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**In re: Universal Broadcasting of  
New York, Inc.  
WTHE(AM), Mineola, NY  
Facility ID No. 68957  
File No. BAL-20190207AAE**

**Petition for Reconsideration**

Dear Counsel:

We have before us the Petition for Reconsideration (Petition) filed on December 6, 2019, by WIN Radio Broadcasting Corporation (WIN), which seeks reconsideration of the Media Bureau (Bureau) decision<sup>1</sup> that reinstated the expired license for Station WTHE(AM), Mineola, New York (Station) and granted the application for consent to assign the Station's license from Universal Broadcasting of New York, Inc. (Universal) to Cantic Nuevo Ministry, Inc.<sup>2</sup> For the reasons set forth below, we deny the Petition.

**Background.** On January 25, 2018, the Station went silent due to the loss of its transmitter site.<sup>3</sup> By letter dated February 16, 2018, the Bureau granted the Station a silent authority STA until August 16, 2018, and warned Universal that the Station's license would expire pursuant to section 312(g) of the Communications Act of 1934, as amended (Act), if the Station failed to resume operation by January 26, 2019.<sup>4</sup>

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<sup>1</sup> *Universal Broadcasting of New York, Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 10319 (MB 2019) (*Bureau Order*).

<sup>2</sup> Petition for Reconsideration of WIN Radio Broadcasting Corporation (filed December 6, 2019) (Petition). Universal filed an Opposition on December 13, 2019 (Opposition) and WIN filed a Reply on December 27, 2019 (Reply).

<sup>3</sup> See File No. BLSTA-20180131AFL.

<sup>4</sup> Letter from Lisa Scanlan, Deputy Chief, Audio Division, FCC Media Bureau, to Richard A. Helmick (Feb. 16, 2018) (citing 47 U.S.C. § 312(g) ("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, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness"))).

Due to a lapse in government funding, the Commission suspended most operations, including the processing of STA applications, on January 3, 2019.<sup>5</sup> On January 15, 2019, Universal (a) filed an STA application for low-power operation with a long-wire dipole antenna, (b) filed a resumption of operations notice with the Commission, stating that the Station had resumed operation with an emergency antenna, as described in the STA application, and (c) sent an email to a Bureau staff member requesting authority to continue operation with an emergency antenna pursuant to section 73.1680 of the Commission's rules (Rules).<sup>6</sup>

Because of the lapse in appropriations, no Bureau staff member reviewed Universal's submissions until after the Commission resumed normal operations on January 26, 2019.<sup>7</sup> By letter dated February 1, 2019, the Bureau granted the STA application authorizing Universal's low-power operation.<sup>8</sup> On February 5, 2019, Universal suspended operation of the Station due to municipal regulatory action and shortly thereafter filed an STA application for silent authority.<sup>9</sup> On February 7, 2019, Universal filed the Assignment Application seeking Commission approval of the assignment of the Station's license to Cantico Nuevo Ministry, Inc.

On March 11, 2019, WIN filed a petition to deny the Assignment Application, alleging that because the Station did not resume operation with authorized facilities by January 26, 2019, the license expired pursuant to section 312(g), and therefore the Assignment Application should be dismissed.<sup>10</sup> In its opposition to the petition to deny, Universal argued that the Bureau implicitly extended or reinstated the Station's license as a matter of "equity and fairness"<sup>11</sup> in the STA grant and the only reason it was not approved prior to the deadline was the government shutdown, which was beyond Universal's control. In the *Bureau Order*, the Bureau granted in part and denied in part WIN's petition to deny, reinstated the license and entered into a Consent Decree with Universal to authorize the assignment of the Station license.<sup>12</sup> The Bureau found that Universal resumed operations using unauthorized facilities that did not prevent license expiration. The Bureau went on to conclude license reinstatement was appropriate as a matter of equity and fairness under section 312(g) due to unique circumstances beyond Universal's control. Specifically, the Bureau determined the government shutdown had prevented Universal from obtaining a timely grant of its STA request. It also found WIN's exclusive lease of Universal's transmission tower from the owner prevented Universal from resuming operations with its authorized facilities or with STA facilities from that site.<sup>13</sup> The *Bureau Order* also adopted a consent decree

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<sup>5</sup> See *Impact of Potential Lapse in Funding on Commission Operations*, Public Notice, 34 FCC Rcd 1 (OGC 2019) (Partial Closure Notice).

<sup>6</sup> Opposition, Attach. B-D.

<sup>7</sup> See *Revisions to Filing and Other Deadlines Following Resumption of Normal Commission Operations*, Public Notice, 34 FCC Rcd 99 (OGC 2019).

<sup>8</sup> See BSTA-20190115AAR and Opposition, Attach. E.

<sup>9</sup> See Petition at 1-2 and Reply at 1-2.

<sup>10</sup> WIN also suggests that Universal's original explanation for going silent, that it was evicted from its transmitter site, was "less than candid, bordering on untruthful" because the Station's transmitter site "was sold at auction by the local taxing authority, for failure to pay accumulated property taxes." Petition at 3. We find no meaningful difference in those explanations in the context of our silent authority determinations, nor can we discern any motive for Universal to deceive us on this issue. Accordingly, we reject WIN's claim.

<sup>11</sup> See note 4 supra, quoting section 312(g).

<sup>12</sup> See generally *Bureau Order*, 34 FCC Rcd at 10219-20, para. 1.

<sup>13</sup> *Id.* at 10322, para. 11.

(Consent Decree) in which Universal agreed to make a civil payment of \$5,000 to the U.S. Treasury for its unauthorized operation of the Station and failure to seek extension of its silent authority STA.<sup>14</sup>

In the Petition, WIN again requests the Bureau find that Universal's failure to resume authorized operations before January 26, 2019, was not due to reasons beyond its control.<sup>15</sup> WIN states that Universal lost access to its transmission tower for failure to pay property taxes and, consequently, the tower was sold at auction.<sup>16</sup> WIN argues that Universal's control over its payment or non-payment of property taxes makes the tower loss well within Universal's control. Additionally, WIN raises a new argument—that, due to the negotiated \$5,000 civil penalty payment and consent decree, the Bureau “knowingly participated in . . . a blatant violation of the *ex parte* rules”<sup>17</sup> and “violated [WIN's] rights under the [Administrative Procedures Act (APA)].”<sup>18</sup> WIN assumes the settlement discussions between the Bureau and Universal were “explicitly directed to the merits of a contested application” and therefore violated WIN's rights under the APA because WIN, as an alleged party, did not receive “service, notice, or any other disclosure of the contents.”<sup>19</sup>

Universal, in its Opposition, argues that WIN does not meet the standing requirements for a petition for reconsideration.<sup>20</sup> Universal also states that WIN is not a party to the Consent Decree and any settlement discussions “dealt strictly with the details of the Consent Decree.”<sup>21</sup> In its Reply, WIN restates its claim that Universal's tower loss was within Universal's control due to nonpayment of taxes.<sup>22</sup> Additionally, WIN repeats its argument that negotiation of the Consent Decree confirms “these *ex parte* communications. . . were somehow material to the staff's decision.”<sup>23</sup> According to WIN, “conditioning the effectiveness of the consent on compliance with the Consent Decree confirms that *but for* the illegal *ex parte* communications, the application would not have been approved.”<sup>24</sup> Based on its assertion that it is a party to the proceeding, WIN argues it should have been able to participate in the settlement discussions to resolve the enforcement issue addressed in the Consent Decree—specifically, Universal's unauthorized operations and failure to seek extension of its silent STA. WIN further contends that, because it did not receive any notice of the communications between the Bureau and Universal or information about the substance of that communication until afterwards, the Commission violated section 554 of the APA.<sup>25</sup>

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<sup>14</sup> *Id.* at 10323, para. 13.

<sup>15</sup> Petition at 2.

<sup>16</sup> Petition at 6.

<sup>17</sup> Petition at 4.

<sup>18</sup> Reply at 3.

<sup>19</sup> Petition at 3.

<sup>20</sup> Opposition at 2. Universal points out that for reconsideration to be granted, the petitioner needs to show “a material error or omission in the original order or [raise] additional facts not known or existing” at the time. Since WIN, Universal argues, failed to show any material error or raise additional facts regarding the expiration of the Station's license under section 312(g), WIN lacks sufficient standing for reconsideration.

<sup>21</sup> *Id.*

<sup>22</sup> Reply at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> *Id.* at 3 (citing 47 U.S.C. § 554(d)(1) (“except to the extent required for the disposition of *ex parte* matters as authorized by law, an agency employee may not . . . consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.”)). As WIN has not received any notice of the settlement discussions and

**Discussion.** The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>26</sup> WIN has failed to satisfy this requirement, and thus we deny the Petition.

WIN's first argument—that Universal's failure to resume authorized operations before January 26, 2019, was not due to reasons beyond its control—is merely a repetition of its petition to deny, an argument that was already addressed in the *Bureau Order*, and it is “well established that reconsideration will not be granted merely for the purpose of again debating matters on which the staff has once deliberated and spoken.”<sup>27</sup> However, we will restate the Bureau's findings in this instance. Pursuant to section 312(g) of the Act, if a broadcast station fails to transmit broadcast signals with its authorized facilities 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, unless extended or reinstated by Commission action.<sup>28</sup> In *Eagle Broadcasting Group, Ltd. v. FCC*, a case the Petitioner cited in its own Petition to Deny,<sup>29</sup> the court noted that “Congress amended § 312(g) by adding language giving the Commission discretion to ‘extend or reinstate’ a license in order to, inter alia, ‘promote equity and fairness.’”<sup>30</sup> In the *Bureau Order*, we found that “WIN's lease of the Station's licensed transmitter site [was] a complicating factor beyond Universal's control that supports relief under the ‘equity and fairness’ provision of section 312(g).”<sup>31</sup> We also acknowledged that the 2019 government shutdown prohibited Universal from receiving an STA before its license's 312(g) expiration, a “compelling factor beyond Universal's control.”<sup>32</sup> We see no evidence of material error in these findings. Moreover, WIN is incorrect that Universal's loss of its site was the true reason the Station did not resume operations. But for the closure of the Commission, Universal would have been granted a timely STA to resume operations at an authorized site.

WIN also argues that the Bureau violated the Commission's *ex parte* rules through settlement discussions resulting in the Consent Decree. Because this argument could not have been made previously, we will consider it now. The DC Circuit Court of Appeals has held that the Commission's decision to enter into a consent decree for an enforcement action is unreviewable except in limited circumstances.<sup>33</sup> Like in the present case, the petitioners in *New York State Dept. of Law* claimed that the Commission violated its *ex parte* rules by participating in settlement discussions.<sup>34</sup> The court explained

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the substance of the discussions was not included in the record, WIN argues the FCC violated WIN's rights under the APA.

<sup>26</sup> 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964) (*WWIZ*), *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).

<sup>27</sup> *Capstar TX LLC, NEW(FM), Modesto, CA*, Letter Order, 34 FCC Rcd 6187 (MB 2019), citing *WWIZ*, 37 FCC at 686, para. 2.

<sup>28</sup> 47 U.S.C. § 312(g).

<sup>29</sup> See Petition at 6-7.

<sup>30</sup> *Eagle Broadcasting Group, Ltd. v. F.C.C.*, 563 F.3d 543, 545 (D.C. Cir. 2009), citing 47 U.S.C. § 312(g) (2004) (amended by Consolidated Appropriations Act, 2005, Pub.L. No. 108-447, 118 Stat. 2809 (2004)).

<sup>31</sup> *Bureau Order*, 35 FCC Rcd at 10322, para. 11.

<sup>32</sup> *Id.* at para. 10.

<sup>33</sup> *New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1213-15 (D.C. Cir. 1993) (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

<sup>34</sup> *Id.* at 1213.

that settlement “communications fall within an exception to the ban that permits *ex parte* communications initiated by the FCC for the resolution of issues in a proceeding that has not been designated for a hearing.”<sup>35</sup> Since the settlement discussions were “requested by the Commission or staff for the clarification or adduction of evidence or for the resolution of issues, [where] the proceeding . . . ha[d] not been designated for a hearing,” the court concluded that the communications fell under an exception and did not violate the *ex parte* rules.<sup>36</sup> The Commission has since held, in multiple proceedings, that under section 1.1204(a)(10), in restricted and permit-but-disclose proceedings, settlement discussions are exempt from the restrictions on *ex parte* communications when the discussions do not include new information on the merits.<sup>37</sup> Whether the proceeding in this case is considered restricted or permit-but-disclose, the subject matter of the settlement discussions only included “information relating to how [the] proceeding should or could be settled,” and therefore the Consent Decree negotiations were permitted communications.<sup>38</sup> The settlement discussions resulting in the Consent Decree complied with the *ex parte* rules, and thus WIN’s argument is without merit.

Finally, WIN suggests that its lack of notice or chance to participate in the settlement negotiations violates section 554 of the APA.<sup>39</sup> Section 554 of the APA “applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”<sup>40</sup> In the present case, the statute at issue, section 312(g), does not require a hearing for the Commission to “extend or reinstate [a] station license.”<sup>41</sup> As in *New York State Dept. of Law*, WIN has “cited no statute requiring the FCC to conduct this proceeding on the record or after a hearing,”<sup>42</sup> and so “the FCC’s decision to conduct . . . settlement negotiations in private [is] fully consistent with the discretion it is granted under the APA.”<sup>43</sup>

WIN fails to show a material error in the *Bureau Order*. WIN’s new claim that the Commission violated the *ex parte* rules and the APA by engaging in settlement discussions with Universal is based on flawed interpretations of applicable law. Accordingly, we affirm the use of our discretion under section 312(g) to reinstate the Station’s license and will deny the Petition.

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<sup>35</sup> *Id.* at 1217.

<sup>36</sup> *Id.* at 1217-1218 (citing 47 CFR § 1.1204(b)(7), now 47 CFR § 1.1204(a)(10)(ii)). See *Amendment of 47 CFR § 1.1200 et. seq. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, GC Docket No. 95-21, 12 FCC Rcd 7348, 7369, paras. 63-64 (1997).

<sup>37</sup> See *Golden Gulf Coast Broadcasting, Inc., Assignor and Capstar TX Limited Partnership, Assignee, Applications for Assignment and Renewal of License of WQYZ(FM), Ocean Springs, MS*, 29 FCC Rcd 2469, 2470, para. 3 (2014); *University of San Francisco and Classical Public Radio Network, LLC, Application for Consent to Assignment of License Station KOSC(FM), San Francisco, CA*, Memorandum Opinion and Order, 30 FCC Rcd 10530, 10532, para. 3 (2015); *Viacom Inc., et. al.*, Order on Reconsideration, 21 FCC Rcd 12223, 12227, n.22 (2006); See also *Capstar TX Limited Partnership, WQYZ(FM), Ocean Springs, MS*, Letter Order, 22 FCC Rcd 4866 (MB 2007).

<sup>38</sup> See 47 CFR § 1.1204(a)(10)(ii).

<sup>39</sup> Reply at 3.

<sup>40</sup> 5 U.S.C. § 554.

<sup>41</sup> 47 U.S.C. § 312(g).

<sup>42</sup> *New York State Dept. of Law*, 984 F.2d at 1218.

<sup>43</sup> *Id.* at 1219.

**Conclusion.** For the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed by WIN Radio Broadcasting Corporation on December 6, 2019, IS DENIED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau