



Federal Communications Commission  
Washington, D.C. 20554

July 21, 2021

In Reply Refer To:  
1800B3-KV

New River Community Church  
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In re: WYPH-LP, Manchester, Connecticut  
New River Community Church  
Facility ID No. 193136  
File No. BLL-20170807AAT

Petition for Reconsideration; 312(g) Letter; and  
Submission of On/Off Interference Test Results

Dear Counsel:

We have before us a “Petition for Reconsideration” (Petition) filed on March 26, 2021, by Red Wolf Broadcasting Corporation (Red Wolf), licensee of WDRC-FM, Hartford, Connecticut (WDRC-FM).<sup>1</sup> The Petition seeks reconsideration of the Media Bureau’s (Bureau) *March 2021 Letter Decision*<sup>2</sup> ordering Red Wolf and New River Community Church (New River), licensee of WYPH-LP, Manchester, Connecticut (WYPH-LP), to engage jointly in on-off testing to determine whether WYPH-LP is the source of the interference to WDRC-FM alleged in Red Wolf’s interference complaint (Complaint).<sup>3</sup> We also have before us a “Submission of On/Off Interference Test Results” (Interference Tests Results) filed

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<sup>1</sup> See Petition for Reconsideration, File No. BLL-20170807AAT (rec’d Mar. 26, 2021).

<sup>2</sup> See *Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to New River, et. al*, DA 21-291 (MB rel’d Mar. 11, 2021) (*March 2021 Letter Decision*). In the *March 2021 Letter Decision*, the Bureau also dismissed an interference complaint filed by Saga Communications of New England (Saga), licensee of WAQY(FM), Springfield, Massachusetts (WAQY(FM)), alleging interference from WYPH-LP to WAQY(FM). Saga did not appeal that decision.

<sup>3</sup> See Interference Complaint, File No. BLL-20170807AAT (rec’d Jan. 10, 2020).

on April 5, 2021, by New River.<sup>4</sup> In addition, we have before us a letter (312(g) Letter) filed on April 30, 2021, by Red Wolf alleging that the WYPH-LP license expired pursuant to section 312(g) of the Communications Act of 1934, as amended (the Act),<sup>5</sup> because WYPH-LP has been silent since April 23, 2020.<sup>6</sup> For the reasons discussed below, we deny the Petition and the 312(g) Letter, and we dismiss the Complaint.

**Background.** WYPH-LP is licensed to operate pursuant to a granted second-adjacent channel waiver, per section 73.807(e)(1) of the Commission's rules (Rules),<sup>7</sup> and is short-spaced to second-adjacent channel station WDRC-FM.<sup>8</sup> On January 10, 2020, Red Wolf filed the Complaint, alleging that WYPH-LP's operations were causing interference to the over-the-air reception of WDRC-FM.<sup>9</sup> In accordance with the procedure set forth in section 73.807(e) of the Rules,<sup>10</sup> on April 23, 2020, the Bureau ordered WYPH-LP to cease operations until New River eliminated the alleged interference to WDRC-FM or demonstrated that WYPH-LP was not the source of the interference.<sup>11</sup> On April 29, 2020, New River filed a response purporting to show that the Complaint was not valid and that WYPH-LP was not the source of the alleged interference.<sup>12</sup> The Bureau reviewed the response and concluded in the *September*

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<sup>4</sup> See Submission of On/Off Interference Test Results, File No. BLL-20170807AAT (rec'd Apr. 5, 2021). On April 16, 2021, Red Wolf filed a reply to the Interference Test Results. See Reply, File No. BLL-20170807AAT (rec'd Apr. 16, 2021) (Interference Test Results Reply).

<sup>5</sup> 47 U.S.C. § 312(g).

<sup>6</sup> See Red Wolf's Letter, File No. BLL-20170807AAT (rec'd Apr. 30, 2021) (312(g) Letter) (citing 47 U.S.C. § 312(g)). On May 5, 2021, New River filed a Response to Red Wolf Broadcasting Corporation's Suggestion of License Forfeiture per 47 U.S.C. § 312(g), File No. BLL-20170807AAT (rec'd May 5, 2021) (312(g) Letter Opposition); and on May 12, 2021, Red Wolf filed a Letter, File No. BLL-20170807AAT (rec'd May 12, 2021) (312(g) Letter Reply).

