



Federal Communications Commission
Washington, D.C. 20554

January 31, 2013

In Reply Refer to:
1800B3-ATS

Mr. Patrick W. Lyke
Little Miami Local Schools
5819 Morrow Rossburg Road
Morrow, OH 45152

In re: DWLMH(FM), Morrow, Ohio
Little Miami Local Schools
Facility ID No. 37781
File No. BRED-20120521ACR

Petition for Reconsideration

Dear Mr. Lyke:

We have before a Petition for Reconsideration ("Petition") filed on September 10, 2012,¹ by Little Miami Local Schools ("Little Miami"). In the Petition, Little Miami seeks reconsideration of a staff letter² informing Little Miami that its license for Station DWLMH(FM), Morrow, Ohio ("Station") had automatically expired as a matter of law and dismissing its license renewal application ("Application"). For the reasons stated below, we dismiss the Petition as untimely filed.

Background. As noted in the *Staff Letter*, on March 23, 2011, Little Miami filed a request for Special Temporary Authority ("STA") in which it informed the Commission that the Station had been silent since August 25, 2010.³ On May 21, 2012, Little Miami filed the referenced license renewal application in which it stated the Station was currently off the air, and had been off the air since August 25, 2010.⁴ It also filed an STA request stating that the Station was off the air and had been so for over a year.⁵

On August 1, 2012, the staff notified Little Miami that because the Station had not resumed operation within a 12-month period its license had automatically expired as a matter of law on August 26, 2011, and its call sign had been deleted.⁶ The staff also dismissed the pending license renewal application and 2012 STA Request as moot.⁷ Little Miami filed the Petition on September 10, 2012, arguing that its license had not expired because the Station had in fact resumed operations on August 25, 2011.

¹ Although the Petition is dated September 7, 2012, our records show it was not electronically filed with the Commission until September 10, 2012.

² *Letter from Peter H. Doyle to Patrick Wayne Lyke*, Ref. 1800B3-VM (MB Aug. 1, 2012) ("*Staff Letter*").

³ See File No. 20110323ACK, Silent Notification. The staff granted the request on March 25, 2011.

⁴ See Application at Section III, Items 4-6; Exhibits 13 (Minimum Operating Schedule) and 14 (Discontinued Operations).

⁵ See File No. BLSTA-20120521ACS, Notification of Suspension of Operations / Request for Silent STA, filed by Little Miami Local Schools on May 21, 2012 ("*2012 STA Request*").

⁶ See *Staff Letter*.

⁷ *Id.*

Discussion. Section 405 of the Communications Act of 1934, as amended (“Act”)⁸ and Section 1.106(f) of the Commission’s Rules (“Rules”)⁹ require petitioners to seek reconsideration no later than 30 days after public notice of the action for which reconsideration is sought. The Commission generally lacks the authority to extend or waive the statutory 30-day filing period for petitions for reconsideration set forth in Section 405 of the Act. Although the Commission may not refuse to consider a late-filed petition for reconsideration if the petitioner shows that its failure to file for reconsideration in a timely manner resulted from “extraordinary circumstances,”¹⁰ no such showing has been made here.

A petition for reconsideration of the *Staff Letter* would have been due on September 5, 2012.¹¹ However, Licensee did not file the Petition until September 10, 2012. Licensee notes that it does not have counsel.¹² However, the Bureau has held that failure to obtain counsel is not an “extraordinary circumstance” warranting waiver of the statutory 30-day deadline for filing petitions for reconsideration.¹³ Therefore, the Petition must be dismissed as untimely.

Additionally, even were we to consider the merits of the Petition, we would deny it. Section 312(g) of the Act provides that “if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary”¹⁴ As discussed in the *Staff Letter*, because the Station has been silent for over a year, beginning on August 25, 2010, and had not resumed operations within a year, the license expired on August 26, 2011.¹⁵ Little Miami argues that its license did not expire because the Station resumed operations prior to the August 26, 2011, expiration date. Specifically, the Petition states:

WLMH forgot to file resumption of operations notice August 25, 2011. In actuality, WLMH did resume operations. Attached is an affidavit from Wayne Lyke stating the transmitter had been turned back on August 25, 2011.”¹⁶

⁸ 47 U.S.C. § 405. *See Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986). *See also Pueblo Radio Broadcasting Service*, Memorandum Opinion and Order, 6 FCC Rcd 1416 (1991); *Panola Broadcasting Co.*, Memorandum Opinion and Order, 68 FCC 2d 533 (1978).

⁹ 47 C.F.R. § 1.106(f).

¹⁰ *Gardner v. FCC*, 530 F.2d 1085, 1091-92 (D.C. Cir. 1976); *Richardson Independent School District*, Memorandum Opinion and Order, 5 FCC Rcd 3135, 3136 (1990). That an application is filed one day late does not constitute an “extraordinary circumstance” that would warrant its consideration. *Pueblo Radio Broadcasting Service*, *supra*.

¹¹ The Bureau provided public notice of the *Staff Letter* on August 6, 2012 and August 8, 2012. *See Broadcast Actions*, Public Notice, Report No. 47795 (MB Aug. 6, 2012) (Station’s license cancelled); *Broadcast Actions*, Public Notice, Report No. 47797 (MB Aug. 8, 2012) (Station’s renewal application dismissed). A petition for reconsideration of the *Staff Letter* would have been due by September 5, 2012, pursuant to Section 405 of Act of 1934, 47 U.S.C. § 405, and Section 1.106(f) of the Rules, 47 C.F.R. § 1.106(f). Even using the later, August 8th public notice date, the petition still would have been considered untimely filed, as it would have been due on September 7, 2012.

¹² Petition at 1-2.

¹³ *See New Beginning World Outreach, Inc.*, Letter, 25 FCC Rcd 2759 (MB 2010) (an applicant’s decision to not obtain counsel is not an “extraordinary circumstance”).

¹⁴ *See Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16499 (1996); *see also* 47 C.F.R. § 73.1740(c).

¹⁵ *See Staff Letter*.

¹⁶ Petition at 1. *See also* Petition at Affidavit of Wayne Lyke (“Lyke Affidavit”).

However, in the Application, Lyke certified on behalf of Little Miami that during the preceding license term the Station had been silent for more than a consecutive 12-month period¹⁷ and was not currently on the air.¹⁸ The Application further states:

Our radio station (WLMH) suspended operation due to budget cuts effective August 25, 2010. On July 13, 2010, the Little Miami Local School District was declared by the State of Ohio to be in fiscal emergency and as such is being overseen by the Ohio Department of Education. The reason for suspending station operation is not having funds in the budget to continue the station operation. STA was filed and approved in file number 20110323ACK. The Station will resume full operation by September 30, 2012.¹⁹

The Application and the *2012 STA Request* thus directly contradict the Lyke Affidavit's claim that the Station had resumed operations on August 25, 2011. Moreover, the veracity of Lyke's claim is questionable because Lyke is an agent of Little Miami.²⁰ The Lyke Affidavit does not explain how the Station was able to resume broadcasting in light of its financial situation, nor does it indicate when the Station went silent again. Additionally, the Lyke Affidavit is unsupported by any documentation, such as Station logs, that supports his contention that the Station resumed operations.²¹ Finally, Lyke fails to provide any explanation for the factual variations between the Lyke Affidavit and the Station's prior filings.²² We therefore find that the *Staff Letter* correctly concluded that the Station license had expired as a matter of law.

Finally, notwithstanding the fact that the Station was silent for more than 12 consecutive months, the Commission retains discretion under Section 312(g) of the Act to extend or reinstate such license "to promote equity and fairness."²³ However, we find that the exercise of that discretion is not warranted here, where the Station has been silent for more than two years.²⁴

¹⁷ Application at Section III, Item 5.

¹⁸ Application at Section III, Item 6.

¹⁹ Application at Exhibits 13 (Minimum Operating Schedule) and 14 (Discontinued Operations). The *2012 STA Request*, also filed by Lyke, contains an identical statement. See *2012 STA Request* at Exhibit 1.

²⁰ See, e.g., *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16310, 16319 (MB 2010) (petitioner's engineering consultant's hearsay statement, uncorroborated by independent documentation, should be given little weight because he was not a disinterested witness); *Second Samoan Congregation Church*, Letter, 23 FCC Rcd 16630, 16636 (MB 2008) (applicant's counsel's statements should be given little weight because he is not a disinterested witness).

²¹ Cf. *Radio Training Network, Inc.*, 27 FCC Rcd 1471, 73 (MB 2012) ("sworn affidavit from the [station's] chief engineer and Station Logs submitted by [licensee], detailing the [station's] power levels throughout much of the period during which it was allegedly silent, strongly rebut [allegation that it was silent for over a year]").

²² We note that the Application and the *2012 STA Request* were filed on May 21, 2012, whereas the Petition was filed on September 10, 2012. The only intervening event between those dates was the *Staff Letter*, released on August 1, 2012, which advised Little Miami of the expiration of the Station's license under Section 312(g) of the Act.

²³ 47 U.S.C. § 312(g).

²⁴ See *CWH Broadcasting, Inc.*, Letter, 27 FCC Rcd 2920, 2924 (MB 2012) (exercise of discretion under Section 312(g) not warranted "where the Station was either silent or operating with noncompliant facilities for more than three years"); *Scott D. MacArthur*, Letter, 25 FCC Rcd 1842, 1844 (MB 2010) (exercise of discretion not warranted "where for nearly four years the station was either silent or engaging in unauthorized operation."); *Creative Media, Inc.*, Letter, 21 FCC Rcd 689, 691 (MB 2006) (exercise of discretion not warranted where station was silent for nearly 18 months).

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the September 7, 2012, Petition for Reconsideration filed by Little Miami Local Schools is DISMISSED as untimely.

Any operation of the WLMH(FM) facilities is unauthorized and must cease immediately. Finally, it is imperative to the safety of air navigation that any prescribed painting and illumination of the Station's tower be maintained until the tower is dismantled. Accordingly, Little Miami must maintain the tower in the manner prescribed by the Rules and the terms of the expired license.²⁵

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" followed by a stylized monogram "PH".

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ See 47 U.S.C. § 303(q) and 47 C.F.R. § 17.6.