



Federal Communications Commission
Washington, D.C. 20554

June 22, 2023

In Reply Refer to:
1800B3-TSN

DA 23-541
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EMAIL AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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Re: DKYTE(FM), Independence, Oregon
Facility ID No. 9848
Application File No. 0000161122
Petition for Reconsideration
Application for Renewal of License

Dear Licensee:

In this letter, we deny the Petition for Reconsideration (Petition) filed by Yaquina Bay Communications, Inc. (YBC),¹ seeking reconsideration of our January 6, 2023, Letter Decision dismissing YBC's application to renew the license of station DKYTE(FM), Independence, Oregon (Station).²

Background. On January 23, 2014, YBC filed an application for a minor modification to the Station's license, seeking to change the Station's community of license from Newport, Oregon, to Independence, Oregon.³ YBC also sought authorization to relocate its transmitter from its then-current site (the Newport Site) to a new site (the Bald Mountain Site) from which it would provide principal community coverage to Independence. The Media Bureau (Bureau) granted the application on April 10, 2014, and subsequently extended the expiration date for the construction permit to September 3, 2017.⁴ YBC filed an application for license to cover the minor modification construction permit on September 11, 2017,⁵ which the Bureau granted on February 21, 2018.

¹ Pleading File No. 0000210640.

² *David Miller, Yaquina Bay Communications, Inc.*, Letter Decision, Ref. No. 1800B3-TSN (MB Jan. 6, 2023) (*Letter Decision*).

³ File No. BPH-20140123BBU.

⁴ See http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/comment.pl?Application_id=1574946&File_number=BPH-20140123BBU.

⁵ File No. BLH-20170911AAL.

On May 30, 2018, citing an inability to operate from the Bald Mountain Site “until generator is sent and returned from manufacturer for warranty replacement,” and stating that the generator was the only power source at the Bald Mountain Site, YBC requested a technical Special Temporary Authorization (STA) to operate from a different site (the Otter Crest Mountain Site).⁶ The Station had previously broadcast from the Otter Crest Mountain Site while still licensed at Newport, Oregon.⁷ The Bureau granted STA until December 1, 2018. YBC did not seek an extension or additional technical STA, nor did it seek any further authorization until filing its Renewal Application on September 29, 2021.⁸

PACNW Broadcasting, LLC (PACNW), licensee of station KPPT-FM, Depoe Bay, Oregon, filed an October 4, 2021, informal objection to the Renewal Application (Informal Objection),⁹ and Outlaw Music Association (OMA), licensee of co-channel low-power FM station KIEV-LP, Camas, Washington, filed a December 31, 2021, Petition to Deny the Renewal Application (OMA Petition to Deny).¹⁰ PACNW and OMA provided evidence indicating that the Station was still broadcasting from the Otter Crest Mountain Site,¹¹ despite expiration of the STA to broadcast from that site. Additionally, both PACNW and OMA produced plots demonstrating that, from the Otter Crest Mountain Site, the Station could not provide the requisite 70 dB μ principal community signal over Independence, its community of license.¹² YBC did not file an opposition to either pleading.

Based on the record indicating that the Station may have been operating with unauthorized facilities for more than twelve consecutive months, the Bureau sent a Letter of Inquiry (LOI) to YBC on September 19, 2022.¹³ In the LOI, the Bureau requested, *inter alia*, that the Licensee “provide a chronological description of KYTE’s operational status for **all periods of either operation or silence** from December 1, 2018, to the present. This description must indicate the exact location (ASRN or geographic coordinates) of KYTE’s transmitter and antenna for each relevant time period, including the effective radiated power and antenna height above ground level, and the start and stop dates for each period of operation or silence.”¹⁴

YBC responded to the LOI on October 10, 2022.¹⁵ In its LOI Response, YBC stated that it had moved the Station to the Bald Mountain Site, and was working with the State of Oregon to have permanent power provided to the site, where the State also had facilities.¹⁶ According to YBC, due to budget constraints the State of Oregon did not provide power to the site, forcing YBC to purchase two

⁶ File No. BSTA-20180530AAS.

⁷ File No. BLH-19921028KA (covering File No. BPH-19910424ID).

⁸ Application File No. 0000161122 (filed Sept. 29, 2021) (Renewal Application).

⁹ Pleading File No. 162733.

¹⁰ Pleading File No. 178368.

¹¹ Informal Objection, Exhibit 1; OMA Petition to Deny, Attachments A and B.

¹² Informal Objection, Exhibit 4; OMA Petition to Deny Exhibit 1.

¹³ Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to David Miller, Yaquina Bay Communications, Inc. (Sept. 19, 2022).

¹⁴ *Id.* at 3 (boldface emphasis in original).

¹⁵ E-mail from David Miller, Yaquina Bay Communications, Inc., to Thomas Nessinger, Senior Counsel, FCC Media Bureau, Audio Division (Oct. 10, 2022, 4:00 p.m. EDT) (LOI Response).

¹⁶ *Id.* at 1.

generators with which to operate its transmitter.¹⁷ However, YBC mistakenly purchased generators designed as backup and not primary generators, one of which failed and was returned to the manufacturer.¹⁸ The manufacturer advised YBC that the generator was not designed for primary use, and further advised that it had failed due to the use of bad propane fuel.¹⁹ YBC's efforts to resolve the situation with the generator manufacturer, the propane supplier, and its insurer were unsuccessful.²⁰ YBC further stated that "with the pandemic," it could not afford to purchase a new generator, and it further lost its lease to the Bald Mountain Site.²¹

As a result of losing the Bald Mountain Site, YBC confirmed that it filed for STA to return to the Otter Crest Mountain Site, but stated that it "failed to realize that [the STA] was for just a short period of time."²² YBC claimed that due to the need to avoid interference to other stations it has been difficult to locate another site from which it could provide community coverage to Independence.²³ YBC stated that it has offered the Station for sale and had an interested buyer that would like to re-establish service from the Bald Mountain Site, and requested that we grant a short-term renewal to enable it to consummate the assignment of the Station license.²⁴ YBC did not provide the requested chronological description of KYTE's operational status for all periods of either operation or silence from December 1, 2018, to the date of the LOI.²⁵

In the *Letter Decision*, we noted that section 312(g) of the Communications Act of 1934, as amended (Act), provides that if a broadcast station fails to transmit broadcast signals with its authorized facilities for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license to promote equity and fairness.²⁶ We held that the Station license expired pursuant to section 312(g) because YBC confirmed in its LOI Response that the Station was operating with unauthorized facilities at an unauthorized location for more than 12 months, from December 1, 2018, to February 1, 2022.²⁷ We rejected YBC's claim that it was not aware of the limited duration of its STA to operate from the Otter Crest Mountain site, because the STA bore on its face the expiration date, and because all STAs issued by

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* Licensee also states that all interference issues with PACNW's station KPPT-FM have been rectified, as have interference issues with OMA's KIEV-LP. Licensee further states that KIEV-LP is not protected from the Station's operations at either site. *Id.*

²⁴ *Id.*

²⁵ See *supra* note 15.

²⁶ 47 U.S.C. § 312(g). See also 47 CFR § 73.1740(c).

²⁷ See *Kingdom of God, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 3654 (2017), *aff'd*, *Kingdom of God, Inc. v. FCC*, No. 17-1132, 719 Fed. Appx. 19, 20 (Mem), (D.C. Cir. Apr. 10, 2018) ("it strains credulity to suggest that the reference to 'broadcast signals' in § 312(g) includes unauthorized and unlicensed transmissions."); *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008) (*Eagle Broadcasting*), *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 license expiration under section 312(g)).

the Bureau are, by definition, temporary, and an initial grant of STA does not exceed 180 days.²⁸ Finally, we held that section 312(g)'s provisions allowing the Commission to extend or reinstate a station license did not apply in this case, because YBC's difficulties in operating from the Bald Mountain Site did not justify its unauthorized operation, for over three years, from an unlicensed site from which it could not provide the requisite principal community coverage of its community of license.²⁹

On February 10, 2023, YBC filed its Petition. PACNW filed a Response to the Petition on February 17, 2023 (Response).³⁰

Discussion. As discussed below, we deny the Petition.³¹ 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.³² We find that YBC has not shown legal error in the *Letter Decision*, and the precedent it cites for a different result is distinguishable.

