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In Reply Refer To:
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Mr. Justin Howze
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In re: Capstar TX, LLC
(NEW) FM Translator, Modesto,
California
Facility ID No. 202581
File No. BNPFT-20181102AAJ

Petition for Reconsideration

Dear Petitioner and Counsel:

Mr. Justin Howze (Howze) filed a November 18, 2018, Petition to Deny the application of Capstar TX, LLC (Capstar) for a new cross-service FM translator station at Modesto, California.¹ The staff denied the Petition to Deny and granted the Capstar application by letter decision dated July 18, 2019.² Howze timely filed a Petition for Reconsideration (Petition) on August 19, 2019.³ For the reasons discussed below, we dismiss the Petition.

Discussion. In order to seek reconsideration of a staff decision, the petitioner must show either (1) the petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; (2) the petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or

¹ File No. BNPFT-20181102AAJ (Application).

² *Mr. Justin Howze and Marissa Repp, Esq.*, Letter Decision, DA 19-670 (MB July 18, 2019) (*Staff Decision*).

³ Capstar filed an Opposition to Petition for Reconsideration (Opposition) on September 4, 2019, and Howze filed a Reply to Opposition to Petition for Reconsideration (Reply) on September 10, 2019.

arguments in question prior to such opportunity; or (3) the Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest.⁴

Howze has not presented us with any new facts or arguments that either arose or were discovered since his last opportunity to present them to the Commission. His Petition is grounded in his conviction that the staff erred in its reasoning that Section 5 of the Local Community Radio Act of 2010⁵ did not require Capstar (or other Auction 100 applicants) to provide detailed preclusion studies demonstrating that grant of their cross-service FM translator applications would leave adequate opportunities for future low-power FM (LPFM) station licensing. In this, Howze essentially re-argues the points made in his original Petition to Deny, which are premised on his assertion that LCRA Section 5 requires an Auction 83-style preclusion study of all FM translator applicants (and, presumably, all LPFM applicants) henceforth,⁶ and that LCRA Section 5's statement that FM translators and LPFM stations are "equal in status" means that the Commission may license no FM translators in an area where there are not an equal number of LPFM stations, or at least equal LPFM coverage.⁷ These contentions were addressed in the *Staff Decision*, and the public interest does not require us to repeat our reasoning. It is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the staff has once deliberated and spoken.⁸

Although we did not request or require preclusion studies from Auction 100 applicants, we observe that Capstar has voluntarily provided a technical study demonstrating that grant of the Capstar translator application would not eliminate all LPFM licensing opportunities in the Modesto market. Capstar shows—and staff analysis confirms—that upon grant of the translator application, at least five available LPFM channels remain in the Modesto market, which would have satisfied the requirements for Auction 83 preclusion studies.⁹ Although Howze contests Capstar's showing, his critique does not deny

⁴ 47 CFR § 1.106(b)(2), (c).

⁵ Pub. L. 111-371, 124 Stat. 4072 (2011) (LCRA).

⁶ Howze, among other things, criticizes our holding that preclusion studies are not required outside of Auction 83, or outside of the context of applications for new translator stations, by contending that there is a "requirement" for such studies by applicants for so-called "Mattoon Waivers." Petition at 3, 15-16; see *John F. Garziglia, Esq., Letter Decision*, 26 FCC Rcd 12685 (2011) (*Garziglia Letter*). However, nothing in the *Garziglia Letter* or any subsequent Commission decision requires a preclusion study, and Howze does not cite any authority in support of such a statement.

⁷ We also agree with Capstar's critique of Howze's argument that the "needs of the local community," under LCRA Section 5, requires that urban areas such as Modesto may only be served by LPFM stations and not by FM translators, which Howze claims should be reserved for rural areas. Howze bases this argument on language in *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3372, para. 18 (2012) (*LPFM Fourth R&O*), in which the Commission noted that both LPFM stations and FM translators serve communities, but that the smaller coverage area of an LPFM station lends itself better to urban areas, while the wider coverage of FM translators makes them more useful in rural areas. As Capstar correctly notes, however (Opposition at 6-9), the fact that an LPFM station's limited coverage area makes the station more effective in an urban area is not the same as saying that *only* LPFM stations may be licensed in urban areas. LPFM stations have in fact been licensed at smaller communities in rural areas, and likewise FM translators have proved effective in more densely populated urbanized areas. Indeed, to accept Howze's segregation of the two services into urban-only LPFMs and rural-only FM translators would implicitly negate LCRA Section 5's mandate to treat the two services as equal in status.

⁸ See *WWIZ, Inc.*, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

⁹ Opposition at 14 (citing *Media Bureau Offers Examples to Clarify Auction 83 FM Translator Application Selections and Cap Showings Requirements*, Public Notice, 28 FCC Rcd 98 (MB 2013)).

the availability of LPFM channels, but rather finds various faults with each available channel.¹⁰ Neither the LCRA nor our Auction 83 procedures, however, requires that we reserve optimal channels for either LPFM or FM translator stations when providing filing opportunities for another secondary service. The fact that an available channel might receive interference, for example, is not unusual for a secondary service station, and does not render the channel unavailable. Thus, even if we were to consider Howze's argument that we must evaluate the Capstar Modesto application using Auction 83 preclusion standards, we would conclude that the application satisfies those standards, and thus we would deny the petition for reconsideration on that basis.

Conclusion. For the foregoing reasons, the Petition for Reconsideration filed by Justin Howze IS DISMISSED.

Sincerely,



Albert Shuldiner
Chief, Audio Division
Media Bureau

¹⁰ See Reply at 12-17.