

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

POSTED
7/1/13

2013 JUN 20 A 6:34

In re:

Carl Tutera

NEW FM Translator Station
Miami, Florida

To: The Secretary
Attn: The Chief, Media Bureau

FILED/ACCEPTED)

JUN 18 2013)

Federal Communications Commission)
Office of the Secretary)

FCC File No. BNPFT-20030317MBE

Facility ID No. 156694

RECEIVED

PETITION FOR RECONSIDERATION OF DISMISSAL

Carl Tutera (“Tutera”), by his attorney, pursuant to §1.106 of the Commission’s rules, hereby respectfully requests reconsideration of the May 20, 2013 *Public Notice* (“*Media Bureau Dismisses FM Translator Form 349 ‘Tech Box’ Proposals with Defective Preclusion Showings*”), DA 13-1160 (“*Public Notice*”), issued by the Audio Division, Media Bureau (“Bureau”), to the extent that the *Public Notice* dismissed the captioned application (the “Application”). As stated in Appendix A of the *Public Notice*, the Bureau dismissed the Application for ostensible conflict with a technical amendment that had been filed one day earlier by Charles E. Crawford to his translator application BNPFT-20030317MKU (the “Crawford Amendment”).

As demonstrated herein, dismissal of the Application was in error, as it was without an apt legal basis; the amended application with which it ostensibly was in conflict is fatally defective and should not have been accepted; and even if the Tutera amendment was unacceptable, then only the amendment itself should have been rejected, leaving the underlying application in pending status. We further note that the subject situation is genuinely unique and

so grant of the requested relief will have no precedential impact upon the Commission's translator processing system.

The Legal Bases for the Dismissal – As legal authority for its action, the *Public Notice* relied upon three sources (at nn.1 and 2), none of which supports dismissal of the Application.

The first is clearly inapplicable. *Creation of a Low Power Radio Service, Fifth Order on Reconsideration and Sixth Report and Order*, 27 FCC Rcd 15402 (MB, 2012) (the “*Fifth Order*”) made no mention whatever of dismissal under the subject circumstances. Rather, the only situations addressed therein for dismissal of applications were (a) for commercial applications that failed to satisfy the national or local caps (¶¶ 25, 31, 38, 55, 68 and n. 124) or (b) for noncommercial educational applications following application of the point system (¶¶ 163, 193, 197 and n. 403).

Second, the Bureau cited its earlier *Public Notice* (“*Media Bureau Announces April 1-April 19 filing Window for FM Translator Auction 83 Preclusion Showings*”), 28 FCC Rcd 2495 (MB 2013), released March 14, 2013 (the “*March Public Notice*”). However, the brief mention therein of criteria warranting dismissal (“*Application Dismissals*” paragraph, p. 3) did not address the present situation. Rather, the only relevant circumstance was an amendment that “... creates a new conflict to a pending Auction 83 tech box.” (*Ibid.*) An explanatory footnote for that criterion referred to *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15290, 15991 (1998) (the “*First Report*”). The *First Report*, in turn, pertained only to specific facilities protected as of the date of closing of the auction window (*Id.*, ¶ 180) and long forms, which were to be cut off as of their date of filing (*Id.*, ¶ 181). Neither of these provisions pertains to the subject Tutera amendment. On the

contrary, the *First Report* further provided that both an applicant's short and long forms were to be protected until grant of the long form (*Id.*, ¶ 182).

Finally, the Bureau referred to its supplementary *Public Notice* ("*Media Bureau Provides Additional Guidance on Preclusion Showing Filing Requirements for Auction 83 FM Translator Applicants*"), 28 FCC Rcd 2840 (MB 2013) (the "*Additional Guidance*"). Yet the *Additional Guidance* merely alluded generally that "applicants in certain circumstances may technically amend the tech box proposal filed during the FM translator Auction 83 filling [sic] window ... at designated times" and referred, in turn, to the Commission's *Creation of a Low Power Radio Service, Fourth Report and Order and Third Order on Reconsideration*, 27 FCC Rcd 3364, 3382-88 (2012) (the "*Fourth Report*"). However, the *Fourth Report* did not address the present situation either. Rather, in recognition of the decade that was about to elapse since the translator filing window, the *Fourth Report* anticipated a "limited opportunity to amend" (*Id.*, ¶ 46) but went on to prescribe those opportunities only in two circumstances: during a 60-90 day settlement window (*Id.*, ¶ 47) and an opportunity for applicants in spectrum-limited markets "to modify their proposals to eliminate all preclusive impacts on protected LPFM channel/point combinations" (*Id.*, ¶ 48). Neither of these circumstances pertains to Tutera's subject amendment.

The same footnote in the *Additional Guidance* also referenced a subsequent *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999) without any page reference, but the only colorably relevant portion is ¶ 35, which provided cut-off protection to **both** allotment and applicant-specified sites, which would mitigate against dismissal of an application on the basis of a specific site alone. Indeed, the same 1999 *Memorandum Opinion and Order* stated at ¶ 28 (referring to and upholding the *First Report*): "In particular, we felt that adherence to date certain

openings and closings of filing windows (rather than first come/first served processing) would enable the Commission to identify more efficiently discrete groups of mutually exclusive applications for auction purposes.” Thus, the full Commission expressly *rejected* the notion of first-come, first-served priority in the processing of translator applications. (The only other authority referenced in the operative footnote to the *March Public Notice* was to a *Memorandum Opinion and Order*, 14 FCC Rcd 12541 (1999), again without any specific reference, but which, in any event, is irrelevant, as it addressed only eligibility for “new entrant” bidding credits, which the Tutera Application did not seek.)

This Commission-mandated approach of treating all amendments filed within a window as having equal priority is entirely consistent with the very purpose of the 2003 FM translator filing window, which, according to the full Commission, was to avoid prioritizing applications properly filed within the window, as the Tutera Application had been. *See, e.g., Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, 24 FCC Rcd 9642 (2009) at ¶ 26. Indeed, when assessing the appropriate filing procedure for the then-new LPFM service, the Commission was insistent that windows were preferable to a first-come, first-served procedure that would create unfair priorities among potential applicants. *Low Power Radio Service*, 15 FCC Rcd 2205 (2000) at ¶ 130.

Consequently, the Bureau had no authority to dismiss the amended Application.

Indeed, it is unclear why the Bureau even bothered to open the April 1-19 filing window in the first place. As set forth in the *March Notice*, the stated purpose of that window was to require each applicant within or near a spectrum-limited market to file a Preclusion Showing in order to warrant further processing. *Id.*, at 1. Yet, in order to define each market as “spectrum available” or “spectrum limited,” the Commission already had determined the channels upon

which there was no LPFM availability. *See, e.g.,* the *Fourth Report* at ¶ 38 and Appendices A and B. *See, also,* the *Fifth Order* at ¶ 28. Moreover, the Commission’s own “LPFM Channel Finder” program available to the public (and certainly to the Bureau) readily identifies those specific channels upon which no LPFM points are available within a given market. With respect to Miami, the tool clearly indicates no LPFM availability on the co- or first-adjacent channels to Channel 282 (the channel specified in the unamended Tuteria Application). Thus the April window for preclusion studies was an unnecessary exercise that served no purpose other than to create a minefield for pending applicants.

The Ostensibly Conflicting Crawford Amendment Was Fatally Defective and Should Not Have Been Accepted – Submitted herewith is a Technical Statement from du Treil, Lundin & Rackley, Inc., Tuteria’s consulting engineers, which demonstrates that the Crawford Amendment blatantly violates FCC allocation rules and therefore should never have been accepted for filing. Specifically, while claiming to meet the criteria for a minor change, the Crawford Amendment causes massive prohibited overlap with the licensed facility of co-channel station W228BY, Miami. Put another way, in order to satisfy the protection requirement with W228BY, the Crawford Amendment would have had reduce power sufficiently to eliminate overlap with its original 60 dBu contour, with the result that it would not qualify as a minor change.

Thus the Crawford Amendment was patently unacceptable for filing. As a result, it could not have conflicted with the Tuteria amendment. Consequently, there was no valid technical basis upon which the amended Tuteria Application should have been dismissed.

Improper Procedures – Yet even were the Bureau correct that its first-come, first-served procedure barred acceptance of the subject Tuteria amendment, and even were the

Crawford Amendment viable, the Bureau still should not have dismissed the Application, as amended. Rather, the appropriate action would have been to reject the amendment and retain the unamended Application in pending status. Indeed, that is precisely the mechanism prescribed in the Bureau's *Public Notice ("FM Translator Auction 83 Mutually Exclusive Applications Subject to Auction")*, DA 13-1170, released May 21, 2013, which announced settlement procedures among mutually-exclusive applications. There, the Bureau stated: "A technical resolution amendment which creates new application conflicts or does not include a required Preclusion Showing will be returned." *Id.*, at 3. A similar procedure should have been followed here. Thus rather than accepting Tutera's amendment and then dismissing his amended Application, the Bureau should have merely rejected the ostensibly unacceptable amendment and retained the unamended Application in pending status. *See, e.g., Robert E. Combs*, 19 FCC Rcd 17421 (2004) (defective technical amendment to cure mutual exclusivity rejected; application retained in pending status subject to outcome of selection process for mutually-exclusive applications).

Indeed, the Bureau has failed to apply its dismissal mandate to similarly-situated applications amended during the same window and in the same manner as the Tutera and Crawford applications. To cite a single example, MX Group 114 now comprises two applications for West Palm Beach – those of Circuitwerkes, Inc. (BNPFT-20030317MWC) and National Christian Network (BNPFT-20030314ADY). Circuitwerkes amended its application to channel 225 on April 2, 2013. National Christian Network amended its application to channel 225 to a nearby site on April 5, 2013 yet it was not dismissed and apparently is eligible to proceed to auction (or be settled). Tutera's amended Application is entitled to comparable treatment. *See, e.g., Melody Music v. FCC*, 345 F2d 730 (DC Cir 1965) (similarly situated parties must receive comparable treatment).

Lack of Precedential Impact – As a final matter, it should be noted that grant of the relief requested herein should not have any precedential impact, nor delay the Commission’s understandable anxiety to finally bring the 2003 translator window to a conclusion. Out of the thousand-plus applications still pending, the Tutera Application was the only one dismissed in the *Public Notice* under “Category B” (for ostensible conflict with another prior-filed technical amendment). *There are no other applications that are, or were, similarly situated.* Therefore, the Bureau need not be concerned over setting a precedent or otherwise complicating its translator proceedings by granting the relief requested herein.

Conclusion – In view of all the foregoing, Carl Tutera respectfully submits that the Bureau erred in dismissing his Application and requests that it be reinstated *nunc pro tunc*.

Respectfully Submitted,

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June 18, 2013

TECHNICAL STATEMENT
ANALYSIS OF MINOR CHANGE COMPLIANCE
FOR AMENDED APPLICATION BNPFT-20030317MKU
MIAMI, FLORIDA

This Technical Statement was prepared on behalf Carl Tuter, applicant for a new FM Translator station at Miami, Florida. This statement provides an analysis of the compliance of the amended FM Translator application BNPFT-20030317MKU with the minor change rule of Section 74.1233(a). Section 74.1233(a) requires that there be overlap of the respective 1 mV/m (60 dBu) contours of the original and amended facilities in order to be considered a minor change.

The original application, FCC File No. BNPFT-20030317MKU (FCC Facility ID No. 158312), was amended on April 16, 2013. The amendment proposed a change in channel from the originally proposed Channel 282 to Channel 228; proposed a relocation of the transmitter site to one located 9.3 km away from the originally proposed site; proposed a change in antenna height; proposed a change in antenna from direction to non-directional; and proposed a change in effective radiated power (ERP) from 0.15 kW to 0.25 kW.

The amendment for BNPFT-20030317MKU indicates in its Form 349 filing that it is a 'minor amendment' to its pending application. However, an analysis of the allocation factors that would apply to the BNPFT-20030317MKU amendment indicate that the amended facility fails the allocation requirements to the licensed co-channel translator facility W228BY, Miami, FL (Channel 228) while claiming qualification for a minor change.

The attached Figure 1 illustrates the situation. As indicated on Figure 1, the amended facility proposes a change in channel to be co-channel with W228BY, but it fails to protect the W228BY 60 dBu contour; and, in fact, it causes a tremendous amount of prohibited overlap with the licensed facility of W228BY. As depicted with cross-hatching on Figure 1, predicted 40 dBu f(50,10) interfering contour of the BNPFT-20030317MKU amended application overlaps the W228BY protected 60 dBu contour by a significant margin. The ERP reduction that would be required for the BNPFT-20030317MKU facility to actually meet the protection requirement with respect to W228BY, would result in the elimination of any 60 dBu contour overlap between the original and amended facilities of BNPFT-20030317AMKU. In effect, the BNPFT-20030317MKU amendment claims to be compliant with the FCC's minor change rule with a proposal that substantially violates the FCC's allocation rules in order to achieve the claim.

I certify that this statement was prepared by me and that it is true and correct to the best of my knowledge and belief.

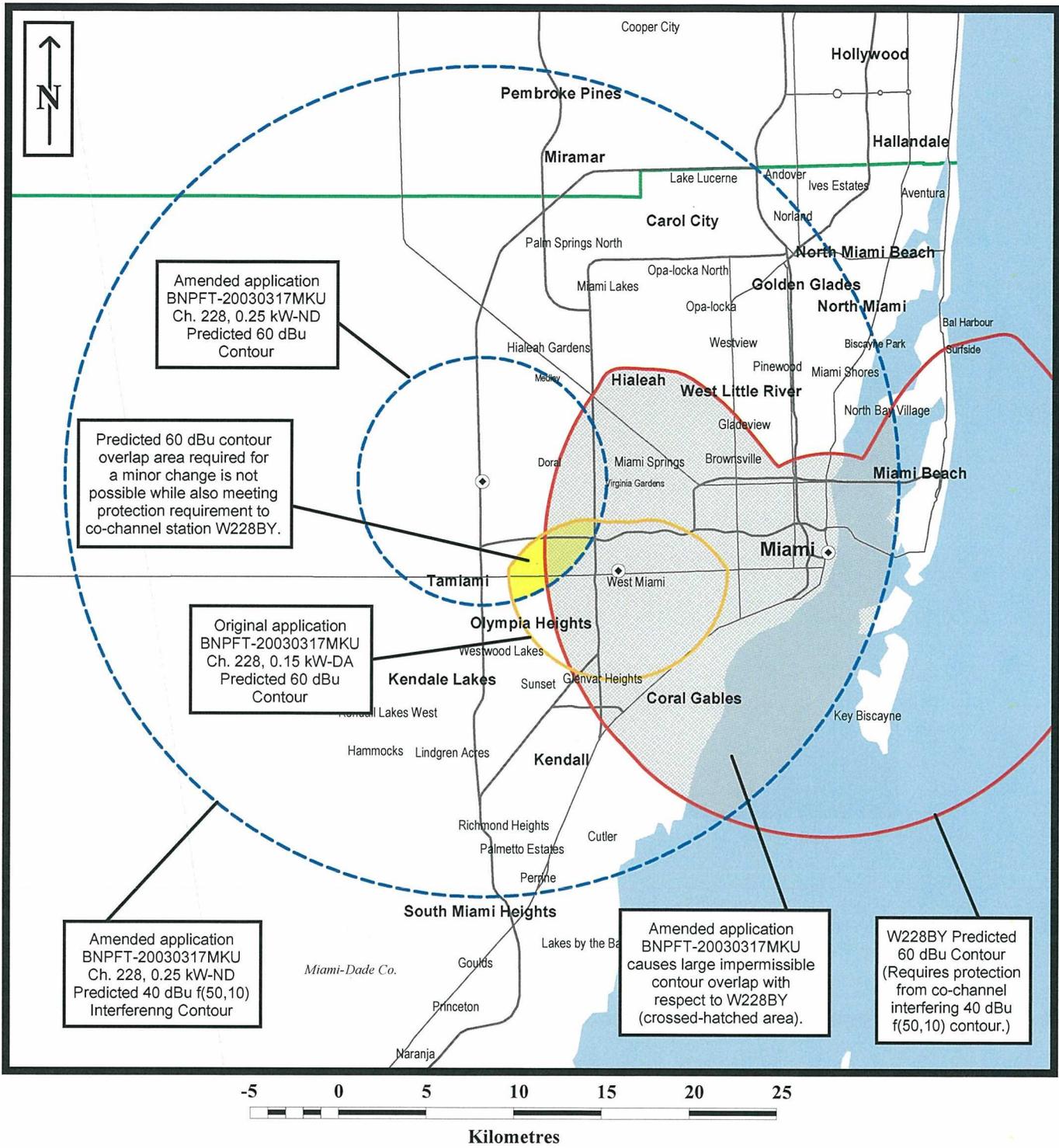


Louis R. du Treil, Jr.

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June 18, 2013

Figure 1



ANALYSIS OF MINOR CHANGE COMPLIANCE FOR AMENDED APPLICATION BNPFT-20030317MKU

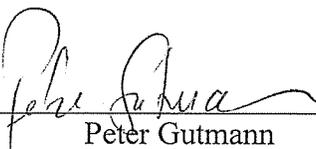
duTreil, Lundin & Rackley, Inc. Sarasota, Florida

CERTIFICATE OF SERVICE

Peter Gutmann, an attorney in the law firm of Womble Carlyle Sandridge & Rice, LLP, certifies that on this 18th day of June, 2013 a copy of the foregoing "Petition for Reconsideration of Dismissal" has been served upon the following by first class mail (and a courtesy copy sent by email):

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