YBC argues that, rather than dismissing its application for renewal of the Station license, the Bureau should grant reconsideration "because of equity and fairness due to the Commission's treatment of other licensees and the once-in-a-lifetime poor economic conditions caused by the Covid 19 pandemic."³³ Specifically, YBC contends that the Bureau should have assessed a monetary forfeiture rather than canceling the Station license and then dismissing the Renewal Application.³⁴ It cites *Christian Broadcasting of Yakima*,³⁵ in which the Bureau assessed a forfeiture to the licensee of a low-power television (LPTV) station that neglected to file either a timely application for license to cover its construction permit or a request for STA extension, resulting in a four-year period of unauthorized operation.³⁶ YBC argues that, just as in *Christian Broadcasting*, it operated for many years without authorization, and further that both it and the licensee in *Christian Broadcasting* operated under "once-in-a-lifetime" hardships: the digital television transition in the latter case, and the COVID-19 pandemic in its case.³⁷

YBC has not demonstrated legal error to justify reversing the *Letter Decision*. In fact, the Bureau's conclusion in the *Letter Decision* that YBC's license expired pursuant to section 312(g) is consistent with long-standing Commission precedent. Moreover, YBC has failed to demonstrate how the COVID-19 pandemic, which did not commence until more than a year and a half after YBC commenced

²⁸ 47 CFR § 73.1635(a)(4). *See also Eagle Broadcasting*, 23 FCC Rcd at 601, para. 26 (broadcaster's claim that it was "merely confused" about the status of its permit did not provide a creditable basis for grant of an exception to section 312(g)).

²⁹ *Letter Decision* at 4.

³⁰ Pleading File No. 0000212211.

³¹ It should be noted that, regardless of our findings on the merits of the Petition, we are unable to grant the Renewal Application, owing to YBC's "red light" status, meaning that YBC is delinquent in its debt to the Commission. *See* 47 CFR § 1.1910(b)(2).

³² *See* 47 CFR § 1.106(c), (d); *see also WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

³³ Petition at 2.

³⁴ *Id.* at 4.

³⁵ *Christian Broad. of Yakima*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 22-760 (MB July 14, 2022) (*Christian Broadcasting*).

³⁶ *Id.* at 1-2.

³⁷ Petition at 4.

unauthorized operations, would warrant the exercise of discretion under the “equity and fairness” provisions of section 312(g). As PACNW notes, the Station moved from the Bald Mountain Site to the Otter Crest Mountain Site in May of 2018, over a year and a half before the start of the pandemic in early 2020.³⁸ The Bureau’s conclusion that the license had expired pursuant to section 312(g) is consistent with the recent decision in *International Aerospace Solutions, Inc.*,³⁹ in which the Commission upheld the dismissal of a renewal application for violation of section 312(g). The licensee in *International Aerospace*, like YBC, asked that the Commission reverse the Bureau’s action by exercising its discretion under the equity and fairness exception to section 312(g).⁴⁰ However, the Commission found that the licensee’s rule violation was due to its own actions and its unexcused ignorance of Commission rules.⁴¹ Additionally, the Commission held that the licensee could not blame its non-compliant operation on the COVID-19 pandemic, as its violation of section 312(g) occurred well before the pandemic began.⁴²

We disagree with YBC that *Christian Broadcasting* is relevant to this case. *Christian Broadcasting* involved the expiration of a construction permit pursuant to section 319 of the Act and that licensee’s failure to file an application for a license to cover.⁴³ Unlike the present case, it did not involve any claim that the station in *Christian Broadcasting* had been silent or that its license was cancelled under section 312(g) of the Act. The Bureau’s decision to impose a forfeiture in response to a station’s failure to file an application for license to cover has no bearing on and cannot serve as precedent for the Bureau’s treatment of stations that have been silent or engaged in unauthorized operation in violation of section 312(g). In this case, the Station was operating from a different location than its licensed site, without a valid STA. The Commission has consistently treated cases involving operation from an unauthorized location in excess of twelve months as subject to cancellation under section 312(g),⁴⁴ reaffirming this precedent in a recent decision.⁴⁵ Thus, *Christian Broadcasting* is inapposite to the facts of this case.

Moreover, we note YBC does not specify a plan to return the Station to operation from its licensed site, other than to state that reversal of the *Letter Decision* would “allow it to submit a license application for Station KYTE.”⁴⁶ However, prior to release of the *Letter Decision* the Station was already licensed to operate at the Bald Mountain site.⁴⁷ The Station would have to return to that site to resume rule-compliant operation. It is thus unclear from YBC’s Petition exactly what kind of application it intends to file—any license application for the Otter Crest Mountain Site or a new site would have to be preceded by an application for, and grant of, a construction permit for that site. YBC has already referred to the difficulty in finding a site from which to cover Independence, Oregon.⁴⁸ Further, as PACNW points out in its Response, YBC’s options are limited given that changing the community of license from

³⁸ Response at 3.

³⁹ *Int’l Aerospace Solutions, Inc.*, Memorandum Opinion and Order, FCC 23-8 (Feb. 14, 2023) (*International Aerospace*).

⁴⁰ *Id.* at 3, para. 6.

⁴¹ *Id.* at 5, para. 11.

⁴² *Id.*

⁴³ *Christian Broadcasting*, DA 22-760 at 2, para. 2. *See also* 47 U.S.C. § 319(c).

⁴⁴ *See Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008), *aff’d*, *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009).

⁴⁵ *Absolute Broadcasting, LLC*, Memorandum Opinion and Order, FCC 23-38, at 9, para. 19 (rel. May 17, 2023).

⁴⁶ Petition at 4.

⁴⁷ *See supra* note 5.

⁴⁸ *See supra* note 23 and accompanying text.

Independence would be disfavored, as the Station is the sole local transmission service at that community.⁴⁹

We further reject YBC's attempt to blame its predicament on the "once-in-a-lifetime poor economic conditions" caused by the COVID-19 pandemic.⁵⁰ In the present case YBC's difficulties ultimately stemmed from its business decisions in site selection and equipment purchases.⁵¹ YBC cannot rely on its mistaken belief that the initial technical STA need not have been extended beyond the expiration date the STA bore.⁵² Finally, YBC cannot blame its inability to replace faulty generators on financial problems caused by a pandemic that was 21 months in the future.⁵³ We find that the case before us more closely resembles *International Aerospace* than it does *Christian Broadcasting*, and warrants the same result.

Conclusion. We find that our action in the *Letter Decision* comports with recent Commission precedent, and on that basis the February 10, 2023, Petition for Reconsideration IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

cc: Richard J. Hayes, Jr., Esq. (fcclaw@rjhayes.com), Counsel to PACNW Broadcasting, LLC
David Stepanuyk (david@outlaw.fm), President, Outlaw Music Ass'n

⁴⁹ Response at 2-3. See *Rural Radio Second Report and Order*, 26 FCC Rcd at 2578 n.106 (citing *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14228-30 (2006), *recon. pending* (retaining presumption against removal of sole local transmission service, regardless of the size of the community)).

⁵⁰ Petition at 2.

⁵¹ LOI Response at 1.

⁵² *Id.* See also *International Aerospace* at 5, para. 11 and n.33.

⁵³ *International Aerospace* at 5, para. 11.