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In re: **KFXV-LP, Mesa, AZ**
Facility ID No. 192016
File Nos. BLL-20150527ACT
BLL-20170710AAT¹

Petition for Reconsideration

Dear Licensee and Counsel:

The Media Bureau (Bureau) has before it an October 7, 2019 Petition for Reconsideration (Petition) from 1TV.com, Inc. (1TV), licensee of KBSZ(AM), Apache Junction, AZ.² 1TV contests a Letter Order and a related Consent Decree, each issued on September 4, 2019, in which the Bureau reinstated, over 1TV's objection, the license of San Tan Educational Media (San Tan) for then-silent Low Power FM (LPFM) station KFXV-LP, Mesa, AZ (Station) and provided additional time for the Station to return to the air.³ For the reasons discussed below, we deny reconsideration.

Background. The Station was first licensed on June 2, 2015 at the Usery Peak Site.⁴ A family whose members comprised the original San Tan board of directors left Arizona and moved to Texas around November

¹ The Petition challenges reinstatement of a license application erroneously identified as File No. BLL-20170710AAT. The correct application is File No. BLL-20150527ACT. We include both file numbers in the caption of the instant letter, even though it takes no action on the 2017 application, because the Commission's database and prior public notices have associated the Petition with the 2017 application due to 1TV's submission under the wrong file number.

² 1TV claims standing as a competitor. See Petition at 2.

³ See Letter Order from Albert Shuldiner, Chief, Audio Division, Media Bureau, FCC to Ryan Greig, President, San Tan (MB Sept. 4, 2019) (September Decision); *Broadcast Actions*, Public Notice, Rep. No. 49568 (rel. Sept. 10, 2019). The September Decision also acted on applications for transfer of control (File No. BTCL-20171004AAB) and authority to remain silent (File No. BLESTA-20180514ACA).

⁴ See File Nos. BLL-20150527ACT (granted June 2, 2015) (2015 License Application).

2015. Volunteers who had been working at the Station assumed control of the organization about January 1, 2016 -- a 100-percent board change -- without seeking required Commission consent to the transfer of control. San Tan obtained a Commission permit in February 2017, to relocate the Station's transmitter to the Novin Site, began to operate there, and filed an application to license the relocated facilities on July 10, 2017.⁵ Objectors, including 1TV, challenged San Tan's 2017 License Application, alleging multiple rule violations including an unauthorized transfer of control, and non-conforming construction at the Novin Site.

San Tan acknowledged a 2016 transfer of control and sought to correct the matter by filing a Transfer Application on October 4, 2017.⁶ On November 11, 2017, while those matters were pending, the Station went silent due to a local dispute over its use of the Novin Site. San Tan filed a request for special temporary authority (STA) to remain silent.

The Bureau, in a June 25, 2018 Letter Order, held that the sudden, 100-percent change in San Tan's board of directors in 2016 was fatal because it occurred while San Tan was still subject to a three-year holding period required by section 73.865(c) of the Commission's rules (Rules).⁷ The Bureau partially reconsidered that decision on September 4, 2019, however, agreeing with San Tan that LPFM majority board changes are generally permissible under section 73.865(e), and that licensees like San Tan did not have adequate notice that such a change would be fatal if it occurred within the first three years of operation.⁸ The Bureau nevertheless viewed the board change as a violation of section 73.865(e) because San Tan had not timely filed Form 316 to seek Commission authority for the change, as that rule requires. In the Consent Decree, San Tan admitted that it had violated several additional provisions of Rules and the Communications Act of 1934, as amended, (Act).⁹ San Tan agreed to pay a civil forfeiture and to undertake a compliance plan to prevent future violations. The Bureau determined that San Tan's violations were not disqualifying, reinstated the underlying license, consented to the transfer of control, and granted San Tan's request for STA to remain silent.

Because the Station was silent, the Bureau considered the impact of section 312(g) of the Act, which provides that a broadcast license expires automatically if a station is silent for 12 consecutive months, but gives the Commission discretion to reinstate or extend the license in three limited circumstances.¹⁰ At the time of the September Decision, the Station had been silent for over 12 consecutive months but San Tan met one of the circumstances for reinstatement/extension because it had prevailed in an administrative appeal of its license termination. The Bureau reinstated the Station's license and extended the time for San Tan to resume broadcasting.

⁵ See File No. BLL-20170710AAT (rec. July 10, 2017) (2017 License Application).

⁶ See File No. BTCL-20171004AAB (filed Oct. 4, 2017) (Transfer Application).

⁷ See Letter Order from Albert Shuldiner, Chief, Audio Division, Media Bureau, FCC to Ryan Greig, President, San Tan (MB June 25, 2018) (June Decision) at 3-4. The Bureau viewed the transfer as a failure to meet a condition of the original permit grant because the Station's construction permit was conditioned upon compliance with the Rules, including the three-year holding period. See 47 CFR § 73.865(c); June Decision at 4.

⁸ Specifically, the Commission adopted section 73.865 without specifying whether the holding period in subsection (c) was to be read in conjunction with or independently from subsection (e), which permits major board turnover reported to the Commission on FCC Form 316. Thus, the Bureau considered as ambiguous whether a major board change was permissible within an LPFM station's first three years of operation. See September Decision at 3, n.14; 47 CFR § 73.865(c), (e). Subsequently, the Commission clarified that section 73.865(e) applies to LPFM permittees and licensees at all times, including during any relevant permit holding period. *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Report and Order, 34 FCC Red 12519 (2019).

⁹ San Tan admitted to violations of: (a) section 73.865(e) of the Rules by undergoing a non-mission-altering transfer of control without seeking Commission consent on Form 316; (b) section 301 of the Act and sections 73.875(b)(3) and 73.1350 of the Rules by constructing and operating a tower and antenna that were each more than four meters lower than authorized; (c) section 1.17 of the Rules by falsely certifying to have constructed in accordance with its permit, as a result of carelessness or negligence without any intent to deceive; and (d) section 399B(b)(2) of the Act by airing announcements that promoted rather than merely identified underwriters.

¹⁰ These circumstances are: (1) when the licensee prevails in an administrative or judicial appeal; (2) the applicable law changes; or (3) to promote equity and fairness. See 47 U.S.C. § 312(g).

The Bureau attempted to return San Tan to a position similar to that which existed at the time of the June 25, 2018, license cancellation by restoring a period of approximately four months, 18 days that it determined would have remained in the twelve-month silent period had the Bureau not terminated the license. San Tan resumed operations on January 15, 2020, well within the deadline set by the Bureau.¹¹ 1TV argues that the Bureau misapplied section 312(g) and miscalculated the deadline for resumption of operations.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's action or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹² 1TV contends that the Bureau's September Decision is inconsistent with several well-established, related section 312(g) principles: (1) that section 312(g)'s limit on broadcast silence is read in conjunction with section 301's prohibition of unlicensed operation;¹³ (2) that periods of broadcasts from unauthorized facilities are no better than silence;¹⁴ and (3) that the 12-month limit includes periods of silence aggregated with periods of unauthorized transmissions.¹⁵ 1TV argues that the Bureau erred generally in reinstating the license and specifically with respect to three overlapping time periods discussed below.¹⁶

General Argument Against Reinstatement. As noted previously, section 312(g) authorizes the Commission to extend or reinstate the license of a silent station: (1) when the licensee prevails in an administrative or judicial appeal; (2) the applicable law changes; or (3) to promote equity and fairness.¹⁷ 1TV argues that this reinstatement authority is quite limited and inapplicable to San Tan.¹⁸ While 1TV correctly observes that the Commission has rarely exercised its discretion to reinstate the licenses of silent stations, its argument concerning San Tan incorrectly relies on decisions not to reinstate under section 312(g)'s "equity and fairness" prong.¹⁹ The Bureau's September Decision did not rely on that prong. Rather, the Bureau reinstated the license under the "administrative or judicial appeal" prong.²⁰ Accordingly, 1TV's overall, equity-based argument that some of San Tan's silence and non-conforming operations resulted from its own business judgments, is immaterial. Next, we consider arguments based on specific periods of alleged silence.

¹¹ San Tan was required to resume operations by January 22, 2020 or January 30, 2020, depending upon whether one computes the date in accordance with language in the September Decision or in the Consent Decree. *See infra*, note 16.

¹² 47 CFR § 1.106(c)(1); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

¹³ Petition at 4-5, citing *Eagle Broad. Group, Inc. v. FCC*, 563 F.3d 543, 554 (D.C. Cir., 2009) (*Eagle*); 47 U.S.C. § 301.

¹⁴ Petition at 4-6, citing *Eagle* 563 F.3d at 554; *John L. White*, Letter Order, 24 FCC Rcd 12541 (MB 2009).

¹⁵ *Id.*

¹⁶ 1TV also notes a discrepancy of eight days in the length of time that the Bureau provided for San Tan to resume operations under the reinstated license. *See* Petition at 7, citing Consent Decree, n. 35 (resumption deadline of four months, 18 days), September Decision at 6 (resumption deadline of four months, 26 days). We acknowledge the discrepancy but find that it is inconsequential. The Bureau intended to add a period of somewhat more than four months to the September 4, 2019 effective date of the Consent Decree. Regardless of whether this resulted in a construction deadline of January 22, 2020 under the Consent Decree or of January 30, 2020 under the September Decision, the eight-day difference is immaterial because San Tan resumed operations well before either of those dates, *i.e.*, on January 15, 2020. *See* LMS File No. 0000098551, Attachment (rec. Jan. 21, 2020) (exhibit to license application reports resumption on Jan. 15, 2020).

¹⁷ *See supra*, note 10.

¹⁸ Petition at 5 and cases cited therein.

¹⁹ *Id.*

²⁰ 47 U.S.C. § 312(g). The September Decision recognized that the Bureau's license cancellation on June 25, 2018 was an error because licensees did not have notice of the rule interpretation underlying that action. *See* September Decision at 3, n.14.

May 27, 2015 to July 10, 2017 (alleged non-conforming operations at the Usery Peak Site). 1TV's Petition alleges for the first time that San Tan's entire, approximately two years of operation at the Usery Peak Site was non-conforming. The period at issue begins with San Tan's initial licensure in May 2015 and continues until it left the Usery Peak Site in July 2017. 1TV contends, based on an October 2019 statement from a tower site principal, that San Tan used an incorrect antenna mounted at an unauthorized height.²¹ The Usery Peak arguments are new, and 1TV does not show that it would not have been possible to present the alleged facts earlier, as section 1.106 requires for grant of reconsideration.²² Since the Bureau had no opportunity to consider these allegations, 1TV has not shown that the Bureau erred. We also find that the newly alleged facts are insufficient to raise an independent public interest basis for reconsideration.²³

January 1, 2016 to October 4, 2017 (control by a new board prior to filing Form 316). The period January 1, 2016 to October 4, 2017 is the primary focus of the Petition and also of the September Decision. That approximately 21-month timeframe begins with San Tan's 100-percent board change and ends with its filing of the Transfer Application to seek Commission approval. 1TV contends that the new San Tan board had no Commission authority to control the Station or to emit broadcasts during that time because the Commission had not evaluated the new board members' qualifications.²⁴ For example, 1TV posits that the Commission could not have known prior to the Transfer Application whether the new board members were U.S. citizens, had been convicted of a serious crime, held interests in other broadcast stations, or previously operated a "pirate" station, any one of which could be disqualifying.²⁵ Accordingly, 1TV characterizes San Tan's operations as "unauthorized and unlicensed," equates the board's operation of the Station during that period with violations of section 301 of the Act, and argues that such broadcasts cannot count as operations for purposes of section 312(g).²⁶ Thus, 1TV suggests that regardless of whether San Tan's transfer of control is considered substantial under the Rules, an unapproved change would have caused San Tan's license to expire in early 2017 pursuant to section 312(g), well before the Bureau's cancellation and reinstatement on other grounds. 1TV further argues that the Bureau's reinstatement of the Station's license despite the board change erroneously relied upon section 73.865(e) because that rule requires a submission of Form 316, which San Tan did not timely file.²⁷

It is undisputed that San Tan violated the Rules by not filing the Transfer Application until approximately 21 months after its board change and that the organization was controlled during that time by directors upon whose qualifications the Commission had no opportunity to pass.²⁸ We reject, however, 1TV's contention that these circumstances caused the Station's license to expire. 1TV's reading of sections 301 and 312(g) of the Act is

²¹ *Id.* at 2; and Attachment. 1TV supports the new allegation with a statement under penalty of perjury from a principal of a tower company that owned the Usery Peak Site, stating his belief that the equipment San Tan constructed differed from that authorized by the Commission. *See* Statement of Bert Hendershott, Partial Owner, Action Tower Sites, LLC (Oct. 7, 2019) (alleging vertical antenna mounted at 2.5 meters instead of horizontal antenna at 6 meters). The tower company does not explain why it would have permitted allegedly nonconforming operations. Nor are there any photographs or other contemporaneous evidence to support the allegations, which relate to a timeframe two years distant.

²² *See* 47 CFR § 1.106(c)(1).

²³ The Bureau has authority to consider facts and arguments, even if not properly raised on reconsideration, if it determines that consideration is required in the public interest. *Id.* § 1.106(c)(2). 1TV does not identify any such public interest grounds. If the Bureau were independently to find a public interest basis to undertake a section 312(g) analysis and to accept, *arguendo*, that non-conforming operations occurred at the authorized Usery Peak Site, the Bureau could still take additional relevant facts, such as the Consent Decree, into consideration.

²⁴ Petition at 8.

²⁵ *Id.*

²⁶ *Id.* at 7-8.

²⁷ *Id.* at 8.

²⁸ In the Consent Decree: (1) San Tan admits that it did not promptly file Form 316 and agrees to corrective action; and (2) the Bureau finds that matter non-disqualifying. Consent Decree at paras. 11-12, 15.

overbroad. Those provisions are specifically concerned with signal transmission, not board composition. Specifically, under section 301, “*transmission of energy or communications or signals by radio . . . [is prohibited] except . . . with a license*”²⁹ and, under section 312(g), licenses expire when a station “*fails to transmit broadcast signals for any consecutive 12-month period.*”³⁰ The Commission and courts have thus held in many cases that broadcast licenses expire upon a licensee’s failure for twelve consecutive months to *transmit signals* in substantial accordance with its license or other valid instrument of authorization.³¹ Each such case has, however, involved a 12-month period in which a licensee either failed entirely to transmit broadcast signals, transmitted signals that were deficient from an engineering perspective (*i.e.*, using equipment or a location substantially different from that authorized), or a combination of the two.³² The instant circumstances are not comparable.

San Tan is a licensed entity. It underwent a non-mission-altering board change, as the Commission anticipated would occur in LPFM organizations and identified as non-substantial, subject to a required filing of Form 316. The Commission has never applied section 312(g) in that context. The fact that San Tan waited a considerable time to file its Transfer Application does not make San Tan’s *signal transmission* unauthorized. As we stated in the September Decision, operations by the new board prior to filing Form 316 were not equivalent to unlicensed “pirate” operations.³³ We reject 1TV’s argument that San Tan’s delay in filing the required paperwork escalated this matter into extended, unauthorized transmissions leading to loss of license.³⁴ We also reject 1TV’s argument that section 73.865(e)’s treatment of such board changes as non-substantial was inapplicable prior to San Tan’s filing of the required FCC Form 316. By failing to file the form promptly, San Tan violated section 73.865(e) but did not alter the non-substantial nature of the change. The Commission has broad discretion, as it did here, to address rule violations through the use of consent decrees.³⁵

July 10, 2017 to June 25, 2018 (aggregation of non-conforming operations at the Novin Site and silence following Novin Site loss). Finally, 1TV makes a brief, alternative argument that the Bureau should recalculate the deadline for San Tan to return to the air.³⁶ That argument, while cursory, appears to suggest that the Bureau should have given San Tan only about two weeks to resume operations instead of four and one half months because San Tan had, in the aggregate, operated with unauthorized facilities and/or been silent for almost twelve months when the Bureau cancelled the license on June 25, 2018.³⁷ We reject this argument because neither the Act

²⁹ *Id.* § 301 (emphasis added).

³⁰ 47 U.S.C. § 312(g) (emphasis added).

³¹ See, e.g., *Eagle*, 563 F.3d at 552; *Kingdom of God, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 7522, 7522-23, para. 2 (2016), *aff’d sub. nom per curiam* 719 Fed. Appx 19 (D.C. Cir. 2018); *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 607-08, paras. 9-10 (2008) (subsequent history omitted); *Chinese Voice of Golden City*, Memorandum Opinion and Order, __ FCC Rcd __, para. 10 (MB rel. Jan. 15, 2020); *Great Lakes Community Broad., Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8244-47 (MB 2009).

³² *Id.*

³³ September Decision at 4.

³⁴ With respect to 1TV’s point that there was a potential that new board members might have been unqualified, there is no evidence of actual disqualification. The Bureau was able to approve the Transfer Application.

³⁵ See *University of San Francisco*, Memorandum Opinion and Order, 30 FCC Rcd 10530, 10535, para. 9, (2015), citing, *U.S. Cellular Corp.*, Order, 24 FCC Rcd 8729, 8738, para. 26 (2009); *Emmis Commc’ns Corp.*, Order on Reconsideration, 21 FCC Rcd 12219, 12221, para. 6 (2006); *Viacom, Inc.*, Order on Reconsideration, 21 FCC Rcd 12223, 12226-27, para.6 (2006).

³⁶ Petition at 9-10.

³⁷ The period includes approximately four months of admitted non-conforming operations at the authorized Novin Site followed by approximately seven and one-half months of silence until the Bureau’s June Decision. The Bureau calculated the resumption deadline solely on the period of silence. Because, as discussed below, the Bureau had discretion to establish a new construction deadline, we need not address whether San Tan’s Novin Site operations, which were at the correct site but incorrect height, were of sufficient variance to be treated as equivalent to silence.

nor the Rules specifies the amount of time that the Commission may afford a silent station upon reinstating or extending a license. In the instant proceeding, the Bureau attempted to restore San Tan to approximately the same position that existed on the date of the erroneous license cancellation. That practice, however, is a matter of discretion. For example, in *V.I. Stereo*, where the Commission reinstated the license of a station that had been silent for 12 months due to multiple hurricanes, the Commission also granted special temporary authority (STA) for the station to remain silent for another six months, with the possibility of a six-month extension of the STA.³⁸ As noted above, the Commission has broad discretion to settle enforcement matters through the use of consent decrees.³⁹ The Bureau appropriately exercised its discretion in giving San Tan approximately four and one-half months to return to the air in connection with the Consent Decree. If 1TV is suggesting that the Bureau should revise the deadline retroactively, we would reject that suggestion as patently unfair.⁴⁰ In reliance on the stated deadline, San Tan undertook obligations under the Consent Decree and constructed within the time period provided.

Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by 1TV concerning reinstatement of the license (File No. BLL-20150527ACT) of San Tan Educational Media for KFXV-LP, Mesa, AZ **IS DENIED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

³⁸ *V.I. Stereo Comm. Corp.*, 19 FCC Rcd 14259, 14233, para. 11 (2006).

³⁹ *See supra*, note 35.

⁴⁰ *See, generally, DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (in a rulemaking context, prohibited retroactivity occurs if a rule impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed).