



Federal Communications Commission
Washington, D.C. 20554

June 8, 2022

SENT VIA CERTIFIED MAIL AND ELETRONIC MAIL

One Ministries, Inc.
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Re: Application For Minor
Modification of Construction
Permit
K03ID-D, Flagstaff, AZ
Fac ID No. 182941
LMS File No. 0000059359
Pleading File No. 0000180883

Dear Permittee,

This concerns the January 25, 2022, Petition for Reconsideration (Petition)¹ filed by One Ministries, Inc. (OMI) seeking reconsideration of the Video Division's (Division) December 21, 2021, dismissal (Decision) of the above-referenced application for minor modification for low power television station (LPTV) K03ID-D, Flagstaff, Arizona (K03ID-D or Station) and related request for waiver. For the reasons below, the Media Bureau (Bureau) dismisses in part, and otherwise denies OMI's Petition.

Background. On August 25, 2009, as part of the Commission's "rural" LPTV filing window (2009 Rural Window),² OMI submitted an application to construct a LPTV station specifying a location south of Flagstaff, Arizona, near Rockledge, Arizona.³ In order to file for its construction permit, OMI had to specify a transmitting antenna site located more than 121 kilometers (75 miles) from the reference coordinates of the top 100 television markets.⁴ Over eight years later, in September 2018, OMI filed its Minor Mod seeking to relocate the facility specified in the Station's construction permit to a site 39-miles southwest of the permitted location, to a location near Cottonwood, Arizona. Pursuant to section 74.787(b)(1)(iii) of the Commission's rules (rules),⁵ in order for a modification application to be considered "minor," it may not propose a change in transmitting antenna location where the change is greater than 30-miles from the reference coordinates of the existing station's antenna location (30-mile rule). In this case, OMI proposed a change in transmitting antenna location of 39-miles. As such, the

¹ Petition for Reconsideration of One Ministries, Inc., LMS Pleading File No. 0000180883 (Jan. 25, 2022) a copy of which is available at LMS File No. 0000059359.

² *Commencement of Rural, First-Come, First-Served Digital Licensing For Low Power Television and TV Translators Beginning August 25, 2009*, Public Notice, 24 FCC Rcd 8911 (MB 2009) (2009 Rural LPTV Window Public Notice).

³ See CDBS File No. BNPDL-20090825CAX.

⁴ See *2009 Rural LPTV Window Public Notice* at 8915-17, Appx. A.

⁵ 47 CFR § 74.787(b)(1)(iii).

Minor Mod would have been considered a “major change” under section 74.787(b)(1)(ii) of the rules⁶ and because applications for major change for LPTV stations are currently subject to a freeze it was not permitted.⁷

In the Minor Mod application, OMI requested that the Commission waive the 30-mile rule and allow its proposed 39-mile relocation of K03ID-D’s proposed facilities as a minor change. OMI posited the new location would improve the Station’s coverage area and allow the Station to be economically viable. OMI went on to assert that the Commission had allowed other low VHF stations, namely KCSO-LD in Sacramento, California, to move more than 30 miles in order to better cover their main population areas.

Division Letter. In its Decision dismissing the K03ID-D Minor Mod and denying OMI’s waiver request, the Division stated that it found insufficient facts exist to waive its rules and allow a grant of OMI’s Minor Mod.⁸ The Division concluded that OMI had not shown that its request for waiver of the 30-mile rule meets the Commission’s standard for waiver.⁹ The Division found that the Station, as originally proposed in the 2009 application, was required, by necessity, to be located in a rural location in order to be accepted.¹⁰ The Division concluded that OMI should have considered such factors as the location of its proposed Station, its choice of a low VHF operating channel, and the Station’s economic viability before it applied for the facility.¹¹

The Division stated further that grant of OMI’s waiver would undermine the purpose of the minor change rule which is to ensure that low power television applications for “minor change” remain just that, and to ensure that stations provide coverage to their current, or in this case, intended viewers.¹² The Division concluded that a permittee realizing, after almost a decade of inaction, that it failed to fully evaluate the viability of its proposed facilities based on facts that should have been known to it at the time of application is not a basis for waiver of the Commission’s rules.¹³

Finally, the Division rejected OMI’s argument that the Commission had allowed other low VHF stations, namely KCSO-LD, Sacramento, California, to move larger distances for a minor mod in order to better cover its main population area.¹⁴ The Division found that KCSO-LD’s application seeking waiver of the 30-mile rule was granted in error without Video Division staff ruling on the merits of the waiver

⁶ 47 CFR § 74.787(b)(1)(iii).

⁷ See *Freeze on the Filing of Applications for New Digital Low Power Television and TV Translator Stations*, Public Notice, 25 FCC Rcd 15120 (MB 2010); *Initiation of Nationwide First-Come, First-Served Digital Licensing for Low Power Television and TV Translators Postponed Until Further Notice*, Public Notice, 25 FCC Rcd 8179 (MB 2010).

⁸ Decision at 2.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Id.* citing *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, 26 FCC Rcd 10732, 10759, para. 58 (2011).

¹³ Decision at 3.

¹⁴ *Id.* at n. 16.

request.¹⁵ The Division concluded that such an erroneous action does not change the Commission's rules or the outcome in this case.¹⁶

OMI Petition. In its Petition, OMI raises the same arguments contained in its waiver request. First OMI contends that a waiver was granted to KCSO-LD to exceed the 30-mile rule.¹⁷ Second, OMI argues that it was impossible for it to consider the economic viability of its proposed low band VHF low power television station when, at the time it filed in 2009, issues with digital low VHF band stations were not yet known.¹⁸ Lastly, OMI states that the Commission "did find sufficient facts to allow KCSO-LD to move to cover more population" and that it should do the same for K03ID-D.¹⁹

OMI also provides several new arguments not previously raised in its waiver request. First, OMI cites to another case in which the Division allegedly granted a waiver of the 30-mile rule to a different LPTV station owned by OMI, KQRO-LD, Morgan Hill, California.²⁰ Second OMI cites to waivers that have been granted to low VHF full power television stations to allow them to exceed the maximum power levels in the rules and STAs that allowed KCSO-LD to operate at power above the authorized levels.²¹ Finally, OMI argues that the staff unfairly delayed processing its Minor Mod and that the "FCC has a history of unfairly holding up the processing of applications for OMI for years."²²

Discussion. Under the rules, "[p]etitions for reconsideration are appropriate where the petitioner demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters, or the Commission determines that consideration of the facts is required in the public interest."²³ It is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected,²⁴ and reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has already deliberated and decided.²⁵

¹⁵ *Id.* citing LMS File Nos. 0000010571 and 0000014156.

¹⁶ *Id.* citing *Renewal Application of Gene A. Smith*, 17 FCC Rcd 13369 (2002) citing *Chem-Haulers, Inc. v. FCC*, 565 F.2d 728, 730 (D.C. Cir. 1977); *Texas International Airlines v. CAB*, 458 F.2d 782, 785 (D.C. Cir. 1971) ("assuming that the Government made a mistake as to (another) in the application of (a) regulation, the law does not require the Government to perpetuate the mistake").

¹⁷ Petition at 1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Petition at 1.

²¹ *Id.* at 1-2.

²² *Id.* at 2.

²³ 47 CFR § 1.106(b)(2).

²⁴ See *Regents of the University of California*, Order, 17 FCC Rcd 12891, 12892 (WTB 2002) (*Regents*) (citing *Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles*, Order, 3 FCC Rcd 1667 (1988)); and *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100 (1987).

²⁵ See *Regents*, 17 FCC Rcd at 12892. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (Commission does not need to reexamine arguments that it has already considered and rejected).

The Bureau finds that the Division's Decision was properly decided and that OMI fails to demonstrate any material error or omission in the Decision. OMI repeats its claim that the Division specifically waived the 30-mile rule in the case of KCSO-LD and granted it a waiver request to move more than 30 miles to improve its coverage. Such was not the case. In that case, as stated in the Division's Decision, the staff mistakenly granted KCSO-LD's minor change application without ever ruling on its request for waiver of the 30-mile rule. That application was granted in error, as evidenced by the failure to act upon the waiver request. As noted by the Division Decision, such an erroneous action would not change the Commission's rules or the outcome in this case. It is a well-settled principle of administrative law that the fact that an agency made an error in one instance does not require the agency to repeat the error.²⁶

Furthermore, OMI's recent discovery that its choice in 2009 to file an application for a low VHF channel contained drawbacks does not support waiving the 30-mile rule here. The facts of this case are not unique to K03ID-D. As the Division noted, the issues involving reception of low VHF channels by viewers were not novel in 2009 when OMI applied for the construction permit at issue.²⁷ Therefore, the Bureau agrees that OMI should have known about the challenges of VHF channels, including knowledge about the Station's economic viability.²⁸ Further, based on the facts of this case, the Bureau agrees that the Station's anticipated reception issues do not constitute the type of unique circumstances that support grant of a waiver.²⁹

As for the three arguments raised for the first time in the Petition, OMI has not explained why it was unable to raise them before. Consistent with the Commission's rules, these arguments will not be considered and this portion of OMI's Petition is dismissed.³⁰ As the Commission has stated on numerous occasions: "We cannot allow a party to 'sit back' and hope that a decision will be in its favor, and when

²⁶ See Decision at n.16 citing *Renewal Application of Gene A. Smith*, 17 FCC Rcd 13369 (2002) citing *Chem-Haulers, Inc. v. FCC*, 565 F.2d 728, 730 (D.C. Cir. 1977); *Texas International Airlines v. CAB*, 458 F.2d 782, 785 (D.C. Cir. 1971) ("assuming that the Government made a mistake as to (another) in the application of (a) regulation, the law does not require the Government to perpetuate the mistake").

²⁷ See Decision at 2-3, n.13 citing *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14627, para. 82 (1997) ("TV operations on the lower VHF channels 2-6 are subject to a number of technical penalties, including higher ambient noise levels due to leaky power lines, vehicle ignition systems, and other impulse noise sources and interference to and from FM radio service"); *Study of Digital Television Field Strength Standards and Testing Procedures*, Report, 20 FCC Rcd 19504, 19542, para. 82 (OET 2005) (stating that man-made noise on low VHF is caused by devices such as hair dryers, computers, microwave ovens and similar appliances and that the interference can be addressed by making sure such devices are turned off when someone is watching television). See also *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16513, para. 43 (2011) (noting that early in the full power digital television transition process that "it was recognized that use of the low-VHF channels 2-6 for digital service could be particularly difficult because of the generally higher levels of background noise on those channels"); A Report on Television Indoor Antenna Performance Attributes, Gary Sgrignoli and Dennis Wallace, Meintel, Sgrignoli and Wallace, LLC, Waldorf, MD, May 8, 2017.

²⁸ See Decision at 2-3.

²⁹ See *id.* at 3. See 47 CFR § 1.3 (waiver for good cause shown); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1072 (1972).

³⁰ See 47 CFR § 1.106(c).

it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”³¹ Even if we were to find the public interest supports consideration of these additional arguments, we find that independent grounds exist to deny them.

First, to the extent that KQRO-LD was granted a minor modification that allowed it to move greater than 30 miles, there was no written waiver decision in that case and we find that such action was made in staff error, consistent with KCSO-LD.³² Second, whether or not any waivers have been given to full power low VHF stations or STAs granted to KCSO-LD to permit it to operate above the power limits in the rules are irrelevant to the question at issue here – namely, whether waiver of the 30-mile rule is appropriate. We fail to see and OMI fails to explain how those cases dealing with VHF power limits are applicable here. Finally, the Bureau finds that OMI’s claims of the Division “unfairly holding up the processing of applications” to be unfounded. The Division strives to act upon rule compliant applications expeditiously.³³ If applications are deficient, division staff attempts to work with all applicants and licensees, including OMI, to rectify such deficiencies prior to denial or dismissal; a process that can result in delayed action. To the extent an applicant declines to amend its request to comply with the Commission’s rules, the burden falls on the applicant to demonstrate why waiver is warranted and comports with the Commission’s waiver standard.³⁴ We cannot find that OMI has met that burden in this instance.

³¹ *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8153, 8154, para. 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941); see also *Charter Communications, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd 8915 (2018); *Ravi’s Import Warehouse, Inc.*, Memorandum Opinion and Order, FCC 22-10 (rel. Jan. 27, 2022); *State of Indiana and Nextel Communications, Inc.*; Memorandum Opinion and Order, 27 FCC Rcd 11469 (2012); *Emmanuel Communications, Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 9294 (1999).

³² See *supra* note 26.

³³ The following are examples of OMI applications that were all processed within three days of filing: KUKR-LD, Santa Rosa, CA, LMS File No. 0000139373 (filed Mar. 16, 2021 and granted Mar. 17, 2021); K15FJ-D, Lakeport, CA, LMS File No. 0000143181 (filed Apr. 7, 2021 and granted Apr. 8, 2021); KYUB-LD, Yuba City, CA, LMS File No. 0000146290 (filed May 19, 2021 and granted May 20, 2021); and K14TG-D, Monterey, CA, LMS File No. 0000184760 (filed Feb. 14, 2022 and granted Feb. 16, 2022). We note that in the other matter cited in the Petition by OMI, the application for minor change filed by KKPM-CD, Yuba City, California, OMI again sought waiver of the 30-mile rule. See LMS File No. 0000113364. That application and waiver request was denied by the Division on December 16, 2019. See Letter from Barbara A. Kreisman, Chief Video Division, Media Bureau to One Ministries Inc. (Dec. 16, 2019), a copy of which is available at LMS File No. 0000036125. OMI sought reconsideration of that decision which is currently pending before the Division.

³⁴ See *supra* note 30.

Based upon the foregoing, the Bureau concludes that OMI has failed to present any facts or arguments that warrant reconsideration of the Decision. Accordingly, the Petition for Reconsideration filed by One Ministries, Inc. **IS HEREBY DISMISSED IN PART AND OTHERWISE DENIED.**

Sincerely,

/s/

Holly Saurer
Chief, Media Bureau

cc (via electronic mail): James Oyster, Esq.