section 312(g), Eagle argues that Congress never intended to require stations to resume operations lawfully to prevent Section 312(g) expiration. According to Eagle, the staff twisted the statute "into a death penalty statute . . . [for] those who do their best to bring service to the public but fail to phrase their communications with the FCC in the desired magic phrases."¹⁸ Eagle states that had Congress intended the staff's approach, Congress would have included explicit language to override a policy enunciated in a 1984 Public Notice.¹⁹ The Notice explains processing guidelines in situations involving premature or

¹⁵ See 47 C.F.R. §§ 73.1020(a) and 73.3539. The station filed another license renewal application (BRH-20050601BTP) on June 1, 2005, the ordinary due date for licensed Arizona stations. The staff dismissed that application, without letter, as inadvertently accepted for filing.

¹⁶ The original 12-month period that resulted in forfeiture of license ran from December 20, 2002, to December 20, 2003.

¹⁷ See *infra* ¶ 25.

¹⁸ June STA Petition at 3-4.

¹⁹ See June Renewal Petition at 7 (referencing Public Notice, "Commission Policy Regarding Premature or Nonconforming Construction," Mimeo No. 3853 (Apr. 27, 1984) (available at http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/pn19840427.pdf)).

nonconforming construction. It states, for example, that where the applicant has not demonstrated FAA approval, the station will not be permitted to operate and that fines may be imposed on the licensee. Eagle argues that pursuant to such policy, its premature and nonconforming construction at the Buckskin site should not result in loss of license. Eagle further contends that by requiring Eagle to resume operations with authorized facilities, the staff held Eagle to a “letter perfect” standard, whereas the Commission has used a more lenient “substantial compliance” standard in other cases.²⁰ Eagle also argues that the staff went beyond its delegated authority because the issue of whether Section 312(g) requires authorized transmissions is novel and requires referral to the full Commission under Section 0.283(a)(1) of the Rules.

9. We disagree with Eagle’s initial contention that unauthorized transmissions are sufficient to avoid the consequences of Section 312(g). Describing it as “[t]he minor infraction of failing to use the words ‘Mother, may I’ . . . ,”²¹ Eagle trivializes the need to receive Commission authorization prior to constructing and operating a broadcast station. Section 301 of the Act, however, provides that no person shall transmit radio signals except in accordance with authority granted by the Commission.²² It further provides that no license shall be construed to create any right beyond the terms, conditions, and authority of the license.²³ The sanctions set forth in Section 312 enforce these provisions.²⁴ Section 312(g), which establishes the specific sanction for extended failure to broadcast, cannot be read to create an exception to Section 301 licensing requirements. 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. Accordingly, we reject Eagle’s contention that unauthorized transmissions can be used to avoid automatic license expiration.

10. The 1984 Public Notice and Section 312(g) are not in conflict. The former sets forth administrative guidelines with regard to premature construction, the latter federal legislation with regard to stations that fail to provide service for extended periods. In any event, the statutory provision would prevail over a Commission processing policy without further action by Congress.²⁵ Eagle also has not shown that requiring resumption of legal broadcasts holds Eagle to a higher standard than other stations

²⁰ See June STA Petition at 9 (citing *Lutheran Church/Missouri Synod*, Initial Decision, 10 FCC Rcd 9880 (ALJ 1995) (subsequent negative history omitted); *North Florida MMDS Partners*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11593, 11607 (1995); and *Crowell-Collier Broadcasting Corp.*, Memorandum Opinion and Order, 44 FCC 2444, 2449 (1961)).

²¹ March Petition at 8.

²² 47 U.S.C. § 301.

²³ *Id.*

²⁴ Cf. *United States v. Peninsula Communications, Inc.*, 335 F.Supp.2d 1013, 1019 (D. Alaska 2004) (rejecting licensee’s argument that Section 312(g) allows a licensee to continue operating a broadcast station after the license is cancelled or revoked in order to “protect” the license from automatic expiration during pendency of a lengthy appeal).

²⁵ See *Fiorentino v. U.S.*, 607 F.2d 963, 967 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980) (“We find nothing in the Supreme Court or D.C. Circuit decisions to suggest that . . . 'agency fostered policies and understandings' could override . . . the limitations of express statutes or regulations having the force of statutes”) (cited in *Doe v. Gates*, 981 F.2d 1316, 1321 (D.C. Cir. 1983)).

without adequate notice. Eagle's reliance on cases which do not involve Section 312(g) is misplaced.²⁶ The Commission clearly stated that former Section 312(g) was nondiscretionary.²⁷ We find that the staff did not act beyond its delegated authority when it concluded that the KVEZ(FM) license had expired and, in any event, the delegated authority issue is moot in light of our affirmance in this order.

11. Second, Eagle argues that its transmissions from the Buckskin site should not be viewed as unlawful because Eagle reasonably believed such transmissions were authorized and the staff was responsible for Eagle's error. According to Eagle, the staff erroneously determined that FAA approval was required to construct the proposed tower at the Buckskin site.²⁸ Eagle states that by the time it began operating from the Buckskin site, the FAA-related "mistake" had, to Eagle's knowledge, been resolved. Further, because considerable time had passed since the staff had advised Eagle that the FAA matter was the only impediment to grant, Eagle "believed" that by Fall 2003 the Buckskin Application had been granted and that Eagle had authority to construct the proposed facilities and commence broadcasts.²⁹ Eagle maintains that its view was reasonable because it was not represented by counsel at that time. Now, with the benefit of counsel, Eagle argues that the staff was obligated under Section 555(b) of the Administrative Procedure Act ("APA")³⁰ to act on the Buckskin Application quickly, given that Eagle would otherwise lose its license. Eagle further contends that its December 3, 2003, letter reporting resumption of operations shifted the burden to the staff: (1) to recognize Eagle's mistaken belief that the Buckskin Application had been granted; (2) to suggest actions, such as STA, in time to prevent Section 312(g) expiration; and/or (3) to consider Eagle's letter as a request for STA.

12. We find no error in the staff's processing of the deficient Buckskin Application. As a preliminary matter, we observe that Eagle has presented at least three different theories regarding the issuance of an FAA air hazard determination. It has claimed that in 2002 it received "clearance" from the FAA.³¹ Eagle has also claimed that the proposed tower did not require formal FAA study and therefore that the Commission's directive to obtain FAA approval and FCC tower registration was a "mistake."³² Finally, Eagle claimed that it "obtained an FAA determination of no hazard to air navigation on August 7, 2003."³³ Eagle promised to "send a copy of FAA information" in December

²⁶ See June STA Petition at 9-10. See also *supra* note 18 and *infra* note 48.

²⁷ See, e.g., *Silent Station Authorizations*, 11 FCC Rcd at 16599-00; *OCC Acquisitions, Inc.*, 17 FCC Rcd at 6149-50; *WKZF-FM, Inc.*, Summary Decision, 11 FCC Rcd 11793, 11796-98 (ALJ 1996) (agency had no discretion to grant silent station's request to withhold Section 312(g) expiration until after grant of a modification application needed to return station to the air).

²⁸ March Petition at 2.

²⁹ *Id.* at 6.

³⁰ See 5 U.S.C. § 555(b) (agencies shall conclude matters presented with "due regard for the convenience and necessity of the parties").

³¹ *Letter to Edward P. DeLaHunt from Maurice W. Coburn* (Dec. 31, 2002) (March Petition, Attachment A) (notification of station silence); *Letter to Edward P. DeLaHunt from Maurice W. Coburn* (Mar. 4, 2003) (report of progress toward resuming operations).

³² March Petition at 2, 6, and Attachment C.

³³ June STA Petition at 2.

2003.³⁴ Notwithstanding its promise to do so, Eagle has never submitted any documentation establishing that it received FAA “clearance.” At the Commission’s request, the FAA searched its database and determined that it had provided an August 7, 2002 determination of no hazard to Eagle for a tower approximately 229 miles away from the Buckskin site.³⁵ Eagle’s primary theory on reconsideration is that no FAA study is required. Eagle indicates that it performed its own study four months after the Section 312(g) expiration date using the Commission’s TOWAIR computer program³⁶ and claims that its study corroborates that no FAA notification and Commission registration is needed.³⁷ The computer printout that Eagle provides of its TOWAIR Study is based on erroneous geographic coordinates for Buckskin, using NAD27 rather than the required NAD83 data.³⁸ When the correct coordinates are entered, the TOWAIR program shows that the Buckskin tower is within the glide slope of an airport, and therefore requires FAA clearance and Commission tower registration.

13. Eagle’s claim that it held an authorization to operate at Buckskin is frivolous. Commission construction permits are written documents. The Commission never issued, and therefore Eagle never received, a construction permit or any other document establishing that the Buckskin Application had been granted. To the contrary, as noted above, the staff advised Eagle in writing that the application could not be granted until Eagle supplied tower notification/registration information. Eagle’s alleged belief that the application had been granted by the fall of 2003 is also inconsistent with its consultant’s contacts with the staff in November and December 2003 to address the FAA-related

³⁴ E-mail to Khoa Tran from Jerry Hale, Consultant to Maurice W. Coburn (Dec. 10, 2003).

³⁵ In June 2004, Commission staff telephoned the FAA’s regional office to verify Eagle’s claim. The FAA informed the staff that it had no record of receiving any application or issuing any determination for the site specified in the Buckskin Application (NAD83 coordinates 34° 10’ 40” North, 114° 12’ 26” West). In view of the potential hazard to air navigation, the staff member informed the FAA at that time that Eagle had constructed a tower at those coordinates. When the staff asked the FAA about any August 7, 2003, determination issued to Eagle, the FAA located a record in its database for a tower approximately 229 miles east of the Buckskin site, near Show Low, Arizona (NAD83 coordinates 34° 10’ 40” North, 110° 12’ 23” West) issued to Eagle on August 7, 2002 (exactly one year prior to the date claimed). In June 2004, the staff searched the Commission’s own antenna structure database and confirmed that no communications towers have been registered with the Commission at either the site specified in the Buckskin Application or the site for which the FAA issued the August 7, 2002 determination to Eagle.

³⁶ TOWAIR, also known as the Landing Facility Slope Calculation program, is a computer program that the Commission makes available to the public over the internet. TOWAIR allows antenna structure owners to determine whether their structures require an aeronautical study by the FAA and registration with the Commission. See 47 C.F.R. §§ 17.4 and 17.7; *Enhanced TOWAIR Query Now Available*, Public Notice, 15 FCC Rcd 72 (WTB 1999).

³⁷ March Petition, Attachment C (“TOWAIR Study”). The TOWAIR Study is dated March 15, 2004.

³⁸ The TOWAIR program requires the user to enter the antenna structure’s geographic coordinates. Since 1999, the Commission has required that applicants express those coordinates in accordance with the North American Datum completed in 1983 (“NAD83”). See *Commission Announces New Procedures for Antenna Structure Registration*, Public Notice, 14 FCC Rcd 9668, 9670 (WTB 1999). Prior to that time, applicants were permitted to use the 1927 North American Datum (“NAD27”). An applicant that knows only the NAD27 coordinates of its structure can easily convert that information to NAD83 coordinates using tools available on the Commission’s web site. *Id.* The NAD27 coordinates (34° 10’ 40” North, 114° 12’ 23” West) and NAD83 coordinates (34° 10’ 40” North, 114° 12’ 26” West) for the Buckskin site differ by three seconds, enough to affect the outcome of the TOWAIR determination.

deficiency that continued to prevent staff action. Eagle's *pro se* status at that time did not exempt it from complying with Commission rules or statutory provisions.³⁹

14. It is well-established that the licensee, not the Commission, is responsible for preventing cancellation of the station's license pursuant to Section 312(g) by resuming broadcasts on or before the one-year anniversary of the station's silence.⁴⁰ Moreover, it is a fundamental principle of the regulatory process that the Commission must routinely rely upon the representations of its licensees and applicants.⁴¹ The staff relied at first on Eagle's representations that it had resumed lawful operations from an authorized site. We reject Eagle's argument that its alleged misunderstanding was so "evident" on the face of its notification as to somehow obligate the staff to catch Eagle's error in time for corrective action.⁴² We also reject Eagle's attempt to shift responsibility for Eagle's mistaken beliefs or unlawful operations to the staff based on its letter inviting "questions or suggestions." Nor can Eagle's use of that phrase plausibly be read, as Eagle now argues, as a request for STA to operate from Buckskin. Eagle had already demonstrated that it knew how to request STA in compliance with our rules.⁴³ Although the staff does its best to expedite applications for silent stations, the staff cannot be expected to "read the mind" of an applicant that supplies inaccurate information.⁴⁴ It was Eagle's responsibility to perfect its Buckskin

³⁹ See *Hooten Broadcasting, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 15023, 15025 (1998).

⁴⁰ See *WYCQ, Inc.*, 18 FCC Rcd at 16902-03; *Silent Station Authorizations*, 11 FCC Rcd at 16601 (warning silent stations that modifications needed to return a station to the air must be completed prior to the Section 312(g) deadline). See also *Procedures Announced for Expediting Processing of Applications Filed By Silent Stations*, Public Notice, 11 FCC Rcd 14356 (MMB/IB 1996) ("*Silent Station Public Notice*") (responsibility to return station to the air is that of the licensee, but Commission staff will use its best efforts to assist stations requesting expedited application processing).

⁴¹ See, e.g., *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990), *recon. denied*, 5 FCC 3727 (Rev. Bd. 1990) (subsequent history omitted); *Nick J. Chaconas*, Decision, 28 FCC2d 231, 233 (1971). See also *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986).

⁴² For example, Eagle contends that it was obvious that its reference to a "previously authorized" site north of Parker referred to the site in the Buckskin Application, because that site is northeast of Parker. Eagle states that the licensed Black Peak site is southeast of Parker. To ascertain Eagle's error, however, the staff would have had to question Eagle's assertion of authorized operations and to consult maps and Commission records to determine the location of Parker, Arizona in relation to all sites for which Eagle held permanent or temporary authority.

⁴³ 47 C.F.R. § 73.1635(a)(2). Additionally, Eagle is incorrect in its assertion that had Eagle explicitly requested an STA to operate pursuant to the Buckskin Application, the staff surely would have granted an STA within a few days. See March Petition at 3; June STA Petition at 8. The staff generally does not grant STA for new facilities intended for permanent operations, nor does it grant an STA to use facilities that potentially create an air hazard.

⁴⁴ See generally 47 C.F.R. § 73.4015 (citing Public Notice, 49 Fed. Reg. 47331 (Dec. 3, 1984)) (balancing severe consequences of dismissal or return of patently defective and incomplete applications with the inordinate staff burden and delays caused by such applications). Further, the Commission has warned parties seeking to modify the facilities of silent stations that modification will not toll or extend the 12-month period and that the parties therefore must ensure that sufficient time exists for the staff to act on the application. See *Silent Station Authorizations*, 11 FCC Rcd at 16601.

Application sufficiently prior to the Section 312(g) deadline,⁴⁵ or explicitly to request STA to broadcast from temporary facilities.

15. Third, citing two Enforcement Bureau cases, Eagle argues that if its operations were unauthorized, the appropriate sanction is, at most, a monetary forfeiture. Eagle contends that it should be treated no more harshly than the licensee in *M.C. Allen Productions*, where the staff assessed a \$4,000 forfeiture for operations at an unauthorized location for over one year.⁴⁶ Claiming that its Buckskin operations were in good faith, Eagle also asserts that its actions compare favorably to intentional unauthorized operations which resulted in a \$6,000 forfeiture in *WRHC Broadcasting Corp.*⁴⁷ Eagle cites additional cases in which the Commission opted for lesser sanctions when stations failed to construct as authorized.⁴⁸ Eagle maintains that the Commission should preserve the KVEZ(FM) license and thereby preserve radio service to the public – a basis for Congress’s authorization of monetary forfeitures as an alternative to license revocation.⁴⁹

16. Eagle fails to comprehend the critical differences between rule violations and Section 312(g). The Commission has discretion to shape penalties for rule violations.⁵⁰ As emphasized previously, however, Section 312(g), as in effect during the period at issue here, provided for automatic termination of a license for a station’s failure to resume authorized operations within 12 months of going silent.⁵¹ The cases Eagle cites do not persuade us otherwise. They do not address Section 312(g), focusing only on other rule violations. In fact, several of these cases pre-date Section 312(g) or involve non-broadcast services or permits which are not subject to Section 312(g).

⁴⁵ "[A]s a matter of law, the staff's inability to act on any application within a specific time can not prevent license expiration nor give rise to any equitable claim that the license term should be extended. Accordingly, it is well established that '[t]he responsibility for bringing a silent station back on the air is that of the licensee.'" *WYCO, Inc.*, 18 FCC Rcd at 16903 (citing *Silent Station Public Notice*, 11 FCC Rcd at 14356).

⁴⁶ Forfeiture Order, 16 FCC Rcd 21138 (EB 2001).

⁴⁷ Forfeiture Order, 16 FCC Rcd 10059 (EB 2000).

⁴⁸ See June STA Petition at 9-10 (citing *KM Radio of St. Johns*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847 (2004) (“*KM Radio*”) (\$4,000 forfeiture for construction of new FM station 900 feet from authorized site); *Maria L. Salazar*, Memorandum Opinion and Order, 19 FCC Rcd 5050 (2004) (\$34,000 forfeiture for multiple violations by FM station including \$4,000 for operations outside community of license); *Tekk Comm*, Forfeiture Order, 19 FCC Rcd 392 (EB 2004) (\$3,200 forfeiture for operating wireless equipment from an unauthorized site); *A-O Broadcasting*, Forfeiture Order, 31 Com. Reg. (P&F) 411 (2003) (\$25,000 forfeiture for multiple violations including construction of antenna at wrong height); *Multimedia Development Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 22649 (\$100,000 notices of apparent liability rescinded where receiver replaced offending licensee and forfeiture would harm innocent creditors) (WTB 2002); and *Morradio*, Forfeiture Order, 14 FCC Rcd 5201 (CIB 1999)).

⁴⁹ June STA Petition at 14-15 (citing *Sonderling Broadcasting Corp.*, Memorandum Opinion and Order, 69 FCC 2d 289 (1977) and S. Rep. No. 86-1857, at 8 (1960)).

⁵⁰ See 47 U.S.C. § 503(b)(3)(A).

⁵¹ The Commission and staff can, of course, determine that a station should be subject to a monetary fine for unauthorized operations *and* license forfeiture pursuant to Section 312(g) of the Act.

17. **License Renewal Applications.** Eagle, based on two staff license renewal actions,⁵² argues that the staff should have granted Eagle's renewal applications. In one case, *Morradio*,⁵³ the Commission staff simultaneously issued a \$4,000 forfeiture, accepted a late-filed license renewal application, and granted partial STA for the station, which had operated 10 miles from its licensed site. The license for which renewal was sought had expired by its own terms, however, not by operation of Section 312(g).⁵⁴ The second staff action renewed the license of a previously silent station in Lordsburg, New Mexico, apparently without written decision.⁵⁵ Eagle acknowledges that the record contained conflicting information about the date the station resumed operations, and its arguments that the staff renewed the license despite Section 312(g) rely on pleadings that were withdrawn and dismissed. We find both the *Morradio* decision and the Lordsburg action to be irrelevant to our analysis here.

18. Eagle's arguments for renewal of its expired license are virtually identical to arguments rejected by the U.S. Court of Appeals for the D.C. Circuit on two occasions. In *Aerco Broadcasting*,⁵⁶ the court affirmed the Commission's dismissal of a license renewal application that was pending on the 12-month deadline for resumption of broadcasting. The renewal application in that case was dismissed because "[t]he subject license was automatically forfeited as a result of [the station's] inactivity over a 12-month period. . . ."⁵⁷ Similarly, in *OCC Acquisitions*, the court upheld the Commission's dismissal of applications for license renewal and license modification, as well as a request for STA. The court agreed with the Commission that under the statute then in effect, "when a license expires by operation of law under 47 U.S.C. [Section] 312(g) the Commission lacks discretion to extend the license term," and found that the Commission had adequately explained why "expiration by operation of Section 312(g) is unique."⁵⁸ The court therefore rejected a claim that the Commission should have reinstated the station's deleted call letters for the purpose of considering an application for renewal of license. As in *Aerco Broadcasting* and *OCC Acquisitions*, Eagle's license was forfeited and the associated Buckskin Application became moot due to the unique nature of Section 312(g) expiration.⁵⁹ When the license

⁵² Eagle also relies on several non-renewal cases which it claims are indicative of staff discretion. *E.g.*, *Southwestern Broadcasting Corp.*, Order, 11 FCC Rcd 14880 (1996); *KM Radio*, *see supra* note 48. We will discuss discretion *infra* at paragraph 24 in the context of legislative changes.

⁵³ 14 FCC Rcd 5201 (CIB 1999).

⁵⁴ The *Morradio* decision indicates that the station first went silent on October 21, 1998. As of the date of the decision, released April 2, 1999, a 12-month period had not yet passed. There is no indication that the station did not resume authorized operations within one year, *i.e.*, by October 21, 1999.

⁵⁵ *See generally* 47 C.F.R. § 0.445(e) (unpublished actions may not be relied upon as precedent).

⁵⁶ 51 Fed. Appx. 23 (D.C. Cir. 2002), *aff'g* *Carlos J. Lastras*, Memorandum Opinion and Order, 16 FCC Rcd 17268 (2001), *aff'g* *Letter to John A. Borsari, Esq.* (MMB Nov. 14, 2000).

⁵⁷ *Id.*

⁵⁸ *OCC Acquisitions, Inc. v. FCC*, 64 Fed. Appx. 790 (D.C. Cir. 2003).

⁵⁹ Eagle's position is even weaker than that of the applicants in *OCC Acquisitions* and *Aerco Broadcasting*. In those two cases, each applicant had filed a timely application for license renewal prior to operation of Section 312(g). Eagle filed its March 2004 renewal application outside of the window for Arizona stations after its license expired by operation of Section 312(g). The June 2005 renewal application also was filed long after the license had expired by operation of Section 312(g) and was a nullity.

terminated by operation of law, neither it nor associated applications could be revived through the Commission's license renewal process. The license renewal applications were thus appropriately dismissed.⁶⁰

19. **Operating Authority/2004 STA Request.** Eagle argues that it should be permitted to operate pursuant to STA because, it alleges, KVEZ(FM) is one of only three commercial radio stations in all of La Paz County, Arizona and its signal is important in emergencies. Eagle provides general letters of support from the Chairman of the Colorado River Indian Tribes and from a member of the Mohave County Board of Supervisors. Eagle states that it could be years until another broadcaster is authorized to begin service to Parker if the staff's decision is affirmed. Eagle argues that the Commission has viewed service to the public, even by a "disqualified broadcaster," preferable to no service at all.⁶¹

20. The Commission's rules specify that authority to operate a station pursuant to STA is limited to permittees or licensees.⁶² As of December 21, 2003, Eagle no longer held a permit or license for KVEZ(FM). Moreover, KVEZ(FM)'s service record belies its claim that it would serve an important role in notifying the community of any emergencies.⁶³ In the two and one-half years preceding Section 312(g) expiration, KVEZ(FM) operated only for six months, and those operations were at reduced power. Eagle has not shown that Parker will be without any other radio service in the event of an emergency.⁶⁴ There are two other FM stations and one AM station licensed to Parker.⁶⁵ Additionally, engineering data indicate that listeners in Parker receive signals from stations licensed to other nearby communities. Furthermore, the loss of KVEZ(FM) does not permanently remove a station from Parker. A channel will remain allotted to Parker, and all interested entities will have the opportunity to apply for the vacant allotment.⁶⁶

21. Eagle contends that, even without STA, it has authority to operate KVEZ(FM) because action on its license renewal application is not yet final. In support, Eagle cites a Commission decision and a court case.⁶⁷ We reject Eagle's contention. First, these cases pre-date Section 312(g). Second,

⁶⁰ To the extent that Eagle argues that the act of filing the renewal application affords it ongoing operating authority, we address that matter below. *See infra* ¶¶ 22-23.

⁶¹ *See* June STA Petition at 14.

⁶² *See* 47 C.F.R. § 73.1635(a). *See also* 47 U.S.C. §§ 309(b) and (f).

⁶³ *See* June STA Petition at 12; 2005 STA Request at 3.

⁶⁴ *See generally* *Michael Rice*, Memorandum Opinion and Order, 16 FCC Rcd 18394 (2001) (former licensee ordered to cease operations despite loss of service, where the area was served by other stations). *Cf.* *Contemporary Media*, Decision, 13 FCC Rcd 14437 (1998) (non-Section 321(g) case allowing interim operations).

⁶⁵ Other stations licensed to Parker, Arizona are KRIT(FM), KWFH(FM) (noncommercial educational stations), and KLPZ(AM) (a daytime station). Commission records indicate that all of these stations are currently operating. Additionally, on July 3, 2007, the staff granted a permit to construct a new station, KPKR(FM), Parker, Arizona.

⁶⁶ The Act creates no Commission obligation to open a filing window at any particular time or interval. We find unpersuasive Eagle's claim that the Commission should grant STA because it has not yet scheduled a filing window for the now-vacant Parker allotment.

⁶⁷ *See* June Renewal Petition at 24 (citing *Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, n.12 (1992) and *Commission for Open Media v. FCC*, 543 F.2d 861, 867 (D.C. Cir. 1976)).

when the Commission has allowed licensees whose renewal applications have been denied to continue operating pending the exhaustion of a judicial appeal, it has done so as a matter of discretion.⁶⁸ A court also has recognized the Commission's ability to prohibit operations during the appeal of an unfavorable license renewal decision.⁶⁹ Finally, as discussed above, when a station's license expires pursuant to Section 312(g), all associated authorizations and applications are nullified. A license renewal application for a station whose license has already expired under Section 312(g) is thus a nullity and cannot give rise to any operating authority.

22. Eagle also bases its continued operations on Section 307(c) of the Act, Section 558(c) of the APA, and Section 1.62 of the Rules. All of these provisions permit station operations while a renewal application is pending, but all presuppose that the renewal application was properly filed. During the relevant time period, Section 307(c) of the Act stated that "the Commission *may by rule prescribe the period* or periods of which licenses shall be granted and renewed . . . Pending any hearing and final decision on such an application . . . the Commission shall continue such license in effect." (Emphasis added.) By legislation (*see supra* note 5) the term "any hearing" has been changed to "any administrative or judicial hearing," a change that does not affect the outcome of this case. Section 558(c) of the APA states: "When the licensee has made a *timely and sufficient* application for a renewal or a new license *in accordance with agency rules*, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." (Emphasis added.) Section 1.62 of our Rules provides for continued operations "where there is pending before the Commission *at the time of expiration* of license any *proper and timely* application for renewal of license . . ." (Emphasis added.) An application filed after Section 312(g) forfeiture of the station's license is neither proper, timely, sufficient, nor filed within the period prescribed by rule.

23. Section 307(c) is designed to permit stations to continue operations when the agency is considering renewal of a license that has expired on its own terms.⁷⁰ To the extent that Eagle equates Section 312(g)'s use of the word "expire" with license expiration at the end of a station's normal eight-year license term, this interpretation is inconsistent with Section 312(g)'s legislative history. Congress designed Section 312(g) to "terminate"⁷¹ licenses by "automatic cancellation,"⁷² and, as discussed *supra* at paragraph 2, the result is license forfeiture. Section 307(c) does not operate as an exception to Section 312(g), which was adopted after Section 307(c) and which provided no exemption from its terms based on the pendency or subsequent filing of any application. We find that all of the staff's actions with respect to KVEZ(FM) were in accordance with Section 312(g), as then in effect.

24. **Effect of Subsequent Legislation/2005 STA Request.** On December 8, 2004, legislation was signed into law which, *inter alia*, revised Section 312(g). The revised law retains all of the existing language of Section 312(g) but adds new language that provides, "the Commission may

⁶⁸ See *Pinelands, Inc.*, 7 FCC Rcd at 6061, n.12 and cases cited therein.

⁶⁹ See *Peninsula Communications Inc. v. FCC*, 55 Fed. Appx. 1 (D.C. Cir. 2003) (per curiam).

⁷⁰ See *Miami MDS Co.*, 14 F.3d 658 (D.C. Cir. 1994); *Commission for Open Media v. FCC*, 543 F.2d at 867.

⁷¹ 141 Cong. Rec. S7881 (daily ed. Jun. 7, 1995) (the statute will "terminate broadcast licenses if a station is silent for more than 12 consecutive months") (emphasis added).

⁷² H. Rep. No. 104-458, at 186 (1996) (the statute provides for "automatic cancellation of a broadcaster's license if the station doe[s] not transmit for 12 consecutive months") (emphasis added).

extend or reinstate 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.”⁷³ On March 21, 2005, Eagle filed a Supplement to its March Petition (“Supplement”), arguing that the Commission must reinstate its license pursuant to this provision.⁷⁴ Eagle observes that the Act does not define “equity and fairness,” and urges the Commission to adopt four “equitable maxims” for deciding Section 312(g) cases. One maxim urged by Eagle -- and the only one of the four allegedly grounded in case law -- is that “equity abhors a forfeiture.”⁷⁵ Eagle also argues that the Commission should follow non-Section 312(g) cases in which the Commission acted leniently based on concerns for equity and fairness.⁷⁶

25. We reject Eagle’s reading of the legislation. The new provision does not change the automatic cancellation provision of Section 312(g) nor mandate any particular Commission action with respect to stations located outside Alaska. It states that the Commission “*may* extend or reinstate” non-Alaska licenses in certain circumstances. This discretionary provision is phrased as an exception to the general rule that affected licenses will be forfeited. Broadcast licenses continue to expire and are forfeited automatically at the end of 12 months of silence unless, prior to that time, the Commission extends the license. After that time, the Commission may reinstate the license upon an appropriate showing. For purposes of deciding whether any applicant’s showing is sufficient under Section 312(g), as revised, we decline to adopt Eagle’s proposed maxims of equity,⁷⁷ which appear to suggest that any loss of license would be inequitable, thereby effectively nullifying Section 312(g). The Commission and

⁷³ 47 U.S.C. § 312(g) (1996), *amended by* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, Title IX, § 213(3) (2004).

⁷⁴ Petitions for reconsideration and any supplement thereto must be filed within 30 days of public notice of the action to be reconsidered. *See* 47 C.F.R. § 1.106(f). No supplement filed after the 30-day period will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefore. *Id.* Eagle has provided a sufficient basis for our consideration of the Supplement, which is limited to discussing legislation enacted after Eagle’s last opportunity to present such matters.

⁷⁵ Supplement at 4. Eagle derives this principle from a case considering a California state law that late-filed insurance claims are not forfeited unless the insurer has shown it has been prejudiced. *See UNIM Life Insurance Company v. Ward*, 526 U.S. 358 (1999) (“*UNIM*”) (*cited in* Supplement at 5). The United States Supreme Court acknowledged therein that “law abhors a forfeiture,” but its decision was not based on that principle nor any principle of equity. Rather, the court stated that the state law was “mandatory for insurance contracts, not a principle a court may plially employ when the circumstances so warrant.” *Id.* at 371. We find the *UNIM* holding concerning state insurance law inapposite to Section 312(g).

The other three “maxims” urged by Eagle are as follows: (1) equity looks to intent rather than to form; (2) equity looks on that as done which ought to be done; and (3) equity imputes an intention to fulfill an obligation. Supplement at 5.

⁷⁶ *See* Supplement at 5 (citing *Sam Bushman*, Memorandum Opinion and Order, 17 FCC Rcd 24808 (EB 2002) (finding equity and fairness a basis for rescinding \$7,000 forfeiture for failure to lock fence around transmitter); and *RKO General, Inc.*, Memorandum Opinion and Order, 89 FCC2d 361 (1982) (subsequent history omitted) (finding equity and fairness to station employees one reason to allow unqualified renewal applicant to broadcast during judicial appeal)).

⁷⁷ *See supra* note 75.

its staff will determine on a case-by-case basis whether any purported equities associated with individual circumstances warrant reinstatement of a license forfeited pursuant to Section 312(g).

26. Eagle's license expired on December 21, 2003, before the 2004 legislation was enacted. In any event, we do not find that Eagle has met any of the statutory exceptions for reinstatement (*i.e.*, prevailing in an administrative or judicial appeal, changes in applicable law, or promotion of equity and fairness). We find unpersuasive Eagle's claim that it is entitled to an exception to Section 312(g) based on preliminary steps it took toward obtaining an authorization at the Buckskin site. None of those steps (securing local permissions, filing the Buckskin Application with the Commission, and the FAA matters discussed previously) conferred upon Eagle any authority to construct or to operate at Buckskin. Neither does Eagle's claim that it was "merely confused" about the status of its permit provide a credible basis for grant of an exception. The staff specifically warned Eagle about the impending expiration of its license pursuant to Section 312(g). Moreover, we do not find any fault in the staff's alleged failure to reiterate this warning following Eagle's misleading – and false – claim that it had resumed operations at an "approved site."

27. With respect to Eagle's 2005 STA Request, we agree with the staff that this request was unnecessary as a result of the Commission's new ability to reinstate licenses, in appropriate circumstances, after 12 months of silence. Eagle wanted to operate temporarily pursuant to the 2005 STA Request because it was concerned that while the Commission might accept its argument that the KVEZ(FM) license did not expire in 2003, the Commission might find that the license nevertheless expired in 2005 due to Eagle's remaining off the air for over 12 months during the pendency of this proceeding. In such circumstances, the Commission could have reinstated the station's license pursuant to subsequent legislation.⁷⁸ In any event, the 2005 STA Request has been mooted by our finding that KVEZ(FM)'s license was forfeited in 2003. Accordingly, we are dismissing that Request.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by Eagle Broadcasting Group, Ltd. on March 18, 2004, June 2, 2004, June 7, 2004, and July 22, 2005, ARE DENIED and that its January 25, 2005, request for Special Temporary Authorization IS DISMISSED AS MOOT.

29. IT IS FURTHER ORDERED, that Eagle Broadcasting Group's Buckskin tower, which lacks a current Commission construction permit or license, cannot be used for communications purposes. Until the tower is dismantled and removed, the structure will remain subject to the requirements of the

⁷⁸ Eagle's wording of its 2005 STA Request raised the question of whether Eagle had operated the station without authority prior to requesting STA. On February 7, 2005, in response to a staff request for additional information, Eagle disclosed that it had operated on January 17, 2005. This information has been forwarded to the Enforcement Bureau.

Federal Aviation Administration and to any future action the Commission may take in coordination with the FAA pursuant to 47 U.S.C. Section 303(q).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary