

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	KXMZ(FM), Box Elder, SD
)	Facility ID No. 164109
Pandora Radio LLC)	
)	FCC File No. BALH-
Application for Assignment of License)	20130620ABJ
)	

To: The Secretary
Attn: Chief, Media Bureau

PETITION FOR RECONSIDERATION

The American Society of Composers, Authors and Publishers (“ASCAP”) petitions for reconsideration of the June 2, 2015 grant of the application for assignment of license in the above-captioned proceeding.¹ The Decision contains significant errors and inaccuracies that must be addressed.

Standing. The Decision claims that ASCAP failed to meet the standard for Article III standing. It states that “ASCAP’s standing argument is . . . too attenuated and speculative to demonstrate that ASCAP has suffered or will suffer an actual or imminent injury in fact as a result of the KXMZ(FM) transaction.”² The Decision sets the standing bar too high. For ASCAP to satisfy Article III standing based on a future harm, it need

¹ *In re: KXMZ(FM), Box Elder, SD*, DA 15-654, 62 CR 1184 (MB, rel. June 2, 2015) (the “Decision”).

² *Id.* at 7.

only show a “substantial probability of injury or a substantial risk that the harm will occur.”³ This it has done.

As ASCAP has explained, large music publishers are dissatisfied with the licensing rates paid by Pandora, and have threatened to withdraw from ASCAP in response.⁴ Pandora has stated that it intends to use KXMZ to claim entitlement for Pandora’s massive, unrelated online music streaming platform to the license fee rate that resulted from the latest ASCAP/Radio Music License Committee (“RMLC”) settlement agreement.⁵ When it does, the music publishers may well follow through on their threat to withdraw, causing significant economic injury to ASCAP and its members. There is, therefore, a “substantial risk” that ASCAP will suffer injury as a direct result of the Media Bureau’s determination to grant the KXMZ assignment application.

Contrary to the Decision’s assertions, ASCAP’s claim of injury is not based on “a weakened litigation position in a different proceeding in another forum.”⁶ The damage to ASCAP would result directly from the Media Bureau’s decision in this forum. Moreover, ASCAP’s injury is not dependent on “the intervening actions of various third parties . . . [such as] Congress, the Department of Justice, and the U.S. Copyright Office.”⁷ Actions by those parties will not impact or alleviate the economic injury that

³ *Nat’l Ass’n of Broadcasters v. FCC*, 2015 U.S. App. LEXIS 9866, *36 (D.C. Cir. June 12, 2015) (internal quotation marks and citations omitted).

⁴ See ASCAP’s Opposition to Petition for Declaratory Ruling, FCC File No. BALH-20130620ABJ (Aug. 28, 2014) at 19-20.

⁵ See, e.g., Pandora Media, Inc., United States Securities and Exchange Commission Form 8-K at 2 (June 11, 2013) (“Pandora’s 8-K”).

⁶ Decision at 6.

⁷ *Id.* at 7.

ASCAP will suffer if large music publishers withdraw from ASCAP as a result of the Media Bureau's decision. ASCAP has clearly shown a "substantial probability" of injury that is directly tied to the Media Bureau's grant of the assignment application.

Public Interest Arguments. Because ASCAP's injury is not, as the Decision assumes, "attenuated and speculative,"⁸ the Bureau's summary dismissal of ASCAP's public interest arguments is unfounded. The injury to ASCAP that will result from grant of the assignment application will flow to ASCAP's constituent members, and then to broadcasters and the American public. Such a result is not "contingent on the independent actions of third parties," but solely on Pandora's actions as a consequence of its acquisition of KXMZ.⁹ Therefore, the harm to the public interest will result directly from the grant of the assignment application.

Shareholder Approval. The Declaratory Ruling required Pandora to "modify its certificate of incorporation . . . to ensure that the Board of Directors has all necessary powers to implement the provisions of this Declaratory Ruling."¹⁰ Pandora sought until 2016 to comply with the Commission's directive to present the matter to Pandora's shareholders,¹¹ although, as ASCAP previously explained, Pandora could (and should) have modified its certificate prior to approval of the assignment application.¹² As

⁸ *Id.*

⁹ *Id.* at 8.

¹⁰ *Pandora Radio, LLC, Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934*, FCC 15-52, 62 CR 902 (¶ 20) ("Declaratory Ruling").

¹¹ See Pandora's Reply to ASCAP's Comments on Pandora's Commitments, FCC File No. BALH - 20130620ABJ (May 14, 2015) at 3.

¹² Pandora had ample time to modify its certificate at its June 4, 2015 shareholder meeting, or at a special shareholder meeting called anytime prior to grant of the assignment. See ASCAP's Comments on Pandora's "Commitment to Ensure Compliance With the Declaratory Ruling," FCC File No. BALH -

ASCAP has noted previously, Pandora, as a Delaware company, can call a special stockholders' meeting at any time.¹³

In the Decision, the Bureau announced that Pandora would have until 2017 (that is, two separate opportunities at two annual shareholder meetings) to obtain shareholder approval. It is inconceivable that the Commission would have countenanced Pandora taking over two years to accomplish the straightforward task of amending an organizational document. The Decision's unprompted postponement of Pandora's duty to amend its certificate of incorporation amounts to a modification of the Declaratory Ruling, for which the Bureau lacks authority.

Biennial Ownership Reports. The Decision states that "the Declaratory Ruling does not require a foreign ownership certification in conjunction with [Pandora's] 2015 biennial ownership report."¹⁴ The Declaratory Ruling said no such thing. The Declaratory Ruling stated:

[W]e require that Pandora Media monitor its foreign ownership and certify that it continues to meet the conditions of the grant of the Declaratory Ruling every two years, *at the same time that it files its FCC Form 323—Biennial Ownership Report*.¹⁵

Pandora, like all broadcast licensees, will file a biennial ownership report in the fall of 2015. Therefore, under the express terms of the Declaratory Ruling, Pandora must submit a foreign ownership certification in the fall of 2015 – "*at the same time* that it files

20130620ABJ (May 12, 2015) at 4; *see also* Response to Pandora's Reply to Comments on Its "Commitment to Ensure Compliance with the Declaratory Ruling," FCC File No. BALH - 20130620ABJ (May 18, 2015) at 3 ("ASCAP's Response").

¹³ *See* ASCAP's Response at 3 n.6; *see also* Delaware General Corporation Law, Section 211(d).

¹⁴ Decision at 8.

¹⁵ Declaratory Ruling (¶ 21) (emphasis added).

its FCC Form 323 – Biennial Ownership Report.” The Declaratory Ruling’s directive contains no ambiguity. It does not somehow “excuse” Pandora from certifying its foreign ownership in its 2015 report. If the Commission had intended Pandora’s foreign ownership certification requirement to commence in the fall of 2017, over two years after issuance of the Declaratory Ruling, it would have said so. Again, the Bureau lacks authority to modify the Declaratory Ruling.

The Decision, if left unaddressed, will not only contravene the plain language of the Declaratory Ruling, but will allow Pandora to operate through the fall of 2017 based on out-of-date foreign ownership data dating back to the fourth quarter of 2013. As ASCAP explained, the Declaratory Ruling was based on data provided to the Commission in late 2013.¹⁶ It is illogical that the Commission would have imposed on Pandora a requirement to “to meet the conditions of the grant of the Declaratory Ruling every two years,”¹⁷ but then permitted Pandora to operate as a broadcast licensee based on stale foreign ownership data approaching two full biennial cycles (four years) in age.

Other Material Errors. The Decision committed material error by mistaking facts essentially stipulated by Pandora for “allegations” made by ASCAP.¹⁸ Pandora has publicly stated many times that it wants to acquire KXMZ so that it can use the station in an effort to “qualify for certain [RMLC] settlement agreements concerning royalties and public performance of music works in the [ASCAP and BMI] repertories;”¹⁹ that is, “to

¹⁶ See ASCAP’s Response at 5. Pandora’s claim that it would somehow be “logical to allow two years before its next foreign ownership study” falls far short. Decision at 3 (internal quotations and citation omitted).

¹⁷ Declaratory Ruling (¶ 21).

¹⁸ See Decision at 8 (referring to “ASCAP’s allegations regarding Pandora’s intent”).

¹⁹ Pandora’s 8-K at 2.

qualify for the same RMLC license under the same terms”²⁰ as broadcasters who, ancillary to their primary business – terrestrial radio broadcasting – also stream audio over the Internet. ASCAP did not “allege” Pandora’s motivation; Pandora has publicly and repeatedly made clear its purpose in acquiring KXMZ.

The Decision further stated that the Bureau is not required to examine the “business, personal, or other motivations of an applicant for a broadcast license.”²¹ Again, ASCAP did not ask for an “examination” of Pandora’s business rationale; Pandora publicly stated its rationale for attempting to acquire KXMZ. Moreover, if it is true that the Bureau will not examine the rationale and motivation behind a transaction, this is an extraordinary change of policy. It means, for example, that the Bureau will no longer consider whether the purpose of an acquisition is to reduce competition among broadcasters. But, of course, this is not accurate. The Bureau does consider the business rationale of a proposed transaction, and it certainly considers the potential effect of the transaction on the public interest. Failure to do so in this case was plain error.

Conclusion

Because the Decision contains numerous errors and inaccuracies, the Commission should set it aside.

²⁰ Christopher Harrison, *Why Pandora Bought an FM Radio Station*, The Hill (June 11, 2013), available at <http://thehill.com/blogs/congress-blog/technology/304763-why-pandora-bought-an-fm-radio-station>.

²¹ Decision at 8.

Respectfully submitted,

**AMERICAN SOCIETY OF
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July 2, 2015

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CERTIFICATE OF SERVICE

I, F. Scott Pippin, hereby certify that a true and correct copy of the foregoing Petition for Reconsideration was sent by first-class, postage prepaid mail, on the 2nd day of July, 2015, to the following:

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