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In re: **K250BY, Plymouth, Minnesota**  
Facility ID No. 202408  
Application File No. 0000142489

**KPPS-LP, St. Louis Park, Minnesota**  
Facility ID No. 196131  
Application File No. 0000142335

**Informal Objections**

Dear Counsel and Objector,

We have before us the referenced minor modification applications of Central Baptist Theological Seminary of Minneapolis (CBT), licensee of FM translator K250BY (K250BY), Plymouth, Minnesota,<sup>1</sup> and Park Public Radio, Inc. (PPR), licensee of low power FM (LPFM) station KPPS-LP (KPPS-LP), St. Louis Park, Minnesota.<sup>2</sup> Also before us are the following: (1) an Informal Objection filed by PPR

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<sup>1</sup> See Application File No. 0000142489 (filed Apr. 1, 2021) (CBT Application). The Media Bureau (Bureau) accepted the CBT Application for filing on April 1, 2021. See *Broadcast Applications*, Public Notice, Report No. PN 1-210405-01 (MB Apr. 5, 2021). K250BY is authorized to operate on channel 250, Plymouth, Minnesota. See Application File No. 0000087253 (granted Dec. 4, 2019) (granting license to cover construction permit number BNPFT-20180418AGO); Application File No. 0000125501 (granted Mar. 22, 2021) (granting license renewal for K250BY, Plymouth, Minnesota).

<sup>2</sup> See Application File No. 0000142335 (filed Mar. 31, 2021) (PPR Application). The Bureau accepted the PPR Application for filing on March 31, 2021. See *Broadcast Applications*, Public Notice, Report No. PN-1-210402-01 (MB Apr. 2, 2021). KPPS-LP is authorized to operate on channel 248, St. Louis Park, Minnesota. See Application File No. BLL-20180315AAX (granted Mar. 30, 2018) (granting license to cover construction permit number

against the CBT Application (PPR Objection);<sup>3</sup> (2) a Petition to Deny filed by CBT against the PPR Application;<sup>4</sup> (3) two Requests for an Expedited Decision filed by CBT;<sup>5</sup> and (4) related responsive pleadings.<sup>6</sup> For the reasons stated below, we grant the CBT Objection, deny the PPR Objection, grant the CBT Application, and dismiss the PPR Application.

## **Background.**

CBT Application and Associated Pleadings. The CBT Application proposes to modify K250BY's facilities on channel 250 by adjusting the station's transmitter location, antenna height, antenna configuration and directional pattern, and community of license.<sup>7</sup> According to CBT, the proposed changes will continue to result in fill-in service for its primary station, WCTS(AM), Maplewood, Minnesota.<sup>8</sup> CBT states that the proposal does not protect co-channel LPFM station KQEP-LP (KQEP-LP), St. Paul, Minnesota, because as of the CBT Application filing date, the KQEP-LP license

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BMPL-20180221AAA); Application File No. 0000125048 (granted Apr. 22, 2021) (granting license renewal for KPPS-LP, St. Louis Park, Minnesota).

<sup>3</sup> Informal Objection of PPR, Pleading File No. 0000144650 (filed May 5, 2021).

<sup>4</sup> Petition to Deny of CBT, Pleading File No. 0000143337 (filed Apr. 12, 2021). We note that petitions to deny do not lie against minor modification applications; therefore, we will treat CBT's pleading as an informal objection (CBT Objection). 47 U.S.C. § 309(c), (d); *see, e.g., Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14220, para. 12 (2006). Because an informal objection may be filed at any time prior to grant of the subject application, the CBT Objection is procedurally acceptable and will be considered on the merits. 47 CFR § 73.3587.

<sup>5</sup> Request for Expedited Decision of CBT, Pleading File Nos. 0000150410 and 0000150414 (filed June 17, 2021); Opposition of PPR to Request for Expedited Decision, Pleading File Nos. 0000152906 and 0000152907 (filed July 15, 2021); Second Request for Expedited Decision of CBT, Pleading File Nos. 0000184382 and 0000184383 (filed Feb. 4, 2022); Opposition of PPR to Second Request for Expedited Decision, Pleading File No. 0000184766 (filed Feb. 13, 2022) (PPR Opposition to Second Request); Reply of CBT to Opposition to Second Request for Expedited Decision, Pleading File Nos. 0000185136 and 0000185138 (filed Feb. 22, 2022). In light of our decision herein, we dismiss the Requests for Expedited Decision and related pleadings as moot. Further, we note that this decision has no bearing on the pending applications of PPR for a new full-power non-commercial educational FM station to replace KPPS-LP in St. Louis Park, Minnesota. *See* Application File Nos. 0000167194 and 0000167193 (filed Nov. 11, 2021, and Dec. 23, 2021, respectively).

<sup>6</sup> The following pleadings were filed in response to the PPR Objection: Opposition of CBT to Informal Objection, Pleading File No. 0000144801 (filed May 7, 2021) (CBT Opposition); Reply of PPR to Opposition to Informal Objection, Pleading File No. 0000150529 (filed June 20, 2021) (PPR Reply); and Response of CBT to PPR Reply, Pleading File No. 0000151306 (filed June 30, 2021) (CBT Response). The following pleadings were filed in response to the CBT Objection: Motion for Extension of Time of PPR, Pleading File No. 0000143846 (filed Apr. 22, 2021); Opposition of PPR to Petition to Deny, Pleading File No. 0000144466 (filed May 3, 2021) (PPR Opposition); Reply of CBT to Opposition to Petition to Deny, Pleading File No. 0000144799 (filed May 7, 2021) (CBT Reply); Supplement of CBT to Petition to Deny, Pleading File No. 0000149866 (filed June 8, 2021) (CBT Supplement); Opposition of PPR to Supplement to Petition to Deny, Pleading File No. 0000150528 (filed June 20, 2021) (PPR Opposition to Supplement); and Response of CBT to Opposition, Pleading File No. 0000151304 (filed June 30, 2021) (CBT Response). We note that Pleading File Nos. 0000151306 and 0000151304 filed on June 30, 2021, are identical.

<sup>7</sup> *See* CBT Application, Comprehensive Technical Statement.

<sup>8</sup> *Id.*

had expired and no license renewal application had been filed.<sup>9</sup> CBT further states that no prohibited overlap will occur between the proposed facility and any potentially conflicting co-channel or first-adjacent facility or proposal.<sup>10</sup> CBT acknowledges that the proposed site is within the protected service contour of third-adjacent station KTIS-FM but claims that no population exists within the interference area.<sup>11</sup> CBT also claims that there are no intermediate frequency separation requirements with respect to channel 250.<sup>12</sup>

PPR filed an Objection against the CBT Application, arguing that the proposed facilities would cause impermissible interference to the facilities proposed in the PPR Application.<sup>13</sup> PPR also contends that the CBT Application was filed one day after the PPR Application, and therefore, under the Commission's first come/first served processing procedure, the CBT Application must be dismissed upon grant of the PPR Application.<sup>14</sup>

In its Opposition, CBT argues that the PPR Application was filed prematurely on March 31, 2021, before the KQEP-LP license expired, and therefore should not be entitled to the benefit of the first come/first served procedure set forth in section 73.3573(f) of the Commission's rules (Rules).<sup>15</sup> CBT maintains that if PPR filed its application after the KQEP-LP license expired, CBT and PPR would have had an equal opportunity for consideration as contemplated by *Ashbacker* and the Commission's

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<sup>9</sup> *Id.* KQEP-LP was licensed to operate on channel 250 (97.9 MHz), St. Paul, Minnesota. The KQEP-LP license expired at 3:00 a.m. on April 1, 2021. See Application File No. BLL-20171204AEB. On April 2, 2021, the KQEP-LP license was formally cancelled, and its call sign deleted for failure to file a renewal application. See *Radio License Expirations*, Public Notice, DA 21-295 (MB Mar. 11, 2021) (*March Public Notice*); *Broadcast Actions*, Public Notice, Report No. 49962 (MB Apr. 7, 2021).

<sup>10</sup> See CBT Application, Comprehensive Technical Statement.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> PPR Objection at 1-2.

<sup>14</sup> *Id.* (stating that the PPR Application was filed in the Commission's License Management System (LMS) database on March 31, 2021, and was accepted for filing on April 2, 2021, while the CBT Application was filed on April 1, 2021, and accepted for filing on April 5, 2021). PPR argues that minor change applications for licensed facilities are treated on a first come/first serve basis, giving an applicant cutoff protection against subsequently filed applications. *Id.*

<sup>15</sup> CBT Opposition at 2 (citing 47 CFR § 73.3573(f) ("Applications for minor modifications for non-reserved FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Processing of these applications will be on a "first come/first serve" basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing, but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.")).

procedures.<sup>16</sup> CBT states that, at a minimum, the Commission should resolve the dispute regarding the acceptability of the PPR Application before taking any action on the CBT Application.<sup>17</sup> CBT further states that if the Commission dismisses the CBT Application and subsequently finds that the PPR Application is improper, CBT will have been deprived of the fair opportunity to be considered as the first validly filed application.<sup>18</sup>

In Reply, PPR maintains that its Application was properly accepted for filing after the expiration of the KQEP-LP license.<sup>19</sup> PPR states that CBT had the opportunity to file its Application on the same day as PPR through the Commission's first come/first served filing procedures.<sup>20</sup> Additionally, PPR argues that the Commission no longer needs to consider the KQEP-LP license in any application that comes before it for processing because official notice of the KQEP-LP license expiration was formally announced in the *March Public Notice*, and the 30-day window for filing a petition for reconsideration has now lapsed.<sup>21</sup> PPR maintains that the Commission may now process the PPR Application because it satisfies all acceptability criteria and meets all technical requirements, including the requirement to maintain or reduce pre-existing short-spacing.<sup>22</sup>

PPR Application and Associated Pleadings. The PPR Application seeks a first-adjacent frequency change for KPPS-LP from channel 248 to channel 249 at St. Louis, Park, Minnesota, and a change in the transmission site.<sup>23</sup> According to PPR, the current licensed transmission site will be unavailable within 12-18 months after the PPR Application filing date and KPPS-LP will be required to either relocate to a new site within that time-frame or permanently cease operations.<sup>24</sup> PPR states that its proposal meets contour clearance for all applications and authorizations on co-channel, first-adjacent, and second-adjacent frequencies with the exception of first-adjacent FM translators K250BY and W248CU.<sup>25</sup> PPR claims that KPPS-LP is already short-spaced to both translators and the short-spacing will be

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

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

<sup>19</sup> PPR Reply at 3. PPR states that KQEP-LP was licensed to operate as a timeshare facility between the hours of 3:00 a.m. to 3:00 p.m. on March 31, and from 3:00 a.m. to 3:00 p.m. on April 1. PPR Reply at 4. PPR maintains that the station was not authorized to operate between the hours of 3:00 p.m. on March 31, and 3:00 a.m. on April 1. *Id.* Thus, PPR contends that the last possible legal time KQEP-LP could have operated was at 3:00 p.m. on March 31, 2021, and the license would have expired at that time. *Id.*

<sup>20</sup> *Id.* PPR points to Refuge Media Group, Application File No. BNPFT-20130830ARX (Refuge Media), where the Bureau granted the application even though it did not specify grantable facilities on the day the application was filed. See PPR Reply at 4-5; Application File No. BNPFT-20130830ARX (granted Nov. 5, 2015).

<sup>21</sup> *Id.* PPR states that the Commission would have been required to wait 30 days before processing the CBT and PPR Applications in case KQEP-LP filed a license renewal application and a petition for reconsideration to reinstate its license. *Id.* at 5. See also *March Public Notice*.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> See PPR Application, Engineering Exhibit.

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

<sup>25</sup> FM translator W248CU is authorized to operate on channel 248, Minneapolis, Minnesota. See Application File No. BLFT-20170622ACC (granted July 3, 2017).

maintained or improved.<sup>26</sup> PPR requests a waiver of section 73.807 of the Rules to maintain the existing short-spacing to K250BY and to reduce the existing short-spacing to W248CU from the new site.<sup>27</sup> Additionally, PPR states that protection is not required for KQEP-LP, because its license expired at 3:00 a.m. on April 1, 2021, and was not renewed.<sup>28</sup>

CBT argues that the PPR Application must be denied or dismissed because, on the date it was filed (9:04 p.m. on March 31, 2021), it was mutually exclusive with then existing station KQEP-LP, the license of which expired at 3:00 a.m. on April 1, 2021.<sup>29</sup> CBT states that the PPR Application contained no request for waiver of the mutual exclusivity rule and offered only a feeble justification for filing prematurely, without satisfactory proof, that KQEP-LP's license had been cancelled because the station had not been broadcasting for 12 consecutive months.<sup>30</sup> CBT contends that allowing applications that conflict with un-expired licenses creates uncertainty and confusion about when applications should be filed; it prevents qualified applicants from being fairly considered;<sup>31</sup> and it diminishes a licensee's right to the benefit of their license for its entire term.<sup>32</sup> CBT further contends that PPR forfeited its *Ashbacker* rights by filing an early application and that any attempt to cure this defect must now bear a filing date subsequent to the CBT Application and may succeed only if CBT does not.<sup>33</sup> Substantively, CBT argues that the PPR Application proposes impermissible first-adjacent short-spacings to K250BY and W248CU,<sup>34</sup> and that it may not seek a waiver of first-adjacent short-spacing requirements.<sup>35</sup> Finally, CBT

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<sup>26</sup> *Id.* PPR explains that, pursuant to section 73.807 of the Rules, the required spacing to K250BY on a first-adjacent channel is 15 km (K250BY has a 60 dBμ contour under 7.3 km); the proposed location is 13.2 km (rounded to 13 km per standard Commission practice), which is 2 km short-spaced. *See* PPR Application, Engineering Exhibit. PPR states that KPPS-LP already has a 2 km (1.8 km unrounded) short-spacing from its existing site which occurred through the filing of K250BY's original permit application BNPFT-20180418AGO on April 18, 2018. *Id.* Since a 2 km short-spacing already exists, PPR asserts that KPPS-LP may continue to maintain the 2 km at the new site. PPR further claims that there will be no contour overlap towards K250BY. *Id.* With regard to W248CU, PPR asserts that the required spacing to W248CU on a first-adjacent channel is 21 km (W248CU has a 60 dBμ contour between 7.3 and 13.3 km); the proposed location is 14 km to W248CU, which is 7 km short-spaced. *Id.* PPR states that KPPS-LP already has a 9 km short-spacing from its existing site which occurred through the filing of W248CU's permit application BMPFT-20160729ABH on July 7, 2016. *Id.* Because KPPS-LP has operated continuously from its licensed location since the filing of the above W248CU application, PPR asserts that the 9 km short-spacing was pre-existing and therefore grandfathered. *Id.* PPR claims that the new site will reduce the short-spacing and pre-existing overlap towards W248CU, which presents a favorable interference situation over its present licensed site. *Id.*

<sup>27</sup> *See* PPR Application, Engineering Exhibit. *See also* 47 CFR § 73.807 (providing minimum distance separation requirements for LPFM stations).

<sup>28</sup> *See* PPR Application, Engineering Exhibit.

<sup>29</sup> CBT Objection at 2.

<sup>30</sup> *Id.* at 2-3.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6. CBT asserts that the change from a second-adjacent channel to a first-adjacent channel is impermissible and invalidates any grandfathered rights. *Id.* CBT further states that even with the change from a co-channel to a first-adjacent channel, the proposed facilities remain impermissibly short-spaced to W248CU by 6.96 km. *Id.*

<sup>35</sup> *Id.* at 6-7 (citing *Creation Of A Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15424-30, paras. 72-80 (2012) (*Sixth Report and Order*) (reminding potential LPFM

argues that PPR fails to substantiate its claim that it will lose its transmission site in the next 12-18 months and fails to demonstrate that it has considered alternative options available for continued operations.<sup>36</sup>

In its Opposition, PPR states that acceptability is not determined by the filing date, as CBT argues, but it is instead determined when an application receives its initial review by Commission staff and is placed on public notice.<sup>37</sup> PPR maintains that its Application was reviewed by the Commission and placed on public notice on April 2, 2021, by which time the license for KQEP-LP had been canceled for failure to file a renewal application.<sup>38</sup> PPR states that the CBT Application was reviewed by Commission staff and placed on public notice on April 5, 2021.<sup>39</sup> Because the CBT Application was filed and accepted after the filing and acceptance of the PPR Application, PPR argues that its Application cuts off the filing rights of the CBT Application and the Applications would not be mutually exclusive.<sup>40</sup> Regarding CBT's short-spacing arguments, PPR states that the Commission has allowed an LPFM station to move to a first-adjacent channel and continue to enjoy short-spacing protections towards stations to which it is already short-spaced.<sup>41</sup> PPR asserts that its proposal would move KPPS-LP one channel from 248 to 249, and it would maintain or reduce short-spacing toward K250BY and W248CU.<sup>42</sup> PPR also maintains that no proposed contour overlap would occur to K250BY, and in the case of W248CU, the existing overlap would be reduced, even though such a showing is not required for an LPFM station.<sup>43</sup> According to PPR, the proposed location and frequency would also maintain or reduce all interference concerns and would therefore result in a favorable interference situation.<sup>44</sup> In response to CBT's suggestion that PPR explore alternative locations, PPR argues that it is not required to provide a list of alternate sites, nor provide reasons why it chose one site over another to best meet its needs.<sup>45</sup>

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applicants that the Local Community Radio Act of 2010 (LCRA) permits the Commission to grant waivers only of second-adjacent, and not co- and first-adjacent channel spacing requirements) and 47 CFR §73.807(d) ("Existing LPFM stations which do not meet the separations in paragraphs (a) through (c) of this section may be relocated provided that the separation to any short-spaced station is not reduced.")).

<sup>36</sup> *Id.* at 7.

<sup>37</sup> PPR Opposition at 3.

<sup>38</sup> *Id.* at 4 (arguing that protection of the KQEP-LP license was unnecessary because the license expired and had been formally deleted).

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

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

<sup>41</sup> *Id.* at 5 (referencing Wimberly Valley Radio, Application File No. 0000094151 (granted Dec. 30, 2019) (Wimberly or Wimberly Application), where the Commission granted a minor change application proposing to move station KVVH-LP from channel 231 to channel 232, and reduce short-spacing towards station KTFM from 17 km to 6 km).

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.* (arguing that PPR has met the requirement to maintain or reduce short-spacing from KPPS-LP towards K250BY).

<sup>44</sup> *Id.* (stating that CBT has acknowledged the PPR Application proposes a slight reduction in short-spacing). PPR claims that the reduction is *de minimis*, and thus, short-spacing remains exactly the same. *Id.*

<sup>45</sup> *Id.* PPR maintains that channel 285 is available to CBT as a minor change but is not feasible for KPPS-LP due to section 73.807 spacing limitations. *Id.* at 7.

In Reply, CBT reiterates its arguments that the PPR Application should be dismissed because it was prematurely filed;<sup>46</sup> it requires and requests impermissible first-adjacent channel short-spacing;<sup>47</sup> and there are alternative locations for KPPS-LP that will not violate Commission rules or policies.<sup>48</sup>

In a supplemental filing, CBT states that it discovered new evidence as part of its LPPM Improvement Study (Study) which suggests PPR overstated the likelihood that it would lose its ability to broadcast if the PPR Application is denied.<sup>49</sup> According to CBT, the Study revealed that the coordinates of the property where PPR's antenna is located ambiguously reference a house owned by PPR's President, Jeff Sibert (Mr. Sibert).<sup>50</sup> CBT states that further research revealed the property is not up for sale and PPR does not otherwise appear to be facing other external circumstances which would force it to relocate its antenna.<sup>51</sup> CBT argues that if PPR is forced off air in the near future, it will be because of its "own actions, finances, or business judgments."<sup>52</sup> CBT asserts that the Commission is not required to provide licensees additional leeway to avoid unfortunate circumstances that may result from their business decisions.<sup>53</sup>

PPR counters CBT's supplemental filing, arguing that it should be stricken as untimely because it does not present new evidence as it claims.<sup>54</sup> PPR states that it has broadcast from the same location since 2016 and Mr. Sibert has owned the property since 2011; thus, CBT should have presented this

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<sup>46</sup> CBT Reply at 3-6. CBT argues that section 73.1020 of the Rules and the license terms itself declare that the KQEP-LP license expired on April 1, 2021, at 3:00 a.m. local time. *Id.* CBT states that the language in the *March Public Notice* did not modify the expiration time of the license and did not preclude an interested party from filing an application for that location on April 1, 2021. *Id.* CBT states that its Application was filed at 9:50 a.m., after the 3:00 a.m. expiration. CBT contends that the license's deletion on April 2, 2021, has no bearing on the actual expiration of the KQEP-LP license; rather, deletion of the call sign from the Commission's database was merely an administrative act to aid with management of the license. *Id.* Additionally, CBT argues that the initial acceptability determination made by the Commission is just a determination that the application is complete and all necessary exhibits are attached; it is not a determination that the application was appropriately filed. *Id.* Finally, CBT states that PPR has provided no support for its argument that it may file an application against an active license so long as the Public Notice accepting it for filing is issued after the license expired. *Id.*

<sup>47</sup> *Id.* at 7-8 (arguing that PPR's impermissible request to move from a second-adjacent channel to a first-adjacent channel and create a short-spacing on that new first-adjacent channel is not justified). CBT further argues that PPR cannot merely allege that, since the distance between the stations seems small, it is *de minimis*, and the Commission should therefore grant its application. *Id.* CBT emphasizes that the *Sixth Report and Order* prohibits waivers of first-adjacent spacing and there is no *de minimis* qualifier. *Id.*

<sup>48</sup> *Id.* at 8-9 (stating that PPR has several options to remain on the air and that an extraordinary waiver of the Rules is not needed to keep it broadcasting).

<sup>49</sup> CBT Supplement at 2-4 (reiterating its claim that alternative locations exist for PPR to relocate its antenna). CBT states that it commissioned the Study to determine whether there were viable, non-mutually exclusive locations to which PPR could relocate that would permit both parties to stay on air without decreasing their respective listening bases. *Id.* at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Id.*

<sup>54</sup> PPR Opposition to Supplement at 1. PPR alleges that CBT is attempting to deceive the Commission by filing essentially identical Improvement Studies with different dates (April 19, 2021, and June 1, 2021). *Id.* at 4-5.

information in its Objection.<sup>55</sup> Additionally, PPR explains that the property from which KPPS-LP transmits is not up for sale because KPPS-LP is required to continue broadcasting from its licensed site until the Commission grants the PPR Application.<sup>56</sup> PPR states that it would not be possible to sell a single-family residential property with a radio station attached to it as no such buyer would be willing to take on such a liability.<sup>57</sup> Regarding CBT's speculation that there are no circumstances forcing PPR to abandon its present site, PPR contends that it is a liability for any non-profit organization to be dependent on a single member for its continued existence and therefore it needs a permanent site that is not reliant upon its President.<sup>58</sup> PPR asserts that if Mr. Sibert decides to tender his resignation or move away from the community, the continued viability of KPPS-LP would be severely threatened as it would no longer have a transmit site.<sup>59</sup>

In response, CBT contends that PPR knew it was not at risk of losing the licensed site, and its decision to state otherwise is a misrepresentation that disqualifies the PPR Application from consideration.<sup>60</sup> Additionally, CBT acknowledges that it commissioned two separate Improvement Studies, one in April to determine what locations might be available to PPR, and another in June to ensure that the spectrum landscape in Minneapolis had not substantially changed since the April Study.<sup>61</sup> CBT explains that a comparison of the two Studies reveals the results were substantially similar because the spectrum landscape had not changed significantly.<sup>62</sup> Thus, CBT states that it was not acting in bad faith by presenting the June Improvement Study in its Supplement; it was merely trying to provide the most up-to-date locations it had found for the Commission to consider.<sup>63</sup>

**Discussion.** The Commission will consider an informal objection if it alleges properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.<sup>64</sup> After careful consideration of the record, we find that CBT has met this burden with regard to the PPR Application, but PPR has failed to meet this burden with regard to the CBT Application.<sup>65</sup> Accordingly, for the reasons discussed below, we grant the CBT Objection, deny the PPR Objection, grant the CBT Application, and dismiss the PPR Application. We also dismiss the Requests for Expedited Decision and related pleadings as moot.

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<sup>55</sup> *Id.* at 1-2.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2-3.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> CBT Response at 2-3.

<sup>61</sup> *Id.* at 3-4.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See 47 U.S.C. § 309(d); see also, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197, n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993) (informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>65</sup> Both parties raise allegations of misrepresentation and/or deceit in their pleadings. However, given the lack of evidence demonstrating intent to deceive the Commission, we are not persuaded that either party engaged in misrepresentation with respect to its application or pleadings in this proceeding.



We first address the dispute concerning the acceptability of the PPR and CBT Applications. In *Ashbacker*, the Supreme Court held that where two applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration.<sup>66</sup> It is well established, however, that the Commission may promulgate procedural rules that limit the ability of parties to file mutually exclusive applications, including the first come/first served procedure governing minor change applications, where the Commission determines that such rules would expedite enhanced service to the public.<sup>67</sup> Under this procedure, the filing of the first acceptable minor change application “cuts off” the filing rights of subsequent, conflicting applications.<sup>68</sup>

Although, in this instance, the PPR Application was filed before the CBT Application, we now find, upon further review, that the PPR Application was premature and should have been rejected when it was filed.<sup>69</sup> In particular, we find that the PPR Application was not acceptable at the time of filing because it conflicted with and failed to protect the KQEP-LP license, which had not expired according to its express terms.<sup>70</sup> The CBT Application, though technically premature, did not suffer from the same flaw, as it was filed after the KQEP-LP license had expired.<sup>71</sup> Our first come/first process is crafted to ensure that all entities and members of the public have an equal opportunity to obtain spectrum as it becomes available. Allowing prematurely filed applications, such as the PPR Application, to be considered acceptable for filing, and/or to process them, would be unfair to all other similarly-situated prospective applicants for the available spectrum, and would undermine their opportunity to file first-in-time or competing applications. It would also create uncertainty about application timing as well as

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<sup>66</sup> *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*)).

<sup>67</sup> See, e.g., *Ashbacker*, 326 U.S. at 333, n.9. Applicants subject to first come/first served procedures must be treated equally and fairly, including being provided with due notice of the operation of the procedure. See, e.g., *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (“The *Ashbacker* decision . . . held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license”); *Processing of FM and TV Broadcast Applications*, Report and Order, 50 FR 19936-01, 19939 (1985) (“[T]he use of cut-off procedures has been acknowledged by the Court as a reasonable and necessary limitation on the statutory right to a comparative hearing. However, any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. Therefore, although the Commission can be flexible in establishing “housekeeping” rules, applicants must be treated equally and fairly by giving them notice of the due dates for their applications.”) (internal citations omitted).

<sup>68</sup> See 47 CFR § 73.870(e); 47 CFR § 73.3573(f).

<sup>69</sup> See 47 CFR § 73.3564(b) (“Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC’s administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC’s rules.”); 47 CFR § 1.934(f) (stating that the Commission may dismiss premature applications without prejudice).

<sup>70</sup> PPR’s reliance on *Refuge Media* where the Bureau granted an application even though it did not specify grantable facilities on the day the application was filed is misplaced. The staff action in that case occurred via Public Notice and did not include a written decision. It is therefore without precedential weight. See *supra* note 20; 47 CFR § 0.455(f) (stating that unpublished documents may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission).

<sup>71</sup> See, e.g., *See Board of Trustees of Eastern Mennonite University*, Letter, 29 FCC Rcd 5925, 5928 (MB June 4, 2014) (declining to dismiss a minor change application as conflicting with a construction permit because, at the time the application was filed, the construction permit had expired according to its express terms). Generally, the Bureau accepts competing applications on the first business day after the date on which a license or construction permit expires. *Id.*

undermine the licensee's ability to make unencumbered use of its license for the entire license term. In light of these considerations, we dismiss the PPR Application as premature.

On alternative and independent grounds, we find that dismissal of the PPR Application is appropriate because it fails to meet the Commission's minimum spacing requirements.<sup>72</sup> Specifically, section 73.807 of the Rules requires the proposed KPPS-LP facilities on channel 249 to be 21 km from first-adjacent channel station W248CU in Minneapolis, Minnesota, and 15 km from first-adjacent station K250BY in Plymouth, Minnesota.<sup>73</sup> The record indicates that, at its present location on channel 248, KPPS-LP is 22.9 km from co-channel station W248CU (required spacing under section 73.807 is 32 km), and 6.1 km from second-adjacent channel station K250BY (required spacing under 73.807 is 8 km).<sup>74</sup> PPR proposes to move KPPS-LP's current facilities to first-adjacent channel 249, arguing that the existing short-spacings to W248CU and K250BY are grandfathered and therefore acceptable at the new location, where they will be maintained or reduced.<sup>75</sup> In support of its argument, PPR identifies one instance (Wimberly) where the Bureau granted an application that reduced short-spacing between the requesting LPFM station and an existing full power station.<sup>76</sup> This argument, however, is unconvincing as the staff action in Wimberly occurred via Public Notice and did not include a written decision; thus, it has no precedential effect on the instant matter.<sup>77</sup> Moreover, unlike the scenario in Wimberly where the LPFM station was moving from a co-channel short-spacing to a first-adjacent short-spacing, which improved matters, PPR proposes to move from a second-adjacent channel short-spacing to a first-adjacent channel short-spacing, which is problematic for the reasons noted below.<sup>78</sup> PPR has not identified, nor are we aware of, any other decision reinstating the status of an existing short-spaced station under similar circumstances. Consequently, we find that PPR's proposal presents a new and impermissible first-adjacent short-spacing to K250BY and W248CU.<sup>79</sup> We also find that PPR's request for waiver of section 73.807 of the Rules to support the change in KPPS-LP's facilities is unwarranted.<sup>80</sup> Section 3(b)(2)(A) of the LCRA prohibits the Commission from considering waiver requests of co- and first-adjacent channel

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<sup>72</sup> See 47 CFR § 73.807 (requiring LPFM stations to be situated specific distances from other co-, first- and second-adjacent channel facilities).

<sup>73</sup> See 47 CFR § 73.807(c).

<sup>74</sup> See PPR Application, Engineering Exhibit.

<sup>75</sup> See PPR Application, Engineering Exhibit. From the proposed site, KPPS-LP would be short-spaced to W248CU (14.04 km instead of the required 21 km) and K250BY (13.14 km instead of the required 15 km). Contrary to PPR's assertions, there is no grandfathering provision for maintaining an "existing" short-spacing when changing channels, particularly when a channel change reduces the number of channels between the station proposing the change and the nearby station (i.e., changing from a second-adjacent channel to a first-adjacent channel).

<sup>76</sup> See PPR Opposition at 5; *supra* note 41.

<sup>77</sup> See Application File No. 0000094151 (granted Dec. 30, 2019); 47 CFR § 0.455(f).

<sup>78</sup> See *supra* note 75 and *infra* note 80.

<sup>79</sup> See 47 CFR § 73.870(e) (Minor change LPFM applications must meet all technical and legal requirements applicable to new LPFM station applications.).

<sup>80</sup> See PPR Application, Engineering Exhibit. The Commission has provided LPFM stations the ability to propose facilities that are short-spaced to second-adjacent channel stations by demonstrating a lack of actual interference. See 47 CFR § 73.807(e) ("Waiver of the second-adjacent channel separations."). However, because of the different spectral relationship on first-adjacent channels, and the higher potential for interference on such channels, there is no provision similar to section 73.807(e) that exists for first-adjacent channel situations.

spacing requirements.<sup>81</sup> We therefore dismiss PPR's waiver request without further consideration.<sup>82</sup>

Turning to PPR's Objection to the CBT Application, we find that the Objection fails to raise any substantial or material question of fact calling for further inquiry. The essence of PPR's argument is that the CBT Application was filed one day after the PPR Application, and therefore, must be dismissed upon grant of the PPR Application. PPR attempts to raise other issues not relevant to the CBT Application, and simply provides no other grounds for its denial.<sup>83</sup> Based on our review, we find that the CBT Application complies with all pertinent statutory and regulatory requirements and that the proposed minor modification of K250BY would serve the public interest. We therefore deny PPR's Objection and grant the CBT Application.

**Conclusion/Actions.** For the reasons discussed above, **IT IS ORDERED**, that the Informal Objection (Pleading File No. 0000144650) filed by Public Park Radio, Inc., on May 5, 2021, **IS DENIED**.

**IT IS FURTHER ORDERED**, that the minor modification application of Central Baptist Theological Seminary of Minneapolis (Application File No. 0000142489) **IS GRANTED**.

**IT IS FURTHER ORDERED**, that the Informal Objection filed by Central Baptist Theological Seminary of Minneapolis (Pleading File No. 0000143337) on April 12, 2021, **IS GRANTED**.

**IT IS FURTHER ORDERED**, that the minor modification application of Public Park Radio, Inc., (Application File No. 0000142335) **IS DISMISSED**.

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<sup>81</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011) (authorizing the Commission to waive the second-adjacent spacing requirements set forth in section 73.807 of the Rules where an LPFM station establishes, "using methods of predicting interference taking into account all relevant factors, including terrain-sensitive propagation models," that its proposed operations "will not result in interference to any authorized radio service."). There is no LCRA provision or Commission rule for waiving first-adjacent short spacing requirements as proposed by PPR and there is no *de minimis* exception to section 73.807 minimum spacing requirements, as PPR implies. Notably, PPR has acknowledged that the Commission has previously been unwilling to waive section 73.807 of the Rules to create new short-spacings under any circumstance, even if contour clearance would be met. *See* PPR Opposition to Second Request at 4.

<sup>82</sup> Given our disposition on the PPR Application, we need not address the parties' arguments concerning the existence of alternative sites from which KPPS-LP or K250BY may or may not be able to broadcast.

<sup>83</sup> *See supra* note 65.

**IT IS FURTHER ORDERED**, that the Request for Expedited Decision (Pleading File Nos. 0000150410, 0000150414) and Second Request for Expedited Decision (Pleading File Nos. 0000184382, 0000184383) filed by Central Baptist Theological Seminary of Minneapolis on June 17, 2021, and February 4, 2022, respectfully, **ARE DISMISSED AS MOOT**.

Sincerely,

James Bradshaw  
Deputy Chief, Audio Division  
Media Bureau