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November 6, 2019

James D. Bradshaw
Senior Deputy Chief
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Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Received-FCC

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Bureau / Office

In Re: W252BE, TARRANT, AL
Shelby Broadcast Associates, LLC
File Nos. BLFT-20140411AAT,
BMLFT-20140520ALM, BPFT-20170511AAL,
BLFT-20181016ABE
Facility ID No. 141124
In reply refer to: 1800B3-KV

Dear Mr. Bradshaw:

Marble City Media, LLC, through its counsel, respectfully responds to your letter of October 7, 2019, in reference to the above matter. Your letter correctly notes that the controversy concerning the operation of W252BE by Shelby Broadcast Associates, LLC ("Shelby") began February 10, 2017, with a complaint by Marble City Media, LLC ("Marble City") as to prohibited interference by W252BE to Marble City's full power FM station WFXO(FM) Stewartville, AL. Further, your letter references the large number of pleadings filed as to this matter since February 10, 2017.

The foundation for your letter is the Commission's adoption of changes to the FCC's Rules concerning the FM translator interference complaint process, *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference, Report and Order, FCC 19-40, 34 FCC Rcd 3457(2019)* (the "Translator Interference Order"). Filing of information under that order and related efforts are unnecessary under the circumstances present in this proceeding. Specifically, the letter seeks further information related to interference complaints initially filed by Marble City in February 2017. Since that time, however, as is evident in the Commission's files, both WFXO and W252BE have modified their technical operations, and those changes have necessarily altered the factual situation, including areas of potential interference, since the time of the initial complaint.

More importantly, however, the Translator Interference Order is inapplicable to the instant proceeding as the primary issue at hand is that Shelby has no license to operate station W252BE. Indeed, its operation of W252BE in an unauthorized manner for nearly three years in the past has negated its status as the station's licensee.

On October 16, 2018, in its last filing for an authorization, Shelby filed an application, BLFT-20181016ABE, for license to cover a construction permit file number BPFT-20170511AAL granted June 21, 2017, sixteen (16) months before that date. In its October 19, 2018, Comments on that application, Marble City noted that W252BE had not operated in accordance with its license or any other authorization from the Commission since November 16, 2016, when its last Commission authorization to operate at variance from its licensed parameters had expired.¹ Shelby itself acknowledged that its operation after November 8, 2015 had not even been in accordance with that 2015 STA.² Thus, W252BE operated without authorization for a period of 35 months prior to filing the license application.

Marble City noted in its pleadings that given the extensive period of time of unauthorized operations and the circumstances, Shelby's license had expired. As is apparent from the facts, the unauthorized operations were deliberate and knowing actions by Shelby. More particularly, Marble City concluded in its October 19, 2018, *Comments*:

“As is well established, unauthorized operation is considered by the Commission to be the equivalent of no operation at all. *Eagle Broad. Group*, 563 F.3d 543, 553 (D.C. Cir. 2009) (“Under the statute, unauthorized and unlicensed transmissions are no better than silence”) *A-O Broad. Corp.*, 23 FCC Red 603 (2008); *see also James McCluskey, Ph.D.*, Letter Order, 27 FCC Red 6252, 6254-55 (MB 2012) (“an unauthorized transmission counts for nothing”); *A-O Broadcasting Corporation*, 23 FCC Rcd 603 (2008); *Tango Radio, LLC*, 30 FCC Rcd 10564, 10567-68 (2015) (temporarily constructed facilities do not form the basis for filing a license application). Section 312(g) of the Communications Act of 1934, as amended, specifies that the license of a station that is silent or engages in operation other than as authorized for a period of 12 consecutive months automatically expires at the end of that period.”³

A brief review of the months leading to the Shelby October 16, 2108, license application filing is helpful to an understanding the conclusion that W252BE is an expired authorization. Apart from prior filings, in a pleading filed July 2, 2018, Marble City demonstrated that W252BE had been

¹ See October 19, 2018, Marble City Comments on Application for License.

² See, *Shelby Opposition*, filed August 3, 2018, in response to Marble City's *Revival of Complaint and Petition for Cancellation of W252BE License*, filed July 6, 2016.

³ In its Comments as to the license application, Marble City referenced, as relevant to the current circumstances, the *Letter Order as to WZNN(FM), Maplesville, AL (reference 1800B3-VM)* dated November 15, 2017, which provided in part, “*Well established Commission precedent dictates that licensees cannot avoid the statutory deadline set forth in Section 312(g) through the use of unauthorized facilities.*” The Commission cancelled the WZNN(FM) license, deleted the call sign, and as a further measure required Valleydale Broadcasting, LLC (“Valleydale”), and its various principals to submit a copy of the *Letter Order* with every facilities application filed for a period of five years. The named principals include those associated with Shelby. Due to its direct relevance as express notice to Shelby that prolonged unauthorized operations result in license cancellation, the *Revival* pleading included a copy of the Commission's *Letter Order* concerning Valleydale and through shared principals, Shelby. See *Revival of Complaint and Petition for Cancellation of W252BE License*.

operating at an unauthorized antenna height of approximately 750 feet, with an improperly oriented directional antenna, and transmitter output power almost double that authorized.⁴

Shelby did not contest the foregoing conclusive showing that Shelby was and had been illegally operating W252BE; however, Shelby responded with a request for a technical STA for W252BE, File No. BSTA-20180718AAD on July 18, 2018. That request was dismissed the very next day due to failure to indicate a reason why the STA was needed, but Shelby turned around and filed another STA request (the “STA Request”). While this STA Request provided the previously missing reason for seeking an STA, that explanation itself, and the other information in the STA Request and additional Shelby filings, raised further troubling questions and definitively established by Shelby’s own statements that W252BE has been operating in an unauthorized manner since November 8, 2015.⁵

Further, as demonstrated by Marble City in a supplemental filing as to the STA Request, through a showing of its consulting engineer, the STA Request was unacceptable as violating Section 74.1204(a)(3) due to prohibited signal contour overlap with WFXO. Shelby’s October 16, 2018, application, BLFT-20181016BE, for license to cover a construction permit followed the two STA attempts but did not cure the infirmities of the translator’s status and its deliberate and knowing actions in operating the station illegally without authorization.

In conclusion, the Translator Interference Order is not relevant to the present proceeding, as the primary issue is no longer interference to WFXO’s past facilities, but rather is that Shelby does not have a license to operate W252BE. As previously requested by Marble City, under all the circumstances, the Commission should order that W252BE immediately cease operation.

Respectfully submitted,

MARBLE CITY MEDIA, LLC

By: 

M. Scott Johnson
Anne Goodwin Crump

cc: Scott Woodworth, counsel for
Shelby Broadcast Associates, LLC

⁴ *Revival of Complaint and Petition for Cancellation of W252BE License.*

⁵ *See, Shelby Opposition, in which Shelby admitted that its operation of W252BE had never been in accordance even with its 2015 STA.*