



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

November 7, 2018

In Reply Refer to:
1800B3-SS

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**In re: W264DP, Daytona Beach, FL
Facility ID No. 201673**

File No. BNPFT-20171201ACH

Petition for Reconsideration

Dear Counsel:

We have before us the Petition for Reconsideration (Petition) filed by Southern Stone Communications, LLC (SSC)¹ on May 14, 2018, seeking reconsideration of the staff's grant of the referenced application (Application) of Glenn Cherry (Cherry) for a construction permit for a new FM translator station on Channel 264 at Daytona Beach, Florida² and related responsive pleadings.³ For the reasons set forth below, we grant the Petition in part and deny it in all other respects.

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 he was invited to file a long-form application,⁵ which he did on December 1, 2017. The staff accepted the Application for

¹ SSC is licensee of several full-power and FM translator stations in the Daytona Beach, Florida radio market.

² W264DP, the referenced FM translator station, is a fill-in for Cherry's Station WPUL(AM) (Station), South Daytona, Florida.

³ Cherry filed an Opposition to the Petition on May 30, 2018 (Opposition), to which SSC replied on June 11, 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).

filing on December 4, 2017.⁶ On December 22, 2017, SSC filed a Petition to Deny the Application. The staff denied SSC's challenge and granted the Application on April 13, 2018.⁷

In its Petition, SSC reiterates its earlier argument that Cherry's Application should have been dismissed because it proposes to rebroadcast the Station, which SSC claims has not been operating for more than one year, and therefore the Station's license expired as a matter of law pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act).⁸ SSC also argues that the staff made two material errors in the *Staff Decision* that warrant reconsideration: (1) the Bureau incorrectly found in the *Staff Decision* that the Declaration of SSC's Chief Engineer Mark McKinney (McKinney) in support of its Petition to Deny was not made under penalty of perjury;⁹ and (2) the staff did not consider the video evidence submitted by McKinney on February 22, 2018, in connection with, but separate from, its Reply pleading.¹⁰ SSC argues that these videos demonstrate that the Station was off the air on August 18, 23, 24 and 28, 2018 – dates that Cherry claims the Station was on the air.¹¹ In addition, although SSC acknowledges that the material evidence and declarations of seven individuals who declared that they heard nothing when trying to listen to the Station between August 15 and September 10, 2017, are not 100 percent conclusive that the Station was off air "for some discrete period of time during that period," SSC argues that it has at least raised a substantial and material question of fact and that the staff at the very least should issue a Letter of Inquiry to Cherry directing him to provide detailed evidentiary support for his certification that the Station resumed operations on August 15, 2017, as the Media Bureau did in a recent case.¹²

In his Opposition, Cherry argues that SSC's Petition to Deny contained a declaration from McKinney not under penalty of perjury, which defect SSC improperly attempted to correct in its Reply, after Cherry's opportunity to respond had passed.¹³ Cherry also argues that SSC's February 22, 2018,

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

⁷ See *Letter to Scott Woodworth, Esq. and Dennis J. Kelly, Esq.*, Ref. 1800B3-SS (MB rel. Apr. 13, 2018) (*Staff Decision*). Cherry recently applied for and received a construction permit to change the FM translator's site and technical facilities, continuing to specify that it will rebroadcast WPUL(AM). See BMPFT-20180619AAX, granted on July 12, 2018. See *Broadcast Actions*, Public Notice, Report No. 49279 (rel. Jul. 17, 2018).

⁸ Petition at 1; see also 47 U.S.C. § 312(g). Commission records indicate that, during the time period at issue here, Cherry reported that the Station went off the air on August 22, 2016, see BLSTA-20160907AAE, and that the Station resumed operations with STA facilities on August 15, 2017. See Notification of Resumption of Operation filed August 15, 2017.

⁹ *Id.* at 1-2. Although SSC Chief Engineer Mark McKinney's (McKinney) October 6, 2017, declaration was not made under penalty of perjury, SSC argues that McKinney's February 15, 2018, declaration, submitted with its Reply pleading, was made under penalty of perjury and that McKinney declared that he visited the Station four times, finding it to be silent. SSC also asserts that McKinney documented his visits with photos and videos declaring under penalty of perjury that the submitted information was true and correct. *Id.*

¹⁰ *Id.* SSC observes that, because the Commission's CDBS electronic filing system could not accommodate videos, its counsel was directed by the staff to submit the videos along with an explanatory letter through the Office of the Secretary. *Id.*, Exhibit A (February 20, 2018, e-mail between Commission staff and SSC's counsel) (*Staff e-mail*). SSC states that these videos were taken when McKinney visited the WPUL(AM) temporary transmitter site – see BESTA-20150127ACX, as extended by, *inter alia*, the grant of BSTA-20170807ABR -- on August 18, 23, 24, and 28, 2017, when Cherry represented to the Commission that the Station was on the air. SSC claims that these videos demonstrate that WPUL(AM) was off the air on those dates. *Id.* at 2.

¹¹ *Id.*

¹² *Id.* at 3, citing *Letter to Francisco San Millan and John F. Garziglia, Esq.*, in re: *KHMQ(FM)*, King City, California, (MB rel. Feb. 13, 2018) (*KHMQ*).

¹³ Opposition at 2.

letter and enclosed computer disc of alleged video evidence demonstrating the Station's silence constitutes an "unauthorized pleading," because SSC did not file a motion for leave to file supplementary material.¹⁴ Cherry also asserts that since the facts alleged by SSC were known to SSC prior to the time that it filed its first challenge to the Application on December 22, 2017, any motion for leave to file a supplement would have been denied.¹⁵

In its Reply, SSC disputes Cherry's claim that McKinney's Reply declaration and the submitted video evidence are inadmissible new evidence/supplementary material, arguing that all such evidence was either offered or referenced in SSC's December 22, 2017, Petition to Deny.¹⁶ SSC also references the February 20, 2018, *Staff e-mail* suggesting hand or United States Postal Service delivery of the video evidence first referenced in the Petition to Deny and McKinney's October 6, 2017 declaration attached thereto.¹⁷

Discussion. The Commission will consider a petition for reconsideration only if the petitioner shows either a material error in the Commission's original order or raises new facts or changed circumstances not known or existing at the time of petitioner's last opportunity to present such matters.¹⁸ A petition for reconsideration that simply reiterates arguments previously considered and rejected will be denied.¹⁹ SSC has failed to meet this burden.

Commission records indicate that although the Station has in fact been off the air frequently since 2014,²⁰ they do not indicate that the Station has been silent for more than 12 consecutive months, and SSC has not provided evidence calling for further inquiry on this question. In this regard, we reject SSC's attempt to analogize this case to *KHMQ*, which involved a completely different factual context – whether a station had been timely constructed according to its permit authorization – and a far greater and

¹⁴ Opposition at 2. In support of this proposition, Cherry improperly cites *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154, para. 6 (1999) (*Canyon*). *Canyon* concerns the procedural prohibition on raising entirely new facts in a petition for reconsideration after an initial challenge was unsuccessful. It does not apply to arguments raised in reply pleadings, which are governed by 47 CFR § 1.45(c) ("The reply shall be limited to matters raised in the oppositions . . ."). Given that Cherry acknowledges arguing that McKinney's declaration in the Petition to Deny was not made under penalty of perjury, SSC's submission of a McKinney declaration made under penalty of perjury in its Reply is certainly addressing a "matter raised in the opposition." This claim warrants no further discussion.

¹⁵ *Id.* at 3, citing e.g., *Brantley County Board of Education*, Order on Reconsideration, 24 FCC Rcd 8102, 8105-06, para. 9 (WTB 1999) and *Richard R. Zaragoza, Esq.*, Letter Order, 24 FCC Rcd 5743, 5746 (MB 2009).

¹⁶ Reply at 1; see also Petition at Exh. A.

¹⁷ *Id.* at 2. See n.10, *supra*.

¹⁸ 47 CFR § 1.106(c).

¹⁹ *Pamplin Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 649, 653, para. 10 (2008).

²⁰ 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 (the primary period on which SSC focuses in its pleadings); 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 to file an application for a new permanent site. See *Letter to Glenn Cherry* (MB rel. Mar. 1, 2018). On August 29, 2018, Cherry filed for an extension of its STA, see BESTA-20180827ABH, which has been accepted for filing. On September 7, 2018, Cherry filed an application for a minor change to facility for a new permanent site, see BP-20180907ADW, which was accepted for filing on September 10, 2018. See *Broadcast Applications*, Public Notice, Report No. 29319 (rel. Sep. 12, 2018).

more probative disparity between objector's documented allegations and the permittee's peremptory and inconsistent statements in opposition.

In addition, we reject SSC's claim that the staff made two material errors in the *Staff Decision*. Although we accept that McKinney's second declaration was made under penalty of perjury and will grant reconsideration to that extent, we do not find the error to be material such that any change to the *Staff Decision* is warranted. As noted in the *Staff Decision*, even were we to consider the McKinney declaration as well as the others submitted by SSC in this proceeding, they were made by persons either affiliated with SSC or competitors of the Station and provide at best a "snap shot" of discrete allegations of station non-operation;²¹ even if considered together, they do not establish that the Station was off the air for 12 consecutive months.²² Moreover, they do not refute the several declarations also made under penalty of perjury made in this proceeding 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.²³

For similar reasons, we reject SSC's claim that the staff did not consider McKinney's video evidence. It is true that the *Staff Decision* does not reference the McKinney videos. However, McKinney's photos and video do not provide any evidence to demonstrate that the Station was silent for more than 12 consecutive months, pursuant to the Act, beyond McKinney's claim that the Station was silent during each of his four visits to the Station's temporary site.²⁴ Neither do they contradict the statements under penalty of perjury from persons unconnected to Cherry that the Station was operational on August 12 and 15, 2017.²⁵ Any silences of less than 12 consecutive months during this period are not fatal. We conclude that, between the declarations made in this proceeding, the information contained in the STA requests, and the evidence proffered, SSC has not shown either a material error in the Commission's original order or raised new facts or changed circumstances otherwise warranting reconsideration.²⁶

²¹ See *Staff Decision* at 4 and n.27, referencing Petition to Deny, Exhibits A and B.

²² *Staff Decision* at 3-4.

²³ *Staff Decision* at 4 and n. 28, Opposition to Petition to Deny, Exhibits A, B, C, and D.

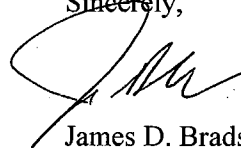
²⁴ See, e.g., *Mr. William Johnson, A. Wray Fitch III, Esq., Stephanie J. Patton, Esq., John Trent, Esq.*, Letter Order, 27 FCC Rcd 1471, 1472-73 (MB 2012) (petitioner's claim that station was silent during each of his weekly visits to the station's site is insufficient to establish violation of Section 312(g)) (emphasis supplied). Here, the video evidence consists of a showing of an apparently deserted temporary transmitter site, allegedly with no electrical power and of a car radio on maximum volume unable to get the Station's signal (1590 kHz) on the four aforementioned dates. See video disc submitted to the FCC's Office of the Secretary on February 22, 2018.

²⁵ See, e.g., declaration under penalty of perjury from Ronald C. Gitschier, referenced in *Staff Decision* at n. 28.

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). 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).

Conclusion/Actions. In light of the discussion above, IT IS ORDERED, that the Petition for Reconsideration filed by Southern Stone Communications, LLC, on May 14, 2018, IS GRANTED to the extend indicated above, and IS DENIED in all other respects. FM Translator W264DP, Daytona Beach, Florida (Facility ID No. 201673) may properly rebroadcast station WPUL(AM), South Daytona, Florida.

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