<sup>7</sup> 47 CFR § 73.807(e)(1) (authorizing waiver of the second-adjacent channel minimum distance separation requirements for LPFM stations if the LPFM station demonstrates "that its proposed operations will not result in interference to any authorized radio service.").

<sup>8</sup> WYPH-LP is also short-spaced to WAQY(FM) licensed to Saga. See *supra* note 2.

<sup>9</sup> See *supra* note 3.

<sup>10</sup> Upon receipt of a bona fide complaint of interference caused by an LPFM station operating pursuant to a second-adjacent channel waiver, the Commission notifies the LPFM station, which must suspend operations until the interference is eliminated or it is demonstrated that the LPFM station is not the interference source. 47 CFR § 73.807(e)(2); see *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15432, para 85 (2012) (*LPFM Sixth Report and Order*) and 47 CFR § 73.807(e)(2)(ii). See also, e.g., *New LPFM Stations at Birmingham, Alabama, LPFM MX Group 2*, Memorandum Opinion and Order, 31 FCC Rcd 5163, n.10 (2016) (LPFM station operating pursuant to a second-adjacent channel waiver must suspend operations upon Commission notification and cannot resume operations until elimination of interference or demonstration that LPFM station is not the interference source).

<sup>11</sup> Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, to New River, *et. al.*, File No. BLL-20170807AAT (MB Apr. 23, 2020) (*Cease Operations Letter*). On September 28, 2020, the Bureau denied New River's request to vacate the *Cease Operations Letter*. Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, to New River, *et. al.*, File No. BLL-20170807AAT (MB Sep. 28, 2020) (*September 2020 Decision*).

<sup>12</sup> See *September 2020 Decision* at 1.

2020 Letter Decision that New River failed to eliminate the alleged interference or demonstrate that WYPH-LP was not the source of the interference.<sup>13</sup>

Subsequently, New River petitioned for reconsideration of the *September 2020 Letter Decision*, requesting that the Bureau accept New River's previous interference showing as sufficient or alternatively order that on-off testing be conducted by a third-party engineer.<sup>14</sup> Also, Red Wolf filed a supplement to the Complaint, arguing that the WYPH-LP license should be rescinded because New River installed what Red Wolf calls an "unauthorized" antenna at the WYPH-LP transmitter site, which Red Wolf claims caused interference to WDRC-FM.<sup>15</sup>

In the *March 2021 Letter Decision*, the Bureau affirmed its conclusion in the *September 2020 Letter Decision* that New River failed to demonstrate that WYPH-LP was not the source of the alleged interference to WDRC-FM and that, apart from brief test transmissions for testing purposes, WYPH-LP cannot resume operations until New River eliminates the interference or demonstrates that WYPH-LP is not the source the interference.<sup>16</sup> The Bureau also denied Red Wolf's Complaint supplement as an impermissible collateral attack on the WYPH-LP license grant.<sup>17</sup> The Bureau further ordered New River and Red Wolf to jointly engage, within 90 days of the *March 2021 Letter Decision*, a third-party engineer to perform on-off testing to determine the source of the alleged interference to the WDRC-FM and submit the results to the Bureau for review.<sup>18</sup>

On March 26, 2021, Red Wolf filed the Petition repeating its previous argument that WYPH-LP is operating with an antenna that "violates sections 73.807(a)(1) and 73.807(e)(1) of the FCC's rules"<sup>19</sup> and that New River has failed to "establish that the [subject antenna] will not result in interference to any authorized radio service as required by section 73.807(e)(1) of the rules."<sup>20</sup> Red Wolf also cited the Commission's recent decision in *Chinese Voice* for its claim that, "strict adherence to the requirements of section 73.807(e)(1) is required."<sup>21</sup> Red Wolf declares that its engineering analysis "shows that WYPH-LP does not meet the requirements for a second-adjacent [channel] waiver using the Shively Antenna" and that "New River must correct this defect."<sup>22</sup>

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<sup>13</sup> *Id.* at 7.

<sup>14</sup> See Petition for Reconsideration, File No. BLL-20170807AAT (rec'd Oct. 28, 2020) (New River Petition).

<sup>15</sup> Red Wolf asserted that on-off testing would not be of any value "[u]ntil this violation is corrected." See Supplement to Complaint, File No. BLL-20170807AAT, at 2 (rec'd Oct. 28, 2020) (Complaint Supplement).

<sup>16</sup> See *March 2021 Letter Decision* at 9.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> Petition at 1. In the Petition, Red Wolf also noted that it filed a "complaint" with the Commission's Enforcement Bureau (EB), but did not attach a copy of the EB complaint or provide additional details on this filing.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 3 (citing *Chinese Voice of Golden City*, File Nos. BLL-20171120AAB, BMLL-20190809AAL, Memorandum Opinion and Order, 35 FCC Rcd 567 (MB 2020) (*Chinese Voice*) *aff'd*, 35 FCC Rcd 13638 (2020), appeal pending, *Chinese Voice of Golden City v. FCC*, No. 20-1514 (D.C. Cir 2021)).

<sup>22</sup> *Id.* at 3. On the same day that Red Wolf filed the Petition, it also filed a Motion to Stay (Motion) seeking to stay the effectiveness of the *March 2021 Letter Decision*, see Motion to Stay, File No. BLL-20170807AAT (rec'd Mar. 26, 2021). On April 2, 2021, the Bureau denied the Motion. Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to New River, *et. al*, File No. BLL-20170807AAT (MB Apr. 2, 2021) (*Motion to Stay Decision*).

*Interference Tests Results.* On April 5, 2021, New River submitted the Interference Test Results, which found no interference from WYPH-LP at certain locations cite in the WDRC-FM listener complaints.<sup>23</sup> New River opines that the Interference Test Results “revealed that there is no signal degradation whatsoever to WDRC-FM at any of these locations.”<sup>24</sup> New River also reports that Graziano is “completely independent” of the parties and “works as Chief Engineer of Radio Station WJMJ in Hartford, Connecticut, which . . . has no connection to either entity.”<sup>25</sup> New River further notes that despite repeated requests, Red Wolf declined to participate in the testing.<sup>26</sup> Lastly, New River requests that WYPH-LP be allowed to resume operations “immediately.”<sup>27</sup>

On April 16, 2021, Red Wolf replied that the Interference Test Results were “deficient” because the tests were not joint as required by the *March 2021 Letter Decision* and did not include all of the locations reported by the WDRC-FM listeners.<sup>28</sup> With respect to Red Wolf’s lack of participation in the tests, Red Wolf notes that the Bureau’s order provided 90 days to complete the testing. Red Wolf states that it “wanted to wait to start the joint testing” until the Bureau acted on Red Wolf’s then-pending motion to stay the *March 2021 Letter Decision*.<sup>29</sup> Regarding the merits of the tests, Red Wolf claims that the following locations were omitted from testing: Sheldon Road, North Main Street, and unspecified driving routes used by certain listener complainants.<sup>30</sup> Red Wolf also asserts that listeners Dave Chappell (Chappell), Joseph Pellegrino (Pellegrino), Ed Lamarre (Lamarre), and Nate Gezzelman (Gezzelman) reported “interference while traveling in their cars” but “[t]he Test Results did not include mobile testing on these routes.”<sup>31</sup> Concerning New River’s decision to test at a commercial property adjacent to the Private Residence, Red Wolf declares this testing is not “not valid” because New River did not attempt to

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<sup>23</sup> Interference Test Results at 3. In particular, New River reports that on March 31, 2021, engineer Michael Graziano (Graziano) performed on-off tests at the following locations: 74 Main Street (Saint Bridget’s School); 375 Oakland Street (Chiropractor’s Office); 827 Middle Turnpike East (Private Residence); and the WYPH-LP studio location, which was not cited by any listener complainants. See Report of Michael Graziano at 3 (Graziano Report), *id.* at 2. Graziano also reports “[t]esting was observed by [New River’s consulting engineer] Thomas R. Ray, III, CPBE, AMD, DRB, representing WYPH-LP, and who was in my vehicle turning the WYPH-FM transmitter on and off by remote control.” *Id.* at 1. Regarding the Private Residence, New River states that because it was occupied at the time of testing, Graziano tested at a commercial property “immediately adjacent to the property.” Specifically, Graziano stated:

At the time of the visit, it appeared that people were home, and it was decided not to check the signal in the driveway for two reasons: first we are still in the pandemic and it would not be appropriate to intrude on someone’s private property and second, their complaint was made over a year ago and they most likely would not remember filing it. It was decided not to risk a confrontation. Signal was checked in the business driveway immediately adjacent to the property.

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

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 2 & n.3 (detailing a series of emails, dated March 15–25, 2021, from New River’s counsel to Red Wolf’s counsel).

<sup>27</sup> *Id.* at 3.

<sup>28</sup> Interference Test Results Reply at 2.

<sup>29</sup> *Id.* at 2-3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

reach listener Gezzelman at the contact number listed on his complaint.<sup>32</sup>

*312(g) Letter.* On April 30, 2021, Red Wolf filed a letter arguing that the *March 2021 Letter Decision* is now “moot,” because the WYPH-LP license has expired pursuant to section 312(g) of the Act due to WYPH-LP’s silence for more than a year.<sup>33</sup> Specifically, Red Wolf opines that WYPH-LP went silent on April 23, 2020, and was required to return to the air by April 22, 2021, but did not.<sup>34</sup> Red Wolf declares that the March 31, 2021, on-off tests did not prevent automatic expiration of the WYPH-LP license under section 312(g), because even if programming was broadcast during said tests, “[such] short transmissions were for testing purposes and not intended to be received by the public.”<sup>35</sup> Red Wolf further claims that the on-off tests do “not meet the minimum operating requirements of section 73.850(b) [of the Rules], which requires a minimum of 5 hours of programming a day.”<sup>36</sup>

On May 5, 2021, New River responded that the 312(g) Letter is meritless because WYPH-LP has been silent “*for reasons one hundred percent out of the control of the Church.*”<sup>37</sup> New River claims that WYPH-LP has repeatedly sought to return to the air by submitting interference studies in “numerous pleadings” but “[t]he Commission has been dilatory in resolving this proceeding to the great detriment of the Church, its congregation, and the community of Manchester, Connecticut.”<sup>38</sup> New River declares that “if Red Wolf’s interpretation of section 312(g) [of the Act] were correct, the Commission could, without the slightest due process . . . , cancel broadcast licenses by ordering stations off the air pending investigations and simply delay the resolution of the process.”<sup>39</sup> New River also contends that pursuant to section 312(c) of the Act, the Commission cannot revoke a license without first issuing a show cause order and providing an opportunity for a hearing. New River asserts that section 312(g) of the Act “was never intended to confer on the Commission the summary authority, by its own inaction, to revoke a license without any due process obligation to the licensee whatsoever.”<sup>40</sup>

New River further declares that section 312(g) is not “absolute” but rather allows the Commission to extend or reinstate a license to promote “equity and fairness.”<sup>41</sup> Here, New River opines, equity and fairness require that the WYPH-LP license be found to be unexpired.<sup>42</sup> New River further states that WYPH-LP broadcast programming during the testing and “any radio broadcasting station which is transmitting programming is, by definition, doing so to disseminate radiocommunications intended to be received by the public.”<sup>43</sup> Lastly, New River argues that the five hour minimum daily operational

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<sup>32</sup> *Id.* at 3.

<sup>33</sup> 47 U.S.C. § 312(g).

<sup>34</sup> 312(g) Letter at 1.

<sup>35</sup> *Id.* at 2 & n.5 (citing *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 609, para. 8 (2008) (*A-O Broadcasting*); *Modesto Graffiti Radio Project*, Letter, 31 FCC Rcd 7214, 7218 (MB 2016), and *ETC Comm’ns, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd, 10686 (MB 2010) (*ETC Communications*)).

<sup>36</sup> *Id.* at n.9.

<sup>37</sup> 312(g) Letter Opposition at 1 (emphasis original).

