



Federal Communications Commission
Washington, D.C. 20554

June 30, 2016

DA 16-741

In Reply Refer to:

1800B3-MML

Released: June 30, 2016

Mr. David Jackson
Modesto Graffiti Radio Project
2625F Coffee Rd., Suite 171
Modesto, CA 95355-2053

In re: Modesto Graffiti Radio Project
DKXOK-LP, Modesto, CA
Facility ID No. 124794
File No. BPL-20160113ABT

Petition for Reconsideration

Dear Mr. Jackson:

We have before us the Petition for Reconsideration (Petition) filed February 25, 2016, by Modesto Graffiti Radio Project (Modesto), former licensee of Low Power FM (LPFM) Radio Station DKXOK-LP, Modesto, California (Station).¹ The Petition seeks reconsideration of the Media Bureau's (Bureau) letter decision finding that the Station's license had expired pursuant to Section 312(g) of the Communications Act of 1934, as amended (Act)² and deleting its call sign.³ For the reasons set forth below, we dismiss in part and otherwise deny the Petition.

Background. The Bureau granted a license for a 100-watt LPFM station⁴ to Modesto⁵ in December of 2005.⁶ On February 7, 2014, Modesto filed a request for special temporary authorization (STA) to remain silent, indicating that the Station had ceased operations on January 10, 2014, after a dispute with its landlord resulted in its being locked out of its studio.⁷ The Bureau granted the First STA on May 2, 2014,⁸ with the warning that if broadcast operations did not resume by January, 11, 2015, the Station's license would expire automatically as a matter of law pursuant to Section 312(g) of the Act.

¹ Petitioner filed a supplement to the Petition on March 3, 2016. See Letter from David F. Jackson, Project Director, DKXOK-LP Radio 107.9, to LPFM Desk (March 3, 2016) (Supplement).

² 47 U.S.C. § 312(g).

³ See Letter to Mr. David Jackson, *First Nation Westside Project*, Ref. 1800B3-VM, (MB Feb. 18, 2016) (*Expiration Letter*).

⁴ The *Inquiry Letter* and *Expiration Letter* incorrectly state that the licensed power for the Station is 50 watts.

⁵ The Station license was originally issued to Westside Project Community Center (WPCC), which later purportedly changed its name to Modesto Graffiti Radio Project. See Letter from David F. Jackson, President/Station Director, Westside Project (May 29, 2015) (*May 2015 Letter*). The first filing by Modesto, as opposed to WPCC, was the June 24, 2015 request to remain silent detailed in Note 15, *infra*.

⁶ See BLL-20050614AAS, granted on December 2, 2005.

⁷ See File No. BLSTA-20140207AAO, Exhibit 1 (First STA).

⁸ See Letter to Michael Ingram, *Westside Project (Community Center)*, Reference 1800B3-DW (MB May 2, 2015).

WPCC filed a request for extension of its authority to remain silent on June 24, 2014.⁹ The Bureau granted the Second STA on August 27, 2014, and again warned the licensee that the Station's license would expire if it did not resume authorized operations by January 10, 2015.¹⁰ On February 25, 2015, Modesto filed a Notice of Resumption of Operations (Resumption Notice) stating that on January 3, 2015, the Station "returned to air with auxiliary 10-watt transmitter from temporary antenna site in Modesto, CA." On June 24, 2015, Modesto again requested STA to remain silent due to "technical issues at our transmitter site."¹¹

On July 14, 2015, the Bureau sent the *Inquiry Letter*¹² because the Resumption Notice appeared to reflect operation with noncompliant facilities, *i.e.*, with lower power than licensed and at an unauthorized transmitter site.¹³ Specifically, the Bureau's letter requested that Modesto provide materials documenting the operational status of the Station since January 10, 2014.¹⁴

On August 11, 2015, and August 19, 2015, Modesto responded to the *Inquiry Letter*, stating that "the [S]tation had returned to the air on 8 December 2014 [not January 3, 2015, as specified in the Resumption Notice]" from a "Seventh Street" location in Modesto, and "had broadcast continuously for a period of 72 hours," but providing no documentation in support of these indefinite claims.¹⁵ Mr. Jackson explained the disparity in resumption dates by stating that "the station's previous chief engineer was wise enough to turn the station's transmitter on for several days."¹⁶ Mr. Jackson also indicated in Modesto Graffiti Letter 1 that he was "told that the transmitter had been operated at reduced power (10% less) which [he mistakenly] understood to mean ten watts," but it had since been explained to him that 'reduced power' meant only that the transmitter was not operated at its full power and that, in fact, the Station had been operating at the station's licensed 100-watt power limit.¹⁷ Additionally, Mr. Jackson claimed that

⁹ See File No. BLESTA-20140624AAA, Attachment 2 (Second STA), indicating that "We are still in litigation and need more time? [sic]"

¹⁰ *Letter to Mr. Michael Ingram, Westside Project (Community Center)*, Ref. 1800B3-MAT (MB Aug. 27, 2014).

¹¹ See File No. BLSTA-20150624AAL, Exhibit 1. The licensee indicates that, due to difficulties in obtaining replacement equipment, the Station would not likely return to the air until July 8, 2015. *Id.* The staff granted this request on September 1, 2015. *Letter to Mr. David Jackson, First Nation Westside Project*, Ref. 1800B3-VM, (MB Sept. 1, 2015).

¹² *Letter to Mr. David Jackson, First Nation Westside Project*, Ref. 1800B3-VM (MB July 14, 2015) (*Inquiry Letter*).

¹³ Two complaints were also filed by Dr. Bernardo Mora, of Grace Orthodox Presbyterian Church of Modesto, on March 23, 2015, and June 25, 2015, indicating that he was monitoring the Station's operation, and he had not detected any transmissions since January 10, 2014. See Informal Objections filed by Bernardo Mora, Grace Orthodox Presbyterian Church of Modesto, CA, dated March 23, 2015 and June 25, 2015. Although the validity of the complaints was subsequently contested by Modesto – *see, e.g.*, Petition at 1-2 -- we note that the Bureau's *Inquiry Letter* and the *Expiration Letter* were not based upon Dr. Mora's allegations, and those filings will receive no further discussion.

¹⁴ *Inquiry Letter* at 2 ("Include copies of all leases, personnel records, engineering records, station logs, invoices, bills, checks written or received, credit card charges, wire transfers or deposits of funds relating to the Station's operation.").

¹⁵ See Letters from David F. Jackson, Station Director, Modesto Graffiti Radio Project, to Peter H. Doyle, Chief, Audio Division, Media Bureau, dated Aug. 11, 2015 (Modesto Graffiti Letter 1) and Aug. 18, 2015 (Modesto Graffiti Letter 2).

¹⁶ Modesto Graffiti Letter 1 at 1. Jackson did indicate what, if any, programming the station aired during that time, did not identify the chief engineer and did not submit an affidavit from this individual.

¹⁷ *Id.*

his reference to the transmitter site as “temporary” was an unfortunate “matter of semantics”; he stated that, because Modesto was facing the loss of its original site on Seventh Street, operation from that location was, in fact, “temporary.”¹⁸ Modesto also claimed that the Station had been broadcasting from the licensed transmitter site with an FCC-certified transmitter that was loaned to the Station.¹⁹

In Modesto Graffiti Letter 2, Mr. Jackson contended that although he misinterpreted several directions, the Station complied with all legally mandated requirements, and the Station’s physical facilities “[met] or exceed[ed] the facilities of most commercial stations.”²⁰ Mr. Jackson added that pending “the Commission’s favorable decision,” the Station [was] prepared to return to the air with fulltime broadcasting.²¹

On February 18, 2016, the Bureau sent the *Expiration Letter* informing Modesto that it had failed to establish that the Station operated between January 10, 2014 and 12:01 a.m. January 11, 2015, because Modesto did not submit any of the information required by the *Inquiry Letter*.²² The Bureau held that although Modesto Graffiti Letter 1 stated that operations resumed at “Seventh Street,” it did not define the “Seventh Street” location as the licensed site or explain how, if it is the licensed site, that site was used after the January 2014 lockout.²³ Thus, the Bureau found that the Station’s license expired as a matter of law at 12:01 a.m. on January 11, 2015, pursuant to Section 312(g).²⁴

In the Petition, Mr. Jackson acknowledges that his lack of experience in dealing with the Commission was a “clear disadvantage,” but he claims that he “did everything possible to meet every legally mandated requirement.”²⁵ With respect to Modesto’s failure to provide *any* of the documentation requested by the *Inquiry Letter*, Mr. Jackson claims that other silent stations in the area were not required to submit any documentation when they filed Resumption of Operation Notices.” He also references (but does not identify) a station that, when it lost access to its transmitter site, returned to the air with less than full power from an adjacent tower and was not asked to provide any engineering or operating data or logs. This, he claims, is “common practice that is employed from time to time by broadcast engineers apparently without penalty.”²⁶ Mr. Jackson claims that all work done on the station was provided by community volunteers, and “[t]he station did not have then, and does not have now, any leases, personnel records, or other such documentation,” as its studio/office space and transmitter location were provided by local businesses at no charge.²⁷

¹⁸ *Id.* at 2. Modesto indicated that it has since entered into agreement with a local tower operator to operate from a registered tower “near the original licensed location,” indicating that an application specifying that tower “has been filed as of August 11, 2015.” That application, File No. BPL-20150915AFA was dismissed as defective on September 18, 2015. See *Letter to Modesto Graffiti Radio Project*, reference 1800B3 (MB Sep. 18, 2015).

¹⁹ *Id.* Modesto indicated that it intends to replace that transmitter with a new unit but is awaiting the outcome of this proceeding.

²⁰ Modesto Graffiti Letter 2 at 1-2.

²¹ *Id.* at 2.

²² *Expiration Letter* at 3.

²³ *Id.* There is confusion in the record whether the site of the lockout was Modesto’s transmitter site at 517 7th Street or a separate studio location at 417 7th Street. The First STA states, “We were illegally locked out of the building.” In the Petition, Modesto explains the location of the lockout was the Station’s “ersatz studio location.” Petition at 3.

²⁴ *Id.*

²⁵ Petition at 2.

²⁶ *Id.*

²⁷ *Id.* at 3.

Regardless, Modesto explains that although Station personnel were locked out of the Station's studio at 417 Seventh Street in Modesto, they retained access to the licensed transmitter tower "across the street, one block away" from which the Station resumed operations.²⁸ It further contends that its error was including additional detail in the Resumption Notice that was neither requested nor required and that the additional, unnecessary details provided regarding the date of resumption of operation and the reduced power were incorrect.²⁹ In the Supplement, Modesto adds that the station is "prepared to resume broadcasting on a fulltime basis," and has "a signed and fully-paid lease to transmit from an FCC-registered tower in Modesto."³⁰

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 new facts or changed circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.³¹

Modesto's argument that it could not provide any documentation because all work done on the Station is provided by volunteers, is untimely because it is raised for the first time in the Petition.³² However, we note that even a timely assertion of this argument would not excuse the Station's obligation to fully respond to the letter of inquiry.³³ Modesto has not provided any information beyond its own unsupported—and conflicting—statements that the Station resumed operation prior to 12:01 a.m. January 11, 2015. Modesto strains credibility when it claims to have no documentation regarding work performed (even on a volunteer basis), equipment, utility bills, services rendered, or studio/transmitter site permission; the statement also appears inconsistent with Modesto's prior claim that it was "illegally" locked out of its previous studio location by its landlord.³⁴ Accordingly, we reject its unpersuasive explanation for its materially incomplete response to the *Inquiry Letter*.³⁵

Modesto's contention that the Bureau erred in the *Expiration Letter* because other stations routinely return to the air from unauthorized locations without being asked for supporting documentation to resume operations is a new argument that is improperly raised for the first time in its Petition.³⁶

²⁸ *Id.* at 3.

²⁹ Petition at 2.

³⁰ Supplement at 1.

³¹ 47 CFR § 1.106(c); *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); *Board of Trustees, Davis & Elkins College*, Memorandum and Order, 26 FCC Rcd 15555, 1556, para. 5 (MB 2011).

³² 47 CFR § 1.106(c).

³³ *See OCC Acquisitions, Inc.*, Memorandum and Order, 17 FCC Rcd 6147, 6149-50, paras. 7, 10 (MB 2002) (affirming the dismissal of license and deletion of call letters where Station failed to provide information documenting resumption of operations).

³⁴ *See* File No. BLSTA-20140207AAO, Exhibit 1 (First STA).

³⁵ *See generally, PCS Partners, LP*, Order, 17 FCC Rcd 21419, 21420, para. 4 (WTB 2002); *see also Mayor Maurice Brown*, Letter, 24 FCC Rcd 7632, 7636 (MB 2009) (holding that unsupported allegations provide no basis for denying or designating for evidentiary hearing an assignment application).

³⁶ *See, e.g., Lake City Lighthouse, Inc.*, Letter Order, 28 FCC Rcd 411, 413 (MB 2013) (dismissing petition for reconsideration that raised arguments which could have been raised earlier); *CCBL Broad. Licenses*, Letter Order, 23 FCC Rcd 4526, 4828 (MB 2008) (same).

Nonetheless, we note that this unsupported claim³⁷ has no bearing on the expiration of the Station license. Section 312(g) provides that “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....”³⁸ Unauthorized operation of a station is equivalent to continued silence for purposes of Section 312(g).³⁹ We decline to credit Modesto’s inconsistent, dissembling and unsupported claims regarding when and where broadcast operations resumed.⁴⁰ It also has not explained how it retained program origination capabilities after it was locked out of its studios even though it relied on this impediment for initially ceasing Station operations. In any event, we note that Modesto’s claim that the Station’s former engineer “turn[ed] on the transmitter” on December 8, 2014 for several days,⁴¹ is unavailing. A station must disseminate radio communications intended to be received by the public in order to be considered to have resumed operations.⁴² Thus, even if we were to accept the truth of the facts set forth in Modesto Graffiti Letter 1, we would conclude that those transmissions did not constitute broadcast operations ending the station’s extended period of silence.

For the reasons discussed above, Modesto has failed to provide sufficient evidence that the Station commenced broadcast operations within 12 months of going silent on January 10, 2014. It therefore has not shown a material error in the Commission's original order nor has it raised new or previously unknown facts that otherwise warrant reconsideration. The Petition is, therefore, subject to dismissal pursuant to Section 1.106(c) of the Rules.⁴³

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed on February 29, 2016, by Modest Graffiti Radio Project, IS DISMISSED to the extent that it raises new arguments or fails to cite any relevant new facts, and otherwise IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁷ We reject Modesto’s patently incorrect allegation that the Commission either routinely countenances or permits on a case-by-case basis broadcast operations in violation of statutory requirements. *See* 47 U.S.C. § 301 (no person shall transmit radio signals without a license to do so).

³⁸ 42 U.S.C. § 312(g).

³⁹ *See Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 591-96, para. 9 (2008), *aff’d sub nom. Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009); *A-O Broad.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 608, para.10 (2008).

⁴⁰ *See generally, PCS Partners, LP*, Order, 17 FCC Rcd 21419, 21420, para. 4 (WTB 2002); *see also Mayor Maurice Brown*, Letter, 24 FCC Rcd 7632, 7636 (MB 2009) (holding that unsupported allegations provide no basis for denying or designating for evidentiary hearing an assignment application).

⁴¹ Modesto Graffiti Letter 1 at 1.

⁴² *See, e.g., ETC Commc’n, Inc.*, Letter Order, 24 FCC Rcd 3021, 3022 (MB 2009) (holding that conducting equipment tests or transmitting an equipment test pattern does not prevent automatic expiration of a license pursuant to Section 312(g)).

⁴³ 47 CFR § 1.106(c).