

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

In re Applications of)	
)	
WYCQ, Inc.)	Facility ID No. 37022
)	File Nos. BPFT-940126TE,
for a Major Modification)	BRFT-960404ZG, and
and)	BLFT-930730TA
Renewal of Broadcast License)	
)	
for FM Translator Station DW234AB,)	
Nashville, Tennessee)	

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 2003

Released: August 20, 2003

By the Commission:

1. The Commission has before it an Application for Review filed by WYCQ, Inc. ("WYCQ").¹ WYCQ seeks review of a staff letter ruling² affirming an earlier staff decision finding that WYCQ's license for FM translator station W234AB, Nashville, Tennessee, expired automatically pursuant to Section 312(g) of the Communications Act of 1934, as amended (the "Act")³ because the translator station failed to broadcast for a consecutive twelve month period.⁴ The initial *Staff Decision* also deleted the station's call sign and dismissed WYCQ's pending applications for renewal and modification of facilities. Finally, the *Staff Decision* denied WYCQ's alternative request that its major modification application be treated as an application for a new FM translator station, with "cut-off" protection against competing applications. WYCQ asserts that the staff erred and requests that the license as well as the dismissed applications be reinstated. WYCQ also renews its alternative request that the major modification application be reinstated and treated as an application for a new FM translator with the March 28, 1994, cut-off date established at the time the modification application was accepted for filing.

¹ Also on file are the following responsive pleadings: Opposition to Application for Review filed by Tuned In Broadcasting, Inc., ("Tuned In"); Reply to Opposition filed by WYCQ; and Supplemental Pleading in Response to Reply to Opposition to Application for Review filed by Tuned In.

² See *Letter to John F. Garziglia, Esquire*, Ref. No. 1800B3-JWR (Aud. Serv. Div., Aug. 30, 1999) ("*Letter Ruling*").

³ 47 U.S.C. § 312(g). See also *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16599 (1996) ("*Silent Station Authorizations*"); 47 C.F.R. § 74.1263(e) (implementing and codifying the statutory requirement with respect to FM translator stations).

⁴ See *Letter to WYCQ, Inc.*, Ref. No. 1800B3-GDG (Aud. Serv. Div., Jun. 11, 1999) ("*Staff Decision*"). Translator station W234AB had been authorized to rebroadcast primary station WZPC(FM), Shelbyville, Tennessee.

The Application for Review is opposed by Tuned In Broadcasting. For the reasons discussed below, we deny the Application for Review.

A. Request to Reinstate Expired License

2. On January 26, 1994, WYCQ filed an application for major modification of W234AB to relocate the transmitter site and to increase facilities on its existing Channel 234, Nashville, Tennessee. On February 28, 1994, the application was accepted for filing and placed on Public Notice with March 28, 1994 established as the cut-off date for filing mutually exclusive applications and petitions to deny.⁵ On March 28, 1994, Tuned In filed an application for a new FM translator station on Channel 233, Nashville, Tennessee, which was mutually exclusive with WYCQ's major modification application. On September 6, 1996, W234AB went silent and on September 9, 1996, WYCQ notified the Commission that the translator suspended its operations because its licensed transmitter site was no longer available. On September 7, 1997, at 12:01 a.m., W234AB's license automatically expired as a matter of law for failure "to transmit broadcast signals for any consecutive 12-month period, notwithstanding any provision, term, or condition of the license to the contrary."⁶

3. On November 17, 1997, the staff informed WYCQ by letter that if the licensee could not document that the translator had resumed broadcast operations prior to September 7, 1997:⁷ (1) the Commission's public and internal databases would be modified to reflect the expiration of W234AB's license as a matter of law, (2) the pending modification and license renewal applications would be dismissed, and (3) W234AB's call sign would be deleted. On December 17, 1997, WYCQ filed a petition for reconsideration of the November 17, 1997, staff letter. In that petition, WYCQ conceded that the subject translator did not resume broadcast operations but requested that the Commission "reconsider" the staff letter. Alternatively, WYCQ requested that the Commission accept its conditional amendment filed on December 17, 1997, requesting that the modification application be treated as an application for a new FM translator station with the March 28, 1994, cut-off date established at the time the modification application was accepted for filing.

4. The *Staff Decision* found that: (1) the November 17, 1997, staff letter did not take any final action and therefore that a petition for reconsideration did not lie against the staff letter; (2) denied WYCQ's alternative request to treat the modification application as an application for a new FM translator station with cut-off protection, finding that WYCQ's reliance on the Commission's 1986 action in *WPOW*⁸ was misplaced; (3) modified the Commission's public and internal databases to indicate that W234AB's license expired, pursuant to 47 U.S.C. § 312(g), as a matter of law on September 7, 1997; (4) deleted the station call sign; (5) dismissed WYCQ's applications for renewal of W234AB's license and modification, and the December 17, 1997, petition for reconsideration. On July 19, 1999, WYCQ filed a

⁵ See *Public Notice, FM Translator-Booster Applications Ready and Available for Processing*, Report No. 94-2, (Feb. 28, 1994).

⁶ 47 C.F.R. § 74.1263(e). See 47 U.S.C. § 312(g).

⁷ The November 17, 1997, staff letter, the *Staff Decision*, and *Letter Ruling* erred in noting September 6, 1997, rather than September 7, 1997, as the expiration date of the translator's license.

⁸ *WPOW*, 66 R.R.2d 81 (1986).

petition for reconsideration, requesting reinstatement of the expired license or, in the alternative, requesting that the staff treat the major modification as an application for a new translator station with cut-off protection. On August 30, 1999, the staff issued a *Letter Ruling* which denied WYCQ's petition for reconsideration.

5. In its Application for Review, WYCQ argues that the staff erred in its interpretation of Section 312(g) and inequitably terminated the station's license. Specifically, WYCQ argues that the translator could not timely resume operations due to the Commission's own inaction on the modification application. This application specified a new transmitter site.⁹ WYCQ urges the Commission to interpret Section 312(g) such that a station's 12-month period of silence is tolled during the pendency of a modification application that is necessary for a station to resume operations. WYCQ argues further that if Section 312(g) compels licensees to resume operations of silent broadcast stations within one year, the FCC has a duty to act within one year on pending modification applications that are necessary for a station to resume operations. According to WYCQ, it specifically advised the Commission on several occasions, including its September 9, 1996, notice of the translator's temporary discontinuance of operations, and in subsequent telephone status inquires to Commission staff, that the translator was forced off the air because of the loss of its authorized transmitter site and that grant of the modification application was necessary for the station to return to the air.

6. **Discussion.** As we have previously held and the court has affirmed, "Section 312(g) accords us no discretion and mandates that a station license will automatically expire as a matter of law if it does not 'transmit broadcast signals' for 12 consecutive months."¹⁰ Moreover, we earlier stated in the

⁹ There is a related matter pending before the staff, concerning the exclusion of WYCQ's application for a major modification of translator station W234AB's facilities from a settlement window. The exclusion was based on the forfeiture of W234AB's license pursuant to Section 312(g) and dismissal of its modification application. W234AB's major modification application was mutually exclusive with Tuned In's application for a new FM translator station on Channel 233, Nashville, Tennessee. Tuned In's application was filed on March 28, 1994, the cut-off date established for filing mutually exclusive applications or petitions to deny against W234AB's modification application. In turn, Tuned In's application was mutually exclusive with a timely filed application of Southwest Florida Community Radio, Inc. ("Southwest Florida") for a new FM translator station on Channel 233, Hendersonville, Tennessee. Southwest Florida's application had the same cut-off date as WYCQ's application. The applications of WYCQ and Southwest Florida, however, were not mutually exclusive with one another. WYCQ and Tuned In attempted to resolve their applications' mutual exclusivity, with Tuned In seeking to amend its application to specify Channel 246 in lieu of Channel 233 while retaining cut-off protection from competing applicants. Tuned In's amendment was filed on January 27, 1997, before the September 7, 1997, expiration of WYCQ's translator station license. However, the staff properly returned Tuned In's amendment as unacceptable for filing because it was a major change and, therefore, could not be acted upon without inviting competing applications pursuant to the 30-day notice requirements of Section 309 of the Act (47 U.S.C. § 309). *See also* 47 U.S.C. § 311(a); 47 C.F.R. § 73.3580. Tuned In was notified of this by letter dated June 10, 1999. *See Letter to David D. Oxenford, Esquire*, Ref. No. 1800B3-JR (Aud. Serv. Div., Jun. 10, 1999). On October 23, 2001, WYCQ filed a petition for reconsideration of the Public Notice announcing the opening of a settlement window for certain mixed mutually exclusive groups. WCYQ seeks reconsideration of its exclusion from FM Translator MX Group 9401T1 listed on this Public Notice. Tuned In and Southwest Florida were included in the Public Notice and on November 30, 2001, filed a settlement agreement to resolve their mutual exclusivity over Channel 233 Nashville, Tennessee, and Channel 233 Hendersonville, Tennessee, respectively. Those matters remain pending and will be addressed separately.

¹⁰ *OCC Acquisitions, Inc.*, 17 FCC Rcd 6147, 6151, n.14 (2002), ("*OCC Acquisitions*"), *aff'd per curiam*, *OCC Acquisitions, Inc. v. FCC*, Case No. 02-143 (D.C. Cir., May 5, 2003). *See also Aerco Broadcasting Corp. v. FCC*, Case No. 01-1466, 51 Fed. Appx. 23 (D.C. Cir., Nov. 21, 2002) (station license automatically forfeited for 12-(continued....))

Commission Order implementing Section 312(g) that “*the modification of the licensed facilities, special temporary authorizations to remain silent . . . and other such transactions will not toll or extend the 12-month period, notwithstanding any provision in any authorization to the contrary. Neither can the Commission prevent the automatic expiration of the license by waiver.*”¹¹ The staff further emphasized that, “as a matter of law, the staff’s inability to act on any application within a specific time can not prevent license expiration nor give rise to any equitable claim that the license term should be extended.”¹² Accordingly, it is well established that “[t]he responsibility for bringing a silent station back on the air is that of the licensee.”¹³

7. The Commission has set up specific procedures for returning silent stations to the air and avoiding automatic cancellation. Given the strict statutory scheme, it was WYCQ’s responsibility to avail itself of the procedures announced by the staff on May 22, 1996,¹⁴ and reiterated by the staff on October 17, 1996.¹⁵ WYCQ believes that it should have received expedited consideration simply because its September 9, 1996, notification that W234AB had ceased operations indicated that grant of a modification application was necessary to return to the air. WYCQ also claims to have made telephone status inquiries to unnamed staff members, therein requesting expedited processing. There is no record that WYCQ followed the announced procedures. It is regrettable that the conflicts among the technically related WYCQ, Tuned In, and Southwest Florida applications could not be resolved prior to the September, 1997 deadline. The *Deadline for Silent Stations PN*, however, cautioned silent station licensees that they could not rely with certainty on the staff completing its processing of *routine* applications pending three months prior to the one-year deadline. The prospects for completing processing of *non-routine* applications such as WYCQ’s, which would require the staff to favorably resolve complex factual issues under the former, rarely used conflict procedures for FM translators,¹⁶ were considerably more uncertain. In these circumstances, WYCQ should have recognized that it was necessary to pursue an alternative strategy during the summer of 1997 to preserve the station license. In this regard, WYCQ did not request special temporary authority to resume operations from a temporary site or file a minor change application.

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month period of inactivity despite transmission of a test pattern during this period) (*affirming Carlos J. Lastra*, 16 FCC Rcd 17268 (2001)). See also *Silent Station Authorizations*, 11 FCC Rcd at 16600; *Public Notice, Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcasting Stations*, 11 FCC Rcd 14356 (M.M. Bur./Int. Bur. 1996) (“*Silent Station Public Notice*”); *Public Notice, Deadline Approaching for Silent Broadcast Stations: AM and FM Stations Urged to File Related Applications By November 1*, 11 FCC Rcd 13241 (M.M. Bur./Int. Bur. 1996) (“*Deadline for Silent Stations PN*”).

¹¹ *Silent Station Authorizations*, 11 FCC Rcd at 16601 (emphasis added).

¹² *Silent Station Public Notice*, 11 FCC Rcd at 14356.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Deadline for Silent Stations PN*, 11 FCC Rcd at 13241 (1996).

¹⁶ See 47 C.F.R. § 74.1233 (f) (1997) (specifying priorities including number of aural services, the need for public radio service, relative size of communities and their growth rates).

B. Request to Convert Major Modification Into Application for New FM Translator with Cut-Off Protection

8. After the translator had been silent for more than 12 consecutive months, WYCQ requested that its modification application be reinstated and converted, by minor amendment, into an application for a new FM translator station. WYCQ argued that the converted application should be entitled to full protection from competing applications as of March 28, 1994, the original “cut-off” date,¹⁷ and that such action would be consistent with the Commission decision in *WPOW*. In its Application for Review, WCYQ repeats these arguments and contests the staff’s conclusion that the circumstances in *WPOW* are inapposite.

9. **Discussion.** *WPOW* is distinguishable on several counts. Most notably, *WPOW* involved an operating station with a valid license at the time the licensee requested that its pending major modification application be converted into an application for a new station. In contrast, WYCQ’s major modification application effectively became moot on September 7, 1997, when the license expired as a matter of law. Only *thereafter*, in its December 17, 1997, pleading, did WYCQ submit its amendment/conversion request. However, by operation of law, there no longer existed any translator station license to modify, and the modification application had become null and void. In the absence of a valid pending modification application, there was nothing to amend and “convert” into an application for a new translator station.

10. We also concur with the staff that *WPOW* is separately distinguishable from the case at hand on technical grounds. WPOW, licensee of AM facilities licensed to Troy, New York, on 1330 kHz, initially filed a major modification application proposing to change both its community of license (to East Greenbush, New York) and its frequency (to 640 kHz). Because WPOW’s existing and proposed new operations could technically co-exist, the protection afforded to WPOW’s already licensed facilities on 1330 kHz under Commission rules had no effect on interested parties’ opportunity to file competing applications against WPOW’s proposed modified facilities.¹⁸ Consequently, the subsequent conversion of WPOW’s major modification application, by amendment, into an application for a new station based on the modification application’s original filing date would not prejudice the rights of any potential applicant seeking to propose facilities in conflict with WPOW’s 640 kHz/East Greenbush proposal. The Commission granted WPOW’s request and treated the modification application as one for a new station.

11. In contrast, the subject major modification application was to enhance W234AB’s then-existing facilities, relocating the transmitter site, but not changing the community of license or the frequency. As a result of the protection afforded to a licensee’s existing facilities under Section 74.1204(a) of the Commission rules, competing proposals were required to protect W234AB’s then-licensed facilities.¹⁹ Thus, the rights of interested parties to file competing applications would have been prejudiced by subsequent amendment and conversion of WYCQ’s application into one for a new FM

¹⁷ See *supra* note 5.

¹⁸ See 47 C.F.R. § 74.1204(a).

¹⁹ Tune-In’s application conflicted, permissibly, with the W234AB modification application, but not with W234AB’s existing facilities.

translator.²⁰ Accordingly, we uphold the staff action separately on this basis.

12. Accordingly, IT IS ORDERED; that the Application for Review filed by WYCQ, INC., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ See *Staff Decision* at 3.