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 3.

requirement in section 73.850(b) of the Rules is inapplicable because section 312(g) of the Act does not specify a “minimum period of time a station has to be placed on the air to toll the license forfeiture provision thereof.”<sup>44</sup>

On May 12, 2021, Red Wolf replied that “[t]he expiration of the WYPH-LP license was not outside of New River’s control.”<sup>45</sup> Red Wolf asserts that New River failed to file a written notification that it suspended WYPH-LP’s operations.<sup>46</sup> Red Wolf notes that the Bureau stated “the notification requirement is the primary way the Commission can ensure that it is aware of impending automatic expirations pursuant to section 312(g) of the Act and can attempt to assist stations to return to the air prior to that statutory loss of license.”<sup>47</sup> Red Wolf claims that New River could have avoided automatic expiration of the WYPH-LP license by requesting special temporary authority (STA) to operate with alternate facilities. Red Wolf contends that the circumstances presented here “are similar to *Wilks License Company*, where an FM translator went silent to avoid causing interference to a full power station and its license expired pursuant to 312(g) when it failed to go back on the air within twelve months. [There], the Media Bureau noted the translator licensee could have ‘requested an STA to return the Station to air with temporary, lesser facilities that would not present an interference problem.’”<sup>48</sup> Red Wolf declares that “New River’s failure to follow the FCC’s rules undercuts any argument that it is entitled to a waiver of section 312(g) as following the FCC’s rules is not something that was beyond New River’s control.”<sup>49</sup>

**Discussion. Interference Test Results.** We have reviewed the Interference Test Results submitted by New River and find that they demonstrate that WYPH-LP is not the source of the interference to the over-the-air reception of WDRC-FM. As an initial matter, we note that we are accepting the Interference Test Results even though they were submitted only by New River. On March 10, 2021, the Bureau ordered Red Wolf and New River to participate in the on-off testing.<sup>50</sup> Subsequently, in a series of emails to Red Wolf, New River repeatedly sought Red Wolf’s participation in the on-off testing but Red Wolf did not commit to participating in such testing.<sup>51</sup> On March 24, 2021, Commission staff reaffirmed in an email to the parties that Red Wolf was obligated “to work cooperatively . . . and to move expeditiously to resolve the matter.”<sup>52</sup> Despite the Bureau’s order and New River’s repeated solicitations, Red Wolf refused to participate in the on-off testing proposed by New

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<sup>44</sup> *Id.*

<sup>45</sup> 312(g) Letter Reply at 1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1-2 (quoting *Amendment of Parts 73 and 74 to Improve Low Power FM Radio Service Technical Rules*, Report and Order, 35 FCC Rcd 4115, 4135 (2020) (*LPFM Technical Service Rules Order*)).

<sup>48</sup> *Id.* at 2 (quoting *Wilks License Company*, Letter, 29 FCC Rcd 4903, 4907 (MB 2014) (*Wilks*)).

<sup>49</sup> *Id.*

<sup>50</sup> See *March 2021 Letter Decision* at 7; see also *LPFM Sixth Report and Order*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15432, para. 85 (2012) (concluding that an LPFM station may demonstrate that it is not the source of second-adjacent channel interference by conducting an on-off test, and requiring that full-service stations cooperate in such tests as required for third-adjacent channel LPFM interference testing, citing, *inter alia*, 47 CFR § 73.810); see 47 CFR § 73.810(b)(1) (stating that “the LPFM and affected stations must cooperate” in an on-off test when required to determine whether the third-adjacent channel interference is traceable to the LPFM station).

<sup>51</sup> See *supra* note 26.

<sup>52</sup> See Email from James Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau (Mar. 24, 2021 1:49 PM EDT). Exh. 1, Interference Test Results Reply.

River. Given that the Bureau had previously rejected Red Wolf's assertion that WYPH-LP was operating with an antenna that violated the Rules, it was not reasonable for Red Wolf to claim in its response to New River's final solicitation that testing with the subject antenna would be a waste of resources. We note that Red Wolf could have participated in the testing performed on March 31, 2021, even if just as an observer, while awaiting the Bureau's decision on its then-pending Motion to stay the *March 2021 Letter Decision*, which the Bureau subsequently dismissed.<sup>53</sup> Under these circumstances, we find that Red Wolf's decision not to participate in the testing with New River was unreasonable, and we will accept the Interference Test Results notwithstanding Red Wolf's nonparticipation in the testing.

Our independent engineering review has determined that the Interference Test Results demonstrate that WYPH-LP is not the source of interference to the over-the-air reception of WDRC-FM at the tested locations. In particular, we have reviewed the methodology employed during the on-off testing and we find the results to be reasonable and accurate. We are, therefore, accepting the Interference Test Results submitted by New River. Regarding Red Wolf's objections to specific locations reported by the listener complainants that were tested,<sup>54</sup> we note that if Red Wolf had participated in the on-off testing as ordered by the Bureau, it could have raised its concerns with the testing at that time. Here, however, as discussed above, Red Wolf unreasonably refused to participate in the on-off testing as directed multiple times by the Bureau and staff. In the future we encourage Red Wolf to participate in joint testing when provided the opportunity to do so.

Therefore, based on the Interference Test Results, we will dismiss the Complaint. We also remind the parties that New River's obligation to refrain from interference is on-going. Should WYPH-LP cause interference to the over-the-air reception of WDRC-FM, Red Wolf may file a new complaint. However, based on the findings discussed herein, so long as WYPH-LP operates under the current licensed facilities, any new interference complaint that Red Wolf files against WYPH-LP should exclude the tested locations that have been shown to not cause interference to WDRC-FM.<sup>55</sup>

*312(g) Letter.* Section 312(g) of the Act stipulates that "[i]f 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."<sup>56</sup> Thus, per section 312(g) of the Act, a broadcast station license expires and is forfeited automatically by operation of law without further Commission action if the station is silent for twelve consecutive months.<sup>57</sup>

We find that for purposes of section 312(g), WYPH-LP has been continuously silent for more than 12 consecutive months. WYPH-LP suspended operations on April 23, 2020, as ordered by the

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<sup>53</sup> See *supra* note 22.

<sup>54</sup> Specifically, Saint Bridget's School; the Chiropractor's Office; and the commercial property "immediately adjacent" to the Private Residence. See *supra* and Graziano Report, Interference Test Results.

<sup>55</sup> Specifically, Saint Bridget's School; the Chiropractor's Office; and the Private Residence.

<sup>56</sup> 47 U.S.C. § 312(g).

<sup>57</sup> See also *V.I. Stereo Comm'n Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259, 14262, para. 8 (2006) (broadcast licenses expire and forfeit automatically at the end of 12 consecutive months of silence) and *Ernest T. Sanchez*, Letter, 31 FCC Rcd 7087, 7088 (MB 2016) ("Because the Station was silent for over 12 consecutive months, its license automatically expired on November 21, 2014, by operation of law without further Commission action.").

Bureau in the *Cease Operations Letter*,<sup>58</sup> and apart from the on-off testing conducted on March 31, 2021, pursuant to the *March 2021 Letter Decision*, WYPH-LP has remained silent.<sup>59</sup> While New River asserts that WYPH-LP broadcast programming during the on-off testing and therefore automatic forfeiture under section 312(g) is not triggered here,<sup>60</sup> it is well settled that equipment tests are not transmissions of broadcast signals for purposes of section 312(g).<sup>61</sup> In *A-O Broadcasting*, the Commission held that the use of music or voice cannot transform equipment tests into broadcast service, even if the test signals are audible by the public.<sup>62</sup> Thus, New River's assertion that WYPH-LP provided program service during the on-off testing is insufficient to demonstrate that such transmissions broke the station's silence for purposes of section 312(g) of the Act and that the WYPH-LP license did not automatically expire.

We reject New River's erroneous assertion that because the Bureau had ordered WYPH-LP to cease operations until it made the showing required by section 73.807(e) of the Rules, the WYPH-LP license did not expire automatically when the station remained silent for twelve consecutive months.<sup>63</sup> Contrary to New River's assertions, neither section 312(a) nor 312(c) of the Act precludes automatic license expiration and forfeiture pursuant to section 312(g) in cases where a station is required to suspend operations due to interference in accordance with the Rules. In a previous case involving an FM translator station that was required to suspend operations due to an interference complaint from a full-service station, the Bureau found that the translator station's license expired under section 312(g) after translator was silent for twelve consecutive months.<sup>64</sup> Similarly, here, the fact that WYPH-LP went silent due to an interference complaint from a full-service station, as required by section 73.807(e) of the Rules, does not exempt WYPH-LP from automatic expiration and forfeiture of the station license under section 312(g) of the Act.

Notwithstanding the fact that WYPH-LP has been continuously silent for more than 12 consecutive months, section 312(g) of the Act affords the Commission discretion, where appropriate, to extend or reinstate a forfeited license. Specifically, section 312(g) provides that "the Commission may extend or reinstate such a 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."<sup>65</sup>

Here, we find that we have discretion to reinstate the WYPH-LP license under the "prevails in an administrative or judicial appeal" exception set forth in section 312(g). As discussed above, we are dismissing Red Wolf's Complaint because we find that the Interference Test Results that New River submitted in response to the *March 2021 Letter Decision* conclusively demonstrate that WYPH-LP is not the source of the alleged interference to WDRC-FM. Contrary to Red Wolf's assertions, we find *Wilks*, which involved the automatic expiration of an FM translator license, to be distinguishable from the

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<sup>58</sup> See *Cease Operations Letter* at 2.

<sup>59</sup> See New River Petition at 2, n.2.

<sup>60</sup> See 312(g) Letter Opposition at 2.

<sup>61</sup> See *A-O Broadcasting*, 23 FCC Rcd at 609, para.12 (holding equipment tests "are not transmissions of broadcast signals as required by Section 312(g)"); see also *ETC Communications*, 25 FCC Rcd at 10688 ("Commission's policy that transmitting an equipment test pattern was insufficient to establish a break in a station's silence for the purpose of Section 312(g)).

<sup>62</sup> *A-O Broadcasting*, 23 FCC Rcd at 609, para.12.

<sup>63</sup> See 312(g) Letter Opposition at 1-2.

<sup>64</sup> See *Wilks*, 29 FCC Rcd at 4903.

<sup>65</sup> 47 U.S.C. § 312(g) (emphasis added).



present case. In *Wilks*, an FM translator license was found to have expired pursuant to section 312(g) because the translator failed to resume broadcasting within 12 months of suspending operations while it awaited the outcome of a petition for reconsideration of the grant of a construction permit to relocate the translator to another channel.<sup>66</sup> There, the Bureau noted that the *Wilks* licensee could have constructed the construction permit and assumed the risk that the permit grant would be rescinded, or that alternatively the licensee could have requested an STA to operate the translator with temporary facilities. However, the licensee “neither constructed nor requested an STA to resume operations before the 312(g) Expiration Date.”<sup>67</sup> By contrast, here, we ordered WYPH-LP to cease operations until it eliminates the interference alleged in the Complaint or demonstrates that WYPH-LP is not the source of the alleged interference, and New River has successfully made such a showing on appeal.<sup>68</sup> Accordingly, we find that this case, unlike *Wilks*, warrants the exercise of the discretion afforded by section 312(g), and we reinstate the WYPH-LP license.

*Petition.* 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>69</sup> Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is in the public interest.<sup>70</sup> As discussed below, Red Wolf has failed to demonstrate that reconsideration is warranted.

In the Petition, Red Wolf argues that the WYPH-LP License should be rescinded because the *March 2021 Letter Decision* sets a “dangerous precedent” by allowing licensees to operate with non-compliant facilities if disclosed in a license application and the time for reconsideration has expired.<sup>71</sup> We disagree. In the *March 2021 Letter Decision*, the Bureau correctly rejected Red Wolf’s argument as an impermissible collateral attack on the Bureau’s WYPH-LP License grant.<sup>72</sup> Indirect challenges to Commission decisions adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.<sup>73</sup> Here, the time period for filing a petition for reconsideration of the Bureau’s grant of the WYPH-LP License expired thirty days after the August 14,

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<sup>66</sup> See *Wilks* at 4903.

<sup>67</sup> *Id.*

<sup>68</sup> See *Cease Operations Letter* at 2; *September 2020 Letter Decision* at 7; *March 2021 Letter Decision* at 9; *Motion to Stay Decision* at 4-5.

<sup>69</sup> See 47 CFR § 1.106(c)-(d); see also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964).

<sup>70</sup> See 47 CFR § 1.106(c)(2).

<sup>71</sup> Specifically, Red Wolf states that New River disclosed in the WYPH-LP license application that it installed the Shively Antenna at the WYPH-LP transmitter site, rather than the Nicom Antenna specified in the construction permit. See Petition at 2.

<sup>72</sup> *March 2021 Letter Decision* at 8.

<sup>73</sup> See, e.g., *Lighthouse Christian Center*, 32 FCC Rcd. 6444, at 6446, para. 8 (we find this indirect challenge to our grant of the 2001 Permit Application constitutes an impermissible collateral attack and is properly denied.”). See also *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, 228 n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.*, *Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).

2017,<sup>74</sup> public notice announcing said grant.<sup>75</sup>

Moreover, even if considered on the merits, we would still deny the Petition. Per section 73.875(c)(1) of the Rules, an LPFM licensee may, without prior Commission authorization, file a modification of license application (FCC Form 319) notifying the Commission of the “[r]eplacement of an antenna with one of the same or different number of antenna bays, provided that the height of the antenna radiation center is not more than 2 meters above or 4 meters below the authorized values.”<sup>76</sup> Here, it is undisputed that in the WYPH-LP License application (FCC Form 319), New River disclosed to the Commission that it had installed the Shively Antenna at the same antenna height<sup>77</sup> authorized in the construction permit at the WYPH-LP transmitter site.<sup>78</sup> Thus, in this case the change in antenna and timely disclosure of the change on the WYPH-LP License was consistent with the Rules.<sup>79</sup>

We find *Chinese Voice*, which involved operation of a station at an unauthorized location and a violation of section 73.875(b)(2)<sup>80</sup> of the Rules, to be inapposite to the WYPH-LP License. Section 73.875(c)(1) of the Rules allows an LPFM station to replace an antenna, as specified therein, without prior Commission authorization, provided that the licensee timely notifies the Commission of the replacement on a modification of license application. In contrast, section 73.875(b)(2) of the Rules requires that an LPFM station seeking to change its coordinates must file a construction permit application, which requires prior approval by the Commission.<sup>81</sup> Here, New River made an antenna change that is permitted by section 73.875(c)(1) and provided the notification required by the Rule.

**Conclusion.** Accordingly, IT IS ORDERED that pursuant to section 405(a) of the Communications Act of 1934, as amended, and sections 0.204, 0.283, and 1.106 of the Commission’s

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<sup>74</sup> File No. BLL-20170807AAT (WYPH-LP License). *See Broadcast Actions*, Public Notice, Report No. 49049 (MB Aug. 15, 2017).

<sup>75</sup> Section 405(a) of the Act provides that “petitions for reconsideration must be filed within thirty days from the date upon which public notice is given of the action . . . complained of.” 47 U.S.C. §405 (a). Absent extraordinary circumstances, the Commission may not waive or extend this statutory 30-day filing period for petitions for reconsideration.

<sup>76</sup> 47 CFR § 73.875(c)(1). *See also, e.g., Jupiter Community Radio, Inc.*, Notice of Apparent Liability for Forfeiture, 35 FCC Rcd 11831 (EB 2020) (LPFM licensee notified of apparent section 73.875(c)(1) violation for operating with a different antenna without properly notifying the Commission).

<sup>77</sup> Specifically, both the WYPH-LP construction permit, File No. BPL-20160128BFG, granted on February 6, 2016, *see Broadcast Actions*, Public Notice, Report No. 49049 (MB Feb. 12, 2016), and the WYPH-LP License specified an antenna radiation center at 49 meters above ground.

<sup>78</sup> As noted above, Red Wolf acknowledges that New River disclosed that it substituted the Shively Antenna for the Nicom Antenna in an engineering statement attached to WYPH-LP License application. *See* Petition at 2; *see also* “Engineering Statement,” Attach. 5, WYPH-LP License.

<sup>79</sup> In the *March 2021 Letter Decision*, the Bureau stated “[n]otwithstanding the finality of the WYPH-LP License grant, however, we remind New River that it must ensure the accuracy of its application certifications and all other information submitted to the Commission.” *Id.* at 8. We clarify here that New River properly notified the Commission of the installation of the Shively Antenna.

<sup>80</sup> 47 CFR § 73.875(b)(2).

<sup>81</sup> 47 CFR § 73.875(b)(2).

rules,<sup>82</sup> the “Petition for Reconsideration” filed by Red Wolf Broadcasting Corporation on March 26, 2021, IS DENIED.

IT IS FURTHER ORDERED that the Letter filed by Red Wolf on April 30, 2021, IS DENIED.

IT IS FURTHER ORDERED that the “Complaint” filed on January 10, 2020, by Red Wolf Broadcasting Corporation IS DISMISSED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>82</sup> 47 U.S.C. § 405(a); 47 CFR §§ 0.204, 0.283, and 1.106.