



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

April 13, 2018

In Reply Refer to:
1800B3-SS

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**In re: NEW (FX), Daytona Beach, FL
Facility ID No. 201673**

File No. BNPFT-20171201ACH

Petition to Deny

Dear Counsel:

This letter concerns: (1) the referenced application (Application) of Glenn Cherry (Cherry) for a construction permit for a new FM translator station on Channel 264 at Daytona Beach, Florida;¹ (2) a Petition to Deny (Petition) the Application, filed on December 22, 2017, by Southern Stone Communications, LLC (SSC);² and (3) related responsive pleadings.³ For the reasons set forth below, we deny the Petition and grant the Application.

Background. Cherry filed for a new FM Translator station at Daytona Beach during the filing window in July of 2017.⁴ Cherry's proposal was determined to be a "singleton," and it was invited to file a long-form application,⁵ which it did on December 1, 2017. The staff accepted the Application for filing on December 4, 2017.⁶

In its Petition, SSC argues that Cherry's Application should be dismissed because it proposes to rebroadcast the Station, which SSC claims has not been operating for more than a year; thus, the Station's

¹ The proposed translator is a fill-in for Cherry's Station WPUL(AM) (Station), South Daytona, Florida.

² SSC is licensee of several full power and FM translator stations in the Daytona Beach, Florida radio market.

³ Cherry filed an Opposition to the Petition on January 19, 2018 (Opposition), to which SSC replied on February 16, 2018 (Reply).

⁴ See Application File No. BNPFT-20170802AAQ; *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26-August 2, 2017*, Public Notice, 32 FCC Rcd 4663 (MB/WTB 2017).

⁵ See *Media Bureau Announces Filing Window for Long-Form Applications*, Public Notice, 32 FCC Rcd 9248, 9265 (MB 2017).

⁶ See *Broadcast Actions*, Public Notice, Report No. 29127 (rel. Dec. 7, 2017).

license has expired as a matter of law pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act).⁷ SSC supplies the declaration of its Chief Engineer Mark McKinney and the declarations of SSC employees Paul Stone, Gregory Pretko, Jay Love and Jonathan Wiley, FCC licensee Clement F. “Skip” Diegel,⁸ and his employee Katie Mentor, none made under penalty of perjury, declaring that they all monitored the Station on or before August 15 until September 10, 2017, and found it to be silent.⁹ In addition, SSC submits the text of Larry Steele, former manager of the Station, who states that it is his understanding that the Station has not been operating since 2014.¹⁰ Finally, SSC submits photos of what it claims is the abandoned temporary transmitter site of the Station.¹¹

In its Opposition, Cherry argues that the individual declarations submitted by SSC are invalid because the declarants do not state the date, time or locations where the alleged monitoring took place.¹² Cherry also argues that the failure of SSC’s chief engineer to include field strength measurements in his study is “tacit admission that WPUL was in fact broadcasting during the relevant dates.”¹³ Cherry also notes that the majority of the declarants share a “pecuniary interest” in opposing the rebroadcasting of the Station in Daytona Beach.¹⁴ Moreover, Cherry argues that the Station did in fact operate between August 15 and September 10, 2017, submitting as evidence the declarations, made under penalty of perjury, of unaffiliated individuals Ronald C. Gitschier and Jerry Kiefer who state that the station was on the air.¹⁵ Cherry also submits the declaration made under penalty of perjury of Harold Ford, a/k/a the aforementioned Larry Steele, who declares that he helped Cherry get the Station back on the air and that SSC “twisted” his comments in an attempt to “kill” the Station’s license.¹⁶ Cherry also submits the declaration made under penalty of perjury of consulting engineer Warren G. Smith, who states that the Station returned to the air on August 15, 2017, and that, after temporarily ceasing Station operations due to damage caused by Hurricane Irma and subsequent vandalism, steps were taken to return the station to the air as of January 18, 2018.¹⁷ Finally, Cherry cites a recent Media Bureau decision where a licensee who broadcast for less than five hours after a period of 363 days of silence did not lose its license, and Cherry argues that neither should he.¹⁸

⁷ Petition at 1; *see also* 47 U.S.C. § 312(g). SSC notes that it will separately file a Petition to Revoke the WPUL(AM) license.

⁸ Diegel is licensee of Station WSBB(AM), New Smyrna Beach, Florida.

⁹ Petition at 2 and at Exhibits A, B, and C. The staff granted Cherry’s request for special temporary authorization (STA) (File No. BSTA-20170807ABR) to operate from temporary facilities on August 14, 2017. *See Letter to Glenn Cherry* (MB rel. Aug. 14, 2017).

¹⁰ *Id.* at 3 and at Exhibit A.

¹¹ *Id.* and at Exhibit C.

¹² Opposition at 2.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 4 and Exhibits A and C. Both declarants state that they “do not work for Glenn Cherry or for radio station WPUL.”

¹⁶ *Id.* and at Exhibit B.

¹⁷ *Id.* and at Exhibits D (Declaration of Warren G. Smith) and E (Notification of Resumption of Station Operation on January 18, 2018).

¹⁸ *Id.* at 5, citing *Continental Media Group*, Order on Reconsideration, DA 17-1204 (MB rel. Dec. 15, 2017).

In its Reply, SSC lists the time periods that the Station was allegedly off the air since its license was renewed in 2012.¹⁹ SSC also asserts that the photos it submitted of the Station's temporary transmitter site indicate that no equipment could function properly with the amount of vegetation growing in and around the building in August 2017.²⁰ In addition, SSC notes that field strength measurements are "irrelevant" and that Cherry cites no case law to support his claim that they are required here.²¹

Discussion. Pursuant to Section 309(d) of the Act,²² a petition to deny must provide properly supported allegations of fact that, if true, establish a substantial and material question of fact that granting the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.²³ In this case, the Petition must establish a substantial and material question of fact that grant of the Application would be inconsistent with the public interest.

We reject SSC's position that we should dismiss the Application because it does not specify a licensed AM station to rebroadcast. Commission records indicate that WPUL(AM) has in fact been off the air frequently since 2014,²⁴ but do not indicate that the Station has been silent for more than 12 consecutive months such that its license expired by operation of law pursuant to Section 312(g) of the Act.

There is a conflict in the declarations provided by SSR and Cherry regarding the Station's silence. However, the "mere existence of conflicts [even] in affidavits does not require a hearing."²⁵ We find that the declarations submitted by SSC are not probative that the Station actually was silent more than is reflected in Commission records. Initially, we note that these declarations, which were not made under penalty of perjury, carry less probative weight than the referenced declarations submitted by Cherry in support of the Station's lawful operation, which were made under penalty of perjury.²⁶ Moreover, even

¹⁹ Reply at 1-2.

²⁰ *Id.* at 4. SSC notes that all vegetation has been removed since the Station went back on the air in January 2018. *See id.* and at Exhibit A.

²¹ *Id.* at 4, n.11.

²² *See* 47 U.S.C. § 309(d).

²³ *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁴ The Commission's data base indicates that the station was silent from February 18, 2014, until February 10, 2015, *see* BLESTA-20141124BIG and Notification of Resumption of Operation filed February 10, 2015; from August 22, 2016, until August 15, 2017, *see* BLESTA-20170411ARR and Notification of Resumption of Operation filed August 15, 2017; and from September 11, 2017, until January 18, 2018, *see* BSTA-20170926AAO and Notification of Resumption of Operation filed January 18, 2018. We note that WPUL(AM) currently is authorized until September 1, 2018, to operate with temporary facilities from a permanent site while it prepares and files an application for a new permanent site. *See Letter to Glenn Cherry* (MB rel. Mar. 1, 2018).

²⁵ *Second Samoan Congregational Church*, Letter Order, 23 FCC Rcd 16630, 16634 (MB 2008), citing *K.O. Commc'ns, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12765, 12777-78, para. 22 (WTB 1998) (*citing Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 493, 495 (D.C. Cir. 1968)).

²⁶ *See, e.g., Texas Educ. Broad. Coop., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13038, 13045, para. 17 (MB 2007) (unsupported allegation adequately rebutted by licensee submission supported by affidavit from station employee with responsibility for that matter). *See also Apple 107.1, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 15722, 15727, para. 18 and n.49 (station license held not to expire under Section 312(g) on the basis of a sworn declaration by

were we to consider substantively the declarations submitted by SSC, we would still deny the Petition. The declarations, by persons either affiliated with SSC or competitors of WPUL(AM) provide at best a “snap shot” of discrete allegations of station non-operation²⁷ and, even if considered together, do not establish that the Station was off the air for 12 consecutive months. Conversely, we credit the several declarations made under penalty of perjury in support of Cherry that the Station has been on the air intermittently during the 12 consecutive months in question, two of which were made by persons disclaiming any connection to Cherry or the Station.²⁸ Thus, SSC's allegations do not warrant further inquiry in this proceeding.²⁹

Conclusion/Actions. In light of the discussion above, we find that SSC has not raised a substantial and material question of fact calling for further inquiry regarding whether grant of the Application will further the public interest, convenience, and necessity. Additionally, we have evaluated the Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant would indeed further the public interest, convenience, and necessity.

disinterested witness), and *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334, para. 6 (1996) (little weight accorded to hearsay statements coming from petitioner's own representatives).

²⁷ For example: (1) the declaration of SSC's General Manager, Gregory Pretko, indicates that he listened to the station between August 10-25 and August 28-September 4, 2017, from multiple locations (Port Orange, Ormond Beach, South Daytona, and Daytona Beach) and “was unable to hear or pick up any radio broadcast that had originated from WPUL”; (2) the declaration of SSC employee Paul C. Stone provides no dates and times of listenership but indicates simply that “all evidence suggests that the station has been off the air since 2014. I can find no evidence that it has ever returned to the air since that time”; the declaration of SSC Operations Manager Jonathan A. Wiley indicates that he had “been tuning into WPUL 1590 for several months starting in June of 2017. I listen several times a day in the morning drive, midday, and afternoon drive from June 2017 – December 2017. At no point was 1590 AM broadcasting anything during those times”; (3) the declaration of Jay Love, Program Director for SSC stations, indicates that he “checked in on the station 1590 AM multiple times, August 14 through September 22 (2017) various times during the week day starting from 8 am - 7 pm, and I haven't heard nothing more than static on the air” and has driven by the Station's “internet-posted address location and the building itself is closed up”; (4) the declaration of Katie Mentor, an employee of a competitor station of WPUL(AM), indicates that she had “attempted to monitor WPUL on many occasions” and was “not able to hear a signal, providing a listing of 15 dates (without times) between June 13, 2017, and November 27, 2017, when she attempted to hear the station; and (5) the declaration of Clement F. “Skip” Diegel, licensee of a competitor station to WPUL(AM) and Ms. Mentor's employer, similarly indicates that he had “monitored WPUL numerous times while driving in Daytona Beach and South Daytona over the past six months” and “did not hear a signal,” providing a listing of 11 dates and times between June 23, 2017, and October 7, 2017, when he did so. Diegel also indicates that “when WPUL was on the air they were a CBS radio affiliate” and that CBS affiliated with his Station WSBB(AM), New Smyrna Beach, Florida, because “CBS Radio determined that WPUL was off the air and unreachable.” Petition, Exhibits A and B.

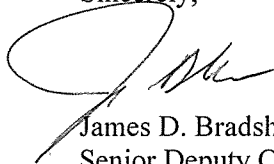
²⁸ For example: (1) the declaration of Ronald C. Gitschier indicates that that on August 15, 2017, he listened on his car radio to 1590 AM broadcasting urban gospel music; (2) the declaration of Harold Ford a/k/a Larry Steele indicates that on August 12, 2017, he aided Cherry in getting the Station back on the air and that day listened to the Station's programming on his car radio; (3) the declaration of Jerry Kiefer indicates that he listened to the Station on his car radio for more than an hour in “late August 2017”; and (4) the declaration of technical supervisor Warren G. Smith indicates that Cherry employed him in August 2017 to restore the Station to the air. Smith declares that the Station was tested on August 12, 2017, and returned to the air three days later. Opposition, Exhibits A, B, C, and D.

²⁹ See *Richard Dean Hodson, d/b/a/ Hodson Broad., Shamrock Comm., Inc., c/o Kenneth E. Satten, Esq.*, Letter Order, 23 FCC Rcd 8751, 8752 (MB 2008) (petitioner's unsworn allegations in affidavit do not provide sufficient indicia of reliability of bare assertions made in petition). See also, e.g., *Texas Educ. Broad. Coop., Inc., supra*. We note that the Station's periods of silence will be reportable in its next license renewal application and may be considered in connection with any action taken on that application. See, e.g., *Radioactive, LLC*, Hearing Designation Order, 32 FCC Rcd 6392 (2017).

For these reasons, IT IS ORDERED, that the Petition to Deny filed by Southern Stone Communications, LLC, on December 22, 2017, IS DENIED.

IT IS FURTHER ORDERED, that the Application (File No. BNPFT-20171201ACH) of Glenn Cherry, for a new FM Translator Station at Daytona Beach, Florida, IS GRANTED.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Bradshaw', written over a horizontal line.

James D. Bradshaw
Senior Deputy Chief
Audio Division
Media Bureau

cc: Glenn Cherry
Southern Stone Communications, LLC