Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer To:
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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

Petition for Reconsideration

Dear Counsel and Petitioner,

We have before us a petition for reconsideration (Petition)[1] filed by Park Public Radio, Inc. (PPR), licensee of low-power FM (LPFM) station KPPS-LP, St. Louis Park, Minnesota, and related responsive pleadings.[2] The Petition seeks reconsideration of our letter decision dismissing the referenced minor modification application of PPR and granting the referenced minor modification application of Central Baptist Theological Seminary of Minneapolis (CBT), licensee of FM translator K250BY (K250BY), Plymouth, Minnesota.[3] For the reasons discussed below, we dismiss in part and otherwise deny the Petition.

[1] Petition for Reconsideration of PPR, Pleading File No. 0000196977 (filed Aug. 4, 2022).

[2] Errata of PPR to Petition for Reconsideration, Pleading File No. 0000197496 (filed Aug. 12, 2022); Opposition of CBT to Petition for Reconsideration, Pleading File No. 0000197291 (filed Aug. 10. 2022); Reply to Opposition of PPR, Pleading File No. 0000197290 (filed Aug. 24, 2022).

[3] In addition, the letter decision granted CBT's informal objection to PPR's minor modification application and denied PPR's informal objection to CBT's minor modification application. Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to Gregg P. Skall, Esq., and Jeffrey Seibert, Application File Nos. 0000142489 and 0000142335 (dated July 5, 2022) (Letter Decision).

Background. On March 31, 2021, approximately six hours before the license of KQEP-LP[4] expired by its express terms, PPR filed an application seeking a first-adjacent frequency change for KPPS-LP from channel 248 to channel 249 at St. Louis Park, Minnesota, and a change in the station's transmission site.[5] Approximately six hours after the expiration of the KQEP-LP license, CBT filed an application proposing 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.[6] On July 5, 2022, the Media Bureau (Bureau) issued a Letter Decision granting the CBT Application and dismissing the PPR Application, finding that the PPR Application was both procedurally deficient and violated the Commission's minimum spacing requirements.[7] The Petition seeks reconsideration of the Letter Decision.[8]

PPR Petition. PPR argues that the Bureau first erred in referencing section 1.934(f) of the Commission's rules (Rules),[9] which applies exclusively to applications processed by the Wireless Telecommunications Bureau, as a basis to dismiss the PPR Application. PPR states that any decisional reliance on section 1.934(f) must be reversed on reconsideration.[10] PPR also argues that the Letter Decision violated *Melody Music* when it determined the PPR and CBT Applications were both prematurely filed but dismissed only the PPR Application.[11] PPR states that *Melody Music* requires the

[4] New Culture Center in the Midwest (New Culture) was the licensee of LPFM station KQEP-LP in St. Paul, Minnesota. Our records show that the Commission granted the station's initial license on December 5, 2014, authorizing operation on channel 250 (97.9 MHz). *See* File No. BNPL-20131115ADR (granted Dec. 5, 2014). KQEP-LP was authorized to operate only during the following times (local times): Saturday through Thursday from 3:00 am until 3:00 pm and Friday from 12:00 midnight to 11:00 am and 11:00 pm to 11:59 pm. *See* Application File No. BLL-20171204AEB. KQEP-LP did not seek to modify this authorization at any time during the license term. On March 11, 2011, the Media Bureau (Bureau) informed New Culture, and other licensees, that their authorizations would expire on April 1, 2021, if they did not file a license renewal application by midnight of the same day. *See Radio License Expirations*, Public Notice, DA 21-295 (MB Mar. 11, 2021) (*March Public Notice*). New Culture did not file a license renewal application and therefore the KQEP-LP license expired at 3:00 a.m. local time on April 1, 2021. 47 CFR § 73.1020(a). On April 2, 2021, we updated our databases to reflect that the KQEP-LP license was cancelled and its call sign deleted for failure to file a renewal application. *See Broadcast Actions*, Public Notice, Report No. 49962 (MB Apr. 7, 2021).

[5] *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).

[6] *See* Application File No. 0000142489 (filed Apr. 1, 2021) (CBT Application). The 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).

[7] Letter Decision.

[8] Petition.

[9] 47 CFR 1.934(f) ("**Dismissal as untimely**. The Commission may dismiss without prejudice applications that are premature or late filed, including applications filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group."); *see also infra* note 85.

[10] Petition at 2-3.

[11] *Id*. at 3-4; *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (*Melody Music*). In *Melody Music*, the Commission refused to renew the license of station WGMA, Hollywood, Florida, because two principals of the licensee produced rigged quiz shows which were carried on the National Broadcasting Company (NBC) television network. At about the same time, the Commission granted renewals for NBC's television stations without any

Commission to do more than enumerate factual differences in the timing of the applications at issue; it must also explain why the one-day difference between the two applications mattered so it could grant one application and not the other. Additionally, PPR asserts that the Letter Decision does not explain why grant of the PPR Application would harm the public interest, and absent such analysis, the dismissal of only the PPR Application is arbitrary and capricious, an abuse of discretion, and contrary to the Administrative Procedure Act (APA).[12] PPR states that the Letter Decision must therefore be reversed pursuant to *Melody Music*, with the PPR Application reinstated, and both applications must either be placed in a comparative proceeding for resolution or dismissed as premature.[13]

Next, PPR argues that pursuant to *Melody Music*, the Bureau should also have analyzed the similarities and differences between the PPR Application and the Wimberley case as materially analogous situations,[14] and when the Bureau refused to do so pursuant to section 0.445(f) of the Rules, it violated the APA.[15] PPR maintains that section 0.445(f) is not a complete ban on relying on unpublished Commission decisions as precedent; it allows citation of such matters "against the Commission."[16] PPR argues that Wimberley was cited as precedent "against the Commission . . . and [is] admissible as evidence of a similar situation to ensure the Commission provided PPR with similar treatment as *Melody Music* requires."[17] PPR states that consideration of Wimberly does not prejudice CBT, which filed its application after PPR, and that the citation was directed at the Commission and therefore must be

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mention of the network's role in the deceptive quiz shows, although the hearing officer concluded that NBC essentially ignored indications that rigging had occurred. The Court remanded the case to the Commission, directing it to explain the different treatment of Melody Music, Inc., the appellant licensee, and NBC. It further directed the Commission to differentiate its denial of renewal to Melody Music from its earlier grants of renewals to licensees who had been found guilty of criminal violations of antitrust laws. The Court said that whatever action the Commission takes on remand, "it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act." *Melody Music*, 345 F.2d at 733.

[12] Petition at 5.

[13] *Id*. at 5-6.

[14] *Id*. at 6; Wimberley Valley Radio, Application File No. 0000094151 (granted Dec. 30, 2019) (Wimberley or Wimberley Application); *Broadcast Actions*, Public Notice, Report No. PN-2-200102-01 (MB Jan. 2, 2020) (*Wimberley Public Notice*) (granting the Wimberley Application, via Public Notice, that reduced short-spacing between FM translator station KWVH-LP and an existing full power station). Wimberley Valley Radio is the licensee of KWVH-LP, which is currently authorized to operate on channel 232, Wimberley, Texas.

[15] Petition at 6; 47 CFR 0.445(f) ("If the documents described in paragraphs (a) through (d) of this section are published in the Federal Register, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation, they are indexed, and they may be relied upon, used or cited as precedent by the Commission or private parties in any manner. If they are not so published, they 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. No person is expected to comply with any requirement or policy of the Commission unless he or she has actual notice of that requirement or policy or a document stating it has been published as provided in this paragraph. Nothing in this paragraph, however, shall be construed as precluding a reference to a recent document that is pending publication."). We note that the Letter Decision's reference to "47 CFR § 0.455(f)" at footnote 70 contained a typographical error and should have referenced 47 CFR § 0.445(f) instead. *See* Letter Decision at n.70.

[16] Petition at 6-7.

[17] *Id*. at 7.

considered rather than ignored.[18]

Lastly, PPR argues that the Bureau erred when dismissing the PPR Application without further inquiry into whether the KQEP-LP license expired prior to April 1, 2021, under section 312(g) of the Communications Act of 1934, as amended (the Act).[19] PPR states that its Engineering Statement noted KQEP-LP had been silent "for well over a year" and no transmitting antenna could be found at or near the coordinates specified in its license.[20] PPR argues that the Bureau failed to inquire about this spectrum availability and instead relied on the expiration date of KQEP-LP's authorization.[21] PPR then claims, for the first time, that before PPR filed its application, the KQEP-LP license had already expired pursuant to section 312(g).[22] PPR provides the sworn declaration of its president and a copy of an email from the alleged property manager for KQEP-LP's antenna site, asserting that this material shows KQEP-LP was legally silent for more than a year at the time the PPR Application was filed.[23] PPR states that its application must therefore be reinstated and given cutoff priority over later filings such as the CBT Application.[24]

CBT Opposition. CBT states that the issues presented in the Petition have been fully considered by the Bureau, and thus, the Petition must be denied. Nevertheless, in response to PPR's assertions, CBT argues that the Bureau referenced section 1.934(f) of the Rules in the Letter Decision to demonstrate that there are analogous Commission procedural rules regarding prematurely filed applications.[25] CBT states that the Petition ignores other Commission rules and cases the Bureau relied upon to conclude that PPR's application was prematurely filed.[26] CBT argues that one citation to a wireless services rule amidst a well-supported conclusion is insufficient to demonstrate that the Bureau made a material mistake of law justifying reconsideration.[27]

Next, CBT takes issue with PPR's argument that the Bureau was required to deny both applications as premature because CBT and PPR are similarly situated parties under *Melody Music*.[28] CBT states that this argument ignores a significant factual difference between the two parties, namely, that PPR filed its application on March 31, 2021, prior to the expiration of the KQEP-LP license, while

[18] *Id.*

[19] *Id.* (citing 47 U.S.C. § 312(g)).

[20] *See* PPR Application, Engineering Statement ("[KQEP-LP has been silent for well over a year b]ased on numerous observations made near Interstate 94 and MN State Highway 280. This would be less than 1 km from the licensed transmitting antenna for KQEP-LP. Based on the height, terrain, and interference conditions the KQEP-LP signal should be heard very clearly in this area. Reception of KQEP-LP was received in this area shortly after KQEP-LP signed on but have not been heard for well over a year. I can find no public information regarding the continued existence of this station. It is therefore believed the station no longer exists.")

[21] Petition at 7.

[22] *Id.* at 7-8.

[23] *Id.* at 9-10.

[24] *Id.* at 9.

[25] Opposition at 3, citing Letter Decision at n.69.

[26] Opposition at 3.

[27] *Id.* at 3.

[28] *Id.* at 4.

CBT filed its application after the KQEP-LP license expired at 3:00 a.m. local time on April 1, 2021.[29] CBT further states that while the Bureau noted CBT's application is "technically premature" because it was filed the same day the KQEP-LP license expired,[30] the Bureau has expressly stated that it will not dismiss an application that was filed after a license or permit has "expired according to its express terms."[31] CBT states that it filed the CBT Application after the KQEP-LP license had expired by its express terms, and thus, CBT complied with precedent in filing the application, while PPR did not.[32]

Additionally, CBT disputes PPR's argument that the Bureau erroneously rejected PPR's citation to Wimberley when concluding the PPR Application violated the Commission's minimum short spacing rules.[33] CBT argues that PPR is on notice of the Commission's rules as a licensee and should be aware that the Commission does not rely on unpublished decisions as precedent.[34] CBT contends that relying on Wimberley as precedent to justify grant of the PPR Application would necessarily mean using an unpublished decision to reject the CBT Application, which would have been a violation of the Commission's rules, as CBT did not have actual notice of the decision.[35] CBT argues that the Petition also ignores the fact that the Bureau actually considered the factual circumstances in Wimberley, compared them to PPR's application, and concluded that even if Wimberley could control, it was factually inapplicable here.[36] CBT states that the Bureau is not required to consider Wimberley again on reconsideration simply because PPR disagrees with the Bureau's conclusion.[37]

CBT then contends that PPR's argument concerning the automatic cancellation of KQEP-LP's license pursuant to section 312(g) fails for the following reasons: (1) PPR failed to substantiate the allegation in its application that KQEP-LP had been off the air for more than 12 months;[38] (2) the evidence PPR submitted with its Petition could have been provided at any point prior to the Letter

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[29] *Id*. (arguing that CBT and PPR are not similarly situated applicants under *Melody Music* because CBT filed its application after the KQEP-LP license expired while PPR filed its application before the KQEP-LP license expired). As noted above, the KQEP-LP license expired at 3:00 a.m. on April 1, 2021. *See* 47 CFR § 73.1020(a); Application File No. BLL-20171204AEB; *supra* note 6.

[30] Opposition at 5 (stating that the Bureau has a policy and practice of accepting competing applications on the first business day after a license or permit has expired, to avoid circumstances where a last minute application is filed prior to the early morning expiration on the license, which may not appear until overnight processing has occurred).

[31] *Id*. at 5, citing *Board of Trustees of Eastern Mennonite University*, Letter, 29 FCC Rcd 5925, 5928 (MB June 4, 2014) (*Eastern Mennonite University*) (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).

[32] *Id*.

[33] *Id*. at 5-6.

[34] *Id*. at 6, citing 47 CFR 0.445(f).

[35] *Id*. at 6.

[36] *Id*. at 6-7 (stating that the Bureau found that "unlike the scenario in *Wimberley* 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.").

[37] *Id*. at 7.

[38] *Id*. (arguing that the Bureau is not required to consider unsubstantiated claims).

Decision;[39] (3) the evidence submitted is insufficient to demonstrate that KQEP-LP was actually off air for 12 consecutive months;[40] and (4) even if KQEP-LP had failed to broadcast for 12 consecutive months, the Commission had not formally initiated its cancellation procedures and given notice to the public that KQEP-LP's license had been cancelled.[41] CBT states that despite PPR's allegations to the contrary, the Letter Decision fully considered all of PPR's arguments and correctly concluded that the PPR Application was procedurally deficient and otherwise failed to comply with the Commission's spacing requirements.[42]

PPR Reply. PPR argues that the Opposition fails to elucidate why the Petition is legally wrong and wholly ignores statutory points concerning the APA.[43] PPR disputes CBT's claim that the Bureau relied on several rules and cases when dismissing the PPR Application as premature, and re-asserts its position that the Letter Decision cited only section 1.934(f) as the basis for the application's dismissal.[44] Regarding the issue of whether the PPR and CBT Applications are similarly situated, PPR restates its argument that *Melody Music* requires the Commission to "explain its reasons and do more than enumerate factual differences, if any," as to why the two applications, both deemed premature in the Letter Decision, were not both subject to dismissal.[45] PPR then disputes CBT's argument that *Melody Music* applies only to situations with a common nexus and that the Commission can treat CBT and PPR as not similarly situated because their applications were filed a day apart.[46] PPR contends that CBT and PPR are similarly situated because a common nexus exists through the Letter Decision's adjudication of the two applications.[47] PPR states that the Letter Decision fails to articulate why the applications were not given the same treatment, and in the absence of such an analysis, the Letter Decision is arbitrary and

[39] *See id*. at 8.

[40] *Id*. at 8-9. CBT argues that the Bureau is not required to consider the declaration from PPR's president and an email from a building manager to substantiate its claim that KQEP-LP was off air, because that information could have been provided at any point prior to its Petition. CBT states that PPR has provided no reasonable explanation for why there was a delay in providing this information, and even if the Bureau were to accept the late-filed evidence, it is insufficient to demonstrate that KQEP-LP was actually off air for 12 consecutive months because: (1) PPR's president was only intermittently listening to the station, which means that there was plenty of opportunity for KQEP-LP to broadcast programming when PPR's president was not listening; (2) the fact that PPR's president could not find an antenna or reach the licensee near the time when PPR filed an application does not demonstrate that KQEP-LP was off air for 12 consecutive months; and (3) an email from one building manager does not prove anything at all when there are a number of buildings at the licensed coordinates that could have housed KQEP-LP's equipment. CBT states that the fact that PPR's president heard KQEP-LP operating in 2018, while the building manager insisted no radio antennas had been installed on the building since 2012, strongly suggests that KQEP-LP was likely not operating from the building alleged to have housed KQEP-LP's facilities. Thus, CBT argues that the evidence presented is insufficient to demonstrate that KQEP-LP's license had expired as a matter of law. *Id*. at 9.

[41] *Id*. at 9-10 (arguing that allowing third parties to proceed against licenses they personally determine are cancelled would result in licensees being unfairly forced to fend off competing applications during their term, robbing them of the full benefit of their license term; qualified applicants would not have fair notice or equal opportunity to compete for spectrum; and there would be chaos of interested parties filing randomly against active licenses in an attempt to preserve their chances against a license that may or may not have expired).

[42] *Id*. at 10.

[43] Reply at 1.

[44] *Id*. at 2.

[45] *Id*. at 3-4.

[46] *Id*.

[47] *Id*. at 5-6.

capricious under the APA.[48]

Next, PPR argues the Opposition incorrectly concludes that PPR failed to demonstrate in its application that the KQEP-LP license expired as a matter of law under section 312(g).[49] PPR also argues that the Opposition's claim that the automatic expiration provisions of section 312(g) are ineffective until the Commission formally initiates cancelation procedures is contrary to the plain language of section 312(g).[50] PPR states that the statute contains no delegation of authority to the Commission to approve the auto-expiration, as CBT claims; it only gives the Commission authority to "extend or reinstate" an authorization if the station in question meets certain conditions, none of which are applicable here.[51] PPR maintains that the Bureau erred when it ignored evidence of KQEP-LP's year-long silence in the PPR Application and should have inquired whether KQEP-LP was still licensed on the day PPR filed the application, before issuing the Letter Decision.[52] PPR states that upon the expiration of KQEP-LP's authorization, there was no licensed facility blocking the PPR Application, and as a result, the PPR Application was not prematurely filed and was wrongfully dismissed on those grounds.[53]

PPR then reiterates its argument that the Bureau should have considered the Wimberley case when addressing the short-spacing issue, but instead, ignored it in violation of the APA and *Melody Music*.[54] PPR maintains that section 0.445 of the Rules limits the citation of routine licensing decisions by public notice but allows such citations to be used "against the Commission."[55] PPR argues that Wimberley could only have been directed to the Commission as a reminder of its past action in an analogous situation, and therefore, it is legitimately cited under section 0.445(f)'s enumerated exceptions.[56]

Discussion. After careful consideration of the record, including PPR's reasserted arguments in slightly revised form, we deny the Petition. The Commission will consider a petition for reconsideration only when the petitioner shows a material error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.[57] We find that the Letter Decision reached the correct decision, fully consistent with pertinent precedent.

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[48] *Id*. at 6.

[49] *Id*.

[50] *Id*. PPR argues CBT is mistaken in its assertion that the Commission may neglect to verify PPR's section 312(g) claims and simply ignore them. *Id*. at 9.

[51] *Id*. at 7.

[52] *Id*. at 8-9 (stating that its exhibit (submitted with the Petition) includes a sworn declaration from PPR's president, Jeffrey Sibert, who prepared the documentation therein, an email from the alleged manager of the location from which KQEP-LP broadcast, and photographs of the only site from which KQEP-LP could have legally broadcast). We note that this evidence was not presented in the Application, Engineering Statement, or pleadings filed prior to the instant Petition.

[53] *Id*. at 9.

[54] *Id*. at 10.

[55] *Id*.

[56] *Id*. at 11.

[57] *See* 47 CFR § 1.106.

Section 312(g) License Expiration. Section 312(g) of the Act 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."[58] It is well established that unauthorized operation is "no better than silence" for section 312(g) purposes; therefore, consecutive periods of silence and unauthorized operation are considered in the aggregate when calculating a consecutive 12-month period under the Act.[59]

As a preliminary matter, we find that PPR's argument on reconsideration concerning the automatic expiration of the KQEP-LP license pursuant to section 312(g) is untimely because PPR did not raise the argument previously with sufficient clarity,[60] nor has it shown that consideration of the late-filed argument is required in the public interest. We also are unpersuaded by PPR's argument that the Bureau ignored evidence presented in the Application regarding KQEP-LP's alleged year-long silence. The evidence to which PPR refers amounts to an observation made in the Engineering Statement that "[n]o signal from KQEP-LP has been heard in well over a year, and no transmitting antenna could be found at or near the coordinates specified in its license."[61] This observation is accompanied by PPR's admission that the KQEP-LP license expired on April 1, 2021.[62] The Application, Engineering Statement, and previous pleadings contain no other evidence or rationale supporting a section 312(g) argument. Thus, it is not clear from these documents that PPR intended to pursue a section 312(g) claim.[63] PPR's attempt to now assert that the KQEP-LP license expired before April 1, 2021, pursuant to section 312(g), is unavailing and therefore we reject it.

We also reject PPR's claim that we erred in dismissing the PPR Application as premature because it allegedly was filed after the KQEP-LP license expired by operation of law.[64] The *March Public Notice*, issued on March 11, 2021, provided notice to New Culture and other interested parties, including PPR, that the KQEP-LP license would expire on April 1, 2021, if a renewal application was not received by

[58] 47 U.S.C. §§ 312(g), 405; 47 CFR § 73.1740(c).

[59] *See, e.g., Eagle Broadcasting Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9 (2008) (rejecting the argument that unauthorized transmissions can be used to avoid automatic license expiration) (subsequent history omitted); *James McCluskey, Ph.D.*, Letter Decision, 27 FCC Rcd 6252, 6254-55 (MB 2012) ("[U]nauthorized and unlicensed transmissions are no better than silence" and, in assessing a licensee's rights under Section 312(g), "an unauthorized transmission counts for nothing.") (internal citations omitted).

[60] *See infra* note 63.

[61] *See* PPR Application, Engineering Statement at 1 (stating that "The license for KQEP-LP expires as of 3:00 a.m. April 1, 2021. No license renewal has been filed. No signal from KQEP-LP has been heard in well over a year, and no transmitting antenna could be found at or near the coordinates specified in its license. Therefore KQEP-LP does not have to be further protected.").

[62] *Id*. *See also infra* note 67.

[63] Indeed, regulatory agencies are not required to address arguments not stated with sufficient force or clarity. *See e.g, WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (the Commission need not sift through pleadings and documents to identify arguments not stated with clarity), *cert. denied*, 409 U.S. 1027 (1972); *Northside Sanitary Landfill v. Thomas*, 849 F.2d 1515, 1519 (D.C. Cir. 1988) (the petitioner has the burden of clarifying its position before the agency), *cert. denied*, 489 U.S. 10978 (1989). *See also MCI WorldCom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (finding that a party did not raise an argument with sufficient force to obligate the Commission to respond).

[64] Petition at 7.

midnight on April 1, 2021.[65] Despite having received this notice, PPR filed its application on March 31, 2021.[66] PPR did not claim in its Application or any of its previous pleadings that the KQEP-LP license expired *before* April 1, 2021, pursuant to section 312(g).[67] Indeed, the question of when the KQEP-LP license expired was not at issue in the pleadings; rather, the basis of the parties' arguments focused on the filing dates of their respective applications.[68] Because both parties recognized April 1, 2021, as the KQEP-LP license expiration date, further inquiry into KQEP-LP's operational status prior to its license expiration was unnecessary.[69] Ultimately, the Letter Decision considered all of the evidence that PPR timely submitted on this issue and properly dismissed the PPR Application as premature.[70]

Even assuming for the sake of argument that PPR raised the section 312(g) claim in a timely manner, which it did not, we find that the evidence presented is insufficient to convince us that KQEP-LP was silent for a consecutive 12-month period. On reconsideration, PPR submits the sworn declaration of its president (Jeffrey Sibert) indicating that (1) at various times in 2018, he heard KQEP-LP transmitting on its licensed frequency; (2) for more than a year before preparing the PPR Application, he was unable to find the station transmitting on its licensed frequency and was unable to reach the licensee to determine

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[65] *March Public Notice*.

[66] *See* PPR Application. By filing its application before the KQEP-LP license expired, PPR assumed the risk that its application might be dismissed as premature.

[67] *Cf.*, PPR Application, Engineering Statement ("The license for KQEP-LP expires as of 3:00 am April 1, 2021."); Opposition of PPR to Petition to Deny, Pleading File No. 0000144466, at 3 (filed May 3, 2021) (PPR Opposition) ("As an initial matter, it should be noted that the KQEP-LP license expired midnight the night of April 1, 2021 per the FCC's March 11, 2021 Public Notice. KQEP-LP's operator still had an opportunity until Midnight on April 1, 2021 to file a renewal application to avoid expiration of its license, which it ultimately did not do. KQEP-LP's license was therefore formally canceled and deleted on April 2, 2021."); Reply of PPR to Opposition to Informal Objection, Pleading File No. 0000150529, at 4 (filed June 20, 2021) (PPR Reply) ("… the KQEP-LP license has expired, the required official notice of expiration was sent in the March 11, 2021 Public Notice…"); and PPR Reply at 3 ("PPR continues to believe that the PPR Application was properly accepted for filing, and was accepted for filing after the expiration of the KQEP-LP (now DKQEP-LP) license as discussed in the PPR Opposition.").

[68] *See*, *e.g.*, Informal Objection of PPR, Pleading File No. 0000144650, at 2 (filed May 5, 2021) (PPR Objection) ("Because the CTS Application was filed subsequent to the PPR Application, and does not protect the cutoff PPR Application, the CTS Application must be dismissed upon grant of the PPR Application."); PPR Reply at 3 (arguing that "CTS had an opportunity to file an application on the same date as PPR through the Commission's first come/first served filing procedures."); Opposition of CBT to Informal Objection, Pleading File No. 0000144801, at 2 (filed May 7, 2021) (CBT Opposition) ("PPR's application was prematurely filed on March 31, 2021, before KQEP-LP's license expired, and thus should not be entitled to the benefit of the "first come/first served" procedure set forth in section 73.3573(f).").

[69] As discussed in the Letter Decision, parties filing an informal objection must allege, with specificity, properly supported facts sufficient to warrant the requested relief. *See, 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); *see also* Letter Decision at 8. Here, PPR's assertion in the Engineering Statement that KQEP-LP had not broadcast for "well over a year" was wholly unsupported by the record and was of such little effect that it did not warrant additional consideration or further investigation, especially when the parties (and Bureau) understood that the KQEP-LP license expired on April 1, 2021. *See supra* notes 29 and 67. An investigation under these circumstances would have been a waste of administrative resources.

[70] Assuming, *arguendo*, PPR's position had been that the KQEP-LP license expired before April 1, 2021, pursuant to section 312(g), which is not evident in the underlying record, it begs the question why PPR did not file its application and unambiguously raise this argument, with supporting documentation, sooner.

whether it planned to file a renewal application; and (3) an email message from a building manager stated that there had not been a radio station in the "Court West" building in the last ten years.[71] PPR also provides photographs of the buildings alleged to have housed KQEP-LP's facilities and official minutes of the Board of Regents of the University of Minnesota dated July 2019 purporting to show that another building KQEP-LP could have been operating from (the "University Building") was vacant between 2015-2019.[72] This documentation, however, is unpersuasive. Mr. Sibert's unsupported assertion that he was unable to find the station transmitting on its licensed frequency for more than a year is insufficient to establish that KQEP-LP was indeed silent for 12 consecutive months.[73] Also unpersuasive is the alleged building manager's assertion in an unsworn and unverified email that no radio antennas had been installed on the "Court West" building since 2012. Further, the photographs of the building alleged to have housed KQEP-LP's facilities were dated August 18, 2021, roughly four months after the KQEP-LP license expired, and therefore they do not establish that KQEP-LP was silent for a consecutive 12-month period prior to April 1, 2021. Finally, the Board of Regents minutes from July 11, 2019, are unsigned, despite having signature lines, and are not otherwise supported by a declaration or sworn statement, and thus they have no probative value. Taken together, the new documentation submitted on reconsideration is not sufficiently reliable to be used as evidence upon which to base a finding that KQEP-LP was silent for a consecutive 12-month period for section 312(g) purposes. Therefore, we reject PPR's argument.

We also reject PPR's assertion that, in the event the Bureau determines the KQEP-LP license did not expire pursuant to section 312(g), the PPR and CBT Applications are entitled to comparative consideration pursuant to *Ashbacker*.[74] As discussed in more detail below, these applications are factually distinguishable. The PPR Application was filed while the KQEP-LP license was in effect, and therefore was required to comply with the Commission's spacing requirements in order to protect the existing license. The CBT Application, on the other hand, was filed after the expiration of the KQEP-LP license and was not subject to the minimum spacing requirements. We emphasize that the Letter Decision's proper dismissal of the PPR Application was not only based on the application's untimeliness, but also on its failure to meet the Commission's minimum spacing requirements.[75] There is no requirement for comparative consideration where it is plain that an application patently violates the Commission's valid, substantive requirements for grant. In these circumstances, a comparative process would only delay the initiation of service without any countervailing public interest benefits.

Timing of CBT and PPR Applications. We find unavailing PPR's argument that the CBT and PPR Applications are so similarly situated that our action in the Letter Decision dismissing one, but not the other, violates *Melody Music* and is reversible error.[76] As noted above, *Melody Music* requires the Commission to treat similarly situated parties alike unless it explains its reasons for treating them

[71] *See* Petition at Exhibit A, Declaration of Jeffrey Sibert and Related Documentation.

[72] Reply at Exhibit 1, Declaration of Jeffrey Sibert and Related KQEP-LP Geographic Site Evidence.

[73] Mr. Sibert does not submit any credible documentation, such as a log, identifying the dates and/or times he attempted to listen to KQEP-LP.

[74] *See* Petition at 11; *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 332-33 (1945) ("*Ashbacker*") (holding 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).

[75] *See* 47 CFR § 73.807 (requiring LPFM stations to be situated specific distances from other co-, first- and second-adjacent channel facilities).

[76] Petition at 3-6; *Melody Music*, 345 F.2d 730.

differently.[77] In this instance, *Melody Music* does not apply because PPR and CBT are not similarly situated parties.[78] PPR's argument fails to recognize a significant difference in the timing of the CBT and PPR Applications.[79] Specifically, PPR filed its application *before* the KQEP-LP license expired, while CBT filed its application *after* the KQEP-LP license expired by its express terms.[80] In the Letter Decision, we explained, and reiterate here, that the PPR Application should not have been accepted at the time of filing because it did not protect the KQEP-LP license, which had not yet expired according to its express terms.[81] The CBT Application, on the other hand, did not suffer from the same flaw because it was filed *after* the KQEP-LP license expired.[82] Given the important distinction concerning the timing of these applications, we find that treating them differently in the Letter Decision did not violate *Melody Music* and is not reversible error.[83]

Consideration of Wimberley. We reject PPR's assertion that Wimberly created precedent the

[77] *See Melody Music*, 345 F.2d at 733.

[78] We note that it is not necessary for the Bureau to respond to every broad and generalized claim of inconsistent treatment. *See Revocation of License of Robert J. Listberger, Jr.*, Decision, 76 F.C.C. 2d 212, note 9 (FCC Rev. Bd. Feb. 11, 1980) (*Listberger*). It is the burden of one relying upon *Melody Music* as a defense, not the Bureau, to make a *prima facie* case that the other identified party received a substantially different outcome for the same action for no apparent reason and without explanation. *Id*. In light of our discussion above, we find that PPR has failed to meet this burden.

[79] PPR's contention that the Letter Decision provides no analysis or explanation as to why it accepted one premature application and dismissed the other is without merit. Petition at 5. In the Letter Decision, we provided a straight-forward explanation for the dismissal of the PPR Application. Simply stated, the PPR Application was filed prematurely and violated the Commission's minimum spacing requirements. *See* Letter Decision 9-10. Therefore, it was not necessary to engage in a more extensive analysis of this issue in the Letter Decision.

[80] *See* Letter Decision at 9. PPR filed its application on March 31, 2021, at 9:04 p.m., approximately six hours before the KQEP-LP license expired, whereas, CBT filed its application on April 1, 2021, at 9:50 a.m., approximately seven hours after the KQEP-LP license expired. *See* PPR Application; CBT Application.

[81] Letter Decision at 9; 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."). We note that, in the Letter Decision, we failed to acknowledge section 1.934(f) of the Rules applies to wireless applications and was used only to illustrate analogous Commission rules concerning prematurely filed applications. Had we relied only on this rule to dismiss the PPR Application, such action would have been inappropriate. However, the omission had no impact on the outcome of this case as it was clear from the underlying facts and circumstances that the PPR Application was indeed filed prematurely and failed to comply with the Commission's minimum spacing requirements.

[82] *See Eastern Mennonite*, 29 FCC Rcd 5925, 5928. We acknowledge that the use of the terms "technically premature" to describe the CBT Application in the Letter Decision may have been misleading. *See* Letter Decision at 9. That language was used only to show that CBT filed its application one day before the Bureau accepts competing applications; it was not a determination that the CBT Application was in fact filed prematurely. *See Eastern Mennonite*, 29 FCC Rcd 5925, 5928 ("[t]he Bureau's longstanding policy and practice has been to accept competing applications on the first business day after the date on which a license or construction permit expires.").

[83] PPR's claim that the Letter Decision "says nothing about why the [PPR Application] harms the public interest" is baseless. Petition at 5. The Letter Decision explained that the acceptance of prematurely filed applications, including the PPR Application, could foreclose filing opportunities for some, and be fundamentally unfair to other, potential applicants and licensees that chose to defer filings based on the recognition that such filings, if submitted prematurely, would not comply with the Rules. *See* Letter Decision at 9-10.

staff was required to follow.[84] It is undisputed that unpublished Commission decisions or actions taken by public notice have no precedential effect.[85] Moreover, even if the staff had been required to consider Wimberley, the facts of that application are sufficiently different from the PPR Application to eliminate any relevance to this case.

In Wimberley, the staff granted an application that reduced short-spacing between the requesting LPFM station and an existing full-power station.[86] PPR previously claimed that its proposal is analogous to the Wimberley proposal and therefore must also be granted.[87] The Letter Decision rejected this argument, however, concluding that the Wimberley grant had no precedential effect on the adjudication of the PPR and CBT Applications,[88] because it occurred via Public Notice and did not include a written decision.[89] Upon further review, we find that the staff did not commit reversible error in rejecting PPR's argument and that the Letter Decision properly concluded that Wimberly had no precedential effect because it was not a published decision.

On reconsideration, PPR asserts that the Wimberley case is admissible as evidence of a similar licensing situation and is being used "against the Commission" to remind it to provide similar treatment to PPR as *Melody Music* requires.[90] We are not persuaded by this argument as the underlying details of Wimberley are distinguishable from the modification proposed in the PPR Application. In Wimberley, station KWVH-LP was licensed to operate on channel 231 (94.1 MHz), Wimberley, Texas. Co-channel

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[84] We note that PPR mischaracterizes the disposition of the Wimberley Application as a "Commission" action. To be clear, the staff's disposition of Wimberley occurred in a Public Notice and did not include a written decision. *See Wimberley Public Notice.*

[85] *See, e.g.*, *Praise Communications, Inc*., Forfeiture Order, 23 FCC Rcd 9139, 9141 (MB June 10, 2008) (licensee's reliance on the staff's grant of a renewal application that was unpublished is not a binding precedent); *Communications Vending Corporation of Arizona, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 24201, 24215 (2002) (unpublished staff letters "are not binding on the Commission"); *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279, para. 13 & n.47 (2003) ("Applicants' reliance on the staff's handling of one radio application (for which no decision document was written) and one unpublished common carrier case is misplaced" as unpublished documents may not be relied upon, used or cited as precedent); *Applications of Carolyn S. Hagedorn*, Memorandum Opinion and Order, 11 FCC Rcd 1695, 1697 (1996) (stating that the Commission is not bound by the staff's decision in an unpublished case); *People of Progress Inc*., Memorandum Opinion and Order, 29 FCC Rcd 15065, 15066 (2014) (staff actions are not binding on the Commission); and *Clear Channel Broadcasting Licenses, Inc*., Letter, 21 FCC Rcd 8677, 8682 (MB July 31, 2006) (unpublished staff decision letters are not binding on the staff).

[86] *See* Wimberley Application.

[87] *See* PPR Opposition at 5.

[88] *Id*. In the Letter Decision, we also explained in no uncertain terms why PPR's proposal violated the Commission's minimum spacing requirements. *Id*. at 10-11.

[89] *Id*. at 10, citing 47 CFR § 0.445(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). A detailed description of PPR's proposed modification is included in the Letter Decision. *See* Letter Decision.

[90] Petition at 6-7; PPR Opposition at 5. We note that PPR mischaracterizes the disposition of the Wimberley Application as a "Commission" action. To be clear, the staff's disposition of Wimberley occurred in a Public Notice and did not include a written decision. *See Wimberley Public Notice.*

station KTFM was granted a construction permit and license to move closer to KWVH-LP.[91] KWVH-LP was permitted to continue operations on channel 231, but the KTFM "move-in" resulted in increased interference to KWVH-LP.[92] By moving to channel 232 (94.3 MHz), as proposed, KWVH-LP significantly reduced the potential for harmful interference to both parties, because it moved from a co-channel relationship with KTFM (the worst channel relationship, in terms of potential interference between two nearby stations) to a first-adjacent channel relationship (a better channel relationship, in terms of interference).[93] The modification did not result in any changes to the transmission site, antenna height, or antenna make/model.[94] PPR, on the other hand, proposes to move KPPS-LP from a second-adjacent channel short-spacing (on channel 248, 97.5 MHz, a better channel relationship in terms of potential interference between two nearby stations) to a first-adjacent channel short-spacing (on channel 249, 97.7 MHz, a worse channel relationship in terms of interference).[95] The proposal would require KPPS-LP to move to a new transmission site[96] and would create a new first-adjacent short-spacing to FM translators K250BY and W248CU, an action that is not permitted under the Commission's rules.[97] Given these circumstances, we find that Wimberley and PPR are not similarly-situated for purposes of analysis under *Melody Music*, and therefore, *Melody Music* does not apply.

APA. We find no merit in PPR's contention that the dismissal of the PPR Application was arbitrary and capricious in violation of the APA.[98] Despite PPR's claims, the Letter Decision thoroughly explained the rationale for dismissing the PPR Application as procedurally and substantively defective on alternative, independent grounds. Specifically, the Letter Decision explained why the PPR Application was premature and discussed the ramifications of allowing prematurely filed applications, such as the PPR Application, to be considered acceptable for filing. It explained that the public interest is not served by processing these applications because they undermine the opportunity for other prospective applicants to file first-in-time or competing applications for the available spectrum; they create uncertainty about

[91] Wimberley Application, Engineering Statement.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *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). As noted in the Letter Decision, and 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). Letter Decision at 10, n.75.

[96] *See* PPR Application, Engineering Exhibit.

[97] *See* 47 CFR § 73.870(e) (Minor change LPFM applications must meet all technical and legal requirements applicable to new LPFM station applications.). LPFM stations may 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."); Pub. L. No. 111-371, 124 Stat. 4072 (2011) (Local Community Radio Act of 2010 (LCRA)) (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."). As noted in the Letter Decision, there is no LCRA provision or Commission rule for waiving first-adjacent short spacing requirements, as proposed by PPR, due to the different spectral relationship on first-adjacent channels, and the higher potential for interference on such channels.

[98] Petition at 2-3, 5-7, and 11.

application timing; and they undermine a licensee's ability to make unencumbered use of its license for the entire license term. The staff also explained that, even if the PPR Application was not procedurally defective, it must be dismissed in any event because it failed to meet the Commission's minimum spacing requirements. PPR has not demonstrated that the Letter Decision was either unsupported or inconsistent with the Commission's policies. Accordingly, based on our consideration of the entire record, we find that our action in the Letter Decision was not arbitrary or capricious, and, therefore, not an abuse of discretion.

Conclusion/Actions. For the reasons discussed above, **IT IS ORDERED**, that the Petition for Reconsideration (Pleading File No. 0000196977) filed by Public Park Radio, Inc., on August 4, 2022, **IS DISMISSED IN PART** and **DENIED IN PART**, as set forth above